THE INDUSTRIAL TRIBUNALS

CASE REF: 22467/19

CLAIMANT: **Julie Sweetlove**

RESPONDENT: **Ministry of Defence**

JUDGMENT

The unanimous judgment of the tribunal is that:-

(i) The claimant's application to amend her claim is refused as the tribunal does not have jurisdiction to hear a claim of direct discrimination on grounds of perceived disability.

(ii) The claim of direct discrimination on grounds of disability is dismissed due to a lack of jurisdiction.

(iii) The respondent did not subject the claimant to direct sex discrimination and that claim is dismissed.

(iv) The claimant did not suffer an unauthorised deduction from wages and that claim is dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Tiffney**

Members: **Mr I Carroll**
Mr M McKeown

APPEARANCES:

The claimant was represented by Ms Emma McIlveen, Barrister-at-Law, instructed by Mr D Mitchell, Solicitor of Millar McCall and Wylie Solicitors.

The respondent was represented by Ms Rachel Best, Barrister-at-Law, instructed by Ms E McNamee, Solicitor of the Crown Solicitor's Office.

OVERVIEW

1. On 7 October 2019 the claimant presented a claim to the tribunal claiming discrimination on grounds of disability, sex, and unauthorised deduction from wages. The claimant was removed from her role as an Armed Guard due to

hearing difficulties she experienced during a mandatory annual training exercise on an outdoor firing range on 9 May 2019. Thereafter, following assessment by Occupational Health and having failed a functioning hearing test, the respondent deemed the claimant unfit for her role as an Armed Guard and applied its Capability Policy. Consequently, the claimant was redeployed into an administrative role in September 2019. The administrative role was at the same grade and salary band as the claimant's role as an Armed Guard. However, the role did not attract payments in the form of allowances, namely, a regular shift allowance, flexible shift allowance and arming allowance. The claimant received all these allowances in her role as Armed Guard as that role involved shift work, working unsociable hours and required the claimant to carry a weapon. The claimant remains employed by the respondent but is currently on sick leave.

2. The claimant alleged that several acts of the respondent which arose out of the factual matrix summarised above, amounted to direct discrimination on grounds of disability and sex. The claimant alleged this discriminatory conduct made her feel that she had no choice but to accept the offer of redeployment which in turn caused her to suffer a loss of job status and a loss of earnings by virtue of the loss of the allowances referred to above. The claimant also alleged the loss of these allowances amounted to an unauthorised deduction from wages.

3. The respondent denied the claimant's claims in their entirety and maintained that at all material times, it acted in accordance with its policies and procedures and did not subject the claimant to less favourable treatment on any protected ground, notably on grounds of disability or sex. The respondent contended that to be safely deployed using a loaded weapon, an Armed Guard must undertake and pass annual mandatory training in the use of firearms. Part of that training involves a shoot using live ammunition at a firing range. During this training exercise the Armed Guard must wear double ear protection. Due to the physical nature of that double ear protection the Armed Guard cannot use hearing aids. Armed Guards must be able to hear the words of command during this training exercise. The respondent maintained its impugned treatment of the claimant was appropriate given the claimant's inability to hear during the training session on 9 May 2019 and her failure to pass a functional field test recommended by Occupational Health and did not amount to less favourable treatment on either protected ground. The respondent also denied the claimant had no option but to accept the offer of redeployment and pointed to other options open to her. The respondent further contended that by virtue of the claimant's acceptance of the offer of redeployment, the claimant agreed to associated changes to her contract of employment, notably the loss of entitlement to the above-mentioned allowances. Unlike the role of Armed Guard, the administrative role did not require the claimant to work shifts, unsociable hours or carry a weapon and thus did not attract any additional payments associated with these requirements.

Amendment Application

4. During the case management of these proceedings the claimant's legal representatives indicated that the claimant wished to apply to amend her claim form. The amendment purported to replace the claim of direct disability discrimination with the ground of perceived disability. Thus, that application raised a

jurisdictional issue which involved interpretation of European law. As this preliminary issue significantly influenced the issues in dispute, it is beneficial to outline the scope of and background to the amendment application at this point.

5. A preliminary issue in these proceedings is whether the claimant's application to amend her claim should be granted. The following uncontested facts disclose the background and substance of this application.

(i) The health condition relied on by the claimant in respect of her disability discrimination claim is bilateral hearing loss. The respondent did not accept this health condition rendered the claimant a "disabled person" as defined within Section 1 and Schedule 1 of the Disability Discrimination Act 1995 (as amended) ("*the DDA*").

(ii) As this issue was in contention the claimant obtained a medical report which was served on the respondent on 21 June 2021. The report (dated 22 May 2021) was prepared by a Mr R Ullah, Consultant ENT Surgeon. In relation to the question of hearing disability, Mr Ullah concluded in his report that the claimant's hearing loss did not render her "*hearing disabled*". Consequently, the respondent invited the claimant to withdraw her disability discrimination claim. The claimant did not accede to this request.

(iii) At a Case Management Preliminary Hearing ("*CMPH*") on 17 September 2021, the case was timetabled for a substantive hearing to take place in December 2021. The respondent's request for a Deposit Hearing to consider its application for a Deposit Order re the disability discrimination claim was granted and listed for 14 October 2021. That application was not heard as the claimant's representative, Ms McIlveen, indicated at the Deposit Hearing that the claimant wished to pursue a disability discrimination claim on grounds of "perceived disability". It was accepted that to pursue that claim, the claimant's claim would require amendment. The substantive hearing was adjourned to afford the claimant's side time to assess whether an amendment application was required. The tribunal ordered the claimant to set out the scope of this amendment to the respondent by 25 November 2021. Thereafter, following consideration of the amendment issue, the parties were directed to revert to the tribunal to indicate whether a Preliminary Hearing was required to address any amendment application.

(iv) Neither side contacted the tribunal until 8 March 2022, when the respondent requested a new date for the Deposit Hearing. At that point the scope of any amendment application had not been set out.

(v) At CMPH took place on 24 May 2022. Ms McIlveen informed the tribunal that the claimant's instructing solicitor learned on 4 April 2022 that the claimant had been diagnosed with dementia and on 16 May 2022 that the claimant had been diagnosed with primary progressive aphasia which affects her speech and language abilities. This development is referred to in more detail in the Procedure section of this judgment. The central point is that these developments engaged the claimant's Article 6 rights which dictated that the claimant's case be heard as quickly as possible.

(vi) At this CMPH the Employment Judge emphasised that the legal basis of the perceived disability discrimination claim did not require instructions from the claimant and must be identified at the next CMPH.

(vii) In advance of the next CMPH which took place on 12 August 2022, Ms McIlveen set out the scope and legal basis of the amendment application in writing. That submission indicated it was the claimant's case that a reference to the Court of Justice of the European Union ("*CJEU*") was not required as the DDA should be read in such a way as to include a claim on grounds of perceived disability and give effect to the EU Directive. This process is reminiscent of the process adopted by the EAT in the case of ***EBR Attridge Law v Coleman [2010] 1 CMLR 28*** which involved associative discrimination under the DDA, in relation to direct discrimination and harassment. Ms McIveen contended that if the tribunal hearing that point concluded that it did not have to power to do so, it should make a reference to the CJEU to determine the matter pursuant to Rule 97 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 ("*the Rules of Procedure*"). The submission referred to the Equality Act 2010 (*"EqA*") which applies in England and Wales and authorities interpreting that legislation including authorities relating to associative discrimination which has been an element of discrimination under the DDA since ***Coleman.***

(viii) On 19 August 2022, the claimant applied to the tribunal to amend her claim to include a claim of discrimination on grounds of perceived disability. An amended claim form was appended to this application with the proposed amendments highlighted. Those amendments comprised of the addition of the words "*actual or perceived*" in two paragraphs of the details of claim section of the claim forms as follows;

> "*The Claimant submits that the new role to which she has been appointed is not a suitable alternative role and is discriminatory on the basis of actual or perceived disability and sex*.
>
> *The Claimant has struggled with mental health difficulties as a result of her change in role, alleged actual or perceived disability discrimination and sex discrimination*."

(ix) That proposed insertion was refined at the outset of the main hearing, to only the insertion of the word "*perceived*" in the two paragraphs cited above. This refinement reflected the claimant's concession that at the relevant time her hearing loss did not render her a disabled person within the meaning of the DDA. That concession was confirmed by Ms McIlveen at a CMPH on 14 September 2022. The Employment Judge determined at that CMPH, that it was not appropriate to strike out the claimant's existing disability discrimination claim, notwithstanding this concession, on the basis that the claimant's amendment application was still extant and the claimant's related contention her direct discrimination claim could be pursued on grounds of "perceived disability".

(x) The claimant served an addendum to her witness statement on 26 August 2022. That evidence was brief, running to one and a half pages and was confined to the evidence the claimant wished to give in support of her proposed perceived disability discrimination claim. The respondent had already served 10 witness statements.

(xi) At the CMPH on 14 September 2022, Ms Best, for the respondent, noted that if the claimant's amendment was granted, it was unlikely to result in much additional evidence being required in relation to the amended claim and would primarily involve legal submissions. Following discussion, the Employment Judge directed the amendment application would be dealt with as part of the substantive claim at the full Hearing.

(xii) The respondent was given time to serve amended statements to take account of any perceived disability discrimination claim allowed by way of amendment but did not do so. Time was given to the parties to amend the agreed legal and factual issues document to reflect the changes to the claimant's case. The resultant amended issues were discussed at a CMPH on 12 October 2022. The representatives of the parties agreed the issues document required further amendment to reflect the fact the claimant was no longer pursuing a reasonable adjustments claim.

ISSUES

6. An agreed list of legal and factual issues was included in the hearing bundle (at pages 80-82) and an agreed one-page chronology of relevant events. That list was refined following clarification by Ms McIveen, during a CMPH on the first day of hearing that three factual issues should be deleted as they related to the reasonable adjustments claim which the claimant had withdrawn (see paragraph 5 (xii) above). Ms McIlveen also confirmed the claimant's disability discrimination claim was solely a claim of direct discrimination on grounds of perceived disability pursuant to Section 3A(5) of the DDA and acknowledged that pursuit of that claim was subject to the tribunal granting the claimant's application to amend her claim. Despite this clarification the agreed issues referred to Section 3B of the DDA which deals with harassment on grounds of disability. However, no such claim was pursued by the claimant in the pleadings, witness statements or during the hearing. As no such claim was advanced, the tribunal considered that reference to be a typographical error.

7. At the outset of the Submissions Hearing the tribunal raised several issues with both representatives arising from their written submissions. After time to consider those issues, Ms McIlveen indicated the claimant wished to refine her claims of direct discrimination on grounds of perceived disability and sex. Key changes were the withdrawal of the following claims:

(i) Requiring the claimant to leave the firing range on 9 May 2019 due to her perceived hearing difficulties.

(ii) Failing to allow the claimant to wear hearing aids whilst on the firing range.

(iii) Failing to allow the claimant to retake the hearing test.

For the avoidance of doubt, point (i) is a claim of direct discrimination on the ground of perceived disability. Points (ii) and (iii) were alleged acts of direct sex discrimination. The hearing test referred to at point (iii) related to the test on the firing range with live fire on 9 May and the subsequent functional test.

8. Those changes considerably narrowed the scope of the direct discrimination claims on both protected grounds and shifted their focus. It rendered a significant amount of the evidence heard, irrelevant to the issues in dispute. The actions of the respondent on 9 May 2019 had been a key focus of the claimant's case and was considered in detail during cross-examination of the relevant witnesses for the respondent. Much of the evidence arising from that focus was immaterial. Thus, the final agreed legal and factual issues, edited due to the refinement of the case and obvious typographical errors were as follows:-

Legal Issues

"Disability Discrimination – Perceived (Direct)

1. *Did the claimant suffer less favourable treatment on the grounds of perceived disability contrary to Section 3A of the Disability Discrimination Act 1995, compared with the claimant's hypothetical comparator?*

   The claimant contends that her hearing difficulties amounted to a perceived disability. The claimant alleges that she was subject to the following:

   (a) Placing the claimant on sickness absence due to her perceived hearing difficulties.

   (b) Removing the claimant from her role due to her perceived hearing difficulties.

   (c) Requiring the claimant to submit sick lines when she was not sick due to her perceived hearing difficulties.

   (d) Subjecting the claimant to capability proceedings due to her perceived hearing difficulties.

   (e) Deeming the claimant unfit to carry a weapon as a result of her perceived hearing difficulties."

9. As outlined above, pursuit of this claim is subject to the tribunal granting the claimant's application to amend her claim in the terms sought. It also subject to the inextricably linked question of whether the tribunal has jurisdiction under the DDA to hear a claim on grounds of perceived disability.

"Sex Discrimination

3. *Did the claimant suffer less favourable treatment on the grounds of sex compared with her comparators, namely her male colleagues, Mr Watson, Mr Andrews, Mr Keenan (referred to at paragraph 31 of the claimant's witness statement) and Mr Cooper? (The claimant will also rely on if necessary a hypothetical male comparator). The claimant alleges that she*

was subject to the following:-

(a) Failing to allow the claimant to perform her role with hearing aids.

(b) Removing the claimant from her substantive role."

The claimant contends as a result of this alleged discriminatory treatment (on either or both protected grounds) she suffered the following detriments:-

"*(a) Placing the claimant in a position where she felt she had no choice to accept the alternative role at Aldergrove as an Administrator.*

(b) Placing the claimant in a position which has resulted in loss of job status with less remuneration."

It is common case that the claimant's sex discrimination claim is a claim of direct discrimination contrary to Article 3 of the Sex Discrimination (Northern Ireland) Order 1996 ("SDO").

"Deduction of Wages

4. *Whether or not the claimant has sustained an unauthorised deduction from wages pursuant to Article 45 of the Employment Rights (NI) Order 1996 ("the ERO") due to her change in role?*

Main Factual Issues

(1) *Is a hearing test and certain hearing standards required for the claimant's role as an Armed Guard?*

(2) If so, is it because the Armed Guards use live ammunition, and it is therefore a health and safety issue?

(3) Did the claimant use a hearing aid during Field Testing on 9 May 2019? If so, was the respondent aware that she was wearing it?

(4) Was the use of a hearing aid permitted in the field/hearing test?

(5) What were the circumstances that led to the claimant having to leave the Field Test on 9 May 2019?

(6) What were the circumstances that led to the claimant failing the Field Test on 9 June 2019?

(7) If so, did the respondent conduct Field Testing to assess the claimant's hearing with the use of a hearing aid?

(8) Did the claimant's hearing fall below the respondent's required standard?

(9) Does the respondent permit its Armed Guards to wear hearing aids?

(10) Does the respondent have other employees who wear aids whilst on the

firing range? If so, are any of them female?

(11) Was the claimant's change in role done with her consent in August 2019?

(12) When did the respondent inform the claimant of her change in role?

(13) Did the respondent consider allowing the claimant to complete a retest?

(14) Whether Occupational Health deemed the claimant unfit for her role as Armed Guard? If so, at what point was this decided?

(15) Whether the claimant is paid a lower salary since she moved to the role of Unit Application Administrator?

(16) In the event that the claimant succeeds in any or all of her complaints, what remedy is she entitled to?"

10. The refinement and shift of focus of the claimant's discrimination claims meant that some of the factual issues were not relevant or were of tangential relevance to the legal issues. It also transpired that some factual issues were not in dispute.

11. During a CMPH on 12 October 2022 it was determined that this hearing would proceed to address the issue of liability only, with a separate Remedy Hearing to be listed thereafter, if appropriate.

PROCEDURE

Case Management

12. This case was extensively case managed. There were eight CMPHs over the period February 2020 to October 2022. The hearing was listed for a substantive Hearing in December 2020, relisted to December 2021 and a Deposit Hearing on 14 October 2021. For a variety of reasons, including Covid and the claimant's amendment application, those hearings could not progress. A Ground Rules Hearing ("*GRH*") took place on 12 October 2022 relating to the claimant's capacity.

