



EMPLOYMENT TRIBUNALS

Claimant
Mr S Karim

v

Respondent
The Commissioner Of Police
Of The Metropolis

Heard at: Central London Employment Tribunal

On: 10- 14, 17 October 2022 & 4 November 2022
25, 28 November 2022 (In Chambers)

Before: Employment Judge Brown

Members: Mr G Bishop
Mr D Shaw

Appearances:

For the Claimant: Mr A Crammond, Counsel
For the Respondents: Mr G Powell, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Respondent subjected the Claimant to discrimination arising from disability by dismissing him.
2. The Respondent failed to make reasonable adjustments on account of the Claimant's disability by failing to:
 - a. Pay the full cost of enhanced in-ear hearing aids, at any time before the Claimant was dismissed;
 - b. Pay for the insurance of those enhanced in-ear hearing aids;
 - c. Allow the Claimant to continue in his role, once the enhanced hearing aids had been provided, rather than putting him in non-operational roles;

- d. Provide the Claimant with refresher operational training and failing to allow him to practise operational duties with his enhanced hearing aids and make any necessary adjustments to his hearing aids, before he undertook the “at works test”;
 - e. Allow the Claimant more than one opportunity to undertake the “at works test” before making a decision to dismiss him.
3. The Respondent subjected the Claimant to indirect disability discrimination.
 4. If the Respondent had acted lawfully, it was 40 % likely that the Claimant would have failed his probation and have been dismissed in any event.
 5. The Respondent did not directly discriminate against the Claimant because of disability.
 6. There will be a remedy hearing for 1 day on 14 April 2023.

REASONS

Preliminary

1. By a claim form presented on 14 December 2021 the Claimant brought complaints of direct and indirect disability discrimination, discrimination arising from disability and failure to make reasonable adjustments, against the Respondent, for whom he had formerly worked as a probationary police officer.
2. The issues in the case had been agreed as follows:

Time/Limitation Issues

1. The Claimant contacted ACAS on 8 October 2021 and an early conciliation certificate was issued on 16 November 2021. The claim form was presented on 14 December 2021. Are any of the Claimant’s claims out of time as they occurred more than 3 months before 9 July 2021?
2. If so:
 - a) was there conduct extending over a period which is to be treated as done at the end of the period? and/or
 - b) further or alternatively, in relation to omissions, the ET shall consider the provisions of section 123(3) and (4):
 - i. Where there is a failure to do something, when did the person in question decide on it?; and
 - ii. In the absence of evidence to the contrary, a person is taken to have decided on it when: when the person does an act inconsistent with doing it, or (b) if

the person does no inconsistent act, on the expiry of the period in which the person might reasonably have been expected to do it;

3. If any complaint was not brought in time would it be just and equitable to extend time?

Causes of Action

4. The Claimant is claiming:

- a) Direct Disability discrimination under s13 and s39(2) Equality Act 2010 (EA 2010);
- b) Indirect Disability discrimination under s19 Equality Act 2010 (EA 2010);
- c) Discrimination arising from disability under s15 Equality Act 2010 (EA 2010); and
- d) Failure to Make Reasonable Adjustments under s20 & 21 Equality Act 2010 (EA 2010);

Disability

5. The Respondent accepts that at the material times, the Claimant met the definition of disability under the Equality Act 2010 by virtue of his hearing impediment.

Direct disability discrimination

6. Did the Respondent subject the Claimant to the following treatment falling within section 39 Equality Act 2010 (EA 2010), namely:
- a) by making the decision to dismiss the Claimant / terminate the Claimant's appointment / probation under Regulation 13 on 12 July 2021; and/or
 - b) by making a stereotypical assumption that the Claimant's hearing impairment rendered him incapable of performing front line duties despite him meeting the medical standard of hearing set by the College of Policing (as per the example provided at paragraph 97(b) of the Grounds of Complaint).
7. If so, did the Respondent treat the Claimant less favourably than it treated or would have treated a hypothetical comparator?
8. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
9. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

Indirect disability discrimination

10. Did the Respondent generally apply a provision, criterion or practice (“PCP”)?

11. What were the alleged PCPs relied on?

- a) the practice of placing probationer officers in purely administrative roles whilst further advice regarding their ability to undertake operational work is sought;
- b) the practice of not providing full financial cover/insurance for disabled officers to obtain necessary equipment through the Access to Work scheme;
- c) the practice of/requirement for disabled officers to undertake an “at works test” with no medical/specialist advice/input in order to determine their fitness to become an officer under Regulation 13;
- d) the practice of requiring / the requirement / expectation to be fit, physically or mentally, to perform the duties of his office and/or to be likely to become an efficient or well conducted constable or superintendent; and/or
- e) the practice of requiring / the requirement / expectation to undertake the full duties of a police officer safely (including the requirement to be fully fit and able to do any and/or all operational / confrontational duties).

12. Did, or would, the Respondent apply the PCPs to other persons with whom the Claimant does not share the same characteristic?

13. Did, or would, the PCPs put disabled people at a particular disadvantage when compared with persons who do not have this protected characteristic? Namely, the disadvantage is that it made it more difficult/impossible for him to complete his probationary period compared to a non-disabled officer.

14. Did the application of the PCP(s) put the Claimant at that disadvantage in that it was made more difficult for the Claimant to pass his probation and/or the Claimant was dismissed / his appointment / probation was terminated on 12 July 2021 and the Claimant was not permitted to complete his probationary period.

15. Can the Respondent show it was a proportionate means of achieving a legitimate aim?

16. What is the legitimate aim relied upon? The Respondent contends that her legitimate aims were to:

- a) Ensure that probationer police constables are properly trained in order to be physically and mentally fit to perform the duties of a police constable, as required by the Police Regulations 2003; and
- b) Ensuring so far as possible the safety of the people of London and the police officers deployed to protect them, including the Claimant.

Discrimination arising from disability

17. Was the Claimant treated unfavourably because of something arising in consequence of their disability? The 'something arising' is the Respondent's concerns about the Claimant's ability to safely carry out the full duties of an operational officer and/or the need to undertake a risk assessment / "at works test" and/or the Claimant's alleged failure to properly perform / pass the "at works test". Based on the reasons given by the Respondent for terminating the Claimant's probation (paragraphs 15.1 to 15.3 of the Grounds of Resistance), does the Respondent accept that this is the 'something arising' in consequence of the Claimant's disability?
18. The Claimant alleges the act of unfavourable treatment was the Respondent's decision to dismiss him under Regulation 13 on 12 July 2021 following the results from the "at works test".
19. Can the Respondent show that the Claimant's dismissal was a proportionate means of achieving a legitimate aim?
20. What is the legitimate aim relied upon? The Respondent contends that her legitimate aims were to:
- a) Ensure that probationer police constables are properly trained in order to be physically and mentally fit to perform the duties of a police constable, as required by the Police Regulations 2003; and
 - b) Ensuring so far as possible the safety of the people of London and the police officers deployed to protect them, including the Claimant.

Failure to make reasonable adjustments

21. Did the Respondent generally apply a provision, criterion or practice ("PCP")? The

Claimant relies on the following PCPs:

- a) the practice of placing probationer officers in purely administrative roles whilst further advice regarding their ability to undertake operational work is sought;
- b) the practice of not providing full financial cover/insurance for disabled officers to obtain necessary equipment through the Access to Work scheme;
- c) the practice/requirement for disabled officers to undertake an "at works test" with no medical/specialist advice/input in order to determine their fitness to become an officer under Regulation 13; and/or

d) the practice of requiring / the requirement / expectation to be fit, physically or mentally, to perform the duties of his office and/or to be likely to become an efficient or well conducted constable or superintendent; and/or

e) the practice of requiring / the requirement / expectation to undertake the full duties of a police officer safely (including the requirement to be fully fit and able to do any and/or all operational / confrontational duties).

22. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled because it was made more difficult/impossible for him to complete his probationary period compared to a non-disabled officer?

23. Did the Respondent fail to take such steps as were reasonable, in all the circumstances of the case, for it to have to take in order to avoid the disadvantages?

24. What reasonable steps does the Claimant allege the Respondent should have taken?

The Claimant contends, inter alia, that the following adjustments (whether made individually and/or collectively and/or in any combination of the same) would have been reasonable but were not made:

a) allowing the Claimant to continue his role (and/or passing his probation period);

b) allowing the Claimant to undertake operational duties whether with or without restrictions and/or a phased return to operational duties with specific training on the skills that he has lost following his time in an administrative role;

c) placing the Claimant into restricted operational roles rather than purely administrative roles so that he could continue to work towards his SOROC whilst on restricted duties;

d) providing the Claimant with additional support and financial cover so that he could more quickly obtain hearing equipment and/or identifying and obtaining the hearing equipment needed and ordering this at the start of his probationary period;

e) properly consulting with medical experts and fully considering whether the hearing equipment was fit for purpose and what adjustments could be put in place to allow the Claimant to return to operational duties before making a final decision under Regulation 13;

f) providing the Claimant with the assistance of another police officer (and when on operational duties) as it is understood that it is very common for officers to be sent out on operational duties in pairs;

g) obtaining adjustments such as hearing aids / equipment and/or undertaking training / guidance and/or implementing the recommendations of Access to

Work and/or other OH guidance and/or doing so more timeously than was undertaken;

h) allowing the Claimant and/or providing support and/or training (including taking part in operational training exercises) to the Claimant to allow him to undertake operational duties and/or to practice operational duties with all equipment / aids provided to him and/or providing sufficient time to practice / train / adjust on the same prior to undertaking the “at works test”;

i) allowing the Claimant the opportunity to practise the “at works test” itself and/or more than one opportunity to undertake the same prior to making a decision to dismiss and/or terminate the Claimant’s probation / appointment;

j) providing more and/or sufficient notice of the “at works test”, including as to when it was going to happen and/or the detail of the expectations and/or requirements of the same and/or guidance and advice as to the same; and/or

k) considering and/or making amendments to the Claimant’s working duties / practices following the outcome of the at work test.

25. Were such steps reasonable and if so, when did it become reasonable to take any such step?

Remedy

26. Is the Claimant entitled to receive compensation?

27. If so, what sum?

28. Has the Claimant mitigated their loss?

29. Is the Claimant entitled to a declaration that the Respondent has treated him unlawfully by way of discrimination?

30. Should a recommendation be made by the Tribunal?

3. This hearing was to consider liability only.
4. The Tribunal raised the issue of *Polkey/Chagger* with the parties at the outset of the hearing. *Polkey/Chagger* issues did not appear in the list of issues, but the witness statements appeared to contain evidence addressing whether the Respondent would have dismissed the Claimant, in any event, for a non-discriminatory reason.
5. The parties agreed that the issue of contributory fault did not arise.
6. They also agreed that “*Polkey/Chagger*” issues should be decided at this hearing. The Tribunal agreed that *Polkey/Chagger* issues should be addressed at this hearing, because the facts relevant to those issues also arose in relation to other liability issues.
7. The Tribunal heard evidence from the Claimant, and from Dave Campbell, Chair of the Respondent’s Disability Staff Association (DSA) and Vice President of the Disabled Police Association of England & Wales. For the Respondent, the Tribunal

heard evidence from: Ryan Davenport, an Acting Inspector and the Claimant's line manager in 2018; Jim Bushell, a Police Sergeant who assisted in conducting the 2021 At Works Test for the Claimant; Nicholas Ephgrave, an Assistant Commissioner and the dismissing officer in the case; Craig Banning, a Police Constable who assisted in conducting the 2021 At Works Test; Gareth Davies, a Police Sergeant and the Claimant's line manager from around April 2021 until the Claimant's dismissal; Parmjit Balu, a Police Sergeant who was involved in conducting the 2021 At Works Test; Sarah Pryor, a Human Resources Case Manager ("HRCM") with Shared Services Connected Ltd ("SSCL") providing HR Case Management support services for the Metropolitan Police Service ("MPS"); and Russell Miles, Team Leader for Human Resources Case Managers ("HRCM") with Shared Services Connected Ltd ("SSCL").

8. There was a bundle of documents. The Claimant sought, and the Respondent provided, disclosure of an additional report from Cubex, an independent hearing health provider, which was sent to Dr Ryan, at Optima, the Respondent's Occupational Health doctor, following the Claimant attending an appointment on 30 October 202.
9. The parties made written and oral submissions. The Tribunal reserved its judgment. The parties provided their dates of availability for a provisional remedy hearing.

Relevant Facts

10. The Claimant applied to join Metropolitan Police Service ('MPS') on 21 September 2014 and completed a Medical History Questionnaires on 11 March 2015, p1351.
11. On 17 August 2015, the Claimant underwent an audiology test, p1502, and, on 25 August 2015, the Respondent's Consultant Otolaryngologist wrote a letter confirming that the Claimant's "performance in a free field setting was acceptable in respect of hearing and that, with the aids in situ and functioning, he would be able to function satisfactorily as a Police Constable." P1322.
12. On 30 November 2015 the Claimant commenced as probationer police constable with the MPS.
13. The purpose of the MPS probation period is for the probationer to demonstrate that they are fit, physically and mentally, to perform the duties of a fully operational officer and that they are likely to become an efficient and well-conducted constable.
14. During the MPS 24 month probationary period, a probationer is expected to have successfully completed the entire core competencies set out in their Student Officer Record of Competence (SOROC). SOROCs involve, amongst other things, dealing with people on the street, in confrontational scenarios, and conducting stop and searches. All of these confrontational scenarios require a student officer to be fully deployed and cannot be completed if the probationer is only carrying out adjusted duties in office-based roles.
15. *Regulation 13 Police Regulations 2003* allows for the services of a probationer to be 'dispensed with at any time' during the probationary period if the 'Chief Officer' considers that the probationer is 'not fitted, physically or mentally, to perform the duties of his office, or that he is not likely to become an efficient or well-conducted constable...'.

16. The Claimant was referred to Occupational Health on 25 February 2016 because, “He struggled with .. hearing whilst training outside. He .. had problems with the background a noise, all [that] he could hear on the radio was echoing.” P1491. The Claimant finished training school and joined the Islington Borough Command Unit on 9 March 2016. He was posted in the Property Store, a non-operational role, because his operational Coach Patrol Model (CPM) had been 'paused' until he was assessed to be 'street fit' due to risks raised during his training relating to this hearing aids, p1497.
17. On 15 April 2016, Ms Messer, from Borough Command, asked Dr Neil Weir, an ENT Specialist, to conduct a hearing assessment in a 'live' environment, so that the test replicated the conditions the Claimant would encounter when on Patrol. She specifically mentioned the Claimant having difficulties hearing in a windy environment with traffic in the background.
18. On 6 September 2016, Dr Samantha Phillips, Occupational Health doctor, produced an Occupational Health report, saying that the Claimant had undergone further audiology testing and that his hearing with his hearing aids in the speech frequency range was adequate in a quiet, rather than an operational, environment. She said that the Claimant was, “medically fit for full operational duties if you are satisfied that his hearing is safe in operational settings.” P1504.
19. On the same day, the Claimant was posted to the Safer Neighbourhoods Team at Finsbury Park, p623. From then, until July 2017, he was operational, on patrol with another officer, p1582. Inspector Richard Padwell replied to OH on 25 September 2016, saying that Insp Padwell had carried out a “written risk assessment with control measures and this has enabled PC Karim to maintain his operational status. He currently has to work with at least one other officer as he is in his coached patrol period.” P1507. Inspector Padwell envisaged that the Claimant would visit Thames Valley Police for his hearing to be tested in an operational setting. He asked OH to assist in arranging this, p1507.
20. In January 2017 the Claimant was posted to the Emergency Response Patrol Team ('ERPT') with an attachment to Beat Crime. He was still in an Emergency Response Team when PS Matt Stringer became his line manager in February 2017, p624. PS Stringer posted the Claimant to a station officer role, in the Islington Police Station Front Office, in July 2017, p1516. This role was designated as “restricted duties”, which meant the Claimant did not have contact with suspects or police outside the police station. At the time, PS Stringer noted that the Claimant had raised concerns about his hearing, in that the Claimant received “feedback” if objects came too close to his hearing aids. PS Stringer also noted that he and other colleagues had noticed that the Claimant did not always hear when spoken to. PS Stringer referred the Claimant to Occupational Health and applied, under Regulation 12 Police Regulations 2003, for the Claimant's probationary period to be extended, p1516.
21. On 15 September 2017 Dr Samantha Phillips wrote to PS Stringer, saying she had proposed that the Claimant should have a functional hearing test. She asked for authority to cover the cost of this. She also said, “There may be better in ear hearing aids for him and when we do the functional assessment we want to make sure he has adequate recently checked hearing aids in.” p100. On 11 October 2017 PS Stringer told Dr Phillips that he had secured funding for the functional test, p99.

22. By 6 November 2017 the Claimant had completed 24 “Student Officer Record of Competence” (“SOROCs”), but 16 were outstanding, p149. His 2 year probation period would have come to an end on 29 November 2017. However, a Regulation 12 Conference was held in respect of him and, on 8 November 2017, AC Hewitt authorised an extension of the Claimant’s probation until 29 November 2018.
23. On 17 January 2018 Dr Phillips, OH doctor, provided another report on the Claimant. She advised that the 2 adjustments which might help the Claimant remain in his role were: “1. To have in ear good quality hearing aids 2. To have a functional assessment to determine whether he is able to hear adequately to undertake the role.” She said that it was a business decision as to whether funding the adjustments was reasonable or not. She said that HR should advise on the provision of hearing aids. She pointed out that there would be a cost implication to the delay in the Claimant completing his probation and being unable to be deployed on his own. She said that the costs of the adjustments “need to be weighed against this.” She also said that she had suggested to the Claimant that he could contact Access to Work, to see if they would help with the funding. P1537.
24. On 24 January PS Stringer emailed HR, saying, “1 - As an organisation, do we pay wholly or partly for the In Ear Hearing Tests. 2 - If the decision is yes, how do we source these, i.e. is it the MPS/OH or Shafi's responsibility to source? 3 - Who would be responsible for the ongoing maintenance? 4 - If the responsibility to fund the hearing aids is our responsibility as an organisation and the decision was made not to fund them, who would make that decision and where do we stand legally under the Equality Act in making that decision. As I said on the phone earlier, the date proposed for the functional hearing test is 09/02/2018. I would not be comfortable in Shafi conducting this test without good in ear hearing aids worn as per Dr Phillips' reasonable adjustment recommendation.” P1440.
25. On 25 January 2018, Russell Miles, at HR, emailed Occupational Health with the title, “Special hearing aids – PC Shafi Karim”. He said, We understand Shafi already uses hearing aids (which we understand to be of a “standard” specification) □ We understand there are superior higher spec hearing aids available, which might be suitable for Shafi so that he can complete his probation and satisfy officer safety concerns (for both his probation and service into the future). □ We understand there are at least two types of “superior” hearing aids – one is an “in ear” type and one is an “implant “. This is where we get stuck.. □ We need to help line management assess whether providing either of these pieces of equipment is a “reasonable” adjustment. As we’ve discussed many times before of course, for an “adjustment” to be “reasonable” it was to work ! ..and cost is also a factor in the “reasonable” test. □ It seems obvious there will be maintenance/periodic replacement costs for any piece of audio equipment /hearing aids , but we don’t know what they are or who we could ask. Shafi’s line management have arranged a hearing test with Sussex police because they are able to offer a more comprehensive hearing test. A date is booked for this, however we understand Shafi should have higher spec hearing aids for this test, so it might be sensible to postpone this test (we understand the cost is app £300).” P1439.
26. In February 2018 PS Ryan Davenport became the Claimant’s line manager.
27. On 4 February 2018, PS Stringer provided a handover note on the Claimant to PS Davenport, p166. This included the following comments on the Claimant and his

hearing, "I restricted him to police within confines of the station and not to have contact with suspects, due to officer safety concerns. I referred him to OH where he has seen Dr Phillips again. She has recommended [2] reasonable adjustments which are to have the functional hearing test and to use "in ear" hearing aids. I have secured funding from the borough (about £900) for the hearing test with Thames Valley Police. It was arranged for the 9 th Feb but I have postponed it temporarily. ... Shafi was advised to go to Access to Work to get funding for the hearing aids, but was told he would have to pay 2/7 th contribution and the question of ongoing maintenance and who will pay for that was not made clear. Shafi did not want to do the hearing test without the in ear hearing aids so as not to disadvantage him. ... Under the Equality Act, we have to consider reasonable adjustment to comply with the act. I would suggest that if the decision to not supply in ear hearing aids is made, it should be done by senior HR, senior ranks and after consultation with the DLS." P166

28. On 3 March 2018 PS Davenport told the Claimant to obtain quotes for hearing aids and to make an 'Access to Work' application for financial support, giving him a deadline set of 19 March 2018, p196. He said that the Claimant would have to pay a contribution towards the equipment.

"... you also state that you do not wish to pay for costs for enhanced high end kit (either upfront or ongoing maintenance). ... I do think it is unrealistic of you to expect all costs to be ultimately covered by the MPS and 'access to work' or any other agency with no contribution by yourself. ... as with anything in life (should we want better than what we may typically qualify for ...) then there is an expectation that there will be a contribution to made towards any such item. Should you decide to make such a contribution it would no doubt legitimise any claim you are likely to have for wearing these new hearing aids outside of work.

If you have no intention of making any financial contribution and are already aware this will be necessary ... then we can at least progress this matter with your current hearing aids." P196.

29. The Tribunal considered that PS Davenport made clear to the Claimant that, if the Claimant did not pay for 2/7 of the enhanced in ear hearing aids, the Claimant would not be provided with the enhanced in ear hearing aids.

30. It appeared that the Claimant was in communication with Access to Work around this time and that Access to Work suggested a cheaper equipment option, a Roger Pen bundle, for the Claimant to use at work. The Roger Pen would act as a microphone which would enhance the sound in the Claimant's hearing aids.

31. On 19 March 2018 the Claimant said that the best decision would be to wear his current NHS hearing aids in combination with bolt-ons from the hearing aid companies, p195.

32. On 30 March 2018 the Claimant submitted his Access to Work application.

33. On 21 April 2018 PS Davenport wrote the Claimant, "... can you make sure you give me an answer about your willingness to pay 2/7 for the 'roger pen bundle' equipment by the end of play on 22/04/18. I appreciate it was a 'no' to the 2/7 request re the enhanced hearing aids due to the expense and this is your alternative / final option. If

you're unwilling / unable to contribute (totally understandable) as required by 'access to 'work' can you please let me know by 15:00 on 22/04/18. If you are now willing to contribute (to the roger pen bundle) can you please answer the questions I set, repeated here, again by the end of play (15:00) on 22/04/18. This will allow others to advance your case on your behalf should this be required. - Are you willing to cover the cost of a full replacement should you lose or damage part or all of the device? - Are you willing have the device(s) covered on an insurance policy? - If at any point you no longer work for the MPS, are you willing to return all equipment?" p201.

34. The Claimant agreed to pay for 2/7 the cost of the Roger pen bundle. On 16 May 2018 Claimant attended a meeting with PS Davenport, in which PS Davenport raised concerns about the Claimant's performance and issued an action plan to him. PS Davenport emailed the Claimant on 17 May 2018, saying that the Claimant's performance had deteriorated, p398. On 18 May 2018, the Claimant was signed off work sick by his GP for "stress at work". P170.
35. On 18 July 2018, PS Dawson became the Claimant's line manager. The Claimant briefly returned to work that day, but then was off work, on a further period of sick leave, until 16 September 2018.
36. During part of his period of sick leave, from 18 May 2018 until 18 July 2018, the Claimant was considered Absent Without Leave because Inspector Austin and PS Davenport tried to contact him on a number of occasions, but considered that the Claimant was not cooperating by staying in contact with them, pp 173-185.
37. PS Dawson commenced a Regulation 13 process in respect of the Claimant. That is a process to consider whether a probationer's services should be dispensed with if he is not fit for office. PS Dawson wrote to the Claimant on 1 September 2018, saying that, due to concerns about his performance and attendance, he would be required to attend a Regulation 13 case conference, p137. PS Davenport gathered documents in support of the Regulation 13 process, relating to what he considered were issues with the Claimant's attendance and performance, including the Claimant's sickness record; the Claimant's failure to record crimes accurately; his failure to investigate and progress missing person enquiries; and his failure to request medical attention for victims of crime.
38. The Claimant attended the regulation 13 case conference on 17 September 2018, when DS Davenport raised concerns in relation to his performance and attendance and non-completion of his SOROCs and HYDRAS. On 28 September 2018 the Claimant submitted a grievance, p1296 -1298.
39. On 1 October 2018 PS Dawson wrote to the Claimant, p420-422, 477 – 480, giving him a Regulation 13 Formal Warning Notice regarding his Performance and Attendance. She said, "...the level you have achieved is not acceptable in terms of your likelihood to become an efficient and well conducted constable and you are therefore informed that you must achieve a substantial and consistent improvement in the following areas ... :• Performance • Attendance. Your performance will be reviewed in one month's time. This will give you the opportunity to demonstrate that you are able to perform to an acceptable level".

40. On 21 November 2018 the Claimant's probation was extended for another 6 months to May 2019, p632.
41. The Claimant's grievance outcome was provided on 7 March 2019, p1281. The Grievance Assessor recommended that the Claimant's performance be assessed in isolation going forward, rather than being compared to other officers, and that his disability be considered when decisions were made.
42. On 17 May 2019 AC Ephgrave ordered an extension of Claimant's probation for 3 months until 30 August 2019, on the basis that a functional hearing assessment and the regulation 13 file be completed during that extension. On 23 May 2019 the Claimant was referred to OH again, to ensure that a hearing assessment was undertaken during the extension period, p613.
43. On 9 July 2019 Dr Irons, the Chief Medical Officer, advised that job-related hearing assessments were no longer available through Thames Valley Police, or at the Ryton Police College, p615.
44. Dr Irons referred the Claimant to Cubex, an independent hearing health provider. Cubex tested the Claimant's hearing and sent a report to Dr Irons on 6 August 2019, p1557. It said, "I have advised Mr Karim to continue to follow-up with his NHS audiology department for service of his current hearing technology. Based on Mr Karim's reported and demonstrated hearing and communicative difficulties, he would also benefit from a treatment plan with Cubex. This treatment would be inclusive of upgraded hearing technology that can provide an advantage over his existing technology in more challenging environments, such that he encounters in his role working for the police. While this technology would allow Mr Karim to communicate with less effort, it is important to stress that it would not eliminate all hearing and understanding challenges." P1560. Dr Irons produced a report on the basis of this Cubex report but did not send this to the Respondent because the Claimant did not consent to its release, p1563.
45. The report said, "*What reasonable adjustments can be achieved to support Shafi to be able to fully perform the roles expected of a fully operation police officer?* [Answer] PC Karim is likely to have issues with his hearing working in front line policing for the reasons identified above. It is unlikely that reasonable adjustments could be made to enable PC Karim to conduct the full duties of a Police Officer however this is a management decision. PC Karim would be fit for a role where verbal communications were not safety critical and good hearing is not required for officer safety. Colleagues would benefit from disability awareness training, specifically with regard to hearing impairments. ..The Equality Act is likely to apply. Q2. *Is further Occupational Health intervention likely to be beneficial and recommended i.e. onward referral to specialists or external agencies such as Access to Work.* There is little further OH could achieve. PC Karim could be assessed for more sophisticated hearing aids however these will not completely remove the functional issues that PC Karim has experienced and I cannot predict what level of improvement may be experienced. Funding would be required." P1569.
46. On 9 August 2019 AC Simmons extended Claimant's probation for the fourth time and on 10 December 2019 AC Simmons extended his probation for a fifth time, p682, 697.

47. On 19 December 2019 an Access to Work assessment was carried out on the Claimant while he was in a non-operational role, p707. His Access to Work grant was approved on 18 January 2020, p1575 – 1576. The equipment funded was: “Phonak Roger Pen £498.00 and Training, £480.00, X 02 Band Receiver x2, £1116.00, DAI Shoe x2, £48.00, Telephone Adapter. £24.00, Support Work: Disability Awareness Training. £540.00”.
48. The Claimant was asked, in evidence, how the assessment was carried out. He told the Tribunal that the assessment took place between the adviser and him; he showed the adviser around the building, showing the environment he was working in. The Claimant did not know whether the adviser had separate conversations with the Respondent. None of the Respondent’s witnesses told the Tribunal that the Respondent gave Access to Work any information about the operational or front line policing the Claimant would be expected to undertake in the future. The Respondent’s evidence was that the Respondent had no involvement with the Access to Work assessment, or recommendations for the Claimant’s work at the Respondent.
49. The letter from Access to Work dated 18 January 2020, confirming the equipment approved for the Claimant, said, “If it is expected that the customer will use items at home, a cost share will be charged to them depending on the days worked. Then the employer will be expected to pay the mandatory cost share of £1000 plus 20% of the recommended Special Aids and Equipment.” P1575.
50. In evidence, the Claimant told the Tribunal that he did not use the Access to Work equipment at home, but only used his NHS hearing aids. Nevertheless, he told the Tribunal that he arranged insurance for the Access to Work equipment himself through “Sheila’s Wheels”.
51. On 3 February 2020, PS Russ Speller, the Claimant’s line manager, emailed the Respondent’s Shared Services (HR) at the time, saying amongst other things, “The report indicates that Shafi will require time to learn and adapt to new strategies, techniques and technology. This will no doubt be best completed on Street Duties so he is able to best adapt to the safe operational use of this new equipment as he demonstrates his capability to perform the duties of a constable. The report suggests a period of 3-4 months to adjust to new ways of working. This will need to be factored into any future action plans and discussed at case conference.” PS Speller asked HR to consider whether a new OH referral was necessary. P707.
52. The Access to Work disability awareness training was proposed for the Claimant, as well as for those working with him, p707.
53. On 12 February 2020 Claimant was posted to the North East (NE) BCU with PS Victoria Coughlan as his line manager, p721.
54. On 17 February 2020, Dr Irons advised Sarah Pryor, at the Respondent’s Human Resources provider, that a functional test would still need to be carried out on the Claimant’s hearing in an operational setting, p709.
55. In February / March 2020 the Access to Work order was placed by the Respondent, p728, and the Claimant received the equipment on 17 March 2020, p777-8. There

were delays in the Claimant being trained on how to use his equipment due to covid lockdown that year.

56. Following receipt of the Access to Work equipment, Dr P Ryan, OH doctor, reported on 22 April 2020 p1582-7. He advised that the Claimant was not operational but that the Claimant he was coping with his current office based role with the hearing enabling equipment supplied. He did not identify any other adjustments needed at that time. Dr Ryan advised that the Claimant should be reviewed by OH if there were changes in his role in the workplace, p1586.
57. On 3 June 2020 the Claimant attended a Regulation 12 meeting, p892. PS Coughlin said that there were no concerns about the Claimant's work but that PS Coughlin was unable to say the Claimant was operationally competent and a well rounded officer because he had only completed limited roles, p893.
58. On 11 June 2020 Inspector Lewis Watson emailed Sarah Pryor, at HR and PS Coughlan, amongst others, saying that he had spoken to Officer Safety Training at the Hendon college with a view to devising a plan for the Claimant to complete his officer safety training and start street duties. He said that the Claimant needed to have an equipment induction from the supplier and afterwards, "... we have agreed it is best for Shafi to re-attend the 5 day recruit OST ["Officer Safety Training"] foundation course to achieve a basic level of OST with this equipment so he is completely refreshed in OST & ELS and to ensure fairness that he begins street duties with the same level of OST input as his peers. During the course the instructors will give daily feedback as well as a short minuted debrief with Shafi at the end of the day for self-reflection about how the equipment worked well and any limitations. At the end of the course Paul will provide a review as an SME and with feedback from experienced instructors in relation to his overall performance and the compatibility of the equipment with the frontline role of a police constable. Paul and I were on the same page that the ultimate focus of this is safety; to ensure the safety of PC Karim, his colleagues and the public. Paul has kindly agreed to engage the OST policy unit with a view to involving them in the creation of the OST element of the risk assessment and will likely invite them to view some of the training in action to make a proper assessment of the additional risks posed in using the Phonak roger pen in a confrontational situation and to what extent they can be mitigated. Nick my thoughts are that once this is completed or alongside this you could explore the RA piece around the radio comms and lights/sirens in the van etc? The end product should be a fairly strong patrol risk assessment that details the risks, any mitigations or where the risk cannot reasonably be mitigated to ensure safety. I have stressed to Paul that I think this needs corporate oversight from subject matter experts in regard to OST and that Steve Yeldham in H&S has offered oversight of any RA to provide support. Also, prior to this course Shafi will attend with his LM to meet PS Hoppe and instructors to give a brief introduction to the equipment so it is not a surprise on day one. This will not involve training, simply a chance for PC Karim to demonstrate how the equipment works following his induction."
59. Dr Ryan reported again on 26 June 2020, p902, saying that the Claimant could do office work, non-operational.
60. On 2 July 2020 AC Ephgrave extended the Claimant's probation to 28 August 2020, p912. In a regulation 12 letter to the Claimant, Det Dc Supt, Borough Commander,

Richard Tucker said, "Following a meeting with AC Simmons in December 2019 your probationary period was extended until 30th July 2020. Following your transfer to NE BCU on 12th February 2020 the recommended equipment for workplace adjustments were ordered with delivery on 18th March 2020. However, due to Covid 19 restrictions the required training has not been available and therefore you have been unable to commence operational duties. I understand end user testing is now accessible, and that full testing and risk assessments will now take place under realistic operational conditions to ascertain whether these adjustments are effective and reasonable to enable you to become fully operational as a constable. I am writing to inform you Assistant Commissioner Ephgrave QPM has supported the Borough's recommendation to further extend your probation; therefore your new confirmation date is 28th August 2020. This will allow time for the equipment provided under workplace adjustments to be tested in realistic conditions to determine whether it is effective, safe and reasonable and will allow you to return to full operational duties, or for a fast track Regulation 13 process to be progressed."

61. On 2 July 2020 Sarah Pryor asked Dr Scott, CMO, to refer the Claimant to a private audiologist, p914. She said that the Claimant needed to be seen by an audiologist before he could be trained to use his new equipment.
62. On 6 August 2020 AC Ephgrave extended Claimant's probation to 30 September 2020 – this was the seventh extension of his probationary period, p920
63. On 3-4 September 2020 Dr Scott, CMO referred Claimant to Cubex, a private audiologist, pp924-6.
64. On 18 September 2020 AC Ephgrave extended the Claimant's probation to 30 September 2020 – this was the eighth extension of his probationary period, p937. On 30 October 2020 AC Ephgrave further extended Claimant's probation to 30 November 2020, p939.
65. On 25 September 2020 HR Sarah Pryor told PS Saux that reasonable adjustments needed to be in place before the Claimant could undertake Officer Safety Training / Street Duties, p933.
66. Following a Cubex hearing assessment on 21 September 2020, p1600 – 1602, and a Cubex Safety Critical Assessment review of the Claimant on 30 October 2020, Cubex produced a report on 30 October 2020. It said that the Claimant reported that he struggled when listening on the phone for work. It said, "if you would like us to provide a treatment plan tailored to his role as a Police Constable, please do get in touch and we can provide a treatment plan with technology incorporating direct connectivity to communication device and focused on improving communications over radio/in complex listening environments." (extra document). Attached to that report was the 21 September 2020 hearing assessment report. Its recommendations said, "Based on Mr Karim's reported and demonstrated hearing difficulties and efforts, he would also benefit from a treatment plan with Cubex. This treatment plan would include bilateral hearing devices that would provide a significant advantage over his existing technology in more challenging environments. A quotation was attached to it, giving a cost of £5,960 for hearing aids. p1600.

67. On 1 and 2 October 2020 Dr Alistair Scott, CMO, asked Cubex a number of questions about the Claimant's hearing deficit and Cubex technology, p1372 – 1369. Dr Scott asked: "Please do provide a quote for a 'treatment plan'. It would be helpful if you could outline what you would expect the benefit to be for improving this hearing thresholds vs his NHS hearing aids." Cubex replied: "This will be sent as an attachment. Due to different frequencies being assessed, the overall free field hearing thresholds will be improved with better hearing devices. Our hearing provides stronger and better features such as noise cancellation and better integrity of speech sounds due to faster processing and enhancement of speech sound signals" p1370.

68. On 20 October 2020 Inspector Lewis Watson emailed the Claimant's line manager, Saux, copying in Sarah Pryor at HR. He said,

"...Sarah - I did OST ["Officer Safety Training"] yesterday for the first time in a while due to COVID. Throughout it I considered how it might work for Shafi in conjunction with the Phonak pen. It became very clear to me that Shafi simply is not going to be able to use the Phonak pen to communicate whilst dealing with conflict, search and detention of subjects. We did edged weapon defence where two hands are absolutely required to defend yourself and the public. A knife during a stop and search can be drawn in a matter of seconds, so both hands must be wherever possible, free and available to take control of a subject. ... Therefore OH need to be absolutely clear that his hearing without the phonak device must be of a standard he can safely operate as a frontline police officer and is able to adequately protect himself and the public through officer safety skills, ELS and tactical communication. There are situations in which it simply won't be practicable, safe or even accessible (unexpected, or lost during conflict etc) to use

If OH approve for frontline duties then he would need to pass an OST/ELS and JRFT to be fit for frontline duties. ... Once we know the OH appointment date and expected decision we can arrange an OST course. Worst case if there are no recruit courses he can go on the full refresher at an appropriate RLC." P1645.

69. Dr Ryan produced a further OH report regarding the Claimant on 9 November 2020, p1592 – 1594. This was not released to the Respondent until 22 February 2021. The OH report said, regarding the Claimant's fitness for work and capabilities,

"He has met the medical standard for hearing capacity. In practice, he has confirmed workplace difficulties, as a result, he must be the subject of an 'at work test' or general patrol risk assessment to identify hearing performance gaps... in his day to day working tasks, as these must be addressed through implementation of work adaptations or adjustments. Due to the fact that he will struggle more with work outside, in a non office work, he is more suited to internal office based roles. His 'behind the ear' hearing aids would need to be changed to internal ones for confrontational duties. He will continue to use adaptive equipment recently supplied while on office roles. He is coping with the current working arrangements. ..."

PC Karim is coping in his current role. The adjustments in place are meeting his needs.

"...Following a local 'at work test' he may well identify other areas that need changes. His hearing will not improve so changes need to focus on the work environment."

...

“On completion of his probation, PC Karim, is likely to be assigned to adjusted duties.” P1592.

70. The report was sent to the Claimant on 16 November 2020, p1595.
71. Dr Ryan made notes of his consultation with the Claimant for the purposes of this report. The notes included the following comment, “Hearing aids; behind the ear; last checked early 2020; always used outside ear aids. ‘BTE’. Unaware of offer on internal aids.” P1588.
72. On 19 November 2020 AC Ephgrave extended the Claimant’s probation to 11 January 2021 – this was the tenth Extension, p949. On 5 January 2021 AC Ephgrave extended Claimant’s probation to 28 February 2021 (the eleventh extension), p951.
73. On 22 February 2021 the Claimant attended a further Regulation 13 meeting, when he agreed to disclose Dr Ryan’s 9 November OH report to the Respondent, p985. Sarah Pryor and AC Ephgrave both confirmed, in evidence, that they had seen Dr Ryan’s 9 November 2020 report before the decision to dismiss the Claimant.
74. On 23 March 2021 PS G Davies became the Claimant’s line manager, p944. AC Ephgrave conducted a further Regulation 13 meeting in respect of the Claimant on 19 April 2021. He extended the Claimant’s probation by three months for simulated tests, in operational policing environments, until 28 July 2021. AC Ephgrave told the Tribunal that the purpose of the “At Works Test” was to test the adjustments provided by Access to Work, and whether they were viable in an operational policing environment as suggested in the November OH Report. AC Ephgrave identified 4 tests to be undertaken, pp992 – 999 – 1000.
75. PS G Davies wrote to the Claimant on 20 April 2021, confirming that a further extension had been granted to permit the Claimant to demonstrate his competence, p1002-3. Superintendent Tucker also emailed the Claimant, confirming an extension of his probation until end of July for an operational test to be carried out, p1004.
76. On 22 April 2021 Sarah Pryor emailed the Claimant’s line manager, saying that AC Ephgrave had directed that the Claimant be tested in with the Access to Work equipment, “1. High street patrolling – can PC Karim communicate (hear and speak) on the radio effectively in a noisy High Street environment. 2. Blue light run – can [the Claimant] communicate (hear and speak) on the radio effectively whilst in a vehicle on a blue light run in traffic 3. Chasing suspects – can [the Claimant] communicate (hear and speak) on the radio effectively whilst running. 4. Confrontational – can PC Karim physically deal with a noisy volatile prisoner and communicate effectively throughout on radio to call for assistance etc.” She said that the tests were to take place over one afternoon. She said, “In my meeting with the AC he was very clear that a failure in one is a failure of the whole test.”
77. On 18 May 2021 PS Gareth Davies emailed the Claimant telling him that the “at works test” would take place on 21 May 2021, p1062. He said that this was “short notice” because of logistics with the OST instructors. PS Davies described the tests, saying that the Claimant would conduct a simulated confrontation and chase of a suspect at

the test centre, when he would be expected to hear information over the PR and to converse with the controller. He said that then, outside the test centre, the Claimant would conduct a blue light run with 2 tones and sirens and the Claimant would again be expected to hear information given to him over the radio and give information back to the controller. After that, the Claimant would attend a shopping centre and would be expected to listen to information over his radio and to hear and respond to this as appropriate.

78. The following day, 19 May 2021, PS G Davies and Claimant discussed the “at works test”, p1068. The location of the shopping centre for the test was changed by agreement.
79. The Respondent did not provide the Claimant with any Officer Safety Training retraining before the test. PS Davies did not give him any advice or practice on his OST skills. He had last been operational in July 2017.
80. The Claimant did not say his skills were out of date before the test, or ask for retraining. PC Banning and PS Bushell both told the Tribunal, however, that the Officer Safety Training Foundation Course “Yellow Book”, p1105, was available online to officers during their career. The Yellow Book aims to provide officers with the “knowledge to police London lawfully, safely and effectively”.
81. Prior to the “at works test”, there was no assessment of the compatibility of the Claimant’s new equipment with the Respondent’s radio systems or other equipment in the Respondent’s emergency response vehicles.
82. The “At works test” took place on 21 May 2021.
83. The first confrontational scenario began at 13:42 and ended at 13:53. PS Balu briefed the Claimant at the beginning of the exercise. During the exercise, PC Banning acted as the subject, PC Snowden acted as the informant, and PC Garraway acted as an additional Officer Safety Training observer. When the exercise began, PS Davies went into a separate room, to act as the Controller, so he could speak to the Claimant through the radio, following a prepared script (pp 1069-1074). PS Bushell observed this exercise.
84. During the exercise the Claimant held his Roger pen out at arm's length towards PC Banning, and, as part of his role-play, PC Banning asked what the Roger pen was. The Claimant explained that it was to aid his hearing.
85. PS Bushell considered that the Claimant followed PC Banning with the pen, rather than maintaining a gap when PC Banning’s weapon was revealed.
86. PS Bushell told the Tribunal that he was concerned at how reliant on the Roger pen the Claimant appeared to be. He told the Tribunal that he was concerned that, if the Claimant used the pen in a real street policing scenario, someone could knock it out of the Claimant’s hands and he wouldn't be able to use it, which could lead to his safety being compromised. PS Bushell said that he was also concerned that members of the public may be shocked, or feel threatened by the pen being pointed at them, without knowing what it was, particularly if they had mental health issues. He said that he was concerned that it might exacerbate a confrontational situation.

87. The second, chasing suspect, exercise started at 14:15 and ended at 14:20. As with the first exercise, PS Balu briefed the Claimant at the beginning, and PS Davies acted as the controller, reading from a script (pp 1069-1074) from a separate room.
88. PC Snowden led a warmup to replicate the Claimant chasing a suspect. A couple of minutes into the warmup, the Claimant's hearing aid battery died. The warm up was paused whilst the Claimant replaced the battery, but PS Bushell told the Tribunal that this was a concern, because, in the middle of a real incident, there would have been no opportunity to stop to fix a hearing aid - and continuing to deal with the situation without being able to hear would be dangerous.
89. During the exercise, the Claimant confiscated the two knives being concealed by PC Banning, and held them in the same hand as his Rogers pen, whilst trying to search PC Banning. PS Bushell considered that the Claimant did not have the knives safely secured. He told the Tribunal that he felt that, in a real policing scenario, this could have caused danger to the Claimant's safety and the safety of his colleagues.
90. PS Bushell told the Tribunal that he observed that the Claimant seemed to focus his full attention on the radio, whilst it was transmitting, which distracted him from PC Banning. He said that he considered that the Claimant did not appear to be able to listen and communicate at the same time as policing effectively.
91. The first two tests were standard Officer Safety Training tests, as administered in police training school.
92. The third exercise was a high street patrolling scenario at the Stratford Shopping Centre. During this exercise, PS Bushell acted as the Controller at Forest Gate Police Station, communicating to the Claimant using the radio, following a script, p1069-1074. PS Davies was observing the Claimant and other members of the assessment team acted as "security".
93. After the test, on the next shift the following day, PS Bushell produced a transcript of the Claimant and his communications over the radio, pp1184-1189, using notes he had made on the script during the Test and a recording.
94. The Claimant conducted the first part of the exercise using his Roger pen, and the second part without it, as PS Davies wanted a comparison. PS Bushell told the Tribunal that the Claimant's ability to hear and communicate over the radio did not seem different with and without the pen. PS Bushell said that he had to repeat himself numerous times. For example, he had to repeat the name of the store and confirm that it was '3 bottles of wine' on 3 transmissions, and then had to repeat his transmission about the suspect struggling violently with security before the Claimant understood him. PS Bushell gave evidence that he would not normally expect to repeat a transmission multiple times and he considered that this would be dangerous in an operational scenario, as it could delay responding to a suspect efficiently.
95. The fourth exercise was a "blue light run". During this exercise PS Bushell acted as the Controller at Forest Gate Police station again. PS Davies was the driver of the police car, and members of the assessment team acted as security in the back of the car.

96. The Claimant completed the first half of the exercise with his Roger pen, and then turned it off for the second half.
97. The Claimant told PS Davies, who was in the car with him, that the blue lights were giving feedback to his hearing aids. He described the sound as "torture".
98. PS Bushell told the Tribunal that he noticed that, whilst using the Roger pen, he had to repeat the incident location twice, and confirm it, before the Claimant understood, p1189-1192. This happened again in respect of the number of suspects reportedly at the scene, p1189-1192.
99. When the Claimant turned off his Roger pen, PS Bushell gave evidence that he still had to repeat transmissions, such as the fact the location was previously a cannabis factory, and where the suspects were heading on foot; he considered that, based on his observations of the test, the Claimant's ability to hear whilst in a blue light run scenario was not effective to be the operator in a police vehicle.
100. PS Bushell observed that the Claimant had particular difficulty in hearing during this scenario, as it was clear he was struggling to hear and had to ask for messages to be repeated a number of times before he fully understood them.
101. PS Bushell told the Tribunal that, in a real policing scenario, an officer has to adjust to the scenario they are in. He said, "For example, you would usually have to deal with noise from the car radio, your own radio and the other officer in the vehicle's radio, and you need to be able to adjust to that environment and still be able to hear the transmissions through your own radio. You wouldn't be able to ask that they adjust their radios, as it is important that they are able to hear their transmissions. If this interferes with your hearing aids and affects your ability to hear, then I do not consider this to be safe."
102. PS Bushell told the Tribunal that, based on what he observed, he did not feel that the Claimant was capable of becoming a fully operational and effective police officer, and he was concerned for his safety and the safety of others.
103. After the tests, PS Davies and PS Bushell gathered reports from PC Banning and PS Balu, which PS Bushell forwarded to Sarah Pryor (HR Case Manager) on 2 June 2021, to be passed on to AC Ephgrave under the Regulation 13 process, p1178 – 1192.
104. All the officers who observed the tests made similar observations to PS Bushell. They expressed their reports in similar terms. For example, in their reports, a number said that the Claimant appeared to be using his rogers pen as a "comfort". PC Banning told the Tribunal that "comfort" is a word he would use regularly in training. He said, "It is in relation to having their hand on their weapon – I would say "stop using that comfort". He said that he would have trained PS Davies in that way.
105. The officers who conducted the tests agreed in evidence that they had discussed their reports before writing them.

106. All the officers who conducted the tests told the Tribunal that, from their observations, they considered that the Claimant was not capable of becoming a fully operational and effective police officer.
107. None of the officers who worked with the Claimant and none of the officers conducting the at works tests ever had disability awareness training, despite Access to Work making provision for such training. None of the officers administering the test had experience of working with officers who had a hearing deficit.
108. The officers who conducted the tests agreed, in evidence, that their reports had highlighted the ways in which they considered the Claimant had failed to perform satisfactorily on the tests, rather than any positive performance by him.
109. All the officers who conducted the tests gave evidence that they understood the purpose of the tests was to assess whether the Claimant could function as a safe and efficient officer with his Access to Work current equipment. They agreed that the purpose was not to assess whether the equipment might be adjusted, or whether different equipment might be suitable. They agreed that the purpose of the tests was not to test his general officer safety, or other police skills.
110. The Claimant's staff side representative, Inspector Ashgar, observed, on the test day, that he considered that the tests had been conducted fairly.
111. Occupational Health was not invited to attend the "at works test" and did not advise in relation to it.
112. On 28 May 2021 the Claimant contacted DS Campbell, Chair of the Disabled Staff Association, explaining what had happened at the "at works tests", p1171-3. On 22 June 2021 the Claimant's Federation Representative / Welfare Officer Inspector Asghar also emailed the DSA about the tests, on the Claimant's behalf, p1100-3
113. Superintendent Richard Tucker produced a Regulation 13 Report on the Claimant dated 16 June 2021, p1208. He attached the reports from the officers who conducted the "at works tests". In the covering letter he said,

"PC Karim joined the MPS over 5 years ago with a hearing issue that has meant that he has been unable to complete his probation. He has had two reg 12 meetings and at the last one it was decided to carry out some operational assessments with PC Karim while he used his 'Rodger Pen' to assist him with his hearing. ...

The report from PC Balu highlights some issues that PC Karim had in doing ... very basic operational functions. During the search exercise PC Karim had to do his role one handed as he had to hold the Rodger pen. This caused issues and restricted his ability to control the situation. ...

In my opinion the assessments demonstrate that PC Karim would struggle in an operational role. The carrying of the Rodger Pen is not a reasonable adjustment and as demonstrated in the assessment can put PC Karim and his colleagues at risk.

My recommendation is that his probation is not extended and his services dispensed with."

114. On 24 June 2021, Sarah Pryor produced a Regulation 13 Report. In it, she described reasonable adjustments in the workplace and said, “When assessing the effectiveness, the better test of phonak pen is the functionality/at works test and the statements provided comment on this. It is not the fault of the device it doesn’t work in the operational policing environment - it is likely to be better suited/beneficial in an office based environment. Endorsed by Dr Alister Scott, CMO, believes the Phonak Roger pen suggested is the best viable option for Shafi to aid his work performance at this time. It should be reflected the consistent feedback from the OST [“Officer Safety Training Instructors”], subject matter experts, is the phonak pen is likely to compromise the health & safety of either Shafi, his colleagues or the public.” p1197-8.
115. In evidence at the Tribunal, Ms Pryor told the Tribunal that she had spoken to Dr Scott about the Roger pen, in May 2021, by telephone. She agreed that Dr Scott had not put the advice in writing and that she had not asked him why his advice contradicted Dr Ryan’s November 2020 report. She was unclear about whether she had any note of Dr Scott’s advice.
116. Russell Miles, Ms Pryor’s supervisor, also gave evidence about Dr Scott’s advice. He told the Tribunal that they had spoken to Dr Scott – “when we first heard about the roger pen – we thought it was odd”. He said that, “In a meeting we had about something else.. He said it was the best equipment. We said what is a roger pen? He said it is the best adjustment in this case.”
117. The Access to Work assessment took place at the end of 2019 and the equipment, including the Roger pen, was ordered and supplied in early 2020. Russell Miles was likely to have first heard of the Roger pen in early 2020. That dated Dr Scott’s alleged advice to 2020. The Tribunal noted that Dr Ryan advised, in April 2020, that the Access to Work equipment was suitable for the Claimant’s office role, at the time, and that the Claimant did not need any further adjustments, at that time. If Dr Scott had given advice that the Roger pen was the best equipment, that advice would have reflected Dr Ryan’s advice, rather than contradicting it.
118. Dr Scott did not produce any OH report on the Claimant. There was no written record of his putative advice.
119. Ms Pryor and Mr Miles’ evidence about the date and circumstances of Dr Scott’s advice was contradictory. The Tribunal did not accept their evidence about Dr Scott’s advice.
120. The Tribunal was not satisfied that Dr Scott gave any advice about the Roger pen and its suitability for the Claimant’s work in May 2021. Dr Scott made no written record of any advice he gave in relation to the Claimant. The Tribunal considered that the only reliable evidence of OH advice in relation to the Claimant, including the adjustments and equipment he required for his work, was contained in the written OH reports prepared in relation to him.
121. AC Ephgrave was asked, in evidence, about his view on the cost of the Cubex hearing aids which had been priced at £5,960. He said that the force funded reasonable adjustment and had a long history of doing so, although there was some limit to the cost. He did not suggest that the cost of those hearing aids would have been a barrier to the Respondent providing them as an adjustment for the Claimant.

122. On 6 July 2021 DS Campbell, Chair of the MPS Disability Staff Association and VP of the England & Wales Disabled Police Association, emailed AC Ephgrave, saying, amongst other things, “Dr Ryan’s recommendation of an at work test was meant as a supportive means to identify gaps in performance and remedy where appropriate those gaps that existed rather than a tool primarily to dismiss the officer. Whilst it is accepted that Dismissal may be the only outcome once all the avenues are exhausted, this sets a dangerous precedent outside of what already exists in terms of police regulations and other legislative guidance that regulate the Police. As a result of the test what measures of support are being considered now that the test has been concluded? Or is this a test purely with the intention of dismissal from the service which is therefore specific to his Disability..” p1216 – 1219

123. The Claimant’s final Regulation 13 meeting was conducted by AC Ephgrave on 8 July 2021, p1238 - 1239.

124. On 12 July 2021 AC Ephgrave terminated the Claimant’s appointment as a probationary Police Constable with immediate effect, p1246 - 1247. In his letter confirming the decision to dismiss, he said,

“We previously met on 19th April 2021 to consider a Regulation 13 recommendation, but I was not satisfied that your Phonak Roger pen workplace adjustment had been sufficiently tested to see whether it would be effective in operational policing situations. I noted our Occupational Health Chief Medical Officer, Dr Scott endorsed the Phonak Roger pen as the most viable workplace adjustment to help you with your hearing issue.

My overriding concern is your safety and the safety of others. For that reason, and in accordance with the suggestion made by our Occupational Health Physician, Dr Ryan, I instructed your line managers at NE BCU, to arrange for experienced OST [“Officer Safety Training”] trainers to oversee tests in the following areas: ‘high street’ general patrolling, a ‘blue light’ emergency response in vehicle, ‘chasing suspects’ and a ‘confrontational situation’. These were carefully designed to replicate commonly encountered scenarios for a uniform constable. You undertook those tests on 21st May 2021 and I am very grateful for your willing co-operation in them. You and your representative have seen the results of those tests. I am satisfied those tests were appropriate and well managed.

I have very carefully considered the test results and based on those results and the judgement of those conducting them, I find that I cannot be confident that you would be able to undertake the full duties of a police officer safely, both in terms of your own safety and those of others, be they members of the public or police colleagues.

...

I have to inform you of my decision that your appointment as a probationary Police Constable will be terminated immediately under Regulation 13 of Police Regulations 2003.” P1247.

125. AC Ephgrave told the Tribunal, “I did consider whether any further reasonable adjustments could be put in place to allow Shafi to continue his employment as a Probationary PC, however I felt able to rely upon the advice of Sarah Pryor, who had

recommended on 24 June 2021 that Dr Scott had endorsed the Rogers pen as the most viable reasonable adjustment to help him with his hearing.”

126. The Claimant’s ACAS Early Conciliation commenced on 8 October 2021 and ended on 16 November 2021, p1.

Relevant Law

Discrimination

127. By s39(2)(c)&(d) *Equality Act 2010*, an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.

Direct Discrimination.

128. Direct discrimination is defined in s13(1) *EqA 2010*:

“(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.”

129. Disability is a protected characteristic, s4 *EqA 2010*.

130. In case of direct discrimination, on the comparison made between the employee and others, “there must be no material difference relating to each case,” s23 *Eq A 2010*.

Causation

131. The ET must decide whether or not the alleged discriminator’s reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase “by reason that” requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?.” Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

132. However, if the Tribunal is satisfied that the protected characteristic is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. “Significant” means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

133. In order for a disadvantage to qualify as a “detriment”, it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to “detriment”. However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC* [2003] UKHL 11.

Burden of Proof

134. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010*.
135. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.
136. In *Madarassy v Nomura International plc*. Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865 and confirmed that the burden of proof does not simply shift where M proves a difference in sex/disability and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

Discrimination Arising from Disability

137. s 15 EqA 2010 provides:
- “(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”.
138. Simler P in *Pnaiser v NHS England* [2016] IRLR 170, *EAT*, at [31], gave the following guidance as to the correct approach to a claim under *EqA 2010 s 15*:
- '(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
- (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
- (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A

discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises..

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UAEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) There is a difference between the two stages – the “because of” stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the “something arising in consequence” stage involving consideration of whether (as a matter of fact rather than belief) the “something” was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the “something” leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of “something arising in consequence of the claimant's disability”. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to “something” that caused the unfavourable treatment."

139. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, the principle of proportionality requires an objective

balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

140. A PCP will not be proportionate unless it is necessary for the achievement of the objective and this will not usually be the case if there are less disadvantageous means available, *Homer* [2012] ICR 704.

Indirect Discrimination, Section 19 EqA

141. By Section 19 EqA: (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.

142. In the case of indirect discrimination the primary issue is whether the groupings of employees and the statistics showing disparate impact based on those groupings are sufficient for the purposes of showing prima facie discrimination, *Haq v Audit Commission* [2013] IRLR 206. Where a PCP is applied; it puts people who share the particular protected characteristic, here the disability of hearing impairment, at a disadvantage to those who do not have that protected characteristic; and it puts the Claimant at a disadvantage then the Respondent can justify it by showing it is a proportionate means of achieving a legitimate aim. Legitimate aim and justification are further addressed in paragraphs 19 and 27 below.

143. In *Essop v Home Office; Naeem v Secretary of State for Justice* [2017] UKSC 27, [2017] IRLR 558 Baroness Hale identified the essential features of indirect discrimination as follows:- “The first salient feature is that [... there ...] is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does”. Para [24] A second salient feature is the contrast between the definitions of direct and indirect discrimination. ... 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. A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various [...]. 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. They could be another PCP, working in combination with the one at issue, 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). Para [26] A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. Para [28] A final salient feature is that it is always open to the respondent to show that his PCP is justified – in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question – fitness levels in fire-fighters or policemen spring to mind..’ Para [29]

Reasonable Adjustments

144. By s39(5) *EqA 2010* a duty to make adjustments applies to an employer. By s21 *EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.
145. s20(3) *EqA 2010* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer 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.
146. S20(7) *EqA 2010* provides, “A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty”
147. The EHRC Code of Practice on Employment (2011) (“the Code”) provides: At Paragraph 6.24, that there is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask); At paragraph 6.37, that Access to Work does not diminish or reduce any of the employer’s responsibilities under the 2010 Act.
148. Para 6.28 of the Code lists factors which might be taken into account when deciding if a step is a reasonable one to take: Whether taking any particular steps would be effective in preventing the substantial disadvantage; The practicability of the step; The financial and other costs of making the adjustment and the extent of any disruption caused; The extent of the employer's financial or other resources; The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and the type and size of the employer.

149. It is not necessary to prove that the potential adjustment will remove the disadvantage; if there is a “real prospect” that it will, the adjustment may be reasonable. In *Romec v Rudham* [2007] All ER (D) 206 (Jul), EAT: HHJ Peter Clark said that it was unnecessary to be able to give a definitive answer to the question of the extent to which the adjustment would remove the disadvantage. If there was a 'real prospect' of removing the disadvantage it 'may be reasonable'. In *Cumbria Probation Board v Collingwood* [2008] All ER (D) 04 (Sep), EAT: HHJ McMullen said that 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage'. In *Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10, [2011] EqLR 1075, the EAT said that, when considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage.
150. *Regulation 13 Police Regulations 2003* require that on completion of probation a probationary officer is fitted physically and mentally to perform the duties of his office and the obligations and duties to the public. Regulation 13 provides, “Subject to the provisions of this regulation, during his period of probation in the force the services of a constable ...may be dispensed with at any time if the chief officer considers that he is not fitted, physically or mentally, to perform the duties of his office, or that he is not likely to become an efficient or well conducted constable...”.
151. *Regulation 13 of the Police Regulations 2003* is an irreducible minimum in the qualification for a police officer and, as a matter of law, the Respondent is entitled to refuse to lower the standard and to refuse to confirm the Claimant as a police constable if he is not in a position to qualify, *Hart v Chief Constable of Derbyshire Constabulary* [2007] All ER (D) 78 (Dec).

Polkey/Chagger

152. Tribunals must not ignore the possibility that the discriminatory act might have been the only causative factor. As the EAT confirmed in *Abbey National plc and Hopkins v Chagger* [2009] IRLR 86 (upheld on this point by the CA, [2009] EWCA Civ 1202) the general rule in assessing compensation is that damages are to place the claimant into the position they would have been in if the wrong had not been sustained. In the context of discriminatory dismissals, if there was a chance of a non-discriminatory dismissal this must be taken into account. As per Underhill J, 'the claimant [ought not to make a] 'windfall' 100% recovery in circumstances where he was likely to be dismissed in any event, simply because his employer had – it may be subconsciously and only to a small extent – allowed himself to be influenced by discriminatory considerations. There is nothing in the statute to suggest that discrimination is to be treated as a specially heinous wrong to which special rules of compensation should apply'. Underhill J went on to note, however, that this is subject to one qualification; as stated in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, a different approach is justified in cases where the damage is done maliciously and/or knowingly.

Time Limits & Continuing Acts

153. By s123 *Equality Act 2010*, complaints of discrimination in relation to employment may not be brought after the end of the period of three months starting

with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable.

154. By s123(3) conduct extending over a period is treated to be done at the end of the period.
155. s123(4) EqA 2010 provides that in the absence of evidence to the contrary, a person is to be taken to decide on a failure to do something, either when they do an act inconsistent with doing it, or on the expiry of the period in which they might reasonably have been expected to do it.
156. In *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530, the Court of Appeal held that, in cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken' in order to establish a continuing act. The Claimant must show that the incidents are linked to each other, and that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period'. The question is whether there is "an act extending over a period," as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed'. Paragraph [52] of the judgment.

Discussion and Decision

157. The Tribunal took into account all its findings of fact, and the relevant law, when reaching its decision. For clarity, it has stated its conclusion on individual allegations separately.
158. It considered the Claimants' reasonable adjustment and indirect discrimination claims first, because they potentially had a bearing on his discrimination arising from disability complaints.
159. **Indirect Discrimination / Reasonable Adjustments**
160. **Did the Respondents apply the following PCPs and did those PCPs put the Claimant at a substantial disadvantage, or disabled officers and the Claimant at a particular disadvantage:**
161. **a) the practice of placing probationer officers in purely administrative roles whilst further advice regarding their ability to undertake operational work is sought;**
162. The Respondent applied this PCP throughout most of the Claimant's probationary period. It did so pursuant to medical advice. For example, Dr Ryan reported on 26 June 2020, p902, saying that the Claimant could do office work, non-operational. Dr Ryan advised that the Claimant would need to undertake an "at works test" to assess his suitability for operational work. The Tribunal concluded that the Respondent would have acted in this way in relation to other probationers where OH advice was required on their ability to undertake operational work.

163. The placing of the Claimant in limited, purely administrative roles did put him at a substantial disadvantage, compared to other non-disabled probationers, because he could not complete the entire core competencies set out in his Student Officer Record of Competence (SOROC), which included the execution of various duties in a confrontational setting. Completing all those competencies and duties was necessary in order to pass the probationary period.
164. Further, the Claimant was put at a substantial disadvantage because he was away from operational duties for at least 4 years, which would inevitably have meant that his operational skills and knowledge would be lost. This meant that the Claimant was more likely to underperform in a test which used operational skills, like an “at works” test. Such skills would not be “second nature” to him and he would need to devote attention to remembering them during the test. The Tribunal concluded that there would have been the same group disadvantage to employees sharing the Claimant’s disability.
165. **b) the practice of not providing full financial cover/insurance for disabled officers to obtain necessary equipment through the Access to Work scheme;**
166. The Respondent did require the Claimant to pay 2/7 of cost of equipment that he would obtain through the Access to Work Scheme. On the evidence, that was the Respondent’s practice in such cases. PS Davenport told the Claimant on 19 March 2018, p196, that the Claimant would have to pay a contribution towards the Access to Work equipment. “... you also state that you do not wish to pay for costs for enhanced high end kit (either upfront or ongoing maintenance). ... I do think it is unrealistic of you to expect all costs to be ultimately covered by the MPS and 'access to work' or any other agency with no contribution by yourself. ... as with anything in life (should we want better than what we may typically qualify for ...) then there is an expectation that there will be a contribution to made towards any such item...” PS Davenport’s statement that “there is an expectation that there will be a contribution” appeared to refer to a broad policy.
167. The Respondent did not provide the full costs of the equipment, nor insurance for it: On 21 April 2018 PS Davenport wrote the Claimant, “... can you make sure you give me an answer about your willingness to pay 2/7 for the 'roger pen bundle' equipment by the end of play on 22/04/18. I appreciate it was a 'no' to the 2/7 request re the enhanced hearing aids due to the expense and this is your alternative / final option. ... Are you willing to cover the cost of a full replacement should you lose or damage part or all of the device? - Are you willing have the device(s) covered on an insurance policy? - If at any point you no longer work for the MPS, are you willing to return all equipment?”
168. It was clear, from DS Davenport’s email, that the Claimant had declined to pay 2/7 of the costs of the enhanced in-ear hearing aids, because he could not afford the cost. The Respondent did not offer to pay that 2/7 part of the cost and therefore the Claimant was not provided with the enhanced in-ear hearing aids. The Claimant, a disabled probationary officer, could not afford to pay for 2/7 of the enhanced hearing aid, so, according to DS Davenport, the Claimant’s “alternative/final option” was the Roger pen.

169. The Claimant, eventually, under pressure from PS Davenport, agreed to pay 2/7 of the costs of the cheaper Roger pen bundle. He was provided with that equipment. The Claimant also paid for insurance for the Roger pen and equipment, obtaining insurance through Sheila's wheels.
170. This PCP did put the Claimant at a substantial disadvantage – he did not obtain the in-ear hearing aids which Dr Phillips had advised he would need to undertake his operational work. On 17 January 2018 Dr Phillips, OH doctor, had advised that the 2 adjustments which might help the Claimant remain in his role were: "1. To have in ear good quality hearing aids 2. To have a functional assessment to determine whether he is able to hear adequately to undertake the role." P1537.
171. The Respondent was well aware of the availability of in-ear enhanced hearing aids. On 25 January 2018, Russell Miles, at HR, emailed Occupational Health with the title, "Special hearing aids – PC Shafi Karim". He said, "We understand there are superior higher spec hearing aids available, which might be suitable for Shafi so that he can complete his probation and satisfy officer safety concerns. We understand there are at least two types of "superior" hearing aids – one is an "in ear" type and one is an "implant."
172. However, because of this PCP, the Claimant was only provided with a Roger Pen, which was suitable for the non-operational role he was undertaking when he was assessed by Access to Work, but was not suitable for operational work.
173. Dr Ryan, OH doctor, advised on 9 November 2020, p1592 – 1594, "His `behind the ear` hearing aids would need to be changed to internal ones for confrontational duties. He will continue to use adaptive equipment recently supplied while on office roles."
174. Dr Ryan's advice was that therefore that the 'adaptive equipment recently supplied' – the Roger Pen – would be used while on "office roles". Dr Ryan was repeating Dr Phillips' advice that the Claimant needed in-ear hearing aids.
175. However, the Respondent never offered to pay for enhanced in-ear hearing aids, despite Dr Ryan advising that in-ear hearing aids would be necessary for confrontational roles.
176. The "at works test" assessment was ordered to assess the Claimant's ability to function in an operational environment with the Roger Pen, not with in-ear hearing aids. The assessors said that they considered that the Claimant, using his Roger Pen, was not safe for confrontational duties.
177. As a result, the Claimant was assessed as not being able to undertake the duties of a police officer and was ultimately dismissed. This was a further substantial disadvantage.
178. The Tribunal concluded the officers sharing the Claimant's disability would have been put at the same particular disadvantages – they would have been likely not to be provided with the work equipment they needed to do their job, and therefore likely to be dismissed, if the Respondent did not pay the full cost and insurance of necessary equipment.

179. **c) the practice of/requirement for disabled officers to undertake an “at works test” with no medical/specialist advice/input in order to determine their fitness to become an officer under Regulation 13;**

180. The Respondent’s practice was to require officers, about whom doubts had been raised about their ability to undertake confrontational/ operational duties, to undertake a test of their ability to do so. Such officers would be likely to include disabled officers.

181. The test was undertaken on the recommendation of Occupational Health, but Occupational Health did not advise on the formulation of the test. The test was conducted by experts in operational duties and officer safety.

182. The requirement to undertake such a test would put a disabled probationary officer like the Claimant at a substantial/ particular disadvantage, compared to non-disabled officers, because they would be more likely to be required to undertake a test: they have a disability which, by definition, impairs their ability to carry out normal day to day activities. Further, they would therefore also be more likely to fail the test and, if they failed the test, they would be likely to be dismissed.

183. In this case, the Claimant was put at that particular and substantial disadvantage. The test was a “pass or fail” test and, because he failed it, he was dismissed.

184. **d) the practice of requiring / the requirement / expectation to be fit, physically or mentally, to perform the duties of his office and/or to be likely to become an efficient or well conducted constable or superintendent; and/or**

185. The Respondent did require its probationary officers to be physically capable of performing the duties of their office.

186. This did put the Claimant at a substantial/particular disadvantage - he was assessed as not being capable of hearing instructions and did not pass the “at works test”, so he was dismissed. Other officers sharing the Claimant’s disability would have been put at the same disadvantage.

187. **e) the practice of requiring / the requirement / expectation to undertake the full duties of a police officer safely (including the requirement to be fully fit and able to do any and/or all operational / confrontational duties).**

188. The Respondent did apply this PCP. It required all probationers to undertake and/or be capable of undertaking the full duties of a police officer in order to pass their probation and be confirmed as a police officer.

189. This did put the Claimant at a substantial disadvantage - he was assessed as not being capable of undertaking the full duties and was dismissed as a result. AC Ephgrave wrote to him confirming the reason for his dismissal, “ ... I have very carefully considered the test results and based on those results and the judgement of those conducting them, I find that I cannot be confident that you would be able to undertake the full duties of a police officer safely, both in terms of your own safety and those of others, be they members of the public or police colleagues. ... I have to inform you of

my decision that your appointment as a probationary Police Constable will be terminated immediately under Regulation 13 of Police Regulations 2003.” P1247. Other officers sharing the Claimant’s disability would have been put at this disadvantage too.

190. **Can the Respondent show it was a proportionate means of achieving a legitimate aim?**

191. **16. What is the legitimate aim relied upon? The Respondent contends that her legitimate aims were to:**

192. **a) Ensure that probationer police constables are properly trained in order to be physically and mentally fit to perform the duties of a police constable, as required by the Police Regulations 2003; and**

193. **b) Ensuring so far as possible the safety of the people of London and the police officers deployed to protect them, including the Claimant.**

194. The Tribunal accepted that these were legitimate aims of the Respondent. It did not find, however, that each of the PCPs was a proportionate means of achieving those aims. This was partly because some PCPs were not a means of achieving those aims at all; and partly because the Tribunal concluded that there were less discriminatory ways of achieving those legitimate aims, including making reasonable adjustments, as set out below.

195. The Tribunal addressed the reasonable adjustments:

196. **Adjustments:**

197. **d) providing the Claimant with additional support and financial cover so that he could more quickly obtain hearing equipment and/or identifying and obtaining the hearing equipment needed and ordering this at the start of his probationary period;**

198. **g) obtaining adjustments such as hearing aids / equipment and/or undertaking training / guidance and/or implementing the recommendations of Access to Work and/or other OH guidance and/or doing so more timeously than was undertaken;**

199. The Tribunal concluded that it was a reasonable adjustment for the Respondent to pay the full cost of enhanced in-ear hearing aids, as recommended by Dr Phillips and by Cubex to the Respondent’s OH doctors and by Dr Ryan.

200. The Tribunal was satisfied that there was a 'real prospect' of enhanced hearing aids removing the substantial disadvantages of: the Claimant not getting the equipment he needed to do the job; the Claimant being likely to fail an “at works test”; the Claimant being dismissed because he could not undertake the full duties of a police officer safely.

201. OH instructed Cubex, as hearing experts, to provide advice on the available technology and the effect it would have on the Claimant’s hearing. Cubex repeatedly advised that Cubex hearing aids would provide much better hearing in the type of

noisy, complex environment that the Claimant would encounter as a police officer. It had also advised that Cubex technology could be adapted to be compatible with police radios. These were the main problems the Claimant encountered during the second 2 parts of the “at works test” in the shopping centre and on the blue light run.

202. On 6 August 2019, p1557, a Cubex report said, “Based on Mr Karim's reported and demonstrated hearing and communicative difficulties, he would also benefit from a treatment plan with Cubex. This treatment would be inclusive of upgraded hearing technology that can provide an advantage over his existing technology in more challenging environments, such that he encounters in his role working for the police. On 21 September 2020, Cubex’s hearing assessment report recommended, “Based on Mr Karim’s reported and demonstrated hearing difficulties and efforts, he would also benefit from a treatment plan with Cubex. This treatment plan would include bilateral hearing devices that would provide a significant advantage over his existing technology in more challenging environments.” p1600. In October 2020, Cubex advised: “Due to different frequencies being assessed, the overall free field hearing thresholds will be improved with better hearing devices. Our hearing provides stronger and better features such as noise cancellation and better integrity of speech sounds due to faster processing and enhancement of speech sound signals” p1370. On 30 October 2020, another Cubex report said, “... if you would like us to provide a treatment plan tailored to his role as a Police Constable, please do get in touch and we can provide a treatment plan with technology incorporating direct connectivity to communication device and focused on improving communications over radio/in complex listening environments.” (extra document).

203. The hearing aids would also have removed the need for the Roger pen completely and therefore would have removed the Roger-pen related reasons the Claimant was found to have failed the at works test. The lack of suitability of the Roger pen was the main problem with the first 2 parts of the “at works test”.

204. Indeed, it was clear from the evidence that the Respondent was aware, even before the “at works test”, that the Roger pen was not suitable for operational environments and that the Claimant would need in-ear hearing aids for operational work instead. Dr Ryan’s OH advice of 9 November 2020, p1592 – 1594 said precisely this. On 20 October 2020 Inspector Lewis Watson also emailed the Claimant’s line manager, PS Saux, copying in Sarah Pryor at HR, saying, “I did OST [“Officer Safety Training”] yesterday ... It became very clear to me that Shafi simply is not going to be able to use the Phonak pen to communicate whilst dealing with conflict, search and detention of subjects. We did edged weapon defence where two hands are absolutely required to defend yourself and the public.”

205. The Tribunal has found that the written OH reports were the only reliable evidence of OH advice at the time. It did not accept the Respondent’s evidence that Dr Scott advised that the Roger pen was the best adjustment for the Claimant.

206. Addressing other factors:

- a. **Whether taking any particular steps would be effective in preventing the substantial disadvantage** – as above, there was a 'real prospect' of Cubex hearing aids removing the substantial

disadvantages. Further, the hearing aids were the only hearing enhancement adjustment which would remove the disadvantage. The Claimant could not do operational work without in-ear hearing aids. Without doing operational work, he would not pass his probation and would inevitably be dismissed.

- b. **The practicability of the step** – the enhanced hearing aids were readily available through Cubex, who provided a quotation for them;
- c. **The financial and other costs of making the adjustment and the extent of any disruption caused** – AC Ephgrave told the Tribunal that the Respondent funded reasonable adjustments. There was no evidence that the Respondent could not afford to fund the enhanced hearing aids;
- d. **The extent of the employer's financial or other resources** – The Respondent is a large organization with OH advisers and access to Cubex audiologists;
- e. **The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and the type and size of the employer.** This was a large employer with significant resources. For the avoidance of doubt, the Tribunal considered that it was reasonable for the Respondent to pay the whole cost of the enhanced hearing aids, whether they would have been part funded by Access to Work, or not. The 18 January 2020 Access to Work report said, "If it is expected that the customer will use items at home, a cost share will be charged to them depending on the days worked..." (Emphasis supplied). The Claimant already had NHS hearing aids which he used at home. The enhanced hearing aids were only necessary for work purposes. There was therefore no justification, even on the Access to Work advice, for the Claimant to pay any of the cost of the specialist work-related hearing aids.

207. There was nothing stopping the Respondent ordering the in-ear enhanced hearing aids at any time after Dr Phillips, Russell Miles and Access to Work first identified enhanced in-ear hearing aids for the Claimant in 2018. They were not ordered because the Respondent required the Claimant to pay 2/7 of the cost. The Respondent should never have required the Claimant to pay this cost. No one ever asked the Claimant whether he, in fact, intended to use the enhanced hearing aids outside work. If they had, they would have learned that the Claimant had his own NHS hearing aids, which were adequate for his needs in the home environment.

208. Requiring the Claimant to insure the hearing aids – which were work equipment – was also completely unjustified. As work equipment, they should have been insured by the Respondent in the same way as all the Respondent's other equipment. If necessary, the Respondent could have required the Claimant to leave the enhanced hearing aids at his place of work at the end of his shifts.

209. Objectively, the in-ear hearing aids were necessary for the Claimant to carry out his work, they were readily available, the Respondent could afford to pay for them

and there was no justification for the Respondent not paying for them. Accordingly, “providing the Claimant with additional support and financial cover so that he could more quickly obtain hearing equipment and/or identifying and obtaining the hearing equipment needed and ordering this”, whether at the start of his probationary period or at any time before the Claimant’s dismissal, was a reasonable adjustment.

210. Addressing the indirect discrimination claim, the PCP of “b) the practice of not providing full financial cover/insurance for disabled officers to obtain necessary equipment through the Access to Work scheme” had no bearing on the legitimate aims at all. It was not a means of achieving them. It appeared simply to be a way of the Respondent reducing the cost of reasonable workplace adjustments.

211. **Reasonable adjustments: a) allowing the Claimant to continue his role (and/or passing his probation period);**

212. The Tribunal concluded that, with the Cubex hearing aids, it would have been a reasonable adjustment to allow the Claimant to continue in his role, rather than putting him in non-operational roles. Dr Ryan advised that he was fit to work and that he could undertake operational roles with in-ear hearing aids. This would have allowed him to attempt to complete his SOROCs.

213. If there were any residual concerns about the Claimant’s hearing, allowing the Claimant to continue in his role would have assisted the Claimant in to undertake any “at works tests” fairly, with the appropriate equipment and with his operational skills up to date.

214. This would have been less discriminatory than keeping the Claimant non-operational and then requiring him to undertake an “at works” test, involving operational skills. It would have removed the disadvantage that he was likely to underperform in such a test on account of having no recent operational experience.

215. On the evidence, this would also have been practicable, and the Respondent had the means and facilities to provide it. On 11 June 2020 Inspector Lewis Watson anticipated that Hendon College Officer Safety Training could devise a plan for the Claimant to complete his officer safety training and start street duties, after he received the Access to Work equipment: “... we have agreed it is best for Shafi to re-attend the 5 day recruit OST [“Officer Safety Training”] foundation course to achieve a basic level of OST with this equipment so he is completely refreshed in OST & ELS and to ensure fairness that he begins street duties with the same level of OST input as his peers.” At that time, Inspector Watson believed the Roger pen was suitable equipment for the Claimant. (He later changed his mind about the suitability of the Roger pen itself).

216. The Tribunal inferred that, if the Claimant was provided with enhanced hearing aids, which actually were suitable for operational work, the Respondent could have arranged OST training for him to resume street duties in the same way.

217. However, the Tribunal decided that it would not have been a reasonable adjustment simply to allow the Claimant to pass his probationary period.

218. *Regulation 13 Police Regulations 2003* require that, on completion of probation, a probationary officer is fitted physically and mentally to perform the duties of his office

and the obligations and duties to the public that a police officer can perform his duties and protect and safeguard the public.

219. The Tribunal accepted that *Regulation 13 Police Regulations 2003* is an irreducible minimum in the qualification for a police officer and, as a matter of law, the Respondent is entitled to refuse to lower the standard and to refuse to confirm the Claimant as a police constable if he is not in a position to qualify, *Hart v Chief Constable of Derbyshire Constabulary* [2007] All ER (D) 78 (Dec).
220. The Tribunal agreed that it was appropriate for the safety of the public and the Claimant's fellow officers, to ensure that the Claimant had demonstrated all the SOROC skills and confrontational duties skills required of a police officer. It was appropriate for the Claimant to be able to carry out the core functions of enforcing the law, preventing crime and protecting life and property.
221. Having provided the Claimant with the enhanced hearing aids, it was a proportionate means of achieving the Respondent's legitimate aims to require him to pass his probation.
222. **b) allowing the Claimant to undertake operational duties whether with or without restrictions and/or a phased return to operational duties with specific training on the skills that he has lost following his time in an administrative role;**
223. It follows that the Tribunal did not consider that it was a reasonable adjustment to allow the Claimant to continue in his role without the enhanced hearing aids. The Tribunal accepted that the "at works test" assessed that the Claimant was unable to undertake essential parts of his role with his ordinary hearing aids and with the Roger pen (see further below).
224. It was not practicable for the Respondent to allow the Claimant to undertake his role when he had great difficulty hearing in the environments in which he would be expected to work. The Tribunal accepted the Respondent's evidence that the "at works test" showed that the Claimant would simply not be safe using his Roger pen or ordinary hearing aids in confrontational, or operational settings.
225. Regarding a phased return, this would have been a reasonable adjustment with the Claimant's enhanced hearing aids. As stated above, it would have been reasonable and practicable for the Claimant to have been provided with refresher OST training before resuming street duties.
226. **c) placing the Claimant into restricted operational roles rather than purely administrative roles so that he could continue to work towards his SOROC whilst on restricted duties;**
227. This would not have been a reasonable adjustment if it meant removing operational roles completely during the Claimant's probationary period. He still had to satisfy *Regulation 13*. Completing operational and confrontational roles are part of an officer's probation.
228. **e) properly consulting with medical experts and fully considering whether the hearing equipment was fit for purpose and what adjustments could be put**

in place to allow the Claimant to return to operational duties before making a final decision under Regulation 13;

229. It follows that it was a reasonable adjustment for the Respondent to adopt its own Occupational Health advice to provide in-ear hearing aids for operational policing.
230. It was also a reasonable adjustment to do this before making a final decision under Regulation 13. The advice from Occupational Health was available long before AC Ephgrave's decision to dismiss the Claimant. Indeed, Dr Phillips had advised, as early as 17 January 2018, that an adjustment to help the Claimant stay in his job would be "to have in ear good quality hearing aids". The provision of such hearing aids would have been a less discriminatory means of ensuring that the Claimant was fitted physically and mentally to perform the duties of his office and the obligations and duties to the public.
231. **f) providing the Claimant with the assistance of another police officer (and when on operational duties) as it is understood that it is very common for officers to be sent out on operational duties in pairs;**
232. This would not have been a reasonable adjustment if it required the Claimant to be accompanied at all times on operational duties, and not ever to have been operational on his own account. The Claimant needed, personally, to be fitted physically and mentally to perform the duties of his office and the obligations and duties to the public.
233. **h) allowing the Claimant and/or providing support and/or training (including taking part in operational training exercises) to the Claimant to allow him to undertake operational duties and/or to practice operational duties with all equipment / aids provided to him and/or providing sufficient time to practice / train / adjust on the same prior to undertaking the "at works test";**
234. **and i) allowing the Claimant the opportunity to practise the "at works test" itself and/or more than one opportunity to undertake the same prior to making a decision to dismiss and/or terminate the Claimant's probation / appointment;**
235. The Tribunal concluded that both these would have been reasonable adjustments, in order to remove the disadvantage caused by not being operational. The substantial disadvantage was that the Claimant's operational skills and knowledge were rusty and he was more likely to underperform in a test which used operational skills, like an "at works" test.
236. Given that the Claimant had not been operational, the Tribunal concluded that it would have been a matter of basic fairness for the Claimant to have refreshed his operational skills before the test. It is a matter of logic that, if the Claimant was struggling to recall basic skills during the "at works test", he would have been distracted from his hearing and communication tasks. On the other hand, if he had practised his operational skills, so that they were second nature to him, he would have been able to concentrate fully on the hearing skills the "at works test" was supposed to be measuring. That would have given a more accurate picture of his hearing and communication abilities.

237. Inspector Watson's view, in relation to the Roger pen, was that it would be fair for the Claimant to undergo OST retraining with it, "... we have agreed it is best for Shafi to re-attend the 5 day recruit OST ["Officer Safety Training"] foundation course to achieve a basic level of OST with this equipment so he is completely refreshed in OST & ELS and to ensure fairness that he begins street duties with the same level of OST input as his peers."
238. There was nothing to suggest that allowing the Claimant to practise operational duties with enhanced in-ear hearing aids, before undertaking the "at works test", was impracticable. Indeed, both Dr Ryan and Inspector Lewis Watson envisaged that the "at works test" might identify issues with the equipment, which might then be addressed, rather than the Claimant being automatically dismissed if he failed the test.
239. In his 9 November 2020 report, Dr Ryan had advised, "he must be the subject of an `at works test` or general patrol risk assessment to identify hearing performance gaps... in his day to day working tasks, as these must be addressed through implementation of work adaptations or adjustments. ...Following a local `at work test` he may well identify other areas that need changes."
240. Inspector Watson had also envisaged, "At the end of the course Paul will provide a review.. and with feedback from experienced instructors in relation to his overall performance and the compatibility of the equipment with the frontline role of a police constable. ... Paul has kindly agreed to engage the OST policy unit .. and will likely invite them to view some of the training in action to make a proper assessment of the additional risks posed in using the Phonak roger pen in a confrontational situation and to what extent they can be mitigated. ... once this is completed or alongside this you could explore the RA piece around the radio comms and lights/sirens in the van etc?"
241. There was strong evidence, therefore, that adjusting equipment and repeating the "at works test" was feasible for the Respondent, rather than immediately dismissing the Claimant. The Tribunal concluded that, objectively, it would also have been fair and reasonable to do this. If there were practical changes that could be made to the enhanced hearing aids, so that they were more compatible with police equipment, these should have been made, before any final decision. One of the Cubex reports had advised that Cubex could assist with ensuring compatibility of equipment.
242. **j) providing more and/or sufficient notice of the "at works test", including as to when it was going to happen and/or the detail of the expectations and/or requirements of the same and/or guidance and advice as to the same; and/or**
243. The Tribunal decided that the Claimant was given several weeks' notice of the test and he was told the four scenarios which would be tested. This proposed adjustment would not have removed the relevant disadvantage if he was not given the opportunity to refresh his Officer Safety Training, or to practise operational duties with his hearing aids, in the meantime. The reasonable adjustment was providing the Claimant with retraining and an opportunity to practise with his equipment, as well as repeating the test, if practical changes could be made to ensure the equipment functioned properly.

244. **k) considering and/or making amendments to the Claimant's working duties / practices following the outcome of the at work test.**

245. This would not have been a reasonable adjustment if it removed the requirement for the Claimant to satisfy Regulation 13.

246. **Summary: Reasonable Adjustment / Indirect Disability Discrimination claims**

247. In summary, the Claimant was put at substantial/particular disadvantages by the Respondent's PCPs of placing probationer officers in purely administrative roles pending advice regarding on operational work; not providing full financial cover to obtain necessary equipment through Access to Work; requiring disabled officers to undertake an "at works test" to determine their fitness to become an officer; requiring officers to be fit, to perform the duties of his office; and/or to be able to undertake all operational and confrontational duties.

248. The Respondent failed to make reasonable adjustments to avoid those disadvantages by failing to:

- a. Pay the full cost of enhanced in-ear hearing aids (as recommended by Dr Phillips, by Cubex to the Respondent's OH doctors and by Dr Ryan) at any time before the Claimant was dismissed;
- b. Pay for the insurance of those enhanced in-ear hearing aids;
- c. Allow the Claimant to continue in his role, once the in-ear hearing aids had been provided, rather than putting him in non-operational roles;
- d. Provide the Claimant with refresher operational training and failing to allow him to practise operational duties with his hearing aids and make any necessary adjustments to his hearing aids, before he undertook the "at works test";
- e. Allow the Claimant more than one opportunity to undertake the "at works test" before making a decision to dismiss him.

249. However, it would not have been a reasonable adjustment simply to allow the Claimant to pass his probationary period; or to have allowed the Claimant to be operational without the enhanced hearing aids; or for the Claimant always to be accompanied by another officer; or for any of the requirements of his probation to be removed.

250. Regarding indirect discrimination, not providing full financial cover to obtain necessary equipment through Access to Work was not a means of achieving any legitimate aim.

251. While the Respondent did have legitimate aims of: a) Ensuring that probationer police constables are properly trained in order to be physically and mentally fit to perform the duties of a police constable, as required by the Police Regulations 2003; and b) Ensuring so far as possible the safety of the people of London and the police officers deployed to protect them, including the Claimant, the PCPs were not a

proportionate means of achieving those. Making the reasonable adjustments would have been proportionate and objectively justified. They were less discriminatory ways of achieving the legitimate aims, without detracting from the need to ensure that the Claimant was capable of performing the duties of a police officer.

Direct disability discrimination

252. The Claimant alleged that the Respondent treated him less favourably than it would have treated a non-disabled comparator:
253. a) by making the decision to dismiss the Claimant / terminate the Claimant's appointment / probation under Regulation 13 on 12 July 2021; and/or
254. b) by making a stereotypical assumption that the Claimant's hearing impairment rendered him incapable of performing front line duties despite him meeting the medical standard of hearing set by the College of Policing.
255. Taking those in reverse order, the Tribunal decided that the assessors at the "at works test" did not apply stereotypical assumptions about the Claimant. The Tribunal considered that they were honest and reflective in their evidence. It was satisfied that the assessors carried out a careful and objective assessment of the Claimant's ability to carry out his duties. It noted that the Claimant's staff side representative, Inspector Ashgar, observed, on the test day, that he considered that the tests had been conducted fairly
256. The Tribunal was satisfied that the safety training officers would have concluded that a comparator, who was not disabled, but was required to hold a piece of equipment in their hand at all times in a confrontational setting, would not be able to secure confiscated weapons safely, thus endangering themselves and others. It was satisfied that the safety training officers would consider that any comparator, who needed to hold a piece of equipment in their hand at all times, in order to do their job, was at risk of having the equipment knocked out of their hands in a confrontational situation, putting them at risk.
257. It was also satisfied that the officers would have concluded that a non-disabled probationer, who did not understand commands repeatedly given over the radio, was not capable of carrying out their role safely, as they would delay responding to an incident.
258. The assessors did not treat the Claimant less favourably than a comparator in the same circumstances; they did not directly discriminate against him.
259. The Tribunal was also satisfied that AC Ephgrave would have dismissed any non-disabled probationer who, after repeatedly extended probation, had been assessed by trained officers as not capable of becoming a fully operational and effective police officer. There had been multiple extensions by that point. The Regulation 13 process exists to remove probationers who are not capable of becoming effective police officers. There was no evidence that another probationers would have been given further time. AC Ephgrave did not directly discriminate against the Claimant.

260. **Discrimination arising from Disability**

261. **Was the Claimant treated unfavourably because of something arising in consequence of their disability? The ‘something arising’ is the Respondent’s concerns about the Claimant’s ability to safely carry out the full duties of an operational officer and/or the need to undertake a risk assessment / “at works test” and/or the Claimant’s alleged failure to properly perform / pass the “at works test”. Based on the reasons given by the Respondent for terminating the Claimant’s probation (paragraphs 15.1 to 15.3 of the Grounds of Resistance), does the Respondent accept that this is the ‘something arising’ in consequence of the Claimant’s disability?**

262. **The Claimant alleges the act of unfavourable treatment was the Respondent’s decision to dismiss him under Regulation 13 on 12 July 2021 following the results from the “at works test”.**

263. **Can the Respondent show that the Claimant's dismissal was a proportionate means of achieving a legitimate aim?**

264. The Tribunal was satisfied that the Claimant was dismissed because of something arising in consequence of disability. The “something arising” was the training officers’ assessment at the “at works test” that the Claimant was not capable of carrying out his role safely.

265. It was clear, on the evidence, that the purpose of the At Works Test was to test the adjustments provided by Access to Work, and whether they were viable in an operational policing environment. The officers who conducted the test were clear that they were testing the Claimant’s ability to hear and communicate and to use his equipment in confrontational settings, rather than testing his general policing skills. The “at works test” was therefore related to the Claimant’s disability and not his general policing skills.

266. His failure of the at works test arose from the officers’ assessment that he could not carry out his role safely using the Access to Work equipment. That arose from his disability, and not from his skill as a police officer.

267. The burden of proof shifted to the Respondent to show that the Claimant’s dismissal was a proportionate means of achieving a legitimate aim.

268. While the Tribunal has accepted the Respondent’s legitimate aims, the Claimant’s dismissal was not a proportionate means of achieving these. The Respondent had failed to make numerous reasonable adjustments, starting with its failure to pay for the enhanced in-ear hearing aids the Claimant needed for confrontational duties. That failure arose as early as 2018. Numerous OH reports advised that the Claimant needed in ear hearing aids for confrontational duties. Cubex audiology reports, provided to the Respondent’s OH advisers in 2020, advised that Cubex hearing aids would provide a considerable enhancement of hearing and could be adjusted to the Respondent’s radio systems.

269. The Respondent knew, before the “at works test”, that the Roger pen was not suitable equipment for confrontational situations. AC Ephgrave had seen Dr Ryan’s

November 2020 report before dismissing the Claimant. It had been released to the Respondent in February 2021, long before the “at works tests” were ordered. While AC Ephgrave told the Tribunal that he relied on Sarah Pryor’s advice that Dr Scott had endorsed the roger pen as the most viable adjustment, the Tribunal has not accepted that Dr Scott gave any such advice. There was no written record of it and, on any reasonable view, Dr Ryan’s most recent OH report represented the official OH view. The Respondent ought to have provided the Claimant with the enhanced in-ear hearing aids and permitted him to practice operational duties with his new hearing aids before assessing him.

270. That would have been considerably less discriminatory but would still have achieved the Respondent’s legitimate aims. The Respondent had ample time to obtain the enhanced in-ear hearing aids before administering the tests.

271. **Time limits**

272. The Claimant commenced ACAS Early Conciliation on 8 October 2021. ACAS issued the Early Conciliation certificate on 16 November 2021. The ET1 was presented on 14 December 2021. Complaints in relation to the Claimant’s dismissal on 12 July 2021 are in time.

273. The Tribunal decided that all matters relating to the “at works test”, and the decisions of the training officers who administered it, which were then relied upon by the Respondent in dismissing the Claimant, were part and parcel of the dismissal. They amounted to conduct extending over time, or a continuing state of discriminatory affairs.

274. Regarding reasonable adjustments, *s123(4) EA 2010* provides that, in the absence of evidence to the contrary, a person is to be taken to decide on a failure to do something either when they do an act inconsistent with doing it, or on the expiry of the period in which they might reasonably have been expected to do it.

275. AC Ephgrave gave evidence that he considered making adjustments as an alternative to dismissal but decided not to, relying on an alleged opinion from Dr Scott, which had not been recorded by Dr Scott anywhere.

276. Complaints in relation to a failure to make reasonable adjustments as an alternative to dismissal are therefore in time. Those complaints include a failure to pay for enhanced in-ear hearing aids, and a failure to allow the Claimant to continue in his role with the hearing aids, undertaking operational duties with the hearing aids, and/or having refresher training with them. So too, are complaints of failures to make reasonable adjustments regarding the “at works tests”, including retraining the Claimant beforehand, and allowing the test to be repeated where technical equipment issues have arisen.

277. Further, from the evidence, the issue of providing in-ear hearing aids for confrontational duties was repeatedly raised in OH reports from 2018 and therefore came up for regular review. The Respondent received Dr Ryan’s November 2020 report in February 2021, but again failed to make that adjustment at the time when the Claimant was dismissed. The failure to provide in-ear hearing aids was a series of linked acts, from 2018 to 2021, the last of which was in time.

278. All the Claimant's complaints are in time.

Polkey/Chagger

279. The Tribunal considered *Abbey National plc and Hopkins v Chagger* [2009] IRLR 86 (upheld on this point by the CA, [2009] EWCA Civ 1202) and the general rule, in assessing compensation, that damages are to place the claimant into the position they would have been in if the wrong had not been sustained. It therefore considered the likelihood that the Claimant would have been dismissed in any event, for a lawful reason - and even if the Respondent had made all reasonable adjustments.

280. The Tribunal noted that the enhanced hearing aids would not have removed all the Claimant's hearing issues. Cubex advised in 2019, "upgraded hearing technology ... can provide an advantage over his existing technology in more challenging environments, such that he encounters in his role working for the police. While this technology would allow Mr Karim to communicate with less effort, it is important to stress that it would not eliminate all hearing and understanding challenges." P1560.

281. Furthermore, Dr Ryan advised in November 2020, having received the Cubex reports, that, "Due to the fact that he will struggle more with work outside, in a non-office work, he is more suited to internal office based roles ... On completion of his probation, PC Karim, is likely to be assigned to adjusted duties." P1592.

282. Dr Ryan therefore anticipated that the Claimant would "struggle" with confrontational roles and be more suited for non- operational roles.

283. The Tribunal considered that that indicated that, even with enhanced in-ear hearing aids, the Claimant would still have some difficulty in completing his operational / confrontational SOROCs during his probation.

284. The Tribunal also took into account the fact that the Claimant was a probationer. He was not an officer who had been confirmed in his role. The Tribunal did not have statistics for the number of Metropolitan Police probationers who passed, or failed, their probation. Nevertheless, it concluded that there must be some risk that the Claimant would not pass probation in any event. The assessment of likelihood of dismissal would be different to the assessment for a person who had been confirmed in post.

285. The Tribunal therefore concluded that there was a significant risk that, even with adjustments, the Claimant would not pass his probation and would be dismissed for lawful reasons in any event.

286. On the other hand, the most recent Cubex reports specifically addressed the particular problems which arose in the "at works test", including incompatibility of equipment and the need for hearing, even in complex environments. Dr Ryan's report merely said that the Claimant would "struggle more with work outside." Dr Ryan did not advise that the Claimant would struggle to pass his probation.

287. Furthermore, the Respondent did not argue that the Claimant was not competent, absent his hearing difficulties, to pass his probation period. There were no statistics suggesting that a significant number of probationers failed.

288. On all the evidence, the Tribunal concluded that it was slightly more likely than not – 60% likely - that the Claimant would have passed his probation and would not have been dismissed, if the Respondent had acted lawfully.

289. If the Respondent had acted lawfully, the Claimant was only 40% likely to fail his probation and be dismissed in any event.

Remedy Hearing

290. A remedy hearing will take place on 14 April 2023. The parties should agree directions for preparation for that hearing.

Employment Judge **Brown**

Date: 15 December 2022

SENT to the PARTIES ON

15/12/2022

FOR THE TRIBUNAL OFFICE