EMPLOYMENT TRIBUNALS

Claimant: **XA**

Respondent: **Ministry of Defence**

Heard at: **Bristol (by CVP)** **On:** **27, 28, 29 and 30 September 2021**

Before: Employment Judge Street
Ms S Maidment
Ms G Meehan

Representation

Claimant: in person
Respondent: Mr J-P Waite, counsel

JUDGMENT

The Respondent indirectly discriminated against the Claimant in relation to sexual orientation contrary to sections 19 and 39 of the Equality Act 2010

REASONS

These Reasons are issued at the request of the Claimant at the hearing and reflect the oral Reasons then given.

1. Evidence

1.1. The Tribunal heard from the Claimant and from Mr Brennan, currently employed by the Ministry of Defence in the FAM Planning Team but at the relevant time as People-SPSupport-Accom Pol 2. The Tribunal read the documents referred to in the agreed bundle and additional documents provided in the course of the hearing.

2. Issues

2.1. By a claim brought on 1 March 2018, the Claimant claims unlawful discrimination in relation to sexual orientation.

2.2. The issues before the Tribunal to decide are as set out in the agreed list of issues, amplified as to the identification of the pool and the protected group at the hearing. The original numbering is retained for ease of reference. There proved to be points which were not agreed, and those are addressed in the text below in italics.

2.3. The agreed PCP is that:

> 1.1 In order to receive a choice of substitute service accommodation, a person falls into either PStatCat1 or PStatCat 2, namely they:
>
> > (a) Live with their married spouse or civil partner, or would do so but for the exigencies of service (PCP 1) or
> > (b) Live with a dependent child (PCP2).
>
> 1.2 It is admitted that the respondent applied the above PCPs to the Claimant and to persons with whom the Claimant did not share the same protected characteristic (sexual orientation) or would have done so.
>
> *The pool to whom the PCPs were applied is broadly agreed. It is agreed that the PCPs were applied to all those entitled to substitute service accommodation, more fully identified by reference to the table on page 211, namely, single personnel, married and those in civil partnerships living with their partners and single people living with and responsible for a child. There was a remaining issue about the inclusion of involuntarily separated members of couples.*
>
> 1.3. It is further admitted that the above PCPs put persons with whom the Claimant shared the characteristic, at a particular disadvantage when compared with persons with whom he did not share the characteristic.
>
> *The group with which the Claimant shared the characteristic is agreed as LGB service personnel, that is those with sexual orientation different from the heterosexual population.*
>
> *The particular disadvantage is not agreed.*
>
> *Notwithstanding the agreement reached, the Respondent proposed that the disadvantaged group is limited to LGB personnel who are members of a couple:*

"The relevant group disadvantage is suffered by LGB service personnel who wish to occupy SSSA as a couple (who are neither married nor in a civil partnership."

The Claimant identifies the particular disadvantage suffered by the group and the individual disadvantage in his case as that they only received one offer of substitute service accommodation.

1.4. For the purposes of 1.3 above, the Respondent admits that persons with whom the Claimant shared the characteristic were less likely to be entitled to a choice of substitute service accommodation because:

(a) In relation to PCP1 gay personnel are less likely to be married or in a civil partnership than heterosexual service personnel and

(b) In relation to PCP2 they are less likely to have a dependent child.

1.5. Was the Claimant put at the particular disadvantage because of either or both of the PCPs for the reasons at 1.4 above? This issue will engage the Tribunal in consideration of paragraphs 32 and 33 of Essop v Home Office [2017] UKSC 27. The Claimant maintains that he was at the same disadvantage as his protected group because he was (and is) gay and unmarried/not in a civil partnership. The Respondent maintains that (in contrast to the position in Essop) the reason for the differential impact referred to in paragraph 1.4(a) above is known, namely that cohabiting gay couples are statistically less likely to be married/in a civil partnership than their heterosexual counterparts. The Respondent maintains that this reason was not operative in the Claimant's case (because he was not in an actual cohabiting relationship at the relevant time). The Respondent admits that the Claimant was put to a particular disadvantage by PCP 2.

1.6. Were the above PCPs a proportionate means of achieving a legitimate aim?

1.7. The Respondent says that its aims were:

As to PCP1:

(a) To establish a fair and efficient system for determining who (within budgetary constraints) should be entitled to a choice of substitute service accommodation.

(b) To give effect to the principle that (in general) the accommodation needs of two people inhabiting a property on a long-term basis as a couple are liable to be more diverse than those of one person.

As to PCP 2:

(c) To establish a fair and efficient system for determining who (within budgetary constraints) should be entitled to a choice of substitute service accommodation.

(d) To give effect to the principle that (in general) the accommodation needs of those with dependents (including dependent children) are liable to be more diverse than that of one person.

(e) To establish a system which, so far as is reasonably practicable, protects family life (including the welfare of the child).

The Claimant disputes that 1.7 (a) – (e) above were legitimate aims, as he believes that they were not the Respondent's genuine aims, and that the Respondent's true aim was to reduce costs. The Claimant also disputes the proportionality of such aims.

3. Findings of Fact

These are the primary findings of fact of the Tribunal. The analysis and consideration of the way the law applies to those facts is given below under "Reasons". Where two page numbers are given, the second is to the digital version of the bundle.

Policy background

3.1. The Ministry of Defence ("MOD") has a diversity policy, JSP 887 – Diversity, Inclusion and Social Conduct. Objective 4 of the Diversity and Inclusion strategy is "increasing representation of under-represented groups at all levels". It has an Equality Duty Tookit, to help, "to understand and effectively consider the Public Sector Equality Duty in day to day work and decisions" and which includes guidance on completing an Equality Impact Assessment. That sets out that,

> "We will only meet current and future security challenges and threats if we draw on and encourage a department where everyone, regardless of background is confident to give their best self, have their efforts and skills properly recognised, their individuality and experiences respected and are able to achieve their potential." (page 1).

3.2. It describes the Equality Duty, including as to the need to have due regard to the need to eliminate discrimination, harassment and victimisation; to advance equality of opportunity including to,

> "remove or minimise disadvantages suffered by persons who share a relevant protected characteristic… to take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it" and "encourage persons who share a relevant protected characteristic to participate in public life."

And

> "to foster good relations between those sharing a relevant protected characteristic and others." (page 2)

3.3. It is stated to be relevant for all activity across Defence that impacts on people, including policy making – new and existing.

3.4. As to how decision makers are to have due regard to the three aims of the Equality Duty, , it sets out that that is by,

- Consciously thinking about the three aims
- Knowledge – being aware of the Equality Duty
- Sufficient information – decision makers must consider the necessary information, and what that information is
- Timeliness – consideration must happen before and the time of the decision, not afterwards
- Real consideration - that is substantive, open-minded and not box ticking
- Not delegated - the decision maker personally must comply
- Review - it is a continual duty.

3.5. There was an audit of compliance in 2017, with the report, People – Diversity and Inclusion – Equality analysis, published in January 2018. The Audit Opinion and Conclusion was this:

> "Testing identified a significant number of policies, projects or services where no evidence was retained of an equality assessment having been undertaken. This included a number that had obvious links to people-related processes.
>
> Our testing identified a lack of awareness of the Department's legal requirements in this area." (page 1).

3.6. The approach taken was to sample polices projects and services to determine the degree to which assessment of equality impact had been undertaken.

Accommodation Policy

3.7. The MOD accommodation policy is set out in the JSP 464.

3.8. Military personnel have access to military provided accommodation, on-site, that is, in mess or barrack accommodation at MOD sites, or externally sourced, that is, substitute service accommodation. At the relevant time, Mears Group plc was, and still is, responsible for sourcing and managing all aspects of the provision of substitute accommodation (Brennan, ws, para 7).

3.9. This is explained in outline in the Equality Impact Assessment in respect of the change to SSSA, carried out in 2019, "SP" referring to service personnel.

> "7. An SP is, in principle entitled to family accommodation if they are (a) married or in a civil partnership and they are living with their spouse/civil partner (a category known as Personal Status Category 1 (PStatCat 1)) and/or (b) they have parental responsibility for and residence of a child (PStatCat 2)). PStatCat 2 does not contain a requirement to be married or in a civil partnership. All other personnel are only eligible for single accommodation, in the form of SLA or itself substitute variant.
> 8. Accommodation for all SP (whether family or single) generally falls into two categories, namely accommodation which is owned and operated by the Services and, where this is not available, accommodation which is sourced externally, through an agreed contract. Family Accommodation from within the military estate is entitled "Service Family Accommodation" (SFA) and accommodation which is sourced externally is described as "Substitute Service Family Accommodation" (SSFA). The equivalent terms for single personnel are SLA and SSSA." (324 – from the Equality Impact Assessment 2019)"

3.10. As to entitlement, there were a number of exceptions and variations to the categories above, for example by virtue of specific appointments, or roles, such as Service Chaplains with pastoral responsibility, but the distinction between those entitled to "family" accommodation and those entitled to accommodation for single individuals is the key distinction in the provision of accommodation.

3.11. While provision is made for those in formal relationships, that is married or in civil partnerships, there is a bar on informally cohabiting in service or substitute service accommodation. Not only is there no entitlement for informally cohabiting couples to "family" accommodation, but an absolute bar to cohabiting relationships in service accommodation. Such cohabitation ends entitlement to service accommodation,

> "Under no circumstances may single personnel and single and lone parents co-habit with a partner (who is not their legal spouse o/ civil partner) in SSSA.

> Cohabitation describes a situation where the SSSA becomes the home of another person…" (335/358 JSP 464, Sept 2015)
>
> "Under no circumstances may Service or Civilian personnel co-habit with a partner (who is not their legal spouse/civil partner) in SFA or SSFA. "Cohabitation describes a situation where the accommodation becomes the home of another person." (342/365 July 2017)

3.12. That policy is now under review and informal couples if duly registered have since 1 April 2019 been permitted to occupy surplus SFA accommodation but without the financial allowances for married and civil partner couples.

3.13. The system allowed one offer of accommodation to single service personnel entitled to MOD on-site accommodation – SLA. Those entitled to SFA and SSFA were entitled to two offers of accommodation, as were those entitled to substitute service accommodation as single officers, SSSA.

3.14. Change was proposed in a revised DIO options paper in 2015, adopted and implemented in 2016. The new policy provided one offer only of property for single officers entitled to substitute service accommodation, the SSSA group. Entitlement for those entitled to SFA and SSFA continued unchanged; they were entitled to two offers. (Version 2.025 of JSP 464 Vol 2 Part 2, in force 25 January 2016, 338/361).

3.15. It is that change that is the basis for this claim.

The 2016 Accommodation Policy Change

3.16. From around 2014, the contract for substitute service accommodation was being recompeted, and that provided the opportunity to change the policy.

3.17. On 12 February 2015, there was a meeting of the Accommodation Policy Working Group ("APWG") at which it was proposed removing the choice of accommodation from those entitled to SSSA and SSFA, that is, all substitute service accommodation (74/ 96). The minute reads,

> "2nd offer SSFA
> DIO Ops Accn-PR3a had provided a revised options paper to the APWG seeking agreement to remove inconsistencies in the policy governing choice of substitute accommodations. The proposal was to remove the choice of two properties for SSSA and SSFA based upon a number of benefits for both the occupant and the Dept. Though there could be presentational issues with how "removing choice" could be perceived by SP and Families Federations, the proposal was generally supported by the APWG." (74/96).

3.18. The minutes are brief throughout and do not record discussions. The paper referred to was presented by the Defence Infrastructure Organisation ("DIO"). That

paper has not been produced to the Tribunal, nor the original of which it was a revision. It is clear that the proposal supported was for the removal of choice in respect of any substitute service properties, whether for PStatCat 1 or 2 or PStatCat 3 to 5.

3.19. There was a further meeting of the APWG on 10 March. Those minutes have not been produced. The position as at that meeting is explained in the email correspondence. The chain starts with a DIO enquiry dated 17 April 2015 (78/100),

> "I know that this has been discussed for some time and that in principal *(sic)* it has been accepted bringing substitute in line with SFA and SLA. This is a key factor in the new contract and will bring the costs down considerable *[sic]* do you know what the decision is.." (8.37 an email from DIO SD Accn-SSM3b1 to People-SPSupport-Accom Pol 1)

3.20. The urgency was to get this into the new contract. The enquiry still relates to both SSFA and SSSA offers.

3.21. There follows an email of 20 April 2015 at 11.42 from People-SPSupport - Accom Pol 1, responsible for accommodation policy development. It was addressed to the APWG and sent to or copied in Mr Brennan, the DIO officer responsible for delivery and assurance of the MOD substitute service contract with Mears and representatives from the RAF, the Navy, the Army and Defence Equipment and Support. It has the heading "Choice of SSSA-SSFA for Substitute Accommodation Contract Re-let SofN". Mr Brennan was at this time the Secretary of the APWG.

3.22. It reported the enquiry from DIO, It notes that there had been further correspondence since the issue of the APWG minutes and writes to clarify the writer's understanding of the position,

> "We agreed to reduce the choice of 2x SSSA rooms bed space offered to SP to just 1 SSSA offer but still keep the 2 choices for SSFA. SP may reject it if it could be demonstrated that the room/bed space did not meet their original search criteria. The rationale for our agreeing the reduction was (1) to align choice with existing Policy with SLA (SP's get just the one offer' of SLA) and (2) to reduce contractor/DIO costs in searching for a second property and holding it whilst the SP considers their options.
>
> SSFA: We also discussed doing the same for SSFA on the basis that (1) in some instances only 1 x SFA is available, so it would be consistent to reduce SSSA *(the context requires that this should read SSFA)* to 1 x offer (rather than preserve the current 2 in all cases); and, (2) again, to reduce contractor's costs. But we agreed not to because (1) the case was not as compelling for SSSA, and, (2) there could be greater reputational risk (e.g. Fam Feds might see it as an erosion to the offer). But we also said it was within the gift of APWG to review SSFA again, if ever we wanted to change this position." (77/99).

3.23. We do not have the earlier correspondence referred to in the course of which this decision was reached and so we do not have access to any detailed reasoning.

3.24. On 20 April 2015 at 16.36, there was a response from the RAF representative (76)

> "I think you have summarised the piece wrt where we got to in the last APWG meeting. However, although we should aim to reduce costs where possible, I think that we also need to maintain opportunities whereby a rejection of SSSA for justifiable reasons including and beyond those of not meeting the search criteria, would afford the ability to consider the first offer of SSSA in exceptional circumstances, ….. Therefore reduction of the number of SSSA properties offered in the first instance must be combined with a policy piece on rejection and offer of an alternative in the event of not meeting search criteria (so that SP are not just offered any property) and in other justified exceptional circumstances."

3.25. That email goes on,

> "Air Cmd does not support the reduction of the SSFA property offers at this time since it would not be commensurate with equality of treatment for SFA particularly when the SP (and family /domestic) dynamic is much more complicated for this cohort" (76/98)

3.26. There is then an email at 17.04, giving the following instruction to DIO,

> "We would like you to reflect the following please:
> - The contractor to provide 1 x SSSA offer for Service Personnel (SP)
> - SP may, in exceptional circumstances, appeal to the Housing Colonel to reject the offer for compelling reasons beyond that it did not fulfil the original search criteria eg. dark / dangerous route from public transport/highway
> - Suitable alternative SSSA should be offered to the SP where the appeal is accepted by the Housing Colonel." (75/97)

3.27. The suggestion of an appeal beyond that the property offered did not fulfil the original search criteria is not referred to by Mr Brennan in his witness statement and does not appear in the amended version of the policy, incorporating the removal of the second offer. The Claimant has not found any policy reference to it and was not offered an appeal. We conclude that there is no appeal as proposed for exceptional circumstances.

3.28. Mr Brennan tells us that including two choices for single people in the Mears contract, DIO advises, would have cost an additional £2,793,950 over the life of the 5-year Mears contract, based on an additional transaction cost of £56 per offer compared to sole-occupancy SSSA and £117 per offer compared to multi-occupancy SSSA (Brennan, ws para 14).

3.29. We do not have the figures for reducing choices for those entitled to SSFA, families, although that had been canvassed until April before being dropped.

3.30. The minutes of the 20 August 2015 APWG meeting contain this,

> "Chair offered to clarify the position as last recorded in the 10 March 2015 minutes, "namely, the APWG agreed to reduce the choice of 2 x SSSA to 1 x SSSA whilst retaining the 2 choices for SSFA and this would come into effect in policy once the new Substitute Accommodation contract was let (date TBA) The Chair's email of 20 April (attached) offers more background. Item Closed." (80/102)

3.31. The new policy came into force on 25 January 2016 (Brennan, ws 11, 338/361).

3.32. On 24 March 2016, the Equality Assessment Template in respect of the Combined Accommodation Assessment System ("CAAS") was completed relating to a change introduced on 1 April 2017 (81/103). This related to a different accommodation policy change, approved in October 2014 in respect of Service Family Accommodation with effect from 1 April 2016 (*sic).* It applies to those charged for occupancy. There is no detail of the policy and no identification of how it applies beyond that. It states,

> "We anticipate that there will be minimal or no impact on the following groups: Race/Age/Disability/Civil Partnership and Marriage/ Maternity or Pregnancy/ Gender Reassignment."

3.33. Sexual Orientation is left out as is religion and belief, apparently in a failure to complete the list. As to why there would be no impact on any service users it is recited that,

> "It should not discriminate against those in a protected group. All efforts have been taken to eliminate or minimize any adverse effects on Service personnel who share a protected characteristic and the equality impacts have been considered throughout the scheme development process."

3.34. It does not explain any possible adverse impacts considered or how the issue was explored.

3.35. As to how the policy contributed to meeting the general equality duties to which MOD is subject, there is the following,

> "The policy underpinning CAAS is applicable to all eligible Service personnel regardless of whether they share a protected characteristic or not."

3.36. There is little other content.

FAM

3.37. The Ministry is exploring a substantial change to the accommodation policy in the Future Accommodation Model ("FAM"), a project still at a pilot stage. Part of the rationale of FAM is because Service Personnel have indicated they want more, not less, choice about their accommodation.

Facts of this case.

3.38. The Claimant commenced service with the Royal Navy in 2003.

3.39. In 2016, the Claimant was assigned to Bristol.

3.40. He was due to be assigned to a rural location with an MOD base. His sexual orientation was known to his careers officer (318). He raised concerns about the assignment, but that remained his careers officer's plan. The Claimant had previously served at that base. He knew the MOD accommodation there. It created difficulties,

> "The difficulty of SLA for a gay man …. living in a mess is not a very private experience, people know who is coming in and out, you are behind security fences, if you want to meet someone, you have to write it down and get it approved. I don't usually reveal my sexual orientation to my line management, I keep it private …. and I mentioned brain drain effect, …. people who can and have the wherewithal choose to move to London and if not move to Bristol."

3.41. The change of plan arose from an intervention from Navy Command Legal who he reports "were concerned about assigning me (there) because of the potential diversity issues the accommodation situation there would present."

3.42. He was unaware of that intervention at the time. He explains,

> "I guess the preamble to it, I raised concern about the accommodation situation. He (the careers officer) said, "It shows you can suffer, so you have potential for leadership. That is the material the Board looks for." I said, "I don't think I should have to suffer to show my competence." I assume he took that back to Navy Legal."

3.43. The Board referred to is the Promotion Board.

3.44. He learned of Navy Legal's involvement much later, from his career officer, who told him that he had "had a roasting" about his initial plan.

3.45. Having been assigned instead to Bristol, on 23 May 2017, the Claimant applied for substitute service single living accommodation (SSSA). Under the revised policy, he was only entitled to one offer of accommodation.

3.46. His preference was for city centre accommodation.

3.47. He explains his preference on the basis that, unlike the non-LGB community, certain communities, including the LGB community, are of their nature small. People tend to cluster together, networks are established where those clusters are. Elsewhere, people can be very isolated.

3.48. On 28 June 2017, the Claimant was told accommodation was available in Bradley Stoke. Bradley Stoke is a new town created for with families in mind.

3.49. He viewed the accommodation on 4 July 2017. He raised his concerns with the Mears representative, including that there was an equality aspect to them. The offer failed to take proper account of his circumstances. (Claimant, ws, para 5)

3.50. He discussed the accommodation with his 2-star, who spoke to the Commanding Officer. In doing so, he had to explain his sexual orientation for the first time to senior officers in the team where he had been working for some time, and he found that difficult.

3.51. For want of alternatives, he moved into the accommodation offered on 11 July 2017 and his Bristol assignment started on 17 July 2017.

3.52. Substantial further correspondence ensued, with requests by the Claimant for disclosure of information and the submission of a Special to Type Complaint and a Service Complaint, the latter in February 2018. In the course of that, an email in January 2017 was circulated to a wider group which referred to the possibility of a claim based on discrimination, in relation to the allocation of accommodation and to the sensitivity of the matter, leaving it open to members of the wider group to draw conclusions as to the protected ground relied on, to the Claimant's concern, given that it was contrary to his wish for privacy.

3.53. The Service Complaint ran to 109 pages, carefully researched and presented. The Claimant raised issues in relation to Equality Analysis, indirect discrimination, equality of opportunity, governance and organisational issues, the accommodation complaints system and policy compliance.

3.54. On 1 March 2018, the Claimant submitted his Employment Tribunal claim, mindful of the time limit.

3.55. 30 July 2018 he learned of the DIA audit into equality analysis and he made an Freedom of Information request for details. He received it on 28 September 2019.

3.56. The investigation report into his complaint was issued in December 2018 (196).

3.57. On 11 February 2019, the Respondent applied for the Employment Tribunal claim to be struck out.

3.58. On 30 April 2019, the Respondent's decision body dismissed the complaint of indirect discrimination, in reliance on para 18(2) of Schedule 9 of the Equality Act 2010. The issue relating to the difference in treatment between single personnel and service personnel having children living with them, PCP2, was not separately considered (234/256)

3.59. A number of failings were recognised,

- The MOD failed in its statutory duty to conduct an Equality Assessment of the change to its revised SSSA Accommodation Policy
- The MOD failed to comply with MOD policy that required an Equality Impact Assessment on the change to SSSA policy
- The MOD failed in its statutory Public Sector Equality Duty, under section 149 of the Equality Act 2010, to consider the impact on equality of the changes to SSSA policy and in failing to consider how to meet the needs of protected groups and increase their participation in public life
- The failure to consult with under-represented groups in the development of accommodation policy likely contributed to the failure of the MOD to have due regard for equality matters in recent changes to JSP 464.

3.60. There were apologies for those and for failures of governance and in relation to the complaints processes. MOD processes were held to be flawed with inadequate record keeping, inadequate training and awareness of Equality Assessments and it was held that it had become normal practice to fail to conduct Equality Assessments of the accommodation policy JSP 464.

3.61. It was held that the MOD's change of policy to limit to one the choice of SSSA accommodation would have a disproportionate effect on the group of Service Personnel who identify as gay (254/276).

3.62. The claim of indirect discrimination was not upheld on the basis that the exemption in the Equality Act para 18(2) of Schedule 9 of the Equality Act 2010 applied (285/307).

3.63. There were a substantial number of recommendations, including that,

- An EA (Equality Assessment) of the revised policy to reduce to one the number of choices of SSSA accommodation is subject to an EA within 20 working days
- The MOD develops a prioritised action plan, with clearly defined timelines, for the conduct of Equality Impact Assessments on all its policies, within 3 calendar months

- The MOD conducts a cultural analysis of its approach to its statutory duties and policy defined procedures, for the handling of diversity and inclusion matters in its policy making and complaints handling
- The MOD conducts a training needs analysis to identify any training required for staff who conduct Equality Impact Assessments
- The MOD set in place, within 6 months of this notification, any necessary training required to support statutory and policy compliance with the Public Sector Equality Duty defined in the Equality Act 2010 and the MOD's Diversity and Inclusion Strategy in JSP 887
- The MOD conducts Equality Impact Assessments on all its policies within 12 months of this notification, ensuring meaningful engagement with the relevant representative groups for all the protected characteristics
- The MOD sets in place procedures that ensure the conduct, assurance and reporting of all necessary periodic Equality Impact Assessments across the Department, required to meet the MOD's obligations in statute and policy.
- The MOD reviews its record taking and keeping procedures and requirements to appropriately support diversity and inclusion matters across Defence and sets in place appropriate policy and procedures within 6 months
- The MOD reviews and identifies how best to publish its Equality Act work, along with the supporting evidence, whenever possible

3.64. Others related to the handling of complaints and freedom of information procedures, with regular review and reporting on progress.

3.65. The Claimant appealed on 17 June 2019 (275). He did so on the basis that the MOD was not entitled to rely on para 18((2) of Schedule 9 because it was not relevant or lawful and that the decision body had failed to consider the relevance of the different treatment of those with dependent children. He referred to the Supreme Court case of Walker v Innospec 2017 in support of the first point (289).

3.66. He set out the statistical evidence showing that those with dependent children were predominantly heterosexual and the reasons for that – the predominance of women amongst single parent families, the predominance of men in the forces, the requirement in some cases that there was a prior marriage – to support the conclusion that gay personnel will be disproportionately represented amongst those who do not have dependent children.

3.67. He concluded that the change in the accommodation policy as regards choice had put gay people at a disadvantage when none existed before and undermined the trust in the MOD’s leadership on diversity issues (293/316).

3.68. On 3 July 2019, the Appeal Body dismissed the appeal (308/330), refusing to consider the argument that the exemption in Schedule 9 paragraph 18(2) was unlawful or that there was discrimination in relation to the choice afforded those living

with children. It was not accepted either that there had been any wrongful disclosure of his sexual orientation in the email in January 2017.

3.69. On the 29 November 2019, there was an Equality Analysis Impact Assessment in respect of the change in policy relating to the reduction in the number of offers provided to service personnel. It was retrospective, an assessment in respect of the change made in 2015 (323/345).

3.70. It records that better use of accommodation and bed space management could be achieved if the SSSA policy emulated that for SLA, without choice.

> "11 It was recognised and discussed by the Accommodation Policy Working Group (APWG), at the time of the requirement to renew the existing Substitute Accommodation contract in April 2015, that a better use of accommodation and bed space management could be achieved if the policy for SSSA emulated that for SLA and allocated a bed space/property rather than offering a choice. It was foreseen that there would be subsequent savings in procurement of properties and bed spaces if the policies were aligned and were allocated correctly. That there would be fewer transaction costs and in a faster moving market, it was more cost effective to allocate a space or one bedroom flat than search for two properties.
> 12. Therefore, the current system of allocating a room for SSSA is broadly equivalent to SLA and enables the contractor on behalf of MOD to manage the use of the properties on the scheme more effectively. It also means that single occupancy properties can be kept on the scheme and less are handed back at the end of each tenancy, reducing the need for sourcing, because of the higher turnover, it enables the contractor to negotiate longer leases, which in turn can reduce the cost. There is a benefit to the SP, in that there is less time spent in temporary accommodation whilst a new property is sourced and finalised, and the ability to plan ahead as they can be given an address before their required move date." (325 /347).

3.71. The assessment made in respect of sexual orientation is this,

> "d) Impact on Sexual Orientation - The application of the policy for the provision of SLA and/or SSSA is gender and sexual orientation neutral and accommodation is provided appropriate to one's military rank. It is considered that this policy change will have no adverse equality impacts on this group. In addition, it is not capable of being indirectly discriminatory on the basis that it differs from the provision under SSFA in as far as it relates to PStatCat 1 personnel as Schedule 9, Part 3, Para 18(2) of the EA10, allows benefits to be provided exclusively to those who are married or in a civil partnership.
>
> While the less advantageous provision to that of SSFA to PStatCat 2 personnel is capable of being indirectly discriminatory, it is considered that the additional choice for both PStatCat 1 and PStatCat 2 personnel is justified as accompanied SP's have additional family member's needs that require being

taken into account e.g. schooling, or co-located partner's workplace travel requirements. Therefore, the impact is Low."

Statistics

3.72. Given the concessions made by the Respondent, statistics are less relevant in this case, but the Claimant has put forward figures that afford useful background.

- The population identifying as lesbian, gay or bisexual (LGB) were most likely to be single, never married or never civil partnered (70.7%) (Office of National Statistics ("ONS") Sexual Identity UK 2016).
- ONS Population estimates by marital status and living arrangements, England and Wales: 2002 to 2016 (released July 2017) states that the percentage of the overall UK population aged 16 and over and classed as "single, never married or civil partnered" is 34.6%.
- ONS data states that 2.00 % of the UK population aged 16 or over identify themselves as lesbian, gay or bisexual (155/177).

3.73. The Claimant concludes and we agree, nor is it in dispute, that members of the LGB community are substantially more likely to be single than the heterosexual population.

4. Law

Indirect Discrimination

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

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ("*PCP*") which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and

> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

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

4.3. Schedule 9 paragraph 18(2) contains an exemption given effect by section 83(1), namely that,

> "(2) A person does not contravene this Part of this Act, so far as relating to sexual orientation, by providing married persons and civil partners (to the exclusion of all other persons) with access to a benefit, facility or service."

4.4. In the Judgment dated 8 November 2020, on the Respondent's application for the claim to be struck out has having no reasonable prospect of success, Employment Judge Midgley ruled paragraph 18(2) of Schedule 9 of the EA 2010 incompatible with Articles 1 and 2(a) of the Framework Directive 2000/78 and Article 21 of the Charter of Fundamental Rights of the European Union and that it is not possible to interpret paragraph 18(2) in a way that could be compatible with the Framework Directive or the Charter. That was for the reasons set out in the judgment which we adopt and apply. Paragraph 18 must therefore be dis-applied by the Tribunal. It is not now relied on by the Respondent.

4.5. All four conditions in subsection (2) must be met before a successful claim for indirect discrimination can be established. In other words, there must be a PCP which the employer applies or would apply to employees who do not share the protected characteristic of the claimant; that PCP must put people who share the claimant's protected characteristic (here, sexual orientation) at a particular disadvantage when compared with those who do not share that characteristic; the Claimant must experience that particular disadvantage; and the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

4.6. It is for the Claimant to establish that the first three elements apply – that there is a PCP, - that is, the Claimant must identify the requirement or condition that is challenged - that it disadvantages those sharing the protected characteristic generally, by comparison with others, and that creates a particular disadvantage to the claimant. At that point, it is for the respondent to justify the PCP as a proportionate means of achieving a legitimate aim.

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

> "Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the

> individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot. – (Essop, para 25)
>
> "…The reasons why one group may find it harder to comply with the PCP than others are many and various (Mr Sean Jones QC for Mr Naeem called them "context factors"). They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between "women's jobs" and "men's jobs" or the practice of starting at the bottom of an incremental pay scale."
>
> "These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem. (para 26)"
>
> "…There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory*. (Essop, para 27)*

4.8. It is not necessary to show why the PCP puts people sharing a protected characteristic at a disadvantage *(Essop)* The key element is the causal link between the PCP and the particular disadvantage suffered by the group and the individual.

4.9. Disadvantage is not defined in the Equality Act. The Equality and Human Rights Commission Code of Practice on Employment 2011 ("the Code"), at paragraph 4.9, says this:

> "'Disadvantage' is not defined by the Act. It could include denial of an opportunity, or choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, is something that a

> reasonable person would complin about – so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently."

4.10. Section 19 requires a comparison between workers with the protected characteristic and those without it.

4.11. The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances. By section 23 of the EA 2010,

> "On a comparison of cases for the purposes of sections 13, 14 and 19, there must be no material difference between the circumstances relating to each case."

4.12. This is dealt with by the Code of Practice from paragraphs 3.22 and 4.15.

4.13. For the purposes of assessing the impact of the PCP on the group sharing the protected characteristic as against the wider group, the pool of all those affected by the PCP has to be identified. The identification of the pool is not a matter on which the burden of proof falls on the Claimant. It is a matter not of fact but of logic *(Allonby v Accrington and Rossendale College [2001] ICR 1189 (CA) (para 18).*

4.14. The Code at para 4.18, advises that:

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

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

4.16. The comparison must then be made with those sharing the protected characteristic. The Code at paragraph 4.19, says this,

> "Looking at the pool, a comparison must be made between the impact of the provision, criterion or practice on people without the relevant protected characteristic and its impact on people with the protected characteristic."

4.17. What is being considered is the particular disadvantage suffered by the group sharing the protected characteristic when the PCP is applied, that is, the disparate impact on that group as against the wider group. The test considers the intrinsic

disadvantage to the group with the protected characteristic arising from the general application of the PCP to the wider pool. The pool must consist of the group which the PCP affects (or would affect) either positively or negatively, while excluding workers who are not affected by it *(Dobson v North Cumbria Integrated Care NHS Foundation Trust v Working Families (para 18), and Essop, above para 41)*

4.18. If there are a range of logical options to be considered in relation to the PCP, the Tribunal should consider each:

> "In reaching their decision as to the appropriate pool in a particular case, a Tribunal should undoubtedly consider the position in respect of different pools within the range of decisions open to them; but they are entitled to select from that range the pool which they consider will realistically and effectively test the particular allegation before them."

4.19. There is no need for the Claimant to prove the reason why the PCP in question puts or would put the affected group at a particular disadvantage.

> "In order to succeed in an indirect discrimination claim, it is not necessary to establish the reason for the particular disadvantage to which the group is put" (Essop para 33)

> "How, it is said, can one know what that disadvantage is unless one knows the reason for it? What is required by the language is correspondence between the disadvantage suffered by the group and the disadvantage suffered by the individual. This will largely depend upon how one defines the particular disadvantage in question. If the disadvantage is that more BME or older candidates fail the test than do white or younger candidates, then failure is the disadvantage and a Claimant who fails has suffered that disadvantage. If the disadvantage is that BME and older candidates are more likely to fail than white or younger candidates, then the likelihood of failure is the disadvantage and any BME or older candidate suffers that disadvantage." *(Essop, para 31):*

4.20. In relation to the impact on the claimant, it is essential that the Claimant suffers the same disadvantage as the group

> "The essential element is a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual." *(Essop, para 33)*

4.21. The Respondent can argue that the particular Claimant was not put at that disadvantage, if there are other, perhaps personal, reasons for the outcome, other than the PCP – the example used is that that particular exam candidate did not study, or did not show up for the exam (*Essop*, para 32). Alternatively, a

Respondent may assert that the Claimant was not in a comparable situation for the purposes of section 23 of the Act, ie, that there was a material difference between the Claimant and the others in the comparison (*Ryan v South West Ambulance Services NHS Trust [2021] IRLR 4*). In either case, it is up to the Respondent to prove that the discriminatory effect of the rule was not at play in this case.

4.22. A PCP is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and necessary in order to do so *(Homer v Chief Constable of West Yorkshire [2012] IRLR 601)*.

4.23. In *Hampson v Department of Education and Science CA [1989] ICR 179* in the Court of Appeal, Lord Justice Balcombe said the true test involved striking "an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition".

4.24. As Mummery LJ explained in *R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:*

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

4.25. 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: -*

- Is the objective sufficiently important to justify limiting a fundamental right?
- Is the measure rationally connected to the objective?
- Are the means chosen no more than is necessary to accomplish the objective?

4.26. It requires the Tribunal to carry out a critical evaluation of the justification put forward, such that the employer's needs against the seriousness of the discriminatory effect are balanced and weighed. That assessment will involve a fair and detailed analysis of the employer's business needs and working practices – not simply accepting the employer's reasoning- and also the actual discriminatory effect generally and on the Claimant in particular. *(Ryan above; Hardy and Hansons plc v Lax [2005] ICR CA*; *Allonby, above)).*

4.27. The outcome may depend on whether there were non-discriminatory alternatives, or less discriminatory alternatives, available.

4.28. Cost alone will not justify a discriminatory act, but cost may be a factor in a legitimate decision based on wider considerations *(Woodcock v Cumbria Primary*

Care Trust [2012] IRLR 491 and see HM Land Registry v Bnson and ors [2012] ICR 627). Almost any decision by an employer will be taken with regard to costs, to a greater or lesser degree. It is necessary to arrive at a fair characterisation of the employer's aim taken as a whole to decide whether the aim was legitimate. And it is legitimate for an organisation to seek to operate within its means and to make decisions about the allocation of its resources (*Heskett v S of S for Justice [2021] CA IRLR 132).*

4.29. In *Pulham and ors v London Borough of Barking and Dagenham [2010] ICR 333 EAT,* Mr Justice Underhill commented that the legitimate aim which the measures taken by the employer are intended to achieve must be identified. But the dichotomy of "aim" and "means" is not always clearcut …."Tribunals need not cudgel their brains with metaphysical enquiries about what count as aims and what count as means as long as the underlying balancing exercise is carried out."

4.30. In assessing the discriminatory effect, the impact on those sharing the relevant protected characteristic is to be considered including the damage or disappointment caused to them and their duration; so too the particular hardships suffered by the claimant, provided proper attention is paid to the question of how typical those hardships are of others adversely affected (*University of Manchester v Jones [1993[ICR 474 CA).*

Burden of proof

4.31. By section 136(2) and (3) of the EA 2010, the test in respect of the burden of proof is set out:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.'

4.32. That provision applies to any proceedings relating to a contravention of the EA 2010.

4.33. The switching of the burden of proof is simply set out in the Code at para 15.34:

> "If a Claimant has proved facts from which a tribunal could conclude that there has been an unlawful act, then the burden of proof shifts to the respondent. To successfully defend a claim, the respondent will have to prove, on balance of probability, that they did not act unlawfully. If the respondent's explanation is inadequate or unsatisfactory, the tribunal must find that the act was unlawful."

4.34. For the burden of proof to shift, the Claimant must show facts sufficient – without the explanation referred to – to enable the tribunal to find discrimination. The

guidelines derived from the Barton case (*Barton v Investec Securities Ltd [2003] ICR 1205)* as amended in the Igen case *(Igen v Wong, 2005 IRLR 258 CA),* remain the basis for applying the law notwithstanding the re-enactment of discrimination legislation in the 2010 Act. It is those guidelines that establish the two-stage test,

> "The first stage requires the complainant to prove facts from which the Employment Tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld *(para 17, Igen)*

4.35. The Tribunal is required to make an assumption at the first stage which may be contrary to reality.

4.36. In *Hewage v Grampian Health Board [2012] UKSC 37,* the application of the Barton/Igen guidelines to cases under the EA 2010 is approved at the highest level. At paragraph 33, Lord Hope, on the burden of proof provisions, says,

> "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence…"

4.37. In *Laing and Manchester City Council and others, 2006 IRLR 748,* the correct approach in relation to the two-stage test is discussed,

> "No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case…. (para 73)
> The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race (*or other)* discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'.

4.38. The nub of the question remains why the Claimant was treated as he or she was:

> "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." *(Madarassy v Nomura International plc) 2007 IRLR 246).*

4.39. In that case, in a judgment later approved by the Supreme Court in Hewage, above, Mummery LJ pointed out that the employer should be able to adduce at stage one evidence to show "that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant."

4.40. The "something more" that may lead a Tribunal to move beyond the difference in status and treatment need not be substantial – it may be derived from the factual context including inconsistent or dishonest explanations *(see Base Childrenswear Ltd v Otshudi 2019 EWCA Civ 1648 CA; Veolia Environmental Services UK v Gumbs EAT 0487/12.*

4.41. The presence of discrimination is almost always a matter of inference rather than direct proof – even after the change in the burden of proof, it is still for a Claimant to establish matters from which the presence of discrimination could be inferred, before any burden passes to his or her employer.

Public Sector Equality Duty

4.42. Section 149 of the EA 10 states;

> (1) A public authority must, in the exercise of its functions, have due regard to the need to:
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

4.43. Subsection 149(3) explains,

> "Having due regard for the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
(b) take steps to meet the needs of persons who share a relevant protected
characteristic that are different from the needs of persons who do not share it;
(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."

4.44. Subsection 149(5) adds,

"Having due regard for the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:

(a) tackle prejudice, and
(b) promote understanding.

4.45. The relevant protected characteristics include sexual orientation.

5. Reasons

5.1. This was a four day hearing using Cloud Video Platform technology. It was held in that way It was conducted in that manner because the parties consented, the Claimant being posted overseas at the moment and because a face to face hearing was not practicable in light of the restrictions imposed by the pandemic and it was in accordance with the overriding objective to do so.

5.2. The hearing was listed for liability only.

5.3. A Restricted Reporting Order had been made on 9 October 2019. The Claimant is therefore referred to as XA throughout.

Historical Background

5.4. Until the European Court of Human Rights decision in Smith and Grady v UK ([1999] 29 EHRR 493), gay men and women were precluded from a military career. Non-discrimination legislation did not cover sexual orientation until the Framework Directive 2000/78/EC was passed on 1 October 2999. In December 2005, civil partnership became legal between same-sex couples. The first same sex marriages following the Marriages (Same Sex Couples) Act 2013 took place

on 29 March 2014 (later in Scotland and Northern Ireland). Civil partnership was extended to opposite sex couples in December 2019.

5.5. By way of background, while the Equal Treatment Bench Book, based on the sources it cites, recognises advances in general acceptance, it points at continuing poor treatment of LGB people, with bullying, hate crime, discrimination and stereotyping. The February 2021 edition reports Stonewall's 2017 survey, that 7% of LGB people did not feel safe where they lived and 26% avoided particular streets because they did not feel safe there as an LGB person. In the year ended March 2020, LGB people were more likely to have experienced crime than heterosexual people. They are reported as still enduring poor treatment while using public services and going about their lives, whether in their local shop, gym, school or place of worship. Peer group support is important.

5.6. Our judgment is founded on the evidence we heard, not on such commentary which is referred to simply by way of context.

The Reduction in Choice

The DIO Options Paper February 2015

5.7. The change from a system whereby single Service Personnel who had entitled to SLA could be offered one choice of SLA or two choices of SSSA changed to a system of offering no choice took effect in January 2016, based on discussions in 2015.

5.8. The minutes of the February 2015 APWG show that a revised DIO Options Paper was presented to the APWG at that meeting and that triggered the discussions leading to the change.

5.9. We have not been provided with the original options paper and know nothing of earlier discussions, if any, or what prompted them. We have not been provided with the revised options paper presented to that meeting. We are told it cannot be found.

5.10. That is surprising. XA told us that he had been the secretary for similar meetings and there was no question of papers not being properly filed ("identified and bolted") and accessible. In any event, the paper would have been distributed to all members of the working group as well as held in the DIO.

5.11. It has this disadvantage, that the Respondent cannot show the original reasoning behind the matter appearing on the agenda.

5.12. The minutes are not designed to show the discussions. The only other contemporary record we have seen is the short email chain from April 2015.

5.13. That email chain shows that the issue was also discussed at the March 10 meeting of the APWG, but those minutes are not before us.

Alignment

5.14. Mr Brennan in his witness statement tells us that the award of the substitute accommodation contract to Mears awarded in 2015 provided the MOD with an opportunity to bring the substitute accommodation policy (SSSA and SSFA) into better alignment with the equivalent mess/barrack accommodation policy (SLA and SFA) (para 13 and 16). The reduction of costs was an additional benefit.

5.15. The February minutes refer to the removal of "inconsistencies" in the policy governing choice of substitute accommodations. The proposal was to remove the choice of two properties for both SSSA and SSFA. A number of benefits are referred to but not identified – these minutes are brief, primarily summaries and action points. Removing choice was seen as unlikely to be well received, given the reference to "presentational" issues and the perceptions of SP and Families Federations.

5.16. Those minutes do not afford an insight into the reasons for the change. The inconsistencies are not identified. At this point, the proposal relates to those entitled to SSSA or SSFA. Both those groups enjoyed two offers. So did those entitled to SFA. Those entitled to SLA – MOD on-site accommodation, for single personnel without resident children – only had one offer.

5.17. It is not obvious what the inconsistency was or why it needed to be addressed. Single personnel on site were the exception with only one offer, but the accommodation on offer to them on site was not likely to vary much.

5.18. Mr Brennan refers to an earlier discussion, in November 2014, about staggering the SSFA offers, to prevent confusion leading to people rejecting the second offer, not realising the implication. That did align with the SFA offer practice. He presents that as part of the same target of reducing inconsistencies. We do not accept that. It did not arise from the DIO paper referred to in February 2015 and in our judgment is a small practical change, unrelated to the change over choice of accommodation.

5.19. The emphasis in evidence has been on the merits of alignment. Absent any contemporary documentation at this stage, that appears to simply refer to the proposal to remove all choice. That is recorded as the preferred outcome.

5.20. The DIO email of 17/04/15 highlights the cost advantages of the scheme.

5.21. The email of 20 April 2015 at 11.42 reports a change in the proposals, leaving the SFA/SSFA group with the benefits of a choice of accommodations, but removing

choice for the SSSA group of single officers without children living with them. The rationale is to align and to reduce costs.

5.22. What is not explained is the business case for alignment. It is not in the documentary evidence and it is not covered in Mr Brennan's witness statement.

5.23. Alilgnment is not a goal in itself. There must be some further justification for change.

5.24. There are two brief mentions of the reasons for making no change for the SSFA group.

5.25. The reasons noted in favour of including the SSFA group is consistency, and to reduce costs. The reasons it was decided against is that the case is "not as compelling as for SSSA" and that there could be greater reputational risk – "Fam Feds might see it as an erosion to the offer."

5.26. There is the further email from the RAF representative referring to the change not being commensurate with equality of treatment for SFA "particularly when the SP (and family/domestic) dynamic is much more complicated for this cohort."

5.27. That represents the full reasoning in the contemporary documentary evidence to us for the removal of choice from SSSA entitled personnel and the retention of choice to SSFA and SFA personnel.

5.28. The Claimant points out with some cogency that there is little obvious merit in treating the offer to SLA personnel and SSSA personnel the same. MOD accommodation on site is likely to be in a domestic block, all units of accommodation offering similar space, access to facilities and travel to external services and work. Two offers of accommodation procured in the open market within a 45 minute public transport travel time could vary very markedly from each other.

5.29. He puts it in his complaint like this (158/180)

> "By its nature, the majority of SLA will be provided at the same site and quite possibly in the same physical building. As a result, many of the factors that might influence choice such as commuting time to work, safety of the area or access to local amenities are likely to be practically identical, whichever SLA bedspace is offered…. The chances of 2 SSSA properties being identical in the kind of factors I highlight in the previous paragraph ….. are remote. Similar argument can be made for SSFA"

5.30. The alignment achieved by the reduction of choice disregards that distinction.

5.31. It is clear that choice itself is valued. Creating and improving choice is one of the goals of the FAM project.

5.32. It remains unclear to us what the goals and benefits of alignment were seen to be. For service personnel, they lose choice, which is a prized part of the accommodation terms and conditions, the more important given the very different merits of the substitute service accommodation that could be offered. We do not accept that that benefit is clearly outweighed by having a quicker offer of an address on moving in, possibly for some years residence or that that was one of the goals.

5.33. For the service, there is administrative neatness and costs savings.

5.34. Those savings are identified for single personnel by Mr Brennan in his witness statement as an additional £2,793,950 over the life of the five year contract with Mears.

5.35. No costs are provided in respect of retaining the choice for those entitled to SSFA. We doubt that they were lower, and surmise that they may have been higher, given larger properties being required. We don't know the numbers entitled to SSFA as against SSSA but our understanding is that the numbers are not small.

5.36. Alignment or consistency are not aims in themselves. There must be some further purpose. That is not identified.

5.37. The original documentation highlights consistency or cost as the drivers of change. In our judgment, the key factor was the cost savings.

5.38. That is supported by the terms of the DIO enquiry of 17 April 2015. It was what Mr Brennan told us he thought it was. Asked about the policy justification, he said, although he could not remember content of the DIO paper,

> "I would assume cost savings to the public purse"

5.39. Given that the origin of the change came in the DIO paper, and the DIO were concerned with the costs and the terms of the new contract, it is likely too that the missing options paper addressed the issue of costs as the key justification. There is no other cogent reason put forward.

Equality Impact Assessment

5.40. The outcome was that service families – married, civil partnered, responsible for children – kept choice. Single personnel lost it. That is a difference in treatment, and an unwelcome one; that is both common sense and confirmed by Mr Brennan,

> "The department recognises that choice is important and matters to service personnel, that is the business situation, in terms of retaining talent within the armed forces

5.41. Most people would rather have some, even a little, choice, and for others it may be essential. Service personnel accept less choice and less permanence than the population at large. Nonetheless, all sorts of considerations may make one property markedly more attractive or more unwelcome. To take the more extreme case, there are places, even in the UK, where someone could be feel unwelcome or be unsafe, for reasons that might be to do with gender, race, religion, sexual orientation or because of wholly different characteristics or concerns.

5.42. For many minority groups, including the LGB community, overall numbers are low, and there is a tendency or preference for clustering in places that offer services, facilities and social life that is appropriate to them. In the MOD people are moved about on different assignments or postings. For single people, this may be isolating and for LGB people – and members of other protected groups - access to their own community and places where they can feel safe, included and accepted will be the more important.

5.43. Taking away choice from this group – the single personnel without responsibility for children – places them at a disadvantage. Choice matters to people. Mr Brennan agreed that choice was a key part of the MOD "offer". The new FAM proposals will, he explained, offer more choice,

> "If it goes live, it gives service personnel the opportunity to say where and how and with whom they want to live with rather than being prescriptive."

5.44. The Respondent admits that persons with whom the Claimant shares the protected characteristic, that is the LGB service personnel, are less likely to be married on in a civil partnership than heterosexual service personnel and less likely to have a dependent child. They will not qualify for a choice of accommodation.

5.45. If there is a disadvantage from not having a choice of substituted service accommodation, it disproportionately affects the LGB service personnel because they are less likely to qualify for choice. And their circumstances may justify needing some choice.

5.46. Given the absence of the revised DIO options paper, it is not possible to see whether there was any consideration of the equality impact of the proposed changes in that paper.

5.47. There is no specific Equality and Diversity lead in the Accommodation Policy Team (191 – the interview with Mr Brennan by the officer investigating the

claimant's complaint) but advice is available from the People Diversity and Inclusion Team. Mr Brennan does not recollect that he sought advice on Equality impacts on this occasion (oral evidence) nor is there any indication that anyone else did.

5.48. No equality assessment for this change has been produced before the 2019 one. Mr Brennan agrees that no Equality Impact Assessment of this change was produced at the time (ws para 22).

5.49. Mr Brennan's evidence was that he believed that this change, "just a line in an existing policy", was seen at that time as a minimal change.

5.50. Mr Brennan's understanding was that an Equality Impact Assessment had been carried out on the whole of the accommodation policy, JSP 464. This was merely an alignment of two existing policies.

> "An EIA had been done on the whole of the JSP."

And,

> **"**My belief it was a full EIA to ascertain all protected characteristics in JSP464 not just those that are married.**"**

And,

> "This was an alignment of two existing policies. I assume, it was deemed a full EIA on the alignment was not required." (oral evidence)

5.51. No assessment has been produced in respect of the whole accommodation policy.

5.52. There are some references to a 2014 Equality Assessment. For example, the Claimant quotes being told on 1 August 2017 that, following the finding of discrimination by an earlier Tribunal, the "Boswell" Tribunal,

> "… an amendment was undertaken and JSP 464 in all its variants at the time (Parts 1 – 5) was impact assessed to ensure that there was no further direct or indirect discrimination contained within the said JSP. …. The Tribunal recommended that the Department review JSPs 464, 752 and 754 in their entirety to ensure that they do not discriminate on the same grounds… Therefore, in light of the above, and as directed by the judgement an Equality Impact Assessment was undertaken in February 2014 of JSP 464 (Parts 1-4)" *page 140/162*

5.53. Given that and Mr Brennan's references to an Equality Impact Assessment on the whole accommodation policy, that 2014 assessment was requested. What was

provided was – as the Claimant had himself earlier identified (140 – 148) - an assessment of a particular change, in relation to the entitlements of two officers married to each other. It related to the facts in the Boswell Tribunal. In fairness to Mr Brennan, that is exactly as he described it to the interviewing officer (190).

5.54. We have not been provided with any full Equality Impact Assessment of JSP 464 parts 1 – 4. We find that none was carried out, notwithstanding the recommendation of the Boswell Tribunal.

5.55. The 2014 assessment was of a policy amendment seeking to eliminate disadvantage for couples, married or in a civil partnership, both of whom are in the Services. It includes this comment,

> "A number of additional elements of the wider policy were identified as needing review to take account of equality. (50 mile radius, LSAP, SSSA 45 minute rule, SFA 1½ hour travelling time, ownership of property – different radius for SSSA and SSFA?) These require further and separate work to address any potential discrimination."

5.56. No Equality Assessment addressing those has been produced or referred to. None of that has figured in the references to the need for alignment in this case.

5.57. Mr Brennan had said in his interview that the Equality Analysis was continuously reviewed, discussed at both desk level and through the APWG and ASG (Accommodation Steering Group) although there is no formal process in place; such discussions, he said are not noted in the minutes of either the APWG or the ASG – only decisions and actions are recorded. We have not been provided with evidence of any such discussions, much less any leading to action to review the Equality Impact of JSP 464 before the one carried out in 2019. The Claimant cites a Freedom of Information response received on 29 July 2017 in which the MOD advised that no such further analysis had taken place (144/167).

5.58. There is a 2016 Equality Assessment of the Combined Accommodation Assessment System (CAAS) (82 and 191). It is short, asserting primarily that the charging system has been developed cognisant of the requirements of the Equality Act 2010 and anticipating no impact on protected groups. There is no account of investigation beyond that Housing Colonels have been consulted and the assessment contains neither explanation or evaluation. It falls very far short of what the Equality Duty Tookit promotes as good practice and performs no useful function.

5.59. In summary, we do not have evidence that the accommodation policy or the substitute service accommodation policy has been subject to an Equality Impact Assessment or that Equality Impacts have been subject to periodic review, even as to elements identified as requiring assessment.

5.60. We do not have evidence that equality issues formed part of the DIO Options paper that triggered the discussion of change in 2015/16. We do not have evidence that advice was taken on the equality impacts of reducing choice in 2015. We have Mr Brennan's evidence that it was seen as a minor change, not requiring an Equality Impact assessment.

5.61. We conclude that the Equality Impacts of removing choice for those entitled to SSSA were not considered at the time or before 2019.

The 2019 Assessment (323/345)

5.62. The 2019 assessment in respect of SLA and SSSA is that the change was neutral as to sexual orientation and that there were no adverse equality impacts on this group. In addition, Schedule 9 Part 3, para 18(2) permitted benefits to be provided exclusively to those who are married or in a civil partnership. That was relied on although subsequently, in the judgment of EJ Midgeley, it is established that that is not a valid exemption. The Respondent cannot and does not now rely on it.

5.63. The lack of choice in respect of SLA and SSSA compared to that of PStat Cat 2 personnel to a choice of SSFA accommodation – that is, those with parental responsibility for a dependent child living with them, who retained a choice of accommodation with two offers to be made – was justified because of the additional family member's needs, for example, schooling. Reference is then made to a co-located partner's workplace travel requirements, although it is not clear who that could refer to. Anyone married or in a civil partnership would be PStat Cat 1. Cohabitation is not permitted in service or substituted service accommodation, to anyone not in a formal relationship.

5.64. In summary, married and civil partners were held entitled to extra benefits without that founding a claim for discrimination, and those with children had additional needs justifying a choice of accommodation.

5.65. No adverse impacts were identified with regard to categories other than sexual orientation, marriage (given the group of necessarily separated officers, living apart from spouses in service accommodation and treated as single) and age (given that under-18s are not put in SSSA). In relation to race or religion, for example, all that is noted is "this policy change will have no adverse equality impacts on this group." That is unsustainable without exploration. There is no exploration, consultation, research or analysis, only the bald statement.

Equality and Diversity: levels of understanding

5.66. What is troubling about the Equality Impact Assessments that we have seen is that they are not informed by consultation or investigation. At best, we hear about consultation in-house, with senior officers. We do not hear about real enquiry.

5.67. The understanding of those preparing the assessments is limited by their personal or group experience.

5.68. The 2019 impact assessment is weak. It is not based on the necessary consultation or research. For the most part, the idea of there being adverse impacts on affected groups is simply dismissed. In relation to sexual orientation, there is a rather fuller discussion, without fuller content, and justifying the case that the impact on this group is low because those with children have more complex needs. The needs of those with protected characteristics cannot be dismissed or ignored because children need schools or partners need access to their work. That is not informed analysis. As an Equality Impact Assessment, it is wholly inadequate to its purpose.

5.69. The other Equality Impact Assessments we have seen are similarly inadequate.

5.70. A recommendation from the previous Tribunal hearing the case known as Boswell, was for training. Mr Brennan attended such training. He was not familiar with the Equality Act Codes of Practice. He was asked what he meant by the expression “equality of treatment” and clarified by explaining that he meant “parity of treatment, everyone treated the same”. That answer seems very much reflective of the culture within that working community. It does not reveal informed awareness of diversity or discrimination issues or how to address them.

5.71. Mr Brennan was asked about the People - Diversity and Inclusion - Equality Analysis report dated January 2018 by the officer investigating the Claimant’s complaint and is noted as responding that,

> “…given that Accommodation Policy was not examined, would suggest that it was an area that had had a “clean bill of health” (191).

5.72. The report was based on the sampling of departments, as explained on the first page. It found a significant number of policies, projects or services where no evidence was retained of an equality assessment having been undertaken. It identified a general lack of awareness of the Department’s legal requirements in this area. It does not show a clean bill of health for the accommodation department.

5.73. Our iintention is not to single out Mr Brennan. He is the only witness for the Respondent from whom we heard. If there is no widespread understanding of the

Diversity and Inclusion policy, no culture of adherence, individuals may not develop a robust understanding or be able to prioritise appropriately.

5.74. There is no adherence here. The policy requires that Equality impacts are kept under review and that there is a paper trail showing the discussion and evaluation, and outcome. None of that exists in respect of this amendment to JSP464, or the whole of it. As the Claimant said, discussions round the water-cooler are not enough.

The needs of couples and children

5.75. The justification for giving the SFA and SSFA eligible families, two offers of accommodation is given in Mr Brennan's witness statement as,

> "It is self-evident that, in general, those in PStat1 and PStat2 (and thus are eligible for SSFA) are liable to have more diverse needs and challenges that need to be catered to than a single service person, arising from the simple fact that there will always be at least one other person's accommodation needs to take into account." (para 24)

5.76. It might be fair to point out that the initial proposal in February 2015 had been to remove choice across the board, and the correspondence expressly reserves the possibility of returning to the question of reducing choice for couples and households with children at a later date. Nor is this Tribunal looking at the removal of choice for those personnel: this is not about removing choice from them instead of from the single personnel. The case is not defended on the basis of having to choose between who was eligible for scant resources.

5.77. The difficulty is that in relation to the group of single personnel affected, the decision makers were uninformed as to the experiences, needs and challenges facing members of minority and protected groups. There wasn't awareness of the difficulties that a member of a protected group might face. It is those considerations that have to inform policy making decisions that affect people.

5.78. XA's own case illustrates the point – albeit not in relation to SSSA accommodation. His career officer was proposing to send him to an assignment where he would be living in MOD accommodation and was "given a roasting" by the legal department for ignoring the legitimate difficulties that would cause. If you do not enquire, you cannot know of the difficulties, challenges, even risks, that might arise.

There was some awareness of this in that again the RAF representative suggested that if there was to be one offer only, there should be an exceptional provision for appeal even where the accommodation offered was met the formal criteria. That however was abandoned as a proposal.

5.79. The statement at paragraph 24 of Mr Brennan's witness statement echoes the comments in the RAF email quoted above as to the reasons for retaining choice for the SSFA group: "change not being commensurate with equality of treatment for SFA particularly when the SP (and family/domestic) dynamic is much more complicated for this cohort.

5.80. The same concerns are identified in the 2019 Equality Impact Assessment. In mentioning the extra needs for example in relation to schooling or a working partner's travel arrangements. Families are seen as having more complicated needs and that is held as justifying giving them choice in accommodation.

5.81. The difficulty is that in the absence of an equality impact assessment, no balanced picture can be formed. There has throughout been a failure to identify the needs, circumstances and disadvantages of the non- family service personnel.

5.82. We accept that families – couples, those with children – have to address the needs of each member, not of a single individual and that that adds complexity.

5.83. That does not mean that for single individuals the removal of a very limited choice of accommodation has no adverse equality impacts on them.

5.84. It is important, again, to point out that this has not been presented as a case in which scarcity of resources led to hard choices between groups. It is not a competition between those with partners (formally recognised) or children and those without. The Respondent has not presented the case on that basis. It is not presented as driven by the need to save costs.

5.85. We do not have to be satisfied that single personnel have equally or more diverse or complex needs than families do.

5.86. The proposal was originally for the removal of choice for both groups Unless cost is the driver here, however, it is not a competition. The PCP1 and 2 group do not lose out by single people retaining the right to a choice.

5.87. Whatever our judgment about costs as a factor in making this change, the Respondent's case has not been on the basis that retention of choice was too expensive or that at least one group had to lose that benefit to stay within budget.

5.88. There is one other consideration apparent from the documents. There is plain concern about the "presentational" aspect - the way the reduction in choice will be perceived. And the Family Federations are mentioned more than once (in documentation as scant as this, that is significant). It does appear to be the case that families are well represented. Members of minority groups may not be so well represented and if so, they will have less of a voice. It is all the more reason to be aware of the impacts of policies on them through proper investigation.

6. **Addressing The Issues**

6.1. The agreed issues are set out below, with the annotation and amendments agreed in italics. The original numbering is included for ease of reference.

6.2. The agreed PCP is that:

> 1.1 In order to receive a choice of substitute service accommodation, a person falls into either PStatCat1 or PStatCat 2, namely they:
>
> (a) Live with their married spouse or civil partner, or would do so but for the exigencies of service (PCP 1) or
> (b) Live with a dependent child (PCP2).
>
> *The pool of those to whom the PCP was applied had not been defined until the hearing. It is agreed that the PCPs were applied to all those entitled to substitute service accommodation, more fully identified by reference to the table on page 211, namely, single personnel, married and those in civil partnerships living with their partners and single people living with and responsible for a child.*

6.3. The Claimant contends for the exclusion of married unaccompanied personnel, that is those with a permanent home elsewhere, who do not pay for their military accommodation. We identify that group - the involuntary separated – as included in that it falls within the agreed PCP notwithstanding the Claimant's arguments but it makes no real difference to the pool or impact.

6.4. The next agreed issues are,

> 1.2 It is admitted that the respondent applied the above PCPs to the Claimant and to persons with whom the Claimant did not share the same protected characteristic (sexual orientation) or would have done so.
>
> 1.3. It is further admitted that the above PCPs put persons with whom the Claimant shared the characteristic, at a particular disadvantage when compared with persons with whom he did not share the characteristic.
>
> 1.4. For the purposes of 1.3 above, the Respondent admits that persons with whom the Claimant shared the characteristic were less likely to be entitled to a choice of substitute service accommodation because:
>
> (a) In relation to PCP1 gay personnel are less likely to be married or in a civil partnership than heterosexual service personnel and

(b) In relation to PCP2 they are less likely to have a dependent child.

It is agreed that the group referred to, the persons with whom the Claimant shared the protected characteristic is the LGB service personnel, that is those with sexual orientation that differs from that of the heterosexual population.

It is also agreed that the PCPs were applied to the LGB service personnel.

6.5. What is not agreed is the particular disadvantage that that group suffered.

In Mr Waite's formulation,

"The relevant group disadvantage is suffered by LGB service personnel who wish to occupy SSSA as a couple (who are neither married nor in a civil partnership"

6.6. We accept that that is a disadvantage suffered by LGB service personnel. The Respondent has agreed that gay personnel are less likely to be married or in a civil partnership. Many members of the LGB service personnel may aspire to a lasting relationship of cohabitation, and the present PCP means fewer of that group can qualify for this choice of accommodation. We do not have to consider the reasons but the fact that civil partnership only became available in 2005 and marriage in 2014 are powerful factors. The Claimant has discussed others, pointing out that it is not just the date from which legal unions become possible, but the time over which they might become part of the cultural tradition. He mentions too that the ban on homosexuals serving was only lifted in 2000. He posits that acceptance of people from the LGB community in the armed forces is much more recent than for other parts of society and given the age at which people join, they are possibly under-represented in the likely age groups for marriage (153/175).

6.7. The issue here goes beyond the agreed fact that LGB service personnel are less likely to be married or in civil partnership. There was and is an embargo on cohabiting couples occupying substitute service accommodation. So this group are not only less likely to qualify for SSFA accommodation but where they fail to qualify they are barred from living with their partner in any service accommodation. (That also applies to other single people wishing to move into a living-together arrangement, But the issue here is the disproportionate impact on the LGB service personnel.)

6.8. That is beginning to change. Cohabiting couples, if registered, can now be authorised to occupy surplus SFA accommodation. They are still not permitted to occupy substitute service accommodation, and there may be good reasons why they would not choose to live on MOD premises. And such couples have no

entitlement to SFA accommodation, only permission to take up surplus accommodation – in a situation where SFA accommodation is a scant resource. They have no entitlement to the allowances that married or formalised partnerships attract.

6.9. Informally cohabiting LGB couples are not entitled to service accommodation at all. Cohabitation ends entitlement.

6.10. Mr Waite's argument is based again on the idea that families have more complex needs than individuals. It is that complexity that justifies the privilege of choice.

6.11. The difficulty is that since fewer LGB couples are in married or civil partnerships, their needs will never qualify to be assessed. They don't get to first base.

6.12. So Mr Waite's formulation does reflect a disadvantage created by the rules in respect of LGB service personnel. But it is not the disadvantage that the Claimant brings to the Tribunal. He is not cohabiting and did not have a partner with whom he intended to share his service accommodation. He complains about losing the limited opportunity to choose.

6.13. He is entitled to bring that complaint. It is a disadvantage.

6.14. Mr Waite's formulation is not the disadvantage identified by the PCP. The PCP is not about being a member of a couple. It is about choice.

6.15. The Claimant's argument is that the disadvantage is lack of choice.

6.16. Everyone wants choice. Their personal priorities will be different but they want and need choice.

6.17. The particular disadvantage is that the rules mean that fewer LGB service personnel can qualify for any choice of accommodation. The ONS figures show that 70.7% of the population identifying as LGB were single, never married, never civil partnered. That compares with 34.6% of the general population. On those figures, substantially fewer LGB service personnel would qualify for a choice of substitute service accommodation.

6.18. They had had the same limited choice as others needing substitute service accommodation, and they lost the opportunity for that choice. We are in no doubt that that choice was important to that group. This is a real disadvantage that they were disproportionately exposed to.

6.19. That is the particular disadvantage suffered by the group.

6.20. The next agreed issue is,

1.5. Was the Claimant put at the particular disadvantage because of either or both of the PCPs for the reasons at 1.4 above?

6.21. That was not agreed, given that the Respondent identified the relevant disadvantage as related to cohabitation. The Claimant was not cohabiting or planning to cohabit. The contention was that therefore he did not suffer the particular disadvantage that the group suffered.

6.22. Having identified the particular disadvantage as lack of choice, in our judgment, that is a disadvantage that affected the Claimant personally. He had only one offer of accommodation.

6.23. The Respondent admits that the Claimant was put to a particular disadvantage by PCP 2.

6.24. We find that the PCPs put the Claimant and those who shared his protected characteristic at a particular disadvantage and were, subject to justification, discriminatory.

6.25. In respect of justification, the agreed issues are,

1.6. Were the above PCPs a proportionate means of achieving a legitimate aim?

1.7. The Respondent says that its aims were:

As to PCP1:

(a) To establish a fair and efficient system for determining who (within budgetary constraints) should be entitled to a choice of substitute service accommodation.

(b) To give effect to the principle that (in general) the accommodation needs of two people inhabiting a property on a long-term basis as a couple are liable to be more diverse than those of one person.

As to PCP 2:

(c) To establish a fair and efficient system for determining who (within budgetary constraints) should be entitled to a choice of substitute service accommodation.

(d) To give effect to the principle that (in general) the accommodation needs of those with dependents (including dependent children) are liable to be more diverse than that of one person.

(e) To establish a system which, so far as is reasonably practicable, protects family life (including the welfare of the child).

6.26. The Claimant disputes that 1.7 (a) – (e) above were legitimate aims, as he believes that they were not the Respondent's genuine aims, and that the Respondent's true aim was to reduce costs. The Claimant also disputes the proportionality of such aims.

6.27. We remind ourselves that we have to consider

- *Was the PCP an appropriate and reasonably necessary way to achieve those aims;*
- *Could something less discriminatory have been done instead;*
- *How should the needs of the Claimant and the Respondent be balanced?*

6.28. And of the de Freitas formulation,

- Is the objective sufficiently important to justify limiting a fundamental right?
- Is the measure rationally connected to the objective?
- Are the means chosen no more than is necessary to accomplish the objective?

6.29. The burden of proof here is on the Respondent

6.30. At the time, the objectives discernible from the evidence were:

- Alignment
- Costs

6.31. We cannot see alignment as a reasonable objective in itself. There must be some reason for it. Simply aligning the choice as between SLA and SSSA was not the objective driving the change, nor, if it were the case, was aligning SFA, SSFA and SSSA with SLA in removing choice – since they did not do that.

6.32. In particular, we do not see the difference in treatment as between those in SLA and those in SSSA as "unjustifiable and inconsistent". There is, as explained above, significant justification for giving people who are to be in private rented accommodation, with all the variables, a choice, as against those on site. And there may well be imperatives for people with protected characteristics that justify choice, even the limited choice at issue.

6.33. Mr Brennan deals with the justification for the change in his witness statement. The re-competing of the substitute accommodation contract in 2015, " provided

the MOD with an opportunity to consider ways in which its substitute accommodation policy (SSSA and SSFA) could be brought into better alignment with the equivalent mess/barrack accommodation policy (SLA and SFA) (para 13).

6.34. The advantages explained are these,

> "14. An additional benefit to this was that it would reduce costs, ensuring better Value for Money for use of public funds. For SSSA, it also meant that single occupancy properties could be kept on the scheme in the more certain knowledge the property would be occupied. Thus, fewer properties are handed back at the end of each tenancy, reducing the need for sourcing, because of the higher turnover, it enables the contractor to negotiate longer leases, which in turn can reduce the cost. A single offer to each serviceman would therefore result in fewer transaction costs, and in a faster moving market it was more cost effective to allocate a space or one bedroom flat than search for two properties."

6.35. The witness statement affords no explanation for alignment. The discussion is about saving costs. The evidence is that the MOD has reduced choice for this group with the sole aim of reducing expenditure.

6.36. It has also been proposed that the change was minimal, or limited, and so it did not require an Equality Impact Assessment. We do not agree, nor was it minimal to the Claimant. In any case, that is not a basis on which the change could be justified.

In respect of couples and households with children, the complexity or diversity of their needs is relied on as a reason for not reducing choice for them. That is not the objective of this change. It is only the reason given for not reducing it in those cases. It cannot of itself be a justification for reducing choice for others.

6.37. The presentation issues play a part – the probable resistance to loss of choice. It is noted that for the Family Federations, the accommodation offer, including that element of choice, is important. That again is a reason for being acute as to the needs of those with protected characteristics who may not have the benefit of representation, bearing in mind that those needs may not be visible or widely understood. We bear in mind that many people do not choose publicly to identify themselves as LGB.

PCP1

(a) To establish a fair and efficient system for determining who (within budgetary constraints) should be entitled to a choice of substitute service accommodation.

(b) To give effect to the principle that (in general) the accommodation needs

of two people inhabiting a property on a long-term basis as a couple are liable to be more diverse than those of one person.

6.38. It is worth noting that the issue of a fair and efficient system for determining who should be entitled to a choice of substitute service accommodation only emerged when it was decided that the reduction of choice would not be universal, that is, when one group was to retain it. And as between the original proposal in February and the final proposal in April, there is little evidence of appraisal or investigation. In other words, the reduction in choice was not embarked on with a view to establishing a fair and efficient system for determining who should be entitled to a choice of substitute accommodation, nor was any step taken towards that other than to decide not to reduce choice for couples and households with children.

6.39. We accept that the aims may not have been clear at the time but remain legitimate.

6.40. It is also true that at the time, there was no system for determining who should have a choice of substitute service accommodation, because everyone was entitled qualified for two offers.

6.41. If there was a need for a system to determine who should be entitled to choice and who should not, it derived from a further objective, which must have been cost-driven. There is no other purpose identified or discernible from the evidence.

6.42. We discount the advantage of service personnel having a settled address early on, given that choice is prized. This was not a measure prompted by a wish to give people an earlier address – that might have been an added advantage in practice but it is not part of the goal. And, it is agreed that at least at the time, it did not bring that about. People stayed longer in temporary accommodation.

6.43. Again, that brings us back to costs.

6.44. If there is to be a decision as to who should have choice, the needs of those with protected characteristics have not been explored or considered.

6.45. There was no investigation, no consultation and no evaluation, no work done on the potential impact.

6.46. There was no consideration either of alternatives. One option put forward briefly was an appeal, on grounds not limited to the formal accommodation criteria. That was not pursued. However defined, an appeal process to deal with exceptions might have safeguarded against discrimination. Other options could have been identified having properly explored the impacts. One might be to align the offers to all those entitled to substitute accommodation, to reflect the variety of accommodations in the private rental sector and the range of community factors that do not apply to residents on the base. That could go with aligning the position

for those on MOD bases, where there is less variety in the accommodation available and in access to facilities or to the external world. It may be that the standard criteria for the provision of accommodation worked well enough when there were two choices, but that they needed refinement if there was to be only one.

6.47. The Respondent could not balance the needs of the Claimant and the Respondent in the absence of information and evidence as to the impact of the rule change on him and on others affected and without considering alternatives.

6.48. The rights of the family and of the child have been pressed. We acknowledge that they have additional needs, in that more than one person is involved.

6.49. This is not a competition. That does not mean that single people on their own do not have needs or that those needs should not be taken into account. The Respondent chose to balance the needs of couples and households with children against those of other service personnel without considering on an informed basis whether there were adverse impacts on those others.

6.50. That is what an Equality Impact Assessment was to be for.

6.51. We recognise that the Respondent needed a clear-cut rule as to entitlements, not to over-complicate a system that had to be clear and robust.

6.52. There is an attractive simplicity in relying on the diversity or complexity of need arising from the fact that the PCP1 and PCP2 groups involve people living with others.

6.53. It does however reflect perhaps an historical position whereby married and now civil partners continue to have additional advantages. There is additional assistance towards the costs of home ownership, for example, those who have a home elsewhere if married or in civil partnerships. The LGB service personnel are less likely to qualify for that assistance, so have greater difficulty in purchasing their own home. They are less likely to qualify for the new permission to cohabit on MOD bases, given that that too is for those in married or civil partnerships.

6.54. The Respondent has an express goal of increasing representation amongst personnel of members of minority or under-represented groups.

6.55. It has been recognised in FAM that there is a need for change to reflect the realities of modern life. Mr Brennan describes it in these terms,

> “Under FAM, accommodation entitlement would be based on the size of the family (the Need) for all Service personnel and not on the current entitlement (by Rank). Single personnel would still be able to live in SLA but will now receive financial support to rent (either on their own or

> with friends), or buy a home. It is also intended that FAM would widen entitlement beyond those who are married or in civil partnerships, allowing those in established and registered long term relationships, and divorced parents with shared custody of children, subsidised access to the private rental market, recognising that not all families follow a traditional model." (witness statement para 30).

6.56. The respondent is to be commended for piloting new approaches although they are not yet ready to be introduced.

6.57. In summary, if the objective for PCP1 is to decide who is to be entitled to choice, the decision that it was to be formal couples or households with children, without exploring factors affecting others cannot be shown to be appropriate or reasonably necessary, nor were any other options explored.

6.58. If the objective for PCP1 was to give effect to the principle that in general the accommodation needs of two people inhabiting a property on a long-term basis as a couple are liable to be more diverse, given the discriminatory impacts other measures should have been considered instead.

6.59. Choice itself is not limited. Limits on choice may arise because of cost. The Respondent does not say that these decisions were cost-driven, made to achieve cost reductions, although costs are acknowledged to play a part. If they were not made to achieve cost reductions, there is no need to give priority to the needs of couples or with children. Their needs can be recognised, and so can the needs of other groups.

6.60. We return to our observation that this is not a competition. As stated above, couples and households with children are wholly unaffected by single service personnel being given a choice of accommodation.

> **PCP 2**:
>
> (c) To establish a fair and efficient system for determining who (within budgetary constraints) should be entitled to a choice of substitute service accommodation.
>
> (d) To give effect to the principle that (in general) the accommodation needs of those with dependents (including dependent children) are liable to be more diverse than that of one person.
>
> (e) To establish a system which, so far as is reasonably practicable, protects family life (including the welfare of the child).

6.61. The first and second of those are addressed above.

6.62. The rights of the child and the family under Article 8 of the ECHR and Article 3 of the UN Convention on the Rights of the Child have been called in aid. That Article begins,

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

6.63. The decision to remove a choice of accommodation from single people who do not have a child living with them is not an action concerning children.

6.64. The Respondent has not presented the case on the basis that if single people have a choice of accommodation, couples and households with children will lose it.

6.65. The protection of family life and the rights of the child are not at issue.

6.66. There is no challenge to the welfare or rights of the family in single personnel having two offers of rented accommodation.

6.67. There would be, were it the case that cost meant that the previous system had to be changed because it was too expensive. That is not the Respondent's case. It may be our view that this decision was cost-driven, but that is not basis on which the Respondent has presented the case. Even the costs savings contended for are given no context.

Conclusion

6.68. LGB service personnel were disproportionately affected by the loss of choice of substitute service accommodation imposed on those entitled to single substitute service accommodation and were disadvantaged by the lack of choice. That was the particular disadvantage. The Claimant was put at that disadvantage. In the absence of justification, that is indirect discrimination.

6.69. The Respondent has failed to justify the change. No business need has been demonstrated. We cannot identify the legitimate aim, beyond cost savings. It cannot be shown that the change was appropriate and reasonably necessary, or that any objective was important enough to justify it. There was no enquiry or reasoned analysis. There was no consideration of alternatives. It cannot be shown that the means chosen were proportionate, no more than necessary to accomplish the objective, or that the needs of the Claimant and the Respondent have been properly balanced.

6.70. In the absence of any business objective for changing the system in place, save for the indications pointing at a costs-based objective, we are satisfied that this

was simply about costs. It was a cost-driven rule change introduced without recognition that some would be disproportionately adversely affected.

6.71. The only reason for the change, on the evidence is cost. That is not a sufficient basis to justify the discriminatory outcome.

6.72. Even were the costs-based nature of the objective sufficient to amount to legal justification, which we do not accept, the evidence we have is so modest and leaves so many questions unanswered that it must fail to meet the required standard. We are not told what prompted reconsideration of the offer system. The figure for costs that we have stands alone. There is no exercise considering other ways of saving costs or any information about an overall budget, or budget reduction. The cost saving cited does not of itself justify the discriminatory effect.

6.73. The removal of choice of substitute service accommodation was discriminatory. LGB personnel and the Claimant were put at a particular disadvantage. It was a decision driven by cost, without adequate analysis. The Respondent has failed to show justification.

6.74. The Claimant has been discriminated against in relation to his protected characteristic, sexual orientation.

Employment Judge Street

Date: 6 October 2021

Judgment & reasons sent to parties: 2 November 2021

FOR THE TRIBUNAL OFFICE