13. Two issues arose during the case management process which added to its complexity: namely the claimant's amendment application and her diagnoses of dementia and primary progressive aphasia. The nature and impact of these health conditions on the claimant meant her Article 6 rights to a fair hearing were engaged. It also meant that time was of the essence. Therefore, tight deadlines were given for completion of hearing preparations to ensure the claimant's evidence could be heard as quickly as possible. Key Orders and information arising from the more recent case management process, including the adjustments required for the substantive Hearing are outlined below.

CMPH on 24 May 2022

14. (i) The tribunal was informed that because of the claimant's diagnoses, her ability to participate in a hearing and provide instructions to her legal team would be assessed by a Consultant Psychiatrist, Doctor B English on 28 May 2022.

(ii) The Employment Judge directed that should the report from Doctor English form the basis of any application for reasonable adjustments or raise an issue about the claimant's capacity to litigate or take part in a Hearing, it should be shared with the other side and the tribunal in good time before the next CMPH.

(iii) Subject to the findings of Doctor English, the Employment Judge directed that the substantive Hearing would be listed in Autumn 2022 to ensure a fair trial of the issues in dispute.

CMPH – 12 August 2022

15. (iv) The report from Doctor English confirmed the claimant was capable to litigate and give instructions. However, Doctor English noted that her condition was unpredictable and progressive in nature.

(v) The claimant's application for the appointment of a Registered Intermediatory ("*RI*") to provide a report to the tribunal was granted and the Employment Judge undertook to request that process to be expedited in the circumstances.

(vi) The Employment Judge directed the claimant's evidence to be taken as quickly as possible. Therefore, tight deadlines were given for service of any amended witness statements to address the claimant's proposed amended claim.

CMPH – 14 September 2022

16. (vii) Following discussion of the RI report, a GRH was listed to take place on 12 October 2022.

(viii) The substantive Hearing was listed from 17-25 October 2022.

CMPH – 12 October 2022

17. (ix) Although the substantive Hearing would only address the issue of liability, the respondent accepted that due to the progressive nature of the claimant's health conditions its opportunity to cross-examine the claimant on remedy was at the liability hearing.

(x) A CMPH at 12 noon on the first day of hearing was listed to address any outstanding applications or any residual concerns regarding compliance with the reasonable adjustments directed at the GRH (which also took place on 12 October).

Ground Rules Hearing and subsequent Reasonable Adjustments

18. The purpose of the GRH was to discuss the arrangements for the hearing and any adjustments required to ensure the claimant could give her best evidence and effectively participate in the proceedings. The legal representatives and the RI, Ms Patterson, attended the GRH. A number of adjustments were recommended by Ms

Patterson in her report. Those adjustments related to the period during which the claimant was giving her evidence given her communication difficulties. The respondent agreed to most of the adjustments. Having taken account of the submissions of both sides and the recommendations and comments of the RI, the Employment Judge made several directions by way of reasonable adjustments for the hearing. Those 15 adjustments are set out in detail in a record of proceedings dated 12 October 2022. Key adjustments are set out at (i) - (iii) below.

(i) The claimant should give her evidence in a separate hearing room in the tribunal building with the RI beside her to assist communications with the claimant and to assist the claimant communicate with others. The claimant's husband would also be in attendance in that separate hearing room for moral support. Only one person from the main hearing room should be visible and audible to the claimant at any given time. All three individuals should be visible to the panel and to all in attendance at the main hearing room on large screens.

(ii) Ms Best's draft questions for cross-examination of the claimant should be considered and approved in advance by Ms Patterson.

(iii) The claimant should be given regular breaks throughout cross examination with the length and frequency of those breaks to be kept under review by the Employment Judge with the assistance of the RI. The claimant should be allowed to leave the hearing room during each break.

19. The Employment Judge hearing the case was satisfied that all the adjustments recommended by the RI and the Employment Judge who presided over the GRH were appropriate. Those adjustments were facilitated as necessary, determined by the Employment Judge with assistance from the RI. The RI reviewed and approved the set-up of the two hearing rooms in advance of the hearing. The representatives confirmed to the Employment Judge at the CMPH on the first day of hearing that they were both content with the hearing arrangements.

20. The claimant was given regular breaks throughout her cross-examination. Those breaks were given at approximately 20-to-25-minute intervals and lasted at least 15 minutes. The Employment Judge made it clear to the claimant at the outset of her evidence that she should indicate at any point if she felt she needed a break, a question repeated, time to consider her response, or if she did not understand a question. Regular reminders to this effect were given to the claimant during her evidence. On occasion whilst giving evidence, the claimant or her legal representative suggested a break was required. On each occasion a break was given, the duration of which was determined with the assistance of the RI.

21. During the claimant's cross-examination, the hearing concluded early on the first and second day of hearing because the Employment Judge and/or the RI, or Ms McIlveen had noticed the claimant was getting upset and/or agitated. On the first day of hearing this early adjournment was also required to facilitate alteration to the technology, at the recommendation of the RI, to allow the claimant to see the Employment Judge if she had cause to speak to the claimant. In reaching this decision on both days, the Employment Judge took account of the view of the RI and Ms McIlveen, both of whom felt it was appropriate to conclude the cross-examination for the day. The Employment Judge determined it was appropriate,

notwithstanding the claimant's desire to proceed, to protect the integrity of her evidence and her right to a fair hearing.

22. Ms Patterson reviewed and approved Ms Best's questions for cross-examination of the claimant but noted she would need to be reactive to how the claimant responded to each question. On several occasions, Ms Patterson asked Ms Best to repeat and/or modify her question to the claimant, to ensure the question was appropriate and the claimant understood the question. On each occasion, Ms Best did so to the satisfaction of the RI and the Employment Judge. Ms Patterson also reviewed and approved the questions to be asked of the claimant by Ms McIlveen in advance of re-examination.

23. All recommendations of the RI and all adjustments identified during the GRH were facilitated as required. No issue was taken by the claimant or respondent's legal representative with the hearing arrangements adopted by the tribunal, in particular the procedure adopted to support the claimant giving her evidence.

Procedural Issues

24. At the CMPH on the first day of hearing Ms McIlveen made an application for specific Discovery. Ms McIlveen confirmed that the documentation sought was not required for the claimant's case but was required before cross-examination of the respondent's witnesses. The timing of this application was wholly unsatisfactory especially considering the extensive case management of these proceedings. Notwithstanding this, the claimant's application was granted and the respondent was ordered to provide discovery in relation to four specified categories of documents. The first was all Occupational Health ("OH") referrals made by the respondent in relation to the claimant over the period of claim. The remaining three categories of documents related to two of the claimant's named comparators, Mr Andrews and Mr Watson and related to the requirement that Mr Andrews undergo a Field Test in 2019, the results of that test and the records of any weapons handling tests undertaken by Mr Watson over the three-year period preceding his retirement from the respondent in June 2022.

25. The respondent was ordered to provide that documentation in its possession, power, or control, to the claimant and the tribunal by the morning of 19 October 2022, to facilitate Ms McIlveen's cross-examination of the relevant witnesses for the respondent. The respondent complied with this Order. The tribunal gave Ms McIlveen time to prepare her cross-examination in relation to this discovery and acceded to every request by Ms McIlveen for a break during her cross-examination of the respondent's witnesses.

26. During the hearing a number of applications were made and agreed positions reached by the parties as follows:-

    (i) The claimant made a further application for specific Discovery on the morning of the second day of hearing. By that point cross-examination of the claimant had commenced. Ms McIveen confirmed that the documentation sought was not required to conclude the claimant's evidence. Therefore, considering the claimant was a vulnerable witness requiring support of a RI who had been booked by the tribunal for a finite period, the tribunal determined it was consistent with the claimant's Article 6 rights and the

tribunal's overriding objective to deal with that application after the claimant's cross-examination.

(ii) The parties agreed that Ms Best could make submissions on the claimant's GP notes and records without the need to cross-examine the claimant on these documents and provided Ms McIlveen had the right to reply to those submissions.

(iii) Having considered the grounds of the application and the objections of the respondent, the tribunal granted the claimant's application to adduce additional oral evidence-in-chief from Mr Sweetlove. Ms Best was offered and availed of the opportunity to cross-examine Mr Sweetlove on this additional evidence.

(iv) At the conclusion of the claimant's case, the claimant's outstanding application for further specific Discovery was considered. At that juncture, the additional documents sought had either been provided by the respondent in the interests of moving the case forward or had been accessed by the claimant's legal representatives via an on-line search. Ms McIlveen made an application to adjourn the hearing for the remainder of that hearing day to facilitate her review that documentation before she cross-examined the respondent's first witness, Mr Girvan. Having considered the representations of both parties, the tribunal refused Ms McIlveen's adjournment application on the basis that the tribunal would have refused the claimant application for specific Discovery because Ms McIlveen had indicated that they were relevant only to the issue of credibility of a witness. Helpfully, the respondent agreed to change its running order of witnesses and called a witness that afternoon whose evidence did not pertain to any issue touching upon the relevant documents. That gave Ms McIlveen adequate time to consider this documentation in advance of her cross-examination of Mr Girvan.

(v) On the fourth day of hearing, in response to further discovery related applications which disrupted the progress of the evidence and were also disappointing given that both sides were legally represented and had ample time to pursue these matters before the Hearing; the Employment Judge stressed that should either party form the view the hearing could not fairly proceed due to a discovery issue, or any other reason, they should apply to adjourn the hearing, setting out the legal and factual basis for that application. Counsel for both sides confirmed they would do so; however, no such application was made.

(vi) The tribunal granted the claimant's application to require one of the respondent's witnesses, Mr Patience to leave the hearing room for the duration of the cross-examination of another witness for the respondent, Mr Martin. There was a conflict of evidence between the evidence of these two witnesses and the claimant in relation to a relevant incident at the firing range on 9 May 2019. The tribunal was satisfied that the credibility of the evidence of the two witnesses for the respondent would be most effectively tested if the second witness did not hear the cross-examination of the first witness.

KEY

27. 1. **ACMT** – Armed Combat Marksmanship Test

2. **AFS** – Aldergrove Flying Station

3. **"Capability Policy"** – Manging Loss of Capability of Qualification Policy

4. **CSO5** – Civilian Security Officer Grade 5

5. **DBS** – Defence Business Services. This is an agency of the Ministry of Defence with expertise in Human Resources Policies

6. **DEP** – Double Ear Protection

7. **"Field Hearing Test" or "Field Test"** – the NISGS Audio Metric Functional Test

8. **IHR** – Ill Health Retirement

9. **MoD** – Ministry of Defence

10. **NISGS** – Northern Ireland Security Guard Service

11. **NIGSU** – Northern Ireland Garrison Support Unit

12. **OH** – Occupational Health. This is an independent contractor of the MoD.

13. **"Pamphlet 21"** – an MoD Army Publication Pamphlet 21 pertaining to Range Management

14. **RCO** – Range Conducting Officer

15. **SS** – Safety Supervisor

16. **UAA Clerk** – Unit Application Administrator Clerk

17. **WHT** – Weapons Handling Test

SOURCES OF EVIDENCE

28. The witness statement procedure was used in this case. Mr Sweetlove was permitted to give brief additional oral evidence-in-chief in relation to evidence contained in paragraph 5 of his witness statement. Both parties were permitted to introduce several additional documents, many of which related to the respondent's compliance with the tribunal's Order for specific Discovery (see paragraph 24). With the agreement of the respondent, the claimant was permitted to introduce further additional documents pertaining to policies and procedures of the NISGS and/or the MOD. At the hearing, each witness swore or affirmed to tell the truth, adopted their witness statement as their evidence, moved to cross-examination and where appropriate brief re-examination.

29. The claimant gave evidence on her own behalf and her husband, Mr G Sweetlove also gave evidence on her behalf.

30. On behalf of the respondent, the following witnesses gave evidence:-

(i) Ms Lynn Smith – Senior Executive Officer, Brigade Secretariat. Ms Smith is responsible for Governance, Finance and is the Civilian Workforce Advisor for MOD Civil Servants (including NISGS).

(ii) Major Stephen Hetherington – Training Officer for the NIGSU. Major Hetherington devised the Field Test and carried out the Field Test on the claimant on 4 June 2019.

(iii) Mr Gary Girvan – Training Instructor for the NISGS. Mr Girvan was the RCO during the ACMT which the claimant participated in on 9 May 2019.

(iv) Mr George Samuel Patience – Band D Trainer with the NISGS working within NIGSU. Mr Patience was one of two Safety Supervisors during the above-mentioned ACMT on 9 May 2019.

(v) Mr Andrew Timothy John Martin – Trainer within the NIGSU. Mr Martin was the other Safety Supervisor at the ACMT on 9 May 2019.

(vi) Mr John Higgins – 38 Irish Brigade, Deputy Brigade Secretariat. In this role, Mr Higgins assists the Brigade Secretary, Ms Smith in the role of Civilian Workforce Advisor. Mr Higgins was involved in the identification of a suitable alternative role for the claimant in July-September 2019.

(vii) Mr Brian Lewthwaite – Area Manager within the NISGS. Mr Lewthwaite is the Countersigning Officer for the claimant and Line Manager of the claimant's Line Manager, Ms J Jennings.

(viii) Mr Andrew Brown – Area Manager within the NISGS. Mr Brown was the Line Manager of one of the claimant's comparators (Mr Peter Keenan).

31. Also, on behalf of the respondent, evidence was given in a written statement from Ms Jeanette Jennings. Ms Jennings is a Unit Manager of the NISGS, based at Ballykinler Training Camp and was the claimant's Line Manager from November 2016 until September 2019. Ms Jennings' evidence related to the application of the respondent's Capability Policy to the claimant over the period circa. July to September 2019. Ms Jennings was unable to attend the hearing to give evidence on health grounds. Owing to the time sensitive nature of this hearing connected to the claimant's Article 6 rights, Ms McIlveen confirmed that the claimant was content to proceed with the hearing and for the witness statement of Ms Jennings to be considered by the tribunal if she was given an opportunity to make submissions in relation to Ms Jennings' evidence and the documents referred to in her witness statement. Ms McIlveen was given that opportunity. The tribunal accepted the evidence of Ms Jennings only to the extent it was corroborated by the documentation and/or by the evidence of another witness and to the extent necessary to determine the issues in dispute.

32. At the outset of the hearing, the respondent removed the witness statement of Mrs Karen Hutchinson who was the Head of the NISGS at the relevant time. Ms Hutchinson's evidence related to her handling of the claimant's internal grievance about the matters raised in these proceedings. That withdrawal was prompted by an indication by Ms McIlveen during the CMPH that day, that the grievance was not relevant to the issues in dispute and the claimant was not pursuing any complaint of discrimination in relation to the respondent's handling of her grievance. Therefore, the tribunal had no regard to Ms Hutchinson's witness statement.

33. The tribunal was presented two agreed hearing bundles running to 751 pages. A further agreed supplemental hearing bundle was provided running to 235 pages.

34. The evidence was concluded within the allotted hearing time. The parties were given just under three weeks after the evidence was heard to prepare and exchange written submissions before the Submissions Hearing on 21 November 2022. In advance of the Submissions Hearing, the tribunal was presented with two further agreed bundles running to 773 pages. Those bundles contained the relevant legal authorities relied upon by both parties in their written and oral submissions.

35. The tribunal considered only those documents and legal authorities in the hearing bundles to which it was referred to by the parties during the hearing or in submissions. The tribunal also considered the written and oral submissions of the parties.

THE LAW

Relevant Legal Provisions

Amendment of Claim

36. Under Rule 25 of the Rules of Procedure, the tribunal has the power to make an order granting leave to amend a claim or response. The decision of amendment is one for the discretion of the Tribunal based on the facts of each case and having regard to the overriding objective. The overriding objective is set out in Rule 2, Schedule 1 to the Rules of Procedure in the following terms:-

> *"The overriding objective of these Rules is to enable tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, insofar as practicable:-*
>
> *(a) Ensuring that the parties are on an equal footing;*
>
> *(b) Dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) Avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) Avoiding delay, so far as compatible with proper consideration of the issues; and*

(e) Saving expense.

The tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it, by these Rules. The parties and their representatives shall assist the tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the tribunal."

Direct Discrimination on Grounds of Disability and Sex

37. The legal provisions in respect of direct discrimination on grounds of disability and sex are set out in the following Orders:-

(i) Disability – the Disability Discrimination Act 1995 as amended ("DDA").

(ii) Sex – Sex Discrimination (NI) Order 1976 ("SDO")

The relevant provisions in each Order are substantively the same.

Meaning of Disability and Disabled Person

38. Section 1 defines disability and disabled person insofar as is relevant and material as follows:-

"(1) Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act … if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

(2) In this Act … "disabled person" means a person who has a disability."

Direct Disability Discrimination

39. This is defined in Section 3A(5) of the DDA as follows: -

"A person directly discriminates a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from those of the disabled person."

40. Section 3A(4) of the DDA makes it clear that direct discrimination cannot be justified.

41. A key component of direct discrimination is the establishment of less favourable treatment of the claimant in comparison to how the chosen comparator was or would have been treated. What amounts to an appropriate comparator is detailed in Section 3A(5) above. The chosen comparator can also be a disabled person but must not have the particular disability the claimant has. The claimant relies on a hypothetical comparator in support of her claim of direct discrimination on grounds of perceived disability. The second key component is proving facts from which the

tribunal could conclude in the absence of an adequate explanation that the respondent's less favourable treatment of the claimant was on the protected ground, in this case perceived disability.

Direct Sex Discrimination

42. Article 3 of the SDO defines direct discrimination as follows:-

> *"In any circumstance relevant for the purposes of any provision of this Order, a person ("A") discriminates against another ("B") if, on the ground of sex, A treats B less favourably than A treats or would treat another person."*

43. As with direct disability discrimination, a key component of direct sex discrimination is the establishment of less favourable treatment in comparison to how the chosen comparator was or would have been treated. Article 6 of the SDO details what amounts to an appropriate comparison and indicates that it must be such that the relevant circumstances in the one case are the same, or not materially different, in the other. The claimant relies on four named comparators in support of her direct sex discrimination claim who work or worked for the respondent as Armed Guards, namely; Mr Watson, Mr Andrews, Mr Keenan and Mr Cooper. Again, the second key component is proving facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent's less favourable treatment of the claimant was on grounds of sex.

Burden of Proof

44. The burden of proof provision is materially the same in the DDA and the SDO and is set out in Section 17A(1)(B) and Article 63A respectively. In essence both provisions provide that where on hearing a complaint of discrimination on grounds of disability or sex, the complainant proves facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent (or one of its employees/agents) has committed an act of unlawful discrimination against the complainant, the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be is not to be treated as having committed, that act.

Unauthorised Deduction from Wages

45. The right not to suffer an unauthorised deduction from wages is enshrined in Article 45 of the Employment Rights (NI) Order 1996 ("*ERO*"). Article 45 provides, insofar as is relevant and material, as follows:-

> "*(1) An employer shall not make a deduction from wages of a worker employed by him unless –*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
>
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

(2) In this Article "relevant provision", in relation to a worker's contract, means a provision in the contract comprised –

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion".

46. The term "wages" is defined in Article 59 of the ERO and expressly includes any sum payable to the worker in connection with his employment, including any fee, bonus, commission, holiday pay or other emolument referrable to his employment whether payable under his contract or otherwise.

Relevant Principles of Law

47. In addition to the above-mentioned legal provisions, counsel for the parties referred to several authorities in written and oral submissions. The authorities referred to are listed below. Key authorities are referred to in the summary of relevant legal principles set out below.

The Claimant's Authorities

Amendment of Claim

48. ***(i) Foley v O'Neill's Irish International Sports Company Ltd [2016] NIIT 01621/16IT.***

(ii) Reuter Ltd v Cole UKEAT/0258/17

(iii) Abercrombie and Others v The Aga Rangemaster Ltd [2014] ICR 2009

Direct Discrimination on grounds of Perceived Disability

49. ***(i) Chief Constable of Norfolk v Coffey [2018] UKEAT/0260/16 EAT***

(ii) McCorry and Others (as the Committee of the Ardoyne Association) v McKeith [2016] NICA 47.

(iii) Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061.

Ms McIlveen also referred to the Employment Code [2011] published by the Equal Opportunities Commission. That Commission has responsibility for the promotion and enforcement of Equality and anti-discrimination laws in England, Scotland, and Wales.

Burden of Proof

50. ***(i) McCrory and Others v McKeith [2016] NICA 47***

(ii) Igen v Wong [2005] 3 ALL ER 812

(iii) Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 33

(iv) McDonagh v Royal Hotel Dungannon [2007] NICA 3

(v) Madarassy v Nomura International PLC [2007] IRLR 247

(vi) Nelson v Newry and Mourne District Council [2009] NICA 24

(vii) Curley v The Chief Constable of the Police Service of Northern Ireland and Another [2009] NICA 8

(viii) Laing v Manchester City Council [2006] IRLR 748 EAT

Credibility

51. ***(i) Thornton v NIHE [2010] NIQB 4***

In written submissions, Ms McIlveen noted that credibility was an issue in this case and referred to the above-mentioned authority. However, Ms McIlveen indicated at the Submissions Hearing that this was not in fact a live issue in this case.

Refinement of Legal and Factual Issues

52. ***(i) Knox v Henderson Retail Ltd [2017] NICA 17***

The Respondent's Authorities

Amendment of Claim

53. ***(i) Selkent Bus Co. Ltd v Moore [1996] IRLR 661***

(ii) Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650 NIRC

Direct Discrimination on Grounds of Perceived Disability

54. ***(i) Aitken v The Commissioner of the Police of the Metropolis [2011] 1 CMLR 2***

(ii) Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061

(iii) EBR Attridge Law v Coleman [2010] 1 CMLR 28

(iv) English H v Thomas Sanderson Blinds Ltd [2009] ICR 543

(v) Showboat Entertainment Centre Ltd v Owens [1984] ICR 65

(vi) Britliff v Birmingham City Council [2020] ICR 653

(vii) R Davey v Oxfordshire County Council (Equality and Human Rights Commission Intervening) [2018] PTSR 281

The Burden of Proof

55. ***(i) Igen v Wong [2005] IRLR 258 CA***

(ii) Madarassy v Nomura International PLC [2007] IRLR 246

(iii) London Borough of Islington v Lidel [2009] ICR 387

(iv) Nagaranjan v London Regional Transport [1999] IRLR 572

(v) Brown v Croyden LBC [2007] EWCA Civ 32

(vi) Anya v The University of Oxford [2001] EWCA Civ 405

(vii) Watt (formerly Carter) v Ahsan [2008] IRLR 243

(viii) McFarlan v Relate Avon Ltd [2010] IRLR 196

Amendment of Claim

56. Guidance on the way in which a tribunal's discretion is exercised in relation to amendments is set out in ***Selkent Bus Company v Moore 1996 ICR 836*** by Mr Justice Mummery:- (paragraphs 22-24)

> *"Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*
>
> …
>
> *What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively but the following are certainly relevant;*
>
> *(a) The nature of the amendment*
>
> *Applications to amend are of many different kinds, ranging, on the one hand from the correction of clerical and typing errors, the addition of factual details to existing allegations and the additions or substitution of other labels for facts already pleaded to, or, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment*

sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of statutory time-limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time-limit should be extended under the applicable statutory provisions

(c) The timing and manner of an application

An application should not be refused solely because there has been a delay in making it. There are no time-limits laid down in the Rules for the making of amendments. The amendments can be made at any time before, at, or even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made; for example, the discovery of new facts or new information appearing from documents disclosed in discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result from adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

57. ***Harvey on Industrial Relations and Employment Law*** identifies the three well established categories of amendment (paragraph 311.04):-

"*A distinction may be drawn between:-*

(1) Amendments which are merely designed to alter the basis of an existing claim but without purporting to raise a new distinct head of complaint.

(2) Amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as the original claim.

(3) Amendments which add or subject a wholly new claim or cause of action which is not connected to the original claim at all."

58. These classifications were quoted with approval by the Court of Appeal in this jurisdiction in the case of ***Bryant v Nestle UK Limited [2021] NICA 34*** (at paragraph 17).

59. The ***Selkent*** principles have been recently reaffirmed in the now leading and uncontroversial case of ***Vaughan v Modality Partnership (EAT) [2021] ICR 535***. In that case, Judge Taylor noted the following:-

*"13. No consideration of an application for amendment is complete without reference to **Selkent [1996] ICR 836**. It is so familiar that it is especially easy to quote it without reflecting on the core principle it elucidates. The key passage is at paragraph 843D:-*

> *"Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it".*

14. *Mummery J reiterated this point at paragraph 844B:-*

> *"Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment".*

15. *The history and central importance of this test was analysed by Underhill J (President), as he then was, in the, unfortunately unreported, case of **Transport and General Workers' Union v Safeways Stores Ltd 6 June 2007**, in which he also concluded that on a correct reading of Selkent the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise.*

16. *The list that Mummery J gave in **Selkent** as examples of factors that may be relevant to an application to amend ("the **Selkent** factors") should not be taken as a checklist to be ticked off to determine the application but are factors to take account of in concluding the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment. Mummery J specifically stated he was not providing a checklist at paragraph 843F: "What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively."*

17. *This is not a new point. Underhill L J returned to a consideration of **Selkent** in **Abercrombie & Others v Aga Rangemaster Ltd [2014] ICR 209** and noted at paragraph 47:-*

> *"It is perhaps worth emphasising that head (5)" – the **Selkent** factors – "of Mummery J's guidance in **Selkent's** case was not intended as prescribing some form of a tick box exercise. As he makes clear, it is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head (4)" – the balance of hardship and injustice.*

18. *Representatives and Employment Judges will be well advised to keep copies of **Safeway and Abercrombie** in their files of key authorities together with the ubiquitous copy of **Selkent***".

60. Underhill LJ in the Court of Appeal in ***Abercrombie & Others v Aga Rangemaster Ltd at (2013) EWCA Civ 148*** considered the issue of whether an amendment is a 're-labelling' (Category 2) or a 'wholly new claim' (Category 3) and gave the following guidance:

> *"… The approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent*

to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted. (Paragraph 48)

…

… Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and a fortiori in a re-labelling case – justice does not require the same approach: NB that in High Court proceedings amendments to introduce "new claims" out of time are permissible where "the new cause of action arises out of the same facts or substantially the same facts as are already in issue" (Limitation Act 1980) Section 35(5))". (Paragraph 50)

61. In ***Vaughan v Modality Partnership (EAT) [2021] ICR 535***, Judge Taylor further endorsed Underhill LJ's approach in ***Abercrombie & Others v Aga Rangemaster Ltd [2013] EWCA Civ 1148*** as follows:-

"Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment? If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters of whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis of instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim. (Paragraph 21).

Refusal of an amendment will self-evidently always cause some perceived and prejudice to the person applying to amend. (Paragraph 22)".

62. In summary therefore, the legal authorities are clear that where a claimant proposes to include a wholly new claim or cause of action (Category 3 amendment), the tribunal must have regard to the relevant time limits and, if the claim is out of time, to consider whether the time should be extended under the relevant statutory provision. The paramount consideration in an amendment application is the relative injustice and hardship involved in refusing or granting an amendment.

63. The proposed amendment to the disability discrimination claim raises the question of whether the tribunal has jurisdiction to hear the amended claim of direct discrimination on grounds of perceived disability. In support of the claimant's application, Ms McIlveen referred to the judgment of the Employment Tribunal in this jurisdiction at a Pre-Hearing Review (now referred to as a Preliminary Hearing) in the case of ***Sinead Foley v O'Neills Irish International Sports Company Ltd, 1621/16 IT***. In that case the claimant sought by way of amendment to add a claim of perceived disability discrimination as an alternative ground to her original claim of disability discrimination. In allowing the amendment, Employment Judge Drennan QC, noted (at paragraph 3.1), that the claimant's application to amend; "*was **not** so "manifestly hopeless", as referred to by Mummery J in **Selkent**, that the application required to be refused outright by the tribunal, without any reference to the respondent*." Judge Drennan QC, made no more comment on the strength or weakness of the proposed amendment because the matter was the subject of a pre-arranged Deposit Order Pre-Hearing Review.

Perceived Disability

64. It is uncontroversial that the relevant provisions of the DDA make no reference to discrimination on grounds of perceived disability. The claimant contends that in the field of employment and occupation, the definition of "disability" in the DDA must be applied in a way which gives effect to the European Union Equal Treatment Framework Directive (No.2000/78/EC) ("the Framework Directive") and that accordingly the tribunal must apply the legislation to encompass discrimination on grounds of perceived disability. The Framework Directive established a general framework for equal treatment in employment and occupation. The purpose of the Framework Directive is set out in Article 1 which provides;

> "*The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment*."

65. Article 2 of the Framework Directive explains that the "*principle of equal treatment*" shall mean no direct or indirect discrimination whatsoever on any of the grounds cited in Article 1. Article 2 2.(a) defines direct discrimination as;

> "..*where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1*."

66. Therefore, as a matter of ordinary construction the definition of direct disability discrimination in the Framework Directive does not stipulate that the victim possess the protected characteristic; it simply requires the victim to be discriminated against on the protected ground. In contrast the definition of direct discrimination in Section 3A(5) of the DDA is narrower; requiring the direct discrimination to be experienced by the disabled person, "*on the ground <u>of the disabled person's</u> disability*" (tribunal's emphasis).

67. The Framework Directive does not contain any reference to discrimination because a person is perceived as possessing a protected characteristic.

68. That omission did not prevent the Court of Appeal in 2009 in the case ***English H v Thomas Sanderson Blinds Ltd*** from holding that Regulation 5 of the then Employment Equality (Sexual Orientation) Regulations 2003 which outlawed discrimination (in the form of harassment) "*on grounds of sexual orientation*" irrespective of whether the employee was gay or not. In that case the appellant, Mr English alleged he had been subjected to harassment at work by his colleagues the nature of which suggested in very obvious terms that Mr English was homosexual. This was not the case. Mr English was heterosexual and was married. It was not in dispute that his harassers knew that he was not gay. The Court noted that it was immaterial that Mr English was not gay. What mattered was that the employee's (or someone else's) sexual orientation, whether real or supposed, was the basis for the harassment. That was the case for Mr English and thus his claim for harassment on grounds of sexual orientation fell within the scope of Regulation 5 and the Framework Directive. In adopting a purposive approach to interpretation of the legislation Sedley LJ noted that it could not have been the intention when the legislation was introduced to prevent sexual harassment in the workplace that a claimant had to declare his/her true sexual orientation to establish that it was "*on grounds of sexual orientation*".

69. Within that judgment the Court At the time of the judgment (in 2008) the DDA was in force in England and Wales. Within this judgment, Collins LJ distinguished discrimination on grounds of sexual orientation or race from disability. In doing so Collins LJ noted (at paragraph 49) that Section 3B of the DDA which deals with harassment, requires the offending conduct to be; *"for a reason which relates to the disabled person's disability"*. Considering this, Collins LJ noted that the wording requires an actual disability. We recognise that this observation was made obiter dicta and thus not binding on this tribunal.

70. That purposive approach echoed the approach adopted in 1983 by the EAT in ***Showboat Entertainment Centre Ltd v Owens*** where it held that the term; "*on racial grounds*" in the Race Relations Act 1976, could be read as referring to the race of the complainant alone or to any case where the race, whether of the complainant or of a third party was an effective cause of the detriment suffered by the claimant. In that case the claimant was a white man and manager of an entertainment centre operated by his former employer, the appellants. He was dismissed by the employer because he refused to obey the instruction to exclude all black customers from the centre. The Employment Tribunal upheld Mr Owen's claim that this treatment amounted to direct discrimination on racial grounds contrary to the 1976 Act. The EAT dismissed the employer's appeal and provided the above-mentioned clarification.

71. Case law developments regarding the scope of protected grounds in anti-discrimination legislation reached a turning point in England and Wales with the introduction of a single Act which covered all protected grounds, namely the EqA (the Equality Act 2010). That piece of legislation replaced the separate anti-discrimination laws, which included the DDA, in force in those jurisdictions for each protected ground. The EqA is not in force in Northern Ireland where protection against discrimination on each protected ground is provided in separate but very similar pieces of legislation. The DDA in force in Northern Ireland closely mirrored the DDA in force in England and Wales before the introduction of the EqA.

72. The definition of direct discrimination is set out in Section 13 of the EqA and is drafted more widely than in its predecessor, the DDA and Section 3A(5) of the DDA in this jurisdiction. The latter outlaws less favourable treatment "*on the ground of a disabled person's disability*" which is narrower than the language in the former which states it is unlawful to treat someone less favourably, "*because of a protected characteristic*" (tribunal's emphasis). Crucially the guidance contained in the Explanatory Notes to the EqA expressly states that it encompasses situations where the perpetrator mistakenly believes the alleged victim possesses the protected characteristic.

73. This expansion in scope was preceded by a decision of the CJEU in ***C-303/06 Coleman v Attridge Law [2008] IRLR 722*** that the Framework Directive provides protection against "associative discrimination" (i.e., discrimination against a non-disabled person on grounds of their association with a disabled person) in respect of direct discrimination and harassment. Less favourable treatment or harassment of an individual on grounds of the disability of a person closely associated to them is therefore unlawful under the Framework Directive. The ***Coleman*** case went back to the EAT who determined that the DDA could be purposively interpreted to include associative discrimination. In that judgment it was noted that the problem with interpreting the DDA to be consistent with the broad scope of the Framework Directive was caused by the definitions of both direct discrimination (Section 3A(5)) and harassment (Section 3B) refer to the disabled person's own disability being the reason for the treatment. Underhill P referenced the judgment of the House of Lords in ***Ghaidan v Godin-Mendoza [2004] 2 AC 557, HL*** which provided guidance on the extent to which statutory provisions should be expansively interpreted, if necessary, with insertions, to achieve conformity with external legal obligations. In that case it was in the context of the Human Rights Act 1998, but it was recognised that the same interpretive principles applied when seeking to achieve uniformity with an EU Directive.

74. ***Aitken v The Commissioner of the Police of the Metropolis [2011] 1 CMLR*** concerned a complaint of direct discrimination on grounds of a perceived disability under the DDA. The EAT in that case held that the ECJ (in ***Coleman***) had not held that action taken because of a mistaken perception that a claimant was suffering from a particular disability was within the scope of the Framework Directive. The EAT noted (at paragraph 75) that ***Coleman*** was concerned with the issue of whether the disability of another which is the basis of the discriminatory treatment of an employee is within the scope of the Framework Directive. In that instance the ECJ ruled that it was and the effect of that judgment on the interpretation of the then DDA (as explained by Underhill P in the appeal on the reference back to the Employment Tribunal) was that it was to be modified to add the words *"or a person associated with a disabled person"* after "*A person directly discriminates against a disabled person"*. The EAT in ***Aitken*** went on to note that the language of Sections 3A(1) and (5) of the DDA requires that the discrimination of which a complaint is made, be for a reason related to or on the grounds of an actual particular disability (tribunal's emphasis). With reference to the ECJ judgment in ***Coleman***, the EAT noted (at paragraph 77):-

> *"The ECJ decided the Directive included discrimination on the grounds of the disability of a person associated with the person discriminated against. The ECJ did not rule that discrimination on grounds of perceived disability was within the scope of the Directive … Accordingly the conduct of which*

complaint is made under DDA ss.3A(1) R(5) must be for a reason relating to or on grounds a disabled person's actual disability." (tribunal's emphasis).

This was not overturned on appeal.

75. Both sides referred to judgment of the EAT and/or Court of Appeal in the case of ***Chief Constable of Norfolk v Coffey.*** As counsel for both parties relied on the ***Coffey*** authorities to make competing arguments on this jurisdictional question, it is worth summarising the relevant factual background and key findings of this decision.

76. Ms Coffey was a Police Officer in the Wiltshire Constabulary. She suffered from bilateral mild hearing loss. It was undisputed that her hearing loss did not constitute a disability within the meaning of the Equality Act 2010 ("EqA"). In 2013, she applied for a transfer to a different Constabulary and was successful subject to a fitness and pre-employment health assessment. However, on a medical test, her hearing fell just outside the acceptable medical standards for recruitment. The Acting Chief Inspector declined the claimant's application on the basis that her hearing fell below the medical standard. The claimant brought proceedings against the Norfolk Constabulary based on direct perception discrimination under s13 of the EqA. The claimant contended that the Chief Constable decided not to recruit her because he believed that she had a disability within the meaning of the EqA. The Employment Tribunal upheld her claim and the EAT dismissed the Chief Constable's appeal. In doing so Judge Richardson (at paragraph 52) noted that the definition of *"disability"* in the EqA must be applied in the field of employment and occupation in a way that gave effect to EU Law.

77. At paragraph 49 of that judgment, Judge Richardson noted:-

> "*I consider that the position is now clear. Section 13 is wide enough to encompass perceived discrimination; and it makes no distinction in this respect between the protected characteristic of disability and other protected characteristics. I would add that I see no reason to doubt that the European Court of Justice would recognise direct discrimination on the grounds of perceived disability. The ECJ has now consistently said that the Equality Directive, along with the linked Racial Discrimination Directive 2000/43/EC, is not to be interpreted restrictively and is to apply to persons who suffer less favourable treatment or particular disadvantage by virtue of a prohibited characteristic even if those persons do not themselves have the protected characteristic; see the associative discrimination case of* ***Coleman v Attridge Law [2008] IRLR 722*** *…"*

78. Judge Richardson went on (in paragraphs 50 & 51) to note that it will not necessarily be straightforward for an Employment Tribunal to decide whether a putative discriminator perceived a person to be disabled and ultimately noted that the key issue for the Employment Tribunal will be whether the putative discriminator, A perceived B to have an impairment with the features which are set out in the legislation as opposed to whether A perceived B to be disabled as matter of law. In essence this emphasised that A's knowledge of disability law is irrelevant; the key question is whether A perceived B to have an impairment, the features of which brought that impairment within the legal definition of a disability.

79. The Chief Constable appealed to the Court of Appeal and one of the issues in that appeal was whether s13 of the EqA prohibited perception discrimination.

80. The Court of Appeal held that an act would be caught by Section 13(1) where A acts because he or she thinks that B has a particular protected characteristic even if they in fact do not, i.e., *"perception discrimination"*. In reaching this conclusion, the Court of Appeal noted that as a matter of ordinary language, the phrase "*because of [a protected characteristic*]" was wide enough to cover the case where A acted on the basis that B had that characteristic, whether they did or not and noted that that had been Parliament's intention when it enacted the EqA. It noted that in a case of perception discrimination what was perceived had to, as a matter of logic, have all the salient features of the protected characteristic as defined in the EqA.

81. The Court of Appeal in ***Coffey*** acknowledged that the DDA had to be amended to conform with the Directive by the implementation date on 2 December 2003. The Court went on to observe that even in its amended form that statutory scheme continued to be differently framed, in several respects in comparison with the Directive. Furthermore, in noting that the Explanatory Notes to the EqA confirm that it was Parliament's intention that the phrase "*because of [a protected characteristic]"* was wide enough to cover perceived discrimination, it went on to acknowledge (as a footnote to paragraph 11) that that was not the position or at the very least not clearly the position under the DDA which proscribed discrimination *"against a disabled person".*

82. The Northern Ireland Court of Appeal held in the case of ***McCrory & Ors v McKeith*** that the tribunal had not erred in finding a claim of associative disability discrimination pursuant to the DDA. At paragraph 34 of its judgment Weatherup LJ acknowledged that the DDA did not on its face apply to associative discrimination but noted that the CJEU in July 2008 in the ***Coleman*** case held that associative discrimination fell within the terms of the Framework Directive but only in relation to direct discrimination and harassment and that has been maintained. It was also noted that thereafter when the case fell to the EAT to be considered, the EAT held that the DDA could be interpreted to include associative discrimination.

83. The EAT in ***Britliff v Birmingham City Council [2020] ICR 653*** referenced the UN Convention on the Rights of Persons with Disabilities [2006] ("UNCRPD"). The EAT held the Convention is not of direct effect and is not incorporated into UK Law. Therefore, it does not provide a route for claim of disability discrimination outside of the EqA.

84. That decision was consistent with the judgment of the Court of Appeal in the case of ***R (Davey) v Oxfordshire County Council (Equality and Human Rights Commission Intervening) [2018] PTSR 281*** in which the Court held that the UNCRPD is an unincorporated international treaty which creates no direct obligations on domestic law. It noted that the Convention could be resorted to in cases of ambiguity or certainty but warned (at paragraph 62):-

> *"Great care must be taken in deploying provisions of a Convention or treaty which set out broad and basic principles as determinative tools for the interpretation of a concrete measure such as a particular provision of a United Kingdom statute. Provisions which are aspirational cannot qualify the clear language of primary legislation."*

Shifting the Burden of Proof

85. Shifting the burden of proof was considered in this jurisdiction by the Court of Appeal in the case of ***McCrory & Others v McKeith [2016] NICA 47***. This case concerned a disability discrimination claim but the burden of proof test is identical in FETO. The court held:-

> *"This provision and its English analogue have been considered in a number of authorities. The difficulties which tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear as it might have been. The Court of Appeal in **Igen v Wong [2005] 3 ALL ER 812** considered the equivalent English provision and pointed to the need for a tribunal to go through a two-stage decision-making process. The first stage requires the complainant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the tribunal has so concluded, the respondent has to prove that he did not commit the unlawful act of discrimination. In an annex to its judgment, the Court of Appeal modified the guidance in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 333**. It stated that in considering what inferences and conclusions can be drawn from the primary facts the tribunal must assume that there is no adequate explanation for those facts. Where the claimant proves facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent. To discharge that onus, the respondent must prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to be adduced to discharge the burden of proof. In **McDonagh v Royal Hotel Dungannon [2007] NICA 3** the Court of Appeal in Northern Ireland commended adherence to the **Igen** guidance."*

86. In the case of ***Madarassy v Nomura International PLC [2007] IRLR 247***, the English Court of Appeal provided further clarification of the tribunal's task at the first stage of considering whether the claimant has proven facts from which the tribunal could conclude in the absence of an adequate explanation, that the respondent has committed an act of discrimination. The Court of Appeal emphasised that the full context of the evidence presented by the claimant and also by the respondent to contest the complaint, should be considered. The court stated:-

> *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient matter from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination; 'could conclude' in Section 63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would*

also include evidence adduced by the respondent in contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage, the tribunal needs to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the complainant were of like with like as required by Section 5(3) and available evidence of all the reasons for the differential treatment.

87. In ***Nelson v Newry and Mourne District Council [2009] NICA 24*** the Court of Appeal noted that the approach to the shifting of the burden of proof set out in ***Madarassy*** requires a tribunal to consider allegations of discrimination in the context of the relevant factual matrix out of which the claimant alleges unlawful discrimination. The whole context of surrounding evidence must be considered in deciding whether the tribunal could properly conclude, in the absence of an adequate explanation that the respondent has committed an act of discrimination. The Court of Appeal went on to note that in ***Curley v Chief Constable of the Police Service of Northern Ireland and ANOR [2009] NICA 8,*** Coughlin J emphasised the need for a tribunal to focus on the fact that the claim to be determined is an allegation of unlawful discrimination. A tribunal must retain this focus when applying the provisions of the burden of proof and in doing so be cognisant of the need to stand back and focus on the issue of discrimination.

88. If the claimant does not prove facts from which the tribunal could conclude that the respondent has committed unlawful discrimination/unlawful harassment, then the claim fails. If the claimant does prove such facts, then the burden of proof moves to the respondent to prove on the balance of probabilities the treatment afforded to the claimant was not on grounds of the protected characteristic (direct discrimination), or was not for a reason related to the protected act (victimisation), or that the claimant was not subjected to unwanted conduct on the protected ground (harassment). In assessing the respondent's explanation for the treatment complained of, the tribunal must be satisfied that the explanation is adequate to discharge the burden of proof on the balance of probabilities. As highlighted in ***McCrory***, a tribunal will normally expect cogent evidence from the respondent to discharge the burden of proof. If the tribunal does not accept the respondent's explanation on the balance of probabilities, then it must find for the claimant.

89. Whilst the mechanics of the burden of proof prescribes a two-stage test, this test is not to be applied too slavishly or mechanically. An alternative way to deal with the burden of proof, which is often used by the tribunal, especially if there is uncertainty as to whether the burden has shifted, is to consider the explanation put forward by the respondent for the treatment complained of. If having done so, the tribunal is satisfied on the balance of probabilities that the respondent has presented a coherent and adequate explanation for the treatment which is in no way influenced by the protected characteristic, (or in the case of victimisation, the protected act) then the claimant's claim of discrimination fails. This approach was endorsed in ***Laing v Manchester City Council [2006] IRLR 748 EAT*** where the EAT stated (at paragraph 71):-

*"There still seems to be much confusion created by the decision in **Igen v Wong**. What must be borne in mind by a tribunal faced with a race claim is*

that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race…"

90. The EAT went on to state (at paragraph 75):-

"The focus of the tribunal's analysis must at all times be the question whether they can properly and fairly infer race discrimination. If they are satisfied that the reason given by an employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is an end of the matter. It is not improper for a tribunal to say, in effect, 'there is a real question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation … and it has nothing to do with race."

RELEVANT FINDINGS OF FACT

91. Based on the sources of evidence referred to at paragraphs 28-35 above, the tribunal found the following relevant facts proven on the balance of probabilities. It is important to note that this judgment does not record all the competing evidence but records only those findings of fact necessary for determination of the issues.

Background

92. The claimant commenced employment with the Northern Ireland Security Guard Service (NISGS) on 2 December 2001. Since 2016, the claimant worked full-time as a Civilian Security Officer, Grade 5 (CSO5) (hereinafter referred to as an Armed Guard), based at Aldergrove Flying Station (AFS).

93. The NISGS is an agency of the Ministry of Defence (MoD) and the claimant is a MoD civil servant. Within the wider MoD, her Armed Guard role is equivalent to the civil service grade code E2.

94. At the material time, the compliment of Armed Guards within NISGS was predominantly male.

95. The purpose of an Armed Guard is to maintain armed security at MoD establishments to prevent infiltration or attack and prevent damage of property or personnel through a combination of site security, access control, observation, and incident response. To perform these duties, all Armed Guards are by necessity required to carry a gun. When an Armed Guard is on duty at the gate of AFS, their gun contains live rounds in case he/she needs to use the weapon to protect the base.

96. It is undisputed that to safely perform her role as Armed Guard, the claimant needs to have an acceptable level of hearing. The respondent has medical standards of acceptable hearing. Determination of whether an existing or prospective Armed Guard meet those medical standards is the remit of the respondent's Occupational Health (OH) Department which is an independent contractor. OH, carry out or

arrange audiometry tests to determine whether an individual's hearing meets the respondent's requisite medical standards to assume or remain in the role of an Armed Guard.

97. The respondent also has acceptable functional standards of hearing. In essence the acceptable functional standard requires the Armed Guard to be able to hear words of command when training on a firing range where live ammunition is used, whilst wearing ear protection and unaided by any hearing device. The reason for the requirement to wear ear protection is rooted in health and safety. MoD policy governing conduct on the range (called "*Pamphlet 21*") requires all firers to wear double ear protection (DEP) during firing practice. This is to protect the firers from damage to their hearing because of the noise made during live firing. The first level of protection is high-density foam, called *"spongies"* which are placed into the ear canal before a second level of protection in the form of a headset/earmuff type of hearing protection (called an *"Amplivox"* headset) is placed over the ears.

98. The respondent maintained that it would be impossible to wear the DEP and a hearing aid device given that the spongies are placed into the ear canal. The tribunal accepts the logic of this position and finds as a fact that this was the case. DEP is not worn by an Armed Guard when on normal duty. DEP is only required to be worn during the ACMT training because of the known noise hazard. Thus, the respondent has no issue with Armed Guards wearing hearing aids, if required to perform their role as an Armed Guard. However, to prevent hearing damage, those hearing aids cannot be worn along with DEP for the purposes of training in a live firing range.

99. Functional hearings standards are determined via practical tests carried out by the respondent's NIGSU Training Officer. These practical tests are carried out after assessment of medical hearing standards and only if recommended by OH. The respondent's treatment of the claimant following her inability to hear on a firing range and her subsequent failure to pass a functional hearing test (referred to herein as the "*Field Test*") formed the subject matter of these proceedings.

100. At the material time, from 9 May to 7 October 2019, the claimant had hearing problems. Based on the medical evidence opened to the tribunal regarding the claimant's hearing, we find as a fact that the claimant had noticed a gradual deterioration in her hearing for a considerable number of years prior to the period claim from at least 2014. It is common case between the parties that the claimant's hearing loss did not constitute a disability within the meaning of the DDA.

The Claimant's Training on 9 May 2019

101. All Armed Guards, including the claimant are required to undertake and pass regular mandatory training to be deemed capable and competent to carry a gun. At a minimum this training is carried out on an annual basis. There are various elements to this training but the elements of relevance to this case are the Weapons Handling Test (WHT) and the Armed Combat Marksmanship Test (ACMT). If either part of this training is not completed or passed, the relevant officer cannot perform the role of Armed Guard unless and until they successfully complete and pass this training. The claimant undertook both types of training on 9 May 2019 at AFS.

102. The claimant completed and passed the WHT on the morning of 9 May 2019. This training was supervised by Mr G Patience, NISGS Trainer.

103. The ACMT training comprised of two parts, an indoor shoot followed by an outdoor shoot. The first element took place in an indoor training theatre and was also conducted by Mr Patience. The indoor element involved use of a weapon system which required the officer to fire a laser onto a screen. It simulated live firing, but no live weapons were used.

104. The claimant carried out and pass the indoor element of the ACMT.

105. To undertake the second element of the ACMT an officer must pass the first element and the WHT. This is because the second element involved the firing of live rounds at targets in the outdoor range at AFS. The claimant and three other Armed Guards participated in the outdoor element of the ACMT. The claimant was only female participating in this training session. This part of the ACMT test was supervised by three NISGS training officers. These were Mr G Girvan, Mr G Patience and Mr A Martin. Mr G Girvan was the Range Conducting Officer (RCO). As RCO, Mr Girvan was the most senior person on the range. He oversaw the shooting practice and conduct on the range and was ultimately responsible for the safety of everyone on the range that afternoon. Mr Martin and Mr Patience were Safety Supervisors (SS). Their role was to ensure the officers participating in the training (referred to as *"firers"*) were carrying out the shooting practices as directed in a safe manner and to assist the firer if required. They operated under the direction of the RCO.

106. The outdoor range at AFS comprised of four lanes which is comparatively small as other ranges used by the respondent can have up to 12 or 15 lanes. Each SS was assigned to supervise two of the four firers. The claimant was supervised by Mr Martin and was assigned to Lane 4.

107. This element of the ACMT test comprised of live firing practice divided into three parts. During each part, the firer is required to fire at the target when the RCO gives the command *"targets up"* and to cease firing when the RCO gives the command *"targets down".* The RCO stood close behind the firers and used a loud hailer to project his voice. During each part of the firing practice the firers were required to shoot the target at various distances in either a standing or kneeling position.

108. It was undisputed that the claimant could not hear the words of command during this practice shoot. However, three related issues were in dispute, namely, why the claimant could not hear the words of command, whether she continued to fire after the command to stop firing was given and why she was removed from the range. The significance of the latter two issues was greatly diluted following the claimant's withdrawal (at the Submissions Hearing) of the allegation that her removal from the firing range was an act of discrimination on grounds of perceived disability. However, because the claimant's removal from the range was a catalyst for subsequent alleged discriminatory actions of the respondent and because her ability to hear words of command on a firing range, is an issue bound up with the respondent's explanation for its impugned conduct, the tribunal is required to make a finding of fact in relation to this issue.

109. The evidence of Mr Girvan, Mr Martin and Mr Patience who conducted/supervised the ACMT test was that the claimant fired a live round after the command *"targets down"* had been given by the RCO and fired another round after she was reminded to cease firing through the command *"stop"*. Mr Martin went over to the claimant and the claimant advised him that she couldn't hear the words of command being delivered. Mr Girvan overheard this. Mr Martin took the claimant's weapon from her as it was in an unsafe position pointing to the ground. As RCO, Mr Girvan decided that in the interest of the safety of the claimant and all other attendees on the range, due to the claimant's inability to hear the words of command during a live firing practice, the claimant could not safely complete the ACMT and should be removed from the firing range to ensure that the safety of everyone on the range was not compromised.

110. The claimant disputes that she fired after the command *"targets down"* was given. Secondly, she maintained the reason she could not hear the words of command was because a hearing aid type device she was wearing underneath the Amplivox headset, to help amplify noise, had dislodged and begun to whistle. In response, the claimant slung her weapon to her side to fix the hearing aid. At that point Mr Martin came over, discovered she was wearing a hearing aid, took her gun and told her to get off the range.

111. Having considered the competing testimonies and the relevant contemporaneous documents, the tribunal prefers the account of the respondent's witnesses for the following principal reasons:-

(i) The evidence of the respondent's three witnesses was consistent and maintained under cross examination, despite Mr Patience not being present during the cross examination of Mr Martin. Their evidence was also corroborated by the written report of Mr Girvan regarding the incident submitted on 20 May 2019, to the NISGS's Area Manager, Mr B Lewthwaite, shortly after the incident.

(ii) The evidence of Mr Girvan and Mr Martin that the claimant said she could not hear the words of command echoed the evidence of Mr Sweetlove in his witness statement as to what the claimant told him on 9 May. The tribunal did not find Mr Sweetlove's evidence in chief at the hearing that the claimant had told him the reason for this was due to issues with her hearing aid, to be credible. Had this been the case, we are satisfied that Mr Sweetlove would have included this important fact in his witness statement.

(iii) The tribunal's acceptance of the account of the respondent's witnesses that the claimant was not able to hear the words of command is consistent with the fact the claimant was experiencing hearing difficulties and had been for some time (see paragraph 100). It is also consistent with the unchallenged evidence of Mr Sweetlove, that due to her inability to hear, he assisted the claimant with telephone calls with an OH advisor (Mrs Sweet in June 2019) and her line manager (Ms Jennings in July 2019), the results of the claimant's subsequent audiometry test in May 2019 (see paragraph 121). It is also consistent with the uncontested fact that the claimant could not hear the words of command during a subsequent functional hearing test, on 4 June 2019, when wearing DEP and unaided by any hearing aid device (see paragraphs 125-128).

(iv) As SS, Mr Martin did not have the authority to remove the claimant from the range on that day. That authority lay exclusively with Mr Girvan as RCO.

(v) The claimant's account requires three NISGS trainers to conspire to lie when they had no apparent motive to do so. Whilst the claimant stated in cross examination that they were lying, that serious allegation was not put to any of the three witnesses in cross-examination.

112. Considering this finding, the tribunal finds as a fact that the claimant did not complete the ACMT training session on 9 May 2019 because, due to hearing loss, she could not hear the words of command during a live shoot and had continued to fire live rounds after two commands had been given to her to stop firing. Thus, the RCO determined that the claimant could not safely proceed with the ACMT, as to do so would compromise her safety and that of others on the range. This was a material reason why the claimant was removed from the range on 9 May 2019.

113. At the RCO's direction, Mr Martin took the claimant's weapon, magazines, and ammunition of her and told her to go to the range shelter. After the practice shoot, Mr Girvan spoke to the claimant and explained that she had been removed from the firing range due to her inability to hear the words of command. In reply, the claimant informed Mr Girvan that her hearing was bad. At no point did the claimant indicate that the reason she could not hear the words of command was because her hearing aid becoming dislodged and/or whistling.

Events following the Claimant's non-completion of the ACMT training on 9 May 2019

114. The claimant's removal from the firing range meant she did not complete and pass her mandatory annual ACMT training. An Armed Guard's ability to safely use and shoot that weapon must be tested on a regular basis in order that the NISGS can safely deploy that officer with a weapon containing live rounds. As the claimant had failed to complete her ACMT, the respondent could not be satisfied that she was currently competent to be safely deployed with a live weapon.

115. The claimant went to speak to her line manager after she left the range at AFS on 9 May 2019. One reason for this was so her duties as an Armed Guard could be reallocated given her failure to complete the ACMT. The claimant's line manager at the time, Ms J Jennings was on sick leave. Therefore, the claimant spoke to another line manager, Mr P Kavanagh.

116. Mr Kavanagh returned to the range at AFS with the claimant later that day and asked Mr Girvan to allow the claimant to retake the ACMT on her own. Mr Girvan refused this request on safety grounds, one of which was the fact the claimant had indicated that she could not hear the words of command.

117. Following this, the claimant was placed on sick leave from 10 May to 6 September 2019. The respondent's sickness record over this period, records the claimant's absence was due to "*Ear conditions*" and under the heading, "*Disability Related*", it is entered "*No*".

118. There was ambiguity as to who placed the claimant on sick leave. The claimant believed it was Ms Jennings. However, this is at odds with Ms Jennings' evidence in her witness statement that she was briefed on the case on 1 July 2019 by her manager Mr Lewthwaite who had handled the case prior to this. It is also at odds with the claimant's evidence that Mr Kavanagh sent her home on 9 May and had a discussion with Mr Lewthwaite. The respondent did not identify any individual as having taken this decision. Having assessed the evidence available, we find as a fact the claimant was placed on sick leave by Mr Lewthwaite following a discussion with Mr Kavanagh.

119. The tribunal accepted the evidence of Mr Lewthwaite and finds as a fact that the claimant was placed on sick leave and thus required to submit sick lines, because due to hearing difficulties, she was unable to complete and pass the mandatory ACMT training due to her inability to hear the words of command during the shoot. That raised a question regarding the claimant's capability and her competence due to a gap in mandatory training. This finding is consistent with the following facts:

    (i) The claimant's sickness summary record which states her absence is due to "*ear conditions*" (see paragraph 117).
    (ii) The ability to carry a gun with live rounds, is an integral part of the role of Armed Guard (see paragraph 95).
    (iii) The claimant's recognition on 9 May that her duties would need to be reallocated by her manager pending successful completion of her ACMT (see paragraph 115).
    (iv) The claimant's colleague, Mr Keenan was placed on sick leave due to hearing difficulties (see paragraph 160).
    (v) The finding also accords with the scope of the respondent's Capability Policy which was applied to the claimant in July 2019 (see paragraph 132).

120. The claimant was critical of the respondent's failure to consider special paid leave. Originally the claimant had alleged that for a period of time, she was placed on special paid leave, and this was an act of perceived disability discrimination. However latterly it was accepted that she was placed on sick leave and her placement on sick leave is alleged to amount to perceived disability discrimination. The claimant suggested (in written submissions) the respondent should have placed the claimant on special paid leave rather than sick leave as she was not sick in the sense, she was not ill. A key difference between the two types of leave is that regular allowances are paid throughout the entire period of special paid leave, whereas on sick leave these payments are time limited. The tribunal accepted the evidence of Ms Smith and finds that special paid leave is given for a variety of specified reasons for e.g., due to a domestic emergency or to facilitate a manager's action such as an OH assessment which the respondent cannot complete within standard timescales. There was no evidence the claimant's case fell into a category warranting special paid leave.

121. The claimant was referred to OH on 15 May 2019 by Mr Lewthwaite and was seen by Mrs M Sweet, OH Advisor on 31 May 2019. In her report (dated 31 May), Mrs Sweet indicated the claimant had had underwent an audiometry test and did not meet the hearing standards for lower frequencies, (associated with speech), i.e., she did not pass this hearing test. Ms Sweet noted that the claimant's hearing loss was *"Category 2; Unilateral Hearing Loss, left ear (mild hearing loss)"*. Ms Sweet

went on to note within the report that; *"as per MOD policy, a field test is now required"*. Although Ms Sweet noted that the claimant could continue with her operational duties, the tribunal finds as a fact that the respondent remained unable to safely deploy the claimant as an Armed Guard due to her ACMT being out of date. In written submissions the claimant sought to introduce a report by an ENT Surgeon, Mr R Guranthen dated 6 June 2019. However, that report was not opened to the tribunal during the evidence and there was no evidence to suggest that the respondent was aware of this report at the material time. Notwithstanding this, the tribunal accepts the unchallenged evidence of the claimant and Mr Sweetlove that during a subsequent telephone call, Mrs Sweet confirmed that a hearing aid would assist the claimant with her hearing difficulties and indicated she would like to see the claimant again, if she were prescribed hearing aids.

122. At the request of Ms K Hutchinson, Head of NISGS, Major S Hetherington, Training Officer for the NIGSU devised a Field Assessment for NISGS Officers based on the MoD Police Field Test Assessment. The resultant policy document was disseminated to the Head of NISGS and the two Area Managers (Mr B Lewthwaite and Mr M Scollan) on 4 March 2019. The "Field Test" refers to the NISGS Audiometric Function Test. Prior to this, there was no Field Test applicable to Officers of the NISGS.

123. The stated policy aim of the Field Test recognises that:-

> *"An NISGS Officer must have acceptable auditory ability in order to perform safety critical tasks. Their hearing must be of a standard where they are safe to operationally deploy with weapons and allows them to reach the required hearing standard."*

124. In simple terms the purpose of the Field Test is to check that an Armed Guard can hear words of command whilst wearing DEP so that they are safe to be trained on a range where live ammunition is used and to check they can hear a message given over the radio. It is a practical test. It is neither linked nor cross referenced to medical hearing standards applicable to Armed Guards within the NISGS.

125. The Field Test is only carried out on the recommendation of OH. It comprises of two functional tests. The first is to give information over a radio to check that an officer can hear and respond to the message. The second test involves setting up a mock shoot on a firing range and delivering words of command in a manner akin to how such commands would be given on a live firing range. As the test simulates a live firing range, the firer is required to wear DEP, although no live weapons are used. There are two outcomes of the Field Test, namely a pass or a fail.

126. The claimant carried out the Field Test on 4 June 2019. It was carried out by Major Hetherington in the presence of an independent observer, Mr M Scollan, an Area Manager within NISGS. The claimant passed the radio message element of the Field Test. However, she failed the assessment on the range.

127. During the assessment on the range, Major Hetherington stayed approximately three metres behind the claimant and gave words of command. Major Hetherington did not use loud hailer. However, he spoke loudly, slowly, and clearly. The claimant could hear singular words. However, when multiple words were used, the claimant turned to Mr Scollan and said she couldn't hear. The claimant confirmed

this fact to Major Hetherington. Therefore, he stopped the assessment. Mr Scollan was approximately 20 metres from Mr Hetherington during this assessment and was also wearing DEP. He confirmed to Major Hetherington that he could clearly hear his words of command. As the claimant failed this element of the Field Test, she could not undergo a further ACMT test where live weapons were used in circumstances where the respondent could not be satisfied that she would be able to hear words of command as this presented an obvious safety concern for the respondent.

128. Major Hetherington informed the claimant that she had failed the field assessment element of the Field Test and thus had failed the test. Major Hetherington sent the results to the Head of NISGS, Ms Hutchinson that day, having informed the claimant he would do this.

129. The Field Test policy gave the claimant a right to appeal the outcome of the Field Test within ten days of the date of the Field Test. The claimant was informed her right of appeal but did not appeal the outcome of the Field Test. The claimant's explanation for not appealing was because she was not informed of the timeframe within which she could appeal and missed her opportunity to do so. The tribunal finds as a fact that she was not informed as there was no evidence to suggest that she was made aware of the timeframe. There was also no evidence to suggest the claimant made any enquiry about the appeal process and the tribunal finds that she did not do this.

130. Another officer of the NISGS, Mr Andrews, took the Field Test on the same date as the claimant. Mr Andrews' test was also conducted by Major Hetherington. Mr Andrews passed both elements of the test.

Events following the Field Test on 4 June 2019

131. The claimant complained that after she went on sick leave she was not contacted by a manger until 5 July 2019 when Ms Jennings telephoned her. The respondent presented no evidence to the contrary. Therefore, we find that the respondent did not contact the claimant over this two-month period. Given the gravity of the situation, notably the claimant's inability to perform her substantive role, this was understandably a worrying and stressful time for the claimant and the tribunal is critical of the respondent's lack of contact. An NISGS manager could and should have contacted the claimant over this period, particularly following OH's assessment of the claimant in May.

132. On 5 July 2019 Ms Jennings telephoned the claimant and informed her that due to the incident on range on 9 May and her failure to pass the Field Test, Ms Jennings had to apply the respondent's Capability Policy. The Capability Policy applies to all civilian staff in the MoD in specified circumstances outlined in the policy; notably (at paragraph 3);

> "*This policy will apply where employees who cannot do the work they were employed to do for reasons of capability or where they no longer have the correct qualifications to continue to carry out their full range of duties*."

133. The tribunal finds as a fact that the respondent applied its Capability Policy to the claimant because she could not hear the words of command on a firing range whilst wearing DEP. That capability issue meant she could not undertake the mandatory ACMT training and thus could not be safely deployed as an Armed Guard.

134. On the same date, Ms Jennings contacted the Defence Business Services (DBS) and was assigned a DBS advisor. Unlike OH, which sits outside of the MOD, the DBS in an agency of the MoD with expertise in HR Policies. Ms Jennings spoke to her DBS case advisor Ms F Wrigglesworth and obtained advice on the process. Ms Jennings wrote to the claimant (letter dated 4 July 2019) and confirmed that following the OH hearing test and subsequent Field Test, the claimant did not meet the required hearing standard and could not therefore perform the full range of duties as an Armed Guard. Ms Jennings invited the claimant to meet with her on 16 July 2019 to discuss her work capability.

135. Whilst application of the Capability Policy is the remit of the line manager, decisions arising out of its application are informed by the views and input from a variety of sources, notably the medical advice of OH, HR advice from the DBS advisor and the wishes of the employee subject to the policy. Thus, the options open to an employee arising out of the application of the Capability Policy and the ultimate outcome, are fact specific.

136. As the claimant could not perform her role, the options available to Ms Jennings under the Capability Policy were, if applicable, to consider any reasonable adjustments or monitoring, or look at redeployment. If these options were not viable or appropriate the matter would be escalated to Stage 2 of the Policy where the options were dismissal on capability grounds, IHR (if appropriate) or exceptional downgrading or monitoring.

137. Ms Jennings opted to explore the possibility of redeployment. The tribunal finds as a fact that Ms Jennings took this step because the claimant had failed the Field Test, had not appealed this outcome and therefore was unable to undergo and successfully complete the mandatory ACMT. Consequently, she could not perform the role of an Armed Guard. The contemporaneous email communications reveal that Ms Jennings took this decision following advice from Ms Wrigglesworth. Ms Jennings approached the 38 Brigade Secretariat (the HR/Finance Function of the MoD) on 5 July 2019 by email to establish whether there were any suitable vacancies to offer the claimant. Mr Higgins, Deputy Brigade Secretariat, informed Ms Jennings that there was a vacancy in the Quarter Master's Department for a Unit Application Administrator Clerk (UAA Clerk). This vacancy was in the claimant's current place of work at AFS. It was an administrative role but was at the same civil service grade as the claimant's substantive role, i.e., grade E2.

138. Ms Jennings discussed this vacancy with the claimant and her husband, Mr Sweetlove during a meeting on 16 July 2019 along with an alternative option to refer the matter back to OH to seek specialist advice on the possibility of IHR. Any decision on whether IHR is granted, is made by the MoD's pension provider, and is informed by medical advice.

139. During this meeting the claimant expressed unhappiness about having to leave the NISGS and her concern regarding the fact that this administrative role would not attract the same allowances she received in her Armed Guard role. Ms Jennings

pointed out that it was open to the claimant to accept this vacancy and apply for voluntary IHR at any stage.

140. The claimant agreed to consider the UAA vacancy, and a suitability interview took place on 6 August 2019 with Mr K Martin. After the interview, Mr Martin informed Mr Higgins, by email on 8 August 2019 that the claimant would be suitable for the role of UAA Clerk. Mr Martin noted the claimant was not particularly interested in the post and was in the process of applying for IHR.

141. After the meeting on 16 July, Ms Jennings referred the claimant to OH to see if IHR was an option open to her. The claimant was assessed by Ms G Icheku, an OH advisor. Ms Ichecku reported to Ms Jennings (on circa 19 July 2019) that she was unable to conduct this assessment and the claimant was being referred on by OH for an OP assessment. The claimant was informed of this.

142. The claimant was again referred to OH by Ms Jennings and was assessed on 30 July 2019 by Dr Williams. Dr Williams noted in his subsequent report that the claimant's audiogram confirmed she had hearing loss across all frequencies in both ears. Dr Williams also noted that the claimant had seen a specialist and was due to be fitted with hearing aids which; "*should help her substantially*" but went on to note that this, "*may not be compatible with her work as an armed guard*." Dr Williams acknowledged that although the claimant was *"medically fit for work"*, she did *"not meet the operational criteria for an Armed Guard if she cannot hear clearly at work. This is a safety matter for management and if she is unsafe, it is entirely appropriate that she is considered unfit to carry a weapon".* Dr Williams advised the options open to the claimant were redeployment or referral for a decision on IHR; *"if there are no other employment options for her."* Dr Williams noted that in his opinion the claimant's hearing loss brought her within the scope of the EqA.

143. Both reports were emailed to the claimant by Ms Jennings. Therefore, at that point in time whilst IHR was an option being explored by the claimant, no formal application for IHR had been made.

144. On 21 August 2019, the claimant emailed Ms Jennings and confirmed that she would accept the UAA Clerk vacancy. Therefore, the option of compulsory IHR was not pursued.

145. Having considered the testimony of the relevant witnesses and the contemporaneous documents, the tribunal finds as a fact the claimant was not *"forced"* to take the UAA role by Ms Jennings. There was simply no evidence to support this allegation. Although it was evident and viewed objectively entirely understandable that the claimant was unhappy about her situation and did not want to take the UAA role, it was clear that the decision to take the role was a decision taken freely by her. Indeed, in her confirmatory email the claimant indicated she *"would be happy"* to take the role. The voluntary nature of this redeployment was reinforced by the respondent's paperwork which cited the reason for the transfer as a "*Voluntary Move*". That document also recorded that the claimant's transfer was permanent.

146. Accepting the UAA role as redeployment was not the only option open to the claimant at that juncture. Alternatively, the claimant could have asked for the option of compulsory IHR to be explored further. She could have explored the possibility of appealing/retaking the Field Test, albeit at that point, outside of the timeframe under the terms of the policy. The claimant didn't take any of these steps, but instead voluntarily chose to accept the UAA role. The claimant's email to Ms Jennings on 16 August 2019 revealed the claimant attributed no blame to Ms Jennings for her situation. With reference to her desire to explore the option of raising a grievance the claimant notes about Ms Jennings, *"it's not you, you've been very helpful".*

147. On 2 September 2019 the claimant lodged a grievance alleging disability discrimination.

148. The claimant commenced the UAA Clerk role on 9 September 2019. The tribunal heard evidence from Mr Higgins who, in his role in the respondent as Deputy Brigade Secretariat provides support on matters of governance and HR to managers throughout the Brigade. Mr Higgins provided support to Ms Jennings regarding the claimant and specifically in relation to the search for a suitable vacancy for redeployment. The tribunal found Mr Higgins to be a credible witness whose evidence was consistent with contemporaneous documents and with the evidence of other witnesses (notably Mr Brown and Ms Jennings). Based on Mr Higgins evidence the tribunal found the following facts. The UAA role is a 9 to 5, Monday to Friday role and as such did not attract a contractual entitlement to shift allowances or other premiums related to the 24-hour nature of the Armed Guard role. The claimant received these allowances and premiums in the Armed Guard role as she was required to work shifts and work unsociable hours. Similarly, as this administrative role did not require the claimant to carry a weapon, it did not attract an entitlement to an arming allowance. The claimant had received this allowance in her role as an Armed Guard because she was required to carry a weapon for that role. As a matter of policy, notably, the respondent's Shift Policy, entitlement to those allowances would cease if the individual was removed from a role which attracted these allowances, and their new role did not require them to perform work which attracted the allowances.

149. The claimant's new role sat outside of the NISGS and did not attract any of these allowances as it did not require the claimant to work a shift pattern, unsociable hours or carry a gun. This was made clear to Ms Jennings by Mr Higgins in an email of 12 August 2019 in which Mr Higgins stressed that the claimant should be made aware of this before she confirmed her acceptance of the role in writing. Ms Jennings duly followed that instruction and forwarded the email from Mr Higgins to the claimant by email on 16 August 2019. In her cover email Ms Jennings expressly pointed out to the claimant that Mr Higgins had confirmed that; "*all NISGS allowances will cease*". The claimant replied to that email by email of 21 August 2019 to confirm that she would be happy to accept the UAA post.

150. Notwithstanding this, the claimant continued to receive payment for these allowances for several months after she was redeployed. Those payments stopped and restarted. Based on the claimant's unchallenged evidence and the issues in dispute which expressly reference the loss of these allowances, the tribunal finds that at some unspecified point in time the claimant stopped receiving these allowances in her new role and the claimant is still repaying the allowances erroneously paid to her.

151. On 16 September 2019, the claimant was prescribed a hearing aid but did not inform the respondent of this fact.

152. The claimant issued these proceedings in the tribunal on 7 October 2019.

The Claimant's Comparators

153. For the purposes of her direct sex discrimination claim, the claimant compared herself to several named male comparators who worked or used to work for the respondent in the role of Armed Guard. They were, Mr Watson, Mr Andrews, Mr Cooper and Mr Keenan. All these comparisons are referenced in the claimant's evidence in chief. Despite this and despite the extensive period over which the parties had time to prepare for this hearing, during which an inordinate amount of documentation was exchanged, little or no documentary evidence had been served by the respondent in relation to the named comparators in advance of the first day of hearing. This matter was first raised with the tribunal during the CMPH on the first day of hearing when the claimant applied and was granted an order for specific discovery in relation to two comparators, Mr Watson and Mr Andrews (see paragraph 24 above). Following this, relevant documentation in relation to these two comparators was provided and opened to the tribunal. Evidence was also given by Ms Smyth who is the most senior HR Manager for the MoD and the current acting Head of NISGS in relation to Messrs Watson, Andrews, and Cooper. The tribunal found Ms Smyth to be a credible witness. The claimant did not challenge the truthfulness of her evidence and her evidence accorded with the contemporaneous documentary evidence available. Considering these factors, the tribunal accepted Ms Smyth's evidence. Based on her evidence and the supporting contemporaneous documents, the tribunal found the following facts.

154. Mr Watson used a hearing aid whilst performing the role of Armed Guard until his retirement in June 2022. Mr Watson successfully passed the mandatory bi/annual training which must be passed to be deemed capable and competent to carry a weapon. Mr Watson most recently passed this training, including the ACMT, in September 2021 as verified in a training record dated 29 September 2021. Mr Watson did so without the use of his hearing aid. As Mr Watson passed these tests, there was no need for him to be removed from his post or be referred to OH to be considered for a Field Test.

155. Mr Andrews experienced issues with his hearing which negatively impacted on his ability to perform key aspects of his role. Following medical assessment by OH on 28 April 2014, the OH doctor, Dr T McGread, noted in his report (also dated 28 April 2014) that because of hearing loss, Mr Andrews could not use the radio system in work and had been undertaking non armed duties because of his condition since February 2014. Dr McGread advised that Mr Andrews' hearing loss was a concern in a safety critical role and noted that Mr Andrews' results for the medical hearing test fell well outside of the MoD medical hearing standards and was categorised as *"Category 3; Poor hearing. Hearing within 5th percentile. Suggests significant hearing loss. They will require further referral".* In view of this Dr McGread determined that Mr Andrews was also not fit to safely receive instructions in the event firearms may be required. He was deemed fit for office-based work and/or driving duties. These restrictions were described in the report to be permanent restrictions with no review suggested. Thereafter, Mr Andrews was invited to a loss of capability meeting on 15 August 2014, under the respondent's Capability Policy

and was redeployed into a non-armed role within NISGS between 2014 to 2019. The respondent accepted that at that time Mr Andrews had a condition which rendered him a disabled person for the purposes of the DDA. This approach was consistent with the view of Dr McGread in the above-mentioned report wherein he indicated that due to his hearing loss, Mr Andrews would be considered disabled under the DDA.

156. Mr Andrews was referred to OH in March 2017. The management referral to OH records that Mr Andrews wears hearing aids but has not been performing the role of Armed Guard for a few years due to his inability to use an earpiece. OH, was asked whether Mr Andrews met the NISGS hearing standards with or without a hearing aid and whether he would be able to fulfil the full range of duties of an Armed Guard. Following this, Mr Andrews was assessed by OH and the OH doctor, Dr J Arthurs in a report dated 25 April 2017 noted that Mr Andrews had long term hearing loss (category 3) corrected by hearing aids and recommended that he undergo a; "*"Sergeant level field hearing test" at work to establish functional level in a work setting*". That report noted that Mr Andrews must wear DEP on ranges and observed that Mr Andrews had no difficulty hearing conversations via telephone during the medical assessment. At that time, the respondent had not devised a Field Test. It was first rolled out in March 2019. Mr Andrews was subject to the Field Test on 4 June 2019.

157. Mr Andrews passed the Field Test on 4 June 2019. The claimant alleged (in her witness statement) that during the assessment on the range Mr Andrews did not insert the yellow spongies in his ears and thus was not wearing the requisite DEP. Mr Andrews was not a witness in this case. The only witness present during Mr Andrews' Field Test was Major Hetherington. Major Hetherington did not respond to this allegation, and it was not put to him in cross examination. This made it difficult for the tribunal to make a reliable finding of fact in relation to this matter. However, it was not necessary to make any finding as it was not the claimant's case that the Field Test was discriminatory or that those involved in carrying out the test subjected her to discrimination on grounds of sex or indeed perceived disability.

158. Thereafter Mr Andrews underwent and passed the mandatory weapons tests, including the ACMT and was reinstated into his Armed Guard role. Based on the claimant's unchallenged evidence the tribunal finds that Mr Andrews was permitted to wear hearing aids in this role.

159. The claimant asserted that Mr Wes Cooper wore a hearing aid whilst performing his role as Armed Guard. That assertion was not challenged by the respondent, and it is consistent with the respondent's position that Armed Guards can wear hearing aids whilst on duty. Therefore, the tribunal finds as a fact that Mr Cooper, who remains in service, wears a hearing aid whilst working as an Armed Guard. Ms Smyth confirmed, and the tribunal finds as a fact that Mr Cooper passed his mandatory ACMT whilst not wearing a hearing aid and passed the other mandatory annual and biannual weapons tests.

160. The claimant also compared herself to a Mr P Keenan. Mr Keenan applied for and successfully obtained compulsory ill health retirement in November 2018. Mr Brown was Mr Keenan's line manager. The tribunal found Mr Brown to be a credible witness. His evidence (regarding applications for IHR) accorded with the evidence of Mr Higgins. Based on Mr Brown's evidence the tribunal found the following facts.

Mr Keenan had issues with his hearing. Mr Keenan had been advised by his doctor that his hearing was extraordinarily poor and that he required two hearing aids. Mr Keenan was removed from armed duty and placed on sick leave. He was referred to OH. The Capability Policy was applied and Mr Brown was assigned a DBS case advisor. Mr Brown enquired whether Mr Keenan would meet the criteria for ill health retirement. OH, advised that he would. Mr Brown then liaised with a DBS advisor who passed the medical advice on to the MoD's pension provider to determine whether Mr Keenan met the requirements for IHR under their scheme. The question was answered in the affirmative and was made by the MoD's pension provider based on the medical information provided in relation to Mr Keenan.

161. Mr Brown did not undergo a Field Test because no such Field Test was available until March 2019. Mr Keenan had been medically retired at that point.

CONCLUSIONS

162. The tribunal applied the relevant legal provisions and legal principles to the facts found to reach the following conclusions in respect of the agreed legal issues.

Amendment Application and Related Issue of Jurisdiction

Submissions

163. In support of the claimant's amendment application, Ms McIlveen made the following key submissions:-

(i) The category of amendment fell into the first classification in ***Harvey***, i.e., an alternative basis for an existing claim. This is because the proposed amendment sought to change the ground for direct discrimination from an actual disability to a perceived disability. At its height the amendment fell into the second classification in ***Harvey***; namely a "relabelling" exercise, whereby the claim of direct disability discrimination is substituted for a claim of direct perceived disability discrimination.

(ii) The extent of amendment to the claim form was minimal, necessitating the insertion of the word *"perceived"* in front of the term of *"disability"* in two sentences within the details of claim section.

(iii) The practical consequences of the amendment were minimal. The amendment did not materially extend the pleadings; all that was added was a short supplemental witness statement from the claimant and the respondent suffered no prejudice as it was offered the chance to respond to the supplemental statement.

(iv) The question as to whether the tribunal has jurisdiction to consider a complaint of discrimination on grounds of perceived disability should not prevent the tribunal from granting this amendment. Ms McIlveen referenced a judgment of the tribunal in this jurisdiction on a preliminary issue, in ***Foley***, in which the presiding Employment Judge granted the claimant's application to amend her to include a claim of perceived disability discrimination. Ms McIlveen contended that since that 2016 judgment, the law on this jurisdictional question has advanced in the claimant's favour due to the

Coffey judgment which in turn supports the granting of this application to amend.

164. In summary, Ms Best's key submissions for the respondent in resisting the amendment application were as follows:-

(i) The claimant's amendment application fell into the third classification in ***Harvey*** as the claimant sought to add a new cause of action, relying on new facts. The primary basis for this classification was rooted in the respondent's argument that the amendment sought to add a claim which the tribunal, a statutory creature, did not have jurisdiction to hear. In support of this, Ms Best noted the wording of Section 3A(5) of the DDA provided no basis for a claim of direct discrimination on grounds of perceived disability. Ms Best also pointed to Ms McIlveen's reliance on legal authorities which interpret the EqA which does not apply in this jurisdiction. Ms Best relied on the authorities listed above (at paragraph 54) to emphasise that this tribunal does not have jurisdiction to hear a claim of discrimination on grounds of perceived disability.

(ii) The timing and manner of the application was late and disruptive; submitted some two years after the original claim was lodged in the tribunal and only after the respondent brought an application for a Deposit Order. The timing of that application necessitated an adjournment of the substantive Hearing which was ultimately heard ten months later than planned and required a re-timetabling of hearing preparations.

(iii) The consequent delay has caused significant prejudice to the respondent. This was because one of the respondent's key witnesses, Ms Jennings, the claimant's Line Manager was unable to attend the tribunal due to ill-health.

165. The tribunal has a broad discretion to determine whether to grant an amendment application. However, the legal authorities remind the tribunal that when exercising this discretion, it should consider all the relevant circumstances with the paramount consideration being the relative injustice and hardship involved in granting or refusing an amendment.

166. In this case, the tribunal finds itself in the rather unusual situation, where it is considering this preliminary issue having heard the evidence and the parties' respective legal submissions on the proposed amendment as if it had been granted. Furthermore, a critical feature of the amendment application is that it raises a jurisdictional question. In contrast to the Employment Judge in the ***Foley*** case, this tribunal has heard the legal submissions of both parties in relation to the question of jurisdiction and has considered the relevant legal authorities to which it was referred. Inevitably therefore, this eventuality has informed the tribunal's assessment process in respect of the amendment application. This tribunal does not have inherent jurisdiction; it gleans its jurisdiction solely from statute. As matter of logic, the tribunal can and therefore should address the question of jurisdiction as determining that it has jurisdiction is a prerequisite to the pursuit of a claim of direct discrimination on grounds of perceived disability.

Submissions on Jurisdiction

167. In support of the claimant's argument that this tribunal had jurisdiction to hear the claim of direct discrimination on grounds of perceived disability, Ms McIlveen made the following key submissions:-

(i) The chief authority relied upon by the claimant in written and oral submissions was the judgments of the EAT and Court of Appeal in ***Coffey***. The claimant contended that based on the dicta in these judgments (quoting paragraphs 49 – 52 of Richardson J in the EAT) this tribunal must interpret the pertinent provisions of the DDA as they stand to include perceived disability discrimination to give effect to EU law. The claimant maintained the tribunal can do so without the need to refer this matter to the CJEU.

(ii) Relying on the purposive approach adopted by the N.I. Court of Appeal in ***McCrory***, this tribunal should adopt a purposive interpretation of Sections 1 and 3A(5) of the DDA to conclude that it outlawed direct discrimination on grounds of perceived disability. In ***McCrory***, the Court acknowledged that on a literal reading, the DDA did not apply to associative discrimination. Despite this, to give effect to EU law, it held that the DDA should be read to afford protection on this ground.

168. In support of the respondent's argument that this tribunal did not have jurisdiction to hear the claim of direct discrimination on grounds of perceived disability, Ms Best made the following principal submissions:-

(i) The claimant had conflated the associative disability point with the concept of perceived disability discrimination. The upshot of the judgments of the EAT in ***Aitken*** and the Court of Appeal in ***Coffey*** was that under the applicable provisions of the DDA in this jurisdiction, the complainant had to contend that the alleged discriminatory treatment was because of an actual disability suffered by the claimant or by someone associated with the claimant.

(ii) The respondent referred to the judgment of the Court of Appeal in ***English*** in which Collins LJ (in obiter dicta at paragraph 49) distinguished discrimination on grounds of disability from discrimination on grounds of sexual orientation or race and noted that the wording of Section 3B of the DDA in relation to harassment required the offending conduct to relate to *"the disabled person's disability"* and thus required an actual disability.

(iii) The respondent referred to the judgment of the EAT in ***Aitken*** that the ECJ (in the case of ***Coleman***) had not held that action taken based on a mistaken perception that a claimant was suffering from a particular disability to be within the scope of the Framework Directive and crucially its observation (at paragraph 77) which was not overturned on appeal, that the language of Section 3A(1) and (5) of the DDA requires that the discrimination of which a complaint is made be for a reason related to or on the grounds of an actual particular disability.

(iv) Ms Best noted that Ms McIlveen's argument for the interpretation of the DDA to include a claim on grounds of perceived disability relies heavily on the EqA which does not apply to this jurisdiction and the ***Coffey*** decision which

interpreted the pertinent provisions of the EqA relating to direct disability discrimination. The wording of those provisions is materially different to the wording in the corresponding provisions of the DDA which applies in this jurisdiction (see (v) below).

(v) Specifically, with reference to the Court of Appeal judgment in ***Coffey***, the respondent pointed to the different wording of the relevant provisions of the DDA and the equivalent provisions of the EqA and emphasised that the language used in the former outlaws less favourable treatment "*on the ground of a disabled person's disability*" which is narrower than the language in the EqA which outlaws less favourable treatment, "*because of a protected characteristic*". The respondent contended that this difference is of critical importance as the narrower wording of the DDA requires the complainant or someone associated with the complainant (post ***Coleman***) to have an actual disability and is not broad enough to permit the tribunal to interpret it as including perceived disabilities.

(vi) The DDA has been amended on several occasions since its introduction over 17 years ago. At no point, have the legislators amended the DDA to outlaw discrimination on grounds of a perceived disability. The respondent argued that the fact the law makers in this jurisdiction have not taken the opportunity to amend the wording of the DDA to incorporate perceived disability as a protected ground is a good indicator that it was not the intention of the legislators for the DDA to encompass a claim on grounds of perceived disability.

Conclusion on Jurisdiction

169. Having considered the competing, written and oral submissions of the parties on this legal point, the tribunal concludes that it has does not have jurisdiction to hear the claimant's claim of discrimination on grounds of perceived disability. We reached this conclusion for the following principal reasons:-

(i) The tribunal does not have inherent jurisdiction. Its jurisdiction arises from statute. On a plain reading of Sections 1 and 3A(5) of the DDA, there is no provision for a claim of discrimination on the ground of perceived disability. The definitions of a "*disability*" and a "*disabled person*" in Section 1 clearly require the relevant person to have a physical or mental impairment the features of which meet the statutory definition. Equally the concept of direct discrimination set out in Section 3A(5) clearly requires the complainant to have an actual disability. Whilst the judgment in ***Coleman*** has widened that jurisdiction to include protection for direct discrimination (and harassment) by reason of association with a person with an actual disability, that still requires a person associated with the complainant to have an actual disability. Therefore, it is conceptually distinct from a claim on grounds of perceived disability where no one has an actual disability. Because of this distinction, associative discrimination can more easily be read into the wording of the provisions of the DDA than the concept of perceived disability. Moreover, that concept was read into the DDA (in England and Wales by the EAT in ***Coleman***) following a ruling by the CJEU in Coleman confirming that the terms of the Framework Directive incorporated associative discrimination. Thereafter the Court of Appeal in this jurisdiction (in ***McCrory***) confirmed that

the DDA should be read in such a way as to incorporate a claim of associative discrimination. However, the tribunal finds it significant that, in so doing, the Court of Appeal expressly referred to the judgment of the CJEU in ***Coleman*** and the subsequent decision of the EAT. Those rulings were self-evidently relevant to the reasoning of the Court of Appeal on this issue.

(ii) The ***Coffey*** authority relied upon by the claimant (both the EAT and Court of Appeal judgments), interprets Section 13 of the EqA which deals with direct discrimination. That provision is materially different from Section 3A(5) of the DDA in that it contains the phrase, *"because of"* which is broader than corresponding wording, *"on the ground of the disabled person's disability"* contained in Section 3A(5) of the DDA. That broader term was deliberately used by Parliament to broaden the remit of the protection provided within the EqA. Indeed, the tribunal finds it insightful that in confirming the EAT had jurisdiction to hear a claim of perceived disability discrimination, Richardson J expressly referred (at paragraph 49) to the fact that the position in that jurisdiction "*is now clear*". He goes on to attribute that clarity to the new, broader wording of Section 13 of the EqA. Furthermore, it was acknowledged by the Court of Appeal in ***Coffey*** that the EqA's predecessor, the DDA did not or at least did not clearly allow as a matter of ordinary language an interpretation of Section 3 of the DDA to cover perceived disability discrimination. The tribunal is persuaded by the respondent's argument that if it was possible to interpret the DDA to include a perceived disability discrimination claim there would have been no need to implement the EqA.

170. The Framework Directive contains no express reference to perceived protected characteristics. Notwithstanding the CJEU's repeated observation that the Equality Directives should not be interpreted too restrictively, for the reasons set out at (i) and (ii) above, this tribunal is cognisant that in the absence of a clear legislative basis (a basis which exists in England and Wales by virtue of the EqA) there are conflicting legal authorities on whether the Framework Directive incorporates perceived disability discrimination. In the absence of an unequivocal ruling from the CJEU to indicate the Framework Directive includes claims of perceived disability and/or a change of the wording of the DDA by the legislature to broaden the scope of the definitions of disability and disabled person and direct discrimination, this tribunal concludes that perceived disability discrimination does not fall within the scope of the DDA. We also conclude that it is step too far for this tribunal to interpret the relevant provisions as incorporating a direct discrimination claim on grounds of a perceived disability. Therefore, this matter needs to be rectified by the legislators or referred to the CJEU for a ruling.

<u>Conclusion on the Amendment Application</u>

171. In terms of the nature of the amendment, having regard to the uncontested background facts (rehearsed above at paragraph 5), the legal principles and the competing submissions of the parties, the tribunal is satisfied the nature of the proposed amendment falls into the first classification in ***Harvey***, i.e., it is an alternative basis for an existing claim. This is because the alteration to the legal basis for the disability discrimination claim does not raise a new cause of action in the normal sense but rather seeks to broaden the scope of the original protected ground relied on to include perceived disabilities. Furthermore, that alteration does not change the core factual basis supporting that claim. Any expansion of the

factual context was minimal, limited to relevant facts added by virtue of the claimant's relatively brief supplemental witness statement. Even if the tribunal is wrong and the proposed amendment does in fact give rise to a new claim/new cause of action, it is our assessment that the new claim arises out of the same facts. Any new facts relied on were concise and were connected to the original claim. Indeed, the respondent made no argument to the contrary. Therefore, in the alternative, it falls within the second relabelling classification in ***Harvey***. The tribunal is very clear that the amendment does not fall into the third classification. This is because of the strong overlap and connectivity between the factual matrix relied on in the original claim and the amended claim. The points relied on by the respondent to support its classification of the nature of the amendment are not relevant to that question. However, they are circumstances which are relevant to determining whether the amendment should be granted and are considered below.

172. The tribunal recognises that its conclusion in relation to the classification of the amendment lends support to granting the amendment. Notwithstanding this, the tribunal's conclusion that it does not have jurisdiction to hear a complaint of direct discrimination on grounds of perceived disability must, as a matter of common sense, extensively inform its attitude to this amendment application. Without jurisdiction to hear the claim to be advanced by virtue of the amendment, assessment of the other factors relevant to the amendment application is academic. Focusing on the practical consequences of allowing the amendment which is the approach most recently endorsed by Taylor J in ***Vaughan***; the lack of jurisdiction to hear the claim to be advanced by virtue of the amendment renders granting the application futile for all concerned. If the tribunal cannot hear a claim, it assists neither party to grant an application to add that claim. The lack of jurisdiction extinguishes the basis of the amendment application and renders it within the "*manifestly hopeless*" category referenced by Mummery J in ***Selkent***. The determining factor of balancing the relative injustice and hardship of granting or refusing the application points to the rejection of the amendment application. There can be no injustice or hardship to the claimant in refusing the application to add a claim which cannot be heard by the tribunal. In contrast, the respondent would suffer hardship and injustice if the amendment were granted to allow the claimant to advance a claim which lacked jurisdiction. Therefore, the amendment application is refused.

Direct Discrimination on Grounds of (Perceived) Disability

173. By implication, the claimant's unamended claim contains a claim of direct discrimination on grounds of disability. In contrast to the reasonable adjustments claim, that claim was not withdrawn in response to the claimant's concession which was mad at the CMPH on 14 September 2022, that her hearing impairment did not, at the material time, render her a disabled person as defined in Section 1 and Schedule 1 of the DDA. Additionally, the claim was not struck out by the tribunal because of the extant amendment application which sought to replace the ground of disability with perceived disability. However, a claim of direct disability discrimination was not pursued by the claimant at the hearing as an alternative to the perceived disability claim. This was made very clear by Ms McIlveen at the outset of the main hearing when the scope of the amendment was refined from "*actual or perceived*" disability to simply "*perceived*" disability (see paragraph 5 (ix)). Therefore, the only disability discrimination claim pursued by the claimant was a claim direct discrimination on grounds of perceived disability. The claimant's ability

to pursue that claim was contingent on the tribunal granting her amendment application which, for reasons set out above, it has not granted (see paragraphs 6 & 9).

174. Owing to the tribunal's refusal to grant leave to amend the claim, the tribunal is constrained by the claimant's concession that her hearing difficulties did not render her a disabled person falling within the remit of the DDA, to conclude that it has no jurisdiction to hear this claim and dismisses it.

175. In the event the tribunal erred in concluding that it does not have jurisdiction to hear the direct discrimination claim on grounds of perceived disability and thus erred in refusing the claimant leave to amend her claim; the tribunal, having heard the evidence in full and having considered detailed submissions on this claim, can confirm that even if the amendment had been allowed and the tribunal had been satisfied that the respondent, at the material time, perceived the claimant to be disabled by reason of her hearing difficulties, we would have dismissed this claim for the reasons set out below.

176. As outlined in the legal issues, the alleged discriminatory acts of the respondent on grounds of the claimant's perceived disability, i.e., her hearing difficulties were;

(i) removing the claimant from her role as Armed Guard;

(ii) placing her on sickness absence and requiring her to submit sick lines when she was not sick and;

(iii) subjecting the claimant to capability proceedings and deeming the claimant unfit to carry a weapon.

On the facts, these alleged discriminatory acts are interconnected.

177. The claimant compared herself to a hypothetical comparator and contended that, because of this alleged discriminatory treatment, she suffered detriment by feeling she had no choice but to accept the alternative UAA Clerk role which attracted less remuneration and caused her to suffer reduced job status.

178. The tribunal first considered the claimant's hypothetical comparison. That hypothetical comparator can be disabled but must not have the particular disability (albeit in this case perceived disability) the claimant has, namely hearing difficulties. However, the comparator's relevant circumstances, including his/her abilities must be the same as, or not materially different from those of the claimant. On the facts of this case, the relevant circumstances are the requirement to wear DEP during the annual mandatory ACMT where live rounds are fired. The other relevant circumstance is the requirement to wear DEP during the functional Field Test. In both cases, it is undisputed that the claimant was unable to hear the words of command whilst wearing DEP. The claimant's inability to do so during the ACMT on 9 May and thereafter during the Field Test, were the catalysts for the alleged discriminatory acts rehearsed above (at paragraph 176). There was no compelling evidence to suggest that a person who did not suffer from a hearing disability but could not hear the words of command whilst wearing DEP at the ACMT or the follow-up Field Test would be treated more favourably than the claimant.

179. In contrast, the fact that Armed Guards must be able to hear the words of command when training on a firing range where live ammunition is used and the obvious safety related reasons for this, point away from any conclusion that a hypothetical comparator in the scenario outlined above (at paragraph 178), would be treated differently to the claimant. In such circumstances that hypothetical comparator would be unable to complete their ACMT. Thus, the respondent could not be satisfied that they were capable and competent to handle a live weapon, which is a critical aspect of the Armed Guard role. Therefore, they too would be deemed unfit to perform the role of Armed Guard and would be subject to the respondent's Capability policy. Like the claimant and Mr Keenan, they would be placed on sick leave pending the outcome of the application of the Capability Policy and by implication required to submit sick lines. Therefore, applying the test in ***Madarassy***, the claimant has failed to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an act of direct discrimination. In this case the claimant has not established a difference in status or a difference in treatment and thus has failed to shift the burden of proof resting upon her in relation to this part of her case.

180. On the alternative analysis promoted in ***Nelson*** when one stands back and looks at the factual matrix within which the claimant's perceived disability discrimination claim arises, it is evident that the reason for the alleged discriminatory acts was rooted in the respondent's legitimate safety concerns. There is no dispute that an intrinsic part of an Armed Guard's role is the ability to safely carry and use a loaded weapon. With that duty comes enormous responsibility and a requirement to be successfully trained on an annual basis in the use of a live weapon. These safety concerns and related training requirements were at the heart of the respondent's explanation for its impugned actions. Applying the approach of the EAT in ***Laing***, even if there was doubt as to whether the burden had shifted, the tribunal is satisfied that the explanation given by the respondent was genuine and credible and did not disclose any conscious or unconscious perceived disability discrimination. Armed Guards are required to carry out the annual ACMT without the use of any hearing aid and whilst wearing DEP. The reason for this is to protect their hearing from a known noise hazard namely live fire. On the facts, the claimant's removal from her role and placement on sick leave was not based on assumptions regarding her hearing abilities or because of a hearing disability. These were actions taken because of her inability to hear the words of command during the ACMT whilst wearing DEP. That inability presented an obvious safety concern which was illustrated during the firing session on 9 May when the claimant continued to fire on two occasions after the command to stop firing had been given. This meant the claimant could not complete her ACMT and thus could not be deemed by the respondent to be competent and capable in her role as Armed Guard.

181. Although OH deemed the claimant medically fit for work notwithstanding her hearing difficulties, the OH advisors consistently recognised (in May & July 2019) that medical fitness did not equate to operational fitness for the Armed Guard role (see paragraphs 121 & 142). That could only be determined by passing the Field Test. The claimant failed this test. Again, this failure was due to her undisputed inability to hear the words of command whilst wearing DEP. The claimant could have appealed that outcome of that functional test but did not do so. This meant she could not complete her annual ACMT and thus could not be deemed capable or competent to perform her duties as an Armed Guard.

182. The fact Armed Guards are permitted to perform the role with the use of a hearing aid; like Messrs, Watson, Cooper, and Andrews also points away from any finding that the respondent removed the claimant from her role as Armed Guard and prevented her from returning because the respondent perceived her to be hearing disabled. Similarly, the reinstatement of Mr Andrews to the Armed Guard role after passing the Field test and thereafter the ACMT, notwithstanding his significant hearing impairment and the respondent's recognition that he was hearing disabled for the purposes of the DDA, is counter-intuitive to the claimant's contention she was written off by the respondent because she was disabled person by reason of her hearing difficulties.

183. In summary therefore, the claimant's inability to complete the ACMT and her subsequent failure of the Field Test, meant the claimant could not be deemed competent or capable in her role as Armed Guard. This caused the claimant to be placed on sickness absence, triggered the requirement that she submit sick lines and led to Ms Jennings applying the capability proceedings. Those proceedings were activated because the claimant was unfit to carry a weapon by reason of being unable to complete her mandatory ACMT and had nothing to do with any perception on the part of the respondent that she was disabled.

184. The tribunal's conclusions regarding the claimant's alleged detriments are rehearsed in its conclusions in respect of the direct sex discrimination claim (below at paragraph 198) and would have had equal application to this claim.

Sex Discrimination

185. In accordance with the agreed issues, there are two alleged incidents of direct sex discrimination. The first is the respondent's alleged failure to allow the claimant to perform her role as Armed Guard with hearing aids. The second act was the respondent's removal of the claimant from her substantive role as Armed Guard. The claimant relies on four named male comparators in support of both complaints namely, Mr Andrews, Mr Watson, Mr Cooper and Mr Keenan, all of whom are or were Armed Guards.

186. The detriments suffered by the claimant because of this alleged discriminatory treatment are the same as the detriments the claimant was alleged to have suffered by reason of the acts of direct discrimination on grounds of perceived disability, rehearsed above, at paragraph 177.

187. The claimant argued that three of these comparators, Messrs Watson, Andrews and Cooper were allowed to perform the role of Armed Guard with the use of a hearing aid whereas she was not. The claimant relied on the fact Ms Sweet had observed in the OH report of 30 May 2019 that the claimant met the requisite medical hearing standards and could continue with her operational duties. Despite this the claimant was not permitted to return to her substantive role. The claimant asserted she was singled out and treated differently than these three male comparators because she was female. The claimant noted the respondent's Capability Policy gave her four options namely; adjustments to her role (which she says was the use of hearing aids), an alternative role or voluntary downgrade, dismissal or IHR. In addition to

not being allowed to remain in her role with hearing aids (unlike the above-mentioned three male comparators), the claimant contended that unlike Mr Keenan, the option of IHR was not progressed and she was thus denied this option. The claimant alleged this also amounted to less favourable treatment of her, on grounds of sex.

188. The tribunal will now consider each of the claimant's comparisons in turn. Regarding Mr Andrews, we are satisfied that over the relevant period, up to and including the taking of the Field Test, his circumstances were not materially different to those of the claimant. We also conclude that over this period the respondent's treatment of Mr Andrews was in all relevant respects, the same as its treatment of the claimant. This is because like the claimant, owing to hearing difficulties, Mr Andrews was removed from his role as Armed Guard and redeployed to a non-armed role. Like the claimant, Mr Andrews was referred to OH, and on the recommendation of OH, given an opportunity to undertake the Field Test.

189. Mr Andrews passed the Field Test. Whilst the claimant suggested this was because Mr Andrews did not wear the requisite DEP, there was no claim that the nature or application of the Field Test to the claimant, was discriminatory. This fact was re-confirmed by Ms McIlveen at the Submissions Hearing. Indeed, there was no allegation that Major Hetherington, who conducted this test, or Mr Scollan, the independent observer, facilitated, overlooked or were aware of this breach of the test protocol. Moreover, if Mr Andrews passed the Field Test because he did not wear DEP, whilst that pointed to him breaking the rules/requirements of the Field Test, there was no evidence to suggest that reason had anything to do with gender.

190. We conclude that the contrasting outcomes of the Field Test was a material difference in circumstance between the claimant and Mr Andrews. That difference fatally undermined the appropriateness of the claimant's comparison with Mr Andrews from that point onwards. This is because that difference placed the claimant and Mr Andrews in different positions with different options which in turn led to different outcomes. As Mr Andrews passed the Field Test, he was able to carry out and pass his mandatory training, including the ACMT and was allowed to return to his role as Armed Guard. In contrast, the claimant did not pass the Field Test and did not appeal this outcome. Whilst the claimant should have been informed of the timeframe to lodge an appeal, the claimant did not require this information to lodge an appeal or to make enquiries about doing so. However, the claimant did not do this. Consequently, the claimant could not perform the mandatory ACMT to be deemed capable or competent to carry a weapon to allow her to assume her role as Armed Guard with or without hearing aids. Ultimately this led to the claimant opting to accept redeployment to the UAA role. These factors are the reasons for the difference in treatment between the claimant and Mr Andrews following the Field Test and had nothing to do with gender.

191. The fact Ms Sweet deemed the claimant operationally fit to perform her substantive role must be viewed in the context of her entire report, in which she recommended that the claimant undergo a Field Test, the aim of which is to determine if she met the practical hearing standards required to enable her to safely complete the mandatory ACMT (paragraph 121). This reflects the fact that hearing standards for Armed Guards have two elements; medical hearing standards which are determined by OH and practical or functional hearing standards determined by the Field Test. The former may be improved by hearing aids, whereas the latter must

be met without hearing aids. This distinction was also acknowledged by Dr Williams in his report of 30 July 2019. His conclusion that the claimant was medically fit for work was tempered with the observation that from an operational perspective, she was unsafe to carry a weapon if she could not hear clearly at work and his related recognition that it was "*entirely appropriate*" that she be considered unfit to carry a weapon should management deem her to be unsafe (paragraph 142). We are satisfied, on the facts, that the requirement to hear clearly at work, relates to the ACMT and thereafter, the Field Test.

192. The claimant sought to suggest in submissions that the timing of the introduction of the Field Test and its limited application was strange. However, these observations were not relevant to the claimant's case which made no allegation of discrimination (direct or indirect) in relation to the substance of the Field Test or its application to the claimant but instead challenged the respondent's treatment of her thereafter. Therefore, the tribunal was not tasked with conducting an enquiry into the genesis, application, or impact of the Field Test. Furthermore, those observations overlooked the clear and credible explanation of the respondent about the rationale for the introduction of this test and explanation for its limited application its application was dependant on a OH recommendation which accounted for its limited application. Similarly, the tribunal attached no significance to the significant gap in time between OH recommending that Mr Andrews be subjected to the Field Test and that test taking place. On the facts, this was because the respondent did not introduce a Field Test until March 2019. That delay denied Mr Andrews a valuable opportunity to have his fitness for the Armed Guard role reassessed in a timely fashion. Crucially, it did not point to more favourable treatment of Mr Andrews vis-à-vis the claimant.

193. The tribunal concludes that neither Mr Watson or Mr Cooper were in the same or similar circumstances as the claimant as they successfully passed their mandatory training, including their annual ACMT. Due to the requirement to wear DEP, Messrs Watson and Cooper did so without hearing aids. Consequently, both were deemed safe to carry a weapon and able to perform the Armed Guard role with the benefit of hearing aids. As a result, there was no need for either of them to be removed from their post or subjected to a Field Test.

194. Considering these facts, the tribunal concludes that neither Mr Watson nor Mr Cooper were appropriate comparators. In any event, the comparisons drawn do not reveal less favourable treatment. This is because like the claimant both comparators were required to undergo and pass a regular mandatory ACMT without hearing aids. The different treatment thereafter emanated from the different outcomes of their respective AMCT which had nothing to do with gender.

195. The tribunal is satisfied that Mr Keenan was an appropriate comparator as, like the claimant, due to hearing difficulties, he was removed from his role as Armed Guard in 2018 and placed on sickness absence, referred to OH and was subject to the Capability Policy. Thus, he was treated the same as the claimant. Mr Keenan did not return to his role. Instead, he applied for and was granted ill-health retirement. The claimant's contention that she was not considered for IHR is factually incorrect. The option of IHR was being explored for the claimant at her request. However, that application was overtaken by the claimant accepting the offer of redeployment. Thus, although the outcomes were different, there was no disparity of treatment in that, like Mr Keenan, the option of IHR was being explored for the claimant.

Moreover, on the facts, the tribunal concludes that the reason for the different outcome for Mr Keenan was in no sense related to gender. The ability to apply for ill-health retirement and the outcome of any application is fact specific. In Mr Keenan's case, he was offered, and accepted ill-health retirement based on the particular facts of his case. Furthermore, that decision was not within the gift of the respondent but was instead a decision taken by the respondent's pension provider based on the terms of its IHR scheme. Therefore, any difference in treatment is fact specific and crucially had nothing to do with gender.

196. In summary, having assessed the relevant facts, the tribunal concludes that the claimant's claim of direct sex discrimination is not well founded. This is because, for the reasons set out above, the tribunal found each of the comparisons made by the claimant to either be inappropriate, or appropriate but did not reveal less favourable treatment. Therefore, applying the test in ***Madarassy***, the claimant has failed to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an act of direct sex discrimination. Thus, the claimant has failed to shift the burden of proof resting upon her in relation to this part of her case.

197. Alternatively, setting aside the various deficiencies in each comparison and the related requirement to shift the burden of proof, adopting the analysis in ***Laing***, we are satisfied that the explanations provided by the respondent for any differences in treatment between the claimant and her four comparators were genuine. Those explanations were rooted in one or more of the following factors: the ability of two of the comparators to pass the annual mandatory ACMT, the claimant's failure to pass the Field Test or appeal that outcome, the fact specific nature of applications for IHR and the claimant's acceptance of the offer of redeployment. Those factors have nothing to with gender. Therefore, the claimant's sex discrimination claim is dismissed.

198. For the sake of completeness, we are satisfied the alleged detriments caused to the claimant in accepting the UAA role was a situation borne out of decisions made by the claimant in circumstances where she had other options. On the facts, the claimant was not forced to accept the UUA role, nor was it reasonable for her to feel that this was her only option. It was not. The claimant could have appealed the Field Test. Whilst the time limit may have expired, she could still have enquired about this possibility none the less. She could have refused the offer of redeployment and instead pursued the application for compulsory IHR. The claimant chose not to pursue these options. Instead, the claimant chose to accept the offer of redeployment to the UAA role. The claimant freely made that decision stating that she "would be happy" to take the role and there was no evidence that Ms Jennings coerced her to do so or acted inappropriate in any way. The fact the claimant told Ms Jennings that she had been very helpful; fatally undermines the credibility of that assertion. The UAA role was of the same grade as the Armed Guard role and thus did not result in a loss of job status. There was a loss of remuneration. However, that loss flowed from the different working arrangements for the role of UAA, notably the different hours of work and the fact it was a non-armed role. This was a role which the claimant chose to accept and, for the reasons set out herein, cannot reasonably be regarded as a detriment flowing from any act of discrimination of the claimant on grounds of sex.

Unauthorised Deduction from Wages

199. The parties' focus on this claim during the hearing and in written submissions was minimal. The scope of the claimant's deduction from wages claim was finally clarified by Ms McIlveen, in oral submissions at the Submissions Hearing. The claim relates to the fact the claimant's new UAA role did not attract the additional payments her Armed Guard role did in the form of allowances paid for working on shift, unsociable hours and for carrying a firearm. The claimant maintains that she did not expressly consent to the removal of her contractual entitlement to these allowances. Therefore, the respondent breached her contract by ceasing to pay her these allowances.

200. However, on the facts, the claimant freely and voluntarily accepted the UAA role which she was aware was an administrative role. Before doing so, the claimant was expressly informed in writing that she would no longer be entitled to receive the allowances and related premiums she enjoyed in her Armed Guard role with the NISGS (see paragraphs 145 & 149). The tribunal is satisfied that this amounted to express consent to the removal of this contractual entitlement; indeed, her consent was a prerequisite to her acceptance of the UAA role. It was also policy requirement of the respondent. The claimant was not contractually entitled to the relevant shift and arming allowances/premiums in her new UAA role. Thus, their non-payment did not amount to a breach of contract. The claimant has failed to establish that she has suffered an unauthorised deduction from wages. Therefore, this claim is dismissed.

Employment Judge:

Dates and place of hearing: **17-21, 24 & 25 October 2022, 21 November 2022, Belfast.**

This judgment was entered in the register and issued to the parties on: