



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Nelson

**Respondent:** Civil Nuclear Police Authority

**HELD AT:** Carlisle

**ON:** 10 – 14 December  
2018 and  
(deliberations) 4  
January 2019

**BEFORE:** Employment Judge B Hodgson  
Mrs J V Bolton  
Ms E Cadbury

## REPRESENTATION

**Claimant:** Mr D Stephenson, Counsel

**Respondent:** Mr J Cavanagh, Queen's Counsel

# RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of indirect disability discrimination is not well-founded and is dismissed
2. The claim of discrimination arising from disability is not well-founded and is dismissed
3. The claim of failure to make reasonable adjustments is not well-founded and is dismissed

4. The claim of victimisation is not well-founded and is dismissed

## REASONS

### Background

1 These claims (other than the victimisation claim) were originally set out in an ET1 Claim Form indicated as having been presented on 15 September 2017 (pages 2 – 26). The respondent submitted a Response. The matter came before the Employment Tribunal at a Preliminary Hearing held on 10 January 2018 ("the Preliminary Hearing") when case management orders were made (pages 52 – 55). The claimant was given leave to amend his claim form, to include adding the victimisation claim (the amended grounds of complaint being at pages 56 – 68d), and the respondent was given leave to amend its response which it did (pages 68e – 78)

### Issues

1. At the Preliminary Hearing the parties produced a draft list of issues which were agreed.
2. These were further discussed at the outset of this hearing and the following issues were agreed at that stage (but further refined, as will be seen, in the submissions made on behalf of the parties at the conclusion of the evidence)

#### *Disability*

- 2.1. It is conceded by the respondent that, at all material times, the claimant was disabled for the purposes of the statutory definition of 'disability', as the result of a knee injury

#### *Time limit issues*

- 2.2. The respondent accepts that the part of the claimant's claim that relates to the period from 2010 onwards is in time

#### *Indirect discrimination*

- 2.3. What is the relevant provision, criterion or practice ("PCP"), or PCPs, that the respondent applied to the claimant as a result of which the claimant was ineligible to be appointed to a National Firearms Instructor ("NFI") role?
- 2.4. It is common ground that the PCP or PCPs which the respondent applied to officers of the respondent who wished to become NFIs was or were applied to the claimant and to persons with whom he did not share the protected characteristic of disability.

- 2.5. It is also common ground that the PCP or PCPs put disabled persons, or at least some disabled persons, at a particular disadvantage as compared with persons who are not disabled.
- 2.6. Did the PCP or PCPs place the claimant at a particular disadvantage?
- 2.7. Was the PCP or were the PCPs a proportionate means of achieving a legitimate aim? The legitimate aims relied upon by the respondent are :
  - 2.7.1. To ensure that Authorised Firearms Officers ("AFOs") were adequately trained in the use of firearms in order that the respondent was able to perform its statutory functions and to carry out its mission of ensuring the safety of nuclear sites and nuclear materials in transit;
  - 2.7.2. To ensure that training was undertaken safely and efficiently.

*Failure to make reasonable adjustments*

- 2.8. It is common ground that the PCP or PCPs that the respondent applied to candidates for NFI roles put persons with the claimant's disability at a substantial disadvantage in comparison to persons who were not disabled.
- 2.9. Did the respondent fail to make reasonable adjustments by declining to:
  - 2.9.1. Offer the claimant one of the vacancies for NFIs that were advertised from time to time;
  - 2.9.2. Relax the requirement that candidates for NFI posts have to be an active AFO (the respondent says that this requirement applies subject to exceptions that do not apply to the claimant);
  - 2.9.3. Allow the claimant to apply for the NFI role and undertake the relevant assessments/tests with reasonable adjustments such as providing refresher training;
  - 2.9.4. Allow the claimant to apply for the NFI role and undertake the National AFO fitness test with reasonable adjustments such as allowing the claimant to undertake the alternative Chester Treadmill fitness test;
  - 2.9.5. Allow the claimant to apply for the NFI role and undertake the assessment (Instructors Shoot) with reasonable adjustments such as allowing additional time to move between courses of fire if required;
  - 2.9.6. If selected, allow the claimant to attend and undertake the National Firearms Course and undertake the relevant

assessments/tests with reasonable adjustments identified above

*Discrimination arising from disability*

- 2.10. It is common ground that, in applying the criteria for selection for the NFI role, the respondent treated the claimant unfavourably because of something arising in consequence of the claimant's disability.
- 2.11. Was the respondent's treatment of the claimant a proportionate means of achieving a legitimate aim? The legitimate aims relied upon by the respondent are:
- 2.11.1. To ensure that AFOs were adequately trained in the use of firearms in order that the respondent was able to perform its statutory functions and to carry out its mission of ensuring the safety of nuclear sites and nuclear materials in transit;
- 2.11.2. To ensure that training was undertaken safely and efficiently.

