



EMPLOYMENT TRIBUNALS

Claimant: Miss Kim-Louise Carter

Respondent: (1) The Chief Constable of Gloucestershire Constabulary
(2) The Chief Constable of Wiltshire Constabulary
(3) The Chief Constable of Avon and Somerset Constabulary

Heard at: Worle (Bristol)

On: 31 October to 3 November 2017 (four days)

Before: Employment Judge Street
Ms G Meehan
Mr E Beese

Representation

Claimant: Mr Stephenson, counsel
Respondent: Mr Arnold, counsel

JUDGMENT having been sent to the parties on 20 November 2017 and reasons having been requested by the respondent in accordance with Rule 30(5) of the Rules of Procedure 2004.

REASONS

1. Issues

- 1.1. The issues before the Tribunal were set out in an agreed list of 16 paragraphs, with one issue, namely as to the provision, criteria or practice (PCP) and one amendment to the PCP as presented by the claimant at the hearing.
- 1.2. The claimant contends that the PCP is the requirement to undertake and complete an assessment set by the respondent (and/or which is over and above the standard set by the National College of policing). The assessment includes the “Long Walk” and the “Dog Carry”.

- 1.3. The respondent agrees that male and female police officers were required to pass their assessment in order to become a dog-handler.
- 1.4. The full list of issues is not set out here but incorporated as applied in the Reasons below.

2. Evidence

- 2.1. The Tribunal heard from the claimant and, for the respondent, from Louise Grabham, a police dog handler with Avon and Somerset, Denis McCoy, a police dog handler with Avon and Somerset, Shane Hawkings, Inspector for the Tri-Force dogs section, and Suzie Thompson, Human Resources lead for Tri-Force.
- 2.2. The Tribunal read the bundle of documents referred to. References to the evidence bundle is given below in brackets, and references to witness statements against the witness's name, with paragraph numbers.

3. Findings of Fact

- 3.1. The claimant was born on 08/08/86. She commenced work as a Police Community Support Officer in October 2005 and on 08/04/13 became a Police Constable (PC) with Gloucestershire Constabulary.
- 3.2. She had the ambition of becoming a dog-handler in the force and took opportunities to familiarise herself with the role, going on attachments with the dog unit when possible and on training exercises.
- 3.3. In 2013, the three respondents joined together in the creation of Tri-Force for specialist training. Avon and Somerset took the lead for Dog Section Training.

Job Related Fitness tests

- 3.4. In January 2010, the Police Advisory Board of England and Wales agreed national job-related fitness standards for specialist posts undertaken by police officers.
- 3.5. In August 2014, the job-related fitness test (JRFT) was introduced for all serving police officers after the Windsor report (465 / 498). The aim was to ensure that officers were sufficiently physically fit to carry out their duties safely (Appendix 13, paragraph 19 of the Winsor Report, cited at 520).
- 3.6. The requirement was a bleep or shuttle test in which candidates achieved a 5.4 level on a 15 metre shuttle run.
- 3.7. The JRFT measures aerobic capacity. It is based on scientific research and the 5.4 level reflects analysis of the physical demands police officers face (that is those required to undertake personal safety training, which reflects the main body of officers, rather than specialist roles) (507). Test conditions are tightly prescribed to ensure consistency.
- 3.8. It is accepted by the College of Policing that a fitness test has the potential to discriminate unlawfully, directly and indirectly (e.g. 506).
- 3.9. An equality impact assessment had shown that the JRFT had the potential to impact adversely on individuals because of their sex or age

(449). Data showed that the average pass rate for men was 98.8 and for women 92.4. The average gender difference was 6.4% with several forces showing a gender difference of over 10%, the highest being 14.1% (466 and 528). That is data from May 2014, from 37 forces, 31,072 officers.

- 3.10. The 2010 specialist post fitness standards had also been established, from a range of higher standards, to have a disproportionate adverse impact because of age and sex (525).
- 3.11. The December 2016 Equality Impact Assessment of the JRFT cites the same figures but also shows that “while the subsequent data collection demonstrates an increase in the pass rate of female officers, the average is still below that of male colleagues and male pass rates are higher in all forces.” The figures cited in that report show a gender difference of 3.5% in the pass rate, men performing better (527). That refers to subsequent data, which we understand to be a reference to the data from 43 forces for the period September 2014 to August 2015. That reflects 94,000 fitness tests, showing an overall pass rate of nearly 98 %. Male officers achieved 98.9% 67,376 taking and 66,619 passing. Females achieved 95.4%, 23,154 taking, 22,095 passing (527).
- 3.12. That 2016 report on the implementation of Job-related fitness tests (494) opens by setting out that the National College guidance is to support the assessment and validation process concerning the introduction of the JRFT for serving police officers:

“Police forces that implement these standards will be able to cite them as being assessed as reasonable and appropriate under the Equality Act 2010.... Any derogation from these standards carries a risk of legal challenge from an officer disadvantaged by the implementation of a higher or lower standard, any additional standards or a different method of assessment.” (497).

- 3.13. The report notes that forces should establish a system which allows officers to become familiar with the JRFT and if necessary to attempt an informal test. This should reassure any officer who is anxious about the test. It is also suggested that familiarity with and training to the test may reduce gender disparity (528).
- 3.14. Amongst the recommendations to address the disparity of outcome as between men and women are suggestions for women only testing sessions and female test administrators. (501). Pacemakers can help avoid early over-exertion.
- 3.15. The recommended endurance and strength standards nationally for specialist roles are higher, for a dog handler are 5.7 and for the Police Support unit, 6.3 (539 and 541). Those remained the standards in place in 2014 (566) and 2017 (537).

Dog Handlers within Tri-Force

- 3.16. There are between the three forces 48 dog handlers, 12 from Gloucestershire, 12 from Wiltshire and 24 from Avon and Somerset.

There are three dog sergeants. Inspector Hawkins is not a dog handler himself but is the inspector in charge.

