Case No: 2207660/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr. A. Wisbey**

Respondent: **(1) Commissioner of the City of London Police**
(2) College of Policing

Heard at: **London Central** **On: 17-21 June 2019, and in chambers 12 August 2019**

Before: **Employment Judge Goodman**
Ms T. Breslin
Ms M. Jaffe

Representation
Claimant: Mr D. Stephenson, counsel
Respondents: (1) Ms I. Omambola, counsel
(2) Ms C. Darwin, counsel

RESERVED JUDGMENT

1. The respondents did not indirectly discriminate against the claimant by removing the claimant from firearms duties.

2. It is declared that the first respondent indirectly discriminated against the claimant by removing him from rapid response driving; there is no award of compensation for this.

REASONS

1. The claimant, a police officer in the City of London Force, is an authorised firearms officer (AFO) deployed to the Tactical Firearms Group (TFG). He has a form of defective colour vision.

2. In April 2017 he was removed from his role as AFO because of the colour vision defect. He was also removed from response driving duties. He was restored to these roles in February 2018.

3. About 8% of men, but only 0.25% of women, suffer colour vision defects.

4. He brings a claim of indirect sex discrimination against the first respondent, the Force in which he serves. He also brings a claim against the second respondent, which sets standards for police use of firearms, for instructing, causing or inducing discrimination by the first respondent in respect of removal from firearms duties, but not response driving.

5. The claim was presented on 9 November 2017. Both respondents dispute liability. There have been several preliminary hearings. The claimant provided further information about his claim in 29 March 2018; later the response was amended to remove reference to a meeting which had not taken place. We have a list of issues prepared by the parties.

Issues for Decision

Indirect Sex Discrimination Claim - First Respondent

6. The claimant relies, individually or cumulatively, on five provisions, criteria or practices (PCPs).

7. The respondent accepts that two were applied to the claimant, namely 2 and 3. In respect of 1,4 and 5, the tribunal must decide whether the first respondent applied these to the claimant. They are:

PCP 1: The practice of applying an insufficiently robust process and/or a standard of testing for CVD which is not sufficiently accurate to assess an officer's suitability to be an authorized firearms officer and/or advanced driver.

PCP 2: The requirement that in order to be and remain in an authorised firearms officer role, all officers must pass the Ishihara test by getting 15 out of 24 plates correct and if they fail that, must pass both the 2nd edition City University test and the D15 Farnsworth test.

PCP 3: The requirement that in order to be and remain in an authorized firearms officer role, all officers must pass the Ishihara test by getting 15 out of 24 plates correct and if they fail that, must *consistently* pass both the 2nd edition City University test and the D15 Farnsworth test (emphasis added).

PCP 4: The policy that officers with CVD are removed/unable to undertake advanced driver duties

PCP 5: the policy that officers who fail the Ishihara test and then do not *consistently* pass the 2nd edition City University test and D15 Farnsworth test are removed from operational advanced driving duties(emphasis added).

8. If applied, did or would the PCPs put men at a particular disadvantage when compared to women? This is accepted by the first respondent for PCPs 2 and 3, but not the others.

9. If so, did they put the claimant at a disadvantage – this is accepted, as he had a colour vision defect, and at times failed the relevant tests.

10. Did the PCPs pursue a legitimate aim? The claimant accepts the legitimacy of the following aims advanced by the first respondent:

    (i) ascertaining the officer's suitability within the constraints of the duties the first respondent is obliged to carry out and in the light of available resources

    (ii) ensuring that the first respondent and its officers are sufficiently and safely able to carry out their duties

    (iii) ensuring the safety of the public and police officers

11. Were all or any of the PCPs a proportionate means of achieving those aims? This is disputed.

    Claim against Second Respondent – section 111 Equality Act

12. Did the second respondent instruct, cause or induce the first respondent to apply PCPs 1, 2 and 3 to the claimant, by:

    (a) an obligation on all police forces to comply with the standards and guidance set by the second respondent

    (b) the alleged conduct of the second respondent's Gary Wedge during a meeting with the First Respondent on 21 March 2017.

13. If so, did this amount to a contravention of Part 5, by virtue of a breach of section 19 of the Equality Act?

14. If so was the claimant subjected to a detriment as a result of the second respondent's conduct?

    Time points:

15. What was the date of the act complained of? Was the claimant subjected t a continuing course of discriminatory conduct pursuant to section 123(3) of the Equality Act 2010?

16. Were his claims presented in time?

17. If not, is it just and equitable to extend time for bringing such claims under section 123(1)(b) ?

    Remedy

18. If there was a contravention of section 19, is the tribunal satisfied that the PCPs were not applied with the intention of discriminating against the claimant?

19. Should the tribunal make a declaration and/or an appropriate recommendation pursuant to section 124(2)

20. Should the Tribunal order the first or second respondent or both to pay compensation to the claimant taking into account the provisions of section 124(3) and (4)?

21. If so, in what amount?

22. The list of issues had been agreed without 12 (a) above. The claimant subsequently sought to add it, arguing it was a matter which he had pleaded, but then omitted from the respondents' draft, which he had agreed inadvertently. The second respondent objected. I heard from the parties on this, and ruled that the claimant could add it, on grounds that the case is what is pleaded, while the list of issues is a summary of the disputes identified in the pleadings, and here: (1) it was pleaded in the grounds of claim (2) the second respondent had responded to it (3) it was understood by E J Elliott to be still live when she gave detailed reasons in relation to an application for a deposit order on 9 May 2018, which was after the claimant had given further information (4) although the second respondent argues that it was withdrawn by implication, in that the claimant's counsel agreed the respondent's draft, it was never expressly withdrawn either at a hearing or in correspondence (5) it was hard to discern what disadvantage there was to the second respondent; no additional evidence is required, only an additional submission. It would be fair and just to allow the claimant to put this part of his case.

Relevant Law

Indirect discrimination

23. Section 19 of the Act prohibits indirect discrimination:

> (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 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.
>
> (3) The relevant protected characteristics are—
> …sex…

24. When making comparisons between one group and another, then by section 23:

> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no

material difference between the circumstances relating to each case.

25. It is for a claimant to prove the first three requirements – section 19 (2) (a) – (c) - to establish indirect discrimination, and then for the respondent to prove section 19(2)(d) namely justification. Whether there is a provision, criterion or practice is a matter of fact for the tribunal to determine – **Jones v University of Manchester (1993) IRLR 218**.