*Victimisation*

- 2.12. Did the claimant carry out a protected act? The claimant relies upon the facts and matters identified at paragraph 55 of his Amended Particulars of Claim as protected acts founding his claims under section 27 Equality Act 2010 ("EqA").
- 2.13. Are the acts and omissions identified in paragraph 56 of his Amended Particulars of Claim detriments within the meaning of section 27 EqA?
- 2.14. Did the respondent subject the claimant to each detriment because it believed he had done or may do a protected act?

Facts

3. The claimant gave evidence on his own behalf. The respondent called a total of five witnesses: Chief Superintendent Duncan Worsell (Divisional Commander); Superintendent Glenn McAleavey (Force Firearms Officer); Police Sergeant Stephen Madden (Interim Police Control Room Manager); Ms Heather Ferguson (HR Case Management Advisor); and Chief inspector Hazel Deans (Operational Chief Inspector).
4. The parties produced an agreed bundle of documents and references to numbered pages within this judgment are references to the pages as numbered in that bundle. The numbering in the index to the bundle runs, on its face, to page 728. There are however a significant number of documents that appear to have been inserted after the initial index was produced resulting in a quite extraordinary set of numbering that the Tribunal has had no option but to follow

(the most extreme example being pages numbered 508 which run right through to page numbered 508 aaag)

5. The Tribunal reached its conclusions on the facts on the balance of probabilities having considered all of the evidence both oral and documentary. In the event, many of the material facts were not in dispute between the parties

*Respondent Background*

6. The respondent is the overarching body responsible for securing and maintaining the effective functioning of the Civil Nuclear Constabulary ("CNC") and this includes employing the staff of the CNC. It is the CNC which is effectively the operational body. For ease of reference, in this judgment the Tribunal uses the word "respondent" interchangeably between these two bodies
7. The following overview is essentially taken from the evidence of Superintendent McAleavey, these general points not being challenged on behalf of the claimant. The Tribunal found Superintendent McAleavey to be a credible, knowledgeable and impressive witness
8. The respondent is a counter terrorism police force that focuses on the protection of infrastructure and material on nuclear licensed sites across the UK. Its operational "Mission of Deter Defend Deny and Recover" is focused on the tactical effect required to neutralise a postulated design-basis threat as defined within the "Nuclear Industries Malicious Capability (Planning) Assumption". It is responsible for the transport of nuclear material by road rail and sea and the role has recently also been expanded to support regional Home Office forces during times of increased threat levels
9. The above paragraph sets out Superintendent McAleavey's somewhat technical description. In more prosaic terms, in answering a question from the Tribunal, Chief Inspector Deans described the respondent's mission as being to provide armed protection for nuclear sites against terrorism
10. A number of acronyms were regularly referred to in the course of the proceedings. An "AFO" is an Authorised Firearms Officer. The "FTU" is the Firearms Training Unit. An "NFI" is a National Firearms Instructor
11. The governing or supervising body for the respondent since 2010 has been the College of Policing ("CoP"). Its role is to ensure safe standards are maintained within UK Armed policing with regard to Firearms Training Licensing, by aligning HSE principles to the delivery of firearms training
12. The principles within the CoP framework outline that for an individual to teach and assess a competency under a role profile they must also be competent and current in that capacity. As a result, NFIs must be assessed against the AFO role profile including refresher training to ensure and demonstrate continuing competence

13. There are two categories of competency for NFIs, "operational" and "occupational". The former, which incorporates the latter, permits the individual NFI to be deployed operationally should the need arise. The latter limits the NFI in that they are not operationally deployable but otherwise reach the competency standards of an AFO and are capable therefore of carrying out the NFI role within the parameters laid down by the CoP
14. There is an internal target within the respondent that a minimum of 90% of its NFIs are operational for deployment
15. There are three potential routes in to being appointed to an NFI role; a warranted officer who is a qualified AFO; an individual with an appropriate military background; an individual who is a Subject Matter Expert ("SME"). They must however all meet the CoP standards