- 3.17. It is a varied and physical role. Dog handlers are expected to work on their own and often in difficult circumstances. They may have to search or track over long periods in difficult terrain, with an uncertain situation ahead. They may be used to seek for missing individuals, who may be vulnerable, suicidal or threatening. They may have to track criminals intent on avoiding capture and who will resist arrest.
- 3.18. Dog handlers within Tri-Force are selected through Tri-Force recruitment and selection processes (475).
- 3.19. All dog handlers are required by Tri-Force to be Police Support Unit (PSU) trained (472) because they are regularly deployed to public order situations including football matches and demonstrations (Hawkins para 6 – 8). All dog handlers within Tri-Force Operations are expected to be physically fit and must be able to complete a fitness test to the required 6.3 level whenever requested (476/480).
- 3.20. A handler who fails to achieve 6.3 will lose the authority to deploy into the PSU arena and will be placed on an action plan while continuing to be able to work as a dog-handler (3.4 page 476).
- 3.21. At the relevant time, in Gloucestershire Constabulary, 35.8% of the police constables eligible to apply for dog handling roles were female. In Avon and Somerset, 29.8% were female. In Wiltshire 39.5% were female. Overall, 35.03% of police constables eligible to apply for dog handling roles across the three forces were women.
- 3.22. Of the dog handlers in post, in Gloucestershire there 13 posts, 4 held by women, in Avon and Somerset there are 24 posts and 3 are held by women, in Wiltshire, there are 12 posts, 4 held by women. The percentage of the posts held by women is 28.6% in Gloucestershire, 12.5% in Avon and Somerset and 33.3% in Wiltshire.
- 3.23. Women are under-represented as dog-handlers in all the forces, in particular in Avon and Somerset.
- 3.24. In the 2016 recruitment, there were 52 applicants in total, 11 of whom were from females, 21%. In the 2015 recruitment for Avon and Somerset alone, there were 28 applicants, 2 from females, 7%.
- 3.25. Women are under-represented as applicants for dog-handling roles.
- 3.26. Since April 2014, one female dog handler has been appointed and 7 males.
- 3.27. Tri-Force is actively concerned at those disparities, with the female awareness days a positive step.

Dog Handler recruitment

- 3.28. The test introduced by Tri-Force was adapted from the test used by Avon and Somerset. The test involves on the first day a Long Walk which incorporates an exercise involving carrying a dog (the dog-carry), at the end of the morning.
- 3.29. The recruitment exercise for Avon and Somerset in 2015 was run using a somewhat tougher version of the long walk in relation to the dog-carry test – anyone putting the dog down would automatically be disqualified and unable to continue the assessment, and the distance over

which the animal had to be carried was longer, 100 metres rather than 70 metres.

- 3.30. Only 2 women applied as against 26 men (77c). Neither woman passed the sift to get through to the assessment days
- 3.31. Wiltshire and Gloucester have not held a recruitment process within the past five years in which the Long Walk and dog-carry exercise formed part of the assessment. Wiltshire used a gym fitness test and then a practical track laying exercise without a dog. Gloucester used a fitness test followed by a tracking exercise with a dog handler (77c).
- 3.32. The Avon and Somerset test at issue here was devised by Sergeant McCoy. The assessment areas and scoring are set out in the document describing the Dog Handler Suitability Course (575).
- 3.33. The assessment areas are as follows: role suitability, mental agility/awareness, interaction with dogs, confidence with police dogs, self-motivation and initiative.
- 3.34. On Day One there are two parts of the assessment, Grooming and the Long Walk. For Grooming, the assessment areas relate to awareness of the dog's demeanour, ability to communicate with the dog, to respond to it and vary tones and body language appropriately and to perform a demonstrated procedure (576).
- 3.35. On the Long Walk, the exercise is to be assessed on the basis of:
- The ability to maintain close contact with the group without hindering the dog
 - Continued awareness of changes in the dog's behaviour, with appropriate reaction
 - Offering reasoned observations under questioning showing understanding of the actions and behaviour of the dog
 - Ability and willingness to take part regardless of adverse weather or terrain
 - The ability to gather and disseminate information (577).
- 3.36. Each candidate is to be given equal opportunity and time to complete the assessment programme.
- 3.37. Scoring is on a scale of 1 – 5. The scoring guidance tests effective performance or competence, with level 5 being outstanding performance, consistently exceeding effective performance or competence and levels 1 and 2 being at or below required levels of performance or competence which is noted as reflecting that the member of staff is in training and/or new to the role. Any more specific performance criteria are not published.
- 3.38. The pass mark is 70%
- 3.39. In the published guidance, there is nothing that shows that failure on any single test represents a failure of the assessment as a whole: it is a multifactorial assessment. Over 38 questions the maximum scoring is 190. While the threshold of 70% is quite high, it can be achieved from a wide range of combined skills and attributes.
- 3.40. No part of the published assessment areas or criteria are based on physical fitness.
- 3.41. There is nothing to indicate that a specific level of physical fitness or stamina are determinative and dog carrying is not mentioned.

