Neutral Citation Number: [2024] EAT 189

Case No: EA-2023-SCO-000090-DT

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street, Edinburgh EH3 7HF

Date: 20 November 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT
MR DESMOND GEORGE SMITH
MR ANDREW HAMMOND

Between :

THE ADVOCATE GENERAL FOR SCOTLAND as representing THE MINIISTRY OF DEFENCE
Appellant

- and -

(1) KOREN BROWN

First Respondent

(2) THE COLLEGE OF POLICING LTD

Second Respondent

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- -

David Walker (Morton Fraser MacRoberts LLP) for the **Appellant**
Andrew Crammond (instructed by Thompsons Solicitors LLP) for the **First Respondent**
No appearance for the **Second Respondent**

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Hearing dates: 19 and 20 November 2024

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JUDGMENT

SUMMARY

Sex discrimination – indirect discrimination – section 19 Equality Act 2010

The claimant complained of the application of a provision, criterion or practice ("PCP") in the form of a policy setting a fitness level requirement for authorised firearms officers in the Ministry of Defence Police ("MDP"). The Employment Tribunal ("ET") accepted that this was a PCP that had been applied to the claimant, which put women at a disadvantage, in that they found it harder to meet the level required, and which put the claimant to that disadvantage. It went on to find that the requirement to meet the fitness level in question was a proportionate means of achieving legitimate aims of the MDP, but that its application to the claimant was not proportionate as an alternative means of establishing the required standard of fitness had not been offered to the claimant. The MDP appealed.

Held: *allowing the appeal in part*

To the extent that the MDP sought to challenge the ET's finding of group and individual disadvantage in relation to the application of the PCP found by the ET, that was an attempt to re-argue the case below and failed to engage with the explanation provided as to why that case had (permissibly) been rejected. As for the MDP's perversity challenge to the ET's finding in respect of the failure to provide the claimant with an alternative means of establishing the required standard of fitness, and its contention that the ET's reasons were inadequate in this regard, these grounds did not withstand scrutiny and were also dismissed. The MDP had, however, raised valid points of concern in relation to the ET's assessment of proportionality: its reasons did not adequately identify the alternative means in question, and did not demonstrate engagement with the question whether this would (or could) have provided a less discriminatory alternative, or, at least, did not properly explain the ET's analysis in this regard. The appeal would be allowed in this respect and the matter remitted to the same ET (insofar as that remained practicable) for reconsideration of this issue.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This appeal arises out of a finding of indirect sex discrimination, as defined by section 19 **Equality Act 2010** ("EqA"); it concerns the assessment of proportionality in the application of a provision, criterion or practice ("PCP") in the form of a policy setting fitness level requirements for authorised firearms officers in the Ministry of Defence Police ("MDP").

2. This is our unanimous judgment on the appeal of the Ministry of Defence (which is represented by the Advocate General of Scotland) against the judgment of the Employment Tribunal ("ET") sitting at Aberdeen (Employment Judge J M Hendry, sitting with members Mrs Massie and Mr Richardson). For ease of reference, we will adopt the same course as the ET and refer to the appellant as the "MDP"; the MDP is, however, simply part of the Ministry of Defence, it does not have separate legal status.

3. The ET hearing took place over some 13 days during 2022 and 2023, starting on 17 January 2022 and ending on 11 May 2023 (albeit the last day was spent in deliberations, in chambers); the ET's reserved decision was sent out on 8 August 2023. By that judgment, the ET upheld a claim of indirect sex discrimination brought by Ms Koren Brown ("the claimant") against the MDP, but dismissed a claim against the College of Policing Ltd ("the CoP"). There is no challenge to the ET's dismissal of the claim against the CoP; the MDP has, however appealed against the ET's finding of indirect sex discrimination and its decision that the MDP is liable to the claimant for losses arising from the termination of her employment and for injury to her feelings. That appeal is resisted by the claimant, on the grounds provided by the ET and/or on limited alternate grounds. The CoP does not seek to resist the appeal and has played no active part in the proceedings before us.

4. Representation before the ET was as it has been before us, save that the CoP has not been represented at this hearing.

The facts

The parties

5. As part of the Ministry of Defence, the MDP is a national, special police force (one of three special police forces within the 49 law enforcement agencies operating in the UK); it is responsible for the armed protection of Ministry of Defence sites from terrorist or other attack. Given its role, the MDP has a high

component of armed officers (around two thirds of its officers), known as authorised firearms officers ("AFOs").

6. The CoP is a company limited by guarantee, wholly owned by the Home Secretary, which was established in 2012 to act as a standard setting agency; as part of its role, it sets a range of standards for (amongst others) armed police roles; more generally it develops policing practice, standards and training, and educational requirements and standards. The CoP issues licences to police forces which adopt and comply with the standards it sets (including fitness standards); although not a legal requirement for the MDP, without a licence from the CoP, it would have difficulty in demonstrating that its officers were appropriately trained and fit enough to carry out their roles.

7. In 2015, the claimant, then aged 26, applied to join the MDP, becoming a constable in that force on 14 November 2016. Ultimately, however, the claimant's service was terminated with effect from 15 October 2018, because she was unable to complete a job related fitness test to the required level. It was the requirement that the claimant achieve a particular standard on what was known as the multi-stage fitness test ("MSFT"), and the loss of her employment as a result, that formed the basis of her claim of indirect sex discrimination against the MDP.

AFO fitness standards and the MDP

8. In addition to its primary role of providing armed protection for Ministry of Defence property and assets, the MDP also provides support to other police services when called upon to do so; in recent years, it has been regularly called upon to assist other forces throughout the UK, usually in response to an incident which requires a substantial armed response. More generally, there is a recognition of the need for close cooperation between forces, and a common understanding that aligning standards assists with the interoperability of personnel, and that the adoption of rigorous standards of training and fitness are necessary to ensure the protection both of the public and of all police officers when working together.

9. The issue of how fit a police officer needs to be to safely undertake the diverse roles performed throughout the various UK police forces came to the fore in or around 2010. Relevantly, in relation to AFOs, a study into "*Fitness for the Police Service*" had been carried out by the Lilleshall National Sports Centre in 2004, which had recommended the MSFT as a practical and robust test, providing an appropriate standard for

AFOs. The MSFT (also known as the "*bleep test*") involves running up and down a 15-metre track, timed against a series of audio bleeps: the participant must "*beat the bleep*", completing the run, before they hear the sound; at the end of each level, the time between bleeps gets shorter, meaning the participant must run faster. Although the Lilleshall study acknowledged that women undertaking the MSFT would be exercising at a "*slightly higher percentage of maximum heart rate*" as compared to men, this was considered to be "*within an acceptable limit for a test of physical fitness*" (see the ET, paragraph 21). In June 2010, following a data collecting exercise involving 17 police forces in relation to job fitness tests for specialist posts, a further report recommended that AFOs should be able to achieve a standard of 7.6 on the MSFT, although it was noted that there was a 16% difference between male and female AFOs in terms of being able to meet this standard, and it was considered that further research needed to be carried out.

10. Historically, the fitness levels of police officers had been a matter for the individual force but in 2013 the policing review undertaken by Sir Tom Windsor recommended common fitness standards, albeit recognising that there would be a number of difficulties in agreeing standards and test regimes, and that there was a danger that too high a requirement of fitness level could discriminate against women officers. In providing guidance as to the implementation of job related fitness tests for the AFO role, the CoP adopted the recommendation that a standard of 7.6 for the MSFT was appropriate (although in fact the majority of armed officers in territorial forces are required to achieve a higher standard, of 9.2, and some must demonstrate yet more onerous levels, up to 10.5). Issuing guidance in this regard, the CoP stated its view that forces would be able to rely on the fact that this standard had been assessed as reasonable and appropriate under the **EqA**, and made the point that any derogation from this could itself risk legal challenge. Acknowledging the potential impact on women and older candidates, it advised that, while it would be "*inappropriate and illegal*" for forces to make concessions to the standard of the test, strategies might be adopted to improve performance, such as running women-only testing sessions, or open days or events targeted at women, or using female test administrators (ET, paragraphs 65-66).

11. The MSFT provides an indirect means of predicting the volume of oxygen ("VO2") the body will consume while exercising (it is also sometimes referred to as "VO2 max", which refers to the maximum rate at which a person can consume oxygen). An alternative method of assessment is by way of a direct test by means of gas analysis. There are a number of tests that allow for direct VO2 testing, including what is known

as the Chester treadmill test - a timed, graded test using a treadmill, with an increased gradient of 3% every two minutes. The Chester treadmill test can also be used as an indirect means of assessing aerobic fitness and the CoP guidance also allowed that this might be used as an alternative to the MSFT, specifying different levels to be attained using the test depending on role (the level required for AFOs having been assessed as equivalent to the achievement of 7.6 on the MSFT). As the ET recorded, on occasion a minority of persons taking the Chester treadmill test could initially experience difficulty balancing, but "*with expert guidance and practice it was highly unlikely that they could not ultimately be able to take the test*" (ET, paragraph 43). On 2 November 2016, the CoP formally endorsed the use of the Chester treadmill test as an alternative to the MSFT.

12. Pausing in our narration of the history at this stage, we note that an issue before the ET was as to the comparative reliability of indirect (predictive, using the level reached on a particular exercise) and direct (actual, through gas analysis of oxygen levels when undertaking the exercise) methods of testing aerobic capacity. For the claimant, the point was made that individuals with good aerobic fitness capacity might fail a test in which aerobic capacity was being estimated, by producing a false negative result. As we will go on to record, the ET concluded that the MDP was entitled to rely on the indirect testing provided by the MSFT as an appropriate (and less cumbersome) means of assessing fitness. We observe, however, that the reasoning provided does not explain whether the comparative merits (and demerits) of indirect and direct testing were in any way related to the potentially different impact on men and women of the assessment standards applied. In any event, we note the ET's reference to current CoP guidance (which we understand to post-date the events in issue in this case), which recommends that forces offer a direct test (either by use of the Chester treadmill test or by a bicycle test) to those in danger of losing their jobs through a failure to pass an indirect test; it is, however, left to individual forces to determine when to offer the alternative test to officers.

13. Turning then to the position within the MDP, at the time when common fitness standards were being adopted, it had in place a freeze on recruitment; this lasted from 2009 to 2014 and led to a significantly reduced, and increasingly ageing, workforce. During this period there had generally been no fitness testing of officers in the MDP. Much of the MDP's work was, however, not overly strenuous, as it involved the static guarding of facilities, and the Defence Police Federation ("DPF") made clear its members' opposition to the introduction of a MSFT standard of 7.6 for AFOs in the MDP.

14. Aware of the view of the CoP and of the Home Office (which had adopted a level 7.6 MSFT for

AFOs), in early 2015, the MDP, in consultation with the DPF, commissioned a report from the Institute of Naval Medicine ("INM") into the occupational fitness standard options for "*critical job related tasks*" undertaken by its officers. The INM's recommendation was that the MDP adopt a lower MSFT of 5.7 for its AFOs, advising that this would adequately test the fitness requirements for the work undertaken, and highlighting the potentially discriminatory impact on women and older officers if a higher standard was used. Almost immediately, however, concerns were raised in relation to this recommendation by other forces, questioning the work undertaken by the INM, in particular, as to whether the test exercises it had used properly reflected the physical exertion that could be needed in real life situations. In July 2015, the CoP also made clear its view that the testing of subjects by the INM had not been as strenuous as in actual scenarios. In February 2016, the CoP set out its concerns in writing to the MDP, warning that it would have to consider whether the MDP could continue to be licensed, as having officers with a lower score would mean 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*" (ET, paragraph 74).

15. From 2016, the failure to maintain national fitness standards was recorded as a risk on the MDP armed policing strategic threat and risk assessment.

16. On 8 July 2016, the MDP made clear that it was a requirement that all new recruits must achieve a level of 7.6 MSFT and maintain that level.

The claimant's employment

17. Having applied to join the MDP in 2015, the claimant attended an assessment in April 2016, which included the MSFT. On this first attempt at the MSFT, she scored 6.7; she was told that she would need to achieve 7.6, but advised that she could re-sit the test at a later date. Otherwise, the claimant's pre-employment assessment was positive and, by October 2016, she had been offered employment to commence in November, albeit, in her statement of particulars, it was made clear there was a requirement to pass the MSFT at level 7.6. On 14 November 2016, the claimant became a constable with the MDP; it was an integral part of her role that she would be armed.

18. In May 2016, the claimant had attended a medical assessment, when it was noted that she had a heart murmur. Subsequently, her GP confirmed there were no issues with her heart, but this meant that she was

unable to take any fitness tests during her initial training, which completed on 24 March 2017. In a discussion about her need to pass the MSFT at the end of March 2017, the claimant indicated she was struggling with her breathing during the test and felt this was preventing her achieving a 7.6 score. Her GP prescribed an inhaler, although the claimant's breathing difficulties were subsequently diagnosed as being stress related. On 12 April 2017, the claimant undertook a training MSFT, when she achieved a level of 6.6 and was advised that she would now be subject to the MDP's "Managing Loss of Qualification process" and needed to achieve the required standard by 3 May 2017.

19. Over the ensuing months, the claimant had two different deployments, which provided her with different levels of support in preparing for the MSFT (as the ET found, one was supportive, the other not). Moreover, between December 2017 and March 2018, she experienced issues with her back (which were in fact related to core weakness), and was unable to then train for the MSFT while she undertook physiotherapy. Ultimately, however, the claimant made a further eight formal attempts at the MSFT, but each time failed to achieve the required 7.6 standard.

20. Although the CoP had recognised the Chester treadmill test as an appropriate alternative means of assessing aerobic fitness (producing guidance as to how the test was to be administered and as to the need to explain to participants the importance of good walking technique), the ET found that the MDP never gave the claimant the opportunity of carrying out a formal attempt at this test (or any other alternative to reaching an equivalent to the 7.6 MSFT). The claimant's evidence was that she had twice tried the Chester treadmill test as a familiarisation exercise (albeit the ET recorded this as only one attempt), but could not immediately keep her balance and had said it was not for her. The ET found that a suitable treadmill for this test was only available at one of the claimant's deployments, and she was not encouraged to persevere with it as an alternative to the MSFT, nor given guidance or support in how to undertake it.

21. By the summer of 2018, the claimant was finding that the MSFT was becoming a mental block and she was prescribed anxiety medication because of her breathing difficulties. On 29 August 2018, she attended a meeting at which she was advised that, as she had been unable to reach a MSFT score of 7.6, her employment would be terminated as from 15 October 2018; this was subsequently confirmed by letter of 11 September 2018. The claimant appealed against her dismissal but was unsuccessful.

The ET's decision and reasoning

22. There was no real dispute before the ET: achieving a score of 7.6 on the MSFT amounted to a PCP which had been applied to the claimant; it had, furthermore, given rise to consequential PCPs, namely a requirement to maintain that level of fitness and liability for dismissal for capability reasons if unable to do so. The MDP had argued that the PCP ought to extend, to include a requirement to meet the required standard for the Chester treadmill test; the ET had, however, tested the claimant's case on the basis of the PCP she had claimed; finding that this was a PCP that had been applied to her in the circumstances relevant to her claim.

23. In defining the pool for comparison, the ET reminded itself that, other than the difference of the relevant protected characteristic, there must be no material difference between the circumstances relating to each case (section 23 **EqA**), and that all those affected by the PCP should be included, and all those not affected by it excluded. The ET considered there was little difficulty in concluding that the application of this PCP gave rise to a disadvantage to a group to which the claimant belonged, namely female AFOs:

> "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."

24. Considering whether the claimant had herself been placed at a disadvantage as a result of the application of the PCP, the ET recorded the position of the MDP, that a number of medical conditions had appeared to impact her ability to pass the MSFT, none of which related to her sex. Acknowledging that the claimant had faced a number of difficulties over the months when she had been trying to pass the MSFT, the ET did not accept that the disadvantage she suffered resulted from a lack of enthusiasm or motivation, or from breathlessness or anxiety – such issues arose as a result of her failure to pass the MSFT at the required level, they were not the actual cause. Finding that the PCPs applied in this case gave rise to an indirectly discriminatory disadvantage, and that the claimant had suffered individual disadvantage as a result of her inability to comply with the primary PCP – that is, to achieve a level of 7.6 on the MSFT – the ET went on to consider the question of justification.

25. Doing so, the ET accepted that the MDP had established the following legitimate aims: (a) protecting

the claimant from risk of harm; (b) protecting her colleagues and members of the public from risk of harm; (c) ensuring that an armed officer was sufficiently fit to carry out their duties, including in emergency situations where weapons were likely to be used; (d) complying with CoP standards; (e) protecting the MDP from reputational risk; (f) safeguarding national security by maintaining an efficient and effective police force, including providing assistance (interoperability) to other forces. In reaching this conclusion, the ET explained:

> "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."

26. In this context, the ET concluded that the PCP of achieving level 7.6 in the MSFT was both appropriate and necessary (ET, paragraph 191). Accepting that the MSFT was only one method of testing, the ET found that it also had many advantages, particularly when testing large groups of people. While the ET recognised that the choice of standard was for the MDP – it could not simply rely on the fact that other forces had adopted the 7.6 requirement – it also accepted that, in order to work on an interoperable basis, it had ultimately had to apply this test (ET, paragraph 193).

27. The ET thus accepted the MDP's case that, for AFOs, the MSFT, to a standard of 7.6, was a proportionate means of achieving a legitimate aim. It did not, however, consider that was the end of the matter, continuing its reasoning in the following terms:

> "195. ... Where the claim must succeed is that this is not the end of the matter. The application must be proportionate in the circumstances especially [under]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."

28. On that basis, the ET adjudicated on the claimant's claim against the MDP, as follows:

> "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."

The legal framework

29. By section 19 **Equality Act 2010** ("EqA") indirect discrimination is defined in the following terms:

> "19 Indirect discrimination
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if— (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
> (3) The relevant protected characteristics are— …sex, ..."

30. It is for a claimant to identify the PCP which she seeks to impugn; as Sedley LJ observed in **Allonby v Accrington and Rossendale College** [2001] EWCA Civ 529:

> "12. … If the [claimant] can realistically identify a [PCP] capable of supporting her case … it is nothing to the point that her employer can with equal cogency derive from the facts a different and unobjectionable requirement or condition."

31. Whether a PCP exists is a question of fact for the ET, see **Jones v University of Manchester** [1993] IRLR 218.

32. In then determining whether the claimant has established the requisite comparative group disadvantage, there must be no material difference between the circumstances relating to each case; see section 23 **EqA**. As Baroness Hale explained in **Essop v Home Office (UK Border Agency); Naeem v Secretary of State for Justice** [2017] UKSC 27, [2017] ICR 640, SC:

> "41. … all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of s.19(2)(b) which requires that "it" – ie the PCP in question – puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison."

33. In **Essop; Naeem**, Baroness Hale identified key features arising from the definition of indirect discrimination, as it had appeared in various iterations of the protection, as follows:

> "24 The first salient feature is that, in none of the various definitions of indirect

> discrimination, is there any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others. ... There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. ...
> 25 A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.
> 26 A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various …. [T]he reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). … [But] both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem.
> 27 A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. … Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. …
> 28 A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. …. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.
> 29 A final salient feature is that it is always open to the respondent to show that his PCP is justified …"

34. Turning to the question of justification, pursuant to section 19(2)(d) **EqA**, the entity applying the (otherwise) discriminatory condition must ''... *show it to be a proportionate means of achieving a legitimate aim*''. Considering this requirement in the light of EU jurisprudence, it has been held that the ET must consider both whether the PCP was an appropriate means of achieving the aim and whether it was reasonably necessary for that purpose, albeit, the employer does not have to show that there was no other route by which its legitimate aim could have been achieved; **Hardy and Hansons plc v Lax** [2005] ICR 1565 CA. In the **EHRC Code of Practice**, the point is made as follows:

> "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."

35. Where the PCP is a general policy which has been adopted in order to achieve a legitimate aim, it is the proportionality of the policy, in terms of the balance between the importance of the aim and the impact on the disadvantaged class, which must be considered, rather than the impact on the individual (see the Supreme Court's approval of the EAT's observation in this regard, in **Seldon v Clarkson Wright and Jakes** [2012] UKSC 16). Where, however, a policy permits a number of responses to an individual's circumstances, although the employer's purpose in adopting the policy will be highly relevant, it will then be necessary to examine its particular application (see, for example, **Buchanan v Commissioner of Police of the Metropolis** [2016] IRLR 918, EAT).

36. As for the respective roles of the ET and the EAT in cases involving claims of indirect discrimination, these were explained by Pill LJ at paragraphs 33-34 of **Hardy and Hansons**; in summary:

> "34. The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."

37. More generally, we remind ourselves of the guidance provided by Popplewell LJ in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, [2021] IRLR 1016 at paragraphs 57-58, and bear in mind the need to read the ET's decision fairly and as a whole, avoiding an overly pernickety critique (see *per* Mummery LJ in **London Borough of Brent v Fuller** [2011] ICR 806 CA, at p 813; cited in **DPP v Greenberg** at paragraph 57(1)). The reasoning provided by the ET should, however, enable the parties to understand why they lost (or won) (*per* Bingham LJ (as he then was) in **Meek v City of Birmingham District Council** [1987] IRLR 250 CA; cited in **DPP v Greenberg** at paragraph 57(3)), and the appellate tribunal to understand how the first instance tribunal reached the decision it did (**English v Emery Reimbold & Strick Ltd** [2002] EWCA Civ 605, [2003] IRLR 710, *per* Lord Phillips MR at paragraphs 9-21). It is, moreover, not the role of the appellate tribunal to comb through an obviously deficient decision for signs of missing elements in the reasoning, to then try to construct an adequate set of reasons (**Anya v University of Oxford** [2001] EWCA Civ 405, [2004] ICR 828, *per* Sedley LJ at paragraph 26).

The MDP's appeal

38. By its amended grounds of appeal, the MDP has raised eight points of challenge (albeit these have been reduced to seven in its arguments for, and at, this hearing).

39. The first ground is put as a perversity challenge to the ET's conclusion that the MDP had not provided the claimant with the opportunity of taking an alternative Chester treadmill test and had failed to provide her with assistance in familiarising herself with that test. Relatedly, by the second ground, the MDP complains that the ET's finding as to the failure to provide assistance in relation to the Chester treadmill test was inadequately explained.

40. Mr Walker addressed the third and fourth grounds of appeal together, as these both seek to attack what is said to have been the ET's failure to properly engage with/provide its reasons in relation to the MDP's case that a number of medical conditions had impacted upon the claimant's ability to pass the MSFT.

41. By its fifth ground of appeal, the MDP returns to the question of the Chester treadmill test, arguing that the ET had failed to make material findings as to whether the claimant would have been fit enough to meet the relevant standard under this test.

42. The final two (or three) grounds then turn to the question of group disadvantage, contending that the ET (i) failed to make any finding in this regard in relation to the Chester treadmill test, (ii) alternatively reached a perverse conclusion on the question of group disadvantage.

Argument, analysis and conclusions

43. In our judgement, to the extent that the MDP seeks to challenge the ET's findings relevant to issues of group or individual disadvantage arising from the application of the PCP, this is simply an attempt to re-argue the case below, ignoring the answers provided to that case within the ET's detailed written reasons. Thus, in relation to the question of group disadvantage, the MDP contends that this could not arise because (as the ET accepted) no AFO recruited after 17 March 2014 (whether male or female) had ultimately been unable to achieve a MSFT level 7.6. This argument fails, however, to engage with the ET's clear finding (paragraph 174 of its decision, cited above) that the evidence demonstrated that women "*would find it more difficult to pass the MSFT test at this level than men*". That was sufficient: a PCP does not need to be an absolute bar, it merely has to place persons with a particular protected characteristic at a disadvantage, and that is what the ET found to be the case here. As for the disadvantage suffered by the claimant, to the extent that this was relevant

to the ET's determination (and, as the Supreme Court made clear in **Essop; Naeem**, the reason why disadvantage is suffered is not the salient question in a case of indirect discrimination), it is clear that it did not find that this was explained by her periods of ill-health (after all, when advised to refrain from fitness tests on medical grounds, the claimant did not undertake the MSFT; it was only when she was considered well enough to take the MSFT that she did so).

44. To the extent that the MDP's appeal is premised on the ET's apparent failure to make findings as to group disadvantage in respect of the Chester treadmill test, the claimant contends that this evinces a misunderstanding (or mischaracterisation) as to the identification of the PCP. As the claimant points out, although the MDP had sought to broaden the PCP to include an alternative requirement to pass the Chester treadmill test, the ET had reached its decision on the more limited basis of a PCP to achieve (and maintain) the MSFT level 7.6. Thus, the claimant argues, the only question the ET was required to answer in respect of group disadvantage related to the PCP it had found.

45. While we do not disagree with the claimant's analysis of how the ET was to approach the question of group disadvantage in this respect, we do not understand this to be the point the MDP is seeking to make. Our understanding of this objection is that it goes to the issue of justification, and to the ET's assessment of proportionality. We return to this point below, when dealing with the ET's reasoning at paragraph 195 of its judgment; as we understand the MDP's argument in this regard, however, its objection is that, in finding that it had failed to offer the claimant the Chester treadmill test as an alternative means of achieving its aims, the ET did not address the question whether this was, on the facts, a less discriminatory measure. It is in this context, that the MDP contends that the ET erred in failing to make any finding as to whether the potential alternative might not itself have given rise to an equivalent group disadvantage.

46. This brings us to what we are clear was, and is, the real issue in this case: the question whether the MDP had demonstrated that the application of the PCP (the requirement to achieve a MSFT of 7.6) was a proportionate means of achieving a legitimate aim. It is apparent that the ET was satisfied that the MDP had discharged this burden in respect of the general policy applied to AFOs; it is also clear, however, that it had found that the policy did not discount alternative methods of testing fitness levels – using the Chester treadmill test or other means – and that it needed to also assess the question of proportionality in terms of the application of the policy to the claimant.

47. The MDP does not challenge that approach, but does argue that the ET's finding on this further issue was perverse; alternatively, failed to engage with the relevant legal questions; alternatively, was inadequately explained. The claimant resists these arguments, contending that the ET's conclusion was plainly one that was open to it on the evidence and its findings of primary fact. Acknowledging that the crucial reasoning at paragraph 195 of the ET's judgment might more helpfully have been expanded, the claimant nevertheless submits that, read holistically, it was apparent that it had applied the correct legal test and had provided adequate explanation for the conclusion it had reached.

48. Addressing first, the MDP's arguments on perversity, we note that the challenge under ground 1 was ultimately reduced to a complaint that the ET had referred to the claimant having had only one opportunity to familiarise herself with the Chester treadmill test, when her unchallenged evidence was that she had (informally) tried the test twice. That, we are clear, does not undermine the ET's decision. Its crucial finding was that the MDP had not provided the claimant with the opportunity to undertake the required fitness testing using an alternative to the MSFT, such as the Chester treadmill test; that was plainly a finding open to the ET on the evidence and there is (and can be) no actual challenge in this regard.

49. Equally, we are not persuaded that there is anything in the further complaints (made under grounds 1 and 2) regarding what was held to be a failure by the MDP to provide the claimant with assistance in familiarising herself with the test. On this question, we think the MDP is correct in its understanding that the ET's criticism was directed to the failure to provide assistance in relation to the Chester treadmill test (rather than, as the claimant has suggested, the MSFT): that, it seems to us, is made clear by the substance of the ET's reasoning at paragraph 195, which resolves the potential ambiguity that otherwise arises from the wording of paragraph 1 of the formal judgment. Nevertheless, we do not consider that it can be said that this conclusion was either perverse or inadequately explained. Again, the ET's findings of primary fact were clear: (i) although the claimant had experienced an initial difficulty with her balance when trying the Chester treadmill test, this was not unexpected and was something that could be addressed (see the ET's finding at paragraph 43, cited above); (ii) the CoP had recognised the Chester treadmill test as an appropriate alternative means of assessing aerobic fitness and had provided guidance as to how the test was to be administered and as to the support to be given to participants; (iii) a suitable treadmill for this test was only available at one of the claimant's deployments, and she was not encouraged to persevere with it as an alternative to the MSFT, nor given

guidance or support in how to undertake it.

50. Reading the ET's decision holistically (as we are required to do), it is clear why it reached the permissible conclusion that the MDP had failed to provide the claimant with the recommended assistance in familiarising herself with, and going on to take, an alternative test to the MSFT, such as the Chester treadmill test.

51. Where, however, we consider there is merit in the MDP's objections (essentially as articulated under grounds 5 and 6) is in relation to the ET's explanation as to how it reached its apparent conclusion that the Chester treadmill test (or other form of assessment) provided a less discriminatory means of achieving the legitimate aims it had found. The difficulty we have found stems from the paucity of reasoning provided on this point: after the ET's very detailed analysis of, and findings on, the arguments relating to the MDP's legitimate aims and its application of the level 7.6 MSFT standard, paragraph 195 gives little insight into how the ET then arrived at the conclusion that the failure to provide the claimant with the opportunity to take an alternative test (and assistance in so doing) meant that the MDP had failed to discharge the burden of showing that the application of the PCP was justified.

52. Accepting the difficulty that arises from the limited explanation provided at paragraph 195, the claimant urges us that we can nevertheless discern the ET's process of reasoning from the preceding parts of its decision, bearing in mind that (i) it was the MDP that bore the burden of proof, and (ii) any alternative to dismissal was bound to be a less discriminatory means of achieving a legitimate aim. We are, however, not persuaded that we can legitimately undertake the exercise that the claimant's submission would require; *per* **Anya**, it is not the role of the appellate tribunal to comb through an obviously deficient decision for signs of missing elements in the reasoning and to then try to construct an adequate set of reasons. Moreover, accepting that an opportunity to take an alternative test might well have been welcomed by the claimant, not least as this might have avoided her dismissal, we consider there is force in the MDP's argument that the ET needed to demonstrate engagement with the question whether this was, on the facts, a less discriminatory means of achieving the aims in issue: the case before it was one of indirect sex discrimination; this was not simply a claim of unfair dismissal. On the explanation provided by the ET, we do not know whether it was seeing the alternative form of testing in this scenario in terms of the application of a direct test, so as to avoid the possibility of a false negative (thus referring back to the dispute relating to indirect and direct forms of

assessing aerobic fitness levels), or simply as providing a different means of indirect assessment that might have better suited the claimant. In either case, we do not know what, if any, conclusion it had formed as to whether the alternative in question would thus have avoided the group disadvantage otherwise suffered by women, or as to whether it considered that this would have avoided the particular disadvantage suffered by the claimant.

53. In oral argument, it was suggested by the claimant that the question whether she would, as a matter of fact, have been able to demonstrate the required level of fitness by some alternative means, is really a matter for the ET to determine at the remedy stage. We see some force in that point but we do not consider that overcomes the prior difficulty, that the ET has made a finding of indirect discrimination against the MDP on the basis that it failed to adopt an alternative means of achieving its legitimate aims, without explaining (i) what the alternative means actually implied in this case (the direct or indirect testing point we have referenced), and (ii) whether such an alternative would (or even could) have had a less discriminatory impact. Accepting that it was for the MDP to prove that the means it had adopted was both reasonably necessary and proportionate, we are left with the difficulty that the paucity of reasoning on this crucial point leaves us uncertain as to whether the ET actually engaged with these issues. As such, we consider the ET's finding of indirect sex discrimination is rendered unsafe. That may be because the ET failed to engage with the issues arising on the balancing exercise required in this case, or because it failed to provide adequate explanation as to that engagement; in either case, we cannot be satisfied as to the manner in which the ET's decision has been reached (see the guidance in **Hardy and Hansons**). In these circumstances, we consider that, on the bases identified in grounds 5 and 6, we are therefore required to allow this appeal.

Disposal

54. Having given our judgment in open court, we provided the parties with the opportunity to address the question of disposal.

55. For the MDP, with his customary candour, Mr Walker acknowledged that this is not a case that the EAT could itself determine (there was not only one possible answer to the point to be reconsidered). Moreover, having regard to the guidance provided in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, EAT, Mr Walker accepted that the appropriate course would be for this matter to be remitted to the same ET. That was

also the view of the claimant.

56. Having thus allowed the appeal on grounds 5 and 6, but dismissed all other grounds, and applying the principles laid down in **SRT v Heard**, we agree that the appropriate course is for us to remit this matter to the same ET to the extent that that remains practicable (if not, then the allocation of the remitted case will be a matter for the President of Employment Tribunals (Scotland) or her Deputy). We will direct that there should be a transcript of our judgment, to assist the ET in its task. As should be clear from our reasoning, however, the remission is limited to the question of proportionality in respect of the application to the claimant of what the ET (permissibly) found to be the otherwise justified policy of the MDP, and the consideration of whether there was some less discriminatory alternative, setting out the ET's evaluative assessment in this regard.

57. As both parties observed, the ET is likely to be assisted by obtaining a transcript of the recording of the relevant evidence from the earlier hearing. Moreover, while case management must be a matter for the ET, we would anticipate that it will wish to hear further submissions from the parties. As for whether it would be appropriate for any further evidence to be adduced, that must be for the ET to determine, having considered any representations from the parties in this regard.