Case Number: 3400709.2016

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr R Huskisson		1. The Chief Constable of
	and	Cambridgeshire Police
		2. The College of Policing

Held at Cambridge on 12, 13, 14 and, in Chambers, 15 March

Representation	**Claimant:**	Mr D Stephenson, Counsel
	Respondents:	1 Mr T Dracass, Counsel
		2 Ms C Darwin, Counsel
	Members:	Ms S Timoney
Employment Judge Kurrein		Miss L Feavearyear

JUDGMENT AS CORRECTED

1 The Claimant's claims are not well founded and are dismissed.

2 The Claimant's claim pursuant to S112 Equality Act 2010 against the Second Respondent is dismissed on withdrawal.

REASONS

The Claim

1 On 6 July 2016 the Claimant presented a claim to the tribunal alleging disability discrimination against the First Respondent and Chief Superintendent Hawkins, the former Second Respondent. On 8 August 2016 the then respondents presented a response in which they denied the Claimant's claims and contested his status as a disabled person under the Equality Act 2010.

2 The Claimant's solicitors came on the record on the 4 October 2016, when they wrote to the tribunal to inform them of that fact and intimated an intention to make a claim against the now Second Respondent.

Summary

3 The Claimant is a serving police officer who wished to become an authorised firearms officer. His partial left ear deafness led to him being refused a place on the appropriate training course.

Abbreviations

4 Inevitably with a case involving a public authority there are numerous acronyms in wide usage. We give the following guide to them.

AFO	Authorised Firearms Officer
APP	Authorised Professional Practice
APU	Armed Policing Unit (for 3 counties)
FMA	Force Medical Advisor
HOC	Home Office Circular
IFC	Initial Firearms Course
JPS	Joint Protective Services
NIHL	Noise induced hearing loss
NPFTC	National Police Firearms Training Curriculum
PSED	Public Sector Equality Duty

Procedural History

5 The case has a long procedural history.

6 A preliminary hearing took place on 7 October 2016 before Employment Judge Ord. He gave directions for an open preliminary hearing to take place on 13 April 2017 to decide whether the Claimant was a disabled person. The issues were not then defined.

7 On 25 November 2016, in accordance with the directions given, the Claimant served a disability impact statement on the respondents and the tribunal. On 2 December 2016 the respondents, having read that impact statement, wrote to say that they did not accept that the Claimant was a disabled person.

8 In the event the open preliminary hearing took place on 9 June 2017 before Employment Judge King. She heard the evidence of the Claimant and the submissions of the parties. She reserved judgement. It was sent to the parties on 26 July 2017. It found that the Claimant was a disabled person for the purposes of the Equality Act 2010 at the material time. The issues remained undefined.

9 A telephone preliminary hearing took place on 4 August 2017 at which the Claimant's application to join the now Second Respondent was granted, but the issues were neither defined nor clarified.

10 On 17 October 2017 the then third respondent sought an order that the Claimant provide further and better particulars of his claim against it and requested a postponement of the full merits hearing, which was then listed to take place on the 24 November 2017.

11 On 17 November 2017 directions were given that the full merits hearing be postponed and that the Claimant provide the further and better particulars requested by the then third respondent.

12 Those were set out on behalf of the Claimant in a document dated 15 December 2017. At that point he sought to rely on Ss.111 and 112 Equality Act 2010.

13 On 11th January 2018 the now Second Respondent filed its response to the Claimant's claim. It raised a significant out of time point. An application was

also made to strike out the claims against it, alternatively for deposit orders to be made in respect of those claims.

14 On 6 March 2018 an open preliminary hearing took place before Employment Judge Tynan to consider the Second Respondent's applications. By his judgement sent to the parties on 26 April 2018 he declined to strike out any part of the Claimant's claim or to make deposit orders in respect of the Claimant's claims alleging a failure to take steps to make reasonable adjustments. He made deposit orders in favour of the first and Second Respondent jointly, and in favour of the then third respondent singly, in the sum of £500 each in respect of the Claimants claims pursuant to S.15 Equality act 2010. Those deposits were duly paid.

15 On 10 April 2018 the now Second Respondent made an application for reconsideration of that judgement which was not successful.

16 The full merits hearing came before Employment Judge James on 9 October 2018. Unfortunately, he had to recuse himself because a family member was an AFO with the relevant APU.

17 On 30 November 2018 the Claimant withdrew all his claims against Chief Superintendent Hawkins so that the third respondent became the Second Respondent.

The Issues

18 At that stage, despite witness statements having been exchanged, the issues in the case had neither been defined by an Employment Judge nor agreed by the parties.

19 On 18 January 2019 the First Respondent made an application to the tribunal to amend its grounds of resistance by giving particulars of the legitimate aims it relied on as its defence to the Claimant's claim under S.15 Equality Act 2010. The Claimant objected to that application.

20 On 28 February 2019 the Claimant made an application to include specific adjustments which he alleged should have been made to comply with S.20 Equality Act 2010. The respondents objected to that application.

21 We heard the submissions of the parties on those issues on the first day of the hearing.

Amendment

The First Respondent

22 The legitimate aim relied on by the First Respondent in its response was "to protect the Claimant's health and to comply with health and safety obligations."

23 In the statement of Temporary Assistant Chief Constable Fullwood, however, he had referred to, "ensuring compliance with the College of Policing standards and protecting the organisation from reputational risk."

24 That statement had been exchanged with the Claimant on 25 September 2018.

25 The First Respondent sought to amend its pleading, to the extent it was necessary, to add that aim to it.

26 It was its case that no amendment was in fact needed because once a justification defence had been raised in broad terms it was a matter of evidence as to what was relied on.

27 We accepted that submission, but went on to consider the position if that were incorrect.

28 We accepted the following points: –

28.1 The Claimant had never sought clarification of the First Respondent's justification defence.

28.2 The Claimant had known of the evidence of Mr Fullwood for several months without objecting to it.

28.3 The existing pleading relying on health and safety encompassed the proposed amendments.

28.4 The Claimant would not have been taken by surprise by the full nature of the justification evidence as it was strikingly similar to that relied on in the first instance decision in *Shields*, a case specifically pleaded in the Claimant's favour, which had some similarities to his own case.

28.5 The amendment would not add to the length or complexity of the case. The Claimant did not deal with the justification defence in his witness statement: it was a matter for cross-examination and submissions.

28.6 The Claimant was not prejudiced, as there was no need for him to obtain further evidence.

29 The Second Respondent did not object to the amendment.

30 The Claimant objected to it on the basis that "public safety" was not specifically pleaded and had not been relied on at the time of the events.

31 We rejected that submission. Public safety was clearly within "health and safety" and there was no obligation to identify the legitimate aim at the time of the relevant events.

32 We concluded, having had regard to the decision in Selkent Bus Co Ltd v Moore [1996] ICR 836, the Presidential Guidance and in accordance with the overriding objective, that the balance of prejudice and the interests of justice were compellingly in favour of allowing this amendment.

The Claimant

33 The Claimant's claim made pursuant to S.20 Equality Act 2010 was to the effect that the First Respondent should have made a reasonable adjustment by offering him the opportunity to take a functional hearing test, rather than relying solely on the standards set out by the NPFTC.

34 It was clear from paragraph 18 of the statement of the Claimant, exchanged for the purposes of the original hearing on 9 October 2018, that he only relied on such a contention.

35 The first indication that the Claimant might wish to amend his claim to add further allegations of reasonable adjustments that might have been made was

at the hearing on 9 October 2018 when he provided counsel for the other parties with a draft list of issues that included suggested amendments of:-

35.1 Providing him with an electronic ear plug;

35.2 Undertaking regular surveillance of any risk of exposure to excessive noise;

35.3 Allowing the Claimant to undertake the firearms training course in any event.

36 We accepted that the respondents at that time made it clear that they would object to any attempt by the Claimant to broaden the scope of his claim, not least because they had prepared for the full merits hearing on the basis that the Claimant was relying on a single adjustment relating to a functional hearing test.

37 Following that hearing being adjourned the parties liaised in an attempt to agree a list of issues, but were unable to do so.

38 It was only on 28 February 2019 that the Claimant made a formal application to amend his claim to include the specific adjustments that had been put into the draft list of issues in October 2018. That was seven working days before the start of this hearing.

39 We heard the submissions on behalf of each of the parties. We had regard to the decision in Selkent Bus Co. Ltd v. Moore (1996) ICR 836 and the Presidential Guidance.

40 We make the following findings on this issue: –

40.1 The Claimant had suggested such adjustments to his employers prior to the commencement of litigation.

40.2 The Claimant did not include any such suggested adjustments in the claim form that he presented on his own behalf on 6 July 2016.

40.3 That that was the sole basis for the Claimant's claim relating to reasonable adjustments was also clear at the open preliminary hearing on 6 March 2018, before Employment Judge Tynan, when he considered strikeouts and making deposit orders.

40.4 The Claimant's case, as set out clearly in paragraph 18 of his statement, was based solely on the adjustment of being allowed to take a functional hearing test, albeit that he mentioned other possible adjustment in passing.

40.5 The respondents had prepared their case, including gathering evidence, giving disclosure and exchanging witness statements, on the basis of the Claimant's case as then formulated.

40.6 This was not a minor amendment. In order to deal with it the First Respondent, and possibly the Second Respondent, would have to gather new evidence such that the hearing would have to be postponed at considerable cost and with further delay: four day cases in Cambridge are being listed in January 2020.

40.7 Granting the amendment would inevitably result in prejudice to the respondents because any evidence they did seek to obtain would be long after the event, up to 3 years or more, and less cogent as a result.

40.8 There had been substantial delay on the part of the Claimant after the date on which he knew or ought to have known that he wished to amend before making the application.

41 We also thought there to be some force in the First Respondent suggestion that the application to amend the Claimant's claim had arisen as a consequence of his advisors taking a different view of the merits of his claim as presently formulated.

42 Having regard to all the circumstances of the case we concluded it was contrary to the overriding objective and the interests of justice to allow the amendment.

The Issues

43 We then went on to clarify the issues in the case. On the basis of our then knowledge of the case we thought the PCP relied on by the Claimant to be inappropriately defined. Despite giving the Claimant further time to formulate the PCP it was not until the morning of the second day, and then only with further input from the tribunal and the respondents' representatives, that an appropriate formulation of the PCP was arrived at.

44 As a consequence, the issues in the case were agreed in the following terms:–

Reasonable adjustments

1 Did the First Respondent apply a provision, criterion or practice (PCP) to the Claimant?

2 The Claimant relies upon the following PCP:

"The Claimant was required to pass the hearing standard set out in the NPFTC and/or not be at greater risk of NIHL."

3 If so, did the PCP put the Claimant at a substantial disadvantage in comparison to persons who are not disabled?

4 What is the disadvantage? The Claimant contends that he was put at a substantial disadvantage in comparison to persons who are not disabled in relation to the pure tone audiometry hearing test which he was unable to pass due to his disability. The consequence of which prevented him from taking up his place on the firearms training course.

5 At the time the PCP was applied, did the First Respondent know or could he reasonably have been expected to know that the Claimant had a disability and was likely to be placed at that disadvantage by the PCP?

6 Did the First Respondent take reasonable steps to avoid that disadvantage? The Claimant asserts and relies upon the following adjustments as being reasonable steps for the Respondent to have taken to avoid the disadvantage:-

6.1 modifying procedures for testing or assessment to allow the Claimant to undertake a functional hearing test which assessed his ability to hear in an operational situation.

7 When did it become reasonable to take any such step? The Claimant contends that it became reasonable to take it when Dr East recommended the same in his OH Reports dated 15.06.16 [219].

Discrimination Arising from Disability

8 Did the First Respondent subject the Claimant to unfavourable treatment? The Claimant asserts and relies upon the following acts of unfavourable treatment as founding his claim under section 15 EqA 2010, namely:

8.1 C/Supt Hawkins' decision on 30.03.16 as, not to allow him to take up the firearms training course ;

8.2 T/ACC Fullwood's reconsideration and confirmation on 15.07.16 that he was not allowed to take up the firearms training;

9 Did the First Respondent know, or could the First Respondent reasonably have been expected to know that the Claimant was a disabled person?

10 If so, did the First Respondent treat the Claimant unfavourably because of something arising in consequence of his disability? The alleged 'something arising in consequence' of the Claimant's disability is his inability to pass the First Respondent's pure tone audiometry hearing test.

11 Can the First Respondent show that the treatment was objectively justified as a proportionate means of achieving a legitimate aim? The First Respondent relies upon the following legitimate aims:

11.1 The need to protect the Claimant from harm/risk of harm (by protecting his health and complying with its health and safety obligations);

11.2 The need to protect the Claimant's colleagues and/ or members of the public from harm/risk of harm;

11.3 The need to comply with College of Policing standards;

11.4 The need to protect the organisation from reputational risk.

12 If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Causing or inducing a contravention of the EqA 2010 (s.111 EqA 2010)

13 The Claimant's claim against the Second Respondent (as set out in his Further Information of 15 December 2017) is that the Second Respondent did the following:

13.1 Following the *Shields* judgment (promulgated on 1 September 2015), the Second Respondent should have taken steps to eliminate any unlawful discrimination; and/or

13.2 Following the *Shields* judgment, the Second Respondent should have undertaken a review of the required hearing standards; and/or

13.3 The Second Respondent should have agreed to the development of a specific National functional test for armed offices; and/or

13.4 The Second Respondent ought to have warned individual forces about the discriminatory impact of the hearing standards in situ and advised them to consider a functional hearing test as an alternative.

14 Did the Second Respondent do any of the above alleged acts or omissions?

15 If so, did all or any of the above alleged acts or omissions at 13.1 to 13.4 cause or induce the First Respondent to contravene sections 15 and/or sections 20 & 21 EqA 2010 in the manner alleged above, contrary to s. 111(2) and/or (3) EqA 2010?

Jurisdiction

Claims against the First Respondent

16 The Claim was presented on 08.08.16. Day A was 26.04.16. Day B was 09.06.16. Accordingly, any act or omission before the 27.01.16 is potentially out of time, so that the Tribunal may not have jurisdiction.

17 Has the Claimant proved that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

18 If not, was any complaint presented within such other period as the Tribunal considers just and equitable?

Claims against the Second Respondent

19 The Claim against the Second Respondent was first raised at a hearing on 04.08.17. The Claimant was given leave to amend the claim to add an additional Respondent at that hearing. Accordingly, any act or omission before 05.05.17 is prima facie out of time.

20 Has the Claimant proved that there was conduct extending over a period which is to be treated as done at the end of the period?

21 If not, was any complaint presented within such further period as the Tribunal considers just and equitable?

Remedy

22 In so far as the Claimant was subjected to any unlawful treatment attributable to the First and/or Second Respondents:

23 What if any loss has the Claimant been caused by reason of such treatment?

24 To what if any compensation is the Claimant entitled in relation to injury to feelings?

25 Is it appropriate for the remedy to consist or consist only of a declaration or recommendation under s.124(a), (c) Equality Act 2010 (and if a recommendation, what recommendation)?

Case management

26 By this time the entire day had been taken up with the amendment issues and the clarification of the Claimant's claim.

27 Against that background we considered it appropriate to impose a guillotine on the length of cross-examination by each party of the other parties' witnesses. There was no objection.

28 We also confirmed that the hearing would also deal with remedy.

29 An issue arose as to whether or not, as set out in the Claimant's schedule of loss, there was a personal injury claim. As it transpired there was no evidence of any such claim.

The Evidence

30 We heard the evidence of the Claimant on his own behalf and the evidence of former Chief Superintendent Hawkins and temporary Assistant Chief Constable Fullwood on behalf of the First Respondent, and Sergeant Wedge, on behalf of the Second Respondent.

31 We read the documents to which we were referred and heard the submissions of the parties. We make the following findings of fact.

Findings of Fact

32 The Claimant was born on 24 February 1985. His grandfather was a policeman about whom he heard a lot, particularly his having been awarded a Queen's Commendation for Bravery, but who he never met.

33 As a young man he had an interest in field sports, including shooting. He took the decision to seek office as a special constable with the First Respondent and was appointed in 2006.

34 The Claimant was diagnosed with partial high-frequency hearing loss in his left ear in 2007. This posed a problem when he sought to be appointed as a police constable in 2010/11. Ultimately, he took employment tribunal proceedings against the First Respondent alleging disability discrimination which were compromised before they were heard. He was appointed a constable on 14 November 2011.

35 The First Respondent is the responsible officer for policing throughout Cambridgeshire. His force is a member of JPS with Bedfordshire and Hertfordshire Constabulary. This grouping covers all specialist areas of policing such as major crime, forensics, armed policing, counter-terrorism and other matters. It was that grouping of which Mr Fullwood was the temporary Assistant Chief Constable.

36 The Second Respondent is the professional body for everyone who works for the police service in England and Wales. Its purpose is to provide them with the skills and knowledge necessary to prevent crime, protect the public and secure public trust. As part of its functions the college develops and "owns" APP, which is authorised by the college as the official source of professional practice on policing. Police officers and staff are expected to have regard to APP in discharging their responsibilities. We accepted that there are circumstances where it is perfectly legitimate for police officers at any level to deviate from APP provided there is a clear rationale for doing so.

Armed Policing

37 It came as no surprise to us that armed policing is beset with numerous regulations. It could not be otherwise. We have particular regard to the following: –

37.1 The home office guidance applicable for recruitment of police officers:-

"The below sets out revised medical standards for police recruitment and replaces HOC 7/98. Eyesight standards remain as set out in HOC 25/2003.

The medical standards have been revised to bring them up to date and to take account of the implementation of the employment provisions of the Disability Discrimination Act to police officers on 1 October 2004.

The main change to the standards is that from 1 October it will be unlawful to exclude candidates automatically on the basis of a medical condition or disability. Each case should be looked at individually and assessed on its merits. The standards also reflect fitness to serve at the time of assessment and for a reasonable time. This differs from the previous standards which reflected fitness at the time of assessment and a prediction that the individual was likely to remain fit for the full duties of a police constable for the foreseeable future and was unlikely to have a condition or medical history which could lead to premature retirement on health grounds.

The revisions do not mean that people who are not fit to perform the job will be recruited. There is no expectation that people who cannot fulfil a substantial part of the role will be recruited. It means that the police service will recruit able people who have, until now, been excluded on medical grounds or the likelihood of early ill-health retirement.

The standards indicate that some medical conditions may be less compatible with police work than others. This is indicative only and each case will need to be looked at individually and assessed on its merits in the light of professional information and judgment.

Applicants should be assessed in terms of ability based on the role, functions and activities of an operational Constable as set out in the Police Integrated Competency Framework (PICF) and fitness for work assessed in terms of the framework of National Medical Standards for Recruitment. This will provide a common base for consistent decision making across force.

The Disability Discrimination Act 1995 (DDA)

Under the DDA it is unlawful for an employer to discriminate against a disabled person in the arrangements he makes to determine who should be offered employment, in the terms on which he offers that person employment or by refusing to offer, or deliberately not offering, him or her employment.

If the recruitment arrangements, working arrangements or premises substantially disadvantage a disabled person, then the employer has an obligation to make reasonable adjustments that would remove that substantial disadvantage and thereby enable that person to compete equally for the job and / or perform the job. Adjustments are not required where there is only minor or trivial disadvantage.

From 1 October, the DDA will apply to medical standards for entry to the police service. Rejection on medical grounds must be justified in terms of the aspects of the job which the applicant would be unable to carry out with a specific condition, illness or disease even if reasonable adjustments were made. Consideration should be given to the nature and extent of the disability, any adjustment which can be made, costs and practicality and likely effectiveness."

37.2 The exemption of the police by the Health and Safety Executive from the Control of Noise Regulations 2005 for police firearms operations, other than

for training and animal destruction, from 1 June 2012 subject to conditions including,

"Schedule 1

3. "The forces" should only apply the exemption for the duration of a firearms operation as defined in Schedule 3, paragraph 2.

4. "The forces" engaging in firearms operations should keep under review the availability and suitability of hearing protection devices and update the risk assessments in light of this.

5. A health surveillance programme should be in place to monitor the effect of noise on "the forces personnel" who might actively be involved in, or in close proximity to, firearms operations. The programme should follow the guidance on suitable health surveillance as set out in HSE guidance L108 (Controlling Noise at Work: The Control of Noise at Work Regulations 2005: Guidance on Regulations) with the following additional requirements:

a) Hearing tests should be conducted at least annually or at more frequent intervals if advised by an occupational health practitioner; and

b) The hearing tests used should include pure tone audiometry and such other additional checks as HSE may, while this certificate of exemption remains in force, determine."

37.3 That exemption applied to operations such as,

Schedule 3

2. Operations where the deployment of armed officers is required and to which the exemption may apply are:

(i) covert operations involving the carrying of firearms, where those firearms may be discharged in a dynamic situation and where the wearing of hearing protection is likely to expose the wearer to increased risks to their safety and / or lead to "the forces personnel" being identified, the effect of which would be to compromise the purpose of the operation and / or the safety of the forces personnel, public or subject. Covert operations include close protection operations and surveillance activities.

(ii) firearms operations where "the forces personnel" expect face to face contact with the subject or subjects of the operation, the public and / or other forces personnel and where the wearing of hearing protection would be likely to reduce the ability of the wearer to hear, increasing the risk to their and others' safety to unacceptable levels, and there would be a risk of compromising the operation. Such operations include:

- Search operations where the need to accurately locate sound is essential;
- Static / overt protection operations e.g. airports / royal residences, where the wearing of hearing protection would be likely to reduce the ability of the wearer to hear, increasing the risk to their and others' safety to unacceptable levels, and / or where there is no time to utilise hearing protection in a fast developing situation;
- Other firearms operations – where the wearing of hearing protection would be likely to reduce the ability of the wearer to hear, increasing the risk to

their and others' safety to unacceptable levels, and / or where there is no time to utilise hearing protection in a fast developing situation.

37.4 The following provisions of the NPFTC

The College is committed to providing fair access to learning and development for all its learners and staff. To support this commitment, this document can be provided in alternative formats by contacting Uniform Operations Support – Firearms on +44 (0)1480 334619 or uos.courseadmin@college.pnn.police.uk

The College is committed to the promotion of equal opportunities. Every effort has been made throughout this text to avoid exclusionary language or stereotypical terms. Occasionally, to ensure clarity, it has been necessary to refer to an individual by gender.

The National Police Firearms Training Curriculum

1. The National Police Firearms Training Curriculum

The National Police Firearms Training Curriculum (NPFTC) consists of a series of linked modules and units covering all aspects of police firearms training and related subjects that are within the terms of reference of the ACPO Working Group on Armed Policing. All references to the police and police officers also apply to the National Crime Agency (NCA) and NCA officers.

Modules A2, Knowledge of Roles, contains a number of nationally agreed common role profiles for armed policing in the United Kingdom. Those role profiles consist of units and modules of training, documented within the NPFTC, which include training content, learning outcomes and performance criteria to be achieved.

The NPFTC provides:

- A framework for continuous professional development
- Consistency and standardisation across the range of training activities
- Standardised national procedures and terminology for police use of firearms and related activities
- A vehicle for the promulgation of good practice in response to lessons learnt
- The basis for a professional register of practitioners and managers
- A basis for the development of national, regional and local role profiles (in line with the Armed Policing Strategic Threat and Risk Assessment Guide 2012).

Medical Assessment and Health Screening

1. Medical Assessment and Health Screening

In order to ensure the safe delivery of armed and less lethal policing and to protect the health and wellbeing of officers, relevant officers are subject to annual medical testing. In the case of Taser officers this is limited to eyesight testing only.

Authorised firearms officers should be individually assessed against these standards at the specified frequency (summarised below), with suitable adjustments being made against their specific post and role profile as required by the Equality Act.

Time / Frequency	**Type of Assessment**	**Further Requirements**
Initial Application	Initial Assessment	GP Questionnaire
Annually	Hearing Test	Self Declaration
Biennially	Review Assessment	Self Declaration
Sixth year	Initial Assessment	GP Questionnaire
For full details see Appendix 2.		

- A GP verified medical history questionnaire should be completed and returned to Occupational Health ahead of the medical assessment and repeated at the frequency recommended in Appendix 2.
- Forces are reminded that in order to comply with the requirements of the noise exemption from HSE that armed officers must undertake annual hearing tests, without which they will be in breach of the relevant legislation.
- Taser STU officers undertake the same eyesight test as armed officers but every two years.
- Taser eyesight tests may be undertaken by any suitably trained person, such as a Taser instructor, supported by a referral process.
- Where an officers role requires the use of the non-dominant eye and a reasonable adjustment cannot be made eyesight should be 6/7.5 6/7.5 aided or unaided. However, where an officer's role does not demand this, the standard below can be used.
- Further understanding of the requirements to perform an AFO role and the reasonable adjustments which can be made to accommodate an individual may be desirable to reflect improvements and changes in medical practice or specific medical conditions. Therefore, this guidance is subject to regular review.

2. Authorised Firearms Officers

The medical assessment of authorised firearms officers is based on task analysis and demands of the role and should be based on the DVLA group 2 medical standards for drivers: www.dft.gov.uk/dvla/medical/ataglance.aspx

The DVLA Group 2 medical standards continue to be carefully evaluated by subject matter experts and should be applied as described below with due consideration to reasonable adjustments.

Annual hearing tests also form part of the statutory health surveillance requirement of the HSE exemption for the operational use of firearms (Control of Noise at Work Regulations 20015).

MEDICAL ASSESSMENT GUIDELINES

The rationale for the medical guidelines is based on the need to be able to carry out the role safely, both for the officer, other police colleagues, and the public.

Any condition that may impair threat perception, communication, weapon handling or physical capability could render the officer unable to safely perform the role. Medical conditions that may lead to sudden incapacity could place both the officer and others at risk. Each officer should be subject to an individual assessment of their capability to safely perform the role.

As part of the application process for a firearms role a GP verified medical history questionnaire should be completed and returned to Occupational Health ahead of the medical assessment.

In addition to medical assessment, physical competence assessment and performance of practical scenarios could be considered as part of the overall capability assessment.

HEARING

Sum of hearing loss > 84 db

Over 0.5, 1, 2 KHz frequencies

Sum of hearing loss > 123 db

Over 3, 4, 6 KHz frequencies

Generally, use of hearing aids to achieve this standard would not be compatible with firearms use though some roles may be suitable for adjustment based on specific risk assessments.

Frequency of Medical Assessments

Initial Assessment

Prior to appointment as firearms officer a full medical history verified by their GP should be obtained prior to OH assessment.

Occupational health can decide what tests are needed based on history / sickness record and role risk assessments but, as a minimum, this should include blood pressure (BP) check, visual acuity, visual fields (by confrontation), colour vision status (if not already known), pure tone audiometry and urinalysis (for glycosuria).

Lung function if the role includes respirator use.

Review Assessments

Audiometry currently needs to be repeated annually as this is statutory health surveillance in line with the HSE guidance on exemption for the operational use of firearms (Control of Noise at Work Regulations 2015).

Application for IFC

38 On 10 July 2015 the Claimant was informed that he had a place on the APU pre-assessment day on 20 July 2015 and was given instructions on attendance. He took part in that training and was assessed as being successful.

39 The Claimant received an application to join the IFC on 17 July 2015. He completed and submitted it, hoping to gain a place on a course starting in December.

The *Shields* case

40 On 1 September 2015 an Employment Tribunal sitting at Reading gave Judgment on liability in the case of Mr B J Shields v. Chief Constables of Surrey and Sussex, Case Number 2700036/2015 ("*Shields*").

41 In that case Mr Shields, a long serving AFO, had been suspended from duty when he failed the recently introduced annual hearing test. Unlike in the case before us, there was no evidence that continuing in post might put him at risk of NIHL.

42 He was represented by Mr Stephenson, who represented the Claimant before us. The Judgment found that:-

42.1 The Claimant had been discriminated against by not being offered the opportunity to take the London Fire Service ("LFS") functional hearing test;

42.2 His other claims, including claims pursuant to Ss.15 and 19 Equality Act 2010, were not well founded.

The IFC Process

43 On 21 October 2015 Mr Crozier's deputy emailed the Claimant and the others who had taken part in the assessment day to apologise for the delay in the final decision in the selection process for the IFC. He confirmed that they were in a group of 36 people who may be eligible for the IFC depending on further checks and negotiations. He advised the recipients to arrange the appropriate documentation with their GP and occupational health.

44 On 6 November 2015 he emailed the Claimant and one other person to inform them that they had not been given an automatic place on the course starting in December. They were told they were eight reserves for that course and that, in the case of the Claimant, if any officers from Bedfordshire or Cambridgeshire forces pulled out of that course he would be given a place. The Claimant was advised that he should prepare himself to attend the course, possibly at very short notice, so should undertake his medical as soon as possible. He was further told that there was the possibility of another IFC starting on 18 April and that if that took place and he had not already taken the course he would automatically be offered a place on that later course.

45 On 6 November the Claimant was invited to attend an occupational health meeting on 10 November 2015. He was informed of the purposes for it and asked to confirm his attendance.

46 On 10 November 2015 the Claimant's inspector, Mr Kerridge, emailed the Claimant and a number of his colleagues to congratulate them on securing a place on the upcoming IFC. We believe Mr Kerridge to have been in error in sending this email to the Claimant because he had not heard that the Claimant had secured a place on the course at that date.

47 The Claimant attended his OH appointment on 10 November 2015. The initial assessment appears to have been carried out by an occupational health advisor who recorded,

> "results do not meet standards (the Claimant) would like to see FM a to discuss."

48 That assessment was reviewed by Dr Phoolchund. In his manuscript notes he identified the Claimant as telling him that the hearing loss in his left ear was due to shooting/hunting in his teens with an unprotected left ear. The FMA concluded by saying,

> "hearing below standard in left ear. Risk assessment recommended in relation to APU role"

49 He confirmed that view in a medical assessment certificate dated 11th November 2015. His entry on the form said,

> "I recommend a risk assessment to establish if he is able to perform the APU role with the hearing impairment."

The file concludes with a typed note,

> "This man's hearing test failed to reach the standard for an AFO. The consequences in this case are likely to be advancing deafness in his affected ear over the next two decades of service. This is very likely to be aggravated by use of firearms. Whilst ear defenders are protective the role also includes exposure to sudden loud noise from other sources including during training. It would be more than a trivial risk to his health to be exposed to loud noise on a recurrent basis for the next 20 years even with use of ear defenders given that there is already evidence of hearing damage. This damage may be the result of frequent exposure to loud noise or a personal susceptibility."

50 As a result of this the Claimant's application to join the IFC was not progressed further at that time.

Risk Assessment

51 On 11 November 2015 the occupational health department emailed the Claimant to ask him to arrange a risk assessment with APU. The Claimant did not appear to be clear as to what was expected of him and on 12 November 2015 the APU was asked to advise him who to contact for the risk assessment that had been recommended. On 25 November the Claimant emailed Mr Crozier's deputy to ask about the risk assessment and was told that Mr Wedge had not heard anything about it.

52 In the event no formal risk assessment took place concerning the Claimant's ability to perform the role of an AFO at that time.

53 However, we accepted the evidence given on behalf of the respondent, particularly that of Mr Hawkins, that every individual that takes part in the IFC is risk assessed at every stage. That is standard procedure.

Shields remedy hearing

54 The remedy hearing in the case of *Shields* took place on 16 December 2015. Following that hearing an officer from Sussex police emailed the Second Respondent to tell them of that hearing and its outcome.

Functional Hearing Test

55 She said that she intended to arrange to take the LFS functional hearing test so as to gain a better understanding of it and thought the Second Respondent might wish to be involved.

56 Mr Wedge agreed and it appears that he and a member of Sussex police took the LFS test in Devon shortly afterwards.

Shields award

57 The reserved judgement in *Shields* was sent to the parties on 20 January 2016. Mr Shields was awarded £4,000 for injury to feelings with a 10% uplift plus interest. His applications for recommendations was refused.

Further IFC

58 On 21 January 2016 the Claimant was advised that an advert would be placed on the vacancy site that day for an IFC to take place on 18 April 2016.

Occupational Health

59 The Claimant saw an occupational health doctor on 26 January 2016, Dr Wildgoose. His report was in the following terms,

> **"OCCUPATIONAL HEALTH REPORT**
>
> I saw the above today who understood their rights under the GMC confidentiality rules and requested prior disclosure. I saw the above in the OHU in Huntingdon.
>
> It is important that the above reviews the report and discusses any disagreement with the report before giving permission for disclosure as soon as possible so any management decisions are taken in the light of medical advice.
>
> The above seeks to become an AFO in the APU and is appealing the decision to refuse to recruit him to this post as he fails to reach the hearing standard.
>
> **Medical Issues**
>
> There appears to be no medical reason to decline this man's application except for deafness in his left ear that falls below the standard required. He prefers the description of high frequency hearing loss but the effect is the same.
>
> An audiogram on 10-11-15 showed changes compatible with noise induced hearing loss (NIHL) in the left ear with the losses confined to higher frequencies. The left ear is below the normal recruitment standard but a functional hearing test was normal at that time. He asked me to point out he failed the audiometric standard but passed on the functional standard for radio use. The left ear hearing loss is above normal speech frequencies but within the normal frequency range for hearing.
>
> The right ear is normal.
>
> He freely admits that this was due to unprotected noise exposure from gun fire whilst hunting. There is little change between his audiogram at recruitment and today.
>
> He still goes hunting but wears ear defenders.
>
> **Occupational Issues**
>
> The issues for a firearms officer are:
>
> 1. potential excess noise exposure leading to NIHL in later life;
>
> 2. the overriding need to be in accurate radio and normal contact with his managers whilst at work. He has asked me to add that he is capable of normal speech hearing in the left ear and I agree with this statement.

> He is very likely to be able to satisfy point 2. A further functional hearing test would be appropriate to ensure he can adequately hear a radio in a noisy environment such as a busy road. Although he is unhappy with a further functional test it is appropriate given the progressive nature of NIHL with continued exposure and the critical nature of radio communication to the AFU.
>
> I am concerned that he would be at risk of uncontrolled noise exposure as a result of gunfire whilst working or possibly training leading to a progression of his NIHL. In his case further progression would reduce his capacity to hear speech frequencies in normal living and on the radio. Management may wish to consider the risk of open uncontrolled noise exposure from gunfire. It is speculation that this man has a sensitivity to NIHL as his previous exposure is unquantifiable but in any case, he should still be as protected as a less sensitive person.
>
> I explained to him that whilst the law did not prevent him from being careless with his Health and Safety in everyday living, deafness resulting from his employers' failure to look after his Health and Safety would be a criminal offence. His employer would certainly be open to pay damages in that event and the damages would be proportional to his loss of useful function which in these circumstances with existing NIHL could be significant.
>
> It is a management decision as to whether or not it is acceptable to train this man as an APU officer in the light of these risks. It might be considered that the risk of excessive exposure to noise from firearms can be successfully managed with PPE and surveillance and so the only risk to his hearing would come from his own hunting activities."

60 Although Dr Wildgoose records this as being an appeal from the decision to refuse to recruit him we have seen no documentation concerning any such appeal. We do, however, note that Dr Wildgoose was at that time the force medical advisor with whom the Claimant had been advised to discuss the issue of his hearing impairment by Dr Phoolchund.

61 The Claimant drafted a "formal reply" to that report in which he set out his position, he took the view that the loss was minimal and the risk to himself and others was negligible.

62 On 29 January 2016 Inspector Crozier emailed the Claimant to inform him that Chief Superintendent Hawkins had reviewed the situation and whilst he supported the Claimant attending the IFC he had asked the First Respondent to obtain legal advice on the position.

Functional Hearing Test Report

63 On 1 February 2016 Sergeant Wedge emailed Sussex police and others to provide his view of the functional hearing test he had undertaken. His report

> "Thanks for the opportunity to undertake the fire service functional hearing test.
>
> Just thought I would identify a few of my thoughts on the subject.
>
> First of all to 'lay people', such as me, I can see the appeal of functional testing, as the link between the test and the occupational requirements appear, on first sight, clearer. However, what is not clear at this time is at what level the pass mark has been set and how that actually relates to operational effectiveness.

I think we all agree this would not be a test for all, but a supplementary test, should an officer's hearing be called into question. I think the main driver for this being it lacking the health surveillance element as required by the HSE noise exemption and the duty of care forces must discharge.

My main concerns with this particular test, in its current fire service form is as follows:

- It is focussed on hearing words above background noise, be it over the radio, through a mask etc., which is broadly similar to the requirement for AFOs.
- It then requires an officer to select the correct word from six options.
- Clearly this has a cognitive element to it too.
- This cognitive element, of recognising and understanding words, could potentially be influenced by other variables such as regional accents, annunciation, emphasis, choice of word etc.
- This would make the development of a standardised national test challenging and may require regional variations, due to some of the radical variations in certain phonics.
- Of most concern there is no testing of the requirement to hear quiet / whispered commands.

Whilst I can see some merit in functional type hearing tests, such as this, I do not believe in its current form it is fit for purpose for the testing of AFOs, mainly because of the omission any testing of the ability to hear quiet command.

Irrespective of what type of test is used, where the test is delivered in a calibrated audiometry type booth, the key question is where the threshold is set and that threshold's relationship to the vocational and health surveillance requirements. For this test that is not established and potentially it introduces additional variables (cognitive understanding of the words and accents) that may have an impact on fairness.

So, as it stands I believe this particular test, without further research and development is not fit for the assessment of AFOs."

Refusal of participation in April IFC

64 On the morning of 30 March 2016, the Claimant was informed by Inspector Kerridge that he would not be taking part in the IFC course starting on 18 April 2016. The Claimant emailed Mr Hawkins to tell him of this and asked for the opportunity to discuss it with him. Mr Hawkins replied late that night to inform the Claimant that he would speak to him the following day.

65 On 26 April the Claimant emailed Mr Hawkins to ask for another opportunity to discuss the reasons for him not being on the IFC. Mr Hawkins responded to suggest a meet up and he would tell the Claimant what he knew.

66 On the same date the Claimant started early conciliation, identifying the first and former Second Respondent as potential respondents.

67 On the 7th of May 2016 the Claimant set out his views in a lengthy letter. We are unclear to who this was addressed. In any event, there does not appear to have been a formal reply to it. It was in the following terms,

Please copy type in the entirety of the letter on page 213, 214, 215 starting with "I have asked ACAS" as marked in blue

68 The First Respondent treated that letter as an appeal by the Claimant against the decision that his application to join the IFC course should not proceed further.

69 Early conciliation ended on 9 June 2016.

Further OH advice

70 On 14 June 2016 the respondent sought further advice from an occupational health physician, Dr John East. He did not see the Claimant, but reviewed the records to provide a report in the following terms,

> *"Further to your e-mail of 14 June, I will try to answer the queries raised, based on his OHU notes:*
>
> - *A functional hearing test can be considered to be the most appropriate one. whilst audiograms will show which frequencies and the extent to which hearing has been lost, what that means in practical circumstances, and in operational situations, is best determined by a functional test.*
>
> - *Under the Equality Act 2010 a disability is defined as an impairment which is long term and has a substantial effect on day to day activities when treatment is ignored. This condition has certainly been present for a long period of time and could have a significant effect on his day to day activities. However, this decision is a legal and not a medical one. Whilst childhood ear infections may have played some part it is more likely that exposure to gunfire has exacerbated the condition.*
>
> - *I have not seen PC Huskisson myself and having gone through the file I can see no mention of him wearing a hearing aid.*
>
> - *Whilst carrying out training on the range adequate hearing protection is always worn. However, when carrying out exercises, field firings and operations such hearing protection is likely to interfere with operational effectiveness. There are forms of hearing protection, which allow speech frequencies through whilst blocking higher sound level such as weapons fire. Whether these are appropriate for use by the Force and acceptable in terms of cost is not a medical decision.*
>
> - *Annual audiogram and assessment is the standard health surveillance for firearms offices, but if there are concerns regarding previous hearing loss and susceptibility to future damage, more frequent surveillance would be instituted."*

71 The Claimant compiled a response to Dr East's medical report. It made similar points to those he had made in response to the report compiled by Dr Wildgoose.

Mr Wedge's Advice

72 On 20 June 2016 Mr Hawkins sought advice from Mr Wedge regarding the Claimant. His enquiry was in the following terms,

> "One of our officers has failed the initial medical for commencement of ARV training, we are now wondering if we can make any reasonable adjustments that would mean we could protect his hearing.

In training I don't think that is too difficult as we use earplugs and ear defenders for indoor range use. For outside training we use ear defenders, the issue will be the operational side and I would suggest spontaneous work as opposed to pre-planned.

The issue for me is, even if we can find ways to mitigate his hearing protection in training and ops, he has still failed the agreed national test and can chiefs go against this? I would suggest that ultimately, they can do as they see fit within their own command, but they would be placing their vicarious liability at great risk. However, the wider issue for me is forces setting a precedent within agreed national standards and the ramifications to NPCC standards."

73 Sergeant Wedge responded the same day in the following terms,

"Whilst ultimately the responsibility lies with your chief officer I think it would be ill advised to go against national standards for the reason you mention, but cases do have to be considered on their individual merits.

If this officer were subject to a post incident procedure, and hearing played a part, it would be difficult for either College or any other national body to support the force. Worst case, consider something like Stockwell[1] where the officers hearing was called into question and potentially a contributing factor.

One has to consider that the hearing standard is twofold, health surveillance to protect deterioration of hearing due to noise exposure and secondly operational to ensure officers can hear sufficiently well to perform their role.

Investigation by John Alder found that hearing aids were incompatible with PPE, so in training you would then have two issues a) they may not be able to hear range instructions clearly whilst wearing PPE, which is critical to safety and b) they may be susceptible to noise induced hearing loss.

Then consider operations, we can't always expect officers to wear hearing PPE operationally, indeed this is what the HSE exemption is for. However, an officer with some hearing loss already, is potentially more vulnerable in the event of a discharge, including accidental discharges, to noise induced hearing loss as they are already starting at a lower point.

Secondly, one has to consider their operational performance. Can they hear instructions during an operation? This could be shouted in a noisy environment or whispered where a degree of stealth is required. Can they still hear and communicate effectively in a noisy environment? Could they hear what a subject or victim was saying when on containment? This is another requirement for the hearing standard.

If an officer has poor hearing at the start of their armed policing career, typically it deteriorates with age and noise exposure, so at what point are you going to say that it is too low if not the national standard? Clearly there has got to be a tipping point where the hearing is not good enough, so where would you set the standard?

I think I'm right in saying the challenge with the Surrey case was not the standard or its pursuit of a lawful purpose but how it was tested and alternative testing procedures."

[1] The mistaken shooting of Jean Charles da Silva e de Menezes by police at Stockwell tube station in 2005.

Mr Hawkins' Report

74 A member of the First Respondent's HR team, Mrs Frisbee, compiled a report concerning the circumstances in which the Claimant's application to join the IFC had not been progressed. We accepted Mr Hawkins' evidence that she did so on his behalf and, having read it, he signed it off. That report was in the following terms,

> "1.1 Background
>
> Cambs PC Rowan Huskisson joined the force on 14.11.11. HR records show that he currently works on B relief shift and has done since April 2014. PC Huskisson applied to join the firearms unit and underwent the necessary medical assessment in January 2016.
>
> Rowan failed the hearing test, within nationally agreed guidelines. The Force Medical Advisor (FMA) then raised concerns with Armed Policing Unit (APU) management regarding his hearing, specifically relating to risk of future litigation should his hearing decline further. Supt Simon Hawkins declined his application to join the APU on the basis that he failed to meet the national hearing test standards and also the risk to Rowan's Health and Safety at Work should he suffer further hearing loss as a result of working within the APU.
>
> PC Huskisson has appealed this decision and is threatening legal action should he not be allowed to undertake the Initial Firearms Course (IFC). I have supported Simon through a period of Acas Early Conciliation regarding this matter. Today, Rowan will be provided with a certificate from Acas to confirm that he has adhered to conciliation procedures and that essentially, he may now wish to raise this with an Employment Tribunal (ET1).
>
> This report will summarise advice from OHU and legal services, together with PC Huskisson's appeal and a management view.
>
> 1.2 PC Huskisson's appeal
>
> - Believes the FMA stated he was operationally fit enough for the APU but that if he was subjected to loud noise (i.e. gunshot) that his hearing could deteriorate.
>
> - Offered to sign a disclaimer (i.e. not to raise a claim should his hearing deteriorate).
>
> - Believes that he has a disability and is being discriminated against as 'reasonable adjustments' are not being made and that this is widespread across the country's police forces.
>
> 26.01.16
>
> - Deafness in his left ear that falls below the standard required. The right ear is normal.
>
> - He failed the audiometric standard but passed on the functional standard for radio use.
>
> - A further functional hearing test could be appropriate to ensure he can adequately hear a radio in a noisy environment such as a busy road. Although he is unhappy with a further functional test it is appropriate given the

progressive nature of NIHL with continued exposure and the critical nature of radio communication to the AFU.

- It might be considered that the risk of excessive exposure to noise from firearms can be successfully managed with PPE and surveillance and so the only risk to his hearing would come from his own hunting activities.

15.6.16

- Considers Rowans exposure to gunfire outside of work is likely to have exacerbated his condition.

- Considers that he could be covered by the Equality Act but that only an ET can make this decision.

1.6 College of Policing – National Standards

- Gary Wedge, College of Policing, advises going against the national standards as this could have a number of implications. Examples he used were if the officer was involved in any incident and hearing played a part in any area of scenario e.g. similar to the Stockwell case. The college would find it difficult to support the force for stepping outside of the agreed national standards. This is a very valid point since at the Stockwell investigation the officers hearing was called into question. Another issue that was put forward by the college is if the officers hearing is already below the standard, when we provide the protective equipment such as double protection on the range there is a greater risk for them not being able to hear commands and create a greater risk. Also, the college highlighted the very real risk about being able to provide protective equipment in training, but operational with a spontaneous deployment this would be unlikely and then place his hearing at a greater risk compared to his peers. There was also a great concern about forces stepping outside of agreed national standards that have been assessed and agreed as suitable this could have ramifications for NPCC standards.

1.7 APU Management view

- Have considered adjustments and have concluded that standard hearing protection would be likely to be sufficient when exposed to loud noises within a controlled environment. However, should there be any errors in a controlled environment, or exposure to loud noises in an uncontrolled environment, Rowans hearing could suffer further permanent damage.

- Despite the officer wanting to agree a disclaimer with the force for any loss of hearing, we simply cannot do this or allow this as it is illegal as advised from our legal advice. A critical issue is that with age some people do suffer a hearing loss to some degree and we would never be able to prove that this was not as a result of working in the APU and could cost the force a lot of money in any ill health claim.

- There has been a legal challenge, however the college of policing state that the issues were about allowing the officer to take the fire service test rather than anything else and even the college do not see the parallels. Therefore, I

am struggling to see the relevance to any stated cases that might offer some solution.

- If the officer had failed a fitness test this would be regarded as a straight forward fail and the officer advised what to do to get fitter. Rowan has failed the hearing test and sadly we cannot advise how to improve this situation, he has failed it.

ET Summary document on Case Law

- Case relates to an officer removed from firearms after years of no issues
- No evidence that hearing loss caused operational difficulties
- Successfully claimed for failure to make reasonable adjustments
- Should have used a different hearing test.

CONCLUSION

There is a strong likelihood that PC Huskisson will try to pursue a claim, likely to be disability discrimination and failure to make reasonable adjustments. It is unclear as to whether he would be considered disabled under the Equality Act 2010, however, we have looked at the case as though he were in order to consider worst case scenario.

In summary I commend Rowan's enthusiasm and commitment to joining the APU and his strength of character to try and overcome his hearing issues. However, there are national agreed standards in place that have been set for a reason. We have been advised by the college of policing, health and safety and to not employ him within the APU and we cannot ignore such overwhelming advice from other experts. The ramifications for the organisation if his hearing was to deteriorate or he was involved in a shooting and his hearing was called into question are significant. Whilst he will be bitterly disappointed, it is our responsibility to ensure that the safeguards are in place for the officer, the organisation and the public. Rowan cannot work within the APU.

RECOMMENDATIONS

The Occupational Health and legal advice together with feedback from colleagues regarding the national hearing test standards all point towards health and safety and litigation risk should Rowan be allowed to join the APU. Therefore, Simon and I recommend upholding the original decision to refuse Rowan Huskisson's application to join the firearms unit.

JPS Senior Management to consider this report and make a final recommendation."

Mr Fullwood's Decision

75 That report was considered by then temporary chief superintendent Paul Fullwood who commented on it on 8 July 2016 in the following terms,

08/07/16

"I have read this report and attached documents and have been asked to objectively review the recommendations for a final management decision around PC Rowan Huskisson's suitability to join the Armed Policing Unit, Joint Protective Services.

Can I say from the outset I commend the enthusiasm and commitment from PC Huskisson to join the Armed Policing Unit, however, I have considered carefully

the legal advice, national advice, medical advice, potential reasonable adjustments and recommendations from senior managers within this specialist area of policing.

I also note the challenge from PC Huskisson and careful consideration within a Health and Safety and litigation risk.

Whilst I fully accept PC Huskisson's desire to work within the Armed Policing Unit, I have also carefully considered the impact to his health (hearing), impact to colleagues within the APU whilst undertaking policing duties and the impact to members of the public whilst operationally deployed.

After careful consideration of all the advice provided, it is my view that PC Huskisson should not be allowed to join the Armed Policing Unit due to concerns around his hearing now and for the future, this is following considered and measured advice from a legal, medical and specialist (reasonable adjustments) perspective.

I do fully appreciate this will be difficult new and would ask this message is delivered in a sensitive and considerate manner. I would also be keen for a JPS senior manager to meet with PC Huskisson and talk through other opportunities within the police service.

T/DCS Paul Fullwood – Head of Crime / JPS People Board Lead

08/07/16"

76 The Claimant had a period of bereavement leave following which he returned to work in late July 2016. He took up the opportunity offered to him to discuss with Superintendent Knight of JPS further opportunities within that service.

77 On 18 July 2016 the Claimant received a letter from Mr Fullwood dated 15 July in which he set out his decision on the Claimant's appeal as follows,

"Further to your letter dated 7 May 2016 where you stated your grounds for the early conciliation proceedings I have carefully and independently considered your case and I have reached the following conclusions:

Firstly, I would like to commend your enthusiasm and commitment to join the Armed Policing Unit (APU). I note that colleagues have spent time considering all aspects of your case and therefore I thank you for your patience with this. I have now had the opportunity to consider objectively the advice available to me from legal services, medical professionals, the College of Policing and recommendations from senior managers within this specialist area of policing.

I have also considered this in the context of Health and Safety requirements to protect your health at work and your future career. The advice is clear that there is a real risk of further damage to your hearing if you join the APU and the organisation cannot accept this. There is also a risk of serious operational consequences if we do not follow the national APU hearing test standards.

Therefore, after careful consideration of all the advice provided, it is my view that the original decision remains unchanged and unfortunately, I cannot accept your application to join the APU.

I understand that you will be disappointed with this outcome, however, as stated the organisation is committed to protecting your health and safety and we want you to have a long and successful career. Therefore, I recommend that you meet with a JPS Senior Manager, to discuss the wealth of other

specialist opportunities within the police service. Kathryn Frisby will be in contact with you to arrange."

Equality Impact Assessment

78 On 30 July 2016 an equality impact assessment concerning the medical standards for AFOs was published. The Second Respondent had input into that document. It is clear from the content of that document that those who compiled it were concerned to ensure that the requirements of the Equality Act 2010 were complied with.

Expert Medical Evidence

79 The Claimant was examined by Mr A J Parker, consultant ENT surgeon, on 17 February 2017 for the purposes of assisting the tribunal to determine his status as a disabled person. His summary opinion was as follows,

> "**OPINION**
>
> Mr Huskisson has given a pure tone audiogram which shows hearing thresholds within the clinically normal range on the right except at 4 kHz where there is minor threshold elevation.
>
> Mr Huskisson however does have significant asymmetric high frequency hearing loss on the left. I am not being asked to comment on the cause of these losses but given the audiometric formations in my opinion it will be shooting.
>
> It is usual practice to give statements in respect of hearing impairment in the form of a binaural average at 1, 2 and 3 kHz. This is the average of thresholds at 1, 2 and 3 kHz determined in the less deaf ear and then the more deaf ear. The average in the less deaf ear is then multiplied by 4 to which is added the average in the most deaf ear and then the total divided by 5. This is as set out in the appended audiogram sheet. This is the DHSS formula which is universally used and it effectively weights disability four times in respect of the less deaf ear and one in respect of the more deaf ear."

Later Incident

80 On 28 May 2017 the Claimant was on duty in a police car late at night when he was involved in an incident in which he saw a person he believed to be a suspect running from some security guards. He mounted the kerb in his car and collided with the young man. Following that incident, he was heard to comment on his radio,

"That's how you deal with that."

On 19 April 2018 it was reported that the Claimant was issued with a final written warning for gross misconduct as a consequence of those events.

Disability Findings

81 The open preliminary hearing to determine whether or not the Claimant was disabled took place on 9 June 2017. The judgement was sent to the parties on 26 July 2017. We took the view that the following passages in the judgement were relevant to our consideration,

> **Findings of Fact**

9. The Claimant had a hearing test in 2007 when he joined the special branch of the force. He was required to take a hearing test by the Constabulary Occupational Medical Personnel. As a result of this hearing test the Claimant booked an appointment with his GP to have another test done which confirmed the results of the police hearing test.

10. The Claimant had hearing issues as a child and the medical report (set out below) summarises a number of ear issues the Claimant had as a child including an ear infection and a ruptured ear drum but before this point (2007) had been unaware of any hearing loss as an adult. He had had grommets fitted as a child.

11. Although the Claimant was left handed he had naturally developed a tendency to put the telephone to his right ear and he had not attributed this to anything. It was only when it was highlighted to him that he had an explanation as to why it was hard to do these things.

12. The Claimant accepted in cross examination that his hearing condition had not materially changed since 20017. His evidence on this issue was that he had taken this step to cope so until someone pointed out why he was doing it he had not associated it with a hearing loss issue.

13. His impairment is in his left ear. He understands this to be hearing loss at a frequency above that of human speech.

14. When the Claimant wanted to become a constable, his hearing became an issue. He underwent a further assessment of his medical suitability to join the force. He underwent a functional hearing test which he passed. He gave evidence as to what this entailed at paragraph 9 of his statement. He referred to using what had at that time become a standard Police issue earpiece in his left ear to relay information. As a result of the ear piece he passed his test.

15. When the Claimant joined the police force the standard issue for officers was a different earpiece. The Claimant felt this impacted on his ability to perform his role so he purchased his own in ear speaker. He described to the tribunal that this projected the radio into the inner ear and reduced ambient noise so that this did not interfere with his hearing. He referred to this as an acoustic tube. Purely coincidently as a result of matters unrelated to the Claimant, this type of earpiece has become standard issue in the force since approximately 2011. The Claimant cannot be precise as to when, he only discovered this when his own earpiece broke and he came to replace it finding that these were now standard issue.

16. It is this reason that the Claimant gave as an explanation as to why his hearing loss did not adversely affect him in his day to day role at work. As a Police Officer he wears his inner ear radio which cuts out background noise and directs the sound straight into his ear. This ear piece was a special ear piece he purchased until this became standard issue as set out above.

17. The impairment adversely affects the Claimant when he is in a noisy pub / club, he has more difficulty than others in that situation in hearing people talking to him. He turns his right ear towards others to alleviate the issues to some extent.

18. The Claimant's friends had noticed he has more problems than others in hearing things in noisy environments and they had noticed his turning of the head and that they had to repeat themselves. These friends did not give evidence before this tribunal but this comes from the Claimant's evidence. The Claimant has also noticed that he seems to have more issue hearing people than others do in these types of social situations.

19. The Claimant also uses lip reading to some extent to help him understand what is being said. These are all mechanisms he has developed to help him cope with the hearing loss.

20. The Claimant gave evidence that the difficulty in hearing occurred even in less noisy social situations. He positions himself to the left of others where possible so that his right ear faces them. He also uses lip reading in these situations.

21. When driving he is unable to listen to moderately loud music on the radio and have a conversation with someone in the passenger seat. He must either listen to the music or turn it off to have a conversation.

22. The Claimant has one particular friend whose first language is not English but Polish and he cannot understand her in a noisy environment more so than other friends.

23. With the TV on fairly loudly he finds it difficult to have a conversation in the living room adjoining the kitchen with an open door, so he must be in the same room as that person.

24. On questioning he also gave evidence that if someone was sitting behind him in the car for example giving directions then this intensifies if the radio is on a talk show or similar as he is unable to distinguish the voices, which I accept.

Submissions

82 We heard oral submissions on behalf of the Second Respondent, written and oral submissions on behalf of the First Respondent and written and oral submissions on behalf of the Claimant. It is neither proportionate nor necessary to set these out.

The Law

83 We were centrally concerned with the provisions of Sections 15, 20, 21, 111, 123 Equality Act 2010.

84 We had regard to the EHRC Code of Practice on Employment at paragraph 6.28.

85 We were referred to and considered the following authorities: –

NHS Trust Development Authority v Saiger and Others and North Cumbria University Hospitals NHS Trust v Saiger and Others [2018] ICR297;

Noor v Foreign and Commonwealth Office UKEAT/470/10;

Kingston Upon Hull City Council v Matuszowicz [2009] EWCA Civ 22;

Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640;

Homer v Chief Constable of West Yorkshire Police [2012] UK SC 15;

Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265;

Buchanan v Commissioner of Police of the Metropolis UKEAT/0112/16/RN;

Newcastle City Council v Mrs K Spires [2011] UKEAT/0334/10/ZT;

Selkent Bus Company Ltd., t/a Stagecoach Selkent v Moore [1996] IRLR 661;

Tucker v Partnership in Care Ltd. UKEAT/0455/09/JOJ;

Commission for Racial Equality v Imperial Society of Teachers of Dancing [1983] EAT.

Further findings and consideration

Claims against the First Respondent

Reasonable adjustments

86 We deal with each of the issues identified at the start of these reasons in turn. For the sake of convenience, we set each of them out.

1. Did the First Respondent apply a provision, criterion or practice to the Claimant?

2. The Claimant relies upon the following PCP:

> "The Claimant was required to pass the hearing standard set out in the NPFTC and/or not be at greater risk of NIHL."

87 This was not in dispute. The First Respondent accepted that it had imposed the PCP as defined in respect of the events on both 30 March 2016 and 15 July 2016.

3. Did the PCP put the Claimant at a substantial disadvantage in comparison to persons who are not disabled?

88 Once again, this was not in dispute. It was accepted that denying the Claimant the opportunity to take part in the IFC was a substantial disadvantage.

4. At the time the PCP was applied, did the First Respondent know or could he reasonably have been expected to know that the Claimant had a disability and was like to be placed at that disadvantage by the PCP?

89 This was admitted.

5. Did the First Respondent take reasonable steps to avoid that disadvantage? The Claimant asserts and relies upon the following adjustments as being reasonable steps for the Respondent to have taken to avoid the disadvantage:-

5.1 modifying procedures for testing or assessment to allow the Claimant to undertake a functional hearing test which assessed his ability to hear in an operational situation

90 In assessing this issue, we accepted that this was fact sensitive and that we should apply an objective test.

91 Our primary finding on this issue is that there was not at that time, or in the foreseeable future, a functional hearing test available to the First Respondent that was suitable to apply to potential AFOs.

92 We accepted the evidence of Mr Wedge on this issue. It was largely unchallenged. Not only that, the Claimant made clear and plain admissions under cross-examination by the Second Respondent that the LFS test was not appropriate for use with AFOs.

93 There was no evidence of the existence of any suitable functional hearing test, although we understand that research is currently being carried out at

Southampton University as a consequence of which such a test may be available later this year. That will not assist the Claimant.

94 We have also reached the conclusion that even if a suitable functional test had been available at the relevant time it would not have assisted the Claimant. Our reasons are as follows: –

94.1 The Claimant accepted under cross-examination by the First Respondent that the future risk of NIHL as a consequence of being an AFO was an important part of the First Respondent's reasoning in declining him the opportunity to take part in an IFC.

94.2 We took the view that the First Respondent's conclusion that the Claimant would be at greater risk of further NIHL if he were permitted to train and/or work as an AFO to be entirely reasonable in light of the medical evidence before him.

94.3 We rejected the Claimants evidence that the risk to him of being subjected to the noise of gunfire without being in possession of suitable PPE was vanishingly small. We preferred the evidence of Sergeant Wedge and Temporary Assistant Chief Constable Fullwood. In particular:-

94.3.1 The Claimant had no experience of training or working as an AFO.

94.3.2 Sergeant Wedge had been an AFO since 1993 and a national firearms instructor since 1999. At the time of these events he was the national police firearms training curriculum manager and had been since 2012.

94.3.3 TACC Fullwood was in charge of the APU and had experience over many years with the JPS covering the three counties.

94.3.4 Mr Wedge took the view that even "double plugging" (the use of earplugs and ear defenders together) might not protect the Claimant during training and, in operational work, the vast majority of which was spontaneous rather than planned, it was not always possible to don PPE in time. That evidence was supported by that of TACC Fullwood,

94.4 It was clear that the Claimant did not meet the standard required for an APO and would be placed at greater risk of NIHL in the future if he was accepted for training and allowed to work as an AFO.

95 In the above circumstances, even assuming that the Claimant could pass a functional hearing test, the First Respondent would have been entirely justified in refusing the Claimant the opportunity take part in an IFC because it would put the health and safety of the Claimant, other employees and the public at risk.

96 There was no evidence before us that any adjustment could be made to reduce the risk of further NIHL to a level where the First Respondent would not be in potential breach of its health and safety obligations, with serious consequences.

97 In addition, as noted above, the situation in the case of *Shields* was quite different. He had been an established AFO for some years before he failed the then recently introduced annual hearing test, and there was no evidence in that case that he was at risk of NIHL or that the LFS test was not appropriate.

Discrimination Arising from Disability

7 Did the First Respondent subject the Claimant to unfavourable treatment?

98 The First Respondent accepted that its failure to progress the Claimant's application for the IFC and the rejection of his appeal were unfavourable treatment.

8 Did the First Respondent know or could the First Respondent reasonably have been expected to know that the Claimant was a disabled person.

99 This was not in dispute

9 If so did the First Respondent treat the Claimant unfavourably because of something arising in consequence of his disability?

100 This was accepted.

10 Can the rest First Respondent show that the treatment was objectively justified as a proportionate means of achieving a legitimate aim?

101 As noted above, although there are significant differences between the circumstances of the Claimant and Mr Shields it was common ground between the parties before us that the legitimate aims relied on by the First Respondent were strikingly similar to those in the case of *Shields*. In respect of the statutory defence of justification pursuant to section 15 Equality Act 2010 the tribunal in *Shields* made the following findings: –

"Proportionate Means

27. When we considered the body of authority to which we were referred, we found two passages of greatest value in this context.

28. We were assisted by Mr De Silva's submission, drawing on paragraph 73 of the judgment of the Employment Appeal Tribunal in Seldon as follows:

"We do not accept … that a tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the employer. Tribunals have an important role in applying their common sense and their knowledge of human nature. .. Tribunals, must, no doubt, be astute to differentiate between the exercise of their knowledge of how humans behave and stereotyped assumptions about behaviour. But the fact that they may sometimes fall into that trap does not mean that the tribunals must leave their understanding of human nature behind them when they sit in judgment."

29. In Homer, Lady Hale, giving the main judgment, stated as follows:

"17. Ingenious though the argument put forward by Mr Lewis is, therefore, to my mind it is too ingenious. The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic. A requirement which works to the comparative disadvantage of a person approaching compulsory retirement age is indirectly discriminatory on grounds of age. There is, as Lord Justice Maurice Kay

acknowledged, "unreality in differentiating between age and retirement" [34]. Put simply, the reason for the disadvantage was that people in this age group did not have time to acquire a law degree. And the reason why they did not have time to acquire a law degree was that they were soon to reach the age of retirement. The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified. But if it cannot, then it can be modified so as to remove the disadvantage.

18. I would therefore allow Mr Homer's appeal on this point.

Justification

19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: Bilka-Kaufhaus GmbH v Weber von Hartz Case 170/84, [1987] ICR 110.

20. 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."

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?"

As the Court of Appeal held in Hardy & Hansons Plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], *it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."*

30. Finally, we had regard to the guidance of the Court of Appeal in Hardy's and Hanson and in particular to paragraphs 31 and 32, as follows:

"31. For the respondent, Mr Langstaff QC submits that the requirement that the employer justify the scheme objectively does not permit the margin of discretion or range of reasonable responses for which Mr Clarke contends. Mr Langstaff accepts that, if another possible scheme is unreasonable, the employer is justified in not adopting it. He accepts that the test does not require the employer to establish that the measure complained of was "necessary" in the sense of being the only course open to him. There is, however, it is submitted, no room for the introduction into this test of the band of reasonable responses which a reasonable employer would adopt which is available to an employer in cases of unfair dismissal (Foley v Post Office [2002] ICR 1283). *It is for the employment tribunal to weigh the real needs of the undertaking, expressed without exaggeration,*

against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate.

32. Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) *and I accept that the word "necessary" used in* Bilka *is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances."*

31. We remind ourselves, as we have had occasion to do throughout this case, that while the quoted authorities set out general principles which are binding upon us, three derive from office based work (of which the members of this tribunal have had personal experience) which does not involve the considerations which we have summarised at 14.4 above.

32. When we come to consider proportionate means therefore, our approach is to take a cautious step by step approach as follows.

33. We ask whether the application of the guidelines, whereby the Claimant did not meet the standards of maximum hearing loss permitted for an AFO, represented a real need of the respondent. We have no hesitation in finding that they represented a number of real needs, which included the need to comply with health and safety legislation so far as safeguarding the Claimant's hearing was concerned; and the need, in a live operational setting, to minimise the risk of harm.

34. We ask whether the means of applying the guidelines were appropriate. We understand this to refer to the means of compulsory annual testing to a prescribed maximum decibel loss. We have no hesitation in finding that the means were appropriate.

35. We ask whether the respondent's objective was one of importance. We accept that the objective was of critical importance: in using firearms for public protection in a public place, the importance of avoiding harm cannot be overstated.

36. The fourth question, as to whether there was rational connection between the means and the objective is readily answered. We accept that the ability to hear in a firearm emergency, including the ability to hear commands accurately, background noises, and sources of threat, is vital, and that there is rational connection between the objectives and the means of assessing individual hearing.

37. The final question was whether the discriminatory effect was no more than was necessary, having regard to the guidance which we have quoted above from Hardys and Hanson.

> 38. We found this a troubling point. There was no evidence before us of how the guidelines had been formulated and promulgated, or of the preparatory work. Ms Eades mentioned that the guidelines had been under consultation and discussion and in draft for a number of years. They bore the authority of ACPO and the CoP, by which we mean the authority which flows from the considered joint expertise of senior experienced officers. A detailed reading of the guidelines showed a document with a high level of knowledge based reflection on the reality of firearms work, expressed in the objective standards of workplace guidelines. Ms Eades' evidence was that she understood that the hearing loss guidelines were based on military standards, but we had no further evidence on the point.
>
> 39. After we had heard submissions, we adjourned briefly and then asked Counsel to address two questions which troubled us, one of which was whether it mattered that we had no evidence as to how the standard of 123 decibels had been set.
>
> 40. Mr De Silva's answer was that it did not matter, because the evidence before us was that the standard was objective, and a national standard, and was set by drawing on military experience and after consultation. He pointed out that the respondent had not challenged the appropriateness of the 123 standard, but had applied it, and that the Claimant had never made it part of his case that it was the wrong or inappropriate standard. Mr Stephenson's reply was that statute places the onus on the respondent to prove justification, and that the respondent bears the risk if it fails to do so. He answered that there was no evidence or explanation as to why a test drawing on military experience might be relevant to the police service.
>
> 41. Those submissions were helpful on both sides. The quoted guidance from Seldon (to which Mr De Silva also referred) and the approach laid down in Hardys and Hanson were, we considered, to be approached in accordance with 14.4 above: as a tribunal we approach with caution a professional balancing exercise which involves work where human life may be taken.
>
> 42. We accept the principle adopted by the CoP that AFOs should have a measurable maximum high frequency hearing loss. While we had no specific evidence as to why it was set at 123 db, we accept that that level was set by an appropriate national body, and may have been based on a military analogy. We accept that the purpose of the guidelines is to contribute to safety, not to expel AFOs from their profession, or to exclude new entrants from becoming an AFO. We noted that the hearing loss limit formed part of a wider assertion of health and training standards, and was not challenged in these proceedings. We were told that within the Surrey and Sussex Forces the guideline standard was met by 186 AFOs out of 188. That is not to say that discrimination is acceptable if it only affects 1% of the workforce. We take the modest percentage as an indication that it has been shown that the discriminatory effect at large is limited.
>
> 43. We draw on all of these matters as the basis of a finding that any discriminatory effect of the guidelines was no more than necessary, and that accordingly the defence of justification is made out.

102 We thought that tribunal's analysis of the law and facts in that case, which so far as relevant to this aspect of the claim did not differ, save that the First Respondent before us has to also take account of the greater risk to the Claimant of suffering further NIHL, to be so in point that we should adopt it in its entirety. We do so.

103 For all the above reasons we find that any discriminatory effects of the guidelines on people such as the Claimant with some hearing loss were no more than was necessary. The First Respondents defence of justification is therefore upheld.

Claims against the Second Respondent

Out of time issue

18 The Claim against the Second Respondent was first raised at a hearing on 04.08.17. The Claimant was given leave to amend the claim to add an additional Respondent at that hearing. Accordingly, any act or omission before 05.05.17 is prima facie out of time.

19 Has the Claimant proved that there was conduct extending over a period which is to be treated as done at the end of the period?

20 If not, was any complaint presented within such further period as the Tribunal considers just and equitable?

104 The Claimant's claims against the Second Respondent are solely under S111 Equality Act 2010, and allege it was responsible for "instructing, causing or inducing contraventions" by the First Respondent. The act for which the Second Respondent is potentially liable must therefore have occurred before the acts of complaint by the Claimant against the First Respondent. The last such matter was the letter from TACC Fullwood on 15 July 2016.

105 The claim was not presented until the third respondent was joined as a respondent on 4 August 2017.

106 Even taking into account the normal three month time limit and the need for early conciliation the Claimants claim was presented nearly 8 months out of time.

107 The Claimant failed to adduce any evidence to suggest that the Second Respondent's conduct amounted to a continuing act, and no submissions were made to that effect on his behalf.

108 It is also the case that the Claimant gave no evidence whatsoever as to why it might be considered just and equitable to extend time in his favour.

109 Not only that, despite Mr Stephenson's valiant efforts not to give evidence, there was no explanation why that delay occurred.

110 It is clear from the content of the Claimant's claim presented on 6 July 2016 that he was seeking a remedy against the now Second Respondent.

111 It is also clear that when his solicitors came on the record on 4 October 2016 they wrote to the tribunal to that effect and intimated an intention to join the now Second Respondent.

112 We have to have regard to the principles set out in *British Coal*. We deal with each in turn.

112.1 The length of the delay in this case is substantial, but has not been explained.

112.2 There has been little effect on the cogency of the evidence because it was largely based on email exchanges and other documents.

112.3 No issue arises concerning the cooperation of the parties.

112.4 The Claimant clearly did not act promptly when he had knowledge of the relevant facts.

112.5 The Claimant had professional advice from an early stage.

113 We have also had regard to the decision in Robertson v. Bexley Community Centre (2003) IRLR 434, which we accept does not amount to a rule, but which indicates that the granting of an extension of time is the exception rather than the rule.

114 We are gravely concerned at the lack of any evidence by the Claimant as to why he maintains it would be just and equitable to grant an appropriate extension of time.

115 In all the circumstances of the case we have concluded that the Claimant has failed to discharge the burden on him of establishing, on the balance of probabilities, that it would be just and equitable to extend time.

116 In those circumstances the tribunal has no jurisdiction to hear his claims against the Second Respondent and they must be struck out for lack of jurisdiction.

117 For the sake of completeness, and to do justice to Ms Darwin's *ex tempore* submissions, we go on to make findings on the further claims against the Second Respondent.

The Legal Test

118 We accepted her submission that the test to be applied in claims under S.111 is set out in the decision in *Saiger* at paragraphs 103 to 106,

> **"The law—types of liability under the Equality Act 2010**
>
> **103** The scheme of the Equality Act 2010 is to set out "Key concepts" in Chapter 1 ("Protected characteristics") and in Chapter 2 ("Prohibited conduct") of Part 2. The main part of the description of "prohibited conduct" is taken up with "discrimination", various types of which are set out, and then section 27 describes the behaviour known as "victimisation" under the sub-heading of "Other prohibited conduct". Then Part 3 ("Services and public functions"), Part 4 ("Premises"), Part 5 ("Work"), Part 6 ("Education") and Part 7 ("Associations") define various areas and activities in which "prohibited conduct" is unlawful. The employment tribunal has jurisdiction in respect of only some of these; Part 3 is not within its jurisdiction.
>
> **104** Part 8 is sub-headed "Prohibited conduct: Ancillary" and comprises sections 108–112. In this case the tribunal referred itself to sections 109, 111 and 112. Section 109 deals with "Liability of employers and principals" and enacts the well-known common law concepts that an employer is vicariously liable for the acts of an employee done "within the course of … employment" (section 109(1)) and that what an agent does "with the authority of the principal" will be "treated as also done by the principal" (section 109(2)). The "principal's knowledge or approval" of the thing done by the agent "does not matter" (section 109(3)). The contentious issues in this case relate to the relationship of principal and agent. Section 110, to which the tribunal does not refer, renders the agent liable in certain circumstances. It

seems to me, therefore, that both agent and principal may be primarily liable in respect of the agent's act.

105 Section 111(1), (2) and (3) create three types of prohibited conduct arising where one person ("A") "instructs" another ("B") to do, "causes" another to do and "induces" another to do, something in relation to a third party ("C") which amounts to "a basic contravention" of the Act (as defined in section 111(1)). Either B or C can bring proceedings against A, providing a detriment has been suffered (see section 111(5)). But by section 111(7) the relationship between A and B must be such "that A is in a position to commit a basic contravention in relation to B". The definition of "a basic contravention" in this section includes a contravention of section 112(1). This has the section heading "Aiding contraventions" but the concept in subsection (1) is that A must not "knowingly help" B to commit "a basic [2018] ICR 297 at 331contravention", which for the purposes of this section is defined as including a contravention of section 111(1).

106 I also think it is important to recognise that both section 111 and section 112 might be said to create a primary liability. It does not matter whether or not the basic contravention actually occurs for the purposes of section 111 (see section 111(6)) and although there is no parallel provision in section 112 it seems to me prohibited conduct will occur in relation to the instruction etc to carry out the basic contravention, irrespective as to whether the basic contravention is actually carried out. These provisions are not easy to understand in the abstract and, for present purposes, the question is how do they apply to the instant appeal?"

119 Some guidance for this is to be found in the case of Commission for Racial Equality v. Imperial Society of Teachers of Dancing [1983] ICR 473, at 476

"The industrial tribunal stated their conclusion on this part of the case in paragraph 26 of their reasons:

> "We think the word 'induce' must imply an element of 'stick or carrot,' a mere request, which is the highest that Mrs. McBride's words could be put at, comes far short of an attempt to induce as covered by the section."

With great respect to the industrial tribunal we for our part do not consider that the word "induce" in section 31 can be so limited. There may be cases where inducement involves the offer of some benefit or the threat of some detriment, but in their ordinary meaning the words "to induce" mean "to persuade or to prevail upon or to bring about." In our judgment the intimation by Mrs. McBride that "she would rather the school did not send anyone coloured" as "that person would feel out of place as there were no other coloured employees" did constitute an attempt to induce Mrs. Patterson not to send coloured applicants for interview. We consider that the word "induce" is apt to cover the facts found by the industrial tribunal in the present case; we see no reason to construe the word narrowly or in a restricted sense.

We turn to the alleged contravention of section 30. That section is in these terms:

> "It is unlawful for a person — (a) who has authority over another person; or (b) in accordance with whose wishes that other person is accustomed to act, to instruct him to do any act which is unlawful by virtue of Part II or III, or procure or attempt to procure the doing by him of any such act."

Before we turn to the main problem presented by this section we should say something about the word "procure." The industrial tribunal came to the conclusion in paragraph 25 of their reasons than an expression of a preference was not an attempt to procure. On this matter we regret to say that we disagree with the industrial tribunal. It seems to us that in the context the words "procure" and "attempt to procure" have a wide meaning and are apt to include the use of words which bring about or attempt to bring about a certain course of action. On this part of Mr. Knott's submission as to the proper meaning of section 30 we agreed with him. We have not found ourselves able, however, to accept the other part of his argument on this section."

120 A further extract from *Saiger* at paragraph 118 is also of considerable assistance.

> "118 But I agree with Mr Reade that the factual findings made by the tribunal do not amount to breaches of section 111 or section 112 so far as TDA is concerned. Putting it another way, there must be evidence of instruction or causation or inducement for there to be a breach of section 111. That Mr Blythin was in a position to instruct cause or induce "a basic contravention" is not enough to establish liability. The evidence must show that he behaved in that way, not that he had the potential to do so. Likewise, concluding that "he did participate in the decision" or that he was "a party to a discussion" or that he "played a material part in the decision" is in my judgment not, without more, to be equated with an instruction, causation or inducement. Nor do any of these findings amount to giving help knowingly. Although this matter really concerns the trust I do not think that the inference drawn by the tribunal that Odgers wished to have written approval from Mr Blythin, even if sound, does anything more than illustrate that Odgers wished to have support from Mr Blythin. To my mind this is looking through the wrong end of the telescope. The question is not whether Odgers wished to be supported but

> whether Mr Blythin was intentionally lending support. In my view the evidence falls short of this. Therefore, in concluding that the findings discussed above were sufficient to render TDA liable under section 111 or section 112, the tribunal misdirected itself as to what had to be proved before breaches of those sections could arise."

121 The word "cause" is not defined in the act. Under the like provision in the Disability Discrimination Act 1995 the word "procure" was used, as it was in other discrimination legislation.

122 We were referred to the explanatory notes for this section of the Equality Act 2010 and the extract from Harvey at paragraphs 522 onward.

123 We note in passing that the EHRC are authorised to bring proceedings pursuant to this provision, but there is no evidence that the Claimant approached the EHRC for assistance but they have not taken action.

124 We did not accept the Claimant's submissions that it is sufficient for the Second Respondent to have "materially influenced" the First Respondent's decisions.

Conclusions

125 The allegations against the Second Respondent are

> Causing or inducing a contravention of the EqA 2010 (s.111 EqA 2010)
>
> 13 The Claimant's claim against the Second Respondent (as set out in his Further Information of 15 December 2017) is that the Second Respondent did the following:
>
> 13.1 Following the Shields judgment (promulgated on 1 September 2015), the Second Respondent should have taken steps to eliminate any unlawful discrimination; and/or
>
> 13.2 Following the Shields judgment, the Second Respondent should have undertaken a review of the required hearing standards; and/or
>
> 13.3 The Second Respondent should have agreed to the development of a specific National functional test for armed offices; and/or
>
> 13.4 The Second Respondent ought to have warned individual forces about the discriminatory impact of the hearing standards in situ and advised them to consider a functional hearing test as an alternative.
>
> 14 Did the Second Respondent do any of the above alleged acts or omissions?
>
> 15 If so, did all or any of the above alleged acts or omissions at 13.1 to 13.4 cause or induce the First Respondent to contravene sections 15 and/or sections 20 & 21 EqA 2010 in the manner alleged above, contrary to s. 111(2) and/or (3) EqA 2010?

126 The allegation that the Second Respondent should have "taken steps to eliminate any unlawful discrimination" is so wide as to be almost meaningless. The alleged acts of unlawful discrimination are undefined. Even assuming in the Claimant's favour that they are those alleged against the First Respondent the power or obligation the Second Respondent allegedly has to take such steps is wholly unidentified.

127 We find as a fact that the second Respondent had no legal duty to take steps to "eliminate any unlawful discrimination" other that its general duty in respect of its own employees.

128 It is clear from our above findings that the Second Respondent did take an interest in the *Shields* Judgment, and took steps to evaluate and report on the LFS functional hearing test. However, even if it had taken part in developing a new test there was no evidence at all it would have been available by the time of the events concerning the Claimant, some of which were contemporaneous with the *Shields* hearings..

129 There was no evidence that the required hearing standards were in any way improper or of themselves discriminatory. Our findings in respect of the First Respondent's liability confirm this. The *Shields* Judgment, to the extent it found a contravention of the Equality Act 2010 is, in our view, peculiar to the facts of that case. It did not find that the hearing standard was itself discriminatory.

130 In the above circumstances we find as a fact that the Second Respondent had no obligation to perform the positive acts alleged against, it and did not fail to carry out any acts it was obliged to.

131 In those circumstances the Claimant has failed to make out the factual basis he relied on for this aspect of his claim.

132 Despite this it is clear that the Claimant, in the course of the hearing, sought to attach liability to the Second Respondent by dint of the emails sent by Mr Wedge setting out the Second Respondent's position on issues that arose. This was not part of the Claimant's pleaded case, and no amendment was sought to make it so.

133 The relevant content of those documents is set out above. We find as a fact that nothing said by Mr Wedge in any of his communications could properly be interpreted as "instructing, causing or inducing" the First Respondent to do anything. He is not encouraging any particular course, but setting out the issues that arise and might be considered relevant.

134 The evidence given on behalf of the First Respondent was clear. Mr Hawkins denied that the Second Respondents advice was "overwhelmingly important" as suggested on behalf of the Claimant. It was his evidence that his telephone call with Sergeant Wedge was not significant. but just one of several factors. TDCC Fullwood's evidence was in a similar vein. The advice given was not something that had to be followed and it was not a primary factor. It was simply a factor taken into account when considering all the individual circumstances in any particular case.

135 In addition, the Claimant in cross-examination accepted that the First Respondent did not have to comply with any advice given by the Second Respondent. It could ignore that advice and seek other advice. Sergeant Wedge made it clear that each case had to be decided on its individual merits having due regard to the terms of the Equality Act 2010.

136 We accepted the Second Respondent's submission that the manner in which the Claimant put his case against the Second Respondent was far from clear.

It appeared to us that the Claimant misunderstood the status and role of the third respondent. It has a role in setting standards but is not a body that advises individual forces or officers of their obligations.

137 In all the above circumstances the Claimant's claims against the Second Respondent are not well founded and must be dismissed.

Remedy

138 We deal with this solely as a contingency.

139 As noted above, the only remedy sought by the Claimant is an award for injury to feelings together with interest.

140 We were assisted by the decision in *Shields* in considering the award we should make. We thought the Claimant, unlike Mr Shields, had only lost the chance of taking part in IFC.

141 We thought that loss of a chance to be far less injurious to the Claimant then would be the loss of the status of an AFO suffered by Mr Shields after many years distinguished service in the role. This was not a case which might merit a substantial middle range award where the Claimant has lost their employment because of discrimination.

142 We also thought it relevant that whilst the Claimant had lost the opportunity offered by taking part in the IFC he would have been aware that at least 40% of those who take the IFC are unsuccessful.

143 Having regard to all the issues in the case we have concluded that any such award should be in the sum of £1,500 and made jointly against both Respondents.

Employment Judge Kurrein

20 September 2019

Sent to the parties and
entered in the Register on 17:10:19

…….
For the Tribunal