- 3.42. Neither the guidelines nor the areas to be assessed indicate that dog carrying is a crucial and determinative part of the assessment (575).
- 3.43. In practice, although not mentioned in the documents, the Long Walk included the requirement to carry a dog over a distance of 70 metres. The candidates were asked to do this deliberately at the end of the morning when they would be tired and at a low ebb. They had already been required to lift the dog at an earlier stage. They were allowed to put the dog down but had to carry the dog the full distance. As applied, if they failed the dog-carry, they were excluded from continuing with the rest of the two-day assessment.
- 3.44. It could be said that they were disqualified from the assessment or failed the assessment, but the term used was “withdrawn”. Withdrawn is also the term used when people were unable to continue by reason of injury or where they withdrew (here termed self-withdrawal) perhaps feeling they were unsuited for the role or no longer wishing to participate for whatever reason. The category of candidates “withdrawn” therefore represents a mixture of people seen as failing, as unable to proceed or opting out.
- 3.45. We have not seen guidance on how to prepare.
- 3.46. The test was submitted to HR for their input as outlined in the documents. No Equality Impact Assessment was carried out. The test as carried out in practice was not submitted to HR – the differences between the test in theory and the test in practice, including that the dog-carry was determinative and the way it was applied, was not reported to HR.
- 3.47. It is not uncommon for candidates to be unable to complete the Long Walk part of the assessment. Louise Grabham tells us that when she first applied, unsuccessfully, she was the only remaining candidate at the end of day one. Her three male colleagues either gave up or were withdrawn. There were six assessments in 2016 and in only two of them did all the candidates complete day one. 26 officers took part in the assessments, 19 completed both days.
- 3.48. In the 2016 assessment exercise, of the 4 female candidates who reached Day One, only the claimant was withdrawn for being unable to pass the dog-carry.
- 3.49. The assessment used is a one-off. Unlike the JRFT, officers once appointed as dog handlers do not have to demonstrate that they can satisfy this test again. That is because it is regarded as an aptitude test not as a fitness test (Hawkins para 11).

June 2016: Awareness Day, Female Officers

- 3.50. The claimant attended the awareness day run in June 2016 by Tri-Force (590, 671). Two of the dog handlers who were there in July said they couldn't do the Avon and Somerset assessment, as she reports in her email after the assessment day in November (671). She confirms that it was called and regarded as a fitness assessment.

“We were informed that no one from Glospol and Wilts pool of handlers had ever completed this fitness assessment and that none of the Avon & Somerset handlers had ever done it since completing it on their assessment day. (671).

- 3.51. The two day assessment as applied in 2016 set a more physically demanding test than the previous Gloucester or Wiltshire assessments; nor had all the Avon and Somerset officers appointed undergone that particular assessment. It is not required to be repeated by officers who have once been appointed as dog handlers.
- 3.52. The majority of dog-handlers in post had therefore never taken this assessment and none had been required to repeat it.

The application and assessment

- 3.53. On 9/11/16, the claimant applied to be a dog handler. She passed the sift.
- 3.54. The first day of the assessment was on 23/11/16. There were four male candidates and one female; the trainers were male save for one female trainer.
- 3.55. The day was wet and the terrain was muddy. Scoring by the assessors was not done save as to perhaps some contemporary notes (none being disclosed) until the evening, because of the difficulty of keeping records in those conditions.
- 3.56. Dogs were swapped several times during the course, so that the handlers were not working with the dogs that they had initially spent time grooming and caring for.
- 3.57. The claimant's account of the morning is not significantly challenged. There was a gentle start on the tow path, followed by work at a jogging pace, and various challenges, such as going up a steep bank to a tree with the dog, and returning safely, navigating down a 3 foot wall, through puddles on a muddy lane, lifting the dog up onto higher ground over a retaining wall, having been running, running up and down a steep muddy incline. The candidates had to repeat the exercises once or twice and were encouraged to give 100% and to go as fast as they could. That was before the dog-carry.
- 3.58. There is no record of the start or finish times, nor any measure of distance but the course took at least 2 ½ hours. The claimant in her email a day later reported that from the awareness day, "I was aware it was a ten mile tough run".
- 3.59. She had a somewhat difficult time, not least because her dog got into a fight with another dog and bit another handler. No blame was attached to her for the incident which arose because someone else let his dog get too close but it must have been unsettling.
- 3.60. There were rests while others were doing exercises that could not be done all together, but short. There were no toilet breaks or pauses for refreshments.
- 3.61. At the end of the morning, candidates were required to carry the dog over a distance of 70 metres, uphill.
- 3.62. She at that point had a somewhat larger dog, Hulk. All the dogs are "green", that is, untrained. They are young. Hulk weighed perhaps 35 kg as against a smaller dog she had also work with, Fizz, who was perhaps 5kg lighter – but these are estimates.

- 3.63. On her account, she had given of her best over the period of the assessment and was exhausted, at the stage where her legs simply wouldn't work..
- 3.64. There is some conflict as to exactly what happened next. She says she could not take more than a few steps carrying Hulk. She was then allowed to try two or three times with Fizz, but couldn't get up the momentum to carry Fizz the distance. It did not help that Fizz had already been carried up the course and was wriggling. Her account is that it was her legs that did not work. She had pushed herself hard.
- 3.65. PS McCoy showed her how to use her legs to gain a better grip and momentum, but she tells us she had no energy or strength left. Her legs felt like jelly.
- 3.66. PS McCoy initially said she managed half the track with Hulk but at the hearing changed it to 2 -3 paces and changed his testimony to that she could not lift the dog, rather than that she could not carry it. "Carry" is the word used in his one line note on the day (688): "withdrawn due to being unable to carry dog". PS McCoy now emphasises that the difficult was that Fizz was wriggling, not that she could not walk. It was aptitude not fitness, he says.
- 3.67. On the third time of stopping with Fizz, PS McCoy pulled the claimant from the task, sent her up to the end of the track where the lunch stop was and then told her she was being withdrawn. She was not allowed to proceed with the assessment.
- 3.68. After the assessment, in deep disappointment, she sent texts (658):
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"I kept up with the male applicants, at no point did I stop, lag behind or allow myself to be overtaken." and she was finished, "too fatigued to move any further".

"I kept up with the boys who naturally run and walk at a faster pace. I dug deep, real deep. Mentally (overcame some hurdles) ... I could lift the dog but had nothing left to carry them..... I just couldn't get the momentum (661)."
- 3.69. There is no contemporary record of the claimant's performance on the day. All that is recorded is that she failed to carry the dog. The full multifactorial assessment even of the half day she completed was therefore not carried out.
- 3.70. The overall picture from the 2016 selection exercise was (percentage of women in brackets):
- 52 total applicants, 11 women (21%)
 - 27 shortlisted, 6 women (22%)
 - 8 passed the two day assessment – 1 woman (12.5%)
 - 7 passed the interview, 1 woman (14.28%)
- 3.71. More than half the women passed the sift (54.5%), Of those, only one (17%) passed the two day assessment.
- 3.72. 51% of male applicants passed the sift. 33% passed the two day assessment.

