



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Penelope McEneaney  
**Respondent:** Ministry of Defence  
**Heard at:** Watford  
**On:** 6-14 January 2026, 20 February 2026  
**Before:** Employment Judge Caiden  
Mrs S Wellings  
Mr M Bhatti MBE

## Representation

**Claimant:** In person, with support of Mr Dan Ashton on 6-9 January 2026  
**Respondent:** Ms L Robinson (Counsel) and Mr J Fireman (Counsel)

# RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of direct sex discrimination is not well-founded and is dismissed.
2. The complaint of pregnancy and maternity discrimination is not well-founded and is dismissed.
3. The complaint of indirect sex discrimination is not well-founded and is dismissed.
4. The complaint of victimisation is not well-founded and is dismissed.

# REASONS

## A) Introduction and preliminary matters

1. By an ET1 presented on 10 November 2023, the Claimant made claims of (a) direct sex discrimination, (b) pregnancy and maternity discrimination, (c) indirect discrimination, and (d) victimisation as against the Respondent.
2. At the hearing before the Tribunal, the Claimant, an employment lawyer by background and who retains a practising certificate as a solicitor, represented herself (although she was supported by a friend Dan Ashton on 6-9 January

2026). The Respondent was represented throughout by Counsels, namely Ms Robinson who led Mr Fireman.

3. In terms of documentation, at the commencement of the hearing, the Tribunal was provided with the following documents:
  - 3.1. a final hearing bundle which had 1311 pages (excluding its indices). All page references in these Reasons, unless otherwise specified, relate to this bundle;
  - 3.2. a cipher detailing the anonymisation used in documents;
  - 3.3. a reading list submitted by the Respondent;
  - 3.4. a bundle referred to as Claimant's disclosure bundle, which had 1394 pages (excluding its indices);
  - 3.5. a chronology on behalf of the Respondent;
  - 3.6. an opening note on behalf of the Respondent;
  - 3.7. witness statements on behalf of the Claimant, Tracey Bottrill, Sophie Da'Silva, Christopher Todd, Alison McLean, Katharine Syfret, Adrian Burns, Paul Yates, Jenifer Hone, and Douglas Cunniff.
4. However, there was further documentation sought and provided throughout the hearing. Indeed, for some documentation – although in the end not referred to in live evidence – there was a need for separate orders to ensure the identities of the parties were not disclosed to the public. The Tribunal is satisfied, as agreed by all parties, that all documents that parties wished to rely upon were available although in the end not all were referred to. The Tribunal has, and informed the parties of the same at the outset of the hearing, only taken into account pages that were referred to in live evidence (be it by reference in witness statements or whilst orally questioning witnesses) and in the parties' submissions.
5. In terms of witness evidence, the Tribunal heard from all witnesses for whom statements had been provided (see paragraph 3.7 above), save for Katherine Syfret and Douglas Cunniff (whom the relevant party determined did not require cross examination). The witness statements were all confirmed as being true to the best of the respective witnesses' knowledge and belief having taken an oath or affirmation.
6. Closing submissions were heard on the 20 February 2026, and the Tribunal was provided with written documents ahead of such which it considered carefully.

## **B) The issues**

7. Turning to the liability issues, all parties accepted that they were as agreed before Employment Judge Findlay on 12-13 June 2025 save as for the following slight modifications as agreed by all:
  - 7.1. there was a slight issue with the numbering and all the elements under 3.1.2 to 3.1.9 of the list of issues as produced by Employment Judge Findlay were in fact particulars of what was stated at "3.1.1 *Fail to appraise the claimant properly during the 2021 to 2022 reporting period by*";
  - 7.2. the reference to "3.1.10 *Air Cdre Burns Taking account of performance beyond the end of the reporting period when appraising the Wing Commander cohort when the claimant was on maternity leave*" was no longer relied upon separately as it was already covered by "3.1.2 *Air*

*Commodore Burns taking into account performance outside the reporting period (14.06.21 to 31 October 2022) when carrying out the peer group comparison and 2RO appraisal”;*

- 7.3. the protected period referred to in “3.2” was specified as being 14 March 2022-20 June 2023;
  - 7.4. it was clarified that the alleged less favourable treatment for the direct sex discrimination claim mirrored precisely the unfavourable treatment for the pregnancy and maternity discrimination claim save for the very final allegation now relied upon “3.1.9 *Air Cdre Burns applying criteria in assessing the Claimant's performance that resulted in her being treated unfavourably due to pregnancy, namely: Clear leadership, strong staff work, EQ, IQ and PQ(emotional, intellectual and physical intelligence) and the need to be more competitive than her peers.*”;
  - 7.5. the legitimate and proportionate aims were specified as required post the list of issues being provided and these were “*In respect of the first PCP (i.e. applying metrics of clear leadership, strong staff work, EQ, IQ and PQ and being more competitive than her peers when carrying out 2RO appraisal and peer group comparison ranking), the Respondent contends that this ensures a robust and effective performance appraisal system based on objective criteria, focused on relevant skills, and which identifies who are the strongest performing staff within a given cohort and that this is a proportionate means of achieving a legitimate aim*” and “*In respect of the second PCP (i.e. taking account of performance beyond the end of a RP), the Respondent contends that this enables it, in an appropriate case, to assess performance of an individual on the most recent evidence, ensuring a more accurate appraisal report and that this is a proportionate means of achieving a legitimate aim*”;
  - 7.6. the protected act relied upon was admitted, namely “*Lead the non-statutory inquiry into unacceptable behaviour within RAFAT and deliver the report of that inquiry on the 1st of July 2022? The respondent accepts that the claimant did a protected act by leading the inquiry and authoring its report*”.
8. The Tribunal notes that during the hearing there as an application to amend the claim, and thereby the issues, but this was refused for the reasons given orally at the time.
  9. For ease the Tribunal now sets out the finalised list of issues, with the above modifications and absent the issue of time limits:

#### Direct Sex

10. Did the Respondent “*fail to appraise the Claimant properly during the 2022 reporting period*” by virtue of:
  - 10.1. Air Commodore Burns taking into account performance outside the reporting period (14 June 2021 to 31 October 2022) when carrying out the peer group comparison and 2RO appraisal;
  - 10.2. Air Commodore Burns failing to give the Claimant an opportunity to address any concerns he had about the scope of her NSI role or any other concerns at the 2RO stage;
  - 10.3. the Respondent failing to inform the Claimant of her true position in the peer group ranking so that she could address any concerns;

- 10.4. the Respondent failing to inform the Claimant of any change in her position in the peer group ranking or why that had occurred so that she could address it during the 2RO process;
  - 10.5. Air Commodore Burns changing the Claimant's PGC ranking from 3/14 to 4/14 between 21 October 2022 and 13 January 2023;
  - 10.6. Air Commodore Burns eroding the appraisal of the Claimant's performance by the comment in the OJAR for the 2021- 2022 RP that she was ranked within the "top third", rather than specifying the PGC ranking 3/14;
  - 10.7. Air Commodore Burns failing to recommend the Claimant for additional comment on her performance by a 3RO (Air Vice Marshal Maria Byford) after receiving a recommendation from Group Captain Yates in December 2022;
  - 10.8. Air Commodore Burns stating, on 8 August 2023, that he could "*feel the emotion*" when she raised the negative impact on her career of the 2021/2022 OJAR and the ongoing negative effect of the report due to her period of maternity leave and expressing his disappointment and referencing the fact that the Claimant was "*normally*" logical and "*very precise*", implying she was not presenting a rational concern?
11. In the event the Respondent is found to have done an act set out above at 10.1-10.8, was that less favourable treatment? The Claimant relies upon a hypothetical comparator as well as Officer C as an actual comparator.
12. Is any such less favourable treatment a detriment?
13. Is any such treatment that is found to have been less favourable and a detriment, because of the Claimant's female sex?

Pregnancy and maternity discrimination

14. Did the Respondent treat the Claimant unfavourably by:
- 14.1. Failing to appraise the Claimant properly during the 2022 reporting by virtue of the matters set out at paragraphs 10.1-10.8;
  - 14.2. Air Commodore Burns applying criteria in assessing the Claimant's performance of clear leadership, strong staff work, emotional intelligence, intellectual intelligence, physical intelligence, and the need to be more competitive than her peers.
15. Did the unfavourable treatment take place during the protected period, namely 14 March 2022-20 June 2023, and was this because of her pregnancy?
16. Was any unfavourable treatment because the Claimant was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?

Indirect sex discrimination

17. Did the Respondent have the following provisions, criterion or practices ("PCPs")

- 17.1. Applying metrics of clear leadership, strong staff work, emotional intelligence, intellectual intelligence, physical intelligence, and the need to be more competitive than her peers.
  - 17.2. taking account of performance beyond the end of a RP
18. Did the Respondent apply the PCPs or either of them to the Claimant?
19. Did the Respondent apply the PCPs (or either of them) to men or would it have done so?
20. Did the PCPs (or either of them) put women at a particular disadvantage when compared with men that only women are likely to be absent on maternity leave after the end of a reporting period and/or be pregnant during a reporting period?
21. Did the PCPs (or either of them) put the claimant at that disadvantage?
22. Were the PCPs or either of them a proportionate means of achieving a legitimate aim? The respondent says that its aims were:
- 22.1. for the PCP at 17.1 above, ensuring a robust and effective performance appraisal system based on objective criteria, focused on relevant skills, and which identifies who are the strongest performing staff within a given cohort;
  - 22.2. for the PCP at 17.2 above, enabling it in appropriate cases, to assess performance of an individual on the most recent evidence, ensuring a more accurate appraisal report.