26. In establishing group disadvantage for section 19 (2) (b), a tribunal could consider the factors that caused disparate impact to occur, and whether an apparent disparate impact resulted from non-discriminatory factors – **Naeem v Secretary of State for Justice (2016) ICR 289**, about length of service provisions for pay having a disparate effect on Muslims when the need for Muslim prison chaplains had arisen relatively recently. An unfair criterion does not have to be justified unless it discriminates in respect of a protected characteristic. Relying on the reasoning in **Essop v Home Office (2015) ICR 1063,** in indirect discrimination, the claimant did not need to show the "reason why" an employer acted as he did, as is required for direct discrimination, but he did still have to show the "reason why" the PCP disadvantages the group sharing the protected characteristic. Section 23, about comparisons and material differences, emphasises the need to compare like with like.

27. With regard to justification, in **Homer v Chief Constable of West Yorkshire (2012) 3 All ER 1287**, the Supreme Court identified that it was the criterion itself that had to be justified, not its discriminatory effect. The assessment of the justification would include comparing the impact on the affected group against the importance of aim to the employer. In any case the provision had to be read in the light of European jurisprudence, in that to be a proportionate means of achieving a legitimate aim, the tribunal must consider both whether it was an *appropriat*e means of achieving the aim, and also whether it was *reasonably necessary* in order to achieve it.

28. Instructing, causing or inducing contraventions - section 111.

(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

(5) Proceedings for a contravention of this section may be brought—

(a) by B, if B is subjected to a detriment as a result of A's conduct;

(b) by C, if C is subjected to a detriment as a result of A's conduct;

(c) by the Commission.

(6) For the purposes of subsection (5), it does not matter whether—

(a) the basic contravention occurs;

(b) any other proceedings are, or may be, brought in relation to A's conduct.

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

(8) A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it.

29. This section was considered in **NHS Trust Development Authority v Saiger (2018) ICR 297**. Being in a position to instruct or induce a breach, or participating in a discussion, were not enough, of themselves, nor was "materially influencing" a breach. There must be evidence that there *was* instruction or inducement, not just that he was able to instruct or induce.

30. What is meant by "induce" was considered in **CRE v Imperial Society of Teachers of Dancing (1983) ICR 473.** It meant "to persuade or to prevail upon or to bring about". In that case, the respondent asked a school to find candidates for a filing clerk's position, and said they "would rather the school did not send anyone coloured", as they would feel out of place. It was held this was an inducement to the school not to send coloured candidates for interview. There need not be any element of carrot or stick to make it an inducement.

Evidence

31. The tribunal heard evidence from:

Police Sergeant **Alexander Wisbey**, claimant

John Babur, Professor of Optics and Visual Science, City University

Andrew Stockman, Professor, Institute of Ophthalmology, University College, London

Gary Wedge, the second respondent's National Police Firearms Training Curriculum Manager

Chief Superintendent **David Lawes**, commanding the first respondent's Uniformed Policing Department

Jane Gyford, now Deputy Chief Constable, Cambridgeshire, but formerly the first respondent's Commander, Operations and Security.

32. Professors Babur and Stockman were announced at the start of the hearing as witnesses of fact, both having at different times provided advice and guidance to the respondents on colour vision standards. There had been permission in April 2018 to the claimant to adduce expert evidence, and for the respondent to respond with any evidence of their own. Neither witness had prepared a narrative statement of their involvement, which might have

been helpful to the tribunal, instead that narrative was elicited by cross examination. Each had prepared a report for these proceedings, in addition to those prepared as part of the events giving rise to the claim; Professor Stockman had then commented on Professor Babur's. In hindsight, it would have been useful, and have shortened the cross examination, if there had been questions to the experts to define the issues, and then a meeting to outline what was and what was not agreed and why. If this were to arise again, the parties should consider agreeing these steps, that would be taken under CPR and were recommended in **Keyser v de Vere Hotels**, either voluntarily, or by applying for directions.

33. There was an agreed hearing bundle of three level arch files. We read those to which we were directed.

Findings of Fact

A. Colour Vision Defects

34. In the human eye colour is detected through three types of light sensitive cone photoreceptors, identified by scientists as L, M and S (long, medium and short wavelengths). Above most wavelengths, colour is determined by comparing the outputs of the L and M cones, the red-green spectral range.

35. Individuals with less than complete colour vision are not "colour blind", but colour deficient. Although there is very rare defect, monochromatism, where subjects cannot distinguish colour, and also have poor visual acuity, the rest confuse some colours, but not others, with varying severity.

36. A deficit in pigmentation of either L or M cones will lead to monochromatic colour vision, meaning the individual had difficulty distinguishing red from green. Loss of pigment in the M cone is called *deuteronopia*, and leads to confusion of brown/green, and red/orange/yellow green. Loss of pigment in the L cone is called *protanopia*. Protanopes may not see red from black, or may confuse red/orange/yellow green, but there is no loss of fine detail.

37. Another type of colour vision defect occurs when the cones are shifted to detect colour at closer or overlapping wavelengths. If the M is shifted towards the L, known as *deuteronomaly*, there is reduced distinction of red and green. If the L is shifted towards the M, called *protonomaly*, there is loss of sensitivity to red. Both these types of defect can be mild, moderate or severe.

38. Both *protonopia* and *protonomaly* lead to loss of sensitivity to red.

39. *Deuteronomaly* tends to reduce colour discrimination less than *protonomaly.* This is because in normal subjects the M and L curves are close together, and less is lost by a shift of M towards L than by a shift of L towards M.

40. The claimant is: "a mild or moderate deuteronomalous observer, whose performance will be compromised or affected principally when an object or target is defined primarily by a red-green chromatic difference" (Professor Stockman). As will be seen, it has not always been clear from the reports whether the claimant's defect is mild or moderate, but it has never been classed as severe.

41. Colour vision defects arise in the X chromosome, which may lack the genes for normal colour receptive cones. Human cells have 2 chromosomes, one donated by each parent. All women are XX. All men are XY. The probability that any particular X chromosome carries a defect is the same for both sexes, but because women have 2 X chromosomes there is a greater chance that one of them is not defective, so leading to normal colour vision.

42. About 5% of men and 0.35% women, are deuteronomalous, (the claimant's group), so in round figures, 1 in 20 men have this particular defect, and men are 14 times more likely to be deuteronomalous than women.