3.73. The figures are skewed because 4 men and 4 women are shown as withdrawn but that category includes those choosing to withdraw, those withdrawing due to injury and the claimant who was disqualified.

3.74. The figures are too small for statistical significance, but there is a pattern.

The email

3.75. On 5/12/16, Ian White, her Federation representative wrote to Inspector Hawkings in relation to the assessment procedure (678). He refers to the College of Policing required fitness levels for the 13 specialisms within the police service.

“These were developed to reflect the level of physical exertion that was required for the role and translated into the JRFT.

At this time the one and only JRFT for dog handlers is 5.7 on the 15 metres shuttle run. This test has been scrutinised for Equality purposes as being relevant, necessary and appropriate and is the subject of an Equality Impact Assessment.....”

“I have spoken to numerous current dog handlers (and instructors) from Gloucestershire Constabulary who all say that they have never had to complete a test of this nature or length, would in all likelihood fail to complete the test and are at a loss to explain the reasoning behind it.”

3.76. He quotes some as describing the physical assessment as akin to a special forces selection procedure.

3.77. He expressly raised indirect discrimination on the grounds of sex.

3.78. Inspector Hawkings was new to his post and not himself a dog handler. He was scheduled to observe the assessment days at that point.

3.79. He talked to PS McCoy and to HR.

3.80. He rejected the complaint (676). He set out the philosophy behind the test, including that the candidate is put under pressure both mentally and physically to test resilience and to test who is prepared to keep going when conditions are tough and above all to see how the relationship with the dog is maintained.

“The physical aspect of the assessment is not a fitness test but it is necessary.”

3.81. He then explains, “I would like to clarify that she was withdrawn from the process not based on fitness levels but due to her inability to carry a dog.” (677)

“There are a number of areas being scrutinised, including the candidates’ relationship with the dog and the potential for further training, how the candidate works with the dog to achieve a certain outcome, the ability to follow instructions whilst still maintaining the safety of themselves and the dog, the ability to carry a wounded

animal and the ability to problem solve. The candidate is put under pressure both mentally and physically to test resilience, to simulate some of the work they may need to undertake operationally...". (677)

- 3.82. He does not address the disparity between the assessment as outlined in the documents and the assessment as applied, in particular the approach that disqualified participants automatically on the dog-carry element, without having the benefit of the multifactorial assessment.
- 3.83. On 15/12/16 Ian White again emailed Inspector Hawkings indicating that the officer concerned may wish to take the matter further (675).
- 3.84. On 6/12/16, the claimant had been referred by her GP for physiotherapy, and on 22/12/16, she was referred for urgent x ray.
- 3.85. She issued her claim on 13/04/17.

4. Law

4.1. Indirect discrimination is defined in section 19 of the Equality Act 2010 in this way:

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (“PCP”) which is discriminatory in relation to a relevant protected characteristic of B’s.

(2) For the purposes 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 with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

4.2. Subsection (3) lists the relevant protected characteristics, which include sex.

4.3. Section 23(1) provides that:

“On a comparison of cases for the purpose of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.”

4.4. Having defined what is meant by discrimination, the Act goes on to define the circumstances in which it is unlawful. Relevant to these appeals is section 39(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.”

- 4.5. The Act deals with the burden of proof in civil proceedings before a court or a list of tribunals which includes an employment tribunal. Relevant to these appeals are section 136(2) and (3):

“(2) If there are 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.”

- 4.6. In *Essop v Home Office*, Supreme Court, [2017] 1 WLR, the difference between direct and indirect discrimination is explained by Lady Hale, as follows.

“Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot. – (Essop, para 25)

“...The reasons why one group may find it harder to comply with the PCP than others are many and various (Mr Sean Jones QC for Mr Naeem called them “context factors”). They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between “women’s jobs” and “men’s jobs” or the practice of starting at the bottom of an incremental pay scale.”

“These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are “but for” causes of the disadvantage: removing one or the other would solve the problem. (para 26)

“...There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. (Essop, para 27)

4.7. It is a characteristic of indirect discrimination that some members of the group may not suffer the disadvantage. Women are statistically less likely to be able to meet a height requirement, but some women will meet it.

4.8. The Statutory Code of Practice (2011), prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006, at para 4.18, advises that:

“In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively.”

4.9. In other words, all the workers affected by the PCP in question should be considered.

4.10. A PCP is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. As Mummery LJ explained in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:

“. . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.”

4.11. He went on, at [165], to commend the three-stage test for determining proportionality derived from *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80:

"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

5. Submissions

5.1. Written submissions were helpfully provided by both advocates and, while amplified in oral submissions, need not be set out fully here.

6. Reasons

6.1. Addressing the issues and applying the law to the facts as found, the Tribunal finds as follows.

The PCP

6.2. It is agreed that the respondent applied a PCP, namely that, in order to be selected as a dog handler, there was a requirement to undertake and complete an assessment set by the respondent. The assessment includes the Long Walk and the dog-carry.

6.3. The assessment as described in the documents is a multi-faceted assessment. There is a total potential maximum mark of 190 out of 38 scoring areas. The pass mark is 70% which reflects the aim of recruiting the best candidates.

6.4. The pass mark can be reached from a range of different parts of the assessment. There is no measure which is in itself determinative of failure – in other words, no single area could lead to someone being disqualified or failed.

6.5. Endurance and stamina are not part of the published criteria nor are they separately scored. Physical fitness is not mentioned.

6.6. The description of the suitability assessment does not include any account of it being physically challenging, save for saying that candidates can be withdrawn if it is felt that their safety would be at risk by continuing.