*Claimant history*

16. The claimant joined the respondent in August 2001, based at Sellafield, and qualified as an AFO later that same year
17. On 14 May 2005 the claimant suffered an injury to his right knee in a road traffic accident. It is conceded that, as a consequence of that injury, he has been a disabled person as defined since approximately 2008 and certainly at all times material to the issues before the Tribunal
18. Thereafter, the claimant underwent various surgical procedures including:
  - 19 February 2007 – Arthroscopy;
  - 28 March 2008 – Microfracture;
  - 13 December 2008 – Arthroscopy;
  - 17 February 2009 – Cartilage Implant;
  - 1 June 2010 – Arthroscopy
19. These procedures resulted in the claimant having lengthy sickness related absences during this period.
20. Dr Ridout is the onsite Occupational Health Advisor to the respondent.
21. Following the earlier procedures, there was a hope or an expectation that the claimant would return to his full AFO duties, but that became less certain after the Cartilage Implant surgery
22. By letter dated 20 August 2010 (page 323) Dr Ridout indicated optimism that the claimant would be able to return to Armed Police duties following further treatment

23. Ultimately, however, Dr Ridout saw the claimant on 20 January 2011 and concluded as follows (see page 381):

*"I saw PC Nelson again on 20 Jan. His knee condition remains unchanged and I do not anticipate any significant change in the foreseeable future. ... He should be considered permanently unfit for front line and AFO duties. I will be happy to discuss his fitness for any 'unusual' duties if required"*

24. Accordingly the claimant was permanently restricted from AFO duties
25. There were at that time two main opportunities for those warranted officers who could not for whatever reason perform the role of AFO, namely the access control function and also the Interim Police Control Room ("IPCR"). Both are essentially sedentary roles. It is the claimant's evidence that it is important, principally for financial reasons eg pension, to retain the status of warranted officer if it is possible to do so
26. In mid-2011 however Sellafield took the decision to contract out the access control function to a private guard force which left the IPCR, with limited exceptions, as the only option for warranted officers to be retained
27. It was confirmed to the claimant by memorandum dated 18 November 2011 (page 386) that with effect from 28 January 2012 his role would be, and was likely to remain, Police Control Room Operator although his attention was also drawn to other limited opportunities. The claimant's formal redeployment to this post was confirmed with effect from 1 April 2016 (see page 447a)
28. The 2011 memorandum also confirmed that his redeployment did not prevent him from applying to be trained as an AFO if he wished to do so (page 386). The claimant accepted in his evidence that he has not subsequently sought in any way to challenge the diagnosis that he was permanently unfit for AFO duties, further accepting that it has been open to him to do so at any time subsequently had he considered it appropriate
29. In the intervening period there have been a number of vacancy notices confirming NFI posts as being available. These include:
- VN-69-12 issued on 21 August 2012 (page 391b);
- VN-22-13 issued on 28 March 2013 (391ah);
- VN-24-14 issued on 7 April 2014 (399);
- VN-63-16 issued on 16 September 2016 (453);
- VN-05-17 issued on 2 March 2017 (508ak);
- VN-64-17 issued on 13 July 2017 (508ay).

30. In respect of most if not all of these advertised vacancies the claimant expressed an interest and queried whether his non-AFO status resulted in him being ineligible to apply. On each occasion that was confirmed by reference to the qualifying criteria
31. Just by way of illustration, by email dated 11 October 2016 (page 450 – 451) an HR Advisor confirmed as follows;

*The criteria from the VN is as follows*

*All applicants must meet the following criteria*

- *Be an established and experienced AFO to a consistently high standard (Defined as : not failed a qualifying shoot in the past two years ...and not subject of a current developmental plan)*
  - *Applicants will need to achieve the current recognised fitness standard to become a Firearms Instructor*
  - *Must successfully pass the recognised instructors shoot ...*
  - *Not have been on any stage of the Unsatisfactory Performance Procedure (UPP) within the last 12 months*
  - *Be prepared to attend and successfully complete a National Firearms Instructors course*
32. The claimant's contention is that notwithstanding his physical impairment, he would be able physically to carry out the role of NFI to the extent of being occupationally competent. The Tribunal rejects this contention as a finding of fact, it flying in the face of all of the evidence before it including that of the claimant. In reaching that conclusion the Tribunal notes the following evidence produced to it
33. The claimant was initially assessed by the DWP for the purposes of benefit entitlement as 15% disabled but that has subsequently increased to 20% indicating a worsening position
34. In the context of seeking to have his working pattern reviewed, the claimant sent an internal e-mail dated 23 October 2015 in which he described his physical condition in the following terms
- "I now wear a knee support, in 18 months time my right knee will be the equivalent to that of a 60 year old man, have constant pain ..."*



