



EMPLOYMENT TRIBUNALS

Claimant: Ms E Upton-Webb

Respondent: Ministry of Defence

Heard at: Southampton

On: 5 – 7 May 2026

Before: Employment Judge Richardson

REPRESENTATION:

Claimant: In person

Respondent: Miss Garner (counsel)

RESERVED JUDGMENT

1. For clarity I should state that this judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues which the Tribunal must consider in order to decide if a claim succeeds or fails. In particular, if I have not mentioned a particular point or piece of evidence, it does not mean that I have overlooked it, it is simply because it is not relevant to the issues.
2. Throughout this judgment I shall refer to Ms Upton-Webb as the Claimant and the Ministry of Defence as the Respondent.
3. By a claim form submitted on 18 July 2023 the Claimant complains of direct sexual discrimination pursuant to s.13 of the Equality Act 2010 ("EqA") and indirect sexual discrimination pursuant to s.19 of the EqA. The ACAS certificate is dated 10 My 2023 to 19 June 2023. Consequently, any act or omission which took place before 18 November 2022 is potentially out of time. However, this was identified as an issue in the first case management hearing and was dealt with during the course of the hearing as I have detailed later in this judgment.

4. For reference at this hearing the Tribunal was presented with a 697 page bundle including an index.
5. The Claimant submitted a witness statement on her own behalf plus two further supplementary statements which were presented to the tribunal on the first day of the hearing. After considering submissions from the parties the tribunal determined that it was in the interests of justice to allow late submission of these statements.
6. The Respondent submitted witness statements from the following persons:
 - a. Cdr David Mahony;
 - b. WO Rosemary Dodd;
 - c. Cpt Andrew Bray.
7. On the third day of the hearing the Respondent sought leave to adduce in evidence a supplementary statement from Cpt Bray responding to the supplementary statements from the Claimant. In view the fact that the tribunal had allowed the Claimant to adduce late witness statements it was considered just and equitable to allow the Respondent to do so as well.
8. The tribunal took time to read these statements and each witness was then questioned about the evidence contained in their statements.
9. Evidence was heard over three days and judgment was reserved. Written closing submissions were received from both parties.
10. The closing submissions from the parties raised some difficulties insofar as:
 - a. The Claimant's closing submission appeared to try to alter the PCP referred to in the list of issues by asserting that she was relying upon the entirety of Brd51(2) - "Physical Education & Executive Health Manual" which she says is applicable to all personnel.
 - b. The Respondent in its submissions noted that the Claimant had not sought to amend her claim to cover the period after she had commenced proceedings i.e. 23 July 2023 to 16 September 2024.
 - c. The Claimant sought leave to submit a supplementary closing submission answering the Respondent's which I allowed in the interests of justice and equity.
11. After careful consideration I have decided to take the unusual step of allowing the Claimant to rely upon what might be construed as the broader PCP referred to in her closing submissions and to take into consideration acts and omissions which occurred

in the period after she commenced proceedings before the tribunal until 16 September 2024 when she started at BRNC. I have decided to proceed on this basis because I believe that it is in accordance with the overriding objective to do so. I have determined that these amendments will make no material difference to my assessment of the merits of the Claimant's case and, consequently, I do not believe that the Respondent will suffer any prejudice as a result of this decision. Moreover, I note that evidence relevant to the period post-commencement of proceedings was adduced by the Respondent in the form of Cdr Mahony's evidence. So the Respondent has had an opportunity during the course of the hearing to put forward its case on issues arising during this period.

12. I have also taken into consideration that the Claimant is a litigant in person and therefore should be afforded some latitude in relation to legal issues which she is not familiar with. I also determined that it was important that the Claimant should regard her case as having been properly ventilated during the course of these proceedings and should feel that all matters that she regards as pertinent have been taken into consideration by the tribunal.
13. In addition I am mindful that I am expected to ensure that cases are dealt with expeditiously using the minimum possible resource. In the event that I was to disallow the changes to the PCP and/or disregard the period post-commencement of proceedings, there is every possibility that my decision would be subject to a request for reconsideration or possibly even an appeal. Given that I do not believe that these amendments to the Claimant's case will make any difference to the outcome of these proceedings, as well as for the reasons set out above, it seems to me in accordance with the overriding objective to allow them.
14. The Claimant sought leave to add a further comparator namely a Mr Glentworth-Miller at the beginning of the first day of the hearing. After considering submissions from the parties the tribunal determined that the inclusion of this further comparator at such a late stage would be unduly prejudicial to the Respondent as well as to the ability the tribunal to conclude matters in a timely fashion. Accordingly, the tribunal determined that it was not all the interests of justice to allow the Claimant to adduce evidence in the form of a further comparator.

The Issues

15. The issues in dispute were set out in the case management order dated 18 January 2024. During the course of that hearing it was explained to the Claimant that because her claims did not fall within the scope of the protected period in section 18 of the EqA her claims were more properly brought pursuant to the provisions of sections 13 and 19 of the same act. However, during the course of the hearing it was explained to the Claimant that claims relating to pregnancy and maternity could be brought under the ambit of section 13 even though they were not classified as protected characteristics for the purposes of section 19.

16. The parties agreed that the issues asset out in the case management order of 18 January 2024 were the ones which this tribunal would need to determine subject to some minor amendments made by the Respondent to reflect matters raised in its amended response permitted following the case management hearing. However, as a consequence of the tribunal's decision in relation to the extension of time limits (dealt with later in the judgment) acts or omissions occurring after the beginning of 2022 also fell to be considered.
17. Following consultation with the parties it was also agreed that there was a need to make one small amendments to the time limit issue insofar as it erroneously referred to the three month time limit provided for in s.123(1)(a) of the EqA when in fact, because the Claimant's claim was brought in pursuant to s.121 of the EqA, so the correct period is in fact six months pursuant to the provisions of s.123(2)(a) of the EqA.
18. I have set out the issues below.

19. Time Limits

- a. The claim form was presented on 18 July 2023. The Claimant commenced the early conciliation process with ACAS on 10 May 2023 (day A). The early conciliation certificate was issued on 19 June 2023 (day B). Accordingly, any act or omission which took place before 18 November 2022 (which allows for any extension under the early conciliation provisions) is potentially out of time so that the tribunal may not have jurisdiction to hear that complaint.
- b. Were the discrimination complaints made within the time limit in section 123 of the EqA. The Tribunal will decide:
 - i. Was the claim made to the tribunal within six months (plus the early conciliation extension) of the act or omission to which the complaint relates?
 - ii. If not, was there conduct extending over a period?
 - iii. If so, was the claim made to the tribunal within six months (plus the early conciliation extension) of the end of that period?
 - iv. If not, whether claims made within a further period that the tribunal thinks is just and equitable? The Tribunal will decide:
 1. Why were the complaints not made to the tribunal in time?
 2. In any event, is it just and equitable in all the circumstances to extend time?

c. Direct sex discrimination (section 13 EqA)

i. Did the Respondent do the following things:

1. Revert the Claimant back to Petty Officer and refuse to allow her to continue the SEMC course in January 2022 because she was pregnant; and
2. Refuse to permit the Claimant to undertake the 2.4 K run without medical clearance when the Claimant's comparators were allowed to do so; and
3. Refusing to allow the Claimant to go to the Britannia Royal Navy College (BRNC) to join the Initial Officer Training Course (IOTC), thus denying the Claimant the opportunity to progress her career in the same fashion whilst pregnant or in the period of up to 2 years after childbirth ("two years post-partum").