6.7. It was not subject to an Equality Impact Assessment.

6.8. If it had been subject to an Equality Impact Assessment, HR could not have known from the assessment criteria and description of the extent to which it was intended to be a physically challenging course or that physical performance might trump other abilities.

6.9. As presented, the wide range of scoring areas means that other attributes – skills, responsiveness to the animal, communication skills, could trump physical fitness, in particular because fitness and stamina are not separately scored.

6.10. That is not the way the test was applied.

6.11. Strength and stamina are relevant to the role. We are told by Ms Graham that grit and determination are required. This assessment was intended to be physically and mentally challenging.

6.12. While it is denied, Miss Carter tells us that it was described as an “elite” test at the awareness day, and that is consistent with the way it was applied. We accept her account.

6.13. The assessment was taken at a good pace over a sustained period without formal rest breaks. The shortest time estimate is 2.5 hours (respondent), the longest 3.5 hours (claimant). There are no accurate timings and no accurate measures of distance, nor would that necessarily help, in that some parts of the course involve steep and slippery slopes, so distance does not reflect difficulty. Exercises involving difficult terrain were repeated. Candidates were encouraged to give of their best. There was no idling except while others were performing on parts of the course where candidates could not all go at once.

6.14. There is no objectivity to this test. Weather conditions, the behaviour of the dogs, the weight of the dogs varied. Even the make-up of the candidate teams varied – it may well make a difference to be the only woman.

6.15. The exertion and stamina required are not measurable, by contrast with the limited JRFT test.

6.16. Equally, there are no criteria against which to measure performance. The limited assessment measures are probably taken from an on the job appraisal, being appropriate to performance in a role, not raw aptitude. But there is simply no framework for measuring the skills or aptitude being tested.

6.17. That means it is not a good test of aptitude. But that it is a poor test does not show of itself show discrimination.

6.18. The key point is that in practice, it was a physically demanding test and that the ability to carry a dog at the end of the morning was decisive. It is not a test of the ability to carry a dog. The course is designed to test candidates physically and mentally, and the dog carry came at the point when they had been going the longest without formal breaks or refreshments – just before lunch. It was done when candidates would be at their most fatigued, at their lowest ebb. That was intentional.

6.19. It is said to be without time limits but in practice candidates had to keep up. Allowing the claimant to recover over lunch was not considered as an option before excluding her. PS McCoy tells us that people used to be excluded or disqualified for lagging behind and the account of the day reflects that expectation. The claimant had to be able to carry the dog when tired.

6.20. There is conflict over whether she could not lift the dog, could not control the smaller dog, Fizz, that was wriggling, or could not carry the dog. The contemporary note is that she could not carry the dog. In our judgment, the fact that the dog was wriggling is neither here nor there. She says she could not lift and carry it, and that is what was noted on the day. We have found her to be wholly honest.

6.21. It is also said that she failed through a lack of a reasonably acquired level of fitness and that she failed through a lack of confidence with the dog. Both are subjective statements, unsupported by any contemporary record or supporting observation. We do not find them to be reliable or persuasive.

6.22. It is not suggested that the claimant did not have the necessary level of fitness as measured by the JRFT requirements.

Fitness or Aptitude?

6.23. The respondent denies that the Tri-Force dog handler assessment is a fitness test. The respondents' witnesses are clear that it is not a fitness test, it is specifically not a Job-Related Fitness Test, but a test of aptitude or suitability (McCoy, para 11, ws).

6.24. That is possibly consistent with the assessment criteria, albeit that the basis for the assessment is not explained and the scoring reflects a job performance assessment rather than natural aptitude.

6.25. However, it is referred to as a fitness test in the advertisement for dog handlers and in the covering letter. Applicants are told they will submit a written application, there will be a shortlisting process against the behavioural competencies and candidates shortlisted will then be "Invited for fitness test, suitability assessment and interview" (595). The JRFT is

not administered as part of the selection process. The only test that that reference could apply to is the two- day assessment which is described as physically and mentally challenging (618).

6.26. It was spoken of as a fitness test – people understood that that was what it was.

6.27. The claimant gives an account of being told to give it 100% on a difficult and demanding course. That account was not challenged and is consistent with the description given in the invitation to the two-day assessment:

“Day one of the assessment is physically challenging and is designed to push you Physically and Mentally. You must be physically fit and free from injuries.”

6.28. Physical capacity was determinative – the only point at which a candidate could be disqualified, as the test was in practice carried out, was on a point of physical capacity.

6.29. What is absolutely clear to us is that whether or not there are elements of aptitude or skill to the dog carry, it is intrinsically a measure of physical capacity. You could not pass it if you were not physically capable, when tired. It may also have elements of aptitude, or confidence. But in the claimant’s case, having failed to dog carry, she was not assessed as to her aptitude. In her case, the test applied was wholly a physical test of fitness.

6.30. It is highly relevant here that the test was applied when it was, after the morning’s exertions, and under encouragement to set a good pace and give 100%.

6.31. This is at heart a test of physical fitness. That is common sense, given the way the assessment was applied. And that applies both to the Long Walk and to the dog carrying element.

A particular disadvantage for women?

6.32. The next question is whether the application of the PCP put women at a particular disadvantage when compared with men.

6.33. We have to determine who is in the affected group. All those wishing to be dog handlers have to pass the two-day assessment and so the pool logically identified from the PCP is the pool of officers eligible to apply to pass the assessment. It can’t be limited to those who pass the initial sift, because that removes from consideration those deterred by this fitness test. That there is a deterrent effect is at least consistent with the low numbers of women applying to take the assessment when run in 2015 by Avon and Somerset.

6.34. We have some statistics from the 2016 assessment. Four women took this test and three did the long walk and the dog carry successfully. That doesn’t help the claimant.

6.35. That is not a sufficient basis for determining whether or not women in general are at a particular disadvantage. The statistics are simply too limited to be statistically reliable.