43. Most colour vison defects, being genetic, neither improve nor deteriorate. This means that once diagnosed there is little need to retest. Acquired defects (which might require repeat testing) are rare, but not unknown. They can occur as cataracts form, when blue/violet distinction can be lost. Colour defects are also found in retinal disease, such as that caused by diabetes.

B. Tests for Colour Vision Defects

44. The standard tests used by the police force are conducted by an occupational health nurse. Others must be done in a specialist setting or with more sophisticated equipment.

45. Colour vision defects are screened by the Ishihara test, where the subject reviews up to 32 plates each showing a circle filled with coloured dots revealing different patterns. This identifies people who confuse red and green, but it does not show the severity of the defect. Nor does it identify the few who are short of S cones – tritans. (In practice, fewer than 32 plates are used– 17 or 22).

46. The Farnsworth D-15 test asks the subject to arrange coloured chips in sequence (e.g. from red to green). Most colour normal and mildly anomalous trichomats can do this without errors. The test is able to distinguish mild from severe red-green sufferers, but allows more protans (as distinct from deuterans) to pass because they can use luminance differences as a cue to identify red. Scoring is done on a chart which shows diametric crossings if there is a defect. Two or more crossings are a fail.

47. The City University test – second edition (developed for the Canadian railway) requires identifying which of four small discs match a larger central disc. More than 5 errors on small discs or 2 errors for small discs equates to the Farnsworth standard. It distinguishes between mild and severe deuterans, but not the severity of protan defects.

48. A more sophisticated test is the Rayleigh anomaloscope or Nagel test, involving coloured lights. It is treated as a gold standard, and has been shown to be consistent with molecular genetic interpretations of red-green signal defects.

49. Finally, there is CAD (Colour Assessment and Diagnosis) test developed by Professor Babur to assess airline pilots, where a subject must identify coloured patterns moving against a grey background. The outcomes are CV1

and CV2 (normal and functionally trichromatic vision), CV3 which is "safe" trichromatic vision, CV4 is poor, and CV5 is severe red-green colour discrimination. Different occupations will require a pass at different levels of CV.

50. The experts differ on which tests are useful for occupational assessment. Professor Babur prefers his CAD assessment to the more common combination of Farnsworth D or City 2nd edition or both, if a subject fails Ishihara screening. Professor Stockman points out that Professor Babur's report refers almost exclusively to his own research, and that by treating CAD tests as gold standard, rather than the Nagel tests, there is a degree of circularity, while the other tests have been extensively validated. We noted the complex statistical methods applied to CAD results to obtain some equivalence to the proportion passed or failed on other tests, and that calibration may yet be inexact.

51. Professor Babur was challenged for not declaring in his report his financial interest in the use of CAD tests in occupational settings. The information is apparent in a 2017 BMJ article, where his financial stake is declared. We did not accept that Professor Babur advocated his own test for venal reasons, as suggested, but rather because he genuinely believed it was better. Nevertheless, the lack of independent testing or validation made it hard to be confident that his test is to be preferred to the other test combinations (other than Nagel, which is not suitable for an occupational health setting).

52. Both experts agreed that no one set of tests will accurately indicate which defects can be tolerated for particular tasks, and that ideally there should be specific assessment of the occupational tasks and what level of colour vision was required for armed firearms officers (or any other occupational group), but they differ on what tests are best in the meantime. A specific assessment requires research. The second respondent has recently (January 2018) had an estimate for this from Newcastle University. A preliminary study of occupational requirements for colour vision in armed police will take 6-12 months and cost £50-100,000. Specific research and development of functional testing will take 1-2 years and cost up to £500,000. At this level the work would have to go out to tender. It might be possible to obtain an academic research grant for some of this.

C. Evolution of CVD Policies for Policing

53. Until 2004, while precise standards varied from force to force, there was a colour vision requirement which "effectively removes all applicants with defective colour vision from the UK police service". (Qinetiq report, 2002, 2.4.16). As the claimant was recruited in 1993 with a colour vision defect, and known to fail Ishihara screening then and later, we conclude that this requirement cannot have been applied consistently, possibly not at all.

54. Following the enactment of the Disability Discrimination Act in 1995 the government planned to extend its employment provisions to police constables. In this connection a report was commissioned to review what standards were required for policing tasks, and to set evidence-based standards. The report, dated April 2003, noted: "colour loss is not always that significant for 'real world' activities". It concluded that colour vision defects should not exclude police officers from most operational policing, but:

> "it is believed that dichromats and severe anomalous trichromats may be unsuitable for certain specialist roles, for example fast response driver and marksman".

A task analysis was required to identify the requirements. Colour vision loss was to be identified by the Farnsworth D15 test.

55. Following this report, recruitment standards for colour vision defects were relaxed for police recruits, but not for firearms officers.

56. In England and Wales very few police are armed, unlike in Northern Ireland, where all officers carry a handgun, and some are trained to use rifles, MP5 submachine guns and baton guns. In 2006 Professor Jennifer Birch, of City University, London prepared a report on colour vision standards for the PSNI (Police Service of Northern Ireland). She concluded that protans were at risk using hand guns because they could not see the red mark indicating whether a safety catch was on. As for red laser sights on rifles and MP5s, these could be used safely by all colour deficient people at the required distance of 20 metres at all levels of illumination.

57. She also analysed accident statistics and colour vision defects, and concluded that all protans and deutans with severe colour deficiency were at risk for rapid response driving. There was no evidence that deuteronomalous trichromats had more accidents.

58. Generally, good colour discrimination was necessary to identify suspects by description, as in Northern Ireland there was a greater risk they might be armed.

59. She concluded that PSNI police recruits should be tested first by screening using the Ishihara test, and if positive, by *either* the Farnsworth D15 *or* by the City University second edition. She said: "officers who fail a grading test have severe colour deficiency". Police recruits with "severe colour deficiency" should be excluded, given the wide range of duties performed by all officers.

60. In England and Wales Tasers were introduced to policing in 2007, with their use limited to AFOs (armed firearms officers). With a view to extending Taser use to other police officers, late in 2010 ACPO (Association of Chief Police Officers) commissioned a review of medical standards for AFOs.

61. A working group was formed by the new College of Policing, the second respondent. The College of Policing is responsible for setting standards and giving guidance nationally to the 43 police forces in England and Wales. The College licenses forces to provide firearms training.