ii. Was that less favourable treatment? The tribunal have to decide whether the Claimant was treated worse than someone else was treated, known as the Claimant's comparator. There must be no material difference between the circumstances of this comparator and those of the Claimant. The comparator can be an actual person, or if there is no actual comparator then someone hypothetically. That is to say a hypothetical comparator whom the Claimant says would not have been treated in the (less favourable) way in which the Claimant was treated.

iii. The Claimant relies on the following actual comparators namely Sam Trennery, Ross Watson and Armand Powell (who were all men with young children born within the last two years) who allowed to attend IOTC, and OC Vincent who was allowed to attend IOTC despite being unable to complete the 2.4 km run and not being medically fit for the full course.

iv. If the Claimant did suffer less favourable treatment above, was this because of sex? Is the Respondent able to prove that it was for a non-discriminatory reason unconnected to the protected characteristic in question?

d. Indirect sex discrimination (section 19 EqA)

i. A "PCP" is a provision, criterion or practice.

ii. The Respondent accepts that it had in place and applied the following PCP: the Royal Navy's policy regarding fitness testing which is

enshrined in BRd51(2) - "Physical Education & Executive Health Manual" requires that the Rockport Walk (RPW) (a 1 mile walk) is completed whenever a naval service woman attempts Royal Navy fitness test (RNFT) within two years of childbirth unless you request, is a personal decision, to undertake the maximal test of the 2.4 km run with specific medical clearance.

- iii. Did the Respondent apply the PCP to persons with whom the Claimant did not share the same protected characteristics (her sex), or would it have done so?
- iv. Did the PCP put persons with whom the Claimant shared the characteristic, at a particular disadvantage when compared with persons with whom the Claimant did not share the characteristic?
- v. Did the PCP put the Claimant personally at disadvantage in that she was informed on 14 April 2023 that she was unable to join the IOTC which was due to commence because the RPW is not accepted by the BRNC
- vi. Was the PCP proportionate means of achieving a legitimate aim? The Respondent contends that it had the following legitimate aims:
 - 1. That due to the arduous nature of the INTC all who attend need to be medically fully deployable in order to have any chance of undertaking the course successfully including undertaking the activities described above (legitimate aim = successful completion of the course and appropriate use of resources);
 - 2. that there is a duty of care to all personnel undergoing training to make sure they are physically fit to undertake the activities asked of them (legitimate aim = health and safety);
 - 3. That there is a duty of care to other personnel undergoing training to make sure that their colleagues are physically fit to undertake the activities asked of them and will not put others at risk (legitimate aim = health and safety);
 - 4. That medical advice is required and an individual may be returned to the unit if the medical condition of physical fitness is assessed during the course as posing a significant risk to themselves, or others or the completion of training (legitimate aim = health and safety).
- vii. The tribunal decided particular:

1. Was the PCP an appropriate and reasonably necessary way to achieve those aims; and
2. Could something less discriminatory have been done instead; and
3. How should the needs of the Claimant and the Respondent be balanced?

Time-limit Issue

20. At the beginning of the hearing the Claimant was asked whether it was necessary for the tribunal to consider the time-limit issue or whether she was content to limit her claims to any acts or omissions which occurred in the period after 18 November 2022. The Claimant confirmed that she did wish to make an application for an extension of time because she wished to encompass issues which arose in the early part of 2022 in the period immediately after she advised the Respondent that she was pregnant.
21. In the circumstances the tribunal elected to deal with the time-limit issue as a preliminary issue and heard submissions from both parties.
22. The Claimant explained that she had delayed filing proceedings before the employment tribunal because it had been her understanding that she had to await the outcome of her service complaint before she could do so. She asserted that she only became aware of the time limitation issue upon taking legal advice after returning from maternity leave. When she became aware of the need to file proceedings she did so without delay.
23. The Respondent refuted this explanation stating that there was documentation available to the Claimant both electronically and in the form of written guidance which sets out very clearly the time-limit issue. They also made the point that the Claimant had sought legal advice around the time of her first service complaint in early 2022 so she had the opportunity to secure advice on this issue at a much earlier date.
24. The Claimant denied that she had ever seen any documentation either electronically or in physical form which had warned her of the risk of limitation issues and the need to file proceedings in a timely fashion. She also stated categorically that, although she had sought legal advice in early 2022, that had been restricted to the formulation of her service complaint and the question of initiating proceedings before the employment tribunal had never arisen.
25. Overall I prefer the Claimant's explanation. She comes across as a capable and intelligent woman. It seems inconceivable to me that, had she been made aware of the requirement to initiate proceedings without waiting for the outcome of the service complaint, she would have done so.

26. The Claimant asserts that she would suffer prejudice if time is not extended to cover the period commencing the beginning of 2022 because it would preclude her from referring to the decision to remove her from the Systems Engineering and Management Course ("SEMC") which she asserts was directly related to her being pregnant. She further asserts that the Respondent would not suffer any prejudice because the details of these allegations were fully set out in her first service complaint which was submitted on 11 February 2022. Accordingly, the Respondent was fully aware of all of the facts and circumstances which she will rely upon in relation to these issues.

Judgment on extension of time limit

27. In making a determination as to whether or not to extend time I am obliged to consider whether it would be just and equitable to do so having regard to the overriding objective and after considering the degree of prejudice that would be suffered by the parties by either allowing or disallowing the application. This is a less onerous test than would be applicable in relation to unfair dismissal claims. I have also taken into consideration the checklist arising out of section 33 of the Limitation Act 1980 which requires me to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case.
28. As I have stated above, I accept the reason for the delay in filing proceedings was a misapprehension on the part of the Claimant that she did not have to do so until her service complaint had been resolved.
29. However, the fact that the Claimant thought she had to await the outcome of her service complaint before making a claim is just one matter to be taken into account by an employment tribunal in considering whether to extend the time limit for making a claim — Apelogun-Gabriels v London Borough of Lambeth and anor 2002 ICR 713, CA. It is not determinative one way or the other, but as I have stated above, I am satisfied that she took steps to initiate proceedings as soon she became aware of the need to do so.
30. In terms of the balance prejudice I find that the Claimant would suffer greater detriment than the Respondent by allowing the extension of time. If time is not extended she will lose the ability to refer to issues which occurred around the time she advised the Respondent she was pregnant. The Respondent on the other hand was made fully aware of these allegations in the Claimant's service complaint filed in February 2022 and they were also pleaded in her ET1.
31. I have taken into consideration the fact that the Claimant is seeking to extend time by a significant period (approximately 11 months) which represents a substantial delay in initiating proceedings. Clearly this is a prejudicial issue for the Respondent.
32. Overall I am satisfied that the prejudice that the Claimant would suffer as a result of not extending the time limit outweighs the prejudice that the Respondent will suffer as

a result of so doing. Accordingly I have determined that it will just and equitable in this instance to extend time until the beginning of 2022.