6.36. We could rely on general knowledge. Women have different levels of strength and stamina from men. If that were not the case, men and

women would compete on equal terms on the sports fields and they don't. Women perform differently on tests of speed, pace, distance – you can't watch a marathon or athletics events without knowing that. There are of course many women who can outperform many or most men, but it is the case that taking an overall view, women have lower physical achievement levels than men measured on those factors.

- 6.37. Given that, an apparently neutral test of pace and stamina may be more demanding for women in general than for men in general.
- 6.38. But to judge on common knowledge of the differential performances of men and women in athletics is a very limited basis to show group disadvantage and we are guided against any such generalised conclusions.
- 6.39. We have the National College of Policing reports. The National College of Policing has accepted throughout that fitness tests are potentially discriminatory on the grounds of age and sex.
- 6.40. A report on the implementation of the job-related fitness tests for the police service of England and Wales was published in September 2014 (441).
- 6.41. The report points out that any test that is part of a selection process for a job comes under the requirements of the employment provisions of the Equality legislation. A fitness test has the potential to discriminate unlawfully, both directly and indirectly (449).

“A fitness test which has the same pass mark for men and women but which fewer women than men are able to pass, could indirectly discriminate against women if it does not accurately reflect the requirements of the role”.

- 6.42. The National College reports show that women on average have a lower pass rate on the standardised JRFT than men and the full discussions and recommendations point clearly to concern about that. Where a standard test has negative impacts on members of a protected group, here women, then it either needs to be changed or objectively justified.
- 6.43. Care has gone into making the tests scientifically sound, consistent and repeatable.
- 6.44. The JRFT is a test of cardiovascular capacity. It is not a health test per se, and not a general test of physical capacity or stamina or functionality (531).
- 6.45. The physical requirements for police constables have been assessed scientifically and identified as 5.4 on a 15 metre shuttle run (Brewer 2004). This is therefore considered to be an appropriate and necessary standard to ensure that the officers are sufficiently fit to safely undertake their role.
- 6.46. Those concerns were not taken into account in devising the Tri-Force test.
- 6.47. It is very different in itself. It is a test over a sustained period of exertion.
- 6.48. A key question is whether it sets a standard over and above the standard of fitness set by the National College of Policing.

- 6.49. The NPCC (National Police Chiefs' Council) Police Dogs Manual of Guidance 2011 states that in relation to the selection of Dog Handlers, any deviation from the ACPO guidance level (5.7) must have an objective basis and must be agreed as part of each individual Force's STRA process (claimant, para 14).
- 6.50. Tri-Force dog handlers were expected to achieve 6.3 on the annual JRFT, with the justification offered that it reflected that part of their duties involving public order situations. We have not seen any objective justification for departing from the national standard for dog-handlers.
- 6.51. The expectation, intention, of the Tri-Force test was that candidates would be physically and mentally challenged. Given that all were expected in any case to achieve 6.3 annually on the JRFT, it is probable therefore that the Tri-Force assessment set a standard of performance higher than that of the JRFT at the 6.3 level.
- 6.52. And that is the evidence of those running the test – this test was seen as a more challenging and therefore a more realistic assessment. The oral evidence agreed. That is supported by the accounts given of the way the assessment day was run. Inspector Hawkings commented that this assessment was “far more demanding” and that must be right.
- 6.53. If women are disadvantaged by the JRFT at the 5.4 standard, then it is likely that they are more disadvantaged as a group by the higher standards required for specialist officers, as found in 2010 (525). We don't have any formal assessment before us, but it makes sense. It is likely that the more demanding the assessment, the greater the disproportionate impact.
- 6.54. The Tri-Force dog handler assessment is tougher again. It is probable that it therefore has a disproportionate impact and one that exceeds the reported figures in relation to the JRFT.
- 6.55. It is relevant that the force which has used this approach to selecting future dog handlers, Avon and Somerset, is the force with the smallest proportion of female dog handlers.
- 6.56. From all of that, we draw the following:
- This is a test of physical capacity
 - It is tougher than and different from the JRFT
 - The JRFT is not gender neutral at the 5.4 level: women are more likely to fail it.
 - The JRFT also has disproportionate effects at the higher levels for specialist officers
 - The higher the standard, the greater the disparate impact.
 - As a more stringent test, this assessment is likely to have a greater disproportionate effect, more women are likely to fail it.
 - Put at its lowest, there is a prima facie case that this test places women at a particular disadvantage.
- 6.57. If we approach it the other way, arguing the converse, we cannot logically reach the point of saying that an apparently neutral test of physical capacity for men and women will not have a disparate effect. It is not an argument that the evidence supports.
- 6.58. In the absence of any basis for objective measurement or appraisal, it is impossible to say that the disparate impact is not significant and in our judgment on the basis of the descriptions of the physical demands of the test, it is significant.

- 6.59. That applies in relation to the Long Walk as a whole and to the part of the test involving the dog-carry. Physical strength and capacity at a point of fatigue is determinative – fail the dog-carry at the end of a 2 ½ hour course and the candidate is disqualified.
- 6.60. The application of the PCP put women at a particular disadvantage when compared with men.
- 6.61. The claimant set out the following particular group disadvantages:
- Women are likely to be physically unable to consistently maintain the same exercise pace as men and/or for the same length of time
 - Due to the physical exertion of being required to maintain the same physical pace as men, women are likely to need more rest and/or comfort breaks in between exercises
 - Women are more likely to be physically exhausted by having to maintain the pace of a man for three and a half hours and resulting in them being physically unable to pick up and carry a dog at that particular point in the day;
 - Women are more likely to physically struggle with a test that is over and above that set by the National College of Policing.
- 6.62. The latter point directly reflects our finding and analysis; there is a group disadvantage. The third is probably the case. The first two are probably not wrong but go beyond the specific evidence we have had.
- 6.63. The key point is that women were more likely to fail the Long Walk and the Dog Carry.

Was the claimant put at that disadvantage?

- 6.64. As expressed in the list of issues,
- “ Did the application of the provision put the claimant at that disadvantage in that:
- The claimant was physically exhausted having had to keep to the same pace as her male colleagues for three and a half hours. As a result, she was physically unable to pick up and carry the dog at that particular time
 - The claimant was physically exhausted which was exacerbated by the lack of opportunity to have a rest and/or comfort break. As such, she was unable to lift and carry the dog at that particular time on the Assessment Day
 - The claimant failed the assessment as a result of being unable to pick up the dog and carry it 100 metres, at that particular time on the Assessment Day
 - The claimant has the required fitness to pass the standard set by the National College of Policing and the recommended

fitness level set by ACPO, but failed the 'Elite test' set by Tri-Force

6.65. We agree (save as to substituting 70 metres for 100 metres). She was withdrawn from the assessment. That is not on the basis of aptitude, it is on the basis of physical capacity. She was physically exhausted.

Legitimate Aim

6.66. The next question is whether the respondent shows that the treatment was a proportionate means of achieving a legitimate aim?

6.67. The respondent relies on the following as to the legitimate aims:

- Assessing whether the applicants could effectively perform the role of a police dog handler, including carrying an injured or wounded animal
- The welfare of police dogs wounded or injured while on duty, to whom the respondent owed a duty of care
- Testing the resilience, determination and aptitude of potential dog handlers, and/or
- Maintenance of an efficient police force

6.68. The aims are legitimate.

Is it justified?

6.69. The respondent relies on the legitimate aims reflecting a real need and being reasonably necessary and that adjustments were made in that;

- The exercise was not time limited
- The candidate was permitted to stop at any time as long as he or she could do so safely for both the candidate and the dog
- Manual handling advice would be offered where appropriate to do so, and/or
- The candidate would be offered a smaller dog, if unable to lift the dog that he or she had been working with on the long walk

6.70. Those adjustments do not alter the fact that this is a fitness test requiring higher standards of endurance and stamina than required for the national fitness test at the higher standards for specialist roles. Nor are they accurate in themselves – there is no evidence that candidates were generally offered a lighter dog, the exercise was in practice time limited.

6.71. The claimant denies that there is justification for setting a standard higher than the National Policing Standard.

6.72. The key point here is that the entire exercise is not required for serving officers. At least half those in post have not undertaken it and will not be required to take it. It is not established how many of the others have taken it given that there has been little recruitment in recent years – perhaps a substantial majority have not taken the assessment as run in 2015 or 2016.

6.73. It is not necessary for serving dog handlers to be able to pass this test.

6.74. On that basis, it cannot be said that the demands of this assessment accurately reflect the demands of the post or that this test is appropriate and necessary.

6.75. The claimant showed courage in bringing the case. It is unfortunate that Tri-Force sought in their defence to deflect attention from the indirect discrimination to the claimant's personal attributes, blaming her for a lack of fitness or confidence.

Conclusion

6.76. We find indirect sex discrimination.

7. Remedy

7.1. The Tribunal gave recommendations, as follows.

We recommend using the National College Job-Related Fitness Test for cardiovascular fitness, specifically, and then that the respondents (through Tri-Force) specifically identify the standards required as necessary for physical function and stamina to perform the role of dog handler, with reasons, and produce a scoring matrix on that basis, as part of a multi-factorial assessment. If some aspect of that test is to be determinative, that is, capable of leading to failure or disqualification independently of the multi-factorial assessment, then the measures used must be justifiable on as objective a basis as possible.

We recommend that the respondents continue to liaise with other forces to assess what tests are available and justifiable for assessing the suitability of dog handlers for selection and that they initiate and/or participate in validation exercises to establish objective approaches to measurement consistent with their overall aims.

Any assessment used must undergo Equality Impact Assessment and monitoring to assess adverse effect.

We recommend that individuals designing and setting criteria for suitability assessments and carrying out assessments of suitability and in monitoring adverse impact on or on behalf of the respondents / Tri-Force, to include Human Resources officers, undergo face to face Equality Training.

We recommend that access to data and other services from each of the three forces relevant to monitoring and evaluation of suitability in selection exercises be available to the Human Resource lead for the respondents / Tri-Force.

- 7.2. Those recommendations being adopted would in our judgment reduce the adverse effect of the discriminatory selection procedures on the claimant. She is young and still in the police force. This has been a long-held ambition, to be a dog handler. People do reapply. She needs to have confidence that the selection procedures, should she reapply, will be as fair as possible. The recommendations will in our judgment overcome the immediate indirect discrimination and promote good practice in Tri-Force.
- 7.3. If a higher standard of fitness is required than the JRFT prescribed levels, that must be capable of being demonstrated objectively based on the requirements of the job.
- 7.4. The assessment used must obviously reflect the way that the documents present it, without which it will not be capable of being properly assessed or monitored. The assessment adopted here was not only not objective but also lacked any transparency. It departed substantially from what the documents described. Anyone without personal knowledge would be misled as to the nature of the assessment carried out. HR would not have been able to identify the physically testing components from the assessment material in order to alert the course designers to any potential difficulties.
- 7.5. The outcome recording is itself flawed, with no distinction between those who withdrew and those who failed. It is wrong to classify someone as withdrawn who has actually failed. That an individual had been disqualified on the physical test is not disclosed in the records kept, again undermining any transparency as to the nature of the tests applied and making it impossible to monitor. The monitoring did not disclose that some individuals had withdrawn because of accidental injury, pooling them with those who withdrew for other reasons.
- 7.6. We were particularly struck by absence of co-ordination between the three forces participating in Tri-Force that meant that the HR lead could not obtain information for monitoring purposes. Ms Thompson was refused access to information about this case by reason of "legal privilege" and she wasn't allowed herself to have access to another force's IT system. That means she could not effectively carry out her role as lead HR. She didn't have access to the data necessary to monitor and evaluate what was happening.
- 7.7. We were also struck by the very limited Equality Training on offer and that it was often online. It had not enabled the officers concerned here even to recognise that there was a problem and did not give them the tools to address it.
- 7.8. Inspector Hawkings believed that the test was targeted to selecting the best people without understanding at all how discrimination can occur. The same applies to PS McCoy. The point of a multi-factorial assessment is that other skills and qualities besides physical capacity can be fairly reflected in the scoring. Those qualities are presumably the qualities displayed by long-serving dog handlers who have never been asked to

- undergo this assessment. This assessment places as critical one area where females are known to be at a disadvantage, without reason. Tri-Force should have officers in charge of training who understand that - hence the importance of face to face Equality training.
- 7.9. In a case of indirect discrimination, if the Tribunal finds that the PCP was not applied with the intention of discriminating against the complainant, the Tribunal may not make an award of compensation unless it first considers whether to act by making a declaration or recommendation.
- 7.10. The claimant was not singled out for discrimination. However, the risk of discrimination was very obvious from the National College reports. In the lack of training and lack of regard to those reports and other guidance, Tri-Force acted without regard to whether there was discrimination or not. Furthermore, Tri-Force deliberately equated the “best” candidates with those who met a stringent test of physical capacity. Exclusion of more women than men was inevitable. In that regard, the discrimination was intentional (*J H Walker Ltd v Hussain* [1996] IRLR 11, EAT).
- 7.11. In any event, with effect from 25 March 1996, employment tribunals were given the power, where they think it would not be just and equitable to decline to do so, to award compensation even where the respondent did not intend to treat the claimant unfavourably on the ground of their sex. Intention remains relevant, but does not preclude an award.
- 7.12. In our judgment, it would not be just and equitable to decide not to award compensation, given the humiliation and distress that the claimant has suffered and that it was foreseeable from the nature of the assessment exercise.
- 7.13. There is a marked disparity between numbers of potential male dog handlers and numbers of potential females, and between actual dog handlers or those applying. More men apply, more men succeed. That points to a problem. The probability is that this fitness test, which can fairly be described as stringent, deters potential women candidates.
- 7.14. The JRFT reports reflect clearly the risks of using physical fitness tests and creating a discriminatory outcome. Tri-Force was on notice that there was a risk of discrimination, from College of Policing reports. Over a period of years, there had been warning about the risk of discrimination. This was avoidable.
- 7.15. There was no Equality Impact Assessment. HR advice on the assessment process was not taken.
- 7.16. The discrimination is structural and potentially impacts all women police constables.
- 7.17. There can be no criticism of the claimant for not bringing a formal grievance. The issue was appropriately raised through the Federation at the time, and the grievance procedure was not appropriate.
- 7.18. Against that background, the claimant was deeply distressed by the experience. She was humiliated by a failure treated as personal (still, unfortunately, treated as personal at the hearing) and deeply disappointed by the outcome. She had prepared well for the assessment and saw herself as at peak fitness. She found herself facing a discriminatory assessment, competing as it happened with male officers. Her distress and disappointment are plainly expressed in the text messages sent

immediately after being sent off the assessment day and in her email to Ian White of the Federation.

- 7.19. She was very alive to the fact that such a test was discriminatory towards her as a woman as shown by the text messages. That added to the hurt she suffered. There is an added hurt in her awareness that the exercise was in excess of the standard required of existing dog handlers.
- 7.20. Her complaint of sex discrimination did not receive the attention it should. Inspector Hawkings, although new to the role, did not investigate sufficiently to establish the disparity between the test as documented and as applied, recognise the failure to carry out an Equality Impact Assessment or note the concerns reflected in the National College reports which cast doubt on the merits of the Tri-Force assessment. The response, while long, was dismissive because inadequately informed, and because he himself was not adequately trained.
- 7.21. We have not heard evidence of lasting damage to the claimant's health, there is no claim for personal injury compensation nor would any such claim form part of the injury to feelings assessment.
- 7.22. We remind ourselves of the value of the broad levels of compensation identified in the case of *Vento v Chief Constable of West Yorkshire Police (No 2)* [2002] EWCA civ 871 as updated. The nature of the discrimination and its effect on the claimant is too significant to fall within the lower level. In terms of injury to feelings, it is also not at the upper level of the middle band. We are assessing compensation to the claimant, not to women generally who may have suffered from this approach to appointing dog handlers.
- 7.23. Injury to feelings was awarded at £7,000.
- 7.24. We do not find a basis for awarding aggravated damages. The claim is based on the failure to address her complaint made via her Federation representative, the aspersions cast on the claimant's performance and abilities that we have found to be unsupported by evidence and unjustified distractions from the issues at hand and the lack of co-operation with Ms Thompson as HR lead by the other forces in the provision of statistical information and in relation to whether an Equality Impact Assessment had been carried out.
- 7.25. In relation to aggravated damages, the claimant must establish a causal link between exceptional or contumelious conduct or motive and the injury to feelings suffered. We have had regard to the guidance in *Commissioner of Police for the Metropolis v Shaw* [2012] ICR 464, to which we were referred. Such awards are the exception.
- 7.26. The points relied on are those taken into account in assessing the overall level of compensation for injury to feelings including as to whether an award is merited at all. The respondent has throughout treated the claimant's failure as her own fault rather than recognising the discriminatory approach they were taking, but that is adequately recognised in the compensation ordered. Nor does the claimant's evidence support an additional award.
- 7.27. Those points do not take this case into the exceptional. The treatment was not aggravated by high-handed, malicious or insulting behaviour to the degree required.
- 7.28. Compensation was otherwise agreed at £7,124.58. Interest was calculated at £805.72.

7.29. The total award was £14930.30 by way of compensation for the indirect sex discrimination.

Employment Judge Street

Date: 29 November 2017

REASONS SENT TO THE PARTIES ON

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS