



EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case No: 4102885/2019 (V)**
Held at Aberdeen on 27, 28 & 29 September 2022 & 15, 16 & 17 February 2023 and
11 May 2023.

10 **Employment Judge J M Hendry**
Members Mrs D Massie
Mr N Richardson

15 **Ms K Brown** **Claimant**
Represented by
Mr Crammond,
Counsel

20 **The Advocate General For Scotland** **Second Respondent**
As Representing The Ministry of Defence **Represented by**
Mr D Walker,
Solicitor

25 **College of Policing Limited** **Third Respondent**
Represented by
Ms M McGrady,
Solicitor

30 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

35 **The unanimous judgment of the Tribunal is as follows:**

40 **E.T. Z4 (WR)**

1. That the second respondents indirectly discriminated against the claimant on the grounds of her sex in the application of the 7.6 MSFT Fitness Standard by not providing the claimant with the opportunity of taking an alternative test in particular the Chester Treadmill test and having failed to provide the claimant with the assistance recommended by the third respondents in familiarising herself with the test and in taking it.
2. That the second respondents having breached Section 19 of the Equality Act 2010 by indirectly discriminating against the claimant on the grounds of her sex are liable to the claimant for the losses arising from the termination of her employment and for injury to her feelings.
3. That the claim against the third respondents not being well founded does not succeed and is dismissed.
4. The case will proceed to a Remedy Hearing on a date to be afterwards fixed.

Reasons

1. The claimant in her ET1 sought findings that she had been indirectly discriminated against on the ground of her sex by having to successfully complete a fitness test set by her employers the second respondents as a condition of her employment. The former employers, the second respondent (“MDP”) defended the application on various grounds but essentially arguing that the level that the test was set at was not discriminatory as it was an accurate measure of the necessary fitness needed to carry out the claimant’s role as an AFO. The third respondent (“COP”) were brought into the proceedings by virtue of section 111 of the Equality Act (“the EA”) as they were alleged to have caused, induced and/or instructed the discriminatory behaviour by introducing/recommending this test for AFO’s as a requirement of the Licence granted to the second respondent.

2. The Tribunal and parties' representatives were conscious that although a restricted reporting order had been put in place there might still be a danger of sensitive information being disclosed or recorded in the Judgment. Parties cooperated with each other to minimise this danger and the Tribunal was careful when evidence was given about operational matters detail was generally not sought except when strictly necessary for an understanding of that evidence.

Section 192 Equality Act 2009 issue.

3. A preliminary hearing had taken place before Employment Judge Hosie on 24 May 2021. Mr Walker appeared for the MDP, Ms McGrady for the COP and Mr Clarke for the claimant. At that point in the amended pleadings there was reference to the MDP relying on Section 192 of the Act which related to possibly justifying a departure from the duties contained in the Equality Act 2010 on national security grounds.

4. A Note had been prepared following the hearing. At paragraph 6 (JBp.37) the Judge recorded that Mr Walker had indicated that he did not intend relying on section 192. This concession was raised at the outset. The Note did not accord with Mr Walker's recollection of the discussion. He explained that the matter was more nuanced. He had said at the hearing, that he didn't intend leading evidence on this particular matter as it might lead to discussion of potentially secret or highly sensitive information. He accepted that following the issue of the Note he had not picked up the inaccuracy. He did not write to the Employment Tribunal asking the Judge to reconsider the term of the Note. As background, he said that in the course of the preparation for the present hearing he had raised the issue with the claimant's representatives as to whether or not there should be a Restricted Reporting Order. This matter was raised by him now at the start of the final hearing. He explained that the Joint Bundle had only been produced shortly before the final hearing with the Witness Statements being available on the Wednesday before the hearing commenced. At that point he was only then able to fully assess the scope of what the Restricted Reporting Order that should be sought.

5. Mr Walker then explained that he had lodged amended pleadings referring to the Section 192 argument and the claimant's solicitors had produced a draft list of issues including reference to it the Section 192 argument. His position was that he had not withdrawn the argument or if he was held to have withdrawn it then he was seeking to amend to reintroduce it. In his view there would be no prejudice to the claimant as her agents were aware of the position and whether the section applied would be a matter for submissions only.
6. We appreciated that Mr Crammond was put in a somewhat difficult position if for no other reason than the hearing was taking place remotely and taking instructions would be difficult. He indicated that we could go back and listen to the recordings but he was not in a position to accept the second respondent's solicitor's position nor agree to an amendment at this stage.
7. The Tribunal considered the matter in terms of the overriding objective. We did not want to delay the hearing. It was unsatisfactory in its view to go back to the original recordings which might take some time to become available. The Tribunal was conscious that sometimes in even the most carefully prepared Note it might in error not fully reflect the more detailed discussions that had taken place and that misunderstandings could occur. In this case the Tribunal concluded that it would be unusual for a party in the second respondent's position to indicate at that stage that they would not seek to rely on this provision especially before any evidence is heard. It seemed more likely that Mr Walker for the reasons he had given, had said that he did not intend leading specific witnesses evidence about the matter but was not dropping this line of argument. He was at that juncture discussing preparations for the hearing.
8. The Tribunal took the view that looking at the documentation and background before it and considering the submissions it was prepared to accept that it was likely that the Note contained an error or misunderstanding in relation to the withdrawal of the section 192 position. It seemed to us that parties had appeared in any event to have proceeded on the basis that the matter was live and accordingly there could be no real prejudice to the claimant other than Mr

Crammond having to turn his mind to the argument at the close of the evidence which was some distance in the future. The Tribunal's view was that even if it had not accepted that an error or misunderstanding had occurred we would have been minded to allow the withdrawal of the concession at this stage given, because as we have stated, we could discern no prejudice to the claimant.

Issues

9. The List of Issues had not been finally agreed as some matters of dispute had arisen. Nevertheless, we set out the Issues as contained in the latest iteration whilst bearing in mind it was not agreed. It seemed to the Tribunal to be comprehensive.

List of Issues

10. The claimant relies on the protected characteristic of sex.

Did the second respondent, during the claimant's period of employment, apply the following provisions, criteria and/or practices (PCPs) to the claimant (as set out at paragraph 36 of the ET1 Paper Apart)?

a. A requirement imposed contractually or otherwise) to attain a fitness standard that equates to a level 7.6 on the 15 metre version of the Multi Stage Fitness Test (MSFT), or alternatively attain the equivalent required standard on the Chester Treadmill Test (known as the Job Related Fitness Test- (JRFT)) during the Initial Learning and Development Programme (ILDLP);

b. A requirement (imposed contractually or otherwise) to attain/maintain a fitness standard that equates to a level 7.6 on the 15 metre version of the MSFT or alternatively attain/maintain the equivalent required score on the Chester Treadmill test after the IDLP;

c. A policy requiring the claimant and all other Authorised Firearms Officers (AFOs) recruited from 17 March 2014 onwards to attain/maintain a fitness

standard that equates to a level 7.6 on the 15 metre version of the MSFT or attain/maintain the equivalent required score on the Chester Treadmill;

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- d. A provision, criterion or practise whereby the claimant and Authorised Firearms Officers (AFOs) recruited from 17 March 2014 onwards who failed to attain/maintain a fitness standard that equates to a level 7.6 on the 15 metre version of the MSFT or attain/maintain the equivalent required score on the Chester Treadmill Test; were likely to be dismissed on capability grounds if no suitable alternative employment as a non AFO could be found.
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- e. If so, does that PCP(s) apply to both the claimant and persons with whom they do not share their protected characteristic employed as AFOs on or after 17March 2014 subject to individual levels of fitness?
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- f. If so, does that PCP(s) place the claimant at a particular disadvantage when compared with persons with whom they do not share her protected characteristic who were employed as AFOs on or after 17 March 2014 subject to individual levels of fitness? The claimant relies on the following as substantial disadvantages (as set out at paragraph 37 of the ET1 Paper Apart):
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- i. Because of biological/physiological differences between men and women, it is (or likely would be) more difficult for female AFOs than male AFOs employed as AFOs on or after 17 March 2014 to attain a fitness standard that equates to a level 7.6 on the 15 metre version of the MSFT or the alternative Chester Treadmill score during the ILDP (subject to individual levels of fitness);
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- ii. Because of her sex, the claimant was, and other similarly situated female AFOs were or would be, at greater risk than male AFOs employed as AFOs on or after 17 March 2014 of not attaining/maintaining the required fitness standard that equates to a level 7.6 on the 15 metre version of
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the MSFT or the alternative Chester Treadmill score (subject to individual levels of fitness);

5 iii. Because of her sex, the claimant was, and other similarly situated female AFOs were or would be, at greater risk than male AFOs employed as AFOs on or after 17 March 2014 of being subject to the MDP's capability process/policy;

10 iv. Because of her sex, the claimant was, and other similarly situated female AFOs were or would be, at greater risk than male AFOs employed as AFOs on or after 17 March 2014 of dismissal under the MDP's capability process/policy for failure to attain/maintain a fitness standard that equates to a level 7.6 on the 15 metre version of the alternative Chester Treadmill score.

15 5. If so, was the claimant placed (or would be placed) at that disadvantage?

20 6. If so, can the second respondent justify the PCP as a proportionate means of achieving a legitimate aim? The respondent relies on the following as legitimate aims (as set out at paragraphs 28 of ET3):

 a. Protect the claimant from harm/risk of harm (by protecting the individual's health and complying with its health and safety obligations);

25 b. protect the claimant's colleagues and/or members of the public from harm/risk of harm;

 c. ensure that officer is sufficiently fit to carry out their duties;

 d. comply with College of Policing standards;

 e. protect the organisation from reputational risk;

 f. safeguard national security;

30 g. maintain an efficient and effective police service, including mutual assistance to other Police Forces.

7. And/or does the section 192 exception apply? i.e. Was the second respondent acting proportionately for the purpose of protecting national security?

5 **s.111 of the Equality Act 2010**

8. Does Section 111 of the Equality Act 2021 apply to the relationship between the second respondent and the third respondent?

10 9. Did the second respondent determine at the behest of the third respondent that new recruits employed from 17 March 2014 would have to attain/maintain a 7.6 MSFT score in their 'Initial Learning and Development Programme' or attain/maintain the equivalent required score on the Chester Treadmill Test as part of the conditions to obtain a training licence from the third respondent?

15 10. Did the third respondent instruct, cause or induce the second respondent to indirectly discriminate by requiring the second respondent to apply any or all of the PCPs set out above?

20 11. If so, does the section 192 exception apply? i.e. Was the third respondent acting proportionately for the purpose of protecting national security?

25 12. If the third respondent instructed, caused or induced the second respondent to apply the PCPs, did the third respondent honestly believe that it would be proportionate and therefore not unlawful?

Evidence

30 11. Parties lodged a Joint Bundle to which further documents were lodged by agreement. The Tribunal heard evidence from the following witnesses on behalf of the claimant who also gave evidence on her own behalf

- Eamon Keating Defence Police Federation;

- Ms Karen McKeown;
- Professor Bilzon.

The two respondents led evidence from:

- Trevor Clark Superintendent MDP;
- David Long Assistant Chief Constable (Operations);
- Mathew Johnston COP Policy Manager;
- Kevin Nicholson;
- Professor John Brewer.

10 Terms used

12. The evidence was peppered with acronyms and we set out the most common. Some such as the MSFT (Multi Stage Fitness Test) was often referred to by its common name the 'bleep test' after the audible signal given to participants to start the stages of the test. The test can be set at different levels.

- **AFO** Authorised Firearms Officer
- **MDP** Ministry of Defence Police
- **DPF or Federation** Defence Police Federation
- **MSFT** 15 metre Multi Stage fitness Test
- **INM** Institute of Naval Medicine.
- **ILDLP** Initial learning and development programme.
- **TACO** Terms and Conditions of Service.
- **VO2 Max** measures how much oxygen used when exercising.
- **NPCC** National Police Chiefs Council.
- **WOE** Weight of Equipment.
- **PPE** Personal Protective Equipment including helmet, baton weapon etc
- **MOD or MDP** Ministry of Defence and Ministry of Defence Police.
- **CNC** Civil Nuclear Constabulary.

13. The MDP is a national UK wide civilian police force responsible for the armed protection of MOD property and assets. It has investigatory powers

limited to its responsibilities. About two thirds of its Officers are armed (AFO's).

14. There are 49 Law Enforcement Agencies in the UK. There are 43 Police
5 Forces in England and Wales reporting to the Home Office. There are two
national forces namely Police Scotland and the Police Service Northern
Ireland. The MDP is one of three special police forces along with British
Transport Police and the Civil Nuclear Constabulary. It shares some
common features with the latter in respect that it also protects sites from
10 terrorist or other attack and has a high component of armed officers.

15. The MDP has always been required to act in support of local/territorial
Police services when called upon to do so. In recent years the MDP has
been regularly called upon to assist other Forces throughout the UK. These
15 deployments are usually in response to an incident which requires a
substantial armed response. An example of planned assistance was when
armed MDP officers were deployed to assist with the COP26 conference
in Glasgow. Following the Manchester Arena bombing in May 2017
assistance from the MDP was given to local Police Forces as part of a
20 national security response. This was done to boost the number of armed
officers deployed. This required Ministerial approval. The Strategic Armed
Policing Reserve is another government contingency that facilitates a
surge of armed officers in local territorial force areas in response to a
significant terrorist threat. The MDP are the largest contributor in terms of
25 AFOs.

16. The fitness levels of Officers was historically a matter for the Force in
question. Discussions took place within and between Police Forces around
30 the benefits of national standards for particular roles including and how fit
an officer needed to be to be armed and able to respond to a terrorist
incident. Some forces had adopted standards for fitness. The Government

ordered a wide ranging review of Policing in 2010 to be undertaken by Sr Tom Windsor. The review reported in different stages. This review included the MDP. In 2013 he recommended common fitness standards. This gave further impetus to the discussions around appropriate fitness standards. It was widely recognised that there would be a number of difficulties in agreeing common standards and agreed test regimes and it was widely recognised that there was a danger that too high a level of fitness being required could discriminate against women officers.

10 Lilleshall Report

17. A report had been carried out by the Lilleshall National Sports Centre 2004 into "Fitness for the Police Service". The Project Team was led by Professor Brewer. It later became a peer reviewed study. The report focussed on the physical demands required of a police officer in various roles. It assessed the 15 metre test MSFT test and recommended it as being a practical and robust test and the appropriate standard for AFOs. It used heart rate as a measurement to show the physical demands on participants. Heart rate was easily measured. A total of 119 police officers and 108 members of the public were assessed as part of the study. The study used simulated training activities which were overseen by fitness instructors who tried to create "real world" situations to mirror the physical demand required to successfully complete them. The MSFT tests took place in the same venue on the same day to ensure a standard environmental setting. There were 47 AFOs who participated in the study 38 of which were male and 9 female. This was the ratio of male to female officers in the participating forces. The instructors were advised to ensure that the activities did not contain any unusual or exceptional physical activity over and above what was needed to complete an exercise. One of the consequences of the report was to reduce the level of the previous standard.
18. At page 5 of the report it stated:

"Data collected during the aerobic component of the JRFT (the 15 multi Stage Shuttle Run Test, MSFT) revealed that the demands of this test were either equal to, or greater than, the demands of OST. Furthermore no differences

5 were found when comparing the physiological responses of males and females to either the 15 metre MSFT or OST. Although heart rate data did show that older people were placed under slightly increased physical demands when completing the test, the absolute workload experience was not particularly high and likely to be attainable by all individuals who maintain the “normal” level of health and fitness.”

19. The report recommended the use of the test as providing a practical test to assess Officers fitness. It stated:

10 “For many years, it has been widely accepted that the ability to transport oxygen to the working muscles is an accurate predictor of aerobic power and work capacity. Consequently the measurement of aerobic power, or maximum
15 “oxygen intake” (VO2 max) has long been accepted as one of the most reliable indicators of a person’s ability to conduct instant steady-state exercise. Whilst initially linked with sports performance, VO2 max has become increasingly associated with general health and wellbeing and is now widely used throughout the health and fitness professions as a general measure of a person’s state of health and capacity for exercise.

20 Measuring a person’s view to max assesses the maximum rate at which oxygen can be transported to the muscles and organs. This is vital, since oxygen is needed to combine with either carbohydrate (Glycogen) or fat to support physical activity. However, at the rate at which energy is required exceeds the rate at which oxygen can be supplied, energy needs to be produced anaerobically (without oxygen), and this quickly results in fatigue. This is as a
25 result of accumulation of one of the by products of anaerobic metabolism, lactic acid, which rapidly inhibits the contractile properties of a muscle. Therefore, the greater a person’s ability to transport oxygen to muscles, the harder an individual is able to work before having to produce energy anaerobically, thus delaying the onset of fatigue.

30 Maximum oxygen uptake is, to some extent, genetically predetermined. However, for the vast majority of individuals, the genetic “ceiling” to the VO2 max has never been reached, since they have never exercised sufficiently to fully challenge their oxygen transport system. Whilst physiologists have shown
35 that elite endurance athletes following vigorous training regimens have reached their genetic limit for VO2 max, this is not true for the general population, for whom VO2 max remains the single most reliable indicator of work capacity. This link between the VO2 max and “work capacity” is important and is additional to the more traditional view that VO2 max is linked to
40 successful sporting performance, particularly in endurance based events. Individual view of the VO2 max will be capable of coping with any form of aerobic, physical, work or exercise more effectively than an individual with a lower VO2 max.”

- 45 20. The report recommended (page 446):

5 *“The scientific data obtained from this study strongly indicates that the aerobic (cardio vascular demands of completing 4 shuttles on level 5 of the 15M MSFT are either equivalent to, or above, the aerobic demands of Officers Safety Training. Furthermore, an aerobic demand of completing 4 shuttles on level 5 over a 15 meter MSFT are also either equivalent to, or above an aerobic demands of OST. These results apply to both genders, all ages and ethnic group.*

10 *It concluded that officers who did not manage to achieve this standard level of fitness below the demands of normal OST activities.”*

21. The report considered the impact of the assessment on female subjects. It accepted that in order to complete the 15 Metre MSFT successfully female subjects were exercising at a “slightly higher percentage of their maximum heart rate than males”. It continued:

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20 *“However, the ‘difference in relative exercise intensity experienced by male and female police officers undertaking the multi stage fitness test is approximately 4%. It is suggested that this is simply a reflection of the different physiological and biological characteristics possessed by males and females, hence with an acceptable limits for a test of physical fitness.”*

22. A report was prepared for the Police Advisory Board of England and Wales in January 2010 (JB467) in relation to Job Fitness tests for specialist posts. It followed a data collecting exercise involving 17 police forces. The exercise aimed to capture data from officers undertaking training exercises, following national training guidelines. They were believed to closely replicate “real life” physical demands of the specialist role and had based on occupational scenarios. It recommended standard on the MSFT for authorised firearm officers was 7.6. The above recommendations were based on further reports prepared by the Lilleshall Consultancy Services (JB 476/JB479) in 2009. The report contained an Equality Impact Assessment (JB550-553). It addressed the issue of possible indirect discrimination thus:

35 *“Endurance – Gender Impact*

2.3 *The overall pass rate for the endurance element was 94%, with over 90% of women and 96% of men achieving the pass standard. There were few or no women tested in respect of ASU, MPU and PD&MPU. There were*

differences between the pass rates of men and women in the following areas:

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- *AFO 16% difference in favour of men.*

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At 2.4 it stated:

10 *“Following the data analysis of the validation assessment, the pass rates for 10 out of the 13 specialist areas are so minimal as to cause no concern regarding disproportional impact between the sexes.However the FWG considered that the 3 firearms-related specialisms (AFO, ARV and DIAFO) required some further examination and explanation.”*

23. In relation to the AFO role the report indicated that further research should be carried out (JB551). There is ongoing but unconcluded research taking place.

15 **Professor Bilzon’s Report**

24. A report was commissioned from Professor James Bilzon by the claimant’s solicitors (JB695). Professor Bilzon is a distinguished expert in occupational and environmental exercise physiology with experience as an exercise physiologist at
20 the MOD. He had conducted research and published over a hundred peer reviewed articles. He considered whether, because of the biological physiological differences between men and women it is, or likely would be, more difficult for female AFOs than male AFOs to attain a 7.6 score on the 15 metre MSFT.

25 25. The report reviewed the claimant’s history and also the history of the development of the testing regime used here the MSFT. He made reference to the Sex Discrimination Act and to guidance from the Equal Opportunities Commission in 1998 (p713) and discussed the steps that needed to be taken to avoid sex discrimination. He accepted that workers with physically demanding occupations
30 such as Emergency Uniform Services are often required to demonstrate corporate levels of physical capability to undertake their roles safely and effectively.

26. Professor Bilzon reviewed the Lilleshall Consultancy Services Report of January 2009. He accepted that the Lilleshall Report was a “very thorough and significant
35 body of work which collected data from a large representative sample..” He was

critical of some aspects of the methodology used in the report which he believed undermined the conclusions and did not represent best practice in his view. He considered the use of heart rate to be inferior to the use of apparatus that directly measured the oxygen uptake of an individual. He was concerned at the use of the test for women. He had considered the later Institute of Naval Medicine Report and noted that their recommendation was to use the lower standard of 5.7 on the 15 metre MSFT. This they had found represented the average performance of MDP Officers in their research trials. The issue, as he saw it, was whether individuals meeting this lower standard could carry out the AFO role at a standard lower than 7.6. He noted that the MDP had continued to assess AFOs who were employed before the 17 March 2014 against the original lower standard of 5.7. He wrote (p719):

“Unless the MDP are admitting that these employees are not capable of performing their AFO role satisfactorily and safely, it seems indefensible to suggest that the higher cardio-respiratory fitness standard of 7.6 is a necessary minimum acceptable standard for performing the job.”

27. He accordingly suggested that a 15 metre MSFT score of 7.6 was an unnecessary requirement for being employed as an AFO and/or completing ILDP training. He submitted that the MSFT was a convenient method for mass testing and indicated that doubts had been raised about the ability of the test to accurately predict VO2 max citing a recent report by the University of Chester that it might underestimate VO2 max. He suggested the possibility that individuals with good aerobic fitness capacity might fail a test in which aerobic capacity was being estimated i.e. producing a false negative result. His position was that there were difficulties in using this test and it should not be used as a final test to determine individuals cardio-respiratory fitness or capability for work. Professor Bilzon was critical of heart rate being used to determine aerobic capacity preferring the measurement to be carried out more accurately through direct gas analysis of the subjects oxygen levels.

College of Policing

28. The College of Policing is company limited by guarantee and wholly owned by the Home Secretary which was set up in 2012 to act as a standard setting agency. It

sets a range of standards other than for armed police roles. It develops policing practice, standards and training and educational requirements and standards.

- 5 29. The COP has ownership of the Job Related Fitness test but is generally not prescriptive leaving it to individual Forces to implement standards. It issues guidance on fitness (JBp875).
- 10 30. The NPCC Fitness Testing Working Group managed issues in relation to fitness testing and development including the development of various tests including the Chester treadmill test. That is a test whereby an individual walks on a treadmill for up to 12 minutes with an increasing gradient of 3% every 2 minutes to measure a specific capacity for oxygen intake. The test is recognised as an alternative to the MSFT test.
- 15 31. The COP has an “Authorised Professional Practice” which includes armed policing. It provides guidance on the appropriate issue and use of firearms and the training and fitness of AFO’s and armed specialist groups. It regarded the AFO job profile as being a generic term used to identify armed police officers at an ‘entry level’ armed policing role on which other more specialist and demanding roles are built. It has the lowest required fitness level. The guidance given includes command issues at strategic, tactical and operational levels. Compliance allows a Force to have a Licence granted to them by the COP.
- 20 32. The COP believed that the work of Professor Brewer supported their understanding that the 5m MSFT test at 7.6 correctly assessed the aerobic demand needed for the AFO role across forces. This level had been widely accepted. This became their requirement for Forces. Both the MSFT and the Chester Treadmill tests are indirect methods of predicting VO₂ or VO₂ maximum values. The current guidance of the COP is for Forces to offer a direct test by means of gas analysis to those in danger of losing their jobs through a failure to pass the indirect tests. They recommended the use of the Chester Treadmill or cycle.
- 25 30

33. The fitness required for the role was assessed as being what was required to carry out AFO duties carrying/wearing PPE of approximately 20 Kgs in weight (body armour, helmet, handcuffs, baton, irritant spray, Taser and Firearm) and still be able to maintain fine and gross motor functions such as changing magazines or dealing with weapon stoppages or malfunction. If the AFO was not sufficiently fit then the likelihood was that they would not be able to think clearly or carry out all the functions of their role efficiently and safely.
34. The COP issues to Licence Police Forces who adopt and comply with their standards, including fitness standards, over roles such as AFOs. The MDP adopted the COP standards in relation to how fit an officer should be when fulfilling an armed, AFO, role.
35. If the MDP did not accept the relevant COP standards it would lose its COP Licence. It was not legally required to have a Licence from COP but without one it would have difficulty in demonstrating that its officers were appropriately trained and fit enough to carry out armed policing roles. This would have a consequential impact on the Force when called upon to assist a territorial force though the provision of armed officers. The MDP was a signatory to Section 22a of the Police Act 1996 agreeing to collaborate with other Forces and to maintain certain operational standards. In 2020 the MDP had agreed to abide by a Code of Practice on Armed Policing and Police use of Less Lethal Weapons. The MDP through the MOD are required to follow National Policing doctrine standards and manuals. There is a recognition for the need for close cooperation between Forces and a common understanding that aligning standards assisted with the interoperability of personnel. This was one of the reasons for the adoption of the 7.6 MSFT fitness standard recommended by the COP.
36. The adoption of rigorous standards of training and fitness are deemed necessary by the COP and all Police Forces to ensure the protection both of the public and of all police officers when working together. In the absence of a COP Licence

Chief Constables seeking assistance from the second respondents would have to consider whether using non licensed AFOs, whose competency was not validated by adherence to COP standards, might give rise to risks of civil liability for their use and to public scrutiny if anything untoward occurred when deployed and a firearm used.

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37. The failure to adhere to these fitness standards and have the appropriate Licence would make it likely that the second respondent would either be excluded from assisting other Forces or at the least the territorial force would be seriously deterred from seeking assistance from the second respondent because of the lack of the Licence. In these circumstances the second respondent would come under pressure to conform to those standards.

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38. The MDP had its COP Firearms Training Licence suspended in 2017 from July until May 2018. There were a number of reasons for the suspension such as a lack of adequate records to vouch appropriate training and standards. A significant reason for the suspension was also the lower fitness standard adopted by the MDP and to which it's AFO's adhered. This led to adverse publicity for the MDP and concerns being raised by other Forces about having them in supporting roles. The MDP submitted itself to an independent peer review chaired by the NPCC National Armed Policing lead. These events were widely known in the MDP and impacted on staff morale and the prestige of the service.

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39. It was agreed at this time that the MDP would carry out remedial work to regain the Licence by adhering to COP standards. This included an agreement to align fitness standards by 2021. It was reinstated in 2018.

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40. The failure to maintain national fitness standards has been recorded as a risk on the MDP Armed Policing Strategic Threat and Risk Assessment since 2016.

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41. The majority of armed officers in the territorial forces are required to achieve 9.2 on the MSFT which is a higher standard than 7.6. Armed specialist responders are required to achieve 10.5 MSFT and Armed Response Vehicle responders 9.4.

42. The MDP adopted a Fitness Testing Policy effective from June 2016 (JB619) in which it noted that the standards for fitness recommended by the INM at that point had been “endorsed” by the COP for the AFO role. It gave detailed guidance to Forces about the use of the test (JB639). It indicated that the person administering test should be “well trained, knowledgeable and experienced in conducting the test and “totally familiar with operating the treadmill”.
43. The COP endorsed the use of the Chester Treadmill as an alternative test in November 2016 (JB625). The guidance was circulated to all Chief Constables. The test involves walking on a treadmill where the elevation is periodically raised to increase the subject’s physical effort. The test was accepted as being an accurate way of measuring fitness up to the 7.6 equivalent MSFT test. On occasion a minority of subjects taking the test could initially find difficulty balancing but with expert guidance and practice it was highly unlikely that they could not ultimately be able to take the test.

Background to MOD adopting MSFT at level 7.6

INM Report

44. The issue of how fit a Police Officer needed to be to safely undertake the diverse roles they performed throughout the various UK Police Force, including the MDP, came to the fore in or around 2010. The MDP had placed little historical emphasis on fitness. Their main role was guarding installations and assets.
45. In 2013 Sir Tom Winsor published recommendations that there should be an annual fitness test. At this time the MSFT test had been developed by Professor John Brewer and his team at the Lilleshall National Sports Centre.
46. The standard for the Home Office Forces was set following these recommendations and following the work carried out by Professor Brewer. The standard recommended for unarmed officers was 5.4 MSFT.

47. The MDP faced various difficulties particular to itself. Between 2009 and 2014 there had been a recruitment freeze which led to a significant reduction in the size of the MDP. No fitness testing of officers took place in this period apart from in two specialist groups. By 2014 there had been no recruitment for 5 years and the MDP had an aging workforce. During this period the COP published a requirement for all Home Office officers to pass an annual fitness test.
48. Much of the day-to-day work of the MDP AFO's was not particularly strenuous involving as it did static guarding of facilities. Because of a recruitment freeze it had an aging cadre of AFO's many of whom were apprehensive about passing a more rigorous test. There was pressure from staff and their Federation to retain the lower level of 5.4 on the 15 metre MSFT (35 Vo2 Max). This would mean that as armed officers their fitness level would be assessed at a lower standard than other Forces. There was talk of developing a bespoke standard for the MDP.
49. A report was carried out on the physical demands of an occupational fitness standard options for "critical job related tasks undertaken by the Ministry of Defence Police" by the Institute of Naval Medicine in February 2015 (JBp762-807). The INM had been tasked by the MDP to develop an occupational fitness standard in various roles including the AFO role.
50. It recommended that the MDP should not adopt the Home Office Police fitness standard policy (p769). The INM also commented on "a lack of methodological detail" in the Home Office Officer Safety Training making "an informed judgment on the appropriateness of the Home Office Police fitness standards for the MDP difficult".
51. The report contained a passage at para 5.16 (p794) commenting on setting of the Home Office standard: "*The Home Office Police were younger (hence probably fitter) and were 'specialists' in an AFO role; whereas MDP personnel in an AFO role would be classes as 'general service' officers. Therefore, it is no surprise that the fitness standards of the MDP and the Home Office are different. The lower level*

fitness standard from the present study may continue to raise interoperability questions. Should interoperability be essential for the MDP, the only option would appear to be the adoption of the Home Office fitness standards by the MDP”.

- 5 52. The report indicated that it recognised limitations in the study (p795) namely that it took the projected fitness standard pass rates from another study and that if different field-based tests were applied (e.g bleep test) different pass rate projections may be observed. It recognised that the pace of the scenarios was partly self-selected and “subjectively rated”.
- 10 53. The INM had conducted physical tests including simulated cover and movement exercises for AFO’s It indicated in its report: *“to some extent the pace was determined by the least physically fit”*(JBp774).
- 15 54. The report concluded that a higher occupational fitness standard would result in less females reaching the fitness standard (p786 -787). In the Discussion section the report (p790) it stated that: *“the decision by the MDP not to adopt the Home Office Police AFO fitness standard has proven to be prudent. This fitness standard equated to an estimated VO2 mx of 41 (or level 7.6 on the 15m MSFT). It is projected that 46% of the MDP workforce would be capable of passing this fitness standard... which would have created an adverse impact (discrimination) against females and personal over the age of 55 years of age”* It suggested that there was a clear rationale for a bespoke fitness test.
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- 25 55. The INM recommended the use of the 15 metre MSFT at a level of 5.7 for AFOs. This was below COP’s standard of 7.6 or higher for specialist officers.
- 30 56. In practice when taking the test participants have to run 15 meters back and forth across a marked track keeping time with beeps. Every minute or so, the next level commences: the time between beeps gets shorter; participants must run faster.

57. When considering the differences between males and females, with regards to Occupational Fitness Standards, the report stated: *“The estimated VO2 max of females was around 22% lower than males, which meant that females worked at a higher (harder) relative exercise intensity when undertaking job-related tasks. Typically females had to work around 14% harder than males during job-related tasks. The peak relative exercise intensity experienced by females in the most physically demanding scenario (AFO operation Context) was around 91% VO2 max, compared with around 80% VO2 max in males. The lower aerobic fitness of female means that they were less likely to attain an occupational fitness standard (compared to males). In addition to “keep up” with male colleagues, female personnel had to work harder than males, which would shorten the duration that they could sustain an imposed workload”* (p791).
58. The INM stated that the role of an MDP AFO was mainly load bearing and endurance. Operational Officers carried over 3 stone of additional Weight of Equipment (WOE). The role could, at times, be mostly stationary when carrying out armed stand-off duties. The role also involved patrolling while carrying WOE as well as entry and exit of vehicles carrying this weight. Following a standard, off the shelf, aerobic test would mean that an officer may be able to carry the required WOE but would be unable to meet the aerobic test, the opposite being an officer may be able to meet the aerobic test requirement but would be unable to carry the WOE.
59. The INM gave a variety of options how the Vo2Max could be tested; the 20m MSFT, the 15m MSFT, the Rockport Walking Fitness Test, the Chester Treadmill Walking Test, the 12m Cooper Run(2.4km) and stated the test could be done on a bike or rowing machine and in several direct testing methods.
60. The authors attempted to identify the most critical and physically demanding occupational tasks. They prepared “job related scenarios” for subjects to carry out including cover movement exercises. Volunteers wore appropriate PPE and carried weapons. The report stated (JBp774):

“3.12 The content and distances covering in the scenario were verified by MDP Firearm SMEs to be a “fair reflection” of that occupational task. Each scenario was undertaken in groups of up to four, at a partly self-selected pace, which is the standard operating procedure (SOPs) for this firearm tactic. The scenario pace was classified as partly self-selected for two reasons. First, the SME Instructor leading the scenario would prompt the four person teams if they were moving too fast or too slow. Second, to some extent the pace was dictated by the least physically fit person in the four person team, so that a tactical formation could be maintained. After each scenario the SME was asked if each individual performed the task to a minimally acceptable level..... The data of any individual that did not meet the minimally acceptable criteria was excluded from the analysis (N=1). Retrospectively, an SME panel verified the minimum acceptable time to complete the scenario was 9 minutes. Therefore, any individuals who did not complete the scenario within this time were also excluded from a modified data analysis..”

61. Most volunteers were given heart rate monitors and some portable oxygen monitors to measure physical demand through analysis of gas. The primary measure used was oxygen uptake and heart rate used as a secondary measure.

62. The report contained the following passage (page 794):

“Discrimination 5.18

Adverse impact occurred (Equation 2) in females, and volunteers over 55 years of age if the occupational fitness standard was equal to, or greater than 30ml – Kg min, or 35ml – Kg min, respectively (Table 3). Whilst this might indicate that indirect discrimination exists if the standard were greater than 30ml – Kg min, it should be noted that this was only a projection. Therefore, at this stage the preferred fitness standard choice of the MDP should not be influenced by the adverse impact projection. The occurrence of adverse impact could be interrogated in the entire work during the initial implementation phase as long as the fitness standard carried no consequence for employability.”

63. The report recommended that the MDP should not adopt the Home Office (and COP) fitness standards (p798).

64. There were observers from Forces who saw the scenarios used by the INM. The exercises were videoed. Almost immediately concerns were raised as to how

realistic the exercises had been in particular the “cover and move” exercise and whether they properly reflected the physical exertion that could be needed in a real life situation.

Guidance on Application of COP recommended MSFT test

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65. The COP prepared a report on the implementation of job related fitness tests for specialist officers in January 2017 (JB875). It provided that authorised firearm officers should achieve the standard of 7.6 on the MSFT. It suggested alternative tests for assessing fitness for specialist posts including the Chester Treadmill Police Walk test. The College of Police prepared a report on implementation in December 2016 (JBp891). The report indicated (p894):

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“This guidance has been produced by the College of Policing to support the assessment and validation process concerning the introduction of the job-related fitness test for seven Police Officers. The Police Forces that implement these standards will be able to cite those being assessed as being reasonable and appropriate under the Equality Act 2010 and Health and Safety at Work etc. Act 1974. Any derogation from these standards carries a risk of legal challenge from an officer disadvantaged by the implementation of a higher or lower standard, any additional standards or a different method of assessment from those recommended in this guidance.” (our emphasis)

66. The document replaced earlier guidance on the application of the fitness tests. Paragraph 7.5 stated:

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“Evidence has identified that age and gender of candidates have an impact on performance. While it is inappropriate and illegal for forces to make concessions in the standard of the test for these groups, forces are able to implement relatively simple strategies which improve performance:

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- *Forces should consider running women only testing sessions;*
- *Forces may run open days/events targeted at these groups in a supportive environment;*
- *Forces should consider using female test administrators..... provide for these alternative tests”.*

Paragraph 14.6 report stated:

5 “Case law in relation to fitness testing indicates that any test must be the same for all those of a protected group. Although only an Employment Tribunal can decide whether indirect discrimination is justified in the particular circumstances, the FTWG considers that the standard is likely to be a proportionate means of achieving a legitimate aim.”

67. The Guidance provided that the Chester Treadmill Walking test could be used as an alternative. The COP did not exclude the use of other tests but warned that they had to be properly evaluated.

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Adoption of 7.6 MSFT test by MDP

68. In 2013 Mr Alf Hitchcock QPM CBE took up office in as Chief Constable of the MDF. He wanted to move forward with agreeing and implementing an annual fitness testing regime. He wanted to use the MSFT test as adopted by other Home Office Forces. There was pressure on the MDP to adopt the standard MSFT fitness test for AFOs. Negotiations took place with the DPF about changes to the Officers Terms and Conditions of Service.

69. The DPF had no objection in principle to the setting of a fitness standard applicable to the roles carried out. They had a number of concerns both as to the correct level of fitness that should be required and the methodology used in coming to levels of fitness for certain roles. Apart from the lower level test 35 Vo2Max or 5.4 on the 15m MSF test which sets the employment standard for Home Office Police Officers, the other more stringent tests appeared to them to lack relevance to the MDP. The DPF argued that in coming to the standards the Lilleshall researchers had only tested specialist officers from the Home Office (who already had a higher level of fitness for their respective roles), they did not test any officer over 60 years of age, the tests had a very low female representation and they did not look to set a minimum standard for employment. Further they argued that the Multi Stage Fitness Test was inherently inaccurate. The MDP officers were generally deployed on guarding duties which the DPF believed did not require as high a level of fitness as other AFO's in other Police Forces.

70. Correspondence took place between the DPF's National Chairman Eamon Keating and Mr Hitchcock in relation to these matters. It was agreed that an outside scientific assessment would be carried out. The MDP and the Ministry of Defence chose the Institute of Naval Medicine (INM) to carry out the work. The Federation engaged in the process. This research ran alongside negotiations about terms and conditions. It was agreed that a representative of the DPF could be present when testing took place. Ms K McKeown was one of those officers who discussed the conduct of the study with those from the INM and who was involved in the process. It was hoped that they could identify an appropriate bespoke test for MDP Officers appropriate to their role.
71. In March 2015, the INM produced a further document (p 810 - 868). The purpose of this was to develop an occupational fitness test and standard for the MDP. At the outset of the document the report states that the "limitation of these tests are that they predict performance rather than measure aerobic fitness per se, hence these tests could potentially misclassify an individual's test outcome" (p810).
72. The INM gave a presentation to the Force on 27 April 2015. At the presentation which took place at the HQ at Weathersfield teams took part in a firearms tactic called a "cover and movement" exercise. This was the only exercise used to assess aerobic capacity. The INM team were clear that due to rushing the study the only specific area they had a result for this exercise. It required a Vo2Max of 35.6 (p818).
73. Negotiations continued between the DPF and the MDP regarding the appropriate level for the MSFT test, the impact of any test on members and related issues. The DPF accepted the report and its findings. It agreed that a healthier fitter workforce was an important objective.

74. In July 2015 the COP indicated that it did not consider the conclusions reached by the INM that a fitness score of 5.7 was sufficient because the testing of subjects carrying out cover and movement exercises was not as strenuous as a real life situation and had been carried out at walking pace. The COP wrote to the MDP setting out their position on the 10 February 2016 (JBp577-578). It indicated that it would have to take a view as to whether the MDPO could continue to be licensed as having officers with the lower score would mean that they were not meeting national standards “and would therefore be unable to be deployed as a national asset against existing role profiles due to interoperability concerns” (JBp578). The MDP and NPCC recognised these risks.
75. In March of 2016 (p151–152) Mr Keating wrote to the Chief Constable, Mr Alf Hitchcock QPM CBE to express concern that he had heard that the College of Policing who wanted a common fitness standard for AFO’s of 7.6 on the MSFT might persuade MDP to ignore the findings and concerns expressed in the INM reports. He wanted assurance from the Chief Constable that the College of Police would agree that the fitness standard for the AFO role in the MSFT being 5.7 on the 15 metre MSFT until such time as there was a further scientific review of any proposed increase the fitness level. Mr Hitchcock responded (p153) that the 5.7 required standard contained in the Terms and Conditions of Service remained 5.7. and that the MDP would consult before there was any change.
76. Mr Keating wrote again on the 30 March 2016 (p154/155) noting that the required fitness standard was 5.7. The College of Policing was suggesting a level of 7.5. and Mr Keating asked the Chief Constable to resist adopting the College’s recommended standard. This correspondence took place as part of the ongoing review into Terms and Conditions of Service or TACO’s. It had been agreed that staff would not be required to meet the fitness level of 5.7 until June 2017.

77. The Chief Constable Alf Hitchcock issued information to staff on the 8 July 2016 (p209) stating that all new recruits were required to achieve a level of 7.6 MSFT and to maintain that level. He confirmed that this did not affect existing officers.
- 5 78. On the 31 January 2017 the Chief Executive of the COP wrote to Alf Hitchcock (JBp673/675) expressing concerns about areas of non-compliance with the licensing requirements. The letter raised a number of issues around First Aid Training, the record and data kept in relation to training and job related fitness testing. It expressed the view that the standard adopted by the MDP of 5.7 was
10 *“well below that expected of Authorised Firearms Officers (AFO) (7.6). MDP has carried out an independent scientific assessment ...and while the College and national armed policing do not challenge the science behind the assessment method we do not consider that the activity tested is representative of the role requirement for an AFO”* The letter made clear that the implications were that
15 unless shortcomings were addressed the licence could be suspended.
79. In March 2017 Chief Officers Group (p213) indicated that they wanted to increase the fitness level to 7.6 in order to address concerns raised by the College of Policing and to promote harmonisation over the following three
20 years with other Forces who had followed the College’s requirements. They made reference to the College’s Fitness Standards applicable to various grades (p215) which stated that AFO’s should achieve a level of 7.60 This would mean a change to the agreed TACO’s applicable to the MDP. The DPF continued to insist that the agreed standard contained in
25 the TACO’s was 5.7 and that this was the appropriate standard as validated by the INM reports.
80. In July 2017 the COP inspected the MDP and provided findings and a recommendation that the license should be suspended (JB676/680) which
30 it was on the 20 July (JB681).

81. In October 2017 the NPCC wrote to the MDP that deploying officers with the lower fitness standard could cause significant risks when being deployed. It had taken legal advice (JBp684) and wrote: *“It is important to acknowledge that the MDP could be deployed in significant numbers without a TEMPERER authorisation as you form part of the National Armed Policing Strategic Reserve”*. It went on to state that legal advice was to the effect that only officers fully compliant with national standards should be deployed except in exceptional circumstances otherwise there could be significant legal consequences for the host Chief Constable deploying them.
82. On the 2 November 2026 the COP’s Professional Committee formally endorsed the use of the Chester Treadmill device as a validated alternative to the MSFT.
83. On the 9 November 2016 in a letter (JBp670) to all Chief Constables the COP wrote *“While recognising that implementation remains a local decision, Forces are encouraged to utilise these validated tests recognising the significant work conducted to ensure validation with the 15mM MSFT”*. Attached to the letter was information about the Treadmill Test, the equipment needed and the settings required to replicate the MSFT test.
84. Guidance was issued to Forces on the Implementation of the Job Related Fitness Test in December (Specialist Posts) and January 2017 (JBp875 and p891).
85. The December Guidance contained a warning that there was a potential legal challenge under the Equality Act but that the standards had been assessed as reasonable and appropriate. It gave guidance about the use of the Chester treadmill Test and how to administer it. It stated (JBp883): *“The test administrator*

should be well trained, knowledgeable and experienced in conducting the test. They should be totally familiar with operating the treadmill and in explaining to the subject the use of the RPE chart” The Guidance indicated that the importance of good walking technique should be explained. It also contained detailed advice about the conditions in which the test should be administered.

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86. The January Guidance contained information of a more general nature in relation to fitness testing. It warned that age and gender would have an impact on performance. It suggested women only testing sessions and if possible female test administrators with mentoring programmes. It suggested that passes and failure should not be passed out of the chain of command (JBp899). The Guidance contained information that the COP had identified a disproportionate impact on women through data of pass and failure rates (JBp903).
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87. The COP also sent an email on 5 March 2019 (JBp693-694) advising that the COP had to robustly protect common national standards.
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88. The MDP began recruiting again in March 2014 requiring new recruits to attain a fitness score of 7.6 on the 15 metre MSFT.

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Claimant

89. The claimant, Ms Koren Mae Brown was 26 years old when she joined the MDP. She is a female. In 2015 she made an application to join the Ministry of Defence Police. She was invited to attend a “SEARCH” assessment which took place over 2/3 days in around April 2016. As part of the assessment there was a fitness test and formal interview. The claimant was advised that she was expected to achieve a score of 7.6 on a multi-stage fitness test (MSFT) or “bleep” test during which she would run a series of 15 metre lengths turning and returning on a “beep” to a shuttle of 15 metres. The intervals between the beeps would decrease requiring anyone undertaking the test to increase their pace. The claimant scored 6.7. She was told that she could resit the test at a later point. The claimant understood that she needed to reach this level of fitness on the MSFT.
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90. The claimant 's pre-employment assessment was positive and she was provided with a candid feedback report. She was held to have passed the physical fitness standard.
- 5 91. In May 2016 the claimant attended a medical assessment. It was noted that she had a heart murmur. The claimant did not take another MSFT test at that point.
- 10 92. The claimant was aware that there were two levels of fitness tests namely 5.7 which applied to existing staff and 7.6 which applied to the claimant's intake.
- 15 93. By October 2016 the claimant had been offered employment to commence November 2016 (JBp39-40). Her salary was £21,534. She was 26 years old. The letter made reference to other documents in relation to her terms and conditions of employment including a document headed "Statement of Particulars"(JBp41-51) which was signed by the claimant on the 9 October 2016 accepting the offer of employment. Clause 14 made reference to job related fitness standards (JBp44) and the requirement to pass the MSFT at level 7.6.
- 20 94. The claimant assumed that despite not achieving 7.6 she might be employed and the lower 5.7 level as that what she thought she would have to maintain in the future. The claimant became a Constable with the MDP on 14 November 2016. As an integral part of her role she was armed. She was to be employed as an Armed Support Vehicle Officer which meant that she would be an AFO. She required to be trained and instructed to perform protection and patrol services at MOD UK sites and be deployed with a firearm (JB41-51).
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Initial learning and development programme (ILDLP)

- 30 95. The claimant began her IDLP at Wethersfield which is the MDP Headquarters. This consisted of a wide range of learning, some classroom based and practical exercises. The initial training period was for 17 weeks, 11 being classroom based

with 6 relating to firearms training. After passing out she returned to the training school for a further 4 weeks for further firearms training.

5 96. For the first 5-6 weeks of training the claimant was asked to fill out a "Fit to Test Note". The claimant indicated on that form that she had a heart defect because of the heart murmur discovered at her initial medical. As a result the claimant was given a "Unfit to Test Note" and was referred to MDP's Occupational Health provider. The claimant was unable to take any further fitness tests meantime. The G.P. eventually confirmed that there were no issues with her heart but the claimant
10 completed her ILDP training on 24 March 2017 having not achieved a 7.6 MSFT score. She had completed only one formal attempt at the MSFT.

15 97. The claimant did not struggle with any physical aspects of the training and took part in and successfully completed various physical exercises including job related tasks such as cover and movement exercises which were completed with "full kit" (PPE) and in exercises requiring search and foot interception of marauding terrorists. In this exercise she was expected to quickly alight from a vehicle, and intercept the attacker by running after them and tackling them. One exercise she did involved running a long distance over uneven ground. The claimant did not find
20 any difficulty in completing these exercises successfully.

25 98. Following the training period the claimant completed further firearms training when deployed to vehicle support where she had to engage in physically demanding exercises such as 'hard stops'. These were more demanding than the exercises she had taken part in at Wethersfield. The were completed with full PPE. From April 2017 the claimant began her role as an armed support vehicle officer. She was assigned to a base in the north of Scotland where she carried out her full range of duties. The claimant was one of a very few female AFOs stationed there.

30 Fitness concerns

99. On the 30 March 2017 the claimant (JB62) had a first meeting in relation to not passing the MSFT. She indicated she was struggling with her breathing during the

test. She believed that this was preventing her from obtaining a 7.6 score. After consulting her G.P. she was prescribed an inhaler to assist her. Her breathing difficulties were later diagnosed as being stress related. The claimant's MSFT times improved and she took a training test on 12 April when she achieved a level of 6.6.

100. Because the claimant had not achieved the 7.6 standard she was advised that she was now part in the "Managing Loss of Qualification process". She was told that she must achieve a 7.6 level by Wednesday 3 May 2017 (JBp62). The claimant felt disadvantaged because she had not taken many tests because of delays getting the permission to do so ahead to do so after her heart murmur was discovered.

First deployment

101. On 18 April 2017 the claimant was deployed. Of the Police Constables and Sergeants only a small percentage were female officers. The claimant commenced her duties and she found no physical difficulty in carrying them out. This included guarding and patrolling. The station did not have the facilities to allow MSFT testing indoors so weather permitting the claimant would set up the necessary equipment outside and run informal tests.
102. The claimant felt that there was a lot of pressure put on her to get the fitness test completed successfully. The matter was regularly commented upon by others officers and her superiors. She would be told that she needed to pass the test to "have other people's back". She found running and failing the test demotivating and embarrassing. The claimant found that this put additional pressure on her. In addition she was now on a regular rota's shift and getting time to train was difficult. The other AFOs recruited before the claimant were only required to train to the 5.7 level.

103. At this point the claimant would run the MSFT at least twice a week. She would use the gym at the station for circuit training and carry out her own physical activities when not working including walking her dogs and riding horses.

5 104. On 7 May the claimant undertook the MSFT and obtained a score of 5.6. After the test she felt dizzy and was advised to contact her doctor (JBp64/67).

105. On 28 July the claimant took the MSFT test and obtained 6.0. The assessor noted that she was struggling with her breathing from around level 5.7 (JBp72/75).

10 106. On 14 August the claimant undertook the MSFT test and failed to obtain 7.6 (JBp77-78).

Wethersfield

15 107. On 21 August and 19 October 2017 the claimant was redeployed to Wethersfield to work on administrative duties in relation to training required to allow the MDP to regain their College of Policing Licence.

20 108. There was a programme of activities arranged for her to undertake to increase her level of fitness. This included circuit training, practising sprints in the hall and gym sessions. During this period the claimant was able to undertake these activities and keep up with others who are doing them. The claimant found the staff and the general environment more encouraging than she had at her first deployment.

25 109. The claimant undertook the MSFT on 5 September 2017 and achieved a score of 6.5. She was told to continue with one-to-one training (JB79-82).

30 110. The one-to-one training plan that was put in place was not tailored to the claimant or her needs. It was a generalised training plan (JBp190-193).

111. On leaving Wethersfield the claimant had achieved 6.1 on an unofficial test.

112. The claimant was unaware at the time of documented concerns about her performance made by Simon Munro (JBp83). The claimant had never been given the opportunity of carrying out a formal attempt on the Chester Treadmill which was a recognised alternative to the MSFT for testing fitness nor been given any assistance or guidance in it's use. No other alternative means of reaching an equivalent to the 7.6 MSFT was discussed. She had been given one opportunity to try the treadmill test as a familiarisation exercise. When she could not immediately keep her balance on it she said it wasn't for her. She was not encouraged to persevere with the treadmill test as an alternative to the MSFT or given guidance or support in it's use. There was no calibrated treadmill available at her first deployment. She did not try it again.
113. The claimant did not have access to a calibrated Chester Treadmill except when stationed at Wethersfield. She did not know the level of gradients used and was unable to informally try the test using treadmills at other stations. Although the claimant received an inhaler from her GP to assist with her breathlessness she was later diagnosed with having panic attacks rather than suffering from asthma.
- 20 Return to first placement
114. On 23 October 2017 the claimant returned to her first deployment to resume fully armed duties.
115. On 8 December 2017 the claimant self-referred herself to Occupational Health with a sore back. She was told not to carry out any training from the fitness test until the problem had resolved. A later assessment found that her back was over compensating for deep tissue muscles in her stomach which weren't working as they should. She attended physiotherapy sessions between 5 December 2017 and 20 March 2018. She was provided with exercise and guidance. These exercises assisted her with her back problem.

Capability process

116. On 15 December 2017 the claimant attended a first meeting under the MDP capability process/policy. At that meeting she advised that she had been unable to train due to her back problems and had a "not fit to test" note provided to her by her G.P. She was still undergoing physiotherapy treatment. She received a letter following the meeting (JBp85-86) which confirmed her probationary period would be extended until 1 June 2018.

Disarmed

117. On 23 January 2018 the claimant along with other colleagues who had not achieved the 7.6 standard were disarmed.

118. After being disarmed the claimant was given administrative tasks to do. She was asked almost daily if she had been to the gym. She found that her anxieties were increasing because of this pressure to pass the MSFT.

119. In March 2018 the claimant was deployed to Wiltshire Police to assist in Operation Scarth in an unarmed capacity.

120. The claimant's physiotherapy treatment was completed around 20 March 2018 and she was clear to recommence training for the MSFT. On that date she took a test and obtained a score 5.8.

121. On 8 May the claimant underwent an unofficial test when back at her first deployment and obtained 5.8.

122. At this point the claimant was running 2-3 times per week and practised the fitness test. She would do circuit training and use the gym when at Wethersfield.

123. On 24 May 2018 the claimant took an official test and scored 6.1.

124. On 24 May the claimant received correspondence from the MDP setting out future dates where she would be subject to a MSFT (JBp87-88). She was advised in this correspondence that her probation period would be extended from 1 June 2017 for 12 weeks.

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125. On 4 July 2017 the claimant took an official MSFT and obtained a score of 6.2.

126. On 15 August 2018 the claimant took an official MSFT and obtained 6.3. She was confident and motivated but at the end of the test she suffered a panic attack and had to go home mid shift.

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Dismissal

127. On 29 August 2018 the claimant attended a second capability meeting chaired by Chief Superintendent Denis Jackson. He had access to the various test scores but did not have details of every unofficial test. The claimant confirmed her exercise regime. When not at work she went walking with her dogs over hilly ground, circuit training and yoga. She indicated that she felt the fitness tests were becoming a mental block because of the pressure on her to pass it. The claimant also said that not carrying out her day-to-day role made it difficult to demonstrate her capability and willingness to carry it out. As she had been disarmed there was little for her to do at work. She said that she had been prescribed anxiety medication because of her breathing difficulties. When asked if she had tried the Chester Treadmill she indicated that she had tried but struggled to stay on it because she could not keep her balance. She had not formally been tested on the Chester Treadmill. She was asked if she had access to practice on a Chester Treadmill and she said no. The claimant was offered no alternatives to demonstrate that she could meet the 7.6 standard or equivalent.

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128. The claimant had not been given any advice about running other than to try and use her whole foot, lengthen her stride and buy better running shoes.

129. The claimant found that doing the “bleep test” with colleagues who, were mostly male and who could pass the test was embarrassing and demotivating. In addition, when she was stationed at her first deployment station there was no suitable indoor facilities to practice the test. She could not use the gym every shift as it depended on whether her duties would allow her to do so.

130. The 12 week fitness plan given to the claimant (JBp93) consisted solely of a list of test dates.

131. The claimant concentrated on passing her fitness test and was told that this should be her primary focus rather than any other aspect of her work. As a consequence, the claimant was criticised by her superiors for her performance. These concerns were not raised with her.

Outcome

132. Chief Superintendent Jackson told the claimant that he had spoken to local line management to obtain a wider view of her performance. He suggested that she had “drifted” and not managed her time correctly. He made reference to an oral examination where she had initially failed but then passed a high standard. He observed that her performance was “mediocre” and needed supervision.

133. The claimant did not have access to the reports written about her by PC Jane Allan and Inspector Glen Marnoch or the contents of those reports to rebut them.

134. At the end of the meeting Chief Superintendent Jackson advised the claimant that as she had been unable to reach her score of 7.6 her employment was to be terminated and her last day of work would be 15 October 2018. The claimant received a letter of dismissal dated 11 September 2018 (JB100-102).

Appeal against dismissal.

135. The claimant appealed her dismissal and argued that the contracted fitness standard was not 7.6. She indicated that she repeatedly met the 5.7 level of fitness.

Her position was that the 7.6 standard disadvantaged her as a woman. The claimant indicated that she was able to perform her duties operationally despite not achieving the 7.6 level and provided a statement in support of her appeal (JB111-112) from the Defence Police Federation. There was an appeal meeting on 12 October 2018 at which the claimant was accompanied by Mr Eamon Keating, Chair of the Defence Police Federation. At the appeal Mr Keating explained the other tests should be explored. He made reference to the Chester Treadmill test and the fact that. The claimant had never formally been assessed on it.

10 136. The claimant's appeal was unsuccessful and she received an outcome letter on 18 October 2018 (JBp118-120). In it David Long ACC Operations, the appeal manager, indicated that he did not accept that there was any misunderstanding as to the fitness level of 7.6 she had to obtain to remain employed. He did not accept that once employed she could remain if she reached the lower standard. He stated that she had been given a minimum number of formal attempts to pass the MSFT and that she had been given a significant number of additional opportunities to demonstrate her competence. He said that he had taken account of her various medical difficulties. He stated that "you have been afforded a familiarisation on the Chester Treadmill and had found difficulty undertaking such. The comment you made during the Dismissal Meeting stated *"I've tried it (Chester Treadmill) but struggle to stay on the treadmill because I can't keep my balance. It doesn't work for me"*. He noted that on two occasions the claimant didn't achieve a pass at the lower standard. He indicated that she had received an *"extraordinary level of coaching/support"* He had concluded that she was not sufficiently self-motivated to pass and that her time management was poor. He believed that the 7.6 standard was required for interoperability and that this was essential to the role of AFO.

137. At the date of the hearing in September 2022 85 AFOs employed before 14 March 2014 had not passed the 7.6 MSFT and had since 1 April 2022 been disarmed. The DPF had provided support to officers struggling with the test. In January 2022 a total of 165 operational officers had failed the 7.6 test made up of 123 male

officers and 42 female officers. Female officers make up less than 10% of the workforce.

- 5 138. No AFOs recruited since 17 March 2014 both male or female have ultimately been unable to pass the 7.6 MSFT test.

Witnesses

- 10 139. The claimant gave her evidence in a clear and straightforward manner. She was subjected to detailed and lengthy cross examination. Both Mr Walker and Ms O'Grady suggested that the fault in not passing the test lay with her and her lack of application to getting fit enough to pass it. She was attacked for presenting herself as a better candidate than the full written evidence suggested.

- 15 140. We considered these criticisms carefully. There were aspects of the claimant's evidence which initially gave us some concern particularly as to whether she had engaged in the physical activities outside work she claimed and if so why she had not ultimately passed the MSFT. However, we needed to look at the context of what was happening. We concluded that in the absence of a detailed training plan or schedule it must be difficult now after the passage of time for a witness to recall exactly what time was spent on exactly which particular exercise especially as
20 these were undertaken after work. The claimant was never asked to make a diary or log of her activities at the time.

- 25 141. Professor Brewer had reminded us that the human body is designed to react to exercise by getting fitter. We studied the scores the claimant had achieved. These did improve to an extent although she never achieved a pass. Looking at the whole circumstances, including the various health difficulties she experienced, we came
30 to the conclusion that we could not be as critical of the claimant's evidence in this regard as we were urged to. Indeed, the fact that the claimant repeatedly failed the test despite being fit and active and having completed successfully various

strenuous exercises during her IDLP should have been a warning sign to her managers. The claimant overall struck us as an honest witness and in general a credible and reliable one who had made no inconsiderable efforts to pass these tests. She was a fit and active young woman who carried out a considerable amount of physical activity over and above her duties as an AFO to try and pass the test. We will return to these matters later in the Judgment.

142. We found the evidence of Professor Brewer and Bilzon, although not at crucial points in accord with each other to emanate from credible and reliable witnesses who tried to assist the Tribunal as best they could. It is often said that science and scientists aim for objectivity and we are sure that both witnesses tried to do so but there were deeply held differences of view and both witnesses at points were keen on a some proselytising for their own positions.

143. We were conscious that both the witnesses from the Federation, Mr Keating and Ms McKeon had strong views in relation to the testing regime and that faithfully reflected their members concerns. Nevertheless, they gave credible and reliable evidence on which the Tribunal could place some weight particularly the evidence of Ms McKeon who we found to be an impressive witness. We would comment on the evidence of Mr Nicolson which we found to be persuasive in many regards given his considerable experience as a Specialist in Armed Policing. We accepted that considerable weight should be given to his view that the 7.6 standard reflected the actual effort needed in his experience to carry out AFO duties. We found him a professional, credible and reliable witness. The other witnesses, not to diminish that evidence, gave evidence in a credible and reliable fashion about the factual background.

Submissions

144. All three parties lodged detailed written submissions with reference to appropriate authorities which were then discussed and supplemented by oral argument. We will attempt to summarise these.

Claimant's Submissions

145. The claimant's Counsel summarised the factual position on which his client relied commenting on the evidence and urging us not to regard Professor Brewer's evidence as either being truly expert evidence, as being either as skilled a witness as Professor Bilzon or as impartial. He urged the Tribunal to prefer the evidence of his client and her witnesses criticising some of the respondent's witnesses for giving opinion evidence without any expert or research foundation to support the adoption of the 7.7 score on the MSFT.

146. Mr Crammond then addressed the legal framework underpinning any decision in particular Sections 19 and 23 of the EA. He then moved onto justification pointing out that the onus was on a respondent to establish justification. The Tribunal he submitted had to with the needs of the organisation against the discriminatory effect of the measure in question. He addressed the PCPs that were engaged and the use of the shuttle test and Chester Treadmill. He examined comparative disadvantage and the evidence that suggested that women were placed at a disadvantage as opposed to me citing biological and physiological differences acknowledged by both the Professors particularly Professor Bilzon. He considered the disadvantage suffered by the claimant that led to her dismissal. He looked at whether a legitimate aim could be discerned and the history around licensing by the COP.

147. Counsel referred the Tribunal to Section 111 of the EA and how that might be interpreted in the present case. In short, his position was that the COP had huge influence over members such as the MDP and that the MDP would not have acted as it did in adopting the 7.6 test without considerable pressure from the COP. The COP in laymen's terms were guilty of aiding and abetting the discriminatory behaviour complained of. His position was that the submissions made by Ms O'Grady that (relying on Section 111(7)) that there could be no claim against them were misconceived (***North Cumbria University Hospitals NHS Trust v Saiger***

UKEAT/2761/15). In addition, he argued that there was no pleading point as the claim is a Section 110 claim and the claimant was never required to respond to the COP's pled defence.

5 **Second Respondents Submissions**

148. The second respondent's solicitor accepted that the various PCP's advanced were applied to the claimant but in addition Mr Walker submitted that crucially the claimant could also pass the fitness test using the Chester Treadmill Test. It was disputed that the claimant suffered the stated disadvantages because of her sex.
- 10 The second respondent also relied on six legitimate aims that it pursued namely to: (1) protect the claimant from harm/risk of harm (by protecting the individual's health and complying with its health and safety obligations),(2) protect the claimant's colleagues and/ or members of the public from harm/risk of harm, (3) ensure that officer is sufficiently fit to carry out their duties,(4)comply with College
- 15 of Policing standards, (5) protect the organisation from reputational risk, (6) safeguard national security maintain an efficient and effective police service, including mutual assistance to other Police Forces. The second respondent only needed to succeed in relation to one of these aims.
- 20 149. The claimant he said, in her evidence seemed to accept the legitimate aim which is that an AFO has to be fit enough to carry out her duties. The claimant's position was that the adoption of the standard was not a legitimate aim as a lower standard was still being applied to AFO's recruited before the change. In relation to proportionality the claimant says it should not depend on when the AFO was
- 25 recruited and that the 7.6 standard was not a proportionate means of achieving the aim of mutual assistance and having a COP Licence. The Tribunal had to consider if Section 192 exemption applies and whether the COP caused or induced the second respondents to act as they did.

150. Mr Walker then examined the evidence before the Tribunal urging it to accept the evidence of David Long and Trevor Clark in particular. Of note was the evidence that by September 2022 Mr Clark stated that 85 AFO's employed before 2014 had been unable to pass the test and had been disarmed. The second respondent's solicitor was critical of the claimant's evidence pointing to the SEARCH assessment results that the claimant referred to in her Statement which were the best results rather than the full picture which disclosed poor or mediocre results in other aspects and led to an overall score of only 53%. She gave evidence that she enjoyed her time at Wethersfield and was not intimidated by others. She said that nothing of concern arose following a medical examination in May 2016 but a heart murmur had been detected which was clearly a concern. He submitted that the claimant's evidence in relation to her understanding of her contractual position, namely that 6.7 score was enough ignored the basis on which she had been recruited. There were real concerns over the claimant's performance and application to getting herself fit enough to pass the test. She appeared not to contest many of the aspects of PC Allan's Briefing Note (JBp95-96). She was ais in that Note to have a mental block about the test and to get anxious about it. She had a panic attack when she last attempted the test. She had informally tried the Chester Treadmill and was unable to balance on it. Examining the pre fitness questionnaires (JBp64,72 and 79) it was not credible that the claimant had spent her free time getting fit for the test as she said. There was inevitably a correlation between the efforts made by the claimant to get fit and her scores. She had received considerable support. There was also some doubt as to how much she actually loved and enjoyed her job. It was notable that after being dismissed she did not take any steps to join another Police Force in a capacity that required a lower fitness level.

151. Mr Walker then examined the evidence both of Mr Keating and Ms McKeown. In relation to the latter witness it was striking how few officers were struggling with the new standard and who had required her assistance. The Tribunal should give her evidence little weight particularly her assertion that the Force was struggling to recruit female officers because of the test standard.

152. Professor Bilzon had no business giving, as he did, a view on the law. He had made reference to the Sex Discrimination Act and not the Equality Act. He was an expert witness but his reasoning was fundamentally flawed. The Report appeared to be written to fit the desired conclusions. He had also stated that it was 6% harder to complete 4 shuttles at level 5 compared to 7 at level 5 and 10% harder to complete 7 at level 5 as opposed to 6 at level 7. Professor Brewer's evidence which should be preferred was that it was only marginally harder comparing 5.4 to 5.7. Professor Bilzon was not asked to comment on the Chester Treadmill System. He gave evidence that 40% of 26 year old females would fail the test but produced no supporting statistical evidence to support the assertion. This should be compared to the evidence of Professor Brewer's experience with the CNC. There was evidence that the 5.7 level was simply too low to allow an AFO to deal with real life terrorist events where considerable exertion can be required. Professor Bilzon did not and could not say where the appropriate level of fitness lay.
153. Mr Nicholson had given evidence for the COP. That evidence tended to suggest that whilst not being in apposition to instruct the second respondents to adopt the 7.6 standard in cross he accepted that the College ensured compliance with that common standard, there was an agreed 'transition plan' to the standard, the COP upheld and enforced standards approved by the National Police Chiefs Council, it could suspend a Forces Licence as it did with the second respondent and so forth. His evidence was also that he had seen the firearms tests carried out by the INM and they were not reflective of real life.
154. Mr Walker then turned to the legal background taking the Tribunal through the relevant law and the approach the Tribunal should adopt. The onus of proving group disadvantage lay with the claimant and she had not been able to discharge this burden. Similarly, she had not proven individual disadvantage. She had a heart murmur, breathing difficulties, problems with her back, a lack of application to getting fit and so forth. The case of **Keane v Investigo and Oths** EAT 0389/09 was apt. The claimant had to be treated to her "disadvantage" and there could be

no disadvantage if what had got in the way of her passing the test related to her lack of motivation.

5 155. Mr Walker explored the law in relation to the justification defence being relied on by his clients. He submitted that there were genuine aims such as to protect the claimant, the public and her colleagues from harm/risk, comply with COP standards allowing interoperability and so forth. He then discussed the issue of proportionality. He referred the Tribunal to the case of **Home v. Chief Constable of West Yorkshire** (2012) 3 AER 1287 which was authority for the proposition that the criterion had to be justified and not just the discriminatory effect. It had to be considered in the light of European jurisprudence. And had to be an appropriate means of achieving a legitimate aim. The same level of fitness had to be applied to both women and men. He also made reference to Section 192 of the Equality Act as being another line of defence or justification for the second respondent's position. The case of **Hardy and Hansons plc v Lax** (2005) ICR 1565 CA was a Court of Appeal authority for the proposition that the employer in showing objective justification does not have to demonstrate that there was no route other than the discriminatory practice by which the legitimate aim could be achieved.

20 156. The solicitor drew the Tribunal's attention to Section 192 of the Equality Act 2010 and to the terms of the section. In his view given the heightened risk of terrorist attacks on the UK the Second Respondent was entitled to ensure that AFOs deployed in such circumstances met the COP standards. He suggested that the reference to proportionality in the section was different to proportionality as defined in Section 19(2)(d).

30 157. Mr Walker then considered Section 111 of the EA submitting that the COP were, if there had been discrimination through the use of the 7.6 standard properly caught by the terms of the statute in the circumstances here. He also referred to the cases of **Saiger** and an unreported Tribunal decision (**Wisbey v. Commissioner of the City of London Police and the College of Policing** 2207660/2017). In the latter

case which was similar on its facts to the current case the Tribunal accepted that the COP had influenced the Forces actions in removing someone from Firearm duties.

Submissions for Third Respondent

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158. The focus of these submissions was initially on whether the claimant could not succeed on the basis that she had failed the tests through anxiety and not because of any inherent difficulty in the test level. Without getting over this hurdle the claim was bound to fail. In addition, the Tribunal had to be mindful of the fact that the claim against the third respondents, set out in paragraph 46 of the ET1, was that the MDP was unlawfully instructed or caused or induced to apply the PCPs if required to have a COP Licence. It was accepted that the MDP was not required to have a Licence. It is only if the Tribunal is satisfied that complying with COP standards is a legitimate aim can it succeed. The claimant was tied to her pleadings (*Chandok v Tirkey* (2015) ICR 527. The Tribunal cannot extend the range of complaints.

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159. Ms McGrady then explored what was meant by a legitimate aim submitting that if the test was objectively justified there could be no indirect discrimination. If it was not justified then it could not be a legitimate aim. The third respondent did not require the second to apply any PCPs.

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160. The submissions then commented on the witness evidence. Ms McGrady rejected any suggestion that Professor Bilzon was the only expert witness. The two respondents had been unable to put any questions to him before he gave evidence at the hearing. He was not truly independent He had worked for the INM which had recommended the 5.7 MSFT and his report was largely a 'cut and paste' of the claimant's ET1. As an expert he was not entitled to express views on whether legally the claimant had suffered sex discrimination. The third respondent's solicitor then examined the evidence in relation to whether the claim was made out and the difficulties the claimant faced. A fair reading of the claimant's evidence suggested that she suffered breathing difficulties and panic attacks and she herself thought

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she was fit enough to pass the test if these difficulties had not occurred. The 7.6 standard was not in her view discriminatory. The Tribunal should accept the evidence of the leading expert in the subject who was Professor Brewer. Based on the data the cardio vascular demand of 7.6 appeared to more closely reflect the demands needed to be an AFO. The INM report conceded that the testing was to some extent led by the pace of the least physically fit participant (p774).

161. The INM used oxygen uptake rather than heart rate as used by the Lilleshall report. The use of oxygen measuring was not practical because it restricted movement according to Professor Brewer. He did not accept that the VO2 measurements would yield different data to heart monitoring. He could not understand how it was possible to criticise the 15 MSFT as a predictor of VO2 capability and not then question their conclusion that the correct level was 5.7. The use of oxygen measuring (gas analysis) could in his view led to false negatives depending on the person exercise economy or errors in calibration.

162. The solicitor then returned to whether the COP could be said to have induced the discrimination or attempted to do so. The claimant had periled her case on the third respondent requiring the second respondent to apply the PCPs. She then examined the effect of Section 111 and the argument that a basic contravention under the section includes a contravention under section 112(1). It was not enough for the claimant to suggest that the third respondent had in some way endorsed the INM standard and was therefore responsible for their implementation. That was a local decision for individual Chief Constables. There was also always the possibility of using the treadmill test which has not been subject to criticism. Ms McGrady then considered the impact of Section 192 submitting that the 7.6 standard was essential to uphold national security.

Discussion and Decision

Indirect Discrimination

163. Whether a PCP exists is a matter of fact for the tribunal to determine (***Jones v University of Manchester*** (1993) IRLR 218. The straightforward background is

that the claimant, Ms Koren Brown, lost her job because she was unable to achieve a score of 7.6 on the MSFT (bleep/shuttle test). Achieving such a score was a condition of her continued employment: It was agreed that this was a PCP and the essential PCP in the present case although there were other ancillary and consequential effects of that PCP which gave rise to others. We determined that the other PCP's set out in the draft List of Issues also applied such as a PCP to maintain this level of fitness and to be liable for dismissal for capability if she could not do so.

10 164. Section 19 of the Equality Act 2010 prohibits indirect discrimination. It is in these terms:

“19 Indirect discrimination

15 (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—***

20 (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***

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

(3) ***The relevant protected characteristics are— ...sex... “***

30 163. The section speaks of “particular disadvantage”. This does not refer to serious or significant disadvantage but any disadvantage (*McNeil v. Revenue and Customs Commissioners* (2019) IRLR 915).

164. Section 23 of the Act deals with making comparisons between groups:

“23 Comparison by reference to circumstances

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

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165. In order to establish indirect discrimination it is for a claimant to prove these first three requirements, and then, if required, for the employer to prove that the PCP(s) are a proportionate means of achieving a legitimate aim (Section 19(2)(d)).

10 166. The COP were not the employers. They were brought into the process on the basis of Section 111 of the Equality Act which is in these terms:

“111 Instructing, causing or inducing contraventions

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

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

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

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

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

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

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

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(c) by the Commission.

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

(a) the basic contravention occurs;

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

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

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

167. The Tribunal had regard to the EHRC Employment Code and the EHRC Services Code. (Paragraphs 4.21 and 4.22 EHRC Employment Code and paras 5.21,5.22 and 5.32 of EHRC Services Code).

5 168. The first matter to determine was whether the MSFT test discriminated against
women as alleged. The claimant 's case was that because of innate
biological/physiological differences between men and women it was likely to be
more difficult for a woman to achieve the relevant MSFT score than a man and to
maintain that level of fitness. It was clear that the harder physical tests were the
10 likelihood was that more men than women would pass. The heart of the dispute
was what level of physical exertion was needed to be an AFO.

169. There was a dispute as to how much harder the 7.6 level on the MSFT was
compared to the lower level of 5.6. To an extent this was not in our view the main
15 issue. We can see from the INM report that even 5.6 coupled with the use of this
particular test can be difficult for women. Whether the 7.6 standard is 6% harder
to more is not really the focus for us rather it is the use of this particular test and
the fact that it is more strenuous than the lower test.

20 170. There was a measure of agreement between Professor Bilzon and Professor
Brewer that these innate differences between men and women existed and that
they included lower average muscle mass, a lower ability to return oxygen (a 20%
Lower Aerobic Capacity) women having a higher percentage of body fat, smaller
hearts with a resultant lower capacity for cardiovascular response, smaller lungs
25 and different pelvis construction. We did not have any specialist assessment of the
physical mechanics as to why women find the shuttle tests more difficult but there
was some indication that they would find the turning and pushing off for the next
run more difficult than men.

171. The second respondent's evidence on these matters was at times a little confusing for us to follow when seeming to suggest no comparative disadvantage existed between men and women in relation to passing the test at the 7.6 level. For example, Dr Brewer almost as an afterthought in his evidence indicated that he had encountered no such disadvantage in his work for the Civil Nuclear Constabulary which used the same test and standard (7.6). This assertion was unsupported by statistical evidence or research and as Counsel for the claimant suggested it was an observation formed by looking at a group of people all of whom must have already met the standard to be able to join the CNC. This evidence also contrasted with the warnings in the Lilleshall report and the evidence of Ms McKeown who had experience of female Officers struggling to achieve such levels in the MDP. We could put little weight on Professor's Brewer's evidence on this particular matter.
172. The point was well made in our view that the two respondents had been alerted to the possible disadvantage to women in correspondence including expert views expressed in the INM report and the recognition of such disadvantage was a widespread and acknowledged concern expressed by the Federation to the Chief Constable when this more stringent test was first proposed.

20 **Group Disadvantage**

172. We accepted that the onus was on the claimant to show group disadvantage. She must show that the PCP in question "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". The disadvantage must adversely affect an actual or hypothetical group that shares the relevant protected characteristic with the claimant. There are actual comparators available here and accordingly we need not consider a hypothetical group. The pool effected are females recruited for the AFO role after 2017 who must pass and maintain the 7.6 score on the MSFT.
173. The Tribunal had, in the end, little difficulty in concluding that there was group disadvantage to the group to which the claimant belonged namely female AFOs.

We not only had her evidence of her experience but the evidence of Ms McKeon and Professor Bilzon. Indeed, we noted that the Report from the Institute of Naval Medicine had suggested that that it "may" be more difficult for female AFO's than male AFOs to achieve the 7.6 MSFT "subject to individual's levels of fitness" (JB p7). This seemed to be widely accepted in the correspondence between the COP and second respondents. It is noteworthy that the COP guidance issued to Police Forces including the second respondent specifically warned about the dangers of discrimination against women in adopting the 7.6 standard from the perspective that it might be discriminatory but it was justified given the physical demands of the job as assessed in the Lillehall report.

174. It seemed clear to us that the disadvantage was simply that women would find it more difficult to pass the MSFT test at this level than men for innate biological reasons. This in turn rendered them liable to be disarmed and subject to the capability procedure leading potentially to their dismissal. We accepted that there appeared to be no evidence that anyone other than the claimant had been the subject of a disciplinary or capability procedure solely relating to failing the MSFT but that did not seem to us to undermine this position or demonstrate that there was no disadvantage. At most it meant that women would have to be fitter and try harder to pass the test than an equivalent male.

Pool

175. The pool will depend on the nature of the PCP being tested. If the claimant is challenging a recruitment criterion, for example, the pool will usually comprise those people who would be eligible for the job but for the criterion in question ***University of Manchester v. Jones*** [1993] ICR 474 (CA).

176. Once the PCP has been defined, "there is likely to be only one pool which serves to test its effect", and the identification of that pool is "neither a matter of discretion nor of fact-finding but of logic" (***Allonby v. Accrington and Rossendale College and Others*** [2001] IRLR 364 (CA)). The Court of Appeal in ***Grundy v British Airways plc*** [2008] IRLR 74 stated:

“provided it tests the allegation in a suitable pool, the tribunal cannot be said to have erred in law even if a different pool, with a different outcome, could equally legitimately have been chosen”.

5 177. The Supreme Court approved of **Allonby and Grundy** in **Essop v. Home Office (UK Border Agency), Naeem v. Secretary of State for Justice** [2017] UKSC 27 where it held that all the workers affected by a PCP should be considered, and all those who are not affected by it excluded.

10 178. We would add that AFO's recruited before 14 March 2014 were subject to a different MSFT requiring them to run 7 shuttles to level 5.7. As Section 23 of the Equality Act provides that for the purposes of section 19 there must be no material difference between the circumstances relating to each case and accordingly, we accept that these, almost certainly older officers need to be excluded from the pool.

Individual Disadvantage

15 179. Both respondent's agents suggested that a number of medical conditions appeared to impact the claimant's ability to pass the fitness test and that none of these conditions related to her gender. These included:

- a heart murmur which delayed her ability to take a repeat test;
- 20 • breathing difficulties requiring the use of an inhaler;
- problems with her core requiring physiotherapy;
- problems with her back her running style taking too short strides;
- the claimant ran on her toes which caused her problems;
- 25 • mental problems/anxiety resulting in her not being able to test;
- problems with her balance on the Chester Treadmill;
- an apparent panic attack but only after she failed her last attempt at the MSFT.

180. The claimant's level of fitness was a central issue in this case. At various points she was unfit and "not fit to test." And doubts were raised as to her motivation. We felt that it was appropriate to take a step back when considering the claimant's evidence and look at it in context as we earlier mentioned. She faced a number of difficulties throughout months she endeavored to pass. We did not doubt that at least initially she was well motivated and enthusiastic to take up this role and to pass the test. If there was latterly some lessening of this enthusiasm that is hardly to be surprising given the difficulties the claimant encountered. We felt we should start by considering the test itself. If despite her best efforts she was unable to pass, despite having no difficulty in performing the onerous practical tests during training, and with her continued employment in jeopardy we can appreciate that taking the test including repeated failures in the informal attempts should begin to cause her the anxiety she spoke of and the related breathlessness she developed.
181. It was submitted that evidence of this lack of motivation or non-engagement was her failure to pursue a non- armed career in the Police after her initial failure to be recruited in December 2018. We can well understand why at this stage the claimant took that decision given her experiences but we do not read into that a failure to keep trying to pass the test.
182. The respondent's solicitors painted the claimant as an "undeserving" claimant borrowing the expression in *Essop (supra)*. They raised the criticisms levelled at her in the soundings or reports which were referred to at her dismissal meeting and appeal about her general performance unrelated to the fitness test. They suggested she was mediocre and not motivated. The respondents pointed to the fact that the claimant admitted in evidence that she did not study for a particular exam explaining that this was because she was told to concentrate on passing the fitness test. We did not hear direct evidence and this criticism came towards the end of the claimant's period of employment. We can well understand that the priority for her managers above all else was to get her to pass the MSFT test rather than on less important matters. We also noted that she had apparently not been the subject of warnings about her performance, except in relation to the fitness test and she was oblivious to these criticism until the disciplinary stage. What is clear is that passing the

test began to loom very large indeed in her thoughts as it was central to her remaining an AFO. Ultimately, we therefore, placed little weight on these criticisms and rejected the submission that the claimant did not genuinely want the job and that her lack of self-motivation caused her failures rather than the use of a discriminatory test which disadvantages females.

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183. We also considered the argument advanced by Mr Crammond that the claimant having passed her IDLP was contractually only required to pass the MSFT test at the lower level that applied to exiting staff. While we accept that the contractual documentation could be clearer we reject the submission. The claimant was recruited on the basis that she could pass the MSFT at 7.6 and as one of the new intake maintain that level in the future. That was the clear intention of the second respondents and part of their agreement with the COP to regain their license. The claimant was fully aware of this and of the need to pass at this level. The second respondent allowed her to continue her employment beyond the IDLP but on the understanding that she had to pass the test or face dismissal. The claimant was well aware of this. There was a common understanding of the position and the need to pass. It was only when facing dismissal the claimant's representative argued that she was now in the pool of staff to which the lower standard applied. There was no evidence that suggested the respondent had ever waived this requirement although we had some sympathy with the Federation's position as some of the correspondence was ambiguous. We suspect that the then Chief Constable was trying to keep the Federation and its members who had concerns about the enhanced test onside as it were whilst bringing in the test for new recruits such as the claimant.

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Justification Defence

Legitimate Aims

184. The respondents both argued that the MSFT test was robust and the testing regime was in furtherance of legitimate aims. We considered the guidance given in the case of *University of Manchester v. Jones* (1993) ICR 474 by the Court of Appeal in England and to its approval of the dicta in the earlier case of *Jones v. Chief*

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Adjudication Officer (1990) 533 that the word “justifiable” (used in the 1975 Sex Discrimination Act) required an objective balance between the discriminatory effect of the condition and the reasonable needs of the person applying the condition. The wording now used in the Equality Act (S19(2)d) is that the person applying the discriminatory condition “*cannot show it to be a proportionate means of achieving a legitimate aim*”. It seemed to us that this also requires a balancing act between the discriminatory effect and the needs of the employer.

185. In **Homer v. Chief Constable of West Yorkshire** [2012] 3 All ER 1287, the Supreme Court identified that justification was the criterion itself that had to be justified, not its discriminatory effect. The assessment of the justification would include comparing the impact on the affected group against the importance of aim to the employer. In any case the provision had to be read in the light of European jurisprudence, in that to be a proportionate means of achieving a legitimate aim, the tribunal must consider both whether it was an appropriate means of achieving the aim, and also whether it was “reasonably necessary” in order to achieve it. In **Hardy and Hansons plc v. Lax** [2005] ICR 1565 CA, the Court of Appeal stated that the employer, in showing objective justification, does not have to demonstrate that there was no route other than the discriminatory practice by which the legitimate aim could have been achieved.

186. We bore in mind the helpful summary given in the EHCR Code of Practice:

“5.32 Although not defined by the Act, the term ‘proportionate’ is taken from the EU Directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an ‘appropriate and necessary’ means of achieving a legitimate aim. But ‘necessary’ does not mean that the provision, criterion or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.”

187. We accepted that there were a number of legitimate aims being pursued. This was after all an armed police service tasked with vital nationally important tasks. This was not contested by the claimant. We list the aims here:

5 (a) protecting the claimant from harm/risk of harm (by protecting the individual's health by complying with its health and safety obligations).

(b) protecting the claimant's colleagues and/ or members of the public from harm/risk of harm.

(c) ensuring that an armed officer is sufficiently fit to carry out their duties including in emergency situations where weapons are likely to be used.

10 (d) complying with College of Policing standards.

(e) protecting the organisation from reputational risk.

(f) safeguarding national security by maintaining an efficient and effective police including mutual assistance (interoperability) to other Police Forces.

188. We accepted that the second respondent was responsible for national security and assisting on a regular basis other Police Forces. In this context we also accepted that it was important to have common standards and that this was a legitimate aim. It allowed for interoperability of personnel. This was a core consideration for the MDP, the COP and other Forces. If the MDP were to supply officers with a lower fitness standard than all other forces then (1) they may not be able to properly perform the role safely and (2) there would be a risk of claims against the relevant Chief Constables and others and (3) there would be a legitimate concern that some Chief Constables would not ask them to assist.

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189. The second respondent not only protects its own premises and others of national importance. It works in conjunction with many Home Office Police forces and non-Home Office forces providing AFO's on a regular basis. It also deployed AFOs various Operations designed to protect the public from terrorist attack. The first respondent required its AFO's to be interoperable to effectively work in conjunction with AFO's of other forces. The College of Policing set national Police Standards and all 43 Home Office Forces required to comply with those standards The other

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six non-Home Office Police Forces also comply with the fitness standards for AFO's otherwise there would be noncompliance with national standards. If the national standards were not maintained we accepted that there would be a legal risk of being sued. Mr Walker gave the example of a serious incident resulting in loss of life or injury in circumstances where it was caused by an AFO whose Police Force adopted a fitness standard lower than the national standard. We also accepted his submission that the second respondent had already been prejudiced by the suspension of its College of Policing firearms training licence. This had, as we had found impacted morale and resulted in adverse publicity. He indicated that this matter was considered at Ministerial level.

190. In considering proportionality the importance of the aims of the Second Respondent the following seemed to us to be the most crucial factors:

Protecting health and safety;

Ensuring an appropriate standard level of fitness of AFOs;

Complying with nationally recognised fitness standards adopted by all other Police Forces in the UK;

Protecting a Government department and the Government from reputational damage;

Protecting national security and maintaining an effective police service.

191. In our estimation the MSFT and the attendant 7.6 standard, while not attracting some criticism was both appropriate and necessary. They faced a choice of this standard or the lower standard. We noted what the INM had stated: "*Should interoperability be essential for the MDP, the only option would appear to be the adoption of the Home Office fitness standards by the MDP*". The Tribunal

concluded that the second respondents had a strong case that the 7.6 standard was needed in furtherance of these legitimate aims. Considering the wider picture it was reasonable for Police Forces, the COP and the second respondents to focus on the fitness required of an armed officer to be able to deal with stressful and physically demanding incidents and how best to measure that fitness. The INM report was unsatisfactory in a crucially important aspect namely in its assessment of a scenario that was widely regarded as being too easy in that it was not physically demanding enough to replicate the demands of a real situation. If there was doubt hanging over this assessment that would be something that would have to be taken very seriously indeed given the importance of the matter. The report acknowledged some of these weaknesses. In the light of this it was hardly surprising that it was held that it was not safe to rely on it.

192. The MDP faced a difficult choice when choosing an appropriate standard of fitness and way of measuring it. The MSFT itself was only one method of testing. It has its proponents and critics but it seemed to us to have many advantages particularly when regularly testing large groups of people. It was not perfect but other methods were also open criticism. Mr Crammond argued that the gold standard was direct gas testing (which we accepted was cumbersome and difficult to use). This was criticised by Professor Brewer. He used the analogy of a car engine and how efficient it was in burning fuel. His position was that if a candidate was very fit their oxygen uptake might be relatively low and although in laymen's terms they might be very fit they might fail the test as not reaching the required level of oxygen uptake.

193. The MDP as an employer had to have regard to issues of potential sex discrimination and because other Forces had adopted the MSFT and the standard of 7.6 that in itself is not sufficient justification for following suit. If it had judged the standard too high or the basis for choosing the MSFT test unsound then it would not escape potential liability for claims of sex discrimination because it was following others. The situation here however is that to work in an interoperable basis it had to adopt this test.

194. The adoption by the second respondent of the test and standard has to be appropriate and necessary. There is an element of discretion afforded to employers in such a situation. The employers here were really faced with the choice of standards and choose the one they thought was most appropriate, of the two standards available. The higher standard had also been adopted by the other Forces and which allowed full interoperability between their personnel.

195. The second respondent's submission that the MSFT and 7.6 standard are a proportionate means of achieving a legitimate aim is one we feel driven to accept. Where the claim must succeed is that this is not the end of the matter. The application must be proportionate in the circumstances especially standing the clear dangers highlighted by the INM and the COP regarding the use of the MSFT and the 7.6 standard and the need, as reflected in the COP guidance, to consider alternatives. Our understanding was that the COP would accept a "pass" using the Chester Treadmill or using some other validated piece of equipment.

Role of COP and Section 111 of the Equality Act

196. Section 111 of the EA provides:

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

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

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

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

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

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

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

(c) by the Commission.

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

(a) the basic contravention occurs;

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

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

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

(9) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating—

(a) in a case within subsection (5)(a), to the Part of this Act which, because of the relationship between A and B, A is in a position to contravene in relation to B;

(b) in a case within subsection (5)(b), to the Part of this Act which, because of the relationship between B and C, B is in a position to contravene in relation to C.”

197. This section was considered in the case **NHS Trust Development Authority v Saiger (2018) ICR 297**. A Tribunal had found the section engaged through inference and not through primary facts. It held that being in a position to instruct or induce a breach, or participating in a discussion, were not enough, of themselves, nor was “materially influencing” a breach. There must be evidence that there was actual instruction or inducement, not just that a party was able to instruct or induce. Mr Crammond referred us to the case of **CRE v Imperial Society of Teachers of Dancing (1983) ICR 473** and the helpful reasoning contained in the Employment tribunal decision in **Wisbey v Commissioner of the City of London Police and College of Policing** Case No: 2207660/2017.

198. The role of the COP was examined in the evidence before us. Ms McGrady argued what Mr. Crammond referred to as a “pleading point” namely that the original ET1 sought to claim against the Third Respondent on the basis that the MDP was required to have a License and that a prerequisite for such a license was staff passing the approved fitness standards. It became clear that there was no actual requirement for the MDP to have a license in the sense that they could in theory still act as a police force without a licence.

199. Ms O’Grady pointed to the recommendations requested by the claimant and noted that one was “not to require MDP to apply the PCPs” referring to the standards needed to obtain a license. She referred the Tribunal to the case of **Chandhok**

v Tirkey (2015) ICR 527 as authority for the proposition that the ET1 was the important measure of a party's claim.

200. There are a number of difficulties in our view with this submission. The first is that the claim was raised at the hearing and the third respondent had ample opportunity to deal with the matter. Secondly Tribunals take a broad view of the pleadings and in the absence of any prejudice, and we could see none, are entitled to ascertain if a claim is made out on the facts it has found. It is true that the COP does in fact require any force that wants a license to adhere to these standards. The ET1 does go too far in suggesting that a Force such as the MDP must have a license but for the reasons set out in the Judgment it is almost unthinkable that they would not want to have such a license to allow them to fulfill their commitment to assist other Forces and to maintain common standards.
201. Finally, as the case law suggests the ambit of the section under which the claim is made is relatively wide and is not just confined to 'instructing' a discriminatory state of affairs to exist. Here the crucial part of the section contains the words "causing and inducing" In our judgment the evidence forcefully suggested that the influence of the COP and its standards are re-organised widely as being essential for a Force to operate. There was both a carrot (the License) and a stick which was not to have a License and to in practice be likely to be excluded from being able to provide support to other Forces. In addition, we heard evidence that when the License was suspended (albeit for more than just a failure to adhere to the MSFT standard) it led to a loss of prestige and impacted on morale.
202. However, for the COP to be caught by the section the crucial problem for the claimant is that the COP was prepared to accept an alternative to the 7.6 MSFT which was a pass on the Chester Treadmill apparatus or some other approved device. This was made clear in correspondence to Chief Constables in November 206 (JBp670). The Second Respondents were clearly aware of this alternative as it is mentioned during the capability process. Our understanding of the COP's position was that they would have in fact have considered some other scientifically validated alternatives to the MSFT not only the Treadmill test but gas/oxygen analysis. There was no discussion between the Second Respondent's management and the COP about the claimant's position. The possible difficulty

she might have as a female in having to pass the MSFT was not considered simply that she had failed and didn't appear able to do the Treadmill test. In these circumstances the COP are saved though the provision by them of appropriate advice on the use of alternative testing means from any discrimination arising through the use of the MSFT and the 7.6 standard.

National Security Exemption- Section 192 of the Equality Act 2010

203. We then considered the Section 192 of the EA:

"A person does not contravene this Act only by doing, for the purpose of safeguarding national security, anything it is proportionate to do for that purpose."

204. Finally it was argued that given the heightened risk of terrorist attacks in the United Kingdom the second respondent was required to ensure, at the material time, that its AFOs could be deployed for "safeguarding national security" throughout the United Kingdom and that accordingly the second respondent was required to recruit and retain AFOs (who are all armed) to be deployed for such purposes subject to such fitness testing levels as the COP considered appropriate. Mr Walker argued that even if the MSFT standard of 7.6 was discriminatory the second respondent would not be in breach of the Equality Act because of the terms of Section 192 of the Equality Act. He submitted that reference to proportionality in the section was different to the reference to proportionality in the justification defence under Section 19 (2) (D) which reads "*A cannot show it to be a proportionate means of achieving a legitimate aim*".

205. We did not accept that the Section appears to be engaged here. We believe that Parliament envisaged that something out of the ordinary would probably have to occur to engage this section. It appears to us that such a provision does not derogate from what might be described as the day-to-day duties imposed by the Equality Act in some blanket fashion otherwise it would be pointless to provide for

such duties in the first place. We have found that the MSFT as a test and the 7.6 standard are appropriate but with the safeguard of alternative testing for someone in the claimant's position The section appears to envisage a particular action taken for the purposes of protecting national security. The act of adopting the MSFT as a fitness standard at a particular level was not in itself an act designed to protect national security except in a very wide and general sense.

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10 **Employment Judge: J M Hendry**
Date of Judgement: 8 August 2023
Date sent to Parties: 8 August 2023