EMPLOYMENT TRIBUNALS

Claimant: **Miss L Welsh**

Respondents: **Chief Constable of Northumbria Police**

Heard at: **Newcastle Employment Tribunal**

On: **10,11, 12 February 2025**

Before: **Employment Judge Sweeney**
L Jackson
SJ Lie

Representation:

For the Claimant: in person
For the Respondent: Richard Stubbs, counsel

JUDGMENT having been given on **12 February 2025** and written reasons for the Judgment having been requested by the Respondent in accordance with Rule 60 of the Employment Tribunals Rules of Procedure 2024, the following reasons are provided.

WRITTEN REASONS

1. The claim before the tribunal was one of discrimination because of something arising in consequence of the Claimant's disability. In brief, the Claimant contended that her application to be become a police constable was not progressed/deferred; that this because of the application *of Annex B: Mental Health Standards for Recruits: A Guide for Force Medical Advisors"* which (at the relevant time) required applicants to be have been off antidepressant medication in a normally stressful environment for at least 24 months. She could not satisfy that requirement. As a consequence, she was not certified as fit by the FMA. The Chief Constable, in the absence of certification, deferred the application. The Claimant contended that the decision by the Chief Constable was unjustified discrimination within the meaning of section 15 Equality Act 2010. The Chief Constable contended that the

decision was justified but that by virtue of paragraph 1(1) of Schedule 22 of the Equality Act 2010, she cannot have contravened section 15 (or other provisions) as she was acting in compliance with regulation 10 of the Police Regulations 2003. The issues on liability (by the final hearing stage) are set out in an Appendix at the end of these reasons.

Witnesses

2. The Claimant gave evidence on her own behalf. The Respondent called the following witnesses:

   2.1. Doctor Deepali Dharmadhikari, Force Medical Adviser

   2.2. Barbara Wilson, Senior People Partner

Documents

3. The parties had prepared an agreed bundle of documents consisting of 169 pages.

Findings of fact

4. The Claimant, Miss Welsh, had been (and still is) employed by the Respondent as a civilian employee in the role of Researcher for the Counter Corruption Unit. On **16 November 2022**, Miss Welsh applied to become a police constable with the Northumbria Police Force through the Degree Entry Holder Programme [**page 62**]. Candidates must pass various stages of the process, including at an assessment centre and interview.

5. The Claimant successfully completed the assessment centre and interview stage of the selection process. Accordingly, she was made an offer of appointment conditional upon being assessed as medically fit. It is only after a candidate has been made a conditional offer that the Respondent asks the candidate to complete a health questionnaire and to provide medical details.

6. Anticipating that she would be certified as fit for the role, she was aiming to start in **June 2023**. On **15 February 2023**, Miss Welsh filled in a health questionnaire [**pages 53a – 53f**]. This health questionnaire must be – and in the Claimant's case was - signed off by the candidate's GP.

7. Among other things, the questionnaire asks the candidate: "*to indicate whether you currently have or have ever had any of the following medical conditions*". The Claimant answered 'yes' to number 33: "*Anxiety/depression, phobias, mental breakdown or stress related problems*". She also indicated that she was currently taking prescribed medication, namely 100mg of Sertraline daily.

8. In **May 2022**, Miss Welsh had been prescribed the medication for anxiety and depression, something she had experienced from about **2016/2017**. The sertraline had significant

beneficial effects, as outlined by her in her disability impact statement [**page 41**]. She saw her mental health improve and stabilise, resulting in her having no depressive episodes.

9. The Claimant then undertook a telephone medical consultation on **14 April 2023**. The occupational health nurse explained to her that because she was taking anti-depressants she was unable to progress the Claimant's application further and that her application would have to be deferred due to Home Office guidance in Annex B.

10. The reference to 'Home Office' standards and to 'Annex B' is a reference to the document at **page 118** of the bundle dating from 2004. It is called "*Annex B: Mental Health Standards for Recruits: A Guide for Force Medical Advisor*s"

11. Paragraph 10.5 of Annex B states as follows:

> *"If an individual with a history of depressive illness seeks appointment whilst still taking antidepressant medication any decision to appoint should be deferred until they have been off medication and remained well in a normally stressful environment for at least 24 months."*

12. This decision to defer the Claimant's application was recorded internally on **17 April 2023** [**page 54**] in an email from an administrator for Optima Health. The email states: "*LW has a history of anxiety/depression and remains on medication. Therefore, they do not meet the home office standards and it is recommended they are deferred until they do not require any more medical treatment and remain well*."

13. Medical Decision Meetings **('MDMs')** are held within the Respondent's force for the purposes of discussing applicants with health conditions. At these meetings, those present discuss whether the applications of such candidates should proceed.

14. On or around **06 June 2023**, there was an **MDM**', at which the Claimant's case was briefly discussed. The notes of that meeting are in the bundle at **pages 59 – 61**]. The date is incorrectly state on the note as being **05 April 2023** but that is of no significance. The entry under the Claimant's name states: "Does not meet HO standards notifications." Present at that meeting was Doctor Deepali Dharmadhikari ('**DD'**). She is the Respondent's Force Medical Adviser ('**FMA'**). For those purposes she is employed as a Consultant Occupational Physical by Optima Health Limited ('**Optima**'). She is the registered medical practitioner for the purposes of Regulation 10 of the Police Regulations 2003.

15. Regulation 10(1) of those Regulations state as follows:

> *"A candidate for appointment to a police force*
> *(d) must be certified by a registered medical practitioner approved by the local policing body to be in good health, of sound constitution and fitted both physically and mentally to perform the duties on which he will be employed after appointment.".*

16. On **09 June 2023**, Michelle Miller (Inspector Recruitment) emailed the Claimant asking whether she would permit the release of her medical information so that the MDM could have sight of it, in order to make an informed decision on how to proceed with her application [**page 62**]. Miss Welsh did so on **22 June 2023** [**page 64]**.

17. Her case was discussed again at an **MDM** on **05 July 2023** [**page 67-68**]. Again, the **FMA** was in attendance. She agreed that the Claimant was not eligible for the role, following the HO guidance.

18. That day, Ms Miller emailed the Claimant to inform her that her case was assessed at the **MDM** and unfortunately they were unable to progress her Police Officer application at this time due to the outcome of her medical assessment by the occupational health unit [**page 69]**.

19. The Claimant was disappointed by the decision and sought to challenge it by way of a grievance on **21 July 2023 [page 71]**. However, although she was not able to pursue a grievance as such, nevertheless, the Respondent agreed to carry out a review of the decision made at the MDM in July [**page 78**]. Helen Murphy, a senior manager in People Services carried out the review. Ms Murphy asked for some information from the **FMA**, who replied on **27 September 2023** [**page 85**].

20. The FMA said as follows: "*Regarding mental health conditions, it has been discussed on* numerous *occasions within the MDM and agreed that the HO guidance is uniformly applied at recruitment for candidates who are currently receiving treatment, this is the current practice*."

21. The doctor went on to say:

> *"I have reviewed the notes and agree that the candidate does not meet the Home Office standards at present due to history of anxiety/depression for which she is currently on mental health medication, albeit that she is currently 'very stable in mood'. She requires medication to achieve this and would not therefore meet the HO guidance. She is currently on a relatively high dose of medication and has been since **May 2022**. Given the underlying vulnerability, there are concerns about psychological resilience as well as risk of further decline in mental health due to workplace exposures."*

22. Ms Murphy completed her review and responded to the Claimant on **05 October 2023** with the disappointing news that she concluded the decision to be appropriate and aligned to the Respondent's approach and guidance [**page 88**].

23. Had it not been for Annex B, paragraph 10.5, Miss Welsh would have gone on to be medically assessed. Further, Annex B is 'guidance'. It is not mandatory. Paragraph 10.5 says 'should be deferred', not 'must' be deferred. It does not follow that because a candidate for appointment is under antidepressant at the time of the medication that their application must come to an end. If a person is a serving police officer of, say the Durham Police Force

applies to the Northumbria Force, that person is a candidate for appointment, just like the Claimant. If that serving officer is on medication for anti-depressants they may well still be medically assessed and can be appointed nevertheless, and some have. A different approach, however, is taken for brand new candidates (or non-police officers) such as the Claimant. The difference in approach is because an existing officer, when he/she first applied to be an officer had to be anti-depressant free; if during the course of their service they find themselves on such medication but are still operating, it is considered that they have demonstrated resilience. That is not the same for non-police, new recruits.

24. The Claimant started early conciliation on **03 January 2024**. An EC Certificate was issued on **09 February 2024** and she presented her ET1 on **22 February 2024**.

25. Bringing matters up to date, in about **April or May 2024**, the College of Policing issued a consultation document (dated **March 2024**) to FMAs called 'Assessment of medical fitness of police officer applicants – a functional approach'. This is draft guidance, in anticipation of a final version being approved in 2025. Certainly as regards mental health, there had been no updated guidance available to FMAs since **2004**. Much has changed with regards to the understanding and treatment of mental health in the 20 years since then.

26. Section 2.8 of the new draft guidance refers to Annex A and B as being out of date and states that they should not be relied on when assessing police officer applicants [**page 132**]. It was anticipated that the finalised guidance would be in place from **September 2024**. However, it has not yet formally been introduced. However, in recognition of what it says, the Respondent has adopted a new approach to assessment of those taking anti-depressants at the time of their application. Now, various factors are taken into account, including the dosage of medication, period of stability, absences from work, impact of episode, consideration of what had triggered the episodes and the applicant's history. The same principles underline the guidance, namely precautionary principles.

27. The Claimant has subsequently been re-assessed against this new draft guidance. Further, she has reduced the dosage of sertraline. On **10 January 2025**, a new offer of 'employment' was made to her. That offer is conditional on successful vetting, biometrics, and fitness test. All things being equal, we are pleased to say that the Claimant is provisionally set to start her new role as a police officer in **March 2025**.

Relevant law

Discrimination because of something arising in consequence of a person's disability

28. Section 15 provides:

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

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

29. For a claim under section 15 to succeed, there must be something that led to the unfavourable treatment and this 'something' must have a connection to the claimant's disability. In **Pnaisner v NHS England and anor** [2016] IRLR 170, the EAT summarised the proper approach to section 15. The 'something' need not be the sole reason for the unfavourable treatment but it must be a significant or more than trivial reason for it. In considering whether the something arose 'in consequence of' the claimant's disability'.

Section 15 not contravened in certain circumstances

30. Section 59 EqA provides:

(1) Nothing in this Act make3s unlawful any act done –
(a) In pursuance of any enactment, or
(b) In pursuance of any instrument made under any enactment by –
(i) A Minister of the Crown,
(ii) …; or
(c) To comply with any condition or requirement –
(i) Imposed by a Minister of the Crown (whether before or after the passing of this Act) by virtue of any enactment.

31. Schedule 22(1) EQA 2010 provides:

A Person (P) does not contravene a provision specified in the first column of the table, so far as relating to the protected characteristic specified in the second column in respect of that provision, if P does anything P must do pursuant to a requirement specified in the third column.

32. Regulation 10(1) of the Police Regulations 2003 ('the Regulations') provides:

"A candidate for appointment to a police force
(d) must be certified by a registered medical practitioner approved by the local policing body to be in good health, of sound constitution and fitted both physically and mentally to perform the duties on which he will be employed after appointment.".

Status of EU law

33. The UK is no longer a member of the EU. In preparation for leaving, Parliament enacted the European Union (Withdrawal) Act 2018. Section 4 of that Act preserved certain EU rights and liabilities. It stated as follows:

(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day—

(a) Are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and

(b) Are enforced, allowed and followed accordingly,

Continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly),

34. Section 6(3) of the Withdrawal Act provides:

Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it—

(a) in accordance with any retained case law and any retained general principles of EU law, and

(b) having regard (among other things) to the limits, immediately before exit day, of EU competences.

35. Therefore, although the UK exited the EU on **31 January 2020** ('exit day'), the law that was in force on withdrawal was essentially brought onto the UK Books and was known as 'retained law'. This meant that in certain cases, Tribunals, would still have regard to principles of EU law. There was a transitional period, up to **31 December 2020**. After that, EU laws would only continue to apply in domestic law insofar as they were not modified or revoked.

36. The position changed again with effect from **01 January 2024**, with the introduction of the Retained EU Law (Revocation and Reform) Act 2023. This Act changed the name and status of retained EU law. It was from then called "assimilated law". The Act removed the principle of supremacy of EU law which had applied to retained EU law. Importantly, it also ended the practice of applying EU principles to interpret EU-derived legislation on the UK domestic statute books. It means that as of **01 January 2024**, legislation on the UK statute books (such as the Equality Act 2010) must be interpreted and applied without reference to the principle of supremacy of EU law and without reference to the previous interpretative features of EU derived law. In other words, principles of EU law have been removed as an aid to interpretation.

37. These new provisions apply in relation to anything occurring on or after **01 January 2024**.

Submissions

38. The Claimant claims that the decision to decline/defer her application to be a police constable was an act of unjustified disability discrimination within the meaning of section 15 EqA 2010.

39. The Respondent accepted that:

    39.1. At the time her application was rejected/deferred, the Claimant was a disabled person within the meaning of section 6 EqA (this concession having been made on **25 September 2024** [**page 45 bundle**])

    39.2. The decision to defer the Claimant's application was unfavourable treatment.

    39.3. She was subjected to this unfavourable treatment because of the absence of certification by a registered practitioner as being fit for duty.

    39.4. The decision not to certify her as fit was directly because the claimant was taking antidepressant medication, which itself arose in consequence of her disability.

40. The Respondent did not raise any argument that it did not know that the Claimant had the disability at the time. However, the Respondent relied on two points, in defending the claim:

    40.1. That by virtue of paragraph 1 of Schedule 22 of the EqA 2010, the Chief Constable cannot be in contravention of section 15 (or any other provision within Parts 3 – 7 of the Act) because in deferring the Claimant's application, she was doing so pursuant to a condition imposed by virtue of regulation 10 of the Police Regulations 2003.

    40.2. In any event, the decision to defer the Claimant's application was a proportionate means of achieving legitimate aims, those being: (1) the protection of the particular recruit, colleagues and members of the public and (2) the effective functioning of the force.

41. The Claimant, it was submitted, could not be certified as fit by the **FMA** because of paragraph 10.5 of Annex B and under regulation 10 of the Regulations, there must be certification. There being none, the Chief Constable could not recruit.

42. The Claimant recognised the force in this argument. Appreciating that no wider arguments had been advanced by the Claimant, prior to the parties making submissions the Tribunal Judge asked Mr Stubbs whether he was aware of any relevant EU law which might have a bearing on the Respondent's arguments under the Equality Act 2010. He had not anticipated any such possibility (we emphasise: no such point had ever been raised by the Claimant). However, he said that he would do his best overnight to research the matter. In his written submissions Mr Stubbs set out extracts from Council Directive 2000/78/EC ('the Directive') and made further observations in oral submissions. In essence, he submitted that:

    42.1. No such argument had been advanced by the Claimant,

42.2. Insofar as the Directive was held to be of relevance in the case of **London Fire Commissioner v Sargeant** [2021] I.C.R. 1057, the context (pensions) was very different to that here (recruitment), which is specifically envisaged to be an area in which a different level of protection may apply, as set out in the recitals to the Directive.

42.3. What was said in **Sargeant** about direct effect of the Directive was obiter and given the different context, one could not read across from that case into this.

42.4. In essence, he submitted:

42.4.1. The requirement for a candidate to be certified in good health is mandatory as a necessary condition of appointment by the Chief Constable.

42.4.2. In the absence of such certification, the Chief Constable is unable to appoint the Claimant to the position of police officer,

42.4.3. By application of schedule 22 of the Act, the Chief Constable cannot thus be in contravention of section 15 of the EqA,

then the claim must fail as EU law does not come to her rescue.

Conclusions

43. The facts in this case were largely agreed. It was accepted by the Respondent that the reason for deferment of the Claimant's application was Annex B. It was agreed that the FMA was the medical practitioner for the purposes of regulation 10 of the Regulations. For the purpose of these proceedings, when applying schedule 22(1) of the EqA::

a. 'P' is the Chief Constable of Northumbria Police.
b. A 'provision specified in the first column' is section 15 EqA 2010.
c. 'a requirement specified in the third column' is regulation 10(1)(d) Police Regulations 2003

2. The Respondent's primary argument was that:

"By rejecting/deferring the Claimant's application to be a police constable, the Chief Constable does not contravene section 15 EqA, if she must do so pursuant to regulation 10(1)(d) of the Police Regulations 2003"

3. We have referred to the schedule 22 point as the 'barrier' issue and the remaining issue as the 'justification' issue. We considered the barrier issue first because it is, as Mr Stubbs said, a 'knock out blow' and if the Respondent is right, that will be the end of the claim. That is because we would have to conclude that the Chief Constable has not

contravened section 15 EqA even if she is unable to justify the decision to defer the Claimant's application.

4. For the exception in paragraph 1, schedule 22 to the 2010 Act to apply, the enactment in question (Regulation 10 of the Police Regulations) must have had a direct effect upon the particular circumstances of the Claimant. On the facts of this case it clearly did.

5. We have had to ask the following questions:

    a. Is Doctor Dharmadhikari ('**DD**') a registered medical practitioner within the meaning of regulation 10(1)(d)? **[the answer to this is yes]**

    b. If so, did **DD** certify the Claimant as '*fitted both physically and mentally to perform the duties on which she would be employed after appointment'*? **[the answer to this is no]**

    c. If not, was the Claimant's application that she made in **November 2022** rejected or deferred by the Chief Constable because the Claimant was not so certified? **[the answer to this is yes]**

    d. If so, in rejecting/deferring the Claimant's application, was the Chief Constable doing something that she must do pursuant to a requirement or enactment or a 'relevant' requirement or condition imposed by virtue of an enactment'? **[the answer to this is yes, namely regulation 10]**

    e. If so, does paragraph (1) of Schedule 22 mean that the Chief Constable cannot be taken to have contravened section 15 EqA? **[the answer to this is yes]**

6. Having answered the questions as we have (and the answers are, in our judgement, obvious on these facts) that means that by virtue of schedule 22, paragraph 1, the Respondent cannot be in contravention of section 15 of the Equality Act 2010 in this case. In her submissions, Ms Welsh recognised the force of this.

7. That being so, EU law is the only thing that could, so to speak, come to the rescue of the Claimant. We will say immediately that we are not prepared to conclude that it does.

8. The act complained of in this case pre-dates **01 January 2024**. In respect of alleged discrimination that occurred before the end of 2023, broadly speaking, lower courts and tribunals are bound by pre-2021 – ie pre-Brexit – EU case law. One doctrine to emerge from EU law was what is known as the 'Marleasing principle', whereby national courts and tribunals must interpret domestic law, as far as possible, in a way that is conforms with the wording and purposes of EU directives.

9. This raised a number of difficult questions. How might that principle apply in this case? What element of EU law (what part of the Framework Directive) might we be asked to

consider? Article 5? Article 16? Both? What element of UK law would we have to interpret in conformity with the Directive? Is it Regulation 10 of the Police Regulations 2003? Is it paragraph 1 of Schedule 22? If it is regulation 10, is it argued that there is something inherently discriminatory about that regulation (it does not appear to be the case). If it is paragraph 1 of schedule 22, are we asked to read words in to that provision or strike it down? If either or both of those, what is the effect of recitals 16 – 18 of the Directive? If we were to conclude that schedule 22 was not compatible with some element of EU law, how could we make it compatible other than by wholly disapplying it? Is it appropriate to do so?

10. If we were unable interpret the Act in conformity, we would then have to consider which article of the directive is relied on as having direct effect (and conclude in favour of the claimant). We would have to decide whether it does have direct effect. This would involve hearing arguments on whether the relevant article is clear, precise, unconditional and whether or not it gives the UK substantial discretion in its application. We would have to consider whether the Respondent is an emanation of the state (although we strongly suspect that the answer to that question is likely to be yes).

11. These are all difficult questions to answer and none was foreshadowed in this case. The Tribunal judge asked whether EU law had anything to say about the issues in this case, in case there had been some clarity as regards the direct effect of article 5, or the status of schedule 22 of the Equality Act. However, all that Mr Stubbs had been able to find in the short period of time available to him, was the case of **Sargeant**, which (as is clear from paragraph 141 of that judgment) was obiter in respect of its observations on schedule 22, paragraph 1 (and even then the EAT did not grapple with the argument that the schedule should be struck down).

12. As a tribunal, we are to apply the law but there are limits as to what we can do to assist any litigant in person. Understandably, Ms Welsh does not know what the answer to these questions are. She does not know what legal arguments to advance and she advanced none. To go further and to do so on her behalf on a subject which is devoid of authority, means that the Tribunal itself would have to shape and develop its own arguments on behalf of the Claimant. It would have to 'step into the arena'. That is not something we feel would be right to do. We are not putting it in the 'too difficult box' (a phrase that emerged during submissions). We are putting it in the '*arguing a case is not our function box*'. Mr Stubbs noted in his written skeleton submissions that no argument on EU law had been run. He is right – because Ms Welsh is unaware of what EU says or might say on the subject. We note that Judge Loy, in paragraph 15 of his case management summary referred the Claimant to the existence of EASS, the Free Representation Unit and the Bar pro bono unit. I imagine any number of barristers would have been interested in the EU argument but we heard no argument at all.

13. Therefore, we accepted the submission of Mr Stubbs that:

a. The position in **Sargeant** is very different to that here and is distinguishable given the nature of the regulations under consideration.

b. There is nothing inherently discriminatory about regulation 10.

c. The court in **Sargeant** did not decide that paragraph 1, schedule 22 was incompatible with the Framework Directive. It did not need to do so. Its decision on section 61 EqA means that what was said about direct effect of the Directive is obiter and not binding.

d. No wider EU argument was raised in these proceedings and it is not for us, on a difficult and contentious issue to develop and advance arguments on behalf of a party and to do so in this case would involve us essentially representing the Claimant.

14. Therefore, in the absence of arguments on which we can arrive at any other conclusion, we have applied domestic law, the effect of which means that the Chief Constable, on the facts of this case, cannot have acted in contravention of section 15 EqA.

15. Two final observations: had it been necessary for us to consider justification, although we arrived at no final position, the Respondent would have had her work cut out to satisfy us that by deferring the Claimant's application by reliance on 10.5, that it acted proportionately to achieve the legitimate aims that it had (which we accept are legitimate aims). That is because for new recruits, 10.5 acted as a blanket policy. We emphasise, however, we arrived at no firm conclusion on this.

16. Secondly, although we heard no argument, the Claimant would have had her work cut out to persuade us that she had suffered any financial loss or pension loss. Further, the evidence regarding injury to feelings was 'thin on the ground', and even if successful, she may well have been looking at the very bottom of the Vento lower band in this case.

44. Having said all of this, we repeated how pleased we were that the Claimant's career looks like it is going to take off and offered her our best wishes for the future.

Employment Judge **Sweeney**

Date: 21 May 2025

APPENDIX

List of issues

Discrimination because of something arising in consequence of the Claimant's disability

1. Did the Respondent know or could it have been reasonably expected to know that the Claimant had the disability?

2. Did the Respondent decide to defer/not to progress the Claimant's application to become a police constable and/or withdraw an offer of employment made to the Claimant for the role of police constable due to it applying Regulation 10(1)(d) Police Regulations 2003 together with Annex A and B of national guidance that provides that the appointment of an individual with a history of a progressive illness who is taking antidepressant medication should be deferred until that individual has been off medication and remained well in a normally stressful environment for at least 24 months?

3. If so, was that unfavourable treatment?

4. If so, was that treatment because of something arising in consequence of her disability? The Claimant relies on the fact that she was taking prescribed medication because of her depression?

5. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the terms set out in clause 1.3 Annex B.

Statutory Defence

6. Does the Respondent have a statutory defence3 pursuant to paragraph 1(1) of Schedule 22 of the Equality Act 2010? The Respondent relies on its statutory obligation to comply with the regulation 10(1)(d) Police Regulations 2003 which requires that a candidate for appointment to a police force must be certified by a registered medical practitioner approved by the local policing body (in this case the FMA) to be in good health, of sound constitution and fitted both physically and mentally to perform the duties on which he will be employed after appointment. In this particular case by the application of clause 10.5 Annex B.