62. The working group used Professor Birch's report, and then drew up a role profile for AFOs. They used DVLA group 2 (HGV and PSV drivers) as a benchmark for medical requirements generally, but decided that vision required a different standard because colour could be important in identifying a suspect, when taking a critical shot (that is, one that could kill or severely maim), or arresting someone thought to be carrying a firearm, when it would be important to get the right person and not let a suspect slip away. It could also be important in identifying replica guns, as 2007 regulations require

these to be manufactured in distinctive bright colours (or be transparent). Training ammunition must be colour coded, but this is unlikely to be operationally relevant. Finally, they were concerned about the use of red dot laser sight; although increasing the brightness could mitigate this difficulty, some Tasers could not be adjusted.

63. The group concluded that Professor Birch's test guidance was to be followed for AFOs in England, with some latitude to individual forces to use *equivalent* tests instead of the set she had recommended. The draft guidance was circulated among police forces for consultation. There was no negative feedback.

64. The draft guidance was included in the College of Policing's Firearms training curriculum in 2014. The tribunal had version 5.1, dated 11 March 2015. This set a visual standard by which dichromats and *severe* anomalous trichromats were unsuitable for firearms roles. Vision was to be tested by Ishihara screening, and if abnormal, then either the Farnsworth D15 or City second edition. Other medical guidance was to follow DVLA group 2 requirements.

65. The final version was published by NPCC (formerly ACPO) in March 2016 when formally ratified (the year's delay related to debate about disclosure of officers' mental health records, not colour vision testing).

66. The requirements for Taser officers were still under review. In June 2016 Professor Stockman was commissioned to review and report. He was chosen because he had been a joint expert witness in the **Ingledew** case. This was a West Midlands employment tribunal decision sent to the parties in January 2016) on whether there was indirect sex discrimination in the application of the either/or colour vision test standard to armed officers; the tribunal concluded that the test requirements were justified. Responding to the commissioning letter, Professor Stockman commented that the

> "main difficulty will be in deciding and also justifying, the cut off between mildly anomalous and severely anomalous observers that will be robust and repeatable."

67. His report is dated November 2016. He concluded that the same standards should apply to Taser officers as firearms officers. He confirmed that dichromatic and severely anomalous red-green officers were unsuitable for firearms roles~~, but he~~. He also changed the regime for testing. Someone who failed the Ishihara screening test should be required to pass both the Farnsworth D15 and City tests, not one or the other. This was a safeguard because some protans (red deficient) could pass the City test.

68. In parenthesis, in his witness statement for the tribunal however, he went further, quoting a 1997 paper of Professor Birch that failing either test "identifies a larger number of anomalous trichromats who are likely to have significant practical difficulties with colour". This was not explored, but is puzzling, as she herself had recommended either/or to the PSNI.

69. The report was circulated to the working group in January 2017 and to all police forces by NPCC circular in February 2017. The updated firearms curriculum (NPFTC) was issued on 20 April 2017.

70. In January 2018 Professor Stockman made some changes. First, he suggested a workaround, as it had been pointed out that the second edition City test was in fact no longer available. Second, he advocated functional testing of laser sights to establish whether the brightness was relevant. He had come to this view after discussion with colleagues at Newcastle University, who were doing some work for Northumbria police, and suggested seeking funding to do the work. In the meantime, the current tests, though inadequate, were a short-term practical solution.

71. In February 2018 the National Firearms Lead of the NPCC circulated Professor Stockman's recent report and advised that any firearms officers who had previously passed only one of the two post-screening tests should be retested to ensure they could pass both.

72. An equality impact assessment by the working group concluded that the colour vision requirements disproportionately affected men, but the ability of armed officers to discriminate colour was an essential factor to assess risk.

D. The claimant's colour vision

73. The claimant joined Essex police in February 1993. He was told he had a red-green colour vision defect on the Ishihara screening, but it seems no other test was done. Over the next 26 years he was a uniformed officer undertaking a full range of duties, including rapid response vehicle driving. His service has been entirely satisfactory and he has obtained commendations.

74. From 1997 he has been an authorized firearms officer (AFO). The training involved identifying suspects by description. The weapons involved some red dot sighting systems; he says he did not need to adjust the brilliance. He has trained with Tasers with red dot systems. He has never failed a qualification shoot. Three times a year firearms officers must pass a qualification shoot with both pistols and carbines. The pass mark was 90% accuracy, later reduced by the College of Policing to 80%, from a variety of positions and distances. He later trained as a close protection officer which requires 90% accuracy. He has never scored less than 90%.

75. In 1998 he trained for response driving, meaning driving under emergency conditions in all lights and weather. He denies that the colour vision defect has ever affected his operational performance. He has never had a collision.

76. In 2009 he transferred to the first respondent's tactical firearms group. As in 1993, a colour vision defect was identified by the Ishihara screening test, but there was no follow up. The respondent's medical adviser reported (16 November 2009) that he had a: "form of colour blindness". He was suitable for normal duties but may have to be restricted for firearms use or response driving, adding: "a risk assessment will inform your decision".

77. He was passed medically fit for the TFG post in December 2009, with a follow up in 12 months time. Each year from then to 2016 he underwent a medical, including the Ishihara test.

78. Since joining the first respondent in March 2010, he has passed a Firearms tactical adviser course, a high profile vehicle escort driver course, and a close protection course with the Metropolitan police.

79. In September 2016 the first respondent's occupational health adviser (OH) asked the chief firearms inspector whether any officers in TFG had a colour vision defect (we assume this followed the final version of the national firearms curriculum in March 2016). John Brown, the respondent's chief firearms officer, replied that the claimant had one, which he thought was minor, and that he had been signed as fit on transfer from Essex.

80. OH then enquired if he had ever had a risk assessment (as recommended when he joined). It seems he had not. He was then told (end November 2016) that he must pass one ~~the .~~ of the two follow-on tests, City 2 or Farnsworth D.

81. The claimant immediately arranged to be tested at City University. A report from Dr M. Rodriguez- Carmona of 26 November showed he had passed Farnsworth D, but not City 2. She attached a report, listing these and other tests carried out.

