



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000185/2023**

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**Held in Glasgow on 23, 24, 25, 30 and 31 July and 1 and 22 August 2024**

**Employment Judge L Wiseman**

**Members E Farrell and J McCaig**

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**Mr I Jeffrey**

**Claimant  
In Person**

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**Chief Constable of the Police Service of Scotland**

**Respondent  
Represented by:  
Ms S Mackay -  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The tribunal decided to dismiss the claim.

#### **REASONS**

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1. The claimant presented a claim to the Employment Tribunal on the 24th April 2023 asserting he had been discriminated against because of the protected characteristic of disability. The alleged discrimination (indirect discrimination, discrimination arising from disability and failure to make reasonable adjustments) focussed on the respondent's promotions process. The claim was subsequently amended to include a complaint of victimisation.

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2. The respondent entered a response denying the claims made by the claimant. The respondent accepted the claimant was a disabled person in terms of the Equality Act because he had a physical impairment arising from a back injury.

3. A number of preliminary matters arose at the start of the hearing:-

- (i) The claimant produced an additional file of documents (in addition to the four folders of documents which had been jointly produced for this hearing). The respondent had no objection to these documents being produced and accordingly they were allowed by the tribunal.
- 5 (ii) The claimant sought production of a further number of documents from the respondent, to which the respondent had objected.
- (a) The claimant wished to have a copy of all of the crime-related scenarios used in the promotions process. The respondent objected to this on the basis they did not wish this information to be in the public domain because it would prejudice the integrity of subsequent promotion processes.
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- (b) The claimant wished a copy of the minutes of the Moderation Panel. He had obtained a copy of the minutes through a Freedom of Information request but the document provided was different to the one provided in the folder of documents produced for this hearing.
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- (c) The claimant wished to be provided with a copy of the guidance/direction provided to assessors. The respondent objected to this on the same basis as point (a) and confirmed the tribunal would hear from a witness who had trained the assessors and would be able to answer the claimant's questions regarding this matter.
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- (d) The claimant wished to be provided with the Kidnapping/Extortion Standard Operating Procedure (SOP). The respondent objected to this on the basis they do not hold this information.
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- (e) The claimant wished to be provided with the free text written responses provided in response to the respondent's survey (August 2023) regarding institutional discrimination. The respondent objected to providing this information because the
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information provided in responses was highly personal and would contravene the assurance given by the respondent that responses would be protected and anonymous. There was a real risk that if the information was provided the identity of individuals may be disclosed. The respondent had disclosed to the claimant a copy of a high level summary of the raw data.

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4. The tribunal refused the claimant's requests in respect of points (a) to (d) above because either the claimant could give evidence about relevant points or he would have an opportunity to ask the relevant witness about matters such as training for assessors. The tribunal acknowledged, in respect of point (e) that the claimant had (during the course of the hearing) been provided with a copy of the document known as the "deep dive" document. The claimant advised the tribunal that certain redactions had been made to the document that he wished to discuss with the respondent. The tribunal allowed time for this but ultimately, on the penultimate day of the final hearing, the document had still not been produced by the claimant. The tribunal took the decision that as there were no witnesses left to speak to the document, it could not be produced.

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(iii) The parties agreed the claimant would lead, and had also agreed a running order for witnesses.

(iv) The final hearing would determine both merits and liability.

5. The tribunal heard evidence from:

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- the claimant,
- Inspector Stephen Piercy;
- Ms Jennifer Stuart, former police officer;
- Inspector Claire Hutchison and
- Sergeant Michael Bruce.

6. We also heard from:

- Mr Simon Wright, retired Superintendent who had been responsible for the modernisation and improvement of the respondent's recruitment and promotions processes;
  - Chief Inspector James Mann, who dealt with the claimant's grievance;
  - 5     • Ms Heather Cunningham, Head of Recruitment, Selection and Promotions;
  - Detective Superintendent Stephen Elliott, who spoke to the Kidnapping and Extortion SOP;
  - Chief Superintendent Hilary Sloan;
  - 10    • Ms Lindsay McGrath, National Promotions Team Manager (who gave her evidence remotely) and
  - Chief Superintendent Stephen Meikle, who dealt with the claimant's second grievance.
7.     The tribunal was referred to a large number of documents which had been  
15     produced jointly and which was subsequently supplemented by documents produced (on two occasions) by the claimant. The jointly produced documents are referred to by their page number in this Judgment, and the documents produced by the claimant are referred to using the initials IJ and then the page number.
- 20    8.     A list of issues was produced by the parties. This is set out later in this Judgment in respect of each head of claim brought by the claimant.
9.     The claim concerned a challenge to the respondent's promotions process on the basis that it favoured operational officers and disadvantaged those with a disability who did not have, and could not obtain, current operational  
25     experience.
10.    The tribunal, based on the evidence before it, made the following material findings of fact.

## Findings of fact

### **Background**

11. The claimant joined the respondent as a Probationary Officer in October 2000.  
5 The claimant successfully completed the probationary training and subsequently took on a temporary Sergeant role, gaining promotion to Sergeant in 2018.
12. The claimant suffered an injury to his back in 2014 and an MRI scan confirmed there was degeneration of discs in his back. This impairment impacts on the  
10 claimant's ability to undertake dynamic movements and he cannot undertake control and restraint. The claimant was placed on modified duties.
13. The respondent's Attendance Management procedure was produced at page IJ79. The document (Appendix F) sets out the meaning of Modified Duties and provides as follows:
- 15 *"Duty modifications are intended to maximise the effective deployment of people with impairments that have an adverse effect on their ability to carry out their normal duties. The categories of modified duty relevant to attendance management are:*
- *Adjusted – workplace adjustments (including reasonable adjustments under the Equality Act 2010) that have been made to overcome  
20 barriers to work for individuals awaiting assessment to see whether they have a permanent disability injury or illness that permanently prevents them fulfilling the full remit of the role. These are likely to last more than 12 months and are subject to quarterly review.*
  - *IHR Retained (officers) (not relevant for the purposes of this case)*
  - *Protected (pre-natal, post-natal) (not relevant for the purposes of this case) and*
  - *Recuperative (not relevant for the purposes of this case).*
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14. The claimant was placed on modified (that is, adjusted) duties because he cannot undertake a full response role (this means the claimant cannot be deployed on operational duties). The claimant, since October 2023, has been dealing with complaints handling.
- 5 15. The claimant, in June 2022, submitted an application for promotion to the rank of Inspector (page 662). The claimant was undertaking a temporary Inspector role at the time, and his application for promotion was supported by his line-manager.
- 10 16. The promotions process from Sergeant to Inspector is the most competitive promotions process because the number of Sergeants eligible to apply, and who do apply, for promotion, far exceeds the number of promoted posts available.

### ***The promotions process***

- 15 17. Mr Simon Wright, former Superintendent who left the respondent at the end of October 2023, was asked by the Chief Constable in 2019/2020, to take on responsibility for introducing a new promotions process. The respondent instructed specialist external Consultants to design the process which had to be a fair process focussing on the respondent's Competencies and Values Framework (page 1256). One of the key changes made was that previously candidates for promotion (from Sergeant to Inspector) had to demonstrate operational competence based on their experience of operational policing. This was changed to assessment being based on the respondent's competencies and values, with policing knowledge being only one of the factors considered within that. So, instead of a candidate having to give an example of when they had done something, they now have to explain how to deal with a situation drawing on all of their experience and training and the guidance which is available.
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- 30 18. The Scottish Police Federation and the respondent's staff associations were consulted regarding the new promotions process. The staff associations included the Disability and Carers Association (DACA) of which the claimant is a member and currently the Chair. DACA is a mandatory consultee when

an equality and human rights impact assessment is being done. The consultation process was lengthy and the document at IJp180 summarised the issues raised by DACA and Mr Wright's response.

19. The key issue for DACA was regarding the use of the term "operational" and what it meant, because many officers with a disability undertake roles that are not operational and therefore cannot evidence operational ability. The respondent's response to this was to confirm that operational evidence was not required: the requirement was to evidence an understanding of police legislation, policy, procedures and that s/he could, if asked, apply them in an operational setting. Further, there was no requirement to demonstrate operational competence because this had been removed and changed to *"providing assessments that test job knowledge, leadership, behaviours and values as well as the application of police policy, procedure and legislation operationally"*.
20. The format of the interview/assessment is that there are three rooms each dealing with a different scenario. The candidate attends in each room and is given a scenario and has 15 minutes to consider it before answering questions, and supplementary questions, about the scenario. The responses are scored by two assessors in each room. The assessors are trained in the promotions process and the scoring of responses. The assessors will each have received a pack in advance of the assessment process, with explanatory notes setting out what should be covered in the response to the questions in order to gain a score of 1, 2, 3 or 4.
21. The scoring of the responses ranged from 1 – 4, with 1 being not met, 2 partially met, 3 met and 4 exceeds. The scoring sheet also provided a short candidate feedback but each assessor also provided a full note of the responses made by the candidate and the assessors comments. The assessors will discuss the responses given against the competencies and values and agree a score.
22. The scenarios/questions in the assessment process are set by qualified business Psychologists.

23. The new promotions process was subject to an Equality and Human Rights Impact Assessment. The promotions process has also been the subject of external review by HMiC. There is ongoing consultation, monitoring and review of the promotions process and data from each promotions process is collected and reviewed on an ongoing basis.

24. The respondent also made available a video of what the national assessment process would look like, so candidates would be familiar with the fact there would be three rooms each with assessors, and three different scenarios (being crime, major incident and HR).

#### 10 ***The claimant's assessment***

25. The claimant attended for interview at the National Assessment Centre on 25 July 2022.

26. The first scenario (A) (page 728) the claimant had to consider, concerned a fire in an unused building near a row of shops with flats above (page 728). The scenario, which the claimant had 15 minutes to consider, advised that he would be required to detail the risks, priorities and his actions; and it also confirmed the eight competencies the assessors would be looking for him to evidence, one of which was policing knowledge. The claimant scored 3 for each of the eight competencies and values assessed in scenario A, giving a total of 24 (page 698).

27. The second scenario (B) (page 730) the claimant had to consider, concerned a call from a local nursery stating a man had been on the premises with a knife and was threatening to injure staff. The man had now left the area and his whereabouts were unknown. As above, the claimant had 15 minutes to consider and then detail the risks, priorities and actions and was advised of the competencies and values the assessors would be looking for him to evidence. The claimant scored mainly 2s and 3s for scenario B, giving a total of 19 (page 696).

28. The claimant considered he had been disadvantaged in his responses to scenario B because he had been unable to find/access the Kidnapping and



Extortion SOP. The Kidnapping and Extortion SOP was removed from the intranet in 2016 and replaced by general guidance for all officers, which would have been accessible to the claimant. The scenario, and supplementary questions, were not a kidnapping and extortion scenario and the SOP and general guidance would not have been relevant in answering the questions. There is a specialist, fully trained team, to deal with kidnapping and extortion and any officer who learns of a kidnap would be required to inform a senior officer who in turn would allocate a senior trained officer.

29. The third scenario (C) (page 742) the claimant had to consider, concerned an HR situation where a discussion was to take place with a Sergeant regarding concerns raised about their performance. The claimant scored 2s for scenario C, giving a total of 16 (page 700).

30. The claimant scored an overall total of 59 points. The claimant scored better in the “response policing” scenarios than he did in the HR scenario. The assessors commented in both scenarios A and B (the response policing scenarios) that the claimant could have enhanced his scoring by use of a better structure.

31. The pass mark for the assessment was 49. The claimant, having scored 59, moved forward to the moderation process (candidates who scored less than 49, or who scored a 1 for any response, failed the assessment and did not move forward). The moderation panel was chaired by Ms Heather Cunningham, and present were ACC Spiers, ACC Mairs, Supt Wright, Supt Kennedy and Mr Jones from the Police Federation. The purpose of the moderation panel is to receive information regarding vacancies/anticipated retirements and where those vacancies may arise; how many Inspectors may be required balancing the anticipated number of vacancies with the desire not to have officers sitting in the promotions pool for longer than a year.

32. The officers who progress to the promotion pool are promoted according to their score and the vacancies which are available. Accordingly, officers with a higher score will be placed into a promoted post before lower-scoring officers. Officers in the promotions pool are paid at their current salary and only

achieve a higher salary when they obtain a promoted post. The respondent aims to run a promotions process each year and aims to not have officers in the promotions pool for longer than a year. This was introduced because officers awaiting promotion found it a stressful and demotivating experience.

- 5 33. Mr Wright's role at the moderation panel for 2022 was to present all of the relevant information (pages 870 – 879). There were 619 applications for promotion, of which 539 progressed to the assessment centre, and 342 progressed to moderation. The information also provided a breakdown of the divisions in East and West (where the promotions process was being run),  
10 detailing the number of applications received from each division, the number assessed, the number who were unsuccessful and the number progressing to moderation. There was also confirmation that there were 236 current Inspector vacancies, rising to 269 over the coming 12 months.
- 15 34. A summary of the moderation panel discussions was produced at page 869. This document was prepared after the appeals process had been concluded. The moderation panel decided to set a merit line at 60. This meant that only candidates who scored a total score of 60 and above would progress to substantive promotion. The merit line was set at 60 because candidates scoring between 49 and 59 must have scored a "partially met" in more  
20 competencies than a "met". The number of officers progressing to substantive promotion was 314.
35. The claimant did not meet the merit line and did not progress to substantive promotion.
- 25 36. The appeals process highlighted an anomaly in some cases where the positive assessor comments did not support a score of 1. Mr Wright obtained authority to carry out a review of the scores of all candidates and he identified 17 cases where the comments did not support a score of 1. The moderation panel was recalled, and it was agreed that a score of 1 had been wrongly given in 9 cases and in those cases the score of 1 was increased to 2 and the  
30 officers progressed to promotion.

37. The claimant was not affected by the above exercise because he had not scored any 1s.

***The claimant's appeal***

5 38. The claimant appealed against the outcome of the promotions process (page 758) on the basis that he felt he had been discriminated against in that process because he was a disabled officer. The claimant detailed his background and that he had, since 2014, and as a result of the impact of his disability, been undertaking solely non-operational roles and was therefore unable to develop operationally. The claimant argued that he had been  
10 discriminated against as a consequence of the two operationally focussed scenarios/assessments undertaken at interview and because of the importance placed on operational competence. The claimant sought an adjustment to his total score to enable him to attain promotion.

15 39. The appeal should have been sent to the claimant's Superintendent, but as they were on holiday, and the claimant wanted the appeal to be treated as confidential, he sent it to Ms Heather Cunningham, Head of Recruitment, Selection and Promotions. Ms Cunningham dealt with the claimant's appeal and responded by email of the 28 December (page 892) rejecting the claimant's position that he could have scored more highly if he had articulated  
20 operational actions/strategies. Ms Cunningham acknowledged the previous promotion process had required candidates to evidence that they had carried out a function and that much of that had focussed on front line policing. The current promotion process did not, however, ask candidates to evidence they had dealt with a police incident. Candidates were asked to prove that if faced  
25 with a police incident they had the knowledge to deal with it, and such knowledge was readily accessible to all officers via their experience and information available on the intranet, in policies and in guidance documents.

30 40. Ms Cunningham rejected the claimant's assertion there was unconscious bias on behalf of the assessors because all candidates were anonymised and therefore assessors would not know the current or previous roles of a candidate. Ms Cunningham also referred to all assessors being trained and

being given clear guidance in relation to assessing both competences and values and policing knowledge. She confirmed that the vast majority of the evaluation was formed from the candidate's demonstration of competencies and values rather than policing knowledge.

5 41. Ms Cunningham confirmed the promotions process had been equality impact assessed, and that the word "operational" did not form any part of the promotions policy. Ms Cunningham referred to the consultations which had taken place with DACA, following which all text had been adjusted to reflect that assessment should centre on candidates having sound legal knowledge and on them being conversant with current policies and procedures.

10 42. Ms Cunningham noted the claimant had performed better in the two scenarios where he claimed to have been discriminated against because they were "operational", and that it was in the third scenario (an HR scenario) that his performance had been poorer. Ms Cunningham also noted that the feedback of the assessors in respect of two scenarios both commented that structure could have been better.

15 43. Ms Cunningham rejected the claimant's appeal because she did not consider he had been discriminated against.

#### ***The claimant's grievance***

20 44. The claimant submitted a formal grievance on the 23 January 2023 (page 900). The claimant summarised the barrier he faced as being that he undertook an assessment encompassing an area of policing he hadn't experienced/utilised for the past 8 years. He felt he had failed in the promotions process because he was unable to fully articulate operational capability, experience or aptitude. The claimant considered the best a disabled officer could hope to score was a 3, rather than a 4 for any of the competencies.

25 45. Supt Stephen Meikle, was appointed to hear the grievance. He held a grievance meeting with the claimant on 22 March 2023.

46. Supt Meikle met with the claimant again on 12 May to deliver the grievance outcome, which was also confirmed in writing by letter of the same date (page 914). Supt Meikle decided not to uphold the grievance. Supt Meikle concluded there had not been any discrimination as alleged by the claimant. He  
5 concluded the claimant had not been placed at a disadvantage in comparison to an officer with recent operational experience. The reason for this was because the assessment was not purely testing operational knowledge but predominantly focussing on the competencies, behaviours and values. Supt Meikle also made reference to the consultations carried out with DACA  
10 regarding the new promotions process and to the equality and diversity monitoring carried out in respect of the 2022 promotions process.
47. Supt Meikle, who is a trained Assessor, rejected the claimant's assertion that it would be difficult for a disabled non-operational officer to attain a score of 4 in the assessment. He confirmed, drawing on his experience as an Assessor,  
15 that he had seen many candidates from non-operational roles being successful in the promotions process.
48. Supt Meikle also rejected the claimant's assertion that the inclusion of two operational scenarios in the assessment was not reasonable. He confirmed the respondent is a police service: the claimant was employed as a police  
20 officer and the rank of Inspector was a senior rank. A (non-operational) Inspector may be called upon to support a police response, and they need to be able to provide an assessment of what needs to be done even if they are in a non-operational role. Supt Meikle confirmed it was not unreasonable for the assessment to test whether would-be Inspectors had a sound policing  
25 knowledge based on Force policy, procedures and the law.
49. The claimant appealed against the grievance outcome. The grievance appeal was heard by Chief Superintendent Henderson and a grievance appeal outcome letter was issued on the 30th November 2023 (page 1036). One  
30 point of the grievance appeal, relating to the initial grievance not being dealt with within the relevant timescales, was upheld but all other points were not upheld.

***The second grievance***

50. The respondent has a number of staff associations, one of which is the Sex, Equality and Tackling Misogyny group (SETM) chaired by Chief Supt Sloan. Chief Supt Sloan asked Ms Jennifer Stuart, who was deputy chair of the Scottish Women's Development Forum, to meet with the promotions team to air any concerns regarding promotion and discuss resolutions.
51. The claimant suggested to Ms Stuart that it would be helpful for him to attend the meeting to discuss the results of a DACA survey. The claimant explained he had a conflict of interest and that he would get someone else to attend the meeting.
52. Ms Stuart sent an invite to attend a meeting on 10 October 2023 to Ms McGrath, National Promotions Manager, the claimant and one other, with Insp Steven Piercy noted as being an optional attendee (page 974). Ms Stuart noted in the invite: *"Iain – I know you said you have a conflict and would invite another member of your board – can you forward this on to them for attendance please"*.
53. Insp Piercy was on holiday on the date of the meeting and the claimant decided to attend. Ms McGrath was surprised to see the claimant at the meeting given his stated conflict of interest.
54. Ms McGrath spoke to Ms Cunningham after the meeting to express her discomfort with what had happened and confirmed she was not comfortable engaging in another meeting like that. Ms McGrath felt uncomfortable because of the claimant's behaviour at the meeting: she considered the discussion which had taken place had not been respectful and had gone beyond a difference of views.
55. Ms McGrath emailed Ms Stuart on 12 October (page 976) and referred to the claimant having raised that he had a conflict of interest around promotion. She had therefore been surprised to see him at the meeting, and felt his attendance had not been appropriate. Ms McGrath confirmed she had felt uncomfortable and, moving forward, would not be attending sessions in which

that conflict of interest existed, but would be happy to engage with Ms Stuart, Scottish Women's Development Forum and DACA otherwise.

56. There were no further requests for meetings of the sub-group. Ms McGrath continued to attend SETM meetings: the claimant has also been in attendance at those meetings.
57. The claimant raised a grievance regarding Ms McGrath and asserted her withdrawal from engagement with SETM sub-groups to identify and discuss discriminatory barriers to promotion resulted in a negative impact and this had happened as a direct result of his involvement and his ongoing challenge of related discriminatory practices (page 1045).
58. Chief Insp James Mann was appointed to deal with the grievance. He met with the claimant and then interviewed Ms Stuart; Chief Supt Sloan; Ms Marshall and Ms McGrath (notes of these interviews were produced as additional documents by the claimant). Ms McGrath told Chief Insp Mann that she felt the claimant had been domineering at the meeting and aggressive towards her. She had felt uncomfortable and had become quiet and withdrawn at the meeting.
59. Chief Insp Mann informed the claimant, by letter of 10 May 2024 (page 1056) that his grievance had not been upheld. He was satisfied Ms McGrath's decision not to attend future smaller SETM subgroups was due to the conflict of interest and her perception of the atmosphere of the meeting and feeling generally uncomfortable attending future meetings. Chief Insp Mann did recommend that should the need arise for a small group of staff associations to meet with the promotions team, then a suitable attendee from that team would attend to ensure communications continued at all levels. He also recommended that a member of the promotions senior management team provided an explanation to the claimant directly on the reason for withdrawal to ensure fairness and transparency.
60. Ms McGrath was, at the time of these events, aware the claimant had presented a claim to the Employment Tribunal.

**Statistical information**

61. There are 16,000 police officers in Scotland and approximately 2000 police officers have modified duties.
62. There are 831 Inspector roles and 3.04% of Inspectors have a declared disability.
63. There is no requirement to disclose a disability: accordingly the number of police officers who are disabled in terms of the Equality Act is not known. The statistical information provided regarding the number of disabled officers reflects only those police officers who have advised of their disability.
64. The information provided at page 639 showed the various policing divisions and the recorded disability rates:
- Contact, Command and Control = 7.63% recorded disability;*
- Corporate Services = 6.28%;*
- Criminal Justice Services = 11.81%*
- Local Policing = 3.16%*
- Operational Support = 3.60%*
- Partnerships, Prevention and*
- Community Wellbeing = 6.72%*
- Professionalism and Assurance = 9.88%*
- Specialist Crime Division = 3.13%*
- Police Scotland Profile = 3.78%*
65. The number of police officers, by rank, who have a recorded disability:
- Chief Inspector and above = 1.27%*
- Inspector = 3.04%*
- Sergeant = 3.94%*



*Constable = 3.87%*

*Overall profile = 3.78%*

- 5 66. A DACA survey report (November 2023) was produced at page 990. The survey (based on 116 responses from DACA members, not all of whom are disabled) showed a 94% belief that there were barriers to promotion because of disability or caring responsibilities. (This percentage was based on the responses of 49 people).
- 10 67. The claimant produced an analysis of the 2022 promotion selection data, based on some figures produced by the respondent for the moderation panel (IJ page 214). The analysis showed the number of applications received from the various policing divisions which had been divided into local policing and local policing support – operational divisions; and corporate functions – non-operational. The data showed that percentage success in progressing to moderation was higher in the operational divisions than in the non-operational divisions.
- 15 68. The claimant produced further analysis on page IJ 215 showing the percentage success and fail rates in each of the assessment scenarios for the operational divisions and non-operational divisions. The data showed much smaller differences between the operational and non-operational divisions. The operational divisions had an average failure rate of 12.5% for scenario A; 15.7% for scenario B and 16.6% for scenario C. The non-operational divisions had an average failure rate of 22.8%, 19% and 32.7% respectively for the scenarios.
- 20 69. The claimant’s classification of divisions as being “operational” or “non-operational” did not reflect the fact that in an operational division, approximately 25% of officers in those divisions will be operational (that is, will go out to attend at an incident). Further, in non-operational divisions, officers will be predominantly deployable if not on adjusted duties.

70. The figures for the number of officers with a disability were based on those officers who have declared their disability. Many officers do not disclose their disability and many officers with a disability remain operational.

5 71. The claimant provided no statistical information (or evidence) regarding either the number of officers who are not deployable or the number of officers who share his disability.

### **Credibility and notes on the evidence**

10 72. The tribunal found the claimant to be a credible witness, although he was absolute in his position that non-deployable disabled officers were disadvantaged in the promotions process because they did not have recent operational experience. The fact the respondent had changed its promotions process to remove focus on operational experience was simply not accepted by the claimant, who argued the change had been merely “*semantics*”.

15 73. The claimant was well prepared and had a good grasp of the issues and documentation, although at times got side-tracked and lost in the granular detail of the statistical evidence which he had prepared rather than explaining to the tribunal what he believed the information demonstrated. There were also times when the claimant lost sight of the fact the hearing was about his case rather than being an opportunity to put forward the general position and challenges of DACA. The tribunal acknowledged that many of the concerns raised by DACA were concerns raised by the claimant, but the claimant had to be reminded that this hearing was to determine whether he had been subjected to disability discrimination when going through the 2022 promotions process: it was not a forum to determine whether DACA’s position that the promotions process discriminated against disabled people generally was  
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25 correct.

30 74. The issue at the heart of this case related to operational policing and whether those in non-operational roles and who cannot be deployed are disadvantaged by this in the promotion process. This issue is addressed more fully below, but, in summary, the tribunal firstly acknowledged that operational policing had previously been the focus of the promotions process and

secondly, accepted that there had been a change in the promotions process to move away from this, as set out in the evidence of Mr Wright and Ms Cunningham. Candidates are no longer asked to evidence operational experience arising from when they were deployed: for example, candidates were previously asked to provide examples of when they dealt with a policing incident. This is no longer the promotions procedure. The (what we will term) “new” promotions procedure assesses eight competencies and values, of which policing knowledge is one. The procedure is not designed to test candidates as a response officer: it is designed to test that the candidate knows the policies, procedures and the law.

75. The tribunal noted that in the claimant’s assessment, he scored more highly for scenarios A and B (the response scenarios) than for the HR scenario. The tribunal considered this undermined and contradicted the claimant’s argument that as a non-operational officer he had been disadvantaged. We say that because the claimant performed well in the scenarios about which he sought to complain. Further, the feedback from the assessors in two scenarios made reference to the claimant scoring more highly if his responses had had a better structure. The structure of the response given by the claimant had nothing to do with being operational.

76. The assessors had also noted the claimant did not detail “risks” until two minutes into his response. The claimant argued that if he had had recent operational experience he would have noted the risks earlier in his response. The tribunal could not accept that argument because the scenario told each candidate to consider and then detail “1. Risks; 2. Priorities and 3. Your Actions”. We considered it very clear from this that detailing the risks arising from the scenario was the first thing to be noted.

77. The claimant also raised an issue regarding the Kidnapping and Extortion SOP not being available and he argued that he had been disadvantaged by this in responding to scenario B. The tribunal could not accept the claimant’s position on this and we preferred the evidence of Detective Supt Elliott, who is one of a small number of officers fully trained in kidnap and extortion. We accepted his evidence that the Kidnap and Extortion SOP had been removed

from the intranet in 2016 and replaced by general guidance, which is available to all with access to the intranet. We also accepted his evidence that scenario B and the supplementary questions, were not about kidnap and extortion. We concluded from this that the general guidance was available to all including the claimant and that the fact the SOP was not available had no bearing whatsoever on the responses to be given to scenario B.

78. The claimant sought to draw a distinction between officers who are disabled and hold a non-operational position and officers who hold a non-operational position. The claimant argued that although both are non-operational, those officers who are in such posts but could be deployed have the advantage of being able to obtain operational experience in order to prepare for interview, whereas disabled officers cannot be deployed and therefore cannot gain such experience. The tribunal acknowledged that holding a non-operational position will not bar an officer from being deployed if/when required except if the officer is disabled and cannot be deployed. This point however leads back to the focus of this complaint which is to what extent does not having operational experience cause disadvantage in the promotions process.

79. The claimant led some evidence regarding the Public Sector Equality Duty but accepted this did not form part of his claim. He also led evidence of training he had been unable to undertake or courses, such as the Police Incident Officer course, which he had not been able to do. The claimant accepted this was background and formed no part of his claim. In those circumstances, the tribunal has made no reference to these matters.

80. The tribunal heard evidence from Insp Steven Piercy; former temporary Insp Stuart; Insp Claire Hutchison and Sergeant Michael Bruce all of whom were or had been members of DACA, and who described themselves as having a disability and being in non-operational roles and not deployable. They (with the exception of Sergeant Bruce) gave evidence of feeling disadvantaged in the promotions process because they cannot obtain current operational experience.

81. Inspector Piercy went through the same promotions process as the claimant in 2022. He scored 24 for scenario A, 20 for scenario B and 14 for scenario C, giving a total of 58. His score did not meet the merit line and therefore he was not successful in gaining promotion. The tribunal noted from Insp Piercy's assessment that he, too, scored well in the operational/response policing scenarios (A and B). He told the tribunal that he would not have been able to pass scenario A if he had not had operational experience. However, the claimant scored the same mark for scenario A and the tribunal considered this demonstrated that a candidate without that operational experience could attain the same score as a candidate with operational experience and pass that scenario. Insp Piercy succeeded in achieving Inspector rank through the Accelerated Leadership programme.
82. Ms Stuart was not supported by her line manager when she wanted to go for promotion to Inspector.
83. Insp Hutchison achieved promotion to Inspector rank in 2019 (under the old promotions process which was based on operational experience) but was in the promotion pool for 26 months before being given an Inspector role. Insp Hutchison is now looking at the promotions process for Chief Insp.
84. Sergeant Bruce decided not to proceed with his application for promotion to Inspector.
85. These witnesses spoke of the feeling that having a disability and being non-deployable limited opportunities. They spoke of "*people being fearful*" of admitting disability, and of being "*sidelined*" and Insp Hutchison described admission of disability as being "*career suicide*". Sergeant Bruce told the tribunal that "*the majority of people with a disability get on with it and are operational*". They all supported the claimant's view that whilst reading policies and SOPs will give you the information, you cannot develop that without operational experience.
86. Ms Stuart also gave evidence regarding the meeting which Ms McGrath attended. She confirmed that she had not witnessed any inappropriate behaviour by the claimant.

87. The tribunal found the respondent's witnesses to be both credible and reliable. Mr Wright was a very impressive witness who spoke knowledgeably, clearly and confidently about the new promotions process and the measures taken, at the time and on an ongoing basis, to ensure fairness and transparency.
- 5 88. Mr Wright described scenario A as "*a low level generic incident*" of the type all officers would cover in basic training. He also described the claimant's score of 24 (scoring 3s for each competence/value) as "exceptional and confident". He confirmed scenario B was not a kidnap and extortion scenario and that the Kidnap and Extortion SOP was not relevant in any way to either  
10 the scenario or the supplementary questions. He would not have expected any candidate to have read the SOP because only a very small number of highly trained Inspectors deal with that issue. He noted the claimant had scored a mixture of 2s and 3s for scenario B and commented that the "structure" of the claimant's response had been raised again as an issue and  
15 told the tribunal that "*it is the structure which has impeded a higher score*".
89. Mr Wright considered that two policing scenarios being used in the promotion process was appropriate given the exercise was a police promotions process. He described the scenarios as "basic and generic" to allow candidates to demonstrate the competencies and values.
- 20 90. Mr Wright, in response to the analysis prepared by the claimant at IJpages 214 and 215 accepted the data tended to suggest that the difference in pass rates was because of being operational and non-operational, but he cautioned against relying on one set of data. He also questioned the way in which the claimant had broken down the information and challenged that it did not show  
25 who was doing what. Officers in modified roles sit across all divisions and all divisions have non front-facing roles, and on that basis Mr Wright could not accept the claimant's analysis. He noted that response policing is about 25% of a division. Mr Wright further noted that not all officers with a disability disclose it; not all officers with a disability hold non-operational roles and many  
30 non-operational roles are held by officers without a disability.

91. Chief Insp Mann gave his evidence in a very straightforward concise manner. He accepted the claimant had done nothing wrong (in terms of his behaviour at the meeting) but confirmed that the issue was about Ms McGrath's perception of the meeting and the fact she had felt uncomfortable at the meeting.
92. Ms Heather Cunningham gave her evidence in a very competent and assured manner. She rejected the claimant's suggestion that "*job knowledge equated to operational policing*" and explained that it related to the job knowledge of a police officer. The promotions process no longer asked about operational matters: it asked about policies and procedures which every police officer should know as a result of cadet training and knowledge acquired subsequently.
93. Ms Cunningham also explained the safeguards put in place to assess the equality impact of the promotions process and confirmed that the data for every protected characteristic was studied after each moderation panel and any negative impact assessed. Ms Cunningham also told the tribunal that the assessments were "*passed really well by people not in response: this is because you are not being tested as a response officer but you are being tested that you know the policies and procedures and the law*".
94. Ms Cunningham disagreed with the suggestion that operational experience would enhance policing knowledge because the data did not support it. She added that there was no trend via the data to support that officers are disadvantaged because of not being operational.
95. Ms Cunningham rejected the claimant's suggestion that the extract from the Equality, Diversity and Inclusion Assessment of the 2022 promotion process suggested there was a barrier for disabled people. She rejected the suggestion because the numbers were too small to support that conclusion. However, the respondent would seek to discuss such matters with the Equality, Diversity and Inclusion group if there was an issue and to seek advice whether anything needed to be changed.

96. Detective Supt Elliott gave his evidence in a straightforward, concise manner. We accepted his evidence that the Kidnap and Extortion SOP had been removed from the intranet in 2016 and replaced by general guidance available to all who have access to the intranet. We also accepted his evidence that scenario B was not a kidnap and extortion scenario. The claimant asked this witness if it had been unreasonable for him to think the scenario was the early stages of kidnap/extortion, to which the response was *"I do not know how you could have thought that"*.
97. Chief Supt Sloan's evidence was short and although she was aware Ms McGrath was not comfortable attending any further sub-group meetings, she did not meet/discuss this directly with Ms McGrath, but went through her line manager.
98. Ms McGrath gave her evidence in a straightforward manner and the tribunal accepted her evidence regarding the claimant's behaviour/her perception of it and how it had made her feel. Ms McGrath told the tribunal she had been surprised to see the claimant at the meeting because he had said he had a conflict of interest and would not attend. Ms McGrath was aware of the existence of the claimant's tribunal claim although she was not directly involved in it. Ms McGrath felt the claimant's behaviour at the meeting had been disrespectful: he had directly asked her a number of questions; spoken over her, was quite rude, shook his head and rolled his eyes. After the meeting Ms McGrath explained to Ms Cunningham that she was not comfortable engaging in another meeting like that. Ms McGrath explained that the reason for her decision was the claimant's behaviour albeit the conflict of interest had contributed but to a much lesser degree. She rejected the claimant's suggestion that she was lying about his behaviour and that the real reason for declining to attend further meetings was because of his grievance and/or the tribunal claim. Ms McGrath confirmed that only she knew how the claimant had made her feel: the manner of his questions, giving her no time to respond or cutting her off or speaking over her if he was not happy with the response.
99. Chief Supt Meikle also gave his evidence in a straightforward and clear manner and he explained very clearly to the tribunal why it was appropriate



to have two policing scenarios in the assessment and to assess policing knowledge.

### **Claimant's submissions**

- 5 100. The claimant's submissions are addressed more fully below (the submissions were repetitive in nature and so we have reflected the main submissions but not repeated them in respect of each claim), but in summary the claimant submitted the respondent had an overwhelming organisational bias towards operational policing with little thought given to disabled officers who may struggle to be deployed in that manner. The claimant considered he had experienced constant double standards and a refusal to consider data which supported the assertion a barrier existed. The claimant contrasted the preparations he could do for interview with the preparations deployable officers could do (although this was not part of his claim and the evidence was led to support the primary position that having operational experience was an advantage).
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- 20 101. The claimant submitted the promotions process was designed with the founding aim of assessing operational competence (Equality and Human Rights Impact Assessment). He submitted the respondent actively sought to promote people who are deployable. Further, the promotions process underlined the importance and advantage gained from recent operational experience or by those working in an operational policing division where it is easier to obtain greater operational experience.
- 25 102. The claimant submitted Mr Wright had not been an objective or credible witness because he had not been able to provide a reason why DACA's feedback on the promotion process had been discounted or why a full description of the national assessment process was not provided at that time. He was also unable to provide any documentation to support that the promotion process designers had undertaken an effective equality impact assessment of the national assessment process. He also provided a weak
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explanation for why disability related data is not used to identify barriers for disabled officers.

- 5 103. The claimant submitted Ms Cunningham had also not been an objective or credible witness and he referred to a number of the answers she had given to his questions.
104. The same submission was made in respect of Ms McGrath and Chief Insp Mann.
- 10 105. The claimant submitted his claim was not timebarred because although the national assessment took place on 25 July 2022, the disadvantage in relation to this was not fully known until marks and written feedback were provided on the 8 December. Further, at that time the claimant was engaged in the appeals process and making a request for a reasonable adjustment and the outcome of this was not given until 29 December. If the tribunal was not with him regarding this submission, the claimant submitted it would be just and equitable to allow his claim to proceed because he is an unrepresented claimant, had engaged in all internal processes to try to remedy the issue and considered that to have brought a claim at an earlier stage without all of the supporting evidence to hand could have appeared vexatious.
- 15 106. The claimant submitted that all officers who passed the national assessment should have been placed in the pool for promotion, failing which the respondent should have made a reasonable adjustment to his score so he met the merit line of 60. If this had happened the claimant argued he would have been promoted shortly thereafter due to the type of role he held. The claimant submitted he would thereafter have been promoted to Chief Inspector role. The claimant calculated his losses on this basis and also sought significant pension loss (as set out in the schedule of loss).
- 20 25 107. The claimant submitted he had been disappointed with the outcome of the promotions process and felt disheartened that such value is placed on going out operationally. The claimant's feelings of self-worth had been impacted.

**Respondent's submissions**

108. Ms Mackay submitted, in respect of each claim, that it was timebarred. The claimant had commenced early conciliation on 7 February 2023 and she submitted that anything alleged to have occurred prior to 8 November 2022 was timebarred under section 123 Equality Act. There had been no evidence regarding conduct extending over a period, or of why it may be just and equitable to grant an extension of time for the claim.

109. Ms Mackay made submissions in respect of each of the claims as set out in the List of Issues. These submissions are reflected below.

**Discussion and Decision*****Indirect Discrimination****The issues to be determined in this claim*

110. The issues to be determined in respect of this claim are:

- Is the complaint out of time having regard to section 123 Equality Act;
- If so, did the conduct form part of a chain of continuous conduct extending over a period which ended on or after 8 November 2022;
- If not, would it be just and equitable in the circumstances for the employment tribunal to consider this claim;
- Did the respondent apply a provision, criterion or practice of:
  - (i) requiring candidates for promotion to complete an assessment scenario which related to kidnapping;
  - (ii) requiring candidates to complete two assessment scenarios which are “operational” exercises and
  - (iii) requiring candidates to score 60 or more points in order to proceed to the promotions pool;

- What is the particular disadvantage you say that people who share your protected characteristic would have been put at when compared to other people who do not share that protected characteristic;
- Was the claimant put at this particular disadvantage due to having the protected characteristic and
- Can the respondent show the PCP to be a proportionate means of achieving a legitimate aim.

The tribunal decided to determine the issue of timebar – which is made in the same terms in respect of all complaints except victimisation – at the end of this Judgment.

*The relevant statutory provisions*

111. The tribunal firstly had regard to the statutory provisions set out in section 19 of the Equality Act 2010, which provide that:

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

112. The tribunal noted that all four conditions in section 19(2) Equality Act (as set out above) must be met before a successful claim for indirect discrimination can be established. That means, there must be a PCP which the employer applied to employees who do not share the protected characteristic of the claimant; that PCP must put people who share the claimant's protected characteristic at a particular disadvantage when compared with those who do not share that characteristic; the claimant must experience that particular disadvantage and the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

113. The tribunal also had regard to section 136 Equality Act which places the burden of proof on the claimant to establish the first, second and third elements of the definition of indirect discrimination: only then does it fall to the employer to justify the PCP as a proportionate means of achieving a legitimate aim.

*The first PCP*

114. The claimant argued there had been a requirement for candidates for promotion to complete an assessment scenario which related to kidnapping. The tribunal noted that it is crucial, in putting his case, that the claimant identifies the PCP with precision, otherwise the claim could fall at the first hurdle. The tribunal accordingly firstly considered whether there had been a PCP as identified by the claimant.

115. The tribunal noted the respondent had, as part of the 2022 Sergeant to Inspector promotions process for East/West, required all candidates to complete three assessment scenarios. One of the scenarios (scenario B) related to a call from a local nursery stating a man had been on the premises with a knife and was threatening to injure staff. The man had now left the area and his whereabouts were unknown. One of the supplementary questions to this scenario noted the man's daughter, who attended the nursery, had been removed by the man. The claimant considered this was a scenario/question involving kidnapping and answered it on that basis.

116. The tribunal preferred the evidence of DS Elliott and Mr Wright and found as a matter of fact that neither the scenario nor supplementary questions were about kidnapping. The claimant asked Mr Elliott whether he could rule out kidnap and extortion from this scenario, and DS Elliott responded “yes: *this scenario needs an overt response – we do covert*”. (The reference to “we” in DS Elliott’s response was to the specialist trained team, which deals with cases of kidnapping and extortion, and of which he is part). DS Elliott went on to explain that the police officers at the scene would need to ask further questions and no response from a specialist unit (which would deal with cases of kidnapping and extortion) would be required. The claimant asked, if it had been unreasonable for him to think it was the early stages of kidnap and extortion and DS Elliott replied “*I do not know how you thought that*”.
117. Mr Wright also confirmed that neither the scenario nor the supplementary questions were about kidnap and extortion.
118. The tribunal noted the claimant, in his submission, appeared to accept the scenario was not a kidnapping and extortion scenario. He stated “*I will happily concede to Detective Superintendent Elliott’s expert knowledge.*”
119. The tribunal, based on these points, concluded there was no requirement for candidates for promotion to complete an assessment scenario which related to kidnapping. The claimant has failed to identify the PCP said to have been applied and the claim in this respect must fail for that reason.
120. The tribunal noted that in the claimant’s submissions the arguments regarding this issue were put somewhat differently with the claimant acknowledging the PCP was the scenario relating to kidnapping, but arguing that he was “*indirectly discriminated as a result of Police Scotland removing their Kidnapping and Extortion SOP prior to assessment, preventing best preparation.*” We have set out above that it is the PCP which must put those who share the claimant’s protected characteristic, and the claimant, at a particular disadvantage. The argument advanced by the claimant in his submissions sought to argue that it was something other than the PCP which caused the particular disadvantage.

121. The Employment Judge had regard to the List of Issues during the hearing and on at least two occasions queried with parties whether the List of Issues correctly set out the issues and in particular the PCPs. The parties confirmed the List was correct. The tribunal acknowledged the claimant is an  
5 unrepresented party but he has had the benefit of legal advice in identifying the claims he wished to pursue.
122. The tribunal acknowledged that the claimant wished to argue that removal of the SOP had disadvantaged him in his preparations for the assessment. This is an argument which is individual to the claimant: there was no suggestion  
10 that others in the promotions process had equally thought the scenario concerned kidnapping and extortion. We say that based on the evidence of DS Elliott (that he did not know how the claimant had thought it was about kidnapping) and on the evidence of Mr Wright (who said he would not have expected any candidate to have read the SOP because it was not relevant to  
15 the scenario, and was not relevant to 99.9% of police).
123. The claimant did, in his submissions, argue that disabled non-deployable officers would be at a particular disadvantage by the removal of the SOP, but that submission was premised on the scenario being about kidnapping, which it was not.
- 20 124. This aspect of the claim of indirect discrimination was based on the PCP of requiring candidates for promotion to complete an assessment scenario which related to kidnapping. The claimant has not shown there was such a PCP in place and accordingly, for all of the reasons set out above, this aspect of the claim is dismissed.

25 *The second PCP*

125. The claimant next argued that the respondent applied a PCP of requiring candidates (for promotion) to complete two assessment scenarios which are “operational” exercises. There was no dispute regarding the fact that two of the three assessment scenarios were “operational” exercises (although  
30 during the hearing they were more often referred to as “response policing” scenarios). The tribunal was satisfied that this PCP was in place and was

applied to employees who do not share the protected characteristic of the claimant in circumstances where it was applied to all candidates in the promotions process.

5 126. The tribunal next asked whether the PCP put (or would put) people who share the claimant's disability at a particular disadvantage when compared with those who do not. The tribunal, having had regard to the terms of section 6(3) Equality Act, noted that in relation to disability, a reference to those who share a protected characteristic, is a reference to those who have the same disability. The claimant did not address the point of "those who share his disability" in his evidence. There was no evidence before the tribunal to inform 10 us of the number (or potential number) of officers who share the claimant's disability of having a back injury which causes them not to be deployable. Further, there was no evidence regarding the number of officers who cannot be deployed.

15 127. The tribunal noted that the purpose of indirect discrimination legislation is to challenge those employment practices that, while ostensibly applied in a neutral way, nonetheless have a greater disadvantageous effect on one protected group than on other people. Section 19 of the Equality Act requires a comparative exercise. In the Supreme Court's decision in **Essop v Home Office (UK Border Agency) 2017 ICR 640** it was stated that "*Essentially, the key is to identify a hurdle that has been placed in the way of the complainant and consider the range of persons affected by it. This will direct attention to the "pool for comparison" which is the focus of this section. The next step is to consider whether those persons within the selected pool who share the 20 relevant protected characteristic are more likely to fall at the hurdle than those who do not*".

25 128. The claimant, in his submission, invited the tribunal to compare two distinct groups, and they were those who work in an operational division compared with those who work in a non-operational division, and those who are operationally deployable compared with those who are not operationally 30 deployable. The tribunal did not consider the claimant had correctly identified the pool for comparison because (as helpfully set out in the above case) the



key is to identify the hurdle that has been placed in the way of the claimant – that is, the PCP - and consider the range of people affected by it. It is this that directs attention to the pool for comparison. Furthermore, the protected characteristic in this case is disability and disability does not define whether an officer is placed in an operational or non-operational division. There was no dispute regarding the fact disabled officers may hold operational or non-operational roles. The tribunal acknowledged the terms operational/deployable/front-facing were all used interchangeably throughout the hearing, but the key point related to disability causing an officer to be unable to be deployed. We say that because the crux of the claimant's case was that officers who were operational (that is, who could be deployed) gained operational experience which advantaged them in the promotions process, whereas officers who could not be deployed (regardless of whether they were in an operational or non-operational division) could not gain operational experience.

129. The tribunal was satisfied that the hurdle which had been placed in the way of the claimant was the PCP of requiring candidates for promotion to complete two assessment scenarios which were operational in nature. This PCP related to the 2022 East/West Sergeant to Inspector promotions process. We noted there were 619 applications for promotion, of which 539 took part in the national assessment. The tribunal concluded the pool for comparison was the 539 candidates who participated in the national assessment.

130. The claimant's document at IJ page 214 provided a breakdown of operational and non-operational divisions and the percentage of disabled officers within each division. There was no evidence beyond this to inform the tribunal how many disabled officers who were not deployable were in the total pool for comparison.

*Particular disadvantage*

131. The next step was to consider whether those persons within the selected pool who share the relevant protected characteristic (that is, who share the claimant's disability) were more likely to fall at that hurdle. We noted that when

making the comparison is was important to bear in mind that the claimant's group is restricted to those who have the same disability (section 6(3) above). We further noted that the Equality and Human Rights Commission Code provides that in relation to disability, those with the particular characteristic would not be disabled people as a whole, but people with a particular disability. This means that the "others" by whom reference to advantage or disadvantage is established, are necessarily a mixture of those without any disability and those with different disabilities.

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132. The tribunal, as stated above, had no information regarding the number of disabled officers who shared the claimant's disability or the number of disabled officers who were not deployable or whether there were any such officers in the pool for comparison (except for Insp Piercy). In the circumstances, we proceeded on the basis that the comparison to be made was between officers who were deployable and those, in the claimant's group, who, through disability could not be deployed. We acknowledged the claimant's group is more widely drawn than comprising only those with a back injury which led to them being not deployable but we considered this was appropriate in the circumstances because the crux was being deployable and not whether a back injury led to this.

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133. The claimant, in his submissions, argued generally that disabled officers were disadvantaged in the promotions process because (i) the design of the promotions process and the national assessment in particular favoured operational experience; (ii) they lacked operational experience; (iii) their previous operational knowledge and experience degraded over time and (iv) there were difficulties preparing for the assessment. The tribunal considered each of these points in turn.

- *The design of the promotions process*

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134. The claimant, in his submissions, argued the national assessment process was designed by an external agency, with the founding aim of assessing operational competence. He submitted the respondent aimed to actively

promote people who were operational and the assessment underlined the importance and advantage gained from recent operational experience.

135. The claimant made reference to the Equality and Human Rights Equality Impact Assessment for the promotions process (versions 13 and 14). The document produced at IJpage 222 was the Equality and Human Rights Equality and Impact Assessment in respect of the promotions process, version 13 (2020). The tribunal noted the aims of the promotions process were to ensure (amongst other things) that the selection process was fair, transparent and consistent and that selection was based on ability, talent and experience aligned to day to day performance. The claimant referred to an extract on IJpage 226, where it was stated *“Design of the promotion exercises was done after holding consultative forums with each specific rank, to seek the view of people currently within that rank and what the essential elements and criteria are for that rank. The same forums were then held with the line managers for each rank to confirm their view of the essential elements. From this information a framework was created, aligned to competencies and values, heavily focus on job knowledge, competence, leadership, values and behaviours. TMP the provider has provided assurance that their design processes take account of all protected characteristics”*.

136. The Equality and Human Rights Equality Impact Assessment for version 14 (October 2021, which the process which applied to the claimant) was at page 470. The tribunal noted the aims of the promotions procedure were the same as set out above. Further, under the heading of Disability (page 477) it was noted that *“consultee feedback from DACA had aided the amendment of certain elements of the procedure, including clarifying that “operational knowledge and ability” is what is tested not “operational competence which can be interpreted as time served operationally” which may be a substantial barrier”*.

137. The tribunal noted there was no dispute regarding the fact the respondent’s promotions process (prior to 2020) was previously focussed on officers being able to evidence operational experience, so questions would have been of the

type asking officers to give an example of when they had done a particular act or dealt with a particular incident.

138. The tribunal accepted the evidence of Mr Wright regarding the instruction from the Chief Constable to introduce a new promotions process, the reasons for that and the steps taken by the respondent to achieve it. The tribunal, accepting the evidence of Mr Wright supported by the documentation, accepted there was a specific and deliberate move away from operational competence being the focus of the promotions process. The tribunal, preferring the evidence of Mr Wright, and the supporting documentation, could not accept the claimant's submission that the national assessment process was designed with the founding aim of assessing operational competence.

139. The tribunal concluded from this that it could not accept the claimant's assertion that the change to the promotions process had been merely semantics. We accepted there was a very real change to the promotions process which put the respondent's Competencies and Values Framework at the heart of that process.

- *Lack of operational experience*

140. The claimant's case was that he was a disabled person and he held a non-operational position: he could not gain operational experience and was disadvantaged by this in dealing with scenarios A and B and answering the supplementary questions. The tribunal considered that the issue was more accurately put that the claimant was a disabled person and was not deployable: he could not be deployed to response/operational policing and therefore could not gain operational experience. We made that distinction because many officers in non-operational positions may still be deployed.

141. This issue was raised by DACA during the consultations process regarding the new promotions procedure which required candidates to demonstrate evidence of the competencies and values set out in the Framework document (page 1256). There was no dispute regarding the fact Mr Wright consulted with DACA regarding the promotions process and addressed all but one of the concerns raised by them. The issue of disabled persons being

disadvantaged because of their lack of operational ability was raised and discussed. Mr Wright confirmed during the consultation that *“operational evidence is not required, the requirement is to evidence that you understand police legislation, policy, procedures and could, if asked, apply them in an operational setting.”* Further, *“Operational competence has been removed and changed to “providing assessments that test job knowledge, leadership, behaviours and values as well as the application of police policy, procedure and legislation operationally.”*

142. The claimant challenged both Mr Wright and Ms Cunningham about the change to the promotions procedure and the thrust of his questions was that the change was nothing more than semantics. The claimant suggested to Mr Wright that the new promotions process was designed to test operational competence. Mr Wright disagreed and responded *“you are being tested on job knowledge once in room A and once in room B but the remainder is on competencies and values”*. The claimant suggested that he had not been operational for 8 years and questioned why this, and not having done the Police Incident Officer training, would not be a disadvantage when detailing the risks in the scenario outlined. Mr Wright responded that the Police Incident Officer training was done by very few and was very specific and not really relevant to the scenario. He described the scenario as being a *“generic police incident”*. He noted the claimant had done 2 years training as a probationer and gave his opinion that he would not have become a police constable if he could not deal with this type of incident. Mr Wright considered the claimant had an advantage because he had completed the Diploma and in his current role he was immersed in scenarios.

143. Ms Cunningham, in response to being asked about the impact of the new promotions procedure on disabled people replied *“In the previous process candidates had to talk about when they had been deployed. This process is much improved and does not discriminate because of being non-operational. Candidates are expected to talk about what they have learned during cadet training and knowledge acquired subsequently.”* Ms Cunningham went on to comment that *“the assessments are passed really well by people not in*

*response – the process is not testing you as a response officer, it is testing you know policies, procedures and the law”.*

144. The claimant questioned Ms Cunningham where non-deployable officers obtained the lived experience that operational officers would have. Ms Cunningham, in her response, made reference to the training the claimant had undertaken, the Diploma he had completed and his work in professional standards which she described as being *“police led with knowledge of policy and procedures.”* Ms Cunningham went on to say that *“the people who scored really highly had not been operational for years”.*

145. The tribunal noted a comment made by Ms Cunningham which we considered encapsulated the distinction between the old and new promotions processes. She said *“It’s not about you going out to arrest someone: it’s about you demonstrating you know how to”.*

- *Degrading of knowledge*

146. The claimant submitted he completed his probationary period 22 years ago and his Diploma 14 years ago. He had been promoted to Sergeant in 2018 (4 years after his injury resulting in disability) and all of his service as a Sergeant had been undertaking roles which were non-operational due to him not being able to be deployed. The claimant submitted that the degrading of knowledge was a concept widely accepted in academia and industry.

147. The tribunal noted the concept of the degrading of knowledge was not put to the respondent’s witnesses. In any event, the respondent’s position was as set out above.

- *Difficulties preparing for assessment*

148. The claimant’s submission in this respect followed on from his position that being unable to gain operational experience was a disadvantage. The claimant compared and contrasted the preparation an operational/deployable officer could take, with the preparations he could take. The claimant submitted deployable officers could move department to response policing; could be used for events; could shadow an operational Inspector and could undertake

course such as the Police Incident Officer course. The claimant was not able to undertake this type of preparation and had to rely on reading relevant SOPs and guidance.

5 149. The respondent did not dispute what was said by the claimant in terms of detailing the actions a deployable officer could take, however the core issue came back to whether the promotions process tested operational competence.

10 150. The claimant also complained about the fact there was no syllabus of assessment and no direction from the promotions teams on how to prepare or how to structure answers. The tribunal noted that whilst the promotions team may not have provided direction on how to structure answers, there was a national decision-making model available to all officers and which was used by the claimant. Furthermore, there was a video regarding the national assessment process, so candidates knew what to expect in terms of format.  
15 The tribunal noted the claimant accepted he was aware there would be three scenarios involving a police incident, a major incident and an HR scenario. The tribunal considered the points referred to by the claimant would impact on all officers in the pool for comparison and although the claimant submitted the impact on non-deployable officers would be greater, this argument was,  
20 again, based on the claimant's position that the promotions process tested operational competence.

25 151. The tribunal also had regard to the evidence of the witnesses called by the claimant all of whom were disabled officers who were non-deployable and all of whom were members of DACA. The witnesses (with the exception of Insp Piercy who has ADHD) did not disclose details of their disability and therefore the tribunal did not know if any shared the claimant's disability.

30 152. Insp Piercy took part in the same 2022 promotions process as the claimant. He scored a total of 58 (one point less than the claimant) and was not successful in moving forward to the moderation panel. He, like the claimant,

scored higher points for the operational scenarios than for the HR scenario. He achieved promotion to Inspector via the accelerated pathway. Ms Stuart was not supported by her line manager for the promotions process and so went no further with it. Insp Hutchison was successful in an earlier promotions process but was critical of the time it took the respondent to actually promote her. Sergeant Bruce applied for promotion in 2022 but then decided not to proceed. These witnesses, although speaking of their own experiences, all supported the claimant (and DACA) view that being non-deployable disadvantaged you in the promotions process because operational competence was being tested.

153. The tribunal did not doubt the feelings expressed by these witnesses. However, we had regard to the fact Insp Piercy performed better in the operational scenarios than in the non-operational scenario (he scored the same mark as the claimant for scenario A and one mark higher than the claimant for scenario B: he failed the non-operational scenario C). Insp Hutchison achieved promotion to the rank of Inspector under the old promotions process which tested operational competence and Mr Bruce and Ms Stuart did not take part in the promotions process. The tribunal did not consider the witnesses added to the arguments because their evidence merely repeated the points already made by the claimant in his evidence or in the DACA documentation.

- *Statistical evidence*

154. The tribunal next had regard to the statistical evidence led by the claimant. The statistical evidence was not at all clear to follow for a number of reasons which included the fact it had been prepared by the claimant based on some figures provided by the respondent but drew conclusions with which the respondent did not agree; looked at operational and non-operational divisions but did not disclose any information whether officers were deployable or non-deployable officers and took no account of a number of variables. For example, there was no dispute in this case regarding the fact that the number of officers recorded as having a disability represents only those officers who have declared their disability; many officers with a disability do not disclose it;



many officers with a disability are deployable and hold operational positions and many non-operational positions are held by officers who are deployable and/or who are not disabled.

5 155. The claimant's analysis of the 2022 promotions process was produced at IJ pages 214 and 215. The claimant's document set out the types of division, split into operational divisions (13) and non-operational divisions (4). The operational divisions were further divided into local policing divisions of which there were 10 and local policing support divisions of which there were 3. The document also showed the percentage of disabled officers in each division, 10 with the non-operational divisions having a higher proportion of disabled officers than all but one of the operational divisions. The document also showed the number of applications for promotion received from each division, the number assessed at the national assessment centre, the number that failed the national assessment, the number that progressed to moderation 15 and the number successful at moderation.

156. The claimant took from the figures that the failure rate at national assessment was higher for officers from the non-operational divisions (with one exception) and those divisions had the higher percentage of disabled officers. Accordingly, there was a bigger likelihood of failure if you worked in a non- 20 operational division. The claimant calculated that for those who were operational, there was a 32 – 50% increase in pass rate compared with those who were not. The claimant also argued that the document at IJpage 216, which showed the recorded disability rate by rank, demonstrated there were less disabled people the higher up the ranks and that this was due to barriers 25 in promotion.

157. Mr Wright was cross examined about the document at IJpages 214. He took issue with the terminology used because it was not terminology, or descriptions, used by the respondent. Mr Wright acknowledged that a few operational divisions had done exceptionally well in the promotions process and he accepted that based on the data produced by the claimant, it 30 suggested the reason for the difference was because some divisions were

operational. However, he considered that it was not appropriate to rely on one set of data.

158. The claimant suggested to Mr Wright that the failure rate at national assessment indicated that those who were in non-operational divisions were more likely to fail. The claimant suggested it was directly related to what people did. Mr Wright disagreed with that suggestion. He explained that the way in which the claimant had broken it down did not give a true picture of who was doing what. Officers in modified roles sat across all divisions and all divisions had non-operational roles. He could not accept the claimant's analysis and commented that response policing (that is, those officers who attend incidents) was about 25% of a division. Mr Wright thought the claimant was trying to show a difference between response policing and others in circumstances where very few did response policing: accordingly, the claimant was in the same position as all of the others.

159. The claimant put the same questions to Ms Cunningham who also disagreed with the suggestion that people in operational divisions had an advantage in the promotions process. She replied that she did not know how the claimant had put the data together, but it did not show what people in the divisions were doing on a daily basis and conclusions could not be reached without knowing this. For example, there were many modified officers in division C3, which is an operational division.

160. The tribunal concluded, having had regard to the above points, that the statistical analysis produced at IJpages 214 and 215 was not reliable and did not demonstrate the conclusions drawn by the claimant. We say that because although the percentage number of disabled officers in the non-operational divisions was higher, there was no clarity regarding whether those officers were deployable/non-deployable, and there was no clarity whether the candidates for promotion included disabled non-deployable officers. The tribunal could not, based on the statistical information, reach any conclusions in respect of the promotions process, regarding the position of officers who are not deployable.

161. The tribunal, having had regard to all of the points set out above, concluded the PCP did not put those who share the claimant's disability at a particular disadvantage when compared to those who do not. We say that principally because we did not accept the claimant's core position that the promotions process tested operational competence. We preferred the evidence of Mr Wright and Ms Cunningham, supported by the consultation documents and the Equality and Human Rights Impact Assessment. The promotions process has moved away from testing operational competence, to testing knowledge and ability under the Competency and Values Framework.
162. The tribunal, having concluded the promotions process does not test operational competence, further concluded (because it must follow) that lack of current operational experience was not a particular disadvantage because that is not what is being tested. The fact those in the claimant's group could not be deployed and gain operational experience, was not a disadvantage in undertaking the assessment.
163. The tribunal, when considering these arguments, drew a parallel with learning to drive a car. A person, when learning to drive a car, will study and have to pass a theory test based on the Highway Code and a practical test involving driving a car. Once a person has passed their driving test they do not lose that skill even if they do not drive a car for many years. The tribunal understood that candidates for promotion were not (to use our parallel) being assessed on their driving skills, but on whether (if called upon) they knew how to drive and could give instruction to someone to drive a car. The claimant (to use Ms Cunningham's words) was not being tested on going out to arrest someone, but on demonstrating he knew how to do it. There is a difference, and it is not – as suggested by the claimant – down to semantics.
- *Was the claimant put at a particular disadvantage*
164. The tribunal next considered whether the claimant had been put at that particular disadvantage. We had regard to the claimant's assessment. The claimant argued he would never be able to give as good an answer as an operational/deployable officer because although he would understand the scenarios, he lacked the recent and lived experience to understand the

interplay between things and was not up to speed with current interpretation. The claimant argued he would be unlikely to ever score a 4 in scenarios A and B.

5 165. The claimant cross examined the respondent's witnesses about this argument and they each rejected his position for the same reasons, being, the claimant was not being tested on operational competence; the claimant is a police officer and, in common with all police officers, he completed two years' basic training; he also completed his Diploma, and had 14 years' experience in operational policing before his accident; all relevant SOPs, policies and  
10 guidance are available on the intranet and of the eight competencies being assessed in scenarios A and B, only one in each scenario was about policing knowledge.

15 166. The tribunal had regard to the claimant's scoring for scenarios A and B. The claimant, in relation to scenario A, scored 3s for each of the competencies and values. The tribunal noted Mr Wright described the claimant's score of all 3s in scenario A as "exceptional and confident". The assessors noted that the claimant could have enhanced his score by a better structured presentation and identification of the risks sooner. In scenario B, the claimant scored a mixture of 2s and 3s. The assessors referred to a lack of coherent structure  
20 which led to repetition. In scenario C the claimant scored all 2s. This was the non-operational scenario. The claimant's scoring in these scenarios demonstrated that he scored more favourably in the operational scenarios than in the non-operational scenario and we considered this undermined his position in respect of this PCP. We also noted that the assessor comments in  
25 both scenarios A and B referred to the claimant being able to enhance his score using a better structure. The issue of the structure of the response was not linked to being operational/deployable.

30 167. The claimant did seek to argue that if he had had operational experience he would have known to highlight risks earlier in his response, but the tribunal could not accept that position in circumstances where the scenario clearly told candidates they were to address "*1/ Risks; 2/ Priorities; 3/ Your actions*".

168. The claimant told the tribunal he was unlikely ever to score a 4 in scenarios A and B, but the claimant was not required to score 4s. The claimant, if he had scored one more mark of 3 rather than 2, would have met the merit line mark.
169. The scoring of the assessment is based on eight competencies and values which a candidate is expected to demonstrate. In scenarios A and B one of the eight competencies was policing knowledge. The claimant scored a 3 for this in scenario A and a 2 in scenario B. The claimant submitted that whilst there may be one score for policing knowledge, it was the foundation upon which the wider competencies and values were interwoven.
170. The tribunal did not hear any direct evidence regarding the claimant's position that policing knowledge was the foundation upon which the wider competencies and values were interwoven and the claimant's position was not put to the respondent's witnesses. We did consider, as a general concept, the competencies and values are not individual unlinked matters: they all form part of the overarching Framework. However, the claimant's own assessment demonstrated that whilst his policing knowledge in scenario B was given a score of 2 (partially met), he was able to score 3s in some of the other competencies and values. This illustrated to the tribunal that policing knowledge was not determinative of the scoring for other competencies and values and that a lower score for policing knowledge did not detract necessarily from a candidate being able to score more highly in other competencies.
171. The tribunal, having concluded that those who share the claimant's disability were not put at a particular disadvantage by the application of the PCP, further concluded, for the same reasons, that the claimant was not put at a particular disadvantage by the application of the PCP. The tribunal decided, for these reasons, to dismiss this aspect of the claim.
- *Proportionate means of achieving a legitimate aim*
172. We should state that if the claimant had shown that those who share his disability were put at a particular disadvantage when compared to those who do not, and that he had been placed at that particular disadvantage, then the

tribunal would have had to determine whether the requirement for candidates for promotion to complete assessments which were operational exercises was a proportionate means of achieving a legitimate aim.

5 173. The legitimate aim, as set out by the respondent, was to keep people safe and have an effective police service. The claimant accepted that keeping people safe was a “core responsibility” of the respondent. The respondent submitted the PCP was reasonably necessary to achieve that aim and was proportionate. Put simply, if police officers do not know about policing they will not be able to carry out policing activities (in this case, from a supporting role).  
10 It was submitted there were no other means of achieving this and no less discriminatory means.

174. The claimant, in his submissions, accepted the respondent had detailed a legitimate aim, he however submitted the legitimate aim was not proportionate and that the assessment process could be changed to use non-policing  
15 scenarios or only 1 operational scenario and basing assessment on other things an Inspector would undertake such as budgeting, planning and process design.

175. The tribunal had regard to the Equality and Human Rights Employment Code which explains that for an aim to be legitimate, it must be “legal, should not  
20 be discriminatory in itself and it must represent a real, objective consideration”. The tribunal considered the aim of keeping people safe and having an effective police service was a legitimate aim. The respondent is the police service for Scotland, and the aim of keeping people safe and having an effective police service able to carry out police activities, was a legal, real and  
25 objective consideration.

176. The tribunal next had regard to proportionality. We had regard to the case of ***Webb v EMO Air Cargo (UK) Ltd 1993 ICR 175*** where the House of Lords expressly approved the objective test laid down in ***Hampson v Department of Education and Science 1990 ICR 511***. It was stated that the true test  
30 involved striking “an objective balance between the discriminatory effect of

*the condition and the reasonable needs of the party who applies the condition.”*

177. The tribunal also had regard to the Equality and Human Rights Commission Employment Code where it is stated that *“Even if the aim is a legitimate aim, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer’s reasons for applying it, taking into account all of the relevant facts”*.
178. The tribunal next had regard to whether there was a real need on the part of the respondent and noted (***Greater Manchester Police Authority v Lea 1990 IRLR 372***) that in order to carry out the proper balancing exercise there has to be a nexus established between the function of the employer and the imposition of the PCP. It is not enough for the respondent to have a desire to further some social need or reasonable policy.
179. We had regard to the evidence of Chief Supt Meikle, who was asked by the claimant why it was reasonable and proper to have operational scenarios as part of the assessment. Chief Supt Meikle responded to say *“we are the police service providing a 24/7 response to the public and major incidents. An Inspector could be supporting that response in a number of ways from non-operational, non-front facing roles. They need to be able to provide an assessment of what needs to be done even if in a non-operational role. It is not unreasonable to test whether would-be Inspectors have a sound policing knowledge based on Force policy, procedure and the law”*.
180. The tribunal, accepting the evidence of Chief Supt Meikle, was satisfied there was a nexus between the function of the employer (the police service for Scotland) and the imposition of the PCP.
181. We next asked whether the PCP was a proportionate means of achieving the legitimate aim. We concluded that having two operational scenarios as part of the national assessment was proportionate for two reasons. Firstly, given the respondent is the police service for Scotland, we considered it

proportionate to test whether candidates for promotion had a sound policing knowledge based on Force policy, procedure and the law. Secondly, we considered it proportionate because policing knowledge was not the only subject of assessment. Eight competencies and values were assessed, of which policing knowledge was one. We have referred above to the fact that the score for policing knowledge was not determinative of the scoring of other competencies and values. It was possible (as demonstrated by the claimant's score for scenario B) to score, for example, a 2 for policing knowledge, but score a 3 for other competencies and values.

182. We next asked whether the PCP was reasonably necessary. We considered it was reasonably necessary because the respondent cannot be in a position where higher ranking officers, such as Inspectors, cannot be called upon to support a response. We acknowledged there was evidence from the claimant's witnesses to the effect they had not ever been called upon to support operational colleagues. We do not doubt that evidence, but it does not change the fact that if a situation arose, the respondent needs to be able to rely on higher ranking officers such as Inspectors, to be able to support a response and make an assessment of what needs to be done. The rank of Inspector was described by Chief Supt Meikle as a "*crucial rank*" and he explained the respondent expected officers holding that rank to make critical decisions based on policy, procedure and the law: it was therefore necessary to test whether candidates had a sound knowledge of those matters.

183. The tribunal then turned to consider the discriminatory effect of the PCP. In the case of ***University of Manchester v Jones 1993 ICR 474*** the Court of Appeal held that in performing the balancing exercise required, it involved both a quantitative assessment of the numbers or proportions of people adversely affected and a qualitative assessment of the amount of damage and disappointment that may result to those persons, and how lasting or final that damage is.

184. There was no evidence before the tribunal regarding the numbers or proportions of people adversely affected by the PCP, beyond the fact the claimant and Insp Piercy did not achieve promotion. There was a general



assertion that disabled non-deployable people would be disadvantaged by the PCP but we do not know how many officers in that category applied for promotion and were unsuccessful – or indeed, successful. We also put into the balance the fact that Insp Hutchison, a disabled, non-deployable officer, was successful in an earlier promotions process.

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185. The claimant was clearly disappointed that he was not successful in achieving promotion. However, the promotion process is run every year and he has an opportunity to apply again. The evidence before the tribunal suggested that most people are not successful in achieving promotion the first time. Chief Supt Meikle, for example, was successful on the third occasion.

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186. We also put into the balance the fact that Insp Piercy had achieved promotion to Inspector through the accelerated pathway. The claimant could apply for and access the same route.

187. The claimant submitted the respondent could use alternatives to the two operational scenarios, such as non-policing based scenarios; reducing to one policing scenario and assessing other duties an Inspector may be required to undertake. The tribunal, in considering those alternatives, noted that using alternatives to operational scenarios and assessing other duties would not achieve the legitimate aim of the respondent. The alternative of using one operational scenario was not put to the respondent's witnesses for their comment. The tribunal considered, however, that the whole thrust of the claimant's case is that testing operational competence leads to disadvantage for disabled officers who are non-deployable. On that basis, the tribunal could not understand how reducing the operational scenarios from two to one would be an acceptable alternative because the core issue (as asserted by the claimant) would still remain. We acknowledged that one argument may be that a candidate in the claimant's position would have more opportunity to score higher points in other scenarios: however, this argument was not supported by the evidence which demonstrated the claimant scored lower in the HR scenario (as did Insp Piercy).

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188. We lastly had regard to the conduct of the respondent in introducing the new promotions process which included two operational scenarios. The steps taken by the respondent are referred to above and not repeated here: suffice to say the tribunal was satisfied the respondent, through its consultations with staff representative bodies (at the time of introducing the new promotions process and on an ongoing basis), conducted itself in a manner which was wholly reasonable and appropriate.

189. The tribunal, having put all of the above points into the balance, and for the reasons set out above, concluded the requirement for candidates to complete two operational assessments was a proportionate means of achieving a legitimate aim.

190. The tribunal, in conclusion, decided (i) those who share the claimant's disability were not put at a particular disadvantage by the application of the PCP, and, for the same reasons, the claimant was not put at a particular disadvantage by the application of the PCP and (ii) even if the claimant had been successful in showing the points at (i), the tribunal would have been satisfied the PCP was a proportionate means of achieving a legitimate aim. The tribunal dismissed this aspect of the claim for these reasons.

20 *The third PCP*

191. The claimant argued the respondent's requirement that candidates score 60 or more points in order to gain substantive promotion placed him and those who share his disability at a particular disadvantage when compared with those who do not.

192. The tribunal asked firstly whether there was such a requirement. We noted there was no dispute in this case regarding the fact the "pass mark" for the assessment was 48. This meant that all candidates (with the exception of those who had scored a 1) who scored 48 or more moved forward to the moderation panel. The moderation panel required to set a merit line because there were too many candidates for the number of projected promoted posts.

The merit line was set at 60. The tribunal accepted, and there was no dispute regarding this matter, that the respondent applied a requirement that in order to achieve promotion candidates required to score 60 or more points.

193. The tribunal next considered the pool for comparison and asked who was affected by this requirement. We answered that question, by noting the total pool for comparison was the 324 candidates who progressed to moderation (IJpage 214). There was no evidence regarding the number of disabled, non-deployable officers in the pool or the number of officers who shared the claimant's disability.
194. We next asked whether the PCP put (or would put) persons with whom the claimant shares a disability at a particular disadvantage when compared with persons with whom the claimant does not share it. The claimant argued generally that disabled, non-deployable people are significantly disadvantaged in the national assessment process and so are unlikely to meet the merit line requirement of 60 points. We have already dealt with this argument, above, and we do not repeat it here: suffice to say that we were not satisfied that disabled, non-deployable officers are disadvantaged in the promotions process.
195. The claimant's statistical analysis of the 2022 promotions process (IJpage 214) divided policing divisions into operational and non-operational and noted that a higher percentage of disabled officers was employed in the non-operational divisions. The statistics purported to show that the failure rate at national assessment was higher in non-operational divisions, as was the success rate at moderation. The difficulty with the statistical information is that we do not know how many disabled non-deployable officers applied for promotion or how they fared in the process. There were also anomalies in the figures where, for example, one operational division did at least as poorly as one non-operational division. Furthermore, the figures will be affected by a number of disabled officers who have not declared their disability and may work in an operational or non-operational division. The tribunal concluded for these reasons that the statistical analysis did not assist the claimant.

196. The tribunal, having decided that people who share the claimant's disability were not put at a particular disadvantage by the PCP, further decided the claimant was not put at that disadvantage. We say that for the reasons which are set out above and not repeated here.
- 5 197. The tribunal decided, for these reasons, to dismiss this aspect of the claim.
198. We should say that if we had had to determine whether the PCP was a proportionate means of achieving a legitimate aim, we would have decided that it was. We say that because the aim of ensuring the number of candidates in the pool awaiting substantive promotion does not greatly exceed the  
10 projected number of vacancies is a legitimate aim which is legal, non-discriminatory and real objective. The tribunal accepted the evidence of Mr Wright and Ms Cunningham when they explained the process undertaken by the moderation panel in order to arrive at the figure for the merit line. We also accepted Ms Cunningham's evidence regarding the negative impact on an  
15 officer if left too long in the pool awaiting a substantive post. Ms Cunningham gave a real example of this when she explained that previously, prior to there being a merit line, an officer had been in the pool awaiting substantive promotion for over 3 years and this had had a negative impact on his mental health. In addition to this, the promotions process is run every year and to  
20 delay that process because officers from the previous process are still awaiting promotion impacts on new talent coming through the promotions process and impacts on those wanting to pursue promotion.
199. Mr Wright and Ms Cunningham both considered the merit line should have been drawn at a higher figure than 60; however, the decision was made by  
25 the moderation panel, who also had regard to promoting those who scored more 3s (met) than 2s (partially met).
200. The tribunal was satisfied that in circumstances where the demand for promotion far outstrips the number of promoted posts available, the aim of the respondent to control/restrict those moving into the pool to await substantive  
30 promotion is necessary.

201. The number of candidates affected by the drawing of the merit line at 60 was 39. The impact on the claimant was that he did not achieve promotion to the rank of Inspector. The claimant will have an opportunity each year to re-apply for promotion or to go down the accelerated pathway route.

5 202. The tribunal concluded, having balanced all of the above factors, that the PCP was a proportionate means of achieving the legitimate aim.

203. The tribunal, in conclusion and for all of the reasons set out above, decided to dismiss the complaint of indirect discrimination in its entirety.

### **Discrimination arising from disability**

10 204. The Issues to be determined in respect of this complaint are:

- Is the complaint out of time having regard to section 123 Equality Act;
- If so, did the conduct form part of a chain of continuous conduct extending over a period which ended on or after 8th November 2022;
- If not, would it be just and equitable to extend time;
- 15 • Did the respondent treat the claimant unfavourably (i) by requiring him to complete two operational exercises and (ii) by drawing the merit line at 60 points;
- If so, was the unfavourable treatment due to something arising in consequence of the claimant's disability (the claimant not having recent operational experience due to his disability) and
- 20 • If so, was that treatment a proportionate means of achieving a legitimate aim.

205. The tribunal had regard to the statutory provisions set out in section 15 of the Equality Act 2010 which provide that a person discriminates against a disabled person if s/he treats the disabled person unfavourably because of something arising in consequence of the disabled person's disability and s/he cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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206. The tribunal had regard to the case of ***Secretary of State for Justice v Dunn EAT 0234/16*** where it was said there are four elements of a claim of discrimination arising from disability which must be made out in order for the claimant to succeed. The four elements are:

- 5           • there must be unfavourable treatment;
- there must be something arising in consequence of the claimant's disability;
- the unfavourable treatment must be because of (that is, caused by) the something that arises in consequence of the disability and
- 10           • the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

207. The claimant's case was that he had been treated unfavourably when (i) the respondent required the claimant to complete two operational exercises in the national assessment for promotion to Inspector and (ii) the claimant was not  
15 placed in the promotion pool because he did not meet the merit line set at 60.

208. The tribunal considered that it had dealt with the arguments relating to point (i), above, and we relied on our reasoning and conclusions (as set out above) in deciding that the claimant was not subjected to unfavourable treatment when he was required to complete two operational exercises at national  
20 assessment for promotion to Inspector.

209. The tribunal next asked if the claimant was treated unfavourably when he was not placed in the pool for substantive promotion because he did not meet the merit line of 60. We accepted the claimant was treated unfavourably in this respect. We asked whether that unfavourable treatment was caused by the  
25 claimant being unable to gain recent operational experience because he could not be deployed because of his disability. We answered that in the negative. We say that because we did not accept (for the reasons set out above) the claimant's primary position that not being deployable and able to gain operational experience disadvantaged him in the assessment process.

210. We decided, for these reasons, to dismiss this complaint.

### **Failure to make reasonable adjustments**

211. The Issues to be determined in this complaint are:

- Is this complaint out of time having regard to section 123 Equality Act;
- 5       • If so, did the conduct form part of a chain of continuous conduct extending over a period which ended on or after 8 November 2022;
- If not, would it be just and equitable to extend time;
- Did the PCP of requiring candidates to complete two operational exercises place the claimant at a substantial disadvantage when compared with persons who are not disabled;
- 10       • Did the respondent know, or ought reasonably to have known, that the claimant was placed at a disadvantage in regards to the PCP and
- If yes, would it have been a reasonable step for the respondent to have (i) adjusted the merit line or (ii) adjusted the claimant's overall score to avoid that disadvantage.
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212. The tribunal had regard to section 20 of the Equality Act 2010 which provides that where a PCP puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

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213. The first issue for the tribunal to consider is whether the claimant has shown there was a PCP of requiring candidates to complete two operational exercises and if so, whether that placed the claimant at a substantial disadvantage when compared with persons who are not disabled. The tribunal has already considered these issues (above) and, relying on our earlier reasoning and conclusion, we decided there was a PCP of requiring candidates to complete two operational exercises, but that it did not place the

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claimant at a substantial disadvantage when compared with persons who are not disabled.

214. We decided, for these reasons, to dismiss this claim.

## 5 **Victimisation**

215. The Issues to be determined in respect of this complaint are:

- was Ms McGrath's non-attendance at relevant meetings (or her expressed intention not to attend) because of the protected acts of (i) the claimant submitting a grievance alleging unlawful discrimination and/or (ii) submitting an employment tribunal claim alleging unlawful discrimination and
- has the claimant suffered a detriment.

216. The tribunal had regard to section 27 of the Equality Act which provides that a person victimises another person if s/he subjects them to a detriment because that person does a protected act. Subsection (2) sets out the meaning of protected act, which includes bringing proceedings under the Equality Act and making an allegation that another person has contravened the Equality Act.

217. The claimant asserted he had done two protected acts: (i) submitting a grievance alleging unlawful discrimination and (ii) submitting an employment tribunal claim alleging unlawful discrimination. The respondent accepted the claimant had done these two acts and that they amounted to protected acts in terms of section 27(2) of the Equality Act.

218. The tribunal noted that in terms of the grievance submitted by the claimant, this was on 23 January 2023; and the claim to the Employment Tribunal was presented on 20 April 2023. The alleged detriment (of Ms McGrath's expressed intention not to attend at relevant meetings) took place on 12 October 2023 when Ms Stuart was notified, but the claimant did not learn of this until "a few weeks later".



219. The first issue for the tribunal to determine is whether the claimant was subjected to a detriment. The claimant, in his submissions, detailed that he had suffered the following detriments:

- 5           • Ms McGrath not attending SETM sub-group meetings as a result of my involvement has reduced engagement with DACA on discriminatory issues affecting members (of which he was one) and effectively side-lined him;
- The questioning of his objectivity; and casting doubts on his integrity and professionalism;
- 10          • The undermining of his position as chair of DACA;
- It has made him feel ostracised at SETM meeting or other meetings attended by Ms McGrath;
- It has resulted in him leaning on the goodwill of the Deputy Chair of DACA to attend and represent DACA at SETM meetings and
- 15          • It was left him feeling angry and frustrated and increased his anxiety and negatively impacted on his confidence and wellbeing.

220. The first detriment alleged by the claimant was that Ms McGrath not attending SETM sub-group meetings as a result of his involvement had reduced engagement with DACA on discriminatory issues affecting members (of which he was one) and this had effectively side-lined him. The tribunal accepted the evidence of Ms McGrath that she told Ms Cunningham that she did not feel comfortable attending any further sub-group meetings if the claimant was going to be present. The position was that if there were to be further sub-group meetings then Ms McGrath would attend if DACA sent an alternative representative. The subsequent email sent by Chief Supt Sloan to Ms Stuart (page 986) stated Ms McGrath's position was that she would not attend any sub-groups. The tribunal accepted this did not accurately set out the position.

221. The tribunal did not accept the claimant was subjected to this first detriment because there was no reduced engagement with DACA. We say that because

there was engagement with DACA at SETM meetings and no further sub-group meetings were arranged, in any event, to take place. The claimant was not sidelined because he was able to (and did) attend the SETM meetings and Chief Supt Sloan confirmed by email of the 10 November (page 987) that the claimant was *“completely within his right to attend and represent DACA at any forum....”*

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222. The second detriment was questioning of the claimant’s objectivity and casting doubts on his integrity and professionalism. This detriment related to the allegations made by Ms McGrath regarding the claimant’s behaviour at the meeting on 10 October. The tribunal accepted that in making those allegations, Ms McGrath did cast doubt on the claimant’s integrity and professionalism, and that this amounted to a detriment.

223. The third detriment was the undermining of his position as chair of DACA. The tribunal did not consider the claimant’s position as Chair of DACA was undermined by these events. We say that because Chief Supt Sloan confirmed he was completely within his right to attend and represent DACA at any forum.

224. The fourth detriment was that this has made him feel ostracised at SETM meetings or other meetings attended by Ms McGrath. The claimant argued that he felt ostracised because he had been required to explain to others why he was not present and visible as the Chair of DACA. The tribunal had regard to the fact the claimant had been told by Chief Supt Sloan that he was completely within his right to attend and represent DACA at any forum, and that he did attend future SETM meetings. The tribunal, without details of what meetings he did not attend, and to whom he had had to explain the reasons for this, was unable to accept there was a detriment to the claimant.

225. The fifth detriment was this had resulted in him leaning on the goodwill of the Deputy Chair of DACA to attend and represent DACA at SETM meetings. The tribunal had regard to the clear guidance given by Chief Supt Sloan, and, given the claimant could (and did) attend SETM meetings, the tribunal did not accept the claimant had to lean on the goodwill of the Deputy Chair of DACA

to attend and represent DACA at SETM meetings and accordingly we concluded there was no detriment arising from this.

5 226. The final detriment was that this left him feeling angry and frustrated and increased his anxiety and negatively impacted on his confidence and wellbeing. The tribunal accepted the claimant's evidence and accepted this amounted to a detriment.

10 227. The tribunal, in conclusion, found that the claimant had been subjected to a detriment when doubt was cast on his integrity and professionalism and when he was left feeling angry and frustrated and negatively impacted in terms of his anxiety, confidence and wellbeing.

228. The next issue for the tribunal to determine is whether these detriments happened because the claimant had done the protected act of (i) submitting a grievance alleging unlawful discrimination and/or (ii) submitting an employment tribunal claim alleging unlawful discrimination.

15 229. The tribunal, when considering this issue, had regard to the fact the claimant's grievance alleging unlawful discrimination was submitted on 23 January 2023. The claim to the Employment Tribunal was presented on 20 April 2023. The alleged detriment (of Ms McGrath's expressed intention not to attend at relevant meetings) took place on 12 October 2023 when Ms Stuart was notified, but the claimant did not learn of this until "a few weeks later". There was a gap of some 9 months between the grievance and the detriments and a gap of some 6 months between the presentation of the employment tribunal claim and the detriments.

25 230. The tribunal next had regard to the fact Ms McGrath accepted that at the time of the sub-group meeting on 10 October and at the time she confirmed her intention not to attend further meetings like that, she was aware of the claimant's claim to the Employment Tribunal. We noted Ms McGrath did not in her evidence in chief make any reference to being aware of the claimant's (23 January 2023) grievance, and she was not asked about this in cross examination. The tribunal further noted that Chief Supt Meikle, who investigated the grievance, acknowledged he had been in contact with Ms

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Cunningham and Mr Wright regarding the grievance. There was no suggestion that he had met with or interviewed Ms McGrath regarding any aspect of that grievance. The tribunal concluded from this that in the absence of any evidence that Ms McGrath knew of the claimant's grievance nine months earlier, that grievance cannot have been the cause of the detriments. In other words, the claimant has been unable to show a causal link between the grievance and the detriments.

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231. The tribunal next asked whether the detriments identified above, happened because of the claimant having presented a claim to the Employment Tribunal. The claimant, in arguing that the detriments did happen for this reason, submitted that in her evidence Ms McGrath had been unable to effectively rationalise why his conflict of interest in challenging the promotions process and attending the meeting, was any greater than hers as manager of the process being challenged. The claimant also pointed to inconsistencies in Ms McGrath's evidence regarding awareness of his challenge to the promotions process. He also drew attention to the statement of Ms McGrath, which was obtained by Chief Insp Mann, where it was stated "*To explain about the conflict of interest, I am not going to a meeting where that conflict exists. Once it is passed and done then that would be fine*". The claimant submitted it was clear that his tribunal claim was at the very least a major factor, if not the sole driving force, in Ms McGrath's decision to withdraw from future SETM sub-group meetings.

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232. The tribunal had regard to the evidence of Ms McGrath at this hearing. Ms McGrath told the tribunal that given the claimant had raised that he had a conflict of interest, and given the terms of the invite to the meeting, she had been surprised to see him in attendance at the meeting. Ms McGrath did not feel the claimant's attendance at the meeting was appropriate because he had identified that he had a conflict of interest (albeit he had not detailed the nature of the conflict) and in the circumstances someone else should have attended.

233. Ms McGrath confirmed she had felt uncomfortable at the meeting due to the behaviour of the claimant and she informed Ms Cunningham that she did not

want to engage in another meeting like that. Ms McGrath was happy to attend the sub-group meetings provided the claimant was not present. Ms McGrath was also happy to, and did, attend the larger SETM meetings even if the claimant was present.

5 234. Ms McGrath told the tribunal that she withdrew from the meetings because she felt uncomfortable because of the claimant's behaviour which she described as having been disrespectful and more than an exchange of views.

235. Ms McGrath agreed in cross examination that there were two reasons for her withdrawal from future sub-group meetings if the claimant was going to be present and they were the claimant's conflict of interest and his behaviour, but she confirmed the main issue was the behaviour.

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236. Ms McGrath was interviewed by Chief Insp Mann when he investigated the claimant's grievance, and the notes of that interview were produced at IJ additional documents page 18. In that interview she told Chief Insp Mann the claimant had been *"very dominant and aggressive towards her"* and that *"[he] spoke solidly for almost half an hour ... it was hard to get a word in or reply .... Felt [the claimant] had a very challenging tone, shaking his head and eye rolling"*.

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237. The tribunal was also referred to a Precognition by Ms McGrath in January 2024 (page 1052). There was no evidence before the tribunal regarding the purposes for which this document had been prepared. Ms McGrath stated in that document that *"I felt in the meeting that PS Jeffrey was dominant and borderline aggressive. It felt personal. I refuse to speak to someone who is not going to speak professionally and with respect and I was unwilling to say something that could be used against me or Police Scotland in the Employment Tribunal."*

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238. The tribunal acknowledged there was a conflict between the evidence of the claimant and Ms McGrath regarding the claimant's behaviour at the meeting. We also acknowledged that the claimant's witness, Ms Stuart, agreed he had not acted as detailed by Ms McGrath. The tribunal did not make any findings regarding whether the claimant had acted as alleged because such findings

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are not material to the issues to be determined. The finding of fact that we did make, accepting the evidence of Ms McGrath, was that she considered the claimant's behaviour at the meeting to be disrespectful and she had felt uncomfortable because of that behaviour.

5 239. We asked whether the claimant was subjected to the detriment (set out  
above) because of submitting an employment tribunal claim alleging  
discrimination. In answering that question the tribunal must ask "*what,  
consciously or subconsciously, motivated the employer to subject the  
claimant to the detriment*". The case of **Chief Constable of West Yorkshire  
10 Police v Khan 2001 ICR 1065** made clear that the test is not a "*but for*" test.  
It was said that what the tribunal is required to do was *identify "the real  
reasons, the core reason, the causa causans, the motive for the treatment  
complained of"*. The tribunal noted that in that case the Chief Constable had  
refused to give a reference to the police force to which the claimant had  
15 applied. It was held that this was not because the claimant had brought a  
claim in the employment tribunal, but rather, because the provision of a  
reference might compromise the Chief Constable's handling of the case being  
brought against the respondent.

240. The tribunal considered that case to be helpful to our analysis in this case.  
20 The tribunal noted there was no dispute regarding the fact Ms McGrath was  
aware, prior to attending the meeting on 10 October, of the fact of the  
claimant's claim to the employment tribunal. She was not directly involved in  
the claim or preparations for the hearing, beyond providing some of the  
documents. In fact, absent the victimisation claim, Ms McGrath would not  
25 have been a witness in these proceedings.

241. The tribunal, as set out above, accepted Ms McGrath felt the claimant had  
been disrespectful and it had made her feel uncomfortable. We accepted that  
this was the main reason why Ms McGrath did not want to attend further sub-  
group meetings with the claimant present: she did not want to be placed in  
30 the same position of feeling uncomfortable again.

242. The claimant's conflict of interest was also part of the reason for Ms McGrath not wanting to attend further sub-group meetings at which the claimant was present. The tribunal accepted Ms McGrath's evidence (and there was no dispute about this) that it was the claimant who declared there was a conflict of interest, but he had not gone beyond that to specify what that conflict was. Ms McGrath's focus appeared to be more on the fact the claimant had declared a conflict of interest and, for that reason, had not intended to attend the meeting. She considered the fact he subsequently did attend, to be not appropriate.
243. The tribunal inferred from this evidence that when Ms McGrath spoke of the conflict of interest being part of the reason for her decision not to attend further sub-group meetings at which the claimant would be present, it was limited to the fact she considered that having declared a conflict of interest, and the claimant himself having said it would not be appropriate for him to attend the meeting, then someone from DACA, other than the claimant, should have been in attendance. Further, her decision not to attend future sub-group meetings was not motivated consciously or unconsciously by the fact the claimant had presented a claim to the Employment Tribunal, but rather by her desire not to say anything that may compromise the handling of the case being brought against the respondent.
244. The tribunal concluded from this that Ms McGrath's decision not to attend future sub-group meetings at which the claimant was present, was motivated consciously and subconsciously by the fact she felt uncomfortable during the meeting because of the claimant's behaviour, which she described as disrespectful and more than an exchange of views, and because she considered that having declared a conflict of interest and acknowledged it was not appropriate for him to attend, he did in fact attend, and she did not consider this to be appropriate. The tribunal further concluded that Ms McGrath did not take her decision because the claimant had submitted an employment tribunal claim alleging discrimination. The tribunal decided, for these reasons, to dismiss this aspect of the claim.

**Timebar**

245. The respondent's representative submitted that each claim (with the exception of the victimisation claim) was timebarred in terms of section 123 Equality Act because it had taken place more than three months prior to the presentation of the claim. Ms Mackay submitted the claimant had commenced early conciliation on the 7<sup>th</sup> February 2023 and it followed that anything alleged to have occurred prior to the 8<sup>th</sup> November 2022 was timebarred. Ms Mackay submitted that time started to run when the claimant attended the national assessment centre on the 25<sup>th</sup> July 2022 and no evidence had been given regarding the basis upon which it would be just and equitable to exercise discretion to allow the claim to proceed late. Further, there had been no argument advanced that there had been a continuing state of affairs.

246. The claimant, in his submissions, acknowledged the assessment had been undertaken on the 25<sup>th</sup> July but the disadvantage in relation to that process had not been known until marks and feedback were provided on the 8<sup>th</sup> December 2022. Further, the claimant had tried to resolve matters internally and had requested a reasonable adjustment and had not known the outcome of this until the 29<sup>th</sup> December 2022. The claimant invited the tribunal to find the claim had been presented in time.

247. The tribunal had regard to the terms of section 123 Equality Act which provides that a claim must be presented to the tribunal within three months of the act complained of, or such other period as the tribunal considered just and equitable. The section also makes provision for conduct extending over a period which is to be treated as done at the end of that period.

248. The tribunal next noted the claimant commenced early conciliation on the 7<sup>th</sup> February 2023. The claim was presented on the 20<sup>th</sup> April 2023. The tribunal noted that the complaints of discrimination (indirect discrimination and discrimination arising from disability) arose from the assessment undertaken by the claimant which started with attendance at the national assessment



centre on the 25<sup>th</sup> July 2023 and ended when he knew he had not been successful in gaining promotion (22<sup>nd</sup> November 2022) and when the respondent refused his request for a reasonable adjustment to be made to his score (29<sup>th</sup> December 2022).

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249. The tribunal could not, in the circumstances, accept the respondent's submission that the date of the act complained of was the 25<sup>th</sup> July 2022 because the claimant did not know, at that time, of the (alleged) discrimination. It was not until he knew he had not been successful in the process, and that his request for reasonable adjustments had been refused, that he considered discrimination had taken place. The tribunal concluded, in these circumstances, that the claim had been presented in time.

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### **Decision**

15 250. The tribunal decided, for all the reasons set out above, to dismiss the claim.

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**Employment Judge: L Wiseman**  
**Date of Judgment: 11 October 2024**  
**Entered in register: 15 October 2024**  
**and copied to parties**

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