35. His oral evidence to the Tribunal as to the current state of his knee is that it needs a complete replacement but he is deemed too young for that procedure
36. In his amended grounds of complaint the claimant (see page 59 at paragraph 17), the claimant asserts that he was removed from AFO duties because he was unable to wear body armour full-time because of the additional strain that the weight of the body armour and/or additional firearms equipment he was required to wear/carry placed on his knee. He goes however to state that he can wear body armour but not for the prolonged periods required as a deployable AFO. Superintendent McAleavey's evidence is that we are concerned here with firearms training and nobody is permitted to be on a firing range unless kitted out in full body armour
37. His work pattern at the IPCR has, relatively recently, been adjusted (to which the Tribunal will return) to ensure he has a fixed working pattern alternating days and nights specifically to give a rest period to his knee (see pages 508aag – aah)
38. He has been given special permission to use the goods lift to access the IPCR rather than use the stairs (see page 388a)
39. The claimant sets out at paragraph 10 of his amended grounds of complaint (page 58) his assessment of the impact of his condition upon his ability to carry out normal day to day activities as follows:
  - a driving a car with manual transmission causes considerable pain;
  - b dressing and undressing takes considerably longer;
  - c walking protracted distances
  - d lifting and carrying heavy objects
  - e walking up stairs
  - f household chores such as vacuuming or shopping takes considerably longer
  - g DIY due to his difficulty in climbing ladders

*Other individuals*

40. Reference was made by both parties to the circumstances of a number of named and unnamed individuals as potentially relevant to the issues before the Tribunal. The Tribunal refers to these (where they were identified) by their initials given the fact that; reference has been made to potentially sensitive personal medical information; they were not witnesses before the Tribunal; and

the individuals may not even know that they were to be referred to in the course of these proceedings.

41. On 3 February 2017, the respondent adopted the Armed Policing Model policy (see page 508m). The purpose of this policy essentially is to seek to assist non-AFO warranted officers to maintain their employment.
42. Applying the policy, in December 2017 the respondent temporarily redeployed 9 AFOs, who had failed the hearing test necessary to be operationally competent, to NFI roles in the FTU. The rationale for this is that the hearing test is currently under review to see whether it is fit for purpose and may be changed. If so, this may result in those officers being categorised again as operationally deployable. In the meantime they are occupationally deployable.
43. PS B is a warranted officer who has been employed by the respondent as an occupationally but not operationally competent NFI. The evidence before the Tribunal was unclear as to the specifics of his situation. It is likely but not certain that his appointment predated the respondent coming under the auspices of the CoP. The claimant believed he had lost his AFO status. Superintendent McAleavey, who knows PS B well, believes he has always retained his AFO status.
44. PS B suffered a wrist injury in the performance of his duties which is the reason he has been deemed unfit for operational duties. He has undergone a Restrictive Risk Assessment by the Chief Firearms Officer who has decided that he is occupationally competent. He meets all the necessary qualification standards and can perform and demonstrate all that is necessary in the performance of the role of AFO and therefore qualifies him to be an NFI. His only restriction is that he can perform – and therefore demonstrate - wrist locks but cannot be subject to them.
45. The Tribunal has been directed to an e-mail exchange between the claimant and PS B (pages 508n – o). This does not clarify the position any further for the Tribunal, PS B indicating that he is in fact now deployable
46. PC R was assessed unfit to continue as an AFO in 2012. Although on the face of matters meeting all necessary standards, he was diagnosed with Type 1 Diabetes and this led to a conclusion that medically it was unsafe for him to carry out armed police duties
47. Two options were outlined to him by Chief Inspector Deans (see page 391ae) in 2012 These included the possibility of applying for the role of NFI. As it happened PC R decided against this step
48. In explaining her offer, Chief Inspector Deans straightforwardly accepts she was naïve, being in a temporary role at the time, and was in error in putting the possibility of an NFI role forward as an option. As PC R was unable to be competent - whether occupationally or operationally (in that he was assessed as not suitable to carry weapons due to his medical condition) – there was in

fact no prospect of him being permitted to proceed down the NFI route. Had PC R decided to take forward an application it would quickly have been rejected, no doubt with an apology for his having been misled into thinking the role had even been a possibility

49. Mr H is employed by the respondent as an NFI. He is a staff employee and not a warranted officer. He has a naval background and was previously employed by the respondent in the position of armourer. He qualified therefore to apply for the role of NFI on both alternative limbs – his previous military background and being a Subject Matter Expert (through his holding the position of armourer)

*Victimisation*

50. On 27 December 2016, the claimant submitted a formal grievance complaining of disability discrimination (page 462f - h).
51. The stage 1 meeting of the claimant's grievance took place on 5 February 2017. His complaint was not upheld and the claimant appealed on 7 February 2017.
52. The stage 2 appeal was heard by T/Insp Sutherland on 9 March 2017 (see page 462o - p). In his outcome conclusion, he states as follows: "... I am satisfied that from 2010 it is correct that none AFOs are excluded from the recruitment process to NFI and therefore PC217 Nelson was not eligible to apply and therefore has not been discriminated against". He goes on to say however that "Pre-2010 the information available is not clear and it may be that a none AFO was allowed to apply and successfully attain an NFI role which leads to the possibility that PC217 may have been indirectly discriminated against".
53. The claimant contends that this is a reference to the situation of PS B and it may be that is the case but the Tribunal cannot know whether that is so or not
54. PS Madden was appointed line manager for the IPCR in or about April 2017
55. There was a background of poor performance and attitude within the IPCR such that the respondent's HR department had intervened to seek to improve matters. PS Madden was charged with improving the performance of the group he was now appointed to manage including the claimant
56. The claimant raised a further grievance dated 5 June 2017 (pages 508s -u) and subsequently sent an e-mail to the respondent's HR department dated 7 August 2017 (page 508aad) indicating that he had initiated action through ACAS alleging potential discrimination.
57. It is common ground between the parties that Sergeant Madden worked with the claimant in supporting his request to ensure he worked fixed shifts alternating night and day to allow for rest periods for his knee (see pages 508aag – aah). When answering questions on this support in cross-examination he described Sergeant Madden as having been "fantastic" for him. This was occurring in or about July 2017

58. Sergeant Madden indicated that he had noticed the lack of courtesy generally on the part of the claimant. There was a specific incident on 27 September 2017 when the claimant allegedly failed promptly to follow commands or instructions. Further feedback was given to PS Madden by a fellow PS of similar circumstances where he had needed several attempts to get the claimant to act. As a result of these matters, states PS Madden, he decided that he should address them with the claimant at a meeting. The Tribunal makes no findings on the allegations and whether they are made out or not. It is not necessary to do so.
59. Sergeant Madden decided that this meeting should be informal but in the e-mail calling the claimant to the meeting (pages 508aat – aau) he draws the attention of the claimant to the respondent's Unsatisfactory Performance Procedure ("UPP") (see pages 332h and following). He declined to give the claimant any advance notification in writing of what the subject matter of the meeting was to be (see page 508aar). The meeting was scheduled for 5 October 2017 and the claimant was invited if he so wished to bring a colleague with him in support.
60. Prior to the meeting, Sergeant Madden notified HR of what he wished to discuss (page 508aaw). This e-mail – to Ms Ferguson whom he had asked to attend in case the claimant needed assistance – also contains the following reference:
- "However, given the officer's eagerness to submit grievances I would not be surprised if this meeting is followed by a complaint about me"*
61. There was a dispute between the parties as to the approach of the claimant to the meeting and his conduct within it. His evidence was that whilst he was surprised and unhappy as to the allegations that were being put to him, he conducted himself in a perfectly civilised fashion. The evidence of Sergeant Madden and Ms Heather Ferguson was completely the opposite. Ms Ferguson's evidence was that the attitude and conduct of the claimant had been unpleasant to the extent of being humiliating and embarrassing for Sergeant Madden. The Tribunal has not heard from the colleague of Sergeant Madden who was present and must make its findings as to how that meeting progressed on the basis of the evidence put before it. The Tribunal found both Sergeant Madden and Ms Ferguson to be consistent and credible witnesses, preferring their evidence to that of the claimant, and the Tribunal formed the impression that their description of the conduct and attitude of the claimant at the meeting was accurate
62. Sergeant Madden decided that he would issue a development plan (see pages 508 aaaa to aaaf). It refers to an alleged failure in standards within the College of Policing Code of Ethics, states that there were no identified causes and/or contributing factors and culminates in the following as "required improvement":
- After 3 months (on or around 5 January 2018) if there are no issues raised and line management consider an improvement in attitude and behaviour then the action plan will be complete. If there is no improvement, further management action (in consultation with HR) will be considered*

63. The claimant declined to sign the plan (see page 520).
64. Sergeant Madden was unclear as to how he should proceed under those circumstances and sought advice from his line manager who in turn felt it necessary to seek advice from HR. Whilst this uncertainty continued, it was apparent that the parties were approaching the Christmas and New Year period and, with both HR and members of staff on holiday, it was decided that it was appropriate to extend the review date to 22 January 2018. This was confirmed to the claimant by email dated 14 December 2017 (page 563). The claimant was not consulted about that decision.
65. The claimant brought a grievance in respect of the UPP process. This was considered and upheld by PS Malcolm and the development plan removed (see pages 564a to c).
66. The claimant presented his complaint to the ET on 15 September 2017. Sergeant Madden states that the first he was aware of the fact that the claimant had issued a Tribunal claim was in January 2018. The Tribunal has no reason to doubt this evidence and accepts it. There is no contrary evidence, whether oral or documentary, to suggest otherwise. The claimant asks the Tribunal to find that this was unlikely but the only relevant evidence before the Tribunal was that matters of that nature are not freely disseminated which is consistent with PS Maddens' position

## Law

### *Statutory Framework*

67. Section 15 EqA states that:
- (1) A person (A) discriminates against a disabled person (B) if -
- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability.
68. Section 19 EqA states that:
- (1) A person (A) discriminates against another (B) if, A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purpose of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons which whom B does not share it,
- (c) It puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

69. Section 20 EqA states that:

"(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

70. Section 23 EqA states that:

(1) On a comparison of cases for the purposes of section ... 19 there must be no material difference between the circumstances relating to each case.

71. Section 27 EqA states that:

(2) A person (A) victimises another person (B) if A subjects B to a detriment because-

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

(3) Each of the following is a protected Act the purpose or effect of –

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

72. Section 39(2) EqA makes it unlawful for an employer (A) to 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.

73. Section 136 EqA ('Burden of proof') states that:

(1) This section applied to any proceedings relating to a contravention of this Act.

(2) If there are any facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions 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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) ....

(6) A reference to the court includes a reference to –

(a) an employment tribunal; ...

74. Counsel for the claimant asked the Tribunal to make findings in respect of section 149 EqA but this is outside the remit of this Tribunal

#### *Caselaw Guidance*

75. The Tribunal was referred to a number of cases in the final submissions. There was no material disagreement between the two learned Counsel as to the relevant law. The case law cited was fully considered by the Tribunal in reaching its conclusions as also was the case with the reference on behalf of the claimant to the EHRC Code of Practice of 2011

#### Submissions

76. Counsel for each of the respective parties produced to the Tribunal extremely detailed written submissions to which they each spoke. The Tribunal found these very helpful and took the full content into consideration including the caselaw referred to. The extent of the submissions and the fact that they are in writing leads the Tribunal to conclude that there is no necessity for them to be repeated within this Judgement.

77. As will be noted from the agreed issues, many matters were agreed or conceded at the outset of the hearing
78. In the course of his submissions, however, Counsel for the claimant further confirmed that he was limiting the reasonable adjustments claim to that set out above in the issues at paragraph 2.9.2 solely – he was not pursuing any further claim for failure to make reasonable adjustments as set out in the rest of paragraph 2.9 above, as had been originally set out in the issues discussed at the outset of the hearing.
79. Counsel for the claimant also confirmed that the "legitimate aim" contended for by the respondent (as set out at paragraph 2.7 and 2.11 above) was conceded.

### Conclusions

#### *Discrimination arising from disability*

80. Counsel for the respondent concedes that the first limb of section 15(1) is made out in that the respondent has treated the claimant unfavourably because of something arising in consequence of his disability.
81. There is no point taken on the question of knowledge. The issue therefore is whether or not the respondent can show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.
82. The unfavourable treatment in question is, effectively in summary, that the claimant is not eligible to be appointed to the role of NFI
83. As indicated, Counsel for the claimant confirmed that the legitimate aim relied upon by the respondent was conceded, namely:
  - 83.1. to ensure that AFOs were adequately trained in the use of firearms in order that the respondent was able to perform its statutory functions and to carry out its mission of ensuring the safety of nuclear sites and nuclear materials in transit; and
  - 83.2. to ensure that training was undertaken safely and efficiently.
84. It is for the respondent to show that the treatment is a proportionate means of achieving that or those legitimate aims.
85. The consideration of this aspect requires the respondent to justify the treatment rather than its own subjective process of reasoning.
86. To be proportionate, a measure (or in this case treatment) has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so. In the case of *Essop & Others v Home Office (UK Border Agency)* [2017] 1 WLR the Supreme Court specifically gives the example of fitness levels in firefighters or policemen as what may amount on the face of



matters to very good reasons but the consideration of the question needs to go further than that.

87. The real question therefore for the Tribunal is whether or not there was a real need for the treatment
88. The respondent's first point is that this is a requirement of the CoP. The Tribunal does not see that as a complete answer. It is open to the respondent to go to the CoP if it considered it appropriate to do so to see whether an adjustment or waiver would be possible.
89. The Tribunal is, however, persuaded that, on any reasonable assessment, the treatment is necessary.
90. This is not an area in which risks can be taken. It is essential that the firearms officers are properly trained and that the instructors are in a position to carry out that training. The evidence is that the instructors have to demonstrate swift interchange between firing from prone, kneeling and standing positions coupled with rapid physical evasive action. This is not a question of training, for example, at a Shooting School where an individual may wish simply to fire from a standing position to a static target but rather, without exaggeration, the need to train firearms officers to be able to counter an attack on a nuclear installation by armed terrorists
91. The Tribunal sees no inconsistency in the treatment of the various other individuals, referred to in the findings of facts, to that of the claimant. The Tribunal accepts the respondent's contention that it has what is described as "organisational knowledge" in respect of its own officers leading to it being able to take an earlier decision as to eligibility
92. The respondent has shown itself willing, by distinguishing between occupational and operational competence, to be as flexible as it can in retaining the employment of those who are no longer operationally competent to carry out the function of AFO. They are not looking for an easy way out. They have adopted the Armed Police Model as an official policy in confirmation of this. They have redeployed those no longer competent to be AFOs where this has been possible, including the claimant.
93. In all the circumstances, the Tribunal's conclusion is that the treatment is a proportionate means of achieving a legitimate aim.

#### *Indirect discrimination*

94. The first issue in this regard is to identify the provision criterion or practice.
95. The respondent has set out its own version of that in its submissions. It is unclear where that precise version has come from and it is to a degree repetitive. The Tribunal concludes that the appropriate PCP is that expressed by the respondent, as set out for example at page 450, with specific reference

to the essential criteria set out in the vacancy notices for the position of NFI namely:

*All applicants must meet the following criteria:*

- *be an established and experienced AFO to a consistently high standard (defined as not failed a qualifying shoot in the past 2 years with either the SRP or GR6C weapon and not subject to the current development or plan);*
- *applicants will need to achieve the current recognised fitness standard to become a firearms instructor;*
- *must successfully pass the recognised instructor's shoot for the SLP and Carbine;*
- *not have been on any stage of the unsatisfactory performance procedure (UPP) within the last 12 months;*
- *be prepared to attend and successfully complete a National Firearms Instructors' course.*

96. This has been the PCP (perhaps specifically criterion or criteria) that had been applied in practice
97. Counsel for the respondent concedes that the respondent applies or would apply such a PCP to persons with whom the claimant does not share the characteristic and also that it puts or would put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it.
98. Counsel for the respondent however takes issue as to whether or not it puts or would put the claimant at that disadvantage
99. In doing so, Counsel for the respondent relies on the contention that, given the physical condition of the claimant and therefore the fact that he would have no prospect whatsoever of succeeding in any application, it does not in any way disadvantage him not to be eligible to proceed with an application. The Tribunal is persuaded by that proposition but acknowledges that there is a counter argument that what we are concerned with here is whether or not the claimant and others in his position are even eligible to apply. In those circumstances, the Tribunal went on to consider also the fourth limb of subsection (2), namely whether or not the respondent can show the PCP to be a proportionate means of achieving a legitimate aim.
100. The Tribunal considers that the above discussion can simply be repeated. Although the terminology is different, the treatment under section 15 is materially the same as the PCP applicable under section 19 and the Tribunal's conclusion stands in that regard.

*Failure to make reasonable adjustment*

101. The PCP in this respect is as indicated above
102. The terminology in section 20 differs in that it is not a requirement for the respondent to show the PCP to be a proportionate means of achieving a legitimate aim but rather it creates an obligation to take such steps as it is reasonable to have to take to avoid the disadvantage
103. The Tribunal accepts the respondent's contention that this makes no material difference to the analysis in the circumstances of our particular case and the discussion and conclusion that the respondent has shown the PCP to be a proportionate means of achieving a legitimate aim leads inevitably to the conclusion that it is not a reasonable adjustment to have to take to waive the PCP.
104. In all the circumstances, the Tribunal's conclusion is that the three claims above are not well-founded and must accordingly fail

*Victimisation*

105. Again Counsel for the respondent confirmed that the protected acts contended for are conceded
106. In terms of "detriment", Counsel for the respondent concedes that calling the claimant to the meeting on 5 October 2017 and issuing the development plan amount to detriments.
107. It is not conceded that the extension of the development plan was a detriment. In this regard, the Tribunal does not accept the respondent's contention.
108. The Tribunal is satisfied that if the issuing of the development plan itself amounts to a detriment (and the Tribunal is satisfied that irrespective of the concession this is what its finding would have been) then to continue that development plan for an extended period of time must also logically amount to a detriment. It cannot be right to say that it had no impact simply because the claimant had not signed up to it. That may have put its validity in doubt but its existence remained.
109. The issue then before the Tribunal, therefore, is whether or not the treatment complained of was "because" the claimant had done the protected acts or that PS Madden believed that the claimant had done or may do the protected acts. The Tribunal has to look at the reason why the claimant was treated as he was.
110. The burden of proof initially rests upon the claimant to prove this but there is potential for the reversal of the burden of proof if the claimant has made out a prima facie case.

111. Counsel for the claimant contends that the burden of proof has been reversed, accepting that unfairness itself cannot shift the burden, but arguing that Sergeant Madden's evidence was inconsistent, littered with half-truths and evasive. On the contrary, the Tribunal found him to be a consistent and credible witness.
112. The Tribunal has accepted in its findings of fact that PS Madden was not aware of the issue of the claimant's ET1 claim form until January 2018, namely after the steps he had taken which are relied upon as detriments.
113. The Tribunal further accepts Sergeant Madden's account that he was not aware of the specifics of the grievance raised in December 2016 noting that it did not concern Sergeant Madden himself and was concluded prior to his taking up his post in the ICPR.
114. The Tribunal looked carefully at a number of circumstances surrounding the acts amounting to detriments as follows
  - 114.1. The decision to call the meeting at all rather than speak informally to the claimant
  - 114.2. Declining to give the claimant advance notification of the matters to be discussed
  - 114.3. Inviting the presence of HR and giving the claimant the opportunity to have a colleague present notwithstanding this being categorised as an informal meeting
  - 114.4. Issuing the development plan
  - 114.5. Extending the period of the development plan without consultation with the claimant
  - 114.6. The fact that the plan was overturned on internal appeal
115. Given that none of these matters have, on the face of matters, any direct link with the protected acts complained of and the Tribunal's findings as to actual knowledge and the credibility of PS Madden, the Tribunal concludes that the burden of proof does not in this case reverse. The Tribunal did however, in order to ensure a correct outcome in the event that it is wrong in that conclusion, examine the evidence of the respondent and whether it has shown to the satisfaction of the Tribunal that the detriments did not arise because of the protected acts
116. The Tribunal's findings as to actual knowledge lead to a conclusion that the first potential limb of section 27(2) is not made out. If PS Madden does not know that a protected act has been done, his actions cannot be "because of" it or them

117. There remains however the second limb, namely whether he believed that the claimant had done or may do a protected act. The fact that he was almost certainly aware of the existence of some type of grievance that pre-dated his appointment gives rise at least to the possibility that he believed a protected act had been done. His view of the propensity of the claimant to raise numerous grievances also gives rise to that as a real possibility, or at least that a protected act may follow in the future. There still remains however the question of whether or not the detriments arose because of that.
118. The allegation is, perhaps as expected, denied by PS Madden but the Tribunal has assessed the credibility of that denial not just in terms of the Tribunal's overall view of PS Madden as a credible witness but also the features of his actions outlined above
119. The Tribunal effectively accepts the explanation that PS Madden was treading on egg-shells to a degree. He felt the need to confront the claimant with what PS Madden considered his inappropriate conduct but ended up falling between the two stools of formality and informality. The Tribunal's conclusion on the facts before it is that PS Madden may be accused of not having handled the matter particularly well (notwithstanding his seeking input and advice from HR) but that his actions were not influenced by the protected acts or potential protected acts in any way whatsoever. To decide otherwise would beg the question why, if there was an intention to "victimise", did the matter result in such a low level outcome
120. In the circumstances the conclusion of the Tribunal is that this claim also is not well-founded and must fail

Employment Judge B Hodgson

Date 30 April 2019

JUDGMENT SENT TO THE PARTIES ON

10 May 2019

FOR THE TRIBUNAL OFFICE

RESERVED JUDGMENT

**Case No: 2405130/2017**

**Public access to employment Tribunal decisions**

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