



# EMPLOYMENT TRIBUNALS

**Claimant:** CD

**Respondent:** The Chief Constable of Staffordshire Police

**Heard at:** Birmingham      **On:** 6,7,8 & 9 January 2020 and 24 February 2020 (Panel only)

**Before:** Employment Judge Miller  
Ms S Campbell  
Miss LS Clark

## Representation

Claimant: In person

Respondent: Mr E Gold - counsel

# RESERVED JUDGMENT

1. The Claimant's claim that he was subject to direct discrimination because of his disability under s13 Equality Act 2010 is unsuccessful and is dismissed.
2. The Claimant's claim that he was subject to indirect discrimination in relation to disability under s19 Equality Act 2010 is unsuccessful and is dismissed.
3. The Claimant's claim that he was subject to unfavourable treatment because of something arising in consequence of his disability contrary to s15 Equality Act 2010 is unsuccessful and is dismissed.
4. The Claimant's claim that the respondent failed to make reasonable adjustments contrary to s21 Equality Act 2010 is unsuccessful and is dismissed.

# REASONS

## Introduction

1. The Claimant, referred to in this judgment as CD, is a disabled person.

His disabilities are Asperger's Syndrome and dyslexia. The Respondent, the Chief Constable of Staffordshire Police is a Police Force.

2. This was a claim brought by the Claimant who applied for a position as a Police Officer (both as a Constable and a Special Constable) with the Respondent. The Claimant's applications were refused at the first "vetting" stage in respect of both applications.
3. By a claim form dated 19 November 2018, the Claimant brought claims of disability discrimination and claims under the Human Rights Act.

### **Issues**

4. At a Case Management Hearing on the 8 April 2019 it was recorded that the Claimant intended to make an application to amend his claim to include a complaint under Section 15 of the Equality Act. That application was subsequently made, and it was granted by Employment Judge Algazy QC on 28 November 2019. In the same Judgment, the Claimant's Human Rights Act claim was dismissed on withdrawal.
5. The matters to be decided are those set out in the appended List of Issues and relate to
  - a. direct discrimination because of disability under s13 Equality Act 2010;
  - b. indirect discrimination in relation to disability under s19 Equality Act 2010;
  - c. discrimination arising from disability under s15 Equality Act 2010; and
  - d. failure to make reasonable adjustments under ss20 and 21 Equality Act 2010.

### **The Hearing and preliminary issues**

6. On 28 November 2019, Employment Judge Algazy QC made an Order under Rule 50(3)(b) of the Employment Tribunal Rules 2013 to the effect that the Claimant's identity should be anonymised in any published documentation of the Tribunal. Employment Judge Algazy QC refused an Order under Rule 50(3)(a), a Restricted Reporting Order, and no such application was renewed before us at the final hearing. It was agreed however, that the Claimant would be referred to as "CD" during the course of the proceedings, and that his name and address would not be disclosed at any time at which there were observers in the Hearing who were not known to the Claimant.
7. Shortly before the hearing, on 3 January 2020, the Respondent sent to the Claimant its skeleton argument and a bundle of authorities, the skeleton argument running to 20 pages and the bundle of authorities running to over 600 pages. Initially, it appeared that the Claimant's Solicitors had stopped acting for him shortly before the Hearing, so that he was suddenly left to deal with matters by himself. However, it transpired that the Claimant had always expected and intended to

represent himself. The Claimant made an application to postpone proceedings to deal with the new bundle of documents sent by the Respondent on 3 January 2020, but that application was refused for reasons given at the time.

8. It was acknowledged and accepted that the Claimant has Asperger's syndrome and dyslexia. The Claimant referred to his disabilities in this way although sometimes he referred to his disability as autism. It was agreed that the Claimant would require adjustments throughout the course of the Hearing. These took the form of regular breaks, additional time to prepare questions and submissions and, in response to the Respondent's skeleton argument and large bundle of authorities, it was agreed that the Claimant would have time to prepare written submissions at the conclusion of the Hearing. Specifically, the Respondent would prepare written submissions within two weeks of the conclusion of the hearing and send them to the Claimant and the Tribunal, and the Claimant would then have a further four weeks to prepare and submit his own written submissions in order that he could have an appropriate time to deal with the matters arising.
9. The Claimant also applied for an Order that the Respondent's witnesses be excluded from the proceedings while he and other witnesses gave evidence in order to not contaminate the evidence that they would give. The Claimant's application to have the Respondent's witnesses excluded while the Claimant gave evidence was refused for reasons given at the hearing. We ordered, with the agreement of the Respondent, that the second of the Respondent's two witnesses shall remain outside the tribunal room while the first gave evidence.
10. In terms of evidence, the Claimant prepared a witness statement and gave evidence. The Respondent had two witnesses:
  - a. Mr Jonathan Gupta, Head of Vetting for the Respondent; and
  - b. Detective Superintendent Jason O'Toole who was Head of Professional Standards for the Respondent at the time of the Claimant's applications.
11. Each of the Respondent's witnesses produced a witness statement and gave evidence. Mr Gupta gave evidence first and Detective Superintendent O'Toole waited outside the hearing room while Mr Gupta gave his evidence. We also had an agreed bundle of evidence of 362 pages. The Claimant also brought a letter from a consultant psychiatrist, Dr Sema, dated 8 August 2016.
12. In respect of the medical evidence brought by the Claimant, Mr Gold asserted on a number of occasions that the evidence brought by the Claimant was inadmissible. The Claimant had produced the letter referred to above and in the bundle were two reports in relation to his disabilities:
  - a. A confidential psychological report about the Claimant's dyslexia, in two parts, dated 24 June 1997, when the Claimant was around 11

- years old;
- b. An assessment report produced by Liverpool Asperger's Team (part of the Mersey Care NHS Trust) relating to the Claimant's Asperger's syndrome dated 7 November 2008 – the report being 12 years old at the date of the hearing
13. We refer to rule 41 of the Employment Tribunal Rules of Procedure 2013 which provides that the Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts. We confirmed to the parties that the medical evidence brought by the Claimant is admissible. However, we note the Respondent's representations about it – it's age and the fact that it does not relate specifically to the matters in dispute in these proceedings. We confirmed to the parties that we will give that evidence appropriate weight in all the circumstances.
14. Finally, in respect of the conduct of the hearing, we set out the time each witness had to give evidence.
15. The Claimant gave evidence, including being cross examined, from 2.20pm on the second day (7 January 2020) until 4.20pm on the same day. We then adjourned to the following day (8 January 2020) and in the morning, the Claimant was given the opportunity to address any points that came up in cross examination (effectively re-examining himself). This finished at 11.45 am.
16. Mr Gupta, the Respondent's witness who made the initial decision to refuse the Claimant at the vetting stage, gave evidence from 11.50am on 8 January 2020. It quickly became apparent that the Claimant did not have copies of the Respondent's witness statements, although they had been exchanged some time previously. The Respondent provided a spare copy and we adjourned early for lunch to enable the Claimant to read the Respondent's witness statements. We also agreed that we would adjourn for 15 minutes after the first Respondent's witness to allow the Claimant to re-familiarise himself with the second witness' statement.
17. We asked the Claimant how long he thought he would need to question the Respondent's witnesses and he indicated that he did not have very many questions and was confident he would finish both witnesses by 4pm that day.
18. We therefore set a timetable to the effect that the Claimant would question Mr Gupta from 1pm until 2.45 pm, then have a 15-minute break and question Detective Superintendent O'Toole until 4pm. This was because Detective Superintendent O'Toole was not available the following day and the Respondent's preferred witness order was for him to go second.
19. In the event, the Claimant did not finish questioning Mr Gupta until approximately 3.20pm and there was a short re-examination. We considered whether the Claimant would still have time to question Detective Superintendent O'Toole that day if we carried on slightly later

than usual, but it was clear that he would not. Detective Superintendent O'Toole was able to rearrange matters so that he could attend the following morning and we therefore adjourned to enable the Claimant to prepare focused questions for Detective Superintendent O'Toole the following day. We imposed a time limit until 12.00 for the Claimant's questions for Detective Superintendent O'Toole.

20. Detective Superintendent O'Toole's evidence, including re-examination and questions from the tribunal, started at 10am on Thursday 9 January and was concluded by 12.30pm.
21. It came to the Tribunal's attention on 28 January 2020 that the Claimant had shortly after the hearing on 9 January 2020 sent an email to the Tribunal asking that the Respondent be asked to answer further questions. We refused that application for reasons that are set out in a separate Case Management Order.
22. The Claimant also sent in further correspondence relating to his medical reports. This correspondence did not include an application although the Respondent objected to it. The entirety of the email submitted was said to be from the Dudley and Walsall Mental Health Partnership NHS Trust and said:

"Many thanks for your email. This patient has an existing diagnosis of ASD, this diagnosis would not become out of date. As we are a diagnostic service only we are unable to accept this referral"
23. The Claimant's disability of Asperger's Syndrome is agreed by the Respondent and this email does not provide any additional evidence relevant to the matters to be decided. We have therefore not relied on it at all in making our decision.

## **Findings**

24. The facts in this case are limited and we make the following findings. We have only made such findings as are necessary to determine the issues in this case. Where matters of fact are disputed, we have made a decision on the balance of probabilities.

## **The arrest and investigation**

25. The substance of the Claimant's claim relates to two separate incidents: (1) his arrest and investigation and (2) his application to join the police. The issues relating to the Claimant's arrest and investigation are recorded on the Police National Database (PND). Except where stated otherwise, the findings set out in respect of that are taken from the PND.
26. We made it clear to the Claimant in the hearing and repeat it here that the Tribunal does not and cannot make any findings about the correctness or otherwise of the allegations leading to his arrest. It is clear that the matters recorded in the PND were relied on by Mr Gupta in his vetting decision. The findings that we make in relation to the

Claimant's arrest are therefore only findings of what was recorded in the PND, they are not to be taken as findings of anything else.

27. In January 2016, allegations about the Claimant came to the attention of the Metropolitan Police. The specific allegations were that a complainant "attended at a police office with her mother...to report that she was being groomed by and older male via social media. For 7 months she was engaging in conversation with a male she met via Instagram, [CD]. [The complainant] repeatedly informed this male she was only 14 years of age, however he continued to contact her and the conversations very soon became sexual with him encouraging her to talk dirty to him and send images (She has only ever admitted sending a photograph of her wearing a bikini)". It also records that the Claimant's phone number was seen on an itemised telephone bill at the complainant's home.
28. The Claimant was arrested on 22 March 2016 in relation to these allegations. The Claimant answered "no comment" to questions put to him by the police in an interview under caution on the same date. The Claimant was accompanied by a legal representative and an Appropriate Adult at that interview.
29. The Claimant's iPhone and iPad were seized on 22 March 2016. It is recorded in the PND that on 23 March 2016 the Claimant declined to give the police the passwords to enable access to those devices. Further enquires were undertaken by the police which included forensic analysis of the iPhone and iPad and the police writing to the Claimant's then solicitor on or around 17 June 2016 asking again for the passwords. The PND records the correspondence as saying "Your client declined to provide the password in interview. I am now asking for the password again".
30. On or around 23 June 2016 the Claimant's then solicitor replied saying:

"[CD] states that he cannot remember the pin number for his phone because it has been so long since he used it.

He has Autism Spectrum Disorder and Asperger's Syndrome. He understands that the phone may be broken by police to gain access to it".
31. The police were able to obtain access to the Claimant's devices and download some files. The police recorded on the PND that the Claimant had communicated with the complainant via Snapchat, that his communications mentioned his genitalia and what he would like to do to the complainant in a sexual manner. However, the officer concerned considered that the behaviour fell short of any of the offences of incitement or grooming.
32. The Claimant remained on bail for about a year then a decision was made not to re-bail him.
33. The case was referred to the CPS and on 20 October 2017 it appears

that a decision was taken that “There is insufficient evidence to prosecute for an offence of grooming at the moment”.

### **The Claimant’s applications to join the Police**

34. On or around 5 or 11 October 2018, the Claimant submitted applications to be a Police Constable and a Special Constable with the Respondent.
35. Prior to submitting his applications, the Claimant attended an Open Day for prospective candidates. Although the Claimant could not remember the date of this open day, an email provided shows that it was on 4 October 2018. He said that he spoke to a few people – maybe Kerry Edge, the Claimant said – of the Respondent’s HR department and asked for reasonable adjustments because he struggled with trying to apply. The Claimant said that Kerry Edge told him to fill in the application and give it to them. The Claimant said, in cross examination, that he had told Kerry Edge that he had ‘disabilities’ and ‘issues’ (these are the Claimant’s words) at that open day. This was not mentioned in the Claimant’s witness statement and Kerry Edge did not give evidence. The Claimant did not assert that he had told Kerry Edge that his disabilities caused him any difficulties with his memory. We note, however, that Kerry Edge has had some email communication with the Claimant in which he asked for feedback on his application (see below) and from the context it is reasonably clear that Kerry Edge worked in an HR capacity.
36. We find that the Claimant did have this conversation with Kerry Edge at the Open Day prior to him submitting his applications. An email from the Claimant to Kerry Edge of 1 October 2018 suggests they have spoken previously, and this was not substantively disputed by the Respondent. However, we find that his discussions with Kerry Edge concerned assistance in completing the application form and attending interviews as explained in cross examination by the Claimant.
37. In his application for to be a Police Constable, the Claimant disclosed 3 driving offences (speeding), ticked the box to say that he did not have any impending prosecutions and ticked the box to say that he had been involved in a criminal investigation. He was required to provide further details and wrote “I was arrested in March 2016 by the Met Police under section 10 of the Sexual Offences Act 2003. No further action was taken. I deny the allegations”.
38. On the same form, the Claimant ticked the box confirming that he has a disability. In the box underneath that it says  
  
“In support of your application, please let us know whether there are any reasonable adjustments that you feel need to be considered to assist you with the application or recruitment process.  
  
Reasonable adjustments will vary between each stage, so will be best to ask on each stage”
39. The application form to be a Special Constable was not as detailed. It

asked, "Do you have any criminal convictions?" and the Claimant answered, "Only 9 points on driving licence". On the same form, the Claimant ticked a box to confirm that he has a disability and wrote next to it "Asperger's Syndrome/Dyslexia".

### The Vetting Scheme

40. As part of the application process, the Respondent operates a vetting procedure.
41. The vetting procedure is the first stage in the assessment of suitability for applicants to be police officers. None of the witnesses set out in their statements any detail of the recruitment process, but vetting is one of the first stages of the application process. Detective Superintendent O'Toole said that the process is along the lines of early vetting followed by academic and physical tests and medical clearance. We are not concerned with the later stages of the recruitment process, only the initial vetting process.
42. Mr Gupta gave an explanation of the background and purpose of vetting in his witness statement. He explained that the Association of Chief Police Officers published the National Vetting Policy the police community (NVP) in around 2004. The Association of Chief police officers was replaced by the National police Chiefs Council (NPCC) in 2015.
43. The NVP was the first national guidance provided to the police in respect of "police vetting". Mr Gupta says "This was developed following a number of corruption and other misconduct cases, where it was found that there were early indicators of potential risk areas which had not been assessed during the recruitment or subsequent service of the officers subject of investigation. The NVP was intended to act as a guidance document for all forces to follow to establish a minimum standard across the police service in terms of the level and extent of vetting enquiries and decision making. It recommended the establishment of a dedicated vetting resource to ensure that meaningful risk assessments were carried out in relation to serving force personnel, those looking to join the force and those working in partnership with the force, such as other agencies, government bodies and contractors. This resulted in Staffordshire police creating the role of Force Vetting Officer."
44. Mr Gupta also explains that between 2006 and 2010 he was involved in revising the NVP which resulted in the publication of the third version in 2010. There was a further review of the NVP in 2012 which Mr Gupta describes as "a light touch review" which made updates relating to amendments to statute and working practices. Mr Gupta also refers to the "code of ethics" which he describes as a code for the principles and standards of professional behaviour within the police service. The aim of the code of ethics is, unsurprisingly, to help police deliver a high professional standard of service.
45. The Vetting Code of Practice ("the Code") dated October 2017 is



included in the bundle. The introduction to the Code says:

“1.1 Everyone in the police service, leaders in particular, must maintain high ethical and professional standards and act with the utmost integrity. This is crucial in ensuring public confidence in the service is maintained.

1.2 It is essential that the public is confident that police vetting processes are effective in identifying those who pose a potential risk to others or who are otherwise unsuitable for working within the police service.

1.3 Vetting is an integral part of the police force’s framework of ethics and professional standards. It assists with identifying individuals who are unsuitable to work within the police service, or to have access to police assets. This includes people who are unsuitable through criminal activity or association, those who have a demonstrable lack of honesty whose previous behaviour has been inconsistent with the code of ethics, and those who are financially vulnerable.”

46. Mr Gupta also says in his witness statement that “Abuse of authority for sexual gain is identified as a key threat to police services...From experience, there is evidence of a link between those who are appointed to the police service after being investigated for sexual offences, going onto engage in serious corruption in the form of abuse of position”. He then provides an example of a case in which this occurred.
47. The Claimant accepted in cross examination the need for “background checks” for Police Officers. In fact, in his witness statement, the Claimant says “I believe the police are widely corrupt and that is one of the many reasons why I wanted to join the police to make a change and a difference. So that the police will effectively do their job better”. He also referred to some case studies in the bundle produced by the Independent Police Complaints Commission. These case studies provided examples of a number of Police officers who had abused their position as Police Officers to facilitate the perpetration of sexual offences including facilitating access to vulnerable children.
48. The purpose of vetting is, we find, clearly to ensure that those people who pose a potential risk, either because they are involved in, or may be involved in criminal activity or who are vulnerable to corruption because of debt or other vulnerabilities, are not appointed to be Police Officers.

### **The First Vetting Decision**

49. The Claimant’s application was referred to Mr Gupta for vetting because, he says, the Claimant had disclosed his driving convictions. Mr Gupta said that it is standard procedure to undertake an initial vetting check (IVC) where relevant matters are declared. It was not asserted by the Claimant that the referral was for any other reason.
50. Mr Gupta looked at the Police National Computer and the Police National Database to, he says, enable an informed decision to be made rather than relying solely on the declared information. His enquiries revealed

the information set out above under “The Arrest and Investigation” (paragraphs 25 to 33).

51. Mr Gupta then said that he assessed the Claimant’s application in accordance with the Code and the Authorised Professional Practice (“APP”), specifically, the test at paragraph 7.26.1 of the APP. The APP sets out more detailed guidance on the application of the Code and the Code is to be read in conjunction with the APP. The applicability of the Code and the APP to the Claimant was not disputed.

52. 7.26 says:

7.26.1 Where information and intelligence relates to the applicant, forces should apply a two stage test:

1 Are there reasonable grounds for suspecting that the applicant, a family member or other relevant associate:

- Is or has been involved in criminal activity
- Has financial vulnerabilities (applicant only)
- Is or has been subject to any adverse information?

2 If so, is it appropriate, in all the circumstances, to refuse vetting clearance?

7.26.2 The existence of criminal convictions would clearly indicate reasonable grounds for concluding that the applicant is, or has been, involved in criminal activity. Intelligence and other non-conviction information may also lead to reasonable grounds for suspecting involvement in criminal activity.

7.26.3 Forces should assess such information on a case-by-case basis, taking into account the exact circumstances of the case and nature of the information revealed.

53. Mr Gupta said in his statement that he took into account the following factors:

- a. “The currency of the information – the allegation was made in 2016 and therefore, in my opinion, I considered it to be a recent allegation given that the Claimant’s application was made in October 2018
- b. The nature of the allegation – sexual offences are considered to constitute serious corruption and are identified as key threats to the police service
- c. The lack of co-operation by the Claimant during the investigation
- d. The established links between those who are investigated for, but not convicted of sexual offences an abuse of authority
- e. The level of risk applied to abuse of authority and predatory sexual behaviour”.

54. Mr Gupta then says that he applied 7.26.1 of the APP and concluded that

the information in the PND report led him to believe that the Claimant had been involved in criminal activity.

55. Mr Gupta agreed that he was aware of the Claimant's disability at the time that he considered the Claimant's application as it was listed on the Claimant's application form and referred to in the PND report. Mr Gupta said that he did not consider it: the facts of the case did not warrant passing it to the Force Medical Officer.
56. It was put to Mr Gupta that disability having been flagged, he should have made further enquiries. Mr Gupta's response was that he assessed the Claimant's application in accordance with the Code. He said that he did not consider the Claimant's disability – only the allegation made against the Claimant and the fact that it was outstanding. When it was put to Mr Gupta that he did not enquire whether the Claimant's disability was a factor in the investigation by the Claimant, Mr Gupta said "The issue of sexualised behaviour and abuse of authority for sexual gain is a key identified threat. The severity of the circumstances and of any allegation of sexual abuse from an applicant where the case has not been answered is considered so serious that in the circumstances it is highly unlikely that any external circumstances would overcome the potential risk".
57. It is clear, in our judgment, that Mr Gupta did know that the Claimant was disabled and did not make any enquiries into any impact the Claimant's disability might have had on vetting process. However, Mr Gupta said that he was unaware that there was a link between the Claimant's memory and his disability at the time he made his decision. We accept that Mr Gupta did not have actual knowledge of any link between the Claimant's disability and any memory problems for the simple reason that the Claimant had not told Mr Gupta or explicitly referred to it anywhere prior to that point. In fact, there was no direct communication between the Claimant and Mr Gupta before Mr Gupta made his decision to refuse the Claimant's vetting clearance.
58. It is also clear, that Mr Gupta considered that the circumstances of the Claimant's arrest and the allegations made against him were so serious that he could not anticipate that anything the Claimant might have said about his disability could have changed his mind.
59. In cross examination Mr Gupta said that he made a decision not to conduct an interview with the Claimant or put the allegations to him as he considered that there would be no value in doing so. When asked about the possibility of the Claimant explaining his disability, and the impact that has on him, Mr Gupta said "Notwithstanding any impact disability has on you, the fact is that an allegation that is still outstanding poses a magnitude of potential risk and I would not grant clearance".
60. Later on, Mr Gupta said in respect of the allegations "nothing save irrefutable evidence deeming it (meaning the allegation) to be groundless would be sufficient mitigation to allow vetting to go".

61. In respect specifically of the issue relating to the failure to provide passwords, the Claimant put it to Mr Gupta that as he had no link between his memory loss and his disability his decision making was hindered – he ought to have investigated this. Again, Mr Gupta disputed this and said that the level of risk was so high that in order to pass the vetting, they would need to see irrefutable evidence that the allegations were unfounded. He also said that the non-remembering of passwords was a small point in a greater issue.
62. In fact, Mr Gupta repeated on a number of occasions that the fact of the allegations, along with credible supporting evidence meant that the Claimant presented such a risk that nothing short of overwhelming proof that the allegations were unfounded would be sufficient to enable the Claimant past the vetting stage.
63. Mr Gupta also referred to paragraph 7.30 of the APP. This says
- “7.30.1 Where the vetting decision is based solely on untested allegations (recorded in the form of intelligence), forces should put the allegations to the applicant and allow them to respond. This can be done by way of a face-to-face interview, telephone interview or letter.
- 7.30.2 Forces must take care where revealing the allegations could reveal a source, threaten the wellbeing of a third party or compromise an operation or investigation. In such circumstances, forces should make the vetting decision without giving the vetting applicant the chance to respond.
- 7,30.3 Where forces decide not to put the information to the vetting subject, they should record the rationale on for doing this on the vetting file”.
64. We were also referred to paragraph 7.24.16 and 7.24.17 which says
- “7.24.16 Interviewing Applicants**
- 7.24.17 Applicants may be interviewed where necessary in order to clarify queries, ambiguities or concerns during the vetting process”.
65. The Claimant said that, effectively, these provisions mean that as he was not convicted, he should have been invited to a meeting to provide an explanation. Detective Superintendent O’Toole said that section 24 referred to other force intelligence. The matters recorded in the PND were not, in his view, intelligence, they were “facts on the PND”.
66. In our judgment, the policy does provide for the opportunity to address concerns with an applicant, whether that is under 7.24.17 by way of a meeting or 7.30 which includes a possible meeting or other contact methods. We find that Mr Gupta was not prevented by the Respondent’s policy from contacting the Claimant to discuss his application but that he chose not to.

67. This first vetting stage was completed by 16 October 2018.

**Communicating the outcome of the vetting check**

68. The Claimant was not party to this decision-making process at the time.

69. The Claimant received an email from Kerry Edge on 16 October 2018 at 1.51pm. The email in its entirety says:

“Thanks for taking the time to complete the application, which I have reviewed.

All applicants need to go through our initial paper sift process. In cases where a declaration is made under the Criminal Histories section, our vetting department will assess the applicant’s suitability. I have been advised by them that there are some concerns and therefore we are unable to progress your application further”.

70. We note that not only does this email not provide any explanation about how or why the decision was made, it conspicuously fails to invite requests for further information, confer a right of appeal or identify any way to challenge the decision.

71. The Claimant replied to that email about an hour later at 14:54. Again, we set out the email in its entirety:

“Thank you for your email. In conversation I understood you would provide feedback relating to my competency questionnaire. I still don’t understand where I’m going wrong and appreciate the support you offered.

In respect of the criminal history, could you clarify if this is down to my traffic offences or in relation to having been arrested in the past.

If it relates to being arrested I should kindly remind you under Article 6 of the Human Rights act 1998 provides that every person is presumed innocent until proven guilty and that it would be discriminatory under the Equality Act 2010 to have a practice, policy or rule which applies to everyone in the same way, but it has a worse effect on some people than others. I am aware serving Police Officers have been arrested before but no further action has taken place and remain employed. Therefore I would expect recruitment would follow a similar course of action.

Kindly I would still appreciate the feedback and clarify hopefully that I would not be treated less favourably than others”.

72. We note that although the Claimant refers to the Equality Act, he does not specify on what basis it might apply to him in this email. This correspondence is with Kerry Edge, who the Claimant said he discussed his disability with at the applicant day.

73. Kerry Edge replied on the same date at 15:40. She says “Due to the

confidential nature of this I have not been advised of the reason not to progress your application. In light of this I have passed your query to the head of our vetting department to advise you accordingly”.

74. The email to Jonathan Gupta to which Kerry Edge refers (assuming it was forwarded by email) was not included in the bundle. However, the following day on 17 October 2013 at 9:30 AM Jonathan Gupta emailed the Claimant. He said:

“I am able to confirm that the decision to discontinue your application has been made following a review of the declared arrest and investigation in 2016. I can further confirm that this decision has been made in accordance with the College of Policing Vetting Code of Practice.

You do have the right to appeal. Should you wish to do so, you should submit an email within the next 21 days. [An email address is provided] The appeal should be based on one or more of the following grounds:

- Further information is available which has not been considered
- The decision is disproportionate considering the details of the case
- The decision is perverse or unreasonable
- No explanation has been given for the decision

As part of the appeal, you will need to explain why the grounds apply to your case”.

75. The Claimant responded on the same day at 10:29am. He refers to number of matters then says

“There is nothing within the Code of Practice that states a person with no criminal convictions has been arrested and subsequently no further action has been taken can be prevented from seeking employment to become a police officer. I feel that the decision is unreasonable or perverse that I’m being stigmatised from stereotypical and prejudicial views. It goes without saying and should be reminded of the case of Sir Cliff Richard v BBC and South Yorkshire Police [2018] EWHC 1837 (Ch).

I don’t quite understand why Jonathan you have requested me to limit my scope of reasons to appeal. But kindly I am entitled to invoke the Human Rights Act 1998 Article 6 par 2 which provides “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.

This includes being arrested with no further action being taken. I believe the decision is also indirectly discriminatory to my disability.”

76. We note that this correspondence dealt with the Claimant’s application to be a Police Constable. For the sake of completeness, the Claimant was notified that his application to be a special constable was also refused on 17 October 2018. No detail as to the reasons that he had failed vetting clearance were given in respect of that application either.

### **Mr Gupta’s Appeal Report**

77. Following receipt of this appeal Mr Gupta then prepared a brief report setting out the reasons for his decision for consideration by Detective

Supt O'Toole. We will not set out the whole of that report, but it refers to the information referred to above relating to the Claimant's arrest and the subsequent investigation. Mr Gupta sets out in two short paragraphs his rationale for his decision. He says:

"Having reviewed the PND record in full, the matter was not progressed due to evidential issues as well as the victim's mental health and the potential for a court trial to have a negative effect on her mental state.

Vetting clearance has been withheld due to the assessed level of potential risk in [the Claimant] being appointed as a Constable. A very serious allegation has been made against [the Claimant] and he has elected to enable negative inferences to be drawn from that allegation by providing a 'no-comment' interview.

78. Mr Gupta refers to the appeal and says, "His grounds for claiming discrimination are unclear."
79. Mr Gupta then provides a recommendation to Detective Superintendent O'Toole. He says

"Based on the information available, there is a prima facie credible allegation of offences against a child. [The Claimant] has refused to engage in the criminal investigation. As he has a law degree, he should be fully aware that his no-comment interview would have negative consequences for him in future, had the matter progressed.

Whilst the matter has not been progressed criminally, on the balance of probabilities, I believe there is sufficient evidence to suggest that [the Claimant] engaged in some form of activity which means that he will be unsuitable for appointment as a police officer.

I therefore recommend that the appeal be dismissed."

80. In our judgment, the Claimant's failure to cooperate with the investigation, and specifically providing a no comment interview, had a material impact on Mr Gupta's decision to firstly refuse the Claimant at the vetting stage and secondly recommend that his appeal was not upheld. We do not accept that it was reasonable for Mr Gupta to conclude that the Claimant ought to have realised that giving a no comment interview would potentially impact on any future application to be a police officer. The statutory drawing of negative inferences applies to criminal proceedings, and we accept the Claimant's evidence that he was in a state of high stress during his investigation and interview. In our view it is extremely unlikely that that Claimant would have been considering the impact of a no comment interview on any potential future applications to be a police officer while being interviewed about a potentially very serious criminal offence
81. An extract from the PND included in this report to Detective Superintendent O'Toole includes reference to both the no comment interview and the Claimant's failure to provide passwords for his devices

to enable the Police to access them as part of their investigation. However, the Claimant's failure to provide passwords is not referred to in either Mr Gupta's rationale for his decision or in his recommendation that the appeal be dismissed except insofar as it says "the Claimant has refused to engage in the criminal investigation".

82. This is reflected in Mr Gupta's witness statement, and which he repeated in cross examination, when he says that the non-provision of passwords is only a relatively small matter in his decision and that the no comment interview was of much greater significance. He refers to the code of ethics which requires that officers must act with honesty and integrity at all times.
83. Having regard to the evidence Mr Gupta gave in his witness statement, his evidence in cross examination, the contemporaneous report and the obvious importance of reducing the risk of and from corruption (which includes sexual offending) in the Police, in our view the reason the Claimant failed the Vetting process at the first stage was because Mr Gupta decided that the fact of the allegations and the additional information that was available on the PND report as a result of the investigation demonstrated that the Claimant was unsuitable to be a Police Officer. The reason he believed he was unsuitable to be a Police Officer was because, as set out in his report, he believed "there is sufficient evidence to suggest that [the Claimant] engaged in some form of activity which means that he will be unsuitable for appointment as a police officer".
84. We note here that none of this detail was communicated to the Claimant at the time of his application.

#### **Detective Superintendent O'Toole's Decision on Appeal**

85. Detective Superintendent O'Toole refused the Claimant's appeal. He relied solely on the report provided by Mr Gupta to make his decision. In his statement he said that he considered the appeal based on the documents provided which were the report provided by Mr Gupta and the Claimant's appeal emails. Although Mr Gupta said that he sent the PND report to Detective Superintendent O'Toole said that he had never seen it and Mr Gupta, when pressed, said he would have to check his emails to be sure. On the balance of probabilities, we find that Detective Superintendent O'Toole did not review the PND report before making his decision on the appeal.
86. In his witness statement, Detective Superintendent O'Toole said that he could not recall if he was aware of the nature of the Claimant's disability and he repeated that in cross examination. However, he did have the Claimant's appeal email which refers to disability discrimination, so he was aware that at the very least the Claimant perceived himself to be disabled. Detective Superintendent O'Toole did not make any further enquiries about the nature or extent of the Claimant's disabilities. He said he could not remember talking to Mr Gupta about the appeal although he may have done.



87. We find that Detective Superintendent O'Toole did not make any enquiries at all about the Claimant's disabilities. Detective Superintendent O'Toole said that his appeal decision had nothing to do with disability and he could not see how it was discriminatory. This, in our view, demonstrates that Detective Superintendent O'Toole did not apply his mind to the question of whether the claimant was disabled and what, if any, impact that might have had on the application and vetting process. In our judgment, Detective Superintendent O'Toole had no good reason for not making further enquiries of Mr Gupta or the Claimant about the Claimant's disability.

88. Detective Superintendent O'Toole communicated his appeal decision to Mr Gupta the following day on 18 October at 14.03. We set out the email in its entirety as it is very brief:

"Jon I have reviewed the documentation and agree that clearance should be withheld.

7.16 of the APP deals with this aspect where we have information, and as such there would be an obvious risk to the organisation if clearance was granted on the known information.

We could of course further interview [the Claimant] but I do not see it would take us any further forward"

89. In our view this email does not provide adequate reasons for Detective Superintendent O'Toole's decision not to allow the appeal although we note that it does refer to the possibility of an interview. In any event, even this brief email was not sent to the Claimant, I was sent to Mr Gupta who then communicated the outcome of the appeal to the Claimant. Mr Gupta's email to the Claimant does not make any reference to the possibility of a meeting and nor does it provide any information or justification for the decision on appeal.

90. In respect of a meeting, however, Detective Superintendent O'Toole said in cross examination that he could not see any circumstances where an interview or meeting would change the outcome. He said it was "...not discriminatory, just facts of PND record in relation to alleged sexual offending. I still can't see anything that would change my mind". In his witness statement, Detective Superintendent O'Toole said, in respect of his consideration of Mr Gupta's decision "I did consider that the Claimant appeared not to have supported the investigation into the offence, although even if he had done so my decision would have been the same".

91. Detective Superintendent O'Toole was unequivocal in his assessment of the Claimant's suitability to be a Police Constable and consistent in his view. We find that the reason for his decision was that Detective Superintendent O'Toole accepted Mr Gupta's assessment of the information in the PND and that caused genuine and well-founded concerns that the Claimant had possibly committed an offence.

92. Detective Superintendent O'Toole also said in his witness statement,
- “Whilst I considered a vetting interview of the Claimant, I could not see any circumstances where this would change the decision to decline vetting and as such viewed undertaking an interview as without merit. Under the circumstances as known regardless of the Claimant’s vetting interview account I believe vetting would still have been declined, as the events as recorded could not be mitigated to such an extent as to show they couldn’t have happened for the purpose of vetting clearance, such information would be the police investigation concluding that the alleged offence could not have occurred...Within the case of the Claimant’s circumstances I could not justify granting clearance when there was information relating to an alleged sexual offence against a child”
93. We asked the Claimant what difference an interview would have made given the apparent evidence against him. He said that he would have sought to explain his disability, but he did not say anything that would, given the approach of the Respondent’s witnesses, have come close to demonstrating conclusively that he was not guilty of the offence. When asked what he would have said in an interview, the Claimant said he could have expanded more, he could have talked about his disability, and been assisted through the appeal process. When asked what he would have said to the Respondent to persuade them to change their minds about vetting he said he would have expanded on how his memory had an impact. He said he had never seen the PND – the Respondent could have told him what it contained, and he could have corrected the facts.
94. We accept the evidence of Detective Superintendent O'Toole that an interview with the Claimant would not have altered the outcome of the vetting assessment. The requirements of the Respondent were clear – nothing short of exculpatory evidence wholly exonerating the Claimant would suffice to alter their decision – and the Claimant did not say in evidence that he would be able or willing to provide such evidence. We find, therefore, that had the Claimant attended an interview, it would not have made any difference to the vetting decision
95. The Claimant also explained the impact of the arrest on him, how he said it had made him unwell and that the arrest was harrowing, frightening and he had never been in such a position before.
96. We have no difficulty in accepting that this was the case – most people would find being arrested for an offence against a child to be a distressing and traumatic experience whether the arrest was justified or not. However, the feelings and experiences of the Claimant arising as a consequence of his arrest and investigation cannot realistically have any bearing on the Respondent’s vetting decision.

**Impact of the Claimant’s disability on his memory.**

97. It was agreed by the Respondent that the Claimant was, at the relevant time, disabled by reason of Asperger’s Syndrome and dyslexia. It is not

conceded that either or both of these impairments impact on the Claimant's memory.

98. Mr Gold asserted that the medical evidence provided by the Claimant was not admissible. As set out above, this is not correct. However, we are required to give appropriate weight to it. The medical evidence we had took the form of a Psychological Report prepared by Ms Boyd, a Chartered Educational Psychologist when the Claimant was aged 11 years and 9 months relating to the Claimant's diagnosis of dyslexia; and an Assessment Report prepared by Mr A Barlow of the Liverpool Asperger's Team in respect of the Claimant's diagnosis of Asperger's Syndrome. The second report was prepared in 2008.
99. Although these reports are both very old, there is some evidence of memory impairment. The Educational Psychologist's report identifies weakness in auditory and visual recall. The Claimant also identifies memory problems in his disability impact statement, and this was not substantively challenged by the Respondent.
100. Although we note that this medical report is of some age, we are prepared to accept the Claimant's evidence that he has some memory impairments. We do not, however, accept that the reason the Claimant did not provide his password at the interview under caution was because he could not remember it for the following reasons.
101. The PND records that the Claimant "declined" to provide the password, rather than it being part of the no comment interview or that he couldn't remember it.
102. In cross examination, the Claimant agreed that he had used his iPhone password on a number of occasions to access his phone without difficulty and he did not need to make a note of the password. In fact, he specifically said that he uses his "noggin" rather than writing them down.
103. In an email from his solicitor in June 2016 in response to further police enquiries, the Claimant's solicitor said that he could not remember his password because he had not used it for a long time, rather than because of his disabilities. The Claimant said in cross examination that he could not recall whether he spoke to his solicitor about memory problems. However, the email from the Claimant's solicitor refers to the Claimant forgetting his password due to lack of use. It also says that the Claimant has Asperger's and Dyslexia, but it does not say that the Claimant's inability to recall the password is in anyway linked to his disability. Given the potential importance of establishing such a link to reduce the possibility or impact of an adverse inference being drawn in any subsequent criminal proceedings, we find, on the balance of probabilities, that the Claimant did not say to his solicitor that his inability to remember this password was linked to his disability.
104. In our view, and again on the balance of probabilities, the Claimant would have mentioned this connection had it actually been the case at the time. We find, therefore, that the reason the Claimant did not provide his

passwords was not related to his disability of either Asperger's Syndrome or Dyslexia and, particularly, his disability did not cause him to forget his password.

## Law

### Jurisdiction

105. Section 39(1) and (5) Equality Act 2010 say

- (1) An employer (A) must not discriminate against a person (B)—
  - (a) in the arrangements A makes for deciding to whom to offer employment;
  - (b) as to the terms on which A offers B employment;
  - (c) by not offering B employment.

...

- (5) A duty to make reasonable adjustments applies to an employer.

106. Section 42 (1)(a) provides that for the purposes of this part, holding the office of constable is to be treated as employment by the chief officer, in respect of any act done by the chief officer in relation to a constable or the appointment of a constable.

### Direct discrimination because of disability

107. Section 13 Equality Act 2010 says, as far as is relevant

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

...

- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

108. In determining whether A discriminates against B because of a protected characteristic, it is necessary to address simply the question of the factual criteria that determined the decision made by the discriminator. Motive is irrelevant (*R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors* 2010 IRLR 136, SC), the reason why a person acted as he did is a question of fact (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48).

### Discrimination arising from disability

109. Section 15 Equality Act 2010 says:

- (1) A person (A) discriminates against a disabled person (B) if—
  - (a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability

110. In *Secretary of State for Justice, HM Inspectorate of Prisons v Dunn* UKEAT/0234/16/DM, the EAT said at para 49 and 50 (underlining is our emphasis)

*“There are four main elements identified by section 15 that must be established for such a claim. First, there must be unfavourable treatment. No comparison is required. Secondly, there must be something arising in consequence of the disability. Those are ordinary words to be given their natural meaning. The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences are likely to be obvious, such as where the disability causes a Claimant to be ill and absent from work so that absence is a consequence. Others may be less so. It is a question of fact for an employment tribunal to decide whether something does in fact arise in consequence of a Claimant's disability. The third element is that the unfavourable treatment must be because of the something arising in consequence of the disability. As Mr Kirk submits, this involves a consideration of the thought processes of the putative discriminator in all but the most obvious cases in order to determine whether the something arising in consequence of the disability operated on the mind of the putative discriminator, whether consciously or subconsciously, at least to a significant extent (see paragraph 17 of *IPC Media Ltd v Millar* ). If so, the treatment will have been because of the "something" even if there were other reasons for the impugned treatment.*

*Finally, unfavourable treatment because of something arising in consequence of disability will not amount to unlawful discrimination if the alleged discriminator can show that the treatment is a proportionate means of achieving a legitimate aim and therefore justified”.*

111. It was further held at paragraph 54 that

*“We agree with [the Respondent's counsel] that motive is irrelevant. Nonetheless, the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability. As we have said, it need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely*

*to be necessary”.*

112. In the context, therefore, of the Claimant’s claim that he failed the vetting process because, as the Claimant asserts, he could not remember his iPhone and iPad passwords or PIN numbers, we need to consider whether something arose in consequence of the Claimant’s disabilities of Asperger’s Syndrome and/or Dyslexia and, if it did, the extent to which this “something” operated on the minds of the Mr Gupta and Detective Superintendent O’Toole.

### **Indirect discrimination**

113. Section 19 of the Equality ACT 2010 provides

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

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

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

### **Justification**

114. This is relevant to both section 15 and section 19. A claim for indirect discrimination or for discrimination arising from disability will not succeed if the Respondent can show that the otherwise discriminatory acts are a proportionate means of achieving a legitimate aim.

115. This is predominantly a question of fact for the Tribunal (*Mandla (Sewa Singh) And Another v Dowell Lee And Others* [1983] I.C.R. 385) but we refer to relevant provisions of the EHRC Employment Code. Paragraph 4.28 states:

“The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence”

116. Paragraph 4.30 says

“Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the

legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts

117. In respect of the potential justification of unfavourable treatment, Mr Gold made submissions about the historic and constitutional nature of the office of constable. We refer to the Police (Conduct) Regulations 2012, made under s 50(3) of the Police Act 1996 which sets out a statutory scheme for the disciplining and removal of constables. This provides that

Without prejudice to the powers conferred by this section, regulations under this section shall—

(a) establish, or

(b) make provision for the establishment of,

procedures for the taking of disciplinary proceedings in respect of the conduct, efficiency and effectiveness of members of police forces, including procedures for cases in which such persons may be dealt with by dismissal.

118. It is clear from the operation of this subsection and the conduct regulations made under it that constables cannot be removed from their offices without undergoing a formal and lengthy disciplinary process.

119. Section 13 of the Police Act 1996 empowers the Chief Constable to appoint officers to any rank below that of Assistant Chief Constable in accordance with the Police Regulations 2003. Regulation 10 of those regulations sets out a number of requirements relating to the character and general competence of candidates for appointment to a police force, from which it is clear that an officer is required to be of satisfactory character and have a minimum level of competence.

120. Finally, we were referred to the declaration set out in schedule 4 of the Police Act 1996 that each Constable is required by virtue of section 29 to make. This says

'I . . . . . of . . . . . do solemnly and sincerely declare and affirm that I will well and truly serve the Queen in the office of constable, with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all people; and that I will, to the best of my power, cause the peace to be kept and preserved and prevent all offences against people and property; and that while I continue to hold the said office I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully according to law.'

121. In our view these provisions together require the Chief Constable to ensure that every person who is appointed to the office of Constable is of satisfactory character such that they will be able to honestly make that

declaration.

### Comparators

122. Section 23 Equality Act 2010 (comparison by reference to circumstances) provides

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

(a) on a comparison for the purposes of section 13, the protected characteristic is disability;

123. The identification of the “pool” of comparators is a question of logic for the Tribunal (*Allonby v Accrington and Rossendale College and Others* [2000] ICR 1189). Where, in respect of direct discrimination, no actual comparator has been identified, it is incumbent on the Tribunal to consider a hypothetical comparator (*Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* 2002 ICR 646, CA).

### Reasonable adjustments

124. Section 20 – Duty to make adjustments says

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

125. In respect of the effect of the PCP in comparison with a person who is not disabled, the Court of Appeal in *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160 said the proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements and that the duty under s20 arises once there is evidence that the arrangements placed the disabled person at a disadvantage.

126. In respect of the potential effectiveness of a proposed adjustment, in *Noor v Foreign and Commonwealth Office* [2011] ICR 695 the EAT held



“35. The purpose of the reasonable adjustment is to prevent the provision, criterion or practice from placing the disabled person at a substantial disadvantage: this follows from the wording of [section 4A](#) .

36. If the substantial disadvantage arises from arrangements for interview (see [section 4\(1\)\(a\)](#) of the 1995 Act) and relates to the ability of the disabled person (compared to persons who are not disabled) to perform in interview for a job, then the purpose of the reasonable adjustment is to remove that disadvantage—in other words, to eliminate the practical difficulty and embarrassment which the provision, criterion or practice has caused and create a level playing field for the disabled person in interview. If a reasonable adjustment should have been made for this purpose it is not fatal to the disabled person’s case that he or she would still not have obtained the job”

127. Section 21 – Failure to comply with duty says

- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

128. Paragraph 20 of Schedule 8 of the Equality Act 2010 provides

- (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
  - (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
  - (b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.
- (2) An applicant is, in relation to the description of A specified in the first column of the table, a person of a description specified in the second column (and the reference to a potential applicant is to be construed accordingly).

<i>Description of A</i>	<i>Applicant</i>
An employer	An applicant for employment

129. Paragraph 20(b) requires that in order to be subject to the requirement to make reasonable adjustments, the employer must either know or be reasonably expected to know that the applicant was both disabled and likely to be placed at the relevant disadvantage.

**Burden of proof**

130. Section 136 Equality Act 2010 provides

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

131. In *Madarassy v Nomura International plc* [2007] IRLR 246, the court of Appeal held that “*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*”

## Conclusions

132. We now consider the claims as set out in the list of issues

### Direct discrimination

133. It is not in disputed that the Claimant failed the vetting process

134. In respect of “less favourable treatment”, the Claimant has not brought any evidence as to any hypothetical comparator. The clear evidence from the Respondent’s witnesses was that they treated all applicants the same. Every applicant was subjected to vetting and we accepted that evidence. We have also accepted the evidence of Mr Gupta and Detective Superintendent O’Toole that any applicant who had been arrested on suspicion of a sexual offence against a child and in respect of whom there was no compelling evidence to show that the applicant had not committed the offence would fail vetting.

135. Having regard to the guidance in *Balamoody* as to the wisdom of considering a comparator, we identify an appropriate hypothetical comparator on the basis of the Respondent’s evidence as a non-disabled applicant for the role of Constable who had been arrested on suspicion of grooming a child for sexual purposes and who had failed to provide access to their iPhone or iPad.

136. It is clear that the Claimant was not treated less favourably than a hypothetical comparator. We have found as a fact that the reason for the treatment complained of was that information in the PND report led Mr Gupta (and subsequently Detective Superintendent O’Toole) to believe that the Claimant had been involved in criminal activity of a serious nature. This was sufficient to fail the vetting process in accordance with the Code and the APP. We did not accept that the Claimant could not remember his passwords and, consequently, the circumstances of his failing the vetting were wholly unconnected with the Claimant’s disability.

### Indirect disability discrimination

137. It is uncontroversial that the Respondent had the PCP of the application of the College of Policing - Vetting Code of Practice ("the Code") and the Authorised Professional Practice on Vetting (APP). In particular, paragraph 7.26 of the APP was applied to the Claimant on his application to become a Constable. This required the Respondent to consider whether there were reasonable grounds for suspecting that the Claimant is or has been involved in criminal activity and, if so, whether it was appropriate in *all the circumstances* to refuse vetting. Paragraph 7.26.6 required the Respondent to assess such information on a case-by-case basis, taking into account the exact circumstances of the case and nature of the information revealed.
138. As discussed above, this PCP was applied to all applicants including those who are not disabled.
139. We do not accept that the PCP put persons with whom the Claimant shares the characteristic, at one or more particular disadvantages when compared with persons with whom the Claimant does not share the characteristic.
140. The Claimant's case was brought on the basis that his inability to remember passwords meant that he failed the vetting process, namely that he was unable to respond to questions about his passwords put to him when he was arrested because of memory problems and was therefore less likely to pass the vetting procedure. However, we accepted the evidence of Mr Gupta that there was other evidence giving reasonable grounds for suspecting that the Claimant had committed criminal acts and particularly evidence of communication with the complainant. We accepted that the failure to provide passwords had very little impact on the decision to fail vetting and specifically we note Detective Superintendent O'Toole's evidence that full co-operation with the police in interview would not have resulted in a different decision.
141. Consequently, the PCP would not put people who shared the Claimant's disability, in so far as it caused an inability to remember passwords, to a particular disadvantage. In respect of the Claimant specifically, we also find that the Claimant was not put to a disadvantage by the PCP for the additional reason that we have found that the Claimant was not unable to remember the passwords for his iPad or iPhone.
142. In any event, we would hold that the PCP is a proportionate means of achieving a legitimate aim. The legitimate aim is twofold – firstly the protection of members of the public from the risk of police corruption and, in this particular case, the risk of sexual exploitation of vulnerable members of the public by Police Officers. This accords with the legitimate aim referred to above of protecting the health, safety and welfare of individuals. Secondly, but linked, the aim of appointing only those Police Officers who are suitable to hold the office as described above.
143. We consider further that the application of the PCP is a proportionate means of achieving that aim. The impact of appointing an offender as a Police Officer is very significant – the potential consequences of a

predatory criminal potentially occupying a position of trust such as a Police Constable are obvious and serious. We are satisfied that all of the circumstances were taken into account but adopting a cautious approach to the appointment of Constables is, in our judgment, proportionate to the potential risk.

### Reasonable adjustments

144. The same findings in respect of the application of the PCP to the Claimant apply as set out in respect of indirect discrimination above. In summary, the PCP was applied to the Claimant, but the application of the PCP did not put the Claimant at a substantial disadvantage in comparison with people who are not disabled.
145. In respect of the identification of the comparators as far as that is necessary, applying the guidance in *Griffiths*, the comparator group is those people who apply for the position of Constable, having been arrested and subject to an investigation, but who do not have a memory impairment. Although we have found as a fact that the Claimant was not prevented from disclosing his password as a result of a memory impairment, this was how the Claimant put his claim. However, we have also found that the failure to disclose his passwords did not have a significant impact on the decision not to allow the Claimant to pass the vetting stage of his application – the overriding reason for the Claimant's failure to pass the vetting stage was the evidence on which the allegation was based.
146. Even if, therefore, the Claimant had been prevented from disclosing his password because of a memory impairment, this would not have put him at a substantial disadvantage compared to applicants who had been arrested but were able to remember their passwords.
147. Although it is not in the circumstances necessary, we address the Claimant's suggested reasonable adjustment – namely that he should have been given the opportunity to give his account of events following his arrest.
148. The APP and the Code do give the option to invite an applicant for an interview. The evidence of Mr Gupta was that there was nothing the Claimant could say in an interview that would change his mind and the Claimant was unable to explain to us what he could have said to change the Respondent's mind. We have considered *Noor v Foreign and Commonwealth Office*. It is not necessary, in the case of an application for a job, for the adjustment to enable the applicant to get the job above other applicants – it is sufficient if it levels the playing field. Potentially, therefore, an interview might have been an appropriate adjustment to overcome any disadvantage that did arise from any inability of the Claimant to recall his passwords.
149. However, given both that we have found that the Claimant was not subject to any substantial disadvantage and that he would not have been able to say anything that would have made a difference to his application we find that it would not, subject to what we say below, have been

reasonable for the Respondent to take the step of inviting the Claimant to an interview. It would, in the event, have been pointless.

150. The final issue in respect of reasonable adjustments is the Respondent's knowledge. It was accepted that the Respondent had knowledge of the Claimant's disability but we have found that the Claimant had not communicated his alleged memory impairment to the Respondent – either in the person of Mr Gupta or Ms Edge – so that the Respondent did not have actual knowledge of the impact of the Claimant's disability and the disadvantage to which he said it subjected him in the vetting process.
151. We note, however, that it would have been appropriate for the Respondent to invite the Claimant for an interview once it was on notice of his disability in order to understand the impact of his disability on him. Had we found that the Claimant was prevented from disclosing his password because of memory problems related to his disability, it is likely that we would have found that the Respondent could reasonably have been expected to know that the Claimant's disability would put him at a substantial disadvantage. Put simply, when it found out about the Claimant's disabilities, the Respondent should have asked the Claimant how they affected him.

#### **Discrimination arising from disability**

152. It is agreed that the Claimant was treated unfavourably in that the Respondent declined to advance his application when he failed vetting.
153. However, as discussed above, in our judgment this was not because of something arising in consequence of the Claimant's disability. This is for two reasons: firstly, the Claimant did not fail the vetting process because he did not disclose his passwords. This was a small factor and we have found that the Claimant would have failed in any event because of the other evidence; secondly we have found that the Claimant was not unable to remember his password so that this was not in fact something arising in consequence of his disability.
154. In any event, for the reasons set out above in respect of indirect discrimination, we would find that failing the Claimant's vetting process was a proportionate means of achieving a legitimate aim.
155. For the reasons set out above, therefore, the Claimant's claims of direct and indirect disability discrimination, a failure to make reasonable adjustments and discrimination arising from disability are unsuccessful.

#### **Final comments**

156. We have found that throughout the vetting process, the communication with the Claimant by the Respondent was not adequate. At no stage was the Claimant given either an explanation of why he had failed vetting or an opportunity to explain any potential impacts of his disabilities on him. Detective Inspector O'Toole recognised this in the hearing. Although we have not found in favour of the Claimant, and in fact better communication with the Claimant is unlikely to have changed the

outcome for the Claimant in his application, a more detailed explanation at the outset may well have avoided the need for these proceedings.

Employment Judge Miller  
10 March 2020

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

**Appendix – list of issues**

*EQA, section 13: direct discrimination because of disability*

(i) It is not in dispute that the Respondent subjected the Claimant to the following treatment:

a. failing the vetting process

(ii) Was that treatment “less favourable treatment”, i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances? The Claimant relies on hypothetical comparators.

(iii) If so, was this because of the Claimant’s disability and/or because of the protected characteristic of disability more generally?

*EQA, section 19: indirect disability discrimination*

(iv) A “PCP” is a provision, criterion or practice. Did the Respondent have the following PCP(s):

a. the application to him of the College of Policing -Vetting Code of Practice(“the Code”) and the Authorised Professional Practice on Vetting (APP). The Respondent accepts paragraph 6.13.1 of the APP was applied to the Claimant and will provide details of the relevant paragraphs of the Code applied to him?

(v) Did the Respondent apply the PCP to the Claimant at any relevant time?

(vi) Did the Respondent apply (or would the Respondent have applied) the PCP(s) to persons with whom the Claimant does not share the characteristic?

(vii) Did the PCP put persons with whom the Claimant shares the characteristic, at one or more particular disadvantages when compared with [persons with whom the Claimant does not share the characteristic, namely that he was unable to respond to questions about his passwords put to him when he was arrested

because of memory problems and was therefore less likely to pass the vetting procedure.

(viii) Did the PCP put the Claimant at that/those disadvantage(s) at any relevant time?

(ix) If so, has the Respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim? The Respondent has not pleaded its legitimate aims

*Reasonable adjustments: EQA, sections 20 & 21*

(x) Did the Respondent not know and could it not reasonably have been expected to know the Claimant was a disabled person?

(xi) A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP(s):

a. the application to him of the College of Policing -Vetting Code of Practice ("the Code") and the Authorised Professional Practice on Vetting (APP). The Respondent accepts paragraph 6.13.1 of the APP was applied to the Claimant and will provide details of the relevant paragraphs of the Code applied to him?

(xii) Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

(xiii) If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

(xiv) If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The burden of proof does not lie on the Claimant, however it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:

a. for the Claimant to have been asked for an account of events when he had been arrested/interviewed

(xv) If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

*EQA, section 15: discrimination arising from disability*

(xvi) Did the following thing(s) arise in consequence of the Claimant's disability:

a. the Claimant's inability in an earlier police interview in March 2016 to remember the passwords to his iPhone and iPad

(xvii) Did the Respondent treat the Claimant unfavourably as follows:

a. by declining to advance his Police Constable/Special Police Constable applications when he failed to pass vetting?

(xviii) Did the Respondent treat the Claimant unfavourably in any of those ways because it had regard to the fact that the Claimant stated in an earlier police interview in March 2016 that he could not remember the passwords to his iPhone and iPad

(xix) If so, has the Respondent shown that declining to advance his Police Constable/Special Police Constable applications when he failed to pass vetting was a proportionate means of achieving a legitimate aim?