### Victimisation

23. Did the Respondent do the following things:
- 23.1. Change the claimants PGC ranking from position 3/14 to position 4/14 between the 21st of October 2022 and the 13th of January 2023
  - 23.2. Air Commodore Burns eroding the appraisal of her performance by the comment in the OJAR for the 2021- 2022 RP that she was ranked within the "top third", rather than specifying the PGC ranking 3/14.
  - 23.3. Air Commodore Burns failing to recommend her for additional comment on her performance by a 3RO (Air Vice Marshal Maria Byford) after receiving a recommendation from Group Captain Yates in December 2022?
24. If so, does this amount to the Respondent subjecting the Claimant to a detriment?
25. If so, was this done because the Claimant had done the protected act of leading the non-statutory inquiring into unacceptable behaviour within RAFAT and deliver the report of that inquiry on 1<sup>st</sup> of July 2022? If not, was it nonetheless done because the Respondent believed the Claimant had done or might do a protected act?

### **C) Findings of fact**

26. The Tribunal heard and considered much evidence. It made the following findings of fact on the balance of probabilities of those areas that were material

to the decision it had to make. For clarity the titles used for individuals was as applied at the time (many have since been promoted).

### General background

27. The Claimant has had and still has given the evidence heard, and fact she remains working there, a long successful career in the Royal Air Force (“RAF”).
28. The RAF is split into different professions, such as Pilots, Engineers, People Operations, Legal Profession and so on. At the material time the Claimant was in the People Operations (although she previously was in the Legal Profession). Her background is as a solicitor, and she retains a practising certificate.
29. The RAF, like other branches the Respondent is responsible for, is hierarchical with differing ranks which denote seniority. The exact naming of the ranks for the military and civilian roles are not the same but as far as relevant to this case, military ranking, they are (in order of junior to senior):
  - 29.1. Wing Commander,
  - 29.2. Group Captain;
  - 29.3. Air Commodore;
  - 29.4. Air Vice Marshall.
30. At the material time, 2022-2023:
  - 30.1. the Claimant’s rank was Wing Commander and her role involved dealing with Employment Tribunal claims and having to lead a non-statutory inquiry (“NSI”) into unacceptable behaviour within the RAF Aerobatics Teams (commonly referred to as the ‘Red Arrows’) – that finalised reported was presented on 1 July 2022;
  - 30.2. the Claimant’s first reporting officer (“1RO”), the equivalent of a line manager in most other work settings, was a rank above her and was Group Captain Yates. His 1RO was Air Commodore Burns who in turn was the Claimant’s second reporting officer (“2RO”). Air Commodore Burns 1RO was Air Vice Marshall Byford and she was the Claimant’s third reporting officer (“3RO”);
  - 30.3. the Claimant was ineligible for a promotion of rank at the time as that needed four years’ service in post at the relevant rank.
31. With respect to the Claimant’s pregnancy and maternity, the Claimant had a positive pregnancy test on 14 March 2022, and she gave birth on 20 November 2022 shortly after commencing maternity leave on 16 November 2022. Throughout this period of being pregnant at work the Claimant was performing her challenging role as well as having to deal with her pregnancy which at various points had issues requiring hospital visits.

### RAF Appraisal process

32. The RAF appraisal process is governed by Joint Service Publication 757 (“JSP”), pp.810-910, which is supplemented by guidance on the same, pp.911-965. Material to this case is the formal end of period appraisal process (there is a mid-period appraisal that is not relevant) which is known as the Officers Joint Annual Report (“OJAR”).
33. In terms of this appraisal process it was common ground that the reporting period for the material OJAR for the Claimant ran from 14 June 2021 until 31 October 2022 and so the Claimant’s performance was being appraised for what

occurred during that period. For all individuals' ones OJAR would make clear the exact period that formed the reporting period (ordinarily a year but changes of roles and so on may alter this).

34. The OJAR is split into two parts (a) performance which has various 10 criteria graded A, A-, B+, B, B- etc.... (pp.834-836) and upon which an overall performance grade is given, and (b) potential which uses phrases for the 'grading' – namely (in order of highest to lowest; see pp.862-863): Exceptional, High, Yes, Developing and No. In terms of the performance grade for each criterion, the starting point is a "B" and then one would look at all the positives and negatives in relation to those criteria to decide whether it is higher or lower than a "B". Whilst there are 10 criteria that are graded, in effect an 'average' is taken to produce also an Overall Performance Grade ("OPG").
35. The OJAR involves two reporting officers the 1RO – who in general has greater input on the performance aspect – and the 2RO – who in general has greater input into the potential aspect. Sometimes, the 3RO input is needed in the process although that is rare. In terms of potential for promotion each personnel receive an indication of potential for promotion one rank and two ranks up (p.863). The phrase "1-up" was commonly used to refer to the promotion to one rank above and "2-up" for two ranks above.
36. Part of the appraisal process often involves Peer Group Comparison ("PGC") which means the officer writing the report gives a numerical ranking of the person being appraised out of the total of people for whom that officer is responsible. This can be a valuable marker for promotion boards (the panel of officers considering matters are referred to commonly as 'boards'), for those that are high ranking, but is obviously dependent on the pool of people against whom one is being ranked (p.932: PGC *"is a valuable marker for Officer and Non-Commissioned Aircrew Promotion Boards...when used and evidence appropriately. For Other Ranks, PGC can also play an important role; however, there is no requirement to include it in all SJAR"*). By way of example, it does not follow that being the number 1 ranked in the peer group will inevitably lead to promotion as they may of course have overall a modest or poor appraisal and the peer group could be particularly poor overall.
37. The appraisal process is particularly important in this environment as it results in a panel of officers considering recommendations to promote individuals to the next rank or recommend them for as Advanced Command and Staff Courts ("ACSC") – a yearlong postgraduate Advance Staff Training ("AST") course – which may lead to a master's degree and further aid advancement of one's career. As already noted, these panels are referred to commonly in this environment as 'boards'. Those individuals whose OJARs are sent to these boards to determine if they should be promoted or be given the opportunity to attend the ACSC are referred to as having been 'pre-boarded'.

#### The ranking discussions

38. There is no set way in which the peer group ranking is to be achieved. In this case, Air Commodore Burns (the relevant 2RO) asked the Group Captains for whom he was 1RO to collectively discuss matters and assign provisional rankings. On this occasion a decision was made to use a formula in an excel table that automatically produced a provisional ranking as follows:

- 38.1. the OPG grade was given a numerical value so that A amounted to 6 points, A- amounted to 5 points, B+ amounted to 4, B amounted to 3 points and so on;
  - 38.2. the phrase given for promotion of rank and also for the ACSC potential above was given a numerical value so that 'Exceptional' amounted to 5 points, 'High' amounted to 4 points, 'Yes/High' amounted to 3 points (note this is not actually in the JSP as a 'phrase' but was a way of having someone between a High and Yes), 'Yes' to 2 points, 'Developing' to 1 point;
  - 38.3. the numerical values produced by the OPG grade and the potential for promotion/ACSC were added together to give a total point score that automatically ranked the individual in the peer group;
  - 38.4. the table was set so that if the overall point score yielded for ranking purposes between more than one person was equal the individual who did better in the 'potential' points appeared higher.
39. The result of this all was that on the 3 October 2022 at 16:50 (pp.975-976), Group Captain Yates sent Air Commodore Burns an email with the provisional rankings. His email stated
- "Sir, the DCOS have conducted a peer ranking discussion for the SO1s and we offer you the following for your consideration. All grades are estimated and may change pending discussion with you as 2nd RO."*
40. Air Commodore Burns by email of 3 October 2022 at 17:51 responded in so far as material *"Many thanks. Rankings all understood and agreed...."*.
41. The table being shared and commented on produced the following results which are relevant to the present claims:
- 41.1. In first place, Officer L, a man. His 1RO was Group Captain Bettington. He got an overall score from the above-described formula of 16.
  - 41.2. In second place, Officer C, a man. His 1RO was Group Captain Yates, which was the same 1RO as the Claimant's. He got an overall score from the above-described formula of 13.
  - 41.3. In third place, Wing Commander Costello, a woman. Her 1RO was Group Captain Bettington. She got an overall score from the above-described formula of 12. This is the same as the Claimant's score (see directly below). She got a B+ (so 4 points) in the overall performance grade, but on the potential criterion of 1-up was a High (so 4 points) and in ACSC was 'Yes' (so 4 points).
  - 41.4. In fourth place, the Claimant. Her 1RO as mentioned above was Group Captain Yates. She got an overall score from the above described formula of 12. On points she was therefore equal to Wing Commander Costello, however as explained above she was put in fourth place automatically as although she got a A- (so 5 points) in the overall performance grade, her potential criterions were lower than Wing Commander Costello.
  - 41.5. In fifth place, Wing Commander McLean. Her 1RO was Group Captain Yates. She got an overall score of 10.
  - 41.6. The remaining places sixth to ninth were Officer I (9 points) a man whose 1RO was Group Captain East, Officer D (9 points) a man whose

1RO was Group Captain East (9 points), Officer H (8 points) a man whose 1RO was Group Captain Vine, and Officer J (3 points) a woman whose 1RO was Group Captain Vine.

42. As noted above, the provisional rankings were provided to Air Commodore Burns which on the face of it he was in agreement with. However, the Tribunal accept that that was not the end of the story as there were other individuals who fell within the cohort for which Air Commodore was responsible. Material to this case is that there were 14 and not 9. The Tribunal does not in fact need to consider these individuals further as none of them ranked above the five individuals cited above and also the order of peer group ranking remained in effect the same.
43. The Tribunal accept as a matter of fact that ultimately it was Air Commodore Burns who retained the final say on the peer group rankings and it was his prerogative as to the date these were finalised (subject to meeting usual OJAR deadlines).
44. Air Commodore Burns' evidence was that he finalised the top third of his cohort on 20 December 2022. He relies upon him *resending* to himself in effect the content of the pp975-976 email – p.988 but with the inclusion at end of the table with names of those missing in the cohort. The Tribunal accepted that evidence on the basis that (a) the Claimant did not challenge this, indeed it was part of her case that there was a 'change' at around this time, (b) it was at this stage that he was having to spend time doing his bits of the OJAR, (c) the email at pp.975-976 does make sense for it to be resent to himself with the extra potential candidates if he was having to finalise it then (which could include determining if any of those would be slotted in higher).
45. In short therefore as far as this case was concerned the 'ranking' of the cohort for the top third (with 14 people in the cohort that would be all those placed higher than 5 technically) remained in effect unchanged from the provisional ranking sent on 3 October 2023 (pp.975-976 email) as at the date of finalising it on 20 December 2022.

#### 21 October 2022 conversation between Claimant and Group Captain Yates

46. On 21 October 2022, there was a conversation between the Claimant and Group Captain Yates as part of the OJAR debrief. Central to the Claimant's case is that she alleges that during this conversation, Group Captain Yates expressly stated that she was placed in position "*three*". The Claimant's case was that after this date and by the time she had a conversation about her draft OJAR (see paragraphs 49 and 57-58 below), it became apparent that she had dropped down to fourth. This is what gives rise to the issues at paragraphs 10.3-10.6 above. Further, it is the Claimant's case that during this conversation – upon pressing for information – in effect sufficient information was given to understand that Officer L was in front of her and as was Wing Commander Costello. The result was that she understood that it was Officer L, Wing Commander Costello and she thought it would then be her with Officer C either in the same position or behind her. With respect to the live evidence, Group Captain Yates denied having these conversations or expressly informing her she was even "*three*".

47. The Claimant relies upon the following evidence:
- 47.1. An email of 21 October 2022 – from Group Captain Yates to Air Commodore Burns – that states “*She’s hoping for a peer group ranking from you (2/3 from me wouldn’t help, but 3/10 – or whatever you decide would be better)*” (p.980). In other words, the Claimant relies upon the 3/10 statement being consistent;
  - 47.2. an alleged oral conversation between Wing Commander McLean and Group Captain Yates that Officer C was in position 3 and that she (Wing Commander McLean was in position 5);
  - 47.3. Group Captain Yates not making the point that in fact the 3 October 2022 email meant the Claimant was always in the fourth position and disclosing such documentation much earlier in the relevant form (ie before Tribunal proceedings given the service complaint).
48. The Tribunal concludes however that *no* such statement was made that the Claimant had a peer group ranking of three. It reaches this factual conclusion for the following reasons:
- 48.1. *before* this date, Group Captain Yates had provided (on 3 October 2022) a table that put the Claimant in the fourth position, although equal on points to Wing Commander Costello (p.975). That was something that on the face of it Air Commodore Burns agreed with. It therefore made no sense for any statement to be made that the Claimant was unequivocally ranked as third as she was not in that spot as sent to Air Commodore Burns;
  - 48.2. ultimately the place in the peer group was not something that Group Captain Yates was responsible for as the final decision rested with Air Commodore Burns. That had not been finalised so it made little sense for Group Captain Yates to represent a decision that could be altered. However, *even if* Group Captain Yates had assumed Air Commodore Burns had approved the ‘list’ he had provided – notwithstanding more people in the cohort for which Group Captain Yates had no knowledge of – any such statement was inconsistent with the provisional table as noted above;
  - 48.3. it is acknowledged that all matters would have been simpler if the email had been disclosed much earlier. However, this is not a case where it is alleged that the email itself is a fabrication, and so the time of disclosure is not an answer. In any event, the Claimant did receive the document as part of a subject access request, so it was not simply something received in litigation and this supports that there was such an email;
  - 48.4. the language of the 21 October 2022 is ambiguous and the reference to “*3/10 – or whatever you decide*” is on balance more likely to be just indicating that a ranking in a greater pool is more helpful. After all it is premised on a “*hoping for a peer ranking from you*” so this reiterates that it is not in Group Captain Yates gift to make it – this being something the 2RO can do as he has the entire cohort – which means it makes little sense for him to have promised or placed any such ranking.

#### Claimant’s OJARs and potential comparators

49. On 20 January 2023, the Claimant provided comments on her draft OJAR (pp.421-422). The majority of these comments, or frankly suggested changes, were incorporated into the finalised OJAR on 23 January 2023 (pp.416-420). The Tribunal pauses to note that this was the OJAR that was seen by the board that considered promotions/ACSC but that a service complaint later led to a

further change (although that is not material for present purposes). However, there was one aspect that did not change at the time, and the Claimant's request is important to the case so is set out in full below:

*"[The OJAR currently states:] Of 14 SO1s, she is in my top third of performance and top 2 for ACSC*

*[My comments on this are as follows:]*

*I have asked CM [Career Manager] (not my Deskie as they were not available) about how the requirement to rank is manifesting itself before the PBs [Promotion Boards]. In doing so, I was asked what my report said in this point and shared only this line of my report. The response from CM was that this statement reads that I am 4 or 5 of 14 for performance but 2 for potential (of those not already selected for ACSC). The feedback from CM was not to leave anything to be implied - so if I am 4 of 14 preceded by other SO1s already read on a PB or with the seniority to promote it would be helpful for this to be clear ie 'in the top third, preceded by .... ' or 'only placing behind the person ranked no 3 because ... '. However, whether it would be beneficial for me to have this in my OJAR does depend on the reason why therefore I do appreciate your original wording my be the most beneficial representation!*

*CM also suggested that if I am no 2 for potential, as it was interpreted by them, this should be clear. I appreciate that we did not discuss these numbers when we spoke and but for the new guidance I wouldn't be heavily focussed on this.*

*As an aside, I would welcome an understanding of where I fall even if you are minded not to change the wording. I am not someone who spends their time looking sideways or wants to know who is ahead of them so I can assert why I think I am better; it is simply helpful for me to understand, in generic terms, why I have been ranked as have ie 'the 3 ahead of you have more breadth' or 'are a high for promotion having been previously read' etc. This will help me optimise my performance and potential in the future.*

*Please contact me on my mobile if that is easier Sir. Thank you again for your report - I hope you don't think any of my comments are impertinent- I will be honest the subjectivity of the PBs mean that all that I have been told, before ma[y] not hold weight this year. I will be happy to do any editing under your direction, and for your consideration, to save you some time." (p.422)*

50. Returning to the finalised OJAR as seen by the board, it was very positive and included the following:

50.1. Group Captain Yates commented in terms of the Claimant's performance that she *"had an enormously impressive reporting period. Under 'Special Projects' banner she has led two of the most difficult pieces of casework in the RAF. First she has been preparing to defend high-profile Employment Tribunal claim....Second, she was also trusted with undertaking a complex and sensitive investigation into Unacceptable Behaviour..." (p.418)*

50.2. Group Captain Yates commented in terms of the Claimant's potential that *"She deputised for me very ably already. ACSC would be a great investment for the Service and would follow on perfectly from Command...I would expect her to excel on any staff course...In summary...[she] has moment and success in command and staff college would accelerate her further" (p.418);*

- 50.3. Air Commodore Burns stated in terms of the Claimant's performance that "*Her engagement in a 4-star directed Special project was no less impressive; such that she was hand selected to lead on the RAF's first HR Non-Statutory Investigation. Here her leadership, her integrity, compassion, and her wider political antennae were fully displayed.*" (p.419);
- 50.4. Air Commodore Burns stated in terms of the Claimant's potential that "*Already selected for Cmd [Command] I expect nothing but success for [her]... Thereafter, [the Claimant] must attend ACSC (to enable her placement in pscj OF5 StratComm and MOD roles) or equivalent and be promoted. Her intellect is such that she can be placed into any role and will deliver*" (p.419). Indeed, in relation to the "ACSC" grade itself the Claimant received a "*High*" (420) from both 1RO and 2RO (that is Group Captain Yates and Air Commodore Burns) and the Tribunal pauses to note that by 12 November 2022 she knew that Group Captain Yates had confirmed that Air Commodore Burns supported the "*High*" for ACSC (p.396);
- 50.5. With respect to the Claimant's peer group ranking this was the statement that Air Commodore Burns set out in the potential section of the OJAR, as considered by the relevant board "*Of 14 SO1s, she is in my top third of performance and top 2 for potential*". (p.419). The Tribunal pauses to note that during cross-examination the Claimant accepted the suggestion that "*top third*" could look better to a 'board' than "4/14" and was consistent with JSP that provided that "*Real value comes with assessment backed up with evidence of....,how they compare with their peer group, i.e top/middle/bottom third*" (p.862).
51. An important issue in this case involved the alleged changing of the Claimant's peer group and use of "*top third*" (issue at paragraph 10.5-10.6 above). As well as the individual ranking which the Tribunal has dealt with its factual findings in part above, it also needed to consider other potential comparator OJARs:
- 51.1. Officer L (a man), had the comment made by Air Commodore Burns, in the potential section of the OJAR "[he] *in all, is the whole package and is easily No1 of the 14 SO1s under my Cmd.*" (p.1139). Additionally, it can be seen in terms of his performance grades he got – across 10 criteria – 2xAs, 7xA-, 1B+ (p.1138). In the summary section the overall performance given by both the 1RO and 2RO was A- and the promotion to '1 Rank up' was "*High*" and '2 Rank up' was "*Yes*" (p.1140). Officer C was in the People Operations profession;
- 51.2. Officer C (a man), had the comment made by Air Commodore Burns, in the *performance* section of the OJAR "*He is my 2 of 14 SO1s for performance*" (p.1163). There was no ranking in any potential section given in his OJAR. Separately, it can be seen in terms of his performance grades he got – across 10 criteria – 2xAs, 6xA-, 2B+ (p.1162). In the summary section the overall performance given by both the 1RO and 2RO was A- and the promotion to '1 Rank up' was "*Yes*" and '2 Rank up' was "*Yes*", and for "ACSC" it was also "*High*" (p.1164). As an aside, whilst the overall performance grade is the same as Officer L, looking at the individual grades it is correct that objectively, assuming equal weight to all criteria, that Officer L overall is higher than Officer C (although they were in different professions, as Officer L was Legal Professional and not People Operations);
- 51.3. Wing Commander Costello (a woman), had the comment made by Air Commodore Burns in the potential section of the OJAR "*Overall,*

*Costello is comfortably in my top third for performance and my No1 of 14 for potential*" (p.1144). In terms of her performance, she got - across 10 criteria – 2xAs, 4xA-, 4B+ (p.1143). In the summary section the overall performance given by both the 1RO and 2RO was A- and the promotion to '1 Rank up' was "High" and '2 Rank up' was "Yes", and for "ACSC" it was also "High" (p.1145). Wing Commander Costello is also in the People Operations profession;

51.4. repeating what was stated above, the Claimant got the following comment in her OJAR "*Of 14 SO1s, she is in my top third of performance and top 2 for potential*" (p.419). With respect to her performance, she got – across 10 criteria – 1xAs, 5xA-, 4B+ (p.418). In the summary section the overall performance given by both the 1RO and 2RO was A- and the promotion to '1 Rank up' was "Yes" and '2 Rank up' was "Yes", and for "ACSC" it was also "High" (p.420);

51.5. Wing Commander McLean (a woman) had the comment made by Air Commodore Burins in the potential section of the OJAR "*McLean is a very well placed 5 of 14 for potential*" (p.1180). With respect to her performance, she got – across 10 criteria – 0xAs, 4xA-, 6B+ (p.1178). In the summary section the overall performance given by both the 1RO and 2RO was B+ and the promotion to '1 Rank up' was "Dev" and '2 Rank up' was "Yes", and for "ACSC" it was also "High" (p.1181);

51.6. Officer I (a man), Officer D (a man), Officer H (a man) and Officer J (a woman) received no ranking statement in their OJAR narrative section of the OJARs (p.1169, p.1134, p.1149, p.1122).

52. At this stage it is worth unpacking the following from the all the evidence as presented to the relevant board:

52.1. in terms of performance, whilst Officer L, Officer C, Wing Commander Costello and the Claimant all got an overall grade of A-, objectively it is correct that they are in that order if equal weight is given to each of the criteria: that is Officer L (1<sup>st</sup>), Officer C (2<sup>nd</sup>), Wing Commander Costello (3<sup>rd</sup>) and the Claimant's (4<sup>th</sup>). The statement therefore made by Air Commodore Burns in relation to Officer C "*He is my 2 of 14 SO1s for performance*" (p.1163) on the face of it is rational;

52.2. in terms of potential, Wing Commander Costello got the same 'grade' (technically a phrase) as Officer L, but higher than both Officer C and the Claimant. The statement therefore by Air Commodore Burns that she is "*my No1 of 14 for potential*" (p.1144) is on the face of it rational;

52.3. Air Commodore Burns did not in fact give an overall ranking, save potentially for Officer L who based on grades and potential phrases arguably would have been 1 of 14, which incidentally matches the provisional table sent to him, but rather separately sought to give indications on performance and potential as relevant. For performance it is clear that the order would be Officer L (1<sup>st</sup>), Officer C (2<sup>nd</sup>), Wing Commander Costello (3<sup>rd</sup>) and the Claimant (4<sup>th</sup>). For potential, he represented it was Wing Commander Costello (1<sup>st</sup>), Claimant (2<sup>nd</sup>). The rest was not represented but presumably, even allowing for some subjectivity, it would seem it would be Officer L (3<sup>rd</sup>) ahead of Officer C (4<sup>th</sup>), and certainly Wing Commander McClean (5<sup>th</sup>) would be below them given she was only given "Dev" 'grade' in her '1-up'.

53. As referenced in paragraph 37 above, there is a board that determines if individuals put forward in their OJAR for the Advanced Command and Staff Course (“ACSC”) are to be selected. In terms of this course:
- 53.1. the course is open to military and civilian personnel from all three services of the UK armed forces;
  - 53.2. for the RAF in particular, the places are limited being about 50;
  - 53.3. however, those 50 places available, ‘slots’ in effect, are divided into the relevant professions. So, people in People Operations (the Claimant’s profession) competed only amongst others in People Operations, those in Legal Profession (Officer C’s) competed only amongst others in Legal Profession and so on. It follows that Officer C, and the Claimant were *not* in direct competition for a place on the course;
  - 53.4. Officer C was selected but not the Claimant for the ACSC course that relevant year. In terms of selection, there is an initial type ‘sift’ (pre-boarding) before the matter goes on for the board for each profession to produce a merit list which allows places to be offered in that order, so if there are only four places by way of example those numbers 1-4 on the merit list are offered it but if one declines it would then be offered to number 5 and so on;
  - 53.5. the year in question there were 4 places for the profession although one of them was sub split for “*Pers Trg*” (p.504).

54. As part of this case involves allegations of sex discrimination, the Tribunal was provided with statistical evidence. This was not challenged and the Tribunal accepted this evidence:

Relevant board selection year	Female Regular Officers	RAF	Female Officers selected for ACSC	RAF	Male Regular Officers	RAF	Male Officers selected for ACSC
2019	1,360 (17%)		10 (21%)		6,430 (83%)		37 (78%)
2020	1,410 (18%)		9 (19%)		6,480 (82%)		38 (81%)
2021	1,440 (18%)		14 (29%)		6,530 (82%)		35 (71%)
2022	1,500 (18%)		11 (23%)		6,610 (82%)		37 (77%)
2023	1,500(19%)		6 (12%)		6,460 (81%)		43 (88%)

55. The Claimant was obviously disappointed not to be selected for ACSC and obtained the following pre-board comments during the internal service complaint process:

*Top third isn’t quite compelling enough. Aligned to the statement that AST should follow command this could be seen as a caveat... (p.507).*

56. By the stage of Tribunal proceedings, it was only the “*Top third isn’t quite compelling enough*” comment that was relevant as it was agreed that the other comment made was a misreading of the OJAR and, it was common ground, was never the intention of either the 1RO or 2RO. In fact, a change was made to make it clear that this was not the case.

Air Commodore Burns meetings with the Claimant

57. On 26 October 2022, the Claimant had a meeting with Air Commodore Burns. This was shortly before she commenced maternity leave on 16 November

2022. The Claimant asked him about her peer group ranking and Air Commodore Burns explained that the OJARs had not been finalised yet and so that information could not be provided. Her claim to this Tribunal notes (p.18)

*“At this interview, Air Cdre Burns confirmed that he needed to ‘do the maths’ to finalised his PCG exercise before he could formally notify people of their position”.*

58. A further meeting occurred on 13 January 2023, between Air Commodore Burns and the Claimant at which the draft OJAR was read. This led to the Claimant raising certain comments as set out at paragraph 49 above. The Claimant stated Air Commodore Burns refused to disclose her ranking during this or be drawn into discussing the performance of others.
59. During the Claimant’s maternity leave she found out that she had not been selected for the ACSC course. The Tribunal note that Officer L had already done the course, Wing Commander Costello had been offered and refused it previously (and was not put forward/selected), and both Officer C and the Claimant were put forward for the course. Officer C was selected but she was not. The Claimant felt that use of the “*top third*” rather than “*4<sup>th</sup> of 14*” was a factor and, whilst Air Commodore Burns disagreed with this or that even the use of the phrase the Claimant wanted was helpful, he agreed to make the change (p.1000).
60. On 8 August 2023, there was a telephone conversation between the Claimant and Air Commodore Burns. The allegation in the list of issues - 10.8 above – is that Air Commodore Burns, when the Claimant was raising issues of being given a ‘top third’ in the OJAR – that he could “*feel the emotion*”. In her witness statement the Claimant referred to it as being he could “*hear the emotion*”. She also asserted in her witness statement that Air Commodore Burns said he was not expecting this from someone who is “*normally so logical and precise*”. This – the Claimant – attributed to Air Commodore Burns expressing disappointment. Air Commodore Burns accepted in cross examination that “*feel the emotion*” is something that sounds like something he would say but denied any criticism of the Claimants’ behaviour. He explained that as part of his familial history he had been exposed to significant mental and psychiatric issues and had even become a helper (volunteer) for “*Mind*”, the mental health charity. As part of this voluntary work with “*Mind*” he, Air Commodore Burns, had received training that advised that one should not say “*you sound stressed*”, which attributes something to another, but rather phrase everything as to how the listener is receiving things “*I feel or hear that you are stressed*”.
61. During the same 8 August 2023 discussion Air Commodore Burns referred to the criteria of “*clear leadership, strong staff work, EQ, IQ, PQ*” and be more competitive than peers – that is in fact one of the matters found in issue 14.2. By the Tribunal hearing this had been conceded and it was common ground that however phrased this wording at the time represented a shorthand, or colloquial wording, for the latter part of the 10 attributes in the JSP found at pp.835-836 “*Leadership...Physical and Mental Resilience...Problem Solving and Decision Making...Teamwork and Collaboration...Values and Standards*”.

62. One of the aspects of this case is issue at paragraph 10.7 above, namely Air Commodore Burns refusing to recommend a 3RO to provide any information on the Claimant's OJAR. This arises from the fact that on 8 December 2022 – Air Commodore Burns asked if any of the “SO1s to require a 3<sup>rd</sup> RO from COS Pers” (p.985) to which Group Captain Yates said “*on reflection I think [Officer C] and Penny [the Claimant] as possible*” (p.985). In fact, neither Officer C nor the Claimant were advanced for this and Air Commander Burns explained in evidence to the Tribunal that this was because such ordinarily occurs only if an individual gets a ‘High’ or more in ‘2-up’. The Tribunal accepts this evidence as the JSP in relation to “*Recommendations for the Future*” only refers to any 3RO in relation to a ‘grade’ of “*Exceptional*” or “*High*”: “*If used for promotions Two Ranks Up, may require comment by 3RO (see table at Annex B to Chapter 1)....if used for promotion Two Ranks Up, may require comment by 3RO*”. In short, this is consistent with what Air Commodore Burns set out as his reasons.

#### Claimant's service complaint and others

63. The Tribunal acknowledges the Claimant brought a service complaint, on 10 August 2023 (p.245-251). This was not upheld and ultimately overlaps with much of the matters considered by the Tribunal. It is relevant in terms of the service complaint that:

63.1. there is no mention of the “*feels the emotion*” phrase or similar discussion;

63.2. whilst other service complaints were made against Group Captain Yates and Air Commodore Burns by other individuals no allegations of discrimination were upheld, and the Tribunal was not shown any evidence of any such conclusions that supported an ‘internal’ finding of discrimination in relation to these two individuals.

### **D) Relevant legal principles**

#### Direct sex discrimination

64. With respect to claims of direct discrimination, s.13(1) EqA provides “*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*” In this case the protected characteristics is sex (s.11 EqA). The comparison required by s.13(1), “*treats or would treat others*” is explained in s.23(1) as “*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*”. The act of direct discrimination, s.13(1) EqA, is rendered unlawful in this case (one of detriment only and not dismissal) by s.39(2)(d) EqA, “*An employer (A) must not discriminate against an employee of A's (B)—(d) by subjecting B to any other detriment*” (with ss.83(3)-(4) EqA making clear this applies to the “*armed forces*” and the provisions should be read to include terms of service in relation to “*Part 5 Work*” in the EqA). Finally, s.136 EqA sets out burden of proof provisions (these apply to all the claims made under EqA).

65. Time limits are in issue in the present case and s.123 EqA sets these out. In this armed forces context it is s.123(2) EqA specifically that applies, subject to a service complaint being made as required by s.120(1) EqA.

66. In terms of relevant case law on direct sex discrimination, the Tribunal had particular regard to the following:
- 66.1. it is usual to take a two stage approach, first deal with less favourable treatment and then whether reason why was protected characteristic, but not always necessary to do so and in some cases a composite question of what the reason for the treatment will be appropriate (*Shamoon v Chief Constable of Royal Ulster Constabulary* [2003] UKHL 11; [2003] IRLR 285 at [8] and [11]);
  - 66.2. in terms of who is to decide whether treatment is 'less favourable' that is an assessment for the Tribunal and it is not simply the case that the subjective view of the employee is adopted (*Burrett v West Birmingham Health Authority* at [1994] IRLR 7 (EAT) [9]-[10]);
  - 66.3. whilst detriment is often overlooked in direct discrimination claims (it being assumed that less favourable treatment automatically amounts to a detriment) it is still a necessary ingredient to be shown along with the less favourable treatment itself: *Cordant Security Ltd v Singh* [2016] IRLR 4 (EAT) at [20]-[21] and [25];
  - 66.4. given the importance of causation, the reason why, the Tribunal must usually carefully consider the mindset of the relevant 'decision maker' or 'alleged discriminator' and it is impermissible to simply transfer the acts or thoughts of others to them, *CLIFS v Reynolds* [2015] EWCA Civ 439, [2015] IRLR 562 at [36];
  - 66.5. to be discriminatory sex need only be a cause (that is not trivial) rather than the sole or predominant cause (ie 'a' cause rather than 'the' cause is the test) – see for example *O'Neill v Governors of St Thomas More Roman Catholic Upper School* [1996] IRLR 372 (EAT); *Nagarajan v London Regional Transport* [1999] IRLR 572 (HL); and *O'Donoghue v Redcar and Cleveland Borough Council* [2001] EWCA Civ 701; [2001] IRLR 615;
  - 66.6. the case of *Igen v Wong* [2005] EWCA Civ 142, [2005] IRLR 258 which has detailed consideration of the burden of proof provisions (see [76] and Annex of its judgment in particular), which has been approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] UKSC 37; [2012] IRLR 870 and expressly found to still apply to s.136 EqA in *Efobi v Royal Mail* [2021] UKSC 33, [2021] IRLR 811;
  - 66.7. notwithstanding the burden of proof provisions and case law in relation to it, the emphasis in *Hewage* at [32] that their role is often for cases where there are doubts as the facts necessary to establish discrimination and it is having little to offer in cases where a tribunal can make positive findings one way or the other;
  - 66.8. additionally, it is important to appreciate that the modified burden of proof in s.136(2) EqA only applies to the 'reason why' question in direct discrimination. So, a claimant must establish on ordinary burden of proof principles, that is on the balance of probability, that there was less favourable treatment. It is only then, that there is the issue of whether there is enough of a *prima facie* case, which if shown leads to s.136(2) EqA coming into play. This can be shown by *Ayodele v Citilink Ltd* [2017] EWCA Civ 1913; [2018] IRLR 114 at [62]-[63] (which set out general principles, including that there may well be at least three issues in most

cases, namely (i) did the allegation take place, (ii) if so, did it amount to less favourable treatment when compared with others (the employee having to show both (i) and (ii)), and (iii) if so what was the reason for it, and in particular was it the protected characteristic?, *Essex County Council v Jarrett* UKEAT/0045/15 at [20] (which is a case concerning actual comparators and hypothetical), and *Transport for London v Aderemi* UKEAT/006/11 at [72]-[75] (a case concerning hypothetical comparators only).

- 66.9. it is of course unusual to have direct or over evidence of discrimination, especially as discrimination can be unconscious, and as such a decision will depend on what inferences can be properly drawn. The relevant principles from case law as to the approach in dealing with such cases has been provided in *Talbot v Costain Oil, Gas & Process Ltd* UKEAT/0283/16/LA at [15]-[16];
- 66.10. in the discrimination context, gender stereotyping and language used of such a nature by a witness *may* lead to relevant inferences and even the burden of proof passing. However, the relevant witness must have an opportunity to respond to such suggestions for these matters to be relied upon (*Commerzbank AG v Rajput* [2019] IRLR 772 (EAT) at [76]-[84], [87]-[90]);
- 66.11. finally, unreasonable conduct in and of itself does not amount to discrimination and inferences are not drawn as a sanction for bad behaviour (*Bahl v Law Society* [2003] IRLR 640, EAT at [93]-[94] approved by the Court of Appeal at [2004] EWCA Civ 1070; [2004] IRLR 799 at [101], and *Commissioner of Police of the Metropolis v Viridi* EAT/0598/07 at [45]).

### Pregnancy and maternity discrimination

67. The definition of pregnancy and maternity discrimination is contained – as relevant to the present case – in s.18(2)(a) “A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably - (a) because of the pregnancy” and s.18(4) EqA “A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave”. The Tribunal note that the allegations of discrimination all pre-date 1 January 2024 and so the wording that applied is as set out in this paragraph. Section 18(6) EqA defines the protective period. In the present case, the discrimination is rendered unlawful by virtue of s.39(2)(d) EqA (read with ss.83(3)-(4) EqA).
68. As before, s.123 EqA time limit provisions are relevant to this claim, along with s.136 EqA burden of proof provisions.
69. In terms of relevant case law, the Tribunal had particular regard to the fact that the ‘because of element’ is construed in the same manner as in direct discrimination – so there is some criterion type cases (where the reason for the treatment is inherently discriminatory) and others that require the mental process to be considered: *Interserve FM Ltd v Tuleikyte* [2017] IRLR 615 at [17];

Indirect sex discrimination

70. Indirect discrimination is defined in ss.19(1)-(2) EqA as

*s.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.

71. Once again, the burden of proof provisions apply (s.136 EqA) and indirect discrimination is rendered unlawful under s.39(2)(d) EqA (with ss.83(3)-(4) EqA making clear this applies to the “armed forces” and the provisions should be read to include terms of service in relation to “Part 5 Work” in the EqA). Section 123 EqA time limit provisions are also relevant to the indirect discrimination claim.

72. In terms of relevant case law, the Tribunal had particular regard to the following:

72.1. the pool for comparison flows from the provision, criterion or practice, *Dobson v North Cumbria Integrated Care NHS FT* [2021] IRLR 729 at [22];

72.2. a claimant must prove ss.19(2)(a)-(c) EqA (ie s.136 EqA does not apply to these elements), *Dziedziak v Future Electronics Ltd* UKEAT/0271/11 at [42] and *Nelson v Carillion Services Limited* [2003] EWCA Civ 544, [2003] IRLR 428 at [36];

72.3. a claimant does not however need to establish the reason why they suffered the disadvantage in issue and that such was because of them sharing the protected characteristic (*Essop v Home Office* [2017] UKSC 27; [2017] IRLR 588 at [30]). Conversely however if the employer can show the particular claimant has not been disadvantaged by the requirement that can defeat the claim (*Essop* at [32]);

72.4. the cases of *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15; [2012] IRLR 601 and *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16; [2012] IRLR 590, which in respect of legitimate and proportionate aim indicate

72.4.1. the employer needs to show that the alleged act of discrimination was a proportionate means of achieving a legitimate aim (*Homer* at [19]), however that aim need not have been articulated or even realised at the time which means post event justification is possible (*Seldon* at [59]-[60]);

- 72.4.2. the first issue to consider therefore is whether the employer has a legitimate aim, which is a question of fact for the Tribunal (*Homer* at [19]-[20]);
- 72.4.3. the second issue is whether the particular measure is capable of achieving that aim (*Homer* at [20]);
- 72.4.4. the third and final issue is whether this measure is proportionate means of achieving the aim, which requires the Tribunal to balance the discriminatory effect against the legitimate aims being pursued (*Seldon* [62] and *Homer* at [20] and [24]);
- 72.4.5. notably where one is dealing with a general rule, and such is justified, then the existence of the rule will usually justify the treatment that results from it (*Seldon* at [65]);
- 72.4.6. finally, in an appropriate case the defence may be established by reasoned and rational judgment, so there is no need for specific/concrete evidence in all cases (*Homer* in EAT at [48]).

### Victimisation

73. In terms of victimisation, s.27(1) EqA provides that *A person (A) victimises another person (B) if A subjects B to a detriment because— (a) B does a protected act...*. In this case the Respondent accept that a protected act has occurred and so no further consideration of s.27 EqA is relevant.

74. victimisation would be unlawful by virtue of s.40(1)(a) EqA (having regard to ss.83(3)-(4) EqA). As previously noted, the burden of proof provisions and time limit provisions of s.136 EqA and s.123 EqA apply to the victimisation claim also.

75. In terms of relevant case law, the Tribunal had particular regard to the following:

- 75.1. The definition of detriment is widely construed and all that is necessary is whether a reasonable worker would or might take the view that treatment was in all the circumstance to their disadvantage (*Shamoon* at [34]-[35]);
- 75.2. the test of causation for victimisation is in effect similar to discrimination in general in that it is a 'reason why' question, that is was the protected act in the mind of the person responsible for the alleged detriment (whether conscious or unconscious) and that it need only be a reason for it (not requirement for it being the principal or main reason) – see *Khan v Chief Constable of West Yorkshire* [2001] UKHL 48; [2001] IRLR 830 at [29] and [77] for the former principle and *Villalba v Merrill Lynch* [2006] IRLR 437 (EAT) at [81]-[82] for the latter principle.

### **E) Analysis and conclusions**

76. The Tribunal sets out its analysis and conclusion on the claims, having regard to the agreed issues which are set out at paragraphs 10-25 above.

(1) Direct Sex

77. The central crux of the claims is that the Claimant was in position 3 but that she dropped down to position 4, and that it was Officer C (a male) who in effect caused her to move down the rankings as he was moved up with the commensurate effect that everybody else – including the Claimant – would be moved down.

78. It therefore makes sense for the Tribunal to commence the analysis with this central point, which is encapsulated by the issue at paragraph 10.5 above, “*Air Commodore Burns changing the Claimant’s PGC ranking from 3/14 to 4/14 between 21 October 2022 and 13 January 2023*”.

*Allegation of Air Commodore Burns changing the Claimant’s PGC ranking from 3/14 to 4/14 between 21 October 2022 and 13 January 2023*

79. The allegation of “*Air Commodore Burns changing the Claimant’s PGC ranking from 3/14 to 4/14 between 21 October 2022 and 13 January 2023*”, paragraph 10.5 above, centres around the Claimant having been in position 3 in her PGC as at the stage that Group Captain Yates was dealing with matters – her 1RO – and then moving down by the time Air Commodore Burns finalised matters to position 4.

80. However, as set out at paragraphs 46-48 above, and for those reasons, the underlying factual basis fails. The Tribunal find as a fact that the Claimant was never in position 3, she was always in position 4. The Tribunal repeats that the documentary evidence does not adequately support her case that she was in 3 – the key email being at p.975 from 3 October 2022 and Air Commodore Burns seeming agreement with her being in position 4.

81. It follows therefore that this allegation of direct sex discrimination must fail as it has not been shown the allegation ever occurred (*Ayodele* at [62], paragraph 66.8).

*Allegation of Air Commodore Burns taking into account performance outside the reporting period (14 June 2021 to 31 October 2022) when carrying out the peer group comparison and 2RO appraisal*

82. The allegation that “*Air Commodore Burns taking into account performance outside the reporting period (14 June 2021 to 31 October 2022) when carrying out the peer group comparison and 2RO appraisal*”, paragraph 10.1, is founded upon the premise that the Officer C switched positions, or his OJAR improved, by virtue of the fact that performance that occurred *after* his reporting period was included.

83. It was common ground that the finalising of the OJAR occurs after the reporting period and that in that sense it is “*retrospective*” (the term used by Air Commodore Burns) – that is one is looking back at past performance.

84. The Claimant's contention is that it was not that her OJAR was 'scored' lower because of anything that occurred after the reporting period but purely that Officer C had account taken of elements that occurred outside his reporting period which led to him being better placed in the peer group comparison. In simple terms the Claimant was saying that but for account of matters that occurred outside of the reporting period for Officer C, she would have had a greater PGC ranking.
85. In support of this argument, the Claimant relied upon two matters:
- 85.1. first, that Officer C changed position and his PGC improved between the "21 October 2022 and 13 January 2023";
- 85.2. second, that Officer C OJAR in the 1RO assessment stated "*His reforms will see that RAF achieves 81% service complaints resolved within 6-months KPI (up from 42% last year*" (p.1162) and the 2RO stating "*delivered the highest achievement of cases across all of the services (81%)!*", however this percentage could not be ascertained until the end of the year (December).
86. As to the first argument, this is premised on the point already addressed above – namely that "*Air Commodore Burns changing the Claimant's PGC ranking from 3/14 to 4/14 between 21 October 2022 and 13 January 2023*". That claim failed on the facts and therefore the suggestion that Officer C must have account of events after the reporting period (31 October 2022) equally fails for the reasons already set out at paragraphs 46-48 and 79-81 above.
87. As to the second argument, the Respondent's position was simply that the data was quite accurate and that given a 31 October end date it was relatively easy to predict the score. It being asserted that in effect it would be impossible to close any complaints received in the two remaining months and such complaints would make little difference to the position. The Tribunal accepts this evidence on the basis that it makes sense that all the data is being recorded in live time for the complaints (there being no evidence to the contrary) and logically it is correct that the number would change very little (unless there was a huge influx in complaints in the short period of the year that remained). The result is the Claimant's claim fails on the facts.
88. Notwithstanding the above, the Tribunal considered what would have happened if the Claimant's factual conclusion was correct – namely that Officer C had material after the reporting period – by just over a month – included in his OJAR. The result is that the claim still fails for the following reasons:
- 88.1. in terms of the issue at paragraph 11, the fact that someone else has material outside of the reporting period assessed *does not* on these facts mean that the Claimant was less favourably treated. This is not a case where one is saying that the Claimant would have performed better if matters that occurred after the reporting period were taken into account, or even that the Respondent should have taken into account matters for her that were beyond the reporting period. So objectively – see *Burrett* at paragraph 66.2 above – there is no less favourable treatment. The Claimant after all needs to establish on balance of probability less

favourable treatment (see paragraph 66.8 above) and on these facts she has not;

- 88.2. even just assuming there was less favourable treatment, it still needs to be established that such a treatment amounts to a detriment (issue at paragraph 12 above, and *Singh* at paragraph 66.3 above). On these facts consideration of anything after the reporting period for Officer C, seems to have made no material difference at all. After all, his performance grades were the same, his PGC position remained the same, and all the other narrative seems to still be the same. So, even if a statement were made, as at '31 October Officer C statistics are X' everything would have remained in essence the same for him and more importantly none of this would have altered what happened to the Claimant;
- 88.3. finally, even ignoring these points dealing with issue of the 81% alone, its inclusion, has nothing whatsoever to do with sex (or maternity leave). In this narrow context the Tribunal concludes that whether man or woman (or individual having taken maternity leave or otherwise) the Respondent would include the correct statistic that was known. It would seem artificial to use something that was not the final statistic, and this is not something that would benefit or be materially considered in the following reporting period (which would consider the next years' worth of complaints).

*Allegation of Air Commodore Burns failing to give the Claimant an opportunity to address any concerns he had about the scope of her NSI role or any other concerns at the 2RO stage*

89. The allegation that "*Air Commodore Burns failing to give the Claimant an opportunity to address any concerns he had about the scope of her NSI role or any other concerns at the 2RO stage*", paragraph 10.2 above, is once again premised on a belief that Air Commodore Burns at the 2RO stage led to the Claimant's OJAR being negative, or at the very least worst. In fact, it was really just another aspect of the argument that the Claimant believed that she had at Group Captain Yates (1RO stage) a better PGC.
90. This allegation fails and can be dealt with shortly by the Tribunal – it fails on the facts. More specifically:
- 90.1. objectively, it is a good OJAR and there the Claimant has not established anything that should have been different. The reality is that the Claimant believes that as Officer C had a 'procedural failing'<sup>1</sup> there is no way that he could have scored better. Whilst the Tribunal rejected an amendment which concerned an all-out attack on Officer's C's individual scores it can be seen that in fact – objectively speaking – Officer C did overall have a better OJAR. He marginally scored better in performance – the Tribunal notes the margins being close and him not scoring better on the criteria that would be most relevant in relation to his 'procedural failing' – and was worse in potential. By the time Air Commodore Burns stage, he

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<sup>1</sup> The Tribunal is mindful that this a public judgment and notwithstanding that there was a great deal of evidence as to the extent of the 'procedural failing', for the purposes of this judgment the exact details are not needed (these potentially disclosing the identity of Officer C and also others).

separately ranked performance and potential, so it arguably was better overall the Claimant's when compared to Officer C. So, on the facts the claim fails;

90.2. the Claimant has not established any 'concerns' that Air Commodore Burns had, or that even in broader terms she was subject to less favourable treatment as required;

90.3. the fact of the matter is this is all intertwined the allegation of "*Air Commodore Burns changing the Claimant's PGC ranking from 3/14 to 4/14 between 21 October 2022 and 13 January 2023*", paragraph 10.5 above. Her claim being that her position changed under Air Commodore Burns and she should have been given an opportunity to address any 'concerns' that led to the change. This was acknowledged by the Claimant closing submissions which focused not on the individual allegation but on the main allegation. As already stated above, on the facts this underlying point is not made out – there was no depressing of ranking/score by Air Commodore Burns of the Claimant (or for that matter inflation of Officer C).

*Allegation of the Respondent failing to inform the Claimant of her true position in the peer group ranking so that she could address any concerns*

91. In relation to the allegation of the "*Respondent failing to inform the Claimant of her true position in the peer group ranking so that she could address any concerns*", paragraph 10.3 above, there are three aspects to this:

91.1. first the overall point which is that there was an alleged 'change' of position which Air Commodore Burns did not want to reveal. That fails as stated repeatedly above on factual grounds;

91.2. second there is the statement by Group Captain Yates that the Claimant was in position 3, and then there was the alleged change. That has already been addressed above, and it fails on the facts. However, the Tribunal considered that if the Claimant was right and had been told by Group Captain Yates she was in position three, the 'reason why' (the issue at paragraph 13 above) was plainly *not* her sex (or having taken maternity leave). The reason was he simply made a mistake. There was nothing underlying the comment that supported that she was in position 3, or that Officer C was below her, *unless* one were to view it as her having scored jointly the same as Wing Commander Costello (or was third in the People Operations profession). Even in that scenario any comment made was plainly not by reason of the Claimant's sex (or having taken maternity leave) – the statement would have been true as she did score jointly the same and was in position 3 in relation to People Operations profession. Accordingly, in relation to Group Captain Yates the claim must fail;

91.3. second there is the alleged refusal of Air Commodore Burns to inform the Claimant of her position. This was on 26 October 2022 (see paragraph 57 above) and on 13 January 2023 (see paragraph 58 above). This claim in relation to Air Commodore Burns must fail for the following reasons. The first is there is nothing to show that Air Commodore Burns would be disclosing someone's position *before* sending any finalised OJAR. The second is that there is nothing to show even a *prima facie* case that the reason was the Claimant's sex (or having taken maternity leave). That is nothing to show that he was disclosing to men these scores before

finalising (or refusing to disclose to women). The third is that there seems to be a good reason for him refusing which is not only had he not finalised everything, but he was not even doing the 'positions' in the way the Claimant wanted to know. She thought there would be one overarching position – as the provisional 1RO stage was going – but in fact Air Commodore Burns ranked performance and potentially separately as noted above. The fourth is that whatever her position was that did not indicate or have anything to do with any 'concerns' as already dealt with above.

*Allegation of the Respondent failing to inform the Claimant of any change in her position in the peer group ranking or why that had occurred so that she could address it during the 2RO process*

92. With respect of the allegation of the "*Respondent failing to inform the Claimant of any change in her position in the peer group ranking or why that had occur so that she could address it during the 2RO process*", paragraph 10.4 above, this fails because the factual premise has already been rejected by the Tribunal. There had been no change in her position in the peer group ranking properly speaking – see paragraphs 46-48 and 79-81 above.

*Air Commodore Burns eroding the appraisal of the Claimant's performance by the comment in the OJAR for the 2021- 2022 RP that she was ranked within the "top third", rather than specifying the PGC ranking 3/14*

93. As far as the allegation of "*Air Commodore Burns eroding the appraisal of the Claimant's performance by the comment in the OJAR for the 2021- 2022 RP that she was ranked within the "top third", rather than specifying the PGC ranking 3/14*", paragraph 10.6 above, this fails because:

- 93.1. as already noted, the Claimant was never in position 3;
- 93.2. but even viewing the claim more broadly, not stating she was in 4 (her actual position) for performance rather than top third the claim would fail. For one, objectively it is not an erosion (or viewed alternatively it would not meet the test of being a detriment). For two, there is nothing to show any less favourable treatment. For three, the reason why it was done was because Air Commodore Burns thought that was the most beneficial way of putting it – (see paragraph 50.5 above). Top third allowed scope for being anything better than 5/14 and indeed this is supported by Wing Commander Costello getting the same phrase – it was only 1 and 2 that were stated in relation to performance.

*Air Commodore Burns failing to recommend the Claimant for additional comment on her performance by a 3RO (Air Vice Marshal Maria Byford) after receiving a recommendation from Group Captain Yates in December 2022*

94. The failure to recommend the Claimant for additional comment on performance, paragraph 10.7 above, fails because:

- 94.1. there is no less favourable treatment, in fact evidence shows parity of treatment. Both Officer C (a man) and the Claimant were in the same email sent by Group Captain Yates put forward as potentially people to go to a 3RO and Air Commodore Burns advanced neither;
- 94.2. the reason why in any event is clear – the reason was because the JSP did not recommend 3RO because neither had received an “*Exceptional*” of “*High*” ‘grade’ for the 2-up (see paragraph 62 above).

*Air Commodore Burns stating, on 8 August 2023, that he could "feel the emotion" when she raised the negative impact on her career of the 2021/2022 OJAR and the ongoing negative effect of the report due to her period of maternity leave and expressing his disappointment and referencing the fact that the Claimant was "normally" logical and "very precise", implying she was not presenting a rational concern*

95. As far as allegation which is set out in paragraph 10.8 above, the Tribunal has set out the pertinent facts at paragraph 60 and 63.1. It has come to the conclusion that some reference to “*emotion*” either feel or hear was made. The Tribunal considered carefully whether this was gender stereotyping, and it reminded itself on the law set out in paragraphs 66.10-66.11 above. On these particular facts the case fails. Before addressing this however the Tribunal wishes to make clear that it can quite understand why this would have aggrieved the Claimant, why it would feature as part of a claim and the failure in this case is not to be taken as a suggestion that such phrasing and language may not be harassment or direct sex discrimination in others (indeed the fact the language may be appropriate in a Mind context does not automatically mean it is appropriate in all work context).

96. Returning to the reason for the claim failing in this case:

- 96.1. the Tribunal does not find any less favourable treatment. Air Commodore Burns evidence was he used this language to both men and women, and this was supported by Group Captain Yates’ evidence before the Tribunal;
- 96.2. in any event, the *reason why* it was made was because of Air Commodore Burns’ training and experience with Mind. This leads him to adopt language of ‘feeling’ or ‘hearing’ emotion. Air Commodore Burns explained all this in his evidence, it was supported by Group Captain Yates’ and further supported, by inference, in that it did not initially make it into the service complaint which the Tribunal has inferred means it was not so unusual for it to jar the Claimant.

## (2) Pregnancy and maternity discrimination

97. In relation to the claim of pregnancy and maternity discrimination, the tribunal commences the analysis with the only allegation that is not also relied upon as an act of sex discrimination – paragraph 14.2 above – namely: “*Air Commodore Burns applying criteria in assessing the Claimant’s performance of clear leadership, strong staff work, emotional intelligence, intellectual intelligence, physical intelligence, and the need to be more competitive than her peers.*”

98. The Tribunal has concluded that words akin to this were spoken by Air Commodore Burns on 8 August 2023 – see paragraph 61 above. Underlying the claim is that the Claimant was assessed in a manner differently to others. The claim obviously does not require less favourable treatment, but it is inherently hard to see how generic ‘criteria’ to assess performance can be unfavourable if the same is applying to an entire cohort. That claim is an indirect claim (which is pursued and dealt with below). The Tribunal however decided that it did not need to deal with any contorted analysis and instead could approach the ‘reason why’ question - *Tuleikyte* (paragraph 69 above) and the issue at paragraph 16. On this basis alone the claim fails, Air Commodore Burns was simply using a shorthand, or colloquial wording, for the exact JSP phrasing which was not immediately to hand. So, he would have used such wording irrespective of whether the individual in a phone call was seeking to exercise any maternity leave. In short, the comments had nothing whatsoever with the Claimant “*exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave*” (in the remainder of these reasons the shorthand ‘taking maternity leave’ is used but the Tribunal is aware of the full phrasing).
99. With respect to the remaining eight allegations these all overlap with the direct sex discrimination claim. The analysis above has already touched upon why these claims fail in part (even though the precise ingredients for the claim are slightly different). The Tribunal will now address each in turn briefly to set out its reasons why none succeed:
- 99.1. “*Air Commodore Burns taking into account performance outside the reporting period (14 June 2021 to 31 October 2022) when carrying out the peer group comparison and 2RO appraisal*”. The analysis that is relevant is at paragraphs 82-88 above. So, the claim fails first on the grounds the unfavourable treatment has not been shown – Air Commodore Burns did not take into account performance outside the reporting period. Additionally, even if the Claimant were correct and for Officer C something outside of the period were included that was (a) not a detriment to the Claimant and (b) nothing whatsoever with the Claimant taking maternity leave;
- 99.2. “*Air Commodore Burns failing to give the Claimant an opportunity to address any concerns he had about the scope of her NSI role or any other concerns at the 2RO stage*”. This allegation fails on the facts – there was no unfavourable treatment as alleged. See above at paragraphs 89-90.3;
- 99.3. “*Respondent failing to inform the Claimant of her true position in the peer group ranking so that she could address any concerns*”. The analysis that is relevant is at paragraph 91 above This allegation fails on the facts as there was the underlying unfavourable treatment is not made out. Additionally, any incorrect statement of position (which was not found as a fact to have been made by the Tribunal) was nothing whatsoever to do with the Claimant taking maternity, neither was any refusal to disclose a position to with the Claimant taking maternity leave;
- 99.4. “*Respondent failing to inform the Claimant of any change in her position in the peer group ranking or why that had occurred so that she could address it during the 2RO process*”. As set out at paragraph 92 in

the direct sex discrimination claim, this claim fails as there was no change of the Claimant's position in peer group ranking – so the unfavourable treatment has not been made out;

- 99.5. *“Air Commodore Burns changing the Claimant's PGC ranking from 3/14 to 4/14 between 21 October 2022 and 13 January 2023”* – for the same reasons mentioned above and set out at paragraph 79-81 above this claim fails. The unfavourable treatment alleged is not found to have occurred – there was no change of PGC ranking by the Claimant dropping from being third to fourth;
- 99.6. *“Air Commodore Burns eroding the appraisal of the Claimant's performance by the comment in the OJAR for the 2021- 2022 RP that she was ranked within the "top third", rather than specifying the PGC ranking 3/14”*. The analysis at paragraph 93 is relevant here. So the claim fails because (a) there was no unfavourable treatment (that is no erosion by the language or incorrect position given) and, in any event, (b) none of this was because of the Claimant having taken maternity leave but purely because Air Commodore Burns thought the way he presented it was best for the Claimant;
- 99.7. *“Air Commodore Burns failing to recommend the Claimant for additional comment on her performance by a 3RO (Air Vice Marshal Maria Byford) after receiving a recommendation from Group Captain Yates in December 2022”*. Paragraph 94 above contains the relevant analysis. This claim fails as it is evident that the reason for the action had nothing whatsoever to do with the Claimant taking maternity leave, it was because the Claimant did not have a *“High”* or *“Exceptional”* grade for the ‘2 up’ in line with what the JSP advises. This is why someone who was not taking maternity leave – Officer 2 – was treated precisely the same way;
- 99.8. *“Air Commodore Burns stating, on 8 August 2023, that he could "feel the emotion" when she raised the negative impact on her career of the 2021/2022 OJAR and the ongoing negative effect of the report due to her period of maternity leave and expressing his disappointment and referencing the fact that the Claimant was "normally" logical and "very precise", implying she was not presenting a rational concern”*. The analysis that is relevant is at paragraph 95-96 above. The reason the claim fails is on causation grounds – any comments made were not because of the Claimant taking maternity leave but purely because of his training and experience with Mind. Although there is no need for a comparator in the claim, the fact that Air Commodore Burns spoke in similar term to others who had not taken maternity leave (in fact men) shows the reason was not the maternity leave.

### (3) Indirect sex discrimination

100. The indirect discrimination claim is advanced on the basis of two PCPs (paragraph 17 above):

- 100.1. applying metrics of clear leadership, strong staff work, emotional intelligence, intellectual intelligence, physical intelligence, and the need to be more competitive than her peers.
- 100.2. taking account of performance beyond the end of a RP.

101. The Tribunal will deal with each in turn.

*Applying metrics of clear leadership, strong staff work, emotional intelligence, intellectual intelligence, physical intelligence, and the need to be more competitive than her peers.*

102. As noted above, the Tribunal has found that the “*applying metrics of clear leadership, strong staff work, emotional intelligence, intellectual intelligence, physical intelligence, and the need to be more competitive than her peers*” is in reality a shorthand for the requirements set out in the JSP. It follows that the answer to the issues at paragraphs 17.1, 18 and 19 is that the relevant PCP existed and was applied to the Claimant, as well as man.

103. In terms of the issue of particular disadvantage, the Tribunal reminded itself that it was for the Claimant to establish this (*Dziedziak and Nelson*, paragraph 72.2 above). The way the matter was initially put was that the PCP led to women doing less well on OJAR’s which in turn meant they were less likely to be selected for ACSC. After all, this was the course the Claimant was not selected to do. However, in closing submissions the Claimant advanced a more general point that women were less likely to be at the top of the PGC in general. On this aspect there is an issue of fairness as the Respondent had not had an opportunity to address such a case but in the end the Tribunal concluded that as the onus was on the Claimant to establish the disadvantage from the PCP only relying upon this particular year and the evidence she, and Wing Commander McLean gave, was insufficient. Therefore, there was no need to take action that related to the fairness issue previously noted.

104. Returning to the disadvantage of selection for ACSC, the Tribunal had regard to statistical evidence presented. Most pertinent is the table extracted at paragraph 54 above. This shows that the selection of female officers is broadly consistent as a percentage of officers in the pool (in most years in fact women do slightly better). Accordingly, the Tribunal conclude that the PCP does not have the required disadvantage as to women and so the claim must fail.

105. In the circumstances and although it has referred to the relevant law, the Tribunal decided not to consider the legitimate and proportionate aim defence as the claim has failed at the earlier hurdle.

*taking account of performance beyond the end of a RP*

106. In terms of the PCP of taking into account performance beyond the end of a RP, this fails at the first hurdle as evident from the previous findings and conclusions above. There is nothing to show that in this particular cycle performance was taken into account beyond the end of the RP.

107. In any event, the Claimant has not shown any group or personal disadvantage from this. Even if the Respondent did – for Officer C as opposed to more generally – take into account performance beyond the RP this did not disadvantage the female group or the Claimant in particular.
108. Once again, the Tribunal has not considered the legitimate and proportionate aim defences as the claim has failed before this stage.

#### (4) Victimisation

109. The victimisation claim concerns three alleged detriments (paragraph 23 above):
- 109.1. Change the claimants PGC ranking from position 3/14 to position 4/14 between the 21st of October 2022 and the 13th of January 2023
  - 109.2. Air Commodore Burns eroding the appraisal of her performance by the comment in the OJAR for the 2021- 2022 RP that she was ranked within the "top third", rather than specifying the PGC ranking 3/14.
  - 109.3. Air Commodore Burns failing to recommend her for additional comment on her performance by a 3RO (Air Vice Marshal Maria Byford) after receiving a recommendation from Group Captain Yates in December 2022
110. These matters were relied upon for the earlier claims and the Tribunal has for each of these things already found the Respondent did not do the matter advanced by the Claimant. So, the claims fail as the answer to paragraph 23 of the issues is the respondent did *not* do the things relied upon.
111. However, even if some were reinterpreted or the Tribunal were incorrect in its analysis on both detriment and causation grounds, the claims fail. That is because the way the ranking was presented was not detrimental objectively speaking – it was a good OJAR and done in a way that could well benefit the Claimant (the terminology and splitting out performance and potential rankings). Further still, there is nothing to show anything was connected with the protected act as the Respondent, and Air Commodore Burns in particular had praised the Claimant's work on the NSI. Indeed, there are clear reasons that are unconnected to the protected act for the Respondent acting as it did as already set out above.

#### Time limits

112. As evident from the above, the Tribunal did not address in these reasons the fact that claims may well have been out of time. This is because it rejected all the claims on the underlying merits and so it was unnecessary to decide if some of the claims were out of time.

#### Stepping back and looking at overall picture

113. As will be apparent from the above, all the claims of discrimination failed. The Tribunal in its analysis approached each issue individually. However, sometimes there is a danger in overly strict compartmentalisation in discrimination claims. Factual evidence in one allegation, which may lead to inferences, can be ignored for example. For this reason, before reaching its conclusion in dismissing the claims the Tribunal also stepped back and looked at the overall picture to see whether a different conclusion should be reached. In this case it concluded, perhaps unsurprisingly given the core facts were not found in the Claimant's favour, that it made no difference.

#### Postscript

114. The Tribunal wishes to make clear that the fact the claim has been unsuccessful does not indicate that there were no issues with the Respondent's process. For one had it been more transparent earlier in the service complaint process and disclosed the material information with adequate information included (ie not nearly completely redacted) the Claimant may not have presented a claim as she would have seen the evidence that she was not in position '3'. For two the methodology of giving peer group ranking and that form of 'scoring' was not consistently applied every year and created confusion. For three the feedback of "*top third*" not being compelling enough never set out that being 4/15 would make a difference and it is surprising that the board cannot check something that is not clear if someone really is on the margin. All in all, it seems that despite having an almost 'legal' type process in the service complaint process no one had got to the core of the issue and set out its findings at the time, with the relevant underlying documentary evidence, which is a shame.

Approved by  
**Employment Judge Caiden**  
13 March 2026

RESERVED JUDGMENT AND REASONS  
SENT TO PARTIES ON 20 March 2026

FOR EMPLOYMENT TRIBUNALS

#### Notes

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