THE INDUSTRIAL TRIBUNALS

CASE REF: 4182/18

CLAIMANT: **Gordon Thomas Downey**

RESPONDENTS: **1. Garrath McCreery**
2. Chief Constable of the Police Service of Northern Ireland

Certificate of Correction

The decision issued on **2nd October 2019 at the opening paragraph which reads;**

"The claimant's claims of direct discrimination, in respect of the enforcement of the CAPES policy, is well founded against the second respondent."

is corrected to read;

"The claimant's claim of direct discrimination, in respect of the enforcement of the CAPES policy, is well founded against the second respondent."

Employment Judge:_____

Date: _____

Amendments recorded in Register and issued to the parties on:

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CLAIMANT: **Gordon Thomas Downey**

RESPONDENTS:
1. **Garrath McCreery**
2. **Chief Constable of the Police Service of Northern Ireland**

DECISION

The unanimous decision of the tribunal is that the claimant was discriminated against contrary to the Sex Discrimination (Northern Ireland) Order 1976. The claimant's claims of direct discrimination, in respect of the enforcement of the CAPES policy, is well founded against the second respondent. The claimant's claim of direct discrimination against the first respondent is dismissed. The claimant's claim of indirect discrimination, in relation to the promulgation of the policy, is well founded against the second respondent. The claimant's claim of indirect discrimination against the first respondent is dismissed. The claimant's claim of victimisation against both respondents is not well founded and is dismissed. A declaration and recommendation is made as set out in this decision.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Gamble**

Members: **Mr T Carlin**
Mr E Gilmartin

APPEARANCES:

The claimant