82. John Brown decided not to remove the claimant's firearms permit. However, the first respondent's medical adviser, Dr Kennedy, asked Dr Rodriguez Carmona for a "steer" on the degree of severity of the claimant's deuteronomalous defect. According to the current guidance, *severe* deuteronomaly made officers unsuitable for firearms. She did not answer the severity question; on 13 January 2017 she replied that without task analysis she could not give an opinion on whether a subject was suitable for firearms duties.

83. On 28 January 2017 therefore the claimant was told further investigation was needed.

84. At this point the first respondent's Mr Lawes asked T/Inspector Pulman to prepare a report on the issue. In the report Mr Pulman pulled together the evidence and standards, and stated that he had also contacted Gary Wedge of the College of Policing because he had given evidence in the **Ingledew** case. The initial Pulman report said they needed to consider risk to the public, and risk to the Force's reputation, as well as possible unfairness to officers being turned down for firearms roles when others with colour vision defects like the claimant were still serving. They may also want to consider whether they could "flex" the policy, given the claimant's long and successful service.

85. On 27 February 2017 the NPCC working group report on "less lethal weapons" (Tasers) was circulated, with Professor Stockman's report attached, stating that Taser officers must meet the same standards as firearms officers. The circular itself does not flag up that the attached report also now required *both* tests to be passed.

86. It is not clear from the report that Mr Pulman appreciated that the claimant had passed one of the tests follow-on tests (Farnsworth D), and so under current guidance could continue, but on 16 March 2016, speaking to Gary Wedge, he learned of Dr Stockman's report of November 2016 and that the second respondent was proposing to tighten the standard such that an officer must pass both follow-on tests.

87. At the end of February 2016 Mr Pulman asked Gary Wedge to attend a case

conference on the claimant's case. Ahead of the meeting Gary Wedge discussed his role with his own line manager. It was agreed that he could attend to give advice and guidance on calibration standards, and testing procedures, but not play any part in decisions as to the treatment of the particular officer (the claimant).

88. At the meeting held on 21 March 2017, Mr Lawes introduced the purpose of the meeting as "to get a corporate position in regards to new guidelines on eyesight". He made it clear that: "staying as we are is not an option as national standards is the standard". He concluded: "I now have a full understanding of the national position".

89. Within the meeting it is minuted that they considered whether there were ways that an officer with this deficiency could be supported by colleagues. Gary Wedge contributed: "in most cases, deficiency is congenital. You cannot start cherry picking staff for large mutual aid operations". Mutual aid is the combining of firearms officers with those of other Forces, as will often be the case in London, where City of London firearms officers may be combined with Metropolitan police. Mr Wedge is then minuted, towards the end, as saying: "I find it difficult to find any reasons why Alex (the claimant) could be allowed to carry on. Every case has to be judged on its merits so you as the employer have to make this decision, but I think you cannot make reasonable adjustments and in view of the standards". (We note the use of "reasonable adjustment" – this is not a disability case, but the employer was considering whether the standard could be relaxed to accommodate the claimant as if it were a disability). Mr. Wedge believes this has been wrongly minuted. We accept he is a conscientious witness; we note that he had not seen these minutes when he made his statement. Nevertheless, we consider it must have been very difficult for someone as well-informed as he was about earlier discussions and papers about the reasons why firearms officers must have good colour vision to confine himself to information and advice about the standards, and not to venture an opinion on whether operations could accommodate someone who did not meet them, despite many years satisfactory service in the role. We conclude that he did in fact say this.

90. In the light of what happened at this meeting we consider whether it could be said that second respondent induced the first respondent to ban the claimant from using firearms (as was the outcome). It was for the second respondent to set a standard. Forces were not required to conform to the standard, and were in theory able to set other tests. The standards were however very powerful. If there was an adverse incident, any failure to conform to national standards might be difficult to justify. It was not however the first respondent's decision alone. Mr Lawes' evidence was that Mr Wedge's view was persuasive, and relied on. We conclude that whatever Mr Wedge's intention to limit his participation, he did in fact do more than state or explain the standard, and did influence the decision that the claimant did not meet a safe standard for firearms officers and should not be permitted to continue.

91. Next day, 22 March 2017, an email was sent to the firearms group stating that the College of Policing had issued new guidance around eyesight standards for colour deficiency, and that the claimant had regrettably failed to meet the standards, such that his ability to be an AFO had been removed. He was thanked for his professionalism and told this was no reflection on his ability.

92. The claimant was devastated to be removed from firearms duties. The tribunal comments that although the decision will always have been difficult for him, this was a brutal way to deliver the news.

93. Immediate colleagues were supportive – they were told that he was being retained in the group because of his specialist knowledge while "the facts are examined and we have a final position".

94. The claimant filed a grievance, in which he ventured the view that he had been removed because he had been critical of some decisions.

95. A decision was made to ask Professor Stockman to review his test results. Occupational health informed the claimant on 25 April that Professor Stockman was to provide a paper-based review, and carry out additional tests as necessary, which would be funded by management. Prof Stockman was instructed on 2 May. He was told that the national curriculum had been ambiguous as to whether an officer had to pass either or both follow-on tests, but they gathered it was now both.

96. Professor Stockman recommended additional tests. The report is dated 28 May 2017. He reviewed the range of tests carried out at City University the previous November, and noted that on the Rayleigh match test, the gold standard, he was in the "milder deuteronomalous range", and had reasonably good red-green discrimination. The other tests were consistent with this. He noted the revised NPC scene guidelines of 2017, and concluded: "Deuteronomalous trichromacy varies in severity. Mr Wisbey is a relatively mild deuteronomalous trichromat, and so has some red green discrimination. Nevertheless, he fails the police standard".

97. This might be a surprising conclusion, when the police standard was to exclude *severe* deuterans (the March 2016 version being based on Professor Birch's work, and the most recent version finalised in April 2017 based on Professor Stockman's reports), and when the mild diagnosis was based on the gold standard rather than the less precise occupational tests**.**

98. Occupational health reported this to David Lawes, saying it was up to management whether to have him retake the tests; it was not necessarily required, as vison defects did not change.

99. The claimant continued to represent that as the defect was mild he should continue. On 9 June Mr Lawes told the claimant he could have a further test at his own expense. His superior, Jane Gyford, indicated that the decision as it stood could not be changed, but it could be reviewed if there was further information.

100. The claimant engaged direct with Professor Stockman who said his severity was not mild but moderate (16 June 2017).

101. The claimant was tested again at City University on 18 July, and this time he passed the City 2nd edition test with 9/10 – although the test report does not mention that this is a pass.

102. The claimant told the first respondent, and had a sympathetic reply from Mr Lawes. They would need to check that the results demonstrated that he

had in fact passed standards, and to confirm he could return to operational firearms policing. Mr Lawes asked occupational health to get an: "explanation as to differences and the continued failure of one test, if I've read that correctly" (he must have meant failing the Ishihara screening). He wanted solid evidence to reverse a policy decision.

103. Occupational health contacted Dr Rodriguez Carmona at City University to ask why the results differed from November to July if the deficiency was congenital. She involved her colleague John Babur. On 17 August occupational health instructed Professor Babur to report on why he had failed the test once and passed it on a retake. He was also asked to assess the risk he presented as a firearms officer.

104. Testing was carried out on 22 September 2017. As usual, he failed the Ishihara screening. As usual he passed Farnsworth D 15. He got 9/10 on City University 2nd edition. On CAD (Professor Babur's own test) he was classed as deutan deficient. The report contained a lengthy discussion of how the various tests could be compared, and why some were inaccurate, which may have been difficult for a layman to follow, but he did usefully summarise the claimant's varying scores: 7/10 correct in November 2016 (the fail), 9/10 in July 2017, then 9/10, 10/10, 8/10 and 10/10 in September 2017. We were not clear about the pass mark for City University tests, but 10/10 must be a pass.

105. Dr Kennedy of occupational health was asked to interpret Professor Barbur's report. He reported on 21 November 2017 that the position was very complex, and Professor Babur thought none of the tests were conclusive as to the extent of any effect. The anomaloscope showed mild red- green impairment. Professor Babur had indicated he performed highly in a range of tests, and the potential practical implications would be reduced.

106. There was a meeting on 29 November 2017 between Mr Lawes, Ms Gyford, John Brown, and occupational health. They concluded that the claimant's results on testing on the last two occasions showed he now met the current colour vision standard. He was to return to firearms duties.

107. There was some delay implementing this because the claimant had to undergo retraining and update medical examinations. He returned to work as firearms officer (and response driver) on 12 February 2018.

E. Advanced Driver Policy and CVD

~~107.~~108. A question whether the claimant should also continue with advanced driving was raised by Ginny Giles of occupational health at the March 2017 meeting. Mr Lawes commented that the risk increased in a built-up environment, and decided that for the time being he should be removed from advanced driving, as well as firearms duties.

~~108.~~109. There is an authorised professional practice document for advanced driving, stating that DVLA group 2 standards apply. These standards apply to bus and lorry drivers (PSV and HGV) and do not bar colour vision defects.

~~109.~~110. The first respondent's Stuart Phillips had an email from the police driving school instructor about this (~~-~~not in the bundle), and he sent it to occupational health on 3 July 2017 asking for clarity on whether the claimant

could drive private and police vehicles. Ginny Giles of OH replied on 4 July with a 2013 document from the Faculty of Occupational Medicine (also not in the bundle) saying that individual forces should decide their own medical standards having regard to occupational requirements and public safety. The first respondent had not set any standards. Ms Giles suggested a meeting to decide policy, and how to assess risk, given the threat to public safety, and whether those with CVD could assess traffic light sequencing and emergency lights quickly enough. By mid-September this was still a task for the future, and in fact no progress had been made by the time the claimant was restored to duty in December 2017.

~~**The claimant's story**~~

~~110. **Babur view on alternative tests**~~

Discussion and Conclusions

The PCPs

111. The 2nd and 3rd PCPs are accepted by the first respondent as having been applied to the claimant. They differ only by the addition of "consistently" to the requirement to pass both of the follow-on tests. However, if by "consistently" is meant that he must be subject to annual repeat testing, this was not the practice. He only had to repeat tests because the first respondent was puzzled why he could fail then pass, if colour vision did not change, and once they were reassured, he was (and is) not required to repeat them in future. It may be added that their puzzlement was reasonable. They tried to find out whether the defect reported in November 2016 was severe (which meant he must be excluded) at a time when a pass in either test sufficed, and did not get an answer from Dr Rodriguez Carmona. They tried for clarity from Professor Stockman in May 2017, and were told that although the defect was mild by the gold standard, (when it was severe deuteronamalous defects that were to be excluded) he failed the police standard. It was also reasonable to want to know why he could fail, then pass, in case there was some explanation of which result was correct. This was not a practice by itself, but an attempt to find out what the various results of the tests applied (agreed to be a requirement or practice) meant in terms of whether he met firearms standards or not.

112. PCP 1 is harder to understand. It is a criticism of the test standards chosen, as an "insufficiently robust" process, and relies on Professor Babur's criticism of the tests relied on, preferring his own, so far incompletely calibrated, CAD test. It may also rely on the admission by all experts that an occupational assessment is needed of what colour vision is in fact required, so they can then decide how best to test for it. Arguments about whether the respondent's practice was useful or effective or accurate ("insufficently robust", "not sufficiently accurate") are better examined in the context of whether the use of the standards and tests they did apply was proportionate to the respondent's aim.

113. PCPs 4 and 5 are not about the use of firearms but rapid response driving. It concerns the first respondent, not the second. At the time neither respondent had a standard for colour vision for driving that we know of. Mr Lawes' decision is the only one of its kind, but it is possible to view this as the institution of a practice which would apply to any officer, made in 2017 by Mr Lawes, who was rattled, in that he had a firearms officer who had not been tested at all for many years despite failing screening, that there might be other such officers, and that a colour vision defect when driving at speed could cause injury. It was made in the context of the claimant's case, but did not apply only to him. It would have applied to any other similar case, though we do not know if the first respondent checked the colour vision

status of rapid response drivers as they were doing for firearms officers. In our finding it did amount to a practice or criterion – not to drive with a colour vision defect until the risk of a colour vision defect had been assessed.

114. As for PCP 5, one difference from 4 is the addition of "consistently", and we reach similar conclusions. The other is that PCP 4 does not refer to particular tests, while 5 does. The first respondent was not looking specifically at tests, only at an unassessed risk, though of course the claimant was identified as defective by reason of not passing this combination of tests.

115. Particular disadvantage is accepted for 2 and 3. On the evidence of the incidence and cause of colour vision defects, there is a clear link to biological sex. That applies also to 4 and 5. We note as a curious fact that there are very few women firearms officers (we have no evidence about rapid response drivers) but it remains that for officers of either sex who aspire to firearms operations (or rapid response driving), men are at a disadvantage by reason of a colour vision requirement.

116. That the claimant was at a disadvantage, at least between March 2017 and February 2018, by reason of the tests is clear, though it should be noted that he did in fact (as eventually accepted) pass on the new testing requirement of 2017.

The Respondent's Aim

117. This is admitted by the claimant as legitimate, but it is useful to discuss this before moving on to proportionality, to help assess the weight to be attached to measures designed to meet the aim. We deal here with firearms. The stated aim is to ensure officers carry out their duties safely. It is important that an officer has the correct suspect before taking a critical shot and that an innocent man is not killed. It is important he does not let a suspect get away because he cannot spot him in a crowd. In both cases there is real risk to the public – that an escaped suspect will harm others, whether police officers or the public, or they may be shot by mistake. Public concern is high; mistakes affect trust in the police generally, which has a wider effect on effective policing than in the use of firearms. The 2005 Stockwell incident, when a Brazilian electrician was killed by a firearms officer because mistaken for a suspected Muslim terrorist, happened not because of any colour vison defect but because a surveillance team took their eye off the ball, but it serves to illustrate the degree of public concern about the deployment of armed police, and the effect of mistakes on trust in the police.

118. We note too that the risk is not isolated or rare, given the frequency of terrorist attacks, actual or threatened, in London. Ms Gyford was not available to give evidence here for several hearing days because giving evidence that week to the enquiry into the June 2017 London Bridge attacks.

119. Finally, we should mention British concern that as a rule the police should not be armed. Although we had evidence of colour vision standards applied to the US coastguard, Canadian railway, electrical contractors, and airline pilots (and the lay members also had workplace experience of colour vision testing of non-operational staff at British Rail before privatisation, and of printers in commercial operations), we were not taken to colour vision standards for other usually armed police forces, such as the US, or in Europe. The special concern about armed police in Britain heightens the importance of safe use of firearms in terms of what the public will tolerate.

Proportionality

120. The core issue in this claim is whether the practice of requiring an officer to pass both follow-on tests was proportionate. Again, we deal here just with firearms.

121. The importance to the employer is set out in the discussion of the legitimate aim. Use of firearms is controversial and a matter of public concern. Effective policing depends on public trust in the police. Applying a colour vision requirement is appropriate, having regard to the PSNI reports, the best assessment so far of police tasks. The real dispute is about the suite of tests required to detect defects. In closing the claimant criticized the use of Ishihara testing at all, because small numbers of defects would pass on some versions of it (and so not be subject to follow on tests that would detect them), arguing instead that CAD alone should be used on all candidates for AFO training. Then leaving aside Ishihara, the claimant argues that the combination of the other two is unsafe because protans can pass one and the other will not distinguish their severity. (The claimant is not of course a protan). As we understand it, the evidence is that using both tests may exclude mild-moderate deuterans like the claimant, who on the guidelines (intended to exclude severe deuterans) are safe enough.

122. Professor Stockman usefully discussed the imperfections of current testing and where the boundaries were to be set. He spoke of “Type 1 errors” where a mild defect was wrongly classed as moderate (bad for the officer, but safe for the pblic) and “Type 2 errors” where a moderate/severe defect was wrongly classed as mild, (good for the officer who wanted to be an AFO but not safe for the public, though we not again the import of “moderate” where the guidelines speak only of severe. It os a matter of policy that give the imprecision of testing, to favour type 1 errors over type 2 errors. The cut offs should be “slightly conservative”, especially because of the need to exclude protan defects. He adds that advanced tests (Rayleigh for example) would eliminate uncertainty is some cases.

123. The tribunal finds this approach convincing. If there is no set of practical tests that can identify all defects reliably, it is better to err on the safe side, given the real risk of harm to the public and policing. The weight to be attached to the risk of harm ot the public and to effective policing if mistakes attributable to colour vision are made is considerable. The harm to an individual officer at the margin is not negligible, but of less weight.

124. The claimant argues that a less discriminatory way of achieving the respondent’s aim is to switch to CAD testing. However, the evidence that CAD tests should be preferred is not satisfactory in their current state of development (lack of calibration), and lack of independent assessment of their effectiveness. Further, Professor Babur was hesitant in whether CV4 (the poor colour vision of the claimant on these tests) should be accepted as a pass or not, in the absence of more detailed assessment of what vision was occupationally necessary. They may eventually prove better but they are not ready now.

125. Professor Stockman also made the useful observation that the main problem in this case is not so much the reliability or usefulness of the tests, but that the claimant was close to the cut-off for pass/fail between mild and moderate/severe anomalous trichromacy. On retesting it was accepted that he did pass.

126. We must consider whether a sub-optimal suite of tests is justifiable when more detailed assessment of occupational requirements (which might conclude that a different combination of tests is better) may be required to set an accurate cut-off point. The financial commitment is considerable. It may take some time to achieve. The respondents (here, mainly the second respondent) has already taken some care to use existing work (in Northern Ireland) and another expert to guide the assessment of whether a colour vision standard is needed, and how to test for it. We conclude that to it was disproportionate to require significant additional delay and outlay to reassess what tests officers must pass, when the existing tests pick up most defects.

127. If anything, what went wrong in the claimant's case was a lack of communication between experts and police decision makers in conveying what the tests showed against the police standards, and some ambiguity in expert opinion on whether the claimant had a moderate deuteronomaly, and if so whether moderate deuteronomaly should be, or was, excluded. If it is in question, we hold that the first respondent's caution in checking what seemed to be equivocal test results was proportionate to the risk of harm if they allowed someone who might have a significant defect to use firearms.

Influence of the Second Respondent on the First Respondent's Decison

128. In our finding, at the meeting on 21 March 2017 the second respondent did influence the decision to remove the claimant from use of firearms. The finding is not in fact necessary when we have held that the first respondent's action was proportionate, and so not indirect sex discrimination. Had it be relevant we would have held that the standards themselves influenced the first respondent's decision. It was clear that Mr Lawes and Ms Gyford accepted that the second respondent's standard was the standard; even though in theory it provides for alternative tests to be used, departing from the recommended tests without good reason too high a risk in terms of being licensed to train firearms officers, or criticism if there was an adverse incident in which a colour vision defect was implicated.

Driving – Legitimate Aim and Proportionate Means

129. It is a legitimate aim that innocent bystanders should not be killed or injured by police rapid response drivers, and that those suspected of lesser offences should not be killed or injured in the process. It is not clear that barring those with colour vison defects from rapid response driving is reasonably necessary or appropriate. The police had adopted DVLA guidelines which do not bar bus and lorry drivers (whose vehicles can cause a lot of damage) with colour vision defects. Buses and lorries are not of course expected to be driven at high speed in urban areas, but even so, there was no evidence that the police had considered this risk in detail, nationally or locally. There was no basis of evidence to show it was necessary to bar a driver with any but the most severe (and very rare) colour vision defects, and those with severe defects would probably fail a normal test of visual acuity anyway. A response driver can rely for identification of the vehicle on the registration number, shape, location, information on the radio about direction, and by following the vehicle itself. As for harm to bystanders, he can see the sequence of traffic lights, identify hazards by shape and other visible colour, and so on. The first respondent's decision was made in haste and abandoned quietly. The absence of evidence of further investigation of colour vision standards for drivers might suggest the first respondent itself finds it hard to justify. In our finding the restriction was not proportionate to the aim. Consequently, there was indirect discrimination by the first respondent when the claimant was barred from rapid response driving because of a colour vision defect.

Remedy for Driving Ban

130. Section 124 of the Equality Act 2010, which concerns remedies for discrimination awarded in the employment tribunal, provides:

> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may—
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to

the matters to which the proceedings relate;

(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.

(4) Subsection (5) applies if the tribunal—

(a) finds that a contravention is established by virtue of section 19, but
(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

131. We make a declaration that the first respondent subjected the claimant to indirect sex discrimination in banning him from rapid response driving between March 2017, and November 2017 when the ban was lifted.

132. It is not necessary to make a recommendation about obviating adverse effects. This was done by reversing the ban.

133. We must now consider whether to make an award of compensation. This concerns injury to feelings only. There is a special damage claim for loss of overtime and loss of promotion opportunity, but it relates only to firearms duties, not driving.

134. Intention is not, in law, the same as motive. In **JH Walker Ltd v Hussain (1996) IRLR 11**, an employer refused to allow his Muslim Asian employees to take holiday to celebrate Eidh. This was held to be indirect discrimination because of race. The employer knew that certain consequences would follow, and in that sense he intended the consequences of his decision – that Asian employees would not be able to celebrate with their families – even if race discrimination was not his motive. Intention was discussed in **London Underground v Edwards (1995) IRLR 355**, where a single parent, female, was disadvantaged by a change in driver shift patterns, held to be indirect sex discrimination. If there were circumstances showing that a requirement or condition (the wording applied was that of the Sex Discrimination Act) was applied with knowledge of its unfavourable consequences for members of the particular class, an intention to produce this consequence could also be inferred. The tribunal should examine the intention with which the requirement was applied to the individual, rather than the intention of generalised introduction of the requirement.

135. We examined what the respondent knew about the discriminatory impact of its decisions and standards. The Pulman report which guided the meeting at which the decision was made is 8 pages long, with half a page devoted to the **Ingledew** judgment. Nothing is said anywhere, even in the discussion of the judgment, about any sex difference in colour vision, not is this mentioned in the minutes. Mr Wedge may have known more, as he had attended the tribunal hearing, but he is not minuted as saying anything about sex differences in colour vision defects. (It cannot be said he influenced the driving ban, he was not asked to and did not comment on that). It cannot be assumed that there is general knowledge that colour vision defects are more prevalent in men. As in fact most armed officers (those primarily in contemplation) are men, as was the claimant, there was no reason why the question of different impact on men and women should have come up. Unlike a group of Muslim employees (predominantly of Asian origin, as Muslims in Britain tend to be), or Ms Edwards, a single woman when most drivers were men, and in the absence of any evidence of actual knowledge of sex difference in colour vision defects, it cannot

be held that the first respondent knew that in applying the colour vision requirement for driving to the claimant he would put him at comparative disadvantage, or that he intended the consequences of his act, whatever the motivation.

136. In view of our finding we do not need to assess injury to feelings, but add that on the evidence the real injury to feelings was the ban on use of firearms, so excluding him from the camaraderie of the TFG, and the lack of involvement in discussion, not the ban on driving, whose consequences are no mentioned in the 179 paragraph witness statement, in contrast to the effect of being barred from firearms. We would have to speculate as to the effect of the driving ban as distinct from the firearms ban. We find it worthy of note that apart from the way the announcement was made on 22 March, the first respondent treated the claimant with respect and sympathy throughout, while holding the line on checking whether he did or did not meet the standard, permitting review if there was fresh evidence. He was not moved away to general policing until July when the grievance was concluded.

Time

137. The respondents argue that the claim was presented out of time such that the tribunal lacks jurisdiction. Section 123 provides:

> (1) proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) …
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period..

138. The early conciliation period began on 5 September 2017 and ended 19 October 2017. The claim was presented on 9 November. The last act that could be in time was 6 June 2017, 3 months before early conciliation stopped the clock. The decision was announced on 22 March 2017. It might be argued he did not know the ban was more than a temporary glitch until July when he was moved out of TFG (though by then non-operational) onto ordinary policing duties, but that cannot apply to response driving. On the face of it the claimant was out of time for that claim.

139. The decision that affected him was a one-off, even though the consequences extended into the future. It is hard to construe this as conduct extending over a period. So we must consider whether it is just and equitable to allow it to proceed. The relevant factors are described in **Keeble v British Coal Corporation**: what was the reason for delay, is the respondent responsible for any delay, how does delay affect the cogency if the evidence, and how do these factors affect the balance of prejudice to the parties. The delay was brief, once the claimant was moved to other duties and he appreciated the firearms decision was final even if he had not focused on the driving part of it, and he was in time for that. All the relevant witnesses and documents are available (and if they were not, such as the material about response driving being considered in 2017, it is not shown

that any delay has made them unavailable); the process was still under review when proceedings were started, so there was little chance of memory fading. The prejudice to the large respondent (especially as we would have held time for the firearms claim did not run until moved onto ordinary police tasks) is small, the prejudice to the claimant suffering the impact was significant. We concluded we should exercise discretion to extend time.

Employment Judge Goodman

Date 16th August 2019

JUDGMENT SENT TO THE PARTIES ON

19/08/2019

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FOR THE TRIBUNAL OFFICE