Findings of Fact

33. The following facts were found to be proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after considering the factual and legal submissions made by and on behalf of the parties.
34. In order to put matters into context is necessary to refer to issues which predate the beginning of 2022.
35. The Claimant initially joined the Royal Navy on 5 January 2024 ultimately being promoted to Petty Officer before leaving the Navy on 30 March 2012.
36. She rejoined the Navy on 31 October 2018 and was accepted to attend BRNC on the Upper Yardsman route to undertake officer training in September 2020. Unfortunately, the Claimant sustained an injury during the training which meant that she had to be withdrawn from the course.
37. In June 2021 the Claimant was advised that she had been scheduled to return to BRNC in September 2021. Regrettably, in August 2021, the Claimant was involved in a traffic accident which resulted in an injury to her right hip which precluded her attending BRNC in September 2021.
38. In September 2021 the Claimant was medically downgraded to Medically Not Deployable ("MND") for a period of three months due to her hip injury. The period of MND was extended for a further three months on 25 November 2021 with a review date of 20 March 2022.
39. The material document for the purposes of these proceedings in terms of policy is BRd51(2) Physical Education and Executive Health Manual Version 1. Section 0219 d (3) deals with post maternity. I have set out the relevant sections below:

"a. In order to ensure that naval servicewomen are treated fairly on returning to work following a period of maternity leave, it has been necessary to assess the impact on the postnatal body of maximal effort fitness training and testing. The science and medicine on which the research is based is complex and extensive and has informed the policy decision to extend the timing requirement for servicewomen to successfully pass their RNFT. It is also informed the policy decision to require that the Rockport Walk (RPW) is completed whenever the naval servicewomen attempts her RNFT within two years of childbirth. Women wishing, exceptionally, to voluntarily undertake either the 1.5 mile run or the multi-stage fitness test will not be allowed to do so without specific medical clearance. Medical clearance is only to be provided and signed for by medical officer or CMP who is accredited and has completed relevant postgraduate training....."

c. For a two-year period following the birth of their child, naval servicewomen will use the RPW as the submaximal element of their RNFT unless they request, as a personal decision, to undertake the maximal test of a 2.4 km run or MSFT and have specific medical clearance to do so, which must be provided to the supervising PT at the time of the test..... The returning mother is exempt from any requirement to pass the RNFT for a period of 18 months post the birth of her child. However, in order to gauge her postnatal recovery to full fitness, she must attempt an RNFT at the 15 month point....

e. This policy does not alter the fitness test requirements for attending leadership courses.”

40. The tribunal was advised that in broad terms officer training in the Royal Navy comprised two phases of INT(O) training at BRNC followed by an academic SEMC course and concluding with sea training. So in the ordinary course, individuals who had completed the training at BRNC would become sub-lieutenants (“S/Lt”) and attend the subsequent phases of the training as commissioned officers.

41. In her first service complaint, the Claimant states that she sought permission to attend the SEMC 2A course in October 2021, even though she had been unable to complete the BRNC training due to injury. The rationale for doing this was to shorten her training pipeline by getting the academic element completed pending her ability to re-commence her training at BRNC. The Claimant states that she was given permission to do this and was given an assignment order as a Sub-Lieutenant to do so and started the course in January 2022.

42. Correspondence on 4 January 2022 between CPO Connolly and Natalie Payne appears to support the Claimant’s version of events in so far as CPO Connolly states:

“Further to the revision of S/Lt Upton (below), she has now turned up to SEMC at Collingwood as a S/Lt..... Do you know if she has been given exceptional authority to be re-promoted to S/Lt and start Ph2 training without having done BRNC first.”

43. Lt Campbell, copied on the email referred to above, replied:

“I had a conversation with Lt Will Hill, the SEMC course officer with whom I agreed she would attend SEMC Ph1 at CWD prior to restarting BRNC in May 22. This is the only element of the course that she will complete.”

44. At that time there was an expectation that the Claimant would join the BRNC course scheduled to commence in May 2022.

45. Later in January 2022 the Claimant asserts that she became aware that she was pregnant and advised her divisional officer. Approximately two weeks after that, the Claimant asserts that she attended a meeting with her Divisional Officer and Lt Cdr

Lucas where she was told that she was going to be reverted back to her previous rank of Petty Officer. The Claimant also asserts that she was told that, although she could continue with the SEMC course, there was little point in her doing so because she would have to repeat it due to the fact that, due to her pregnancy and maternity leave, too much time would pass before she could undertake the sea training element of the course after completing the academic element of the course.

46. The Claimant asserts that the reason why she was reverted back to her previous rank and refused permission to continue on the SEMC course was that she was pregnant.
47. Unfortunately, the Respondent's decision letter does not address this allegation, but instead upholds her complaint by finding that her reversion to Petty Officer was not correctly handled and notes with approval that issues in relation to her salary and seniority appear to have been addressed.
48. I was not taken to any documentation in the bundle which dealt specifically with the reasons why the Claimant was taken off the SEMC course by her divisional officer or Lt Cdr Lucas, nor did they give evidence.
49. Cdr Mahoney was cross-examined quite extensively on this issue by the Claimant. He expressed surprise that the Claimant had been allowed to undertake the SEMC course before she had completed her training at BRNC. He explained that although there were courses where officers and other ranks were trained together, the SEMC course was specifically designed and intended for individuals who had passed through BRNC and were commissioned officers. Additionally, he expressed surprise that the Claimant had been allowed to retain her rank of S/Lt after being unable to complete the BRNC course in September 2020 as, in his view, she had no entitlement to that rank. The light of this it was his view that it was entirely appropriate that the Claimant was reverted back down to Petty Officer. He was very clear that he would have taken this view irrespective of the sex of the individual in question.
50. In his evidence Capt Bray acknowledged that there were courses where ratings and commissioned officers were trained together. However he was very clear that the SEMC course was intended to be a commissioned officer only course and that it would not have been appropriate for the Claimant to have attended until such time as she was a commissioned officer.
51. On 1 April 2022 the Claimant was designated as medically non-deployable due to her pregnancy with a review date of 1 April 2023. This included an RNFT exemption.
52. The Claimant was on maternity leave between 25 July 2022 through to 23 January 2023. She then took a period of annual leave returning to work on 20 March 2023.
53. After having her child, the Claimant sought clarification from the Respondent via communications with WO Dodds as to when she would be able to return to BRNC. Apart from an entirely understandable desire to progress her career, the requirement

for clarification was driven by the need to coordinate her career ambitions with those of her husband. By way of further explanation, the Claimant's partner (and later husband), was a sergeant in the RAF who was also in the process of seeking advancement to commissioned officer status. The military has a policy called the Serving Parents' Deployment/Assignment Restriction Process (SWDC) which is intended to address circumstances where service personnel who have children are not deployed simultaneously with their partners thus creating childcare problems. In her testimony, the Claimant asserted that she had agreed with her husband that her career would take priority, but that required the Respondent to provide her with dates as soon as possible so that these could be coordinated with the RAF.

54. On 30 January 2023 the Claimant confirmed to the Respondent that her husband had been selected for officer training with the RAF commencing in November 2023 which would last 23 weeks. This effectively precluded the Claimant from attending the September 2023, January 2024 and May 2024 IOT courses at BRNC because of the restrictions imposed by SWDC.

55. Cdr Mahoney describes himself as having a policy and employment role. In this instance he describes this as encompassing a number of strands and interlocutors to reach a consensus from both the medical team and the training team at BRNC as to whether and how the Claimant could return to BRNC.

56. In April 2022 Cdr Mahoney met with the Claimant who had confirmed that she wished to proceed to BRNC after her return from maternity leave in 2023. In his evidence Cdr Mahoney emphasised that he wanted to keep the Upper Yardsman ("UY") route open to the Claimant subject to entry criteria being met.

57. On 12 January 2023 Cdr Mahoney sent an email to the Claimant which he described as a holding response because he needed to speak to BRNC about training pipelines and fitness standards. He stated in this email:

"Notwithstanding all of the above I think our preference would be for you to start IOT as soon practicable and do you have any thoughts about this taking into account start dates of May/September/January? This will need to be balanced against the requirement for the RAF to deploy your partner....."

58. In a separate email on the same day Cdr Mahoney indicated that he was happy to extend the date for the Claimant's Admiralty Induction Board ("AIB") pass to allow for her maternity leave.

59. By mid-January Cdr Mahoney was focused on trying to identify the earliest possible date that the Claimant could go back to BRNC. As part of this he liaised with the principal medical officer at BRNC, Surgeon Cdr Schofield, about what the Royal Navy fitness requirements were and whether there would be any leeway for the Claimant, outside of current RNFT requirements, that would allow her to attend BRNC in May 2023. Surgeon Cdr Schofield responded the same day saying:

“.... One of our individuals had her baby in December 2021. She was supposed to join in September 2022 and ROHT [Royal Navy Occupational Health Team] deferred her to January 2023.

The individual who was allowed to join at the 14-month point has really struggled, not so much with fitness, but with the fact that her body has changed so much post-childbirth.

I would really (really) worry about someone joining ahead of the 12-month point.”

60. In his evidence Cpt Bray explained in more detail what levels of fitness were required from prospective IOT candidates prior to commencing the course at BRNC. He was very clear that the fitness standard for entry was the maximal RNFT standard and not the Rockport Walk. He explained that this was consistent with the BRNC pre-joining guide which states that the INT(O) fitness test takes place in week five which includes the 2.4 km run and that continued failure to achieve that standard can lead to withdrawal from training. Cpt Bray emphasised that the INT(O) fitness test represented the standard below which it was potentially unsafe to progress with training and that it was a pre-requisite for the later stages of the course including exercise ABLE.
61. On 30 January 2023 Cdr Mahoney updated the Claimant about the conversations he was having with BRNC and possible dates for her to commence the IOT. Later that day the Claimant advised Cdr Mahoney of her husband's deployment to RAF Cranwell for 18 weeks as from November 2023.
62. On 7 February 2023 Cdr Mahoney arranged a decision conference to decide on a date when the Claimant could attend BRNC. At that meeting it was determined that September 2024, when she would be 24 months post-partum, would be the appropriate date to allocate to the Claimant. The note of the meeting also records that there was an opportunity to attend at an earlier date provided the Claimant had been signed off as fit to undertake the 2.4 km RNFT.
63. On 29 March 2023 the Claimant attended a return to work medical where she was temporarily medically downgraded to MND with a review date of six months. Claimant explained that, as a complication of her pregnancy, she had developed hip issues which required physiotherapy to resolve. The downgrade meant she was medically exempt from the requirements of the RNFT and was unfit for strenuous physical exertion for the duration of the period that she was designated MND.
64. Cdr Mahoney was advised of the Claimant's medical downgrade on the same day by, Surgeon Cmdr Castledine, the doctor who examined her, who also advised that she was likely to be downgraded for a further six months and that she was uncertain about her admission to BRNC. Cdr Mahoney replied the same day that the Claimant's entry into BRNC had been left open to a point when she was medically fit and in date for

her RNFT.

- 65. On 15 November 2023 the Claimant undertook further medical review and her medical downgrade was extended until 15 January 2024 with the same restrictions.
- 66. On 9 January 2024 the Claimant underwent further medical review where her condition was upgraded to fully deployable.
- 67. On 11 April 2024 Cdr Mahoney sent a terms and conditions letter to the Claimant confirming her return to BRNC on 16 September 2024 and that her AIB pass had been extended to facilitate her return at that date.
- 68. The Claimant attended the IOT course at BRNC in September 2024 as scheduled.

Distinction between Upper Yardsman ("UY") v Senior Upper Yardsman ("SUY") IOT at BRNC

- 69. Brd 8374 sets out the primary difference between the Initial Naval Training (Officer) (INT(O)) undertaken by UY and SUY candidates. UY candidates undertake the full INT(O) whereas SUY candidates along with medical, dental, chaplaincy and Royal Navy reserve officers receive a shortened INT(O) packaged to their specific needs.
- 70. The Claimant first attended BRNC in September 2020 as a UY candidate and eventually commenced the course at BRNC in September 2024 as a UY candidate.
- 71. In her evidence the Claimant asserted that she had the requisite training and experience to be admitted onto the BRNC course as a SUY candidate. The benefit for her being that she could undertake a shortened course which would not have the same physical requirements i.e. the 2.4 km run and therefore could undertake it notwithstanding her medical downgrade.
- 72. On 29 March 2023 Cdr Mahoney sent an email to Lt Cdr Kent and Lt Cdr Hayes seeking their views on the Claimant's suitability as a potential SUY candidate as opposed to a UY candidate. Lt Cdr Hayes responded that the situation had been considered by him back in November 2021 and that his view remained same i.e. that the Claimant and the service would benefit from her full attendance and completion of INT(O) as a UY.
- 73. The reference to the issue being considered in November 2021 relates to an exchange of emails between Lt Cdr Howe (WE General Service Branch Manager) and Lt Cdr Hayes dated 15 November 2021. In this email Lt Cdr Howe states:

".... I have stated that the Branch would likely decline a waiver request to become an SUY. She has inadequate seniority and nil sea time as a POET Senior Rate. Her previous experience prior to leaving and re-joining (15 months as a POWEA in HMS Liverpool ending 2012) would not provide her seagoing currency to have the required

credibility as an SUY candidate.”

74. Lt Cdr Hayes responded by email the same day:

“I agree with all your recommendations; notwithstanding her ineligibility for SUY selection and, based on my observations as CoS(T) at BRNC, PO Upton is not a suitable candidate for the SUY course.”

If she is able to meet the INT(O) entry standard (RNFT, BMI, WC) by Sept 22, PO Upton, and the Service, will benefit from her full attendance and completion of INT(O) as an UY.”

75. In his witness statement Cpt Bray detailed the criteria which the Claimant would have needed to satisfy in order to qualify as an SUY candidate. Specifically, the candidate would have had to have served at least three years since being rated Petty Officer, of which two years must have been seagoing service or service in authorised complement positions. He also referred to the email exchange between Lt Cdr's Howe and Hayes as evidence that the Claimant had not achieved the requisite seagoing currency or credibility required to qualify for the SUY course.

76. During the course of her cross-examination of Cdr Mahoney the Claimant referred to documentation evidencing her experience during her first period of service between January 2004 and March 2012. This appeared to support the Claimant's contention that she did have the requisite experience to be considered as an SUY candidate. In fairness to Cdr Mahoney, he had never seen these documents before and he emphasised that any decision regarding the Claimant's suitability as a prospective SUY candidate was taken by her departmental manager. He had consulted the departmental manager and been informed that she was not a suitable SUY candidate. There was no reason for him to doubt what he had been told.

77. In her witness statement Claimant referred to the comments from Lt Cdr Hayes on her suitability as a prospective SUY candidate. She asserts that she only met Lt Cdr Hayes on one occasion at BRNC in October 2020 following a request on her part compassionate leave for childcare. The Claimant asserts that she was instructed not to speak during the course of the meeting and was criticised by Lt Cdr Hayes for making the request and allegedly accused of causing trouble. Lt Cdr Hayes was not called to give evidence.

Comparators

78. The Claimant seeks to rely on the following individuals as comparators:

- a. Sam Trennery
- b. Ross Wason

- c. Armand Powell
- d. Berkeley Vincent

79. The first three comparators were all men whose wives had recently given birth. Trennery and Wason were both UY candidates and Powell was a direct entry candidate. In common with the Claimant, this meant that they were all required to undertake the full INT(O) course at BRNC and were subject to the same fitness standard that all candidates had to satisfy.

80. Berkeley Vincent was selected for promotion under the UY route in the (E) (MESM) specialisation, Route C, with a provisional start date of 14 September 2020. He was promoted from the Marine Engineering/Engineering Submarine branch.

81. It seems that during October 2020 Vincent was compulsorily withdrawn from training. The situation was summarised in an email to Vincent from Lt Cdr Carlton on 9 November 2020 the key elements of which I have set out below:

“My understanding is that in October 2020, you were not in a physical position to continue with INT(O) due to you (sic) current medical restrictions. You were unable to undertake the 2.4 km run as required or partake in any activity that can cause impact, stopping your involvement in IMF, Period Zero pre-ABLE conditioning, and therefore BLD and ABLE. To that end Commander M Reynolds, Commander Training at BRNC recommending (sic) that you be removed from INT(O).....

You were CWFT [Compulsory Withdrawal from Training] from INT(O), which from an administrative perspective was deemed the correct process to follow for BRNC....

*Given your medical issues, the ESM (BM) (Cdr Richie) gave you a **tailored package** (which was explained to you at the time) that you would join with the SUY course solely to complete Phase one at BRNC (since the SUY course is less physically challenging) and on completion you would then re-join Phase 2 training at DSMarE on the **UY pipeline**.”*

82. Further amplification about the extent of Vincent's medical condition is contained in an email from Lt Cdr Hayes dated 17 November 2020 in which he states:

“Vincent joined BRNC on 14 September 2020 as an initial commission in the marine engineer specialisation. He arrived medically downgraded, as part of which it was clearly stipulated that Vincent was not permitted to conduct a 2.4 km run for his RNFT. In addition his medical limitations and physical condition was such that he struggled with all physical aspects of the INT(O) course, including IMF and all pre-BLD ABLE conditioning. As a direct result of this, his position in INT(O) became untenable. The medical downgrade was made by Occupational Health and is permanent, meaning that Vincent is not eligible at any time in the future to re-enter INT(O) as a UY. To that end he was removed from training with effect from 22 October 2020, following an

interview with Captain R Readwin RN, Captain BRNC. His case has been referred to ToS and the Branch Manager, such that his TACOS [Terms and Conditions of Service] can be reviewed and potential offer made for INT(SUY)."

83. In his evidence Capt Bray reiterated that Vincent had a permanent medical condition which he contrasted with the Claimant's position, which was a temporary medical condition from which she was expected to recover fully.

84. Further clarification of the reason why Vincent was offered a tailored package is contained in a TACOS letter sent to him on 6 November 2020 by Natalie Payne which states:

"Although you have been removed from INT(O), it is the view of the BRNC training team that you have demonstrated sufficient evidence of "officer like qualities" to warrant consideration for a tailored Officer training pipeline. Thus, should you accept temporary version rather than discharge, MESM Branch Management offer you the following as an alternative route..."

85. The Claimant's case is that the Respondent allowed Vincent to proceed with his officer training despite being unable to complete a 2.4 km run by switching him to the SUY route, but this opportunity was not extended to her.

The Law

86. Section 13 Equality Act 2010 (EqA):

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

87. Section 19 EqA:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) It puts, or would put, B at that disadvantage, and

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

88. Section 39 of the EqA:

(2) An employer (A) must not discriminate against an employee of A's (B)

- a. as to B's terms of employment;
- b. in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
- c. by dismissing B;
- d. by subjecting B to any other detriment.

89. Section 136 of the EqA:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

90. Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL

91. The Employment Appeal Tribunal decision in Field v Pye and Co [2022] EAT 68 – at para 36 provides guidance on the application of the burden of proof in discrimination cases:

“(1) Pursuant to section 63A of the 1975 Act, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the Claimant which is unlawful...These are referred to below as "such facts".

(2) If the Claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the Claimant has proved facts from which conclusions could be drawn that the employer has treated the Claimant less favourably on the ground of sex [or other relevant characteristic], then the burden of proof moves to the employer.

(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question. i.e. not the ground

(13) Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Discussion

Indirect Sexual Discrimination

92. Section 19 of the EqA is intended to deal with circumstances where a policy, which applies broadly across the workforce, disproportionately disadvantages individuals who have a protected characteristic (other than maternity or pregnancy) as defined under the terms of the EqA.

93. The Claimant asserts that the PCP that she relies upon as set out in BRd51(2) is the universal requirement that all Naval personnel must satisfy RNFT fitness standards and associated testing requirements for service, deployability, and career progression. She asserts that this applies broadly across the entire workforce.

94. The specific provision within BRd51(2) which the Claimant cites is paragraph 0219.d.(3)(e) which states:

“This policy does not alter the fitness test requirements for attending leadership courses.”

95. Claimant asserts that this creates a clear inconsistency insofar as the Respondent accepts that postnatal women require time and adjustment to recover yet continues to apply the same fitness-linked barriers to career progression.

96. The difficulty for the Claimant is that paragraph 0219.d.(3)(e) is incorporated within Paragraph 0219.d.(3) which is entitled “Post Maternity” and deals exclusively with the treatment of naval servicewomen upon return from maternity leave.

97. Section 19 of the EqA does not include pregnancy or maternity as protected characteristics. So the protected characteristic that the Claimant must rely upon is her sex. Self-evidently paragraph 0219.d.(3) is applicable only to women and therefore does not satisfy the requirements of s.19(2)(a) of the EqA i.e. that it must apply to persons with whom the Claimant does not share the protected characteristic.

98. In the circumstances I have no option but to find that the Claimant’s claim for indirect sex discrimination pursuant to the provisions of s.19 of the EqA is not well conceived

and is dismissed.

Direct Sexual Discrimination

99. The Claimant's case appears to condense down to three acts which she asserts were discriminatory. These were:

- a. Her demotion from S/Lt to Petty Officer in January 2022 and advising her at the same time that there was no point in continuing with the SEMC course as she would have to repeat it because, due to her pregnancy and maternity leave, too much time would pass before she could the required sea training;
- b. The Respondent's refusal to permit the Claimant to undertake the 2.4 km run without medical clearance when the Claimant's comparators were allowed to do so;
- c. The Respondent's refusal to allow the Claimant to go to BRNC to join the IOTC, thus denying the Claimant the opportunity to progress her career in the same fashion whilst pregnant or in the period of up to two years after childbirth.

Demotion and the SEMC course

100. There appears to be no dispute between the parties that following the unfortunate bicycle accident which occurred in 2021 which precluded her attending BRNC in September 2021, the Claimant applied for and was given permission to commence the SEMC course.

101. I am also satisfied that in January 2022 shortly after advising her divisional officer that she was pregnant she was reverted back to Petty Officer rank and advised that, while she could continue the SEMC course, there was no point in doing so because she would have to repeat it due to their being too much time between her completing the course and undergoing sea training due to her maternity leave.

102. None of the Claimant's comparators appear to be relevant to this situation. Neither did the parties put forward suggestions for a hypothetical one. In these circumstances I mindful of the guidance set out in Shamoon v. Royal Ulster Constabulary [2003] UKHL 11 that it is often better to focus on the reason why the Claimant was treated the way she was.

103. In accordance with the provisions of s.136 of the EqA and the Employment Appeal Tribunal guidance in Field v Pye and Co [2022] EAT 68 in the first instance the burden is on the Claimant to prove on, the balance of probabilities, facts from which the Tribunal could conclude that her employer committed an act of discrimination against the Claimant which was unlawful. At this stage the tribunal must assume that there is no adequate explanation for the facts cited by the Claimant. It is only in circumstances where the tribunal is satisfied that the Claimant has proved facts of this nature that the

burden shifts to the Respondent to prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of sex.

104. The Claimant asserts that the reason why she was reverted back Petty Officer and advised that there was little point in continuing with the SEMC at that juncture was that she was pregnant. The Claimant has not adduced any evidence to support her claim that her demotion was due to her pregnancy. However, the alleged reference to continuing with the SEMC being pointless due to the fact that her pregnancy and maternity leave would result in too much time passing before she could go to sea to complete her training, would suggest some form of link. There also appears to be a temporal link insofar as the demotion and advice not to continue with the SEMC occurred very shortly after the Claimant advised her divisional officer that she was pregnant.
105. The detriment complained of by the Claimant is firstly that she was demoted and secondly that, because she was unable to complete the SEMC course at that time, her career progress was delayed.
106. In the circumstances I am satisfied that the Claimant has established facts which, on the balance of probabilities, could evidence discriminatory conduct.
107. The Respondent's position on the Claimant's demotion was unequivocal. In the opinion of both Cdr Mahoney and Cpt Bray the Claimant had no right to be regarded as a S/Lt because she had not successfully passed through the INT(O) course at BRNC. In short she was not a commissioned officer at that time. Why she was not reverted back to her previous rank of Petty Officer after being withdrawn from the INT(O) course in December 2020 is unclear. But that is not material as both Cdr Mahoney and Cpt Bray were clear that any person of any sex in the same position as the Claimant would have been reverted back to Petty Officer. In line with this I am satisfied that the decision to revert the Claimant back to the rank of Petty Officer was taken for reasons unconnected with her protected characteristics of sex or pregnancy and, therefore, was not discriminatory.
108. Based on the testimony from Cdr Mahoney and Cpt Bray it seems clear that participation in the SEMC was restricted to commissioned officers. This is backed up by the Claimant's own evidence that she was given an assignment order as a S/Lt to attend the SEMC as from January 2022. In these circumstances it seems that the information given to the Claimant by her divisional officer and Lt Cdr Lucas was incorrect insofar as they suggested that she could continue with the course.
109. The evidence from Cdr Mahoney and Cpt Bray does not really assist the Respondent's case insofar as they can only provide evidence on what probably would have happened if the Claimant had attempted to continue on the SEMC as a Petty Officer. The question I have to determine is why the Claimant's Divisional Officer and Lt Cdr Lucas told her that she could continue with the SEMC, but there was no point in doing so because, due to her maternity leave, too much time would pass between

her completing that course and undergoing sea training.

110. Although no evidence was adduced by any party on the requirements for the timeframe within which sea training had to be undertaken after the SEMC had been completed, based on the Claimant's account of what was said, the Divisional Officer and Lt Cdr Lucas appeared to be under the impression that one existed and that the Claimant would be unable to comply with it because of her maternity leave. The Claimant did not dispute that there was such a restriction in her evidence. However, what the Claimant has to establish in order to satisfy the requirements of s.13 of the EqA is that she was treated less favourably than someone who does not share her protected characteristic i.e. a man. It seems to me that there is no reason to suppose that a man who was unable to undertake sea training after completing the SEMC within the required timeframe because of some form of medical downgrade would not be subject to the same prohibition that was applied to the Claimant.

111. In the light of the foregoing, I am not persuaded that the Claimant was subjected to discriminatory conduct by not allowing her to participate in the SEMC in circumstances where she would not be able to undertake sea training within the timeframe required after completing the academic element of that training. The reason she was effectively prevented from continuing with the SEMC was that she was unable to satisfy the requirements of the course which applied to all candidates irrespective of their gender.

The Respondent's alleged refusal to permit the Claimant to undertake the 2.4 km run without medical clearance when the Claimant's comparators were allowed to do so.

112. It is common ground that BRd51(2) Physical Education and Executive Health Manual Version 1. Section 0219 d (3)(c) contains a provision that for a two-year period following the birth of their child, naval servicewomen will use the RPW as the submaximal element of their RNFT unless they request to undertake the maximal test of a 2.4 km run and have specific medical clearance to do so.

113. Self-evidently, as this provision applies solely to women following the birth of a child, the time period in question in this case will be the period from 20 March 2023 when the Claimant returned from maternity leave until 16 September 2024.

114. Once again in accordance with the guidance in *Field v Pye and Co [2022] EAT 68* the onus is on the Claimant to establish facts which could enable the tribunal to conclude that an act of discrimination had occurred. The Claimant's case is that in order to satisfy the fitness requirements for entry onto the INT(O) at BRNC, candidates had to satisfactorily pass the maximal test of a 2.4 km run. However, she was restricted to the submaximal RPW which would not satisfy the entry requirements for BRNC and the only way that she could attempt maximal test was with medical clearance. Therefore, she asserts, she suffered less favourable treatment by virtue

of her sex.

115. The Claimant cites three comparators, Trennery, Wason and Powell all of whom were recent fathers who entered BRNC either on the UY or direct entry routes. As men, none of these individuals were subject to the prohibition contained in BRd51(2) Physical Education and Executive Health Manual Version 1. Section 0219 d (3)(c).
116. Taking the above into consideration I am satisfied that the Claimant has established facts which, on the balance of probabilities, could permit the tribunal to make a finding that she had been discriminated against.
117. The Respondent has challenged the appropriateness of the comparators cited by the Claimant asserting that there are material differences between the Claimant and her suggested comparators because of the fact that she was signed off as MND from 29 March 2023 until 9 January 2024.
118. I shall return to this later in this judgment, but in my assessment there is also another material difference between the Claimant and her suggested comparators. That is that she was a woman who had just had a baby which, as referred to in BRd51(2) Section 0219 d (3)(a) and in the comments from Surgeon Cdr Schofield meant that, based on medical research, she was at risk of injury if she was to attempt maximal fitness training during the first two years post-partum. In my assessment, this alone, is a material distinction between the Claimant and a physically fit male service person.
119. In addition, as I have mentioned above, the Claimant was signed off as MND from 29 March 2023 until 9 January 2024 with hip issues and was exempted from the requirements of the RNFT (including the PRW) as well as being unfit for any strenuous physical exertion throughout this period.
120. Accordingly, I find that there are significant material differences between the Claimant and her three proposed comparators and, therefore, they are of no assistance in this case.
121. The Claimant's other comparator, Berkeley Vincent, does not appear relevant to the determination of this issue insofar as he had a permanent medical condition which precluded him from undertaking the 2.4 km run in any event.
122. No hypothetical comparators were put forward by either of the parties and so in the absence of any relevant actual comparators, I will again focus on the reason why the Claimant was treated as she was.
123. The question of whether someone has suffered less favourable treatment because of a protected characteristic is an objective one. The rationale for the policy contained in BRd51(2) is set out in paragraph 0219 d (3)(a), which clearly explains that the restrictions imposed are intended to protect postnatal servicewomen from adverse

consequences of maximal effort fitness training and testing. This concern was also referred to by WO Dood in her evidence where she referred to research by the Canadian Navy which had established the existence of an increased level of risk of injury for postnatal women at higher levels of physical activity.

124. Guidance on what constitutes less favourable treatment was provided by Lord Scott in *Chief Constable of West Yorkshire Police v Khan* 2001 ICR 1065, HL where he stated:

“.. There must also be a quality in the treatment that enables the complainant reasonably to complain about it. I do not think, however, that it is appropriate to pursue the treatment and its consequences down to an end result in order to try and demonstrate that the complainant is, in the end, better off, or at least no worse off, than he would have been if he had not been treated differently. I think it suffices if the complainant can reasonably say that he would have preferred not to have been treated differently.”

125. From this it is clear that there is an obligation on the Claimant to have a reasonable basis to complain about the treatment that she has received. In this instance I am not persuaded that, looked at objectively, it was reasonable for the Claimant to regard herself as having received less favourable treatment because of the provisions imposing less onerous fitness requirements on women for the first two years after birth. I am satisfied that any reasonable person considering the restrictions imposed in an objective fashion could only conclude that they were a benefit to post-natal servicewomen by affording some measure of protection from injury arising out of maximal levels of exercise post childbirth. The fact that the Claimant subjectively regards this requirement as less favourable treatment in her specific circumstances is not enough, in isolation, to establish that it is.

126. In light of the foregoing I do not find that the provisions contained in BRd51(2) Physical Education and Executive Health Manual Version 1. Section 0219 d (3)(c) when viewed objectively constitute less favourable treatment of postpartum servicewomen or that applying this policy to the Claimant in the circumstances of this case constituted less favourable treatment within the meaning of s.13 of the EqA.

Did the Respondent refuse to allow the Claimant to go to BRNC to join the IOTC, thus denying the Claimant the opportunity to progress her career in the same fashion whilst pregnant or in the period of up to two years after childbirth.

127. In summary, the Claimant's case is that, notwithstanding any physical limitations which may have been imposed by her by being pregnant or in two years after childbirth, the Respondent could have devised a tailored programme which would have enabled her to have completed the INT(O) at BRNC. In this regard she cites Berkeley Vincent as her comparator being someone who was unable to satisfy the fitness requirements of the UY induction course, but nevertheless was allowed to attend the shorter and less physically demanding SUY induction course (in

circumstances where she asserts he was not qualified to do so) to secure his commission before reverting back to the UY course to progress his career. The Claimant asserts that this type of tailored programme was not offered to her notwithstanding that she asserts she was qualified to undertake the SUY induction route. She claims she suffered this less favourable treatment because of her protected characteristic of being a woman and/or on the grounds of pregnancy/maternity. The Claimant asserts that the delay in progressing her career resulted in loss of seniority and salary.

128. Once again, in accordance with the guidance in *Field v Pye and Co [2022] EAT 68*, I have to be satisfied that the Claimant has adduced facts which could on the balance of probabilities establish that she had been discriminated against on the basis of either her sex or on the grounds of maternity/pregnancy. I am satisfied that the Claimant has adduced evidence could indicate that she was treated less favourably than her comparator Mr Vincent.

129. It is the Respondent's case that there were two material differences between the Claimant and Mr Vincent:

- a. Mr Vincent suffered from a permanent medical condition which meant that he was never going to be able to satisfy the fitness requirements of a UY INT(O) course at BRNC; and
- b. The Claimant did not satisfy the entry requirements for induction via the SUY route.

130. In relation to the first point, the email to from Lt Cdr Hayes of 17 November 2020 clearly states that the medical condition preventing Mr Vincent from being able to undertake the 2.4 km run was permanent and, consequently, he would never be able to undertake the INT(O) as a UY candidate. The Respondent contrast this with the circumstances in which the Claimant found herself which were that she was subject to restrictions on her ability to undertake the 2.4, to run arising out of a temporary state of affairs which had a likely end date. Accordingly, in contrast with Mr Vincent, the Claimant was not in a situation where she would never be able to undertake entry via the UY route. Her ability to do so was simply delayed until such time she was able to satisfy the fitness requirements, which she ultimately did.

131. In relation to the second point, the Respondent's position was that the Claimant had inadequate seniority and sea time as a Petty Officer to qualify her for entry into BRNC via the SUY route. In his testimony, Cdr Mahoney confirmed that the possibility of switching the Claimant from the UY to the SUY was considered. He referred to communications sent on 29 March 2023 between himself and Lt Cdr's Hayes and Kent where he was informed that the SUY route had been considered back in November 2021 and it had been determined that the Claimant was not a suitable candidate for the SUY course. Having asked the question and received an answer from the Claimant's departmental manager, Cdr Mahoney took the view that there was no basis

or reason for him to doubt what he had been told.

132. During the course of her cross-examination of Cdr Mahoney and Cpt Bray the Claimant adduced evidence which appeared to call into question the determination that she was not appropriately qualified to undertake the SUY course. In her witness testimony she also called into question whether Lt Cdr Hayes' assessment of her suitability in his email of 15 November was entirely objective. In particular she questioned how he had formed the view that she was not a suitable candidate for the SUY route when her only interaction with him had been on a single occasion in October 2020 where he had criticised her for causing trouble and had refused to allow her to speak.
133. The question of whether or not the Claimant was or was not qualified to undertake the SUY course is not a matter which needs to be determined by this tribunal. I am satisfied that Cdr Mahoney believed on reasonable grounds and after appropriate enquiries that the Claimant was not qualified to be switched onto the SUY route. Clearly this is a material difference between the Claimant and Mr Vincent.
134. The Claimant alleged in her first supplementary statement that Mr Vincent did not qualify for the SUY route because he had not completed 12 months sea time as a Petty Officer. She further asserted that she had requested evidence from the Respondent that Mr Vincent had completed the requisite sea time, but had been advised by the Respondent that they were not able to provide the same. The Claimant cites this as evidence that the special arrangements which were made for Mr Vincent were not offered to her.
135. In his evidence Cpt Bray noted that the correspondence with Mr Vincent made clear reference to the fact that the arrangements put in place for him were specifically tailored for his individual circumstances to enable him to complete the INT(O) course despite his permanent medical downgrade. In Cpt Bray's assessment it was the permanency of the medical downgrade which resulted in the need for the tailored package. However, he was not able to comment as to whether or not that also entailed waiving the sea time requirements of the SUY course in Mr Vincent's case.
136. Whilst no evidence was adduced one way or the other as to whether or not Mr Vincent had secured the requisite sea time, I find that it was possible that in order to deal with the rather unusual circumstances of Mr Vincent's case, he may have been placed onto the SUY course in circumstances where he may not have completely satisfied all of the qualification requirements. However, I do not believe that this really assists the Claimant insofar as the underlying rationale for adopting such a flexible approach was that Mr Vincent had a permanent disability which would have meant that he could never have completed the INT(O) via the UY route. As I have stated above the Claimant's position was different insofar as her medical downgrade was

temporary and of a reasonably assessable duration.

137. Finally, in relation to the SUY situation, I need to address the observations made by the Claimant regarding Lt Cdr Hayes assessment of the Claimant's suitability to undertake the SUY route. Although it was not stated in terms, the implication of the Claimant's observations on the way she was treated by Lt Cdr Hayes was that his assessment was in some way influenced by her sex and thus was discriminatory.
138. Once again the onus is on the Claimant to prove facts which on the balance of probability could establish that she was discriminated against on the basis of her sex. In her statement the Claimant refers to a meeting at BRNC in October 2020 following a request by her for compassionate leave for childcare which, although refused by Lt Cdr Hayes, was subsequently approved. She asserts that during this meeting she was accused of causing trouble and not allowed to speak. The only other evidence that we have is Lt Cdr Hayes' email of 15 November 2021 where he expresses the view that the Claimant was not suitable for the SUY route and that she and the service would benefit from her completing the full UY course. Lt Cdr Hayes was not called to give evidence.
139. Whilst I accept that the burden of proof on the Claimant in these circumstances is not onerous, she does have to establish facts which on the balance of probabilities could permit this tribunal to conclude that she suffered discriminatory treatment. In this instance I am not satisfied that she has crossed that threshold. I note that the meeting referred to by the Claimant related to compassionate leave for childcare which the Claimant asserts had been granted to male colleagues. However, I think it is reasonable to suppose that applications of this nature would always be judged on their individual facts. As no evidence was adduced in relation to the background for the application, in my assessment, the mere fact that initially it was refused by Lt Cdr Hayes, but subsequently permitted, is not enough in isolation to enable me to reach a conclusion, on the balance of probabilities, that it was in any way discriminatory.
140. In his email of 15 November 2021 Lt Cdr Hayes indicates that notwithstanding the Claimant's ineligibility to undertake the SUY course, based on his observations he was of the view that both the Claimant and the service would benefit from her actually undertaking the full UY course. The Claimant disputes that Lt Cdr Hayes had any interactions with her other than the meeting in October 2020. The Claimant invites me to read this email against the background of the difficult meeting in October 2020 as evidence of prejudicial treatment due to discrimination.
141. Once again, I am unable to accept that, on the balance of probabilities, the Claimant has established facts which could enable me to reach that conclusion. I accept that it is possible that the meeting in October 2020 evidenced some bad feeling on the part of Lt Cdr Hayes towards the Claimant. However, I cannot accept that there are facts which would allow me to conclude that any such animosity occurred because the Claimant was a woman. To suggest that, in correspondence more than a year later, Lt Cdr Hayes' assessment of her capabilities was still somehow driven by that

animosity is not supported by any factual evidence. In these circumstances I believe I am entitled to treat the email of 15 November 2021 as evidence of what it actually says and not that it evidences a discriminatory reason for believing that the Claimant should undertake the UY course rather than the SUY course.

142. In circumstances where I have determined that the Claimant's comparators are of no assistance, I must once again revert to trying to assess the reason why the Claimant was not allowed to undertake the INT(O) course at BRNC prior to September 2024.
143. In his testimony Cdr Mahoney set out a chronology of the events leading up to the decision to offer the Claimant a position on the September 2024 training course. His testimony was that it was always his ambition that the Claimant should be allowed to attend BRNC as soon as possible.
144. In January 2023 Cdr Mahoney corresponded with the Claimant regarding possible start dates at BRNC in May 2023 or September 2023 or January 2024 noting that they would need to be some coordination with the RAF because of the potential need to deploy the Claimant's partner and the associated need to consider childcare under the SWDC procedures.
145. Cdr Mahoney received advice from Surgeon Cdr Schofield on 23 January 2023 regarding the RNFT and when individuals could undertake the maximal fitness test. In their email Surgeon Cdr Schofield expressed grave reservations about women undertaking the maximal fitness test within 12 months of childbirth.
146. By 30 January 2023 the situation crystallised further insofar as the Claimant's partner was selected for officer training at RAF Cranwell starting in November 2023 for 18 weeks. This effectively ruled out the January 2024 and May 2024 courses at BRNC for the Claimant due to the need for childcare provision under the SWDC procedures. So this left May 2023 as the only available option (as September 2023 would overlap with her husband's deployment to Cranwell) failing which the Claimant would have to be placed on the September 2024 course.
147. By February 2023 Cdr Mahoney had established that, in order to undertake the INT(O) at BRNC, the Claimant would have to have a current RNFT. However, due to her pregnancy she was required to use the RPW as the submaximal element of their RNFT unless they took a personal decision to undertake the 2.4 km run with specific medical clearance as per Brd 51(2).
148. On 13 February 2023 the decision was taken to allocate the Claimant to the September 2024 BRNC course, but that she had the option to attend at an earlier date provided she had been signed off to conduct the full RNFT by an appropriately qualified medical practitioner. In his testimony Cdr Mahoney explained the decision to go for September 2024 was based on concerns to ensure that the Claimant was properly prepared for the course. He stated his anxiety was that he wanted to prepare

the Claimant for success rather than pushing her prematurely to reach the required fitness standard in circumstances which could be prejudicial to her health.

149. At the end of March 2023 Cdr Mahoney was made aware that the Claimant had been medically downgraded for a period of at least a further six months which would preclude her from undertaking the full RNFT. In correspondence with the medical officer who had examined the Claimant and medically downgraded her, Cdr Mahoney advised that in the circumstances the Claimant's entry into BRNC had been left open pending her recovery to full fitness.
150. A formal terms and conditions letter setting out a starting date of September 2024 at BRNC was eventually sent to the Claimant in April 2024 after she had been reinstated to full fitness.
151. Taking all of the foregoing into consideration I have concluded that the reason why the Claimant was not offered an earlier starting date than September 2024 was because starting dates between September 2023 through to May 2024 were precluded because of the clash with her partner's Cranwell officer training dates.
152. A date in May 2023 would have been less than 12 months after she had given birth. Cdr Mahoney had been given advice by Surgeon Cdr Schofield that attempting the maximal 2.4 km run and a point less than 12 months after childbirth would be potentially very risky for the Claimant's health. Moreover, Cdr Mahoney was made aware at the end of March 2023 that the Claimant had been downgraded to MND for a period of at least six months, thus precluding her attendance on the May 2023 BRNC course. In the circumstances it seems entirely logical and proper to me that the Claimant was allocated a slot in the September 2024 intake when she would have been more than two years post-partum and the physical risk to her of undertaking the maximal RNFT hopefully would have abated. It also ensured that she had the maximum possible time to recover from her hip injury which ultimately did not resolve until January 2024.
153. I am conscious that the Claimant has argued that the reason she was not permitted to undertake the maximal RNFT was that she was a woman who had just given birth. However, in my assessment, the correct analysis is that the reason why she was not recommended for the May 2023 course was that there was a tenable risk to her health (albeit due to the fact that she had recently given birth) which Cdr Mahoney and his team sought to mitigate by allowing her more time to recover fully and reach the required fitness standard.
154. In line with the foregoing it is my judgment that the Claimant was not discriminated against on the grounds of sex and/or pregnancy/maternity in accordance with the

provisions of s.13 of the EqA.

Judgment

155. The Claimant's claim for indirect sex discrimination pursuant to s.19 of the Equality Act 2010 is not well conceived and is dismissed.

156. The Claimant's claim for direct sex discrimination pursuant to s.13 of the Equality Act 2010 is not well conceived and is dismissed.

**Approved by
Employment Judge Richardson
Date: 4 June 2026**

Judgment sent to the parties on
23 June 2026

Jade Lobb
For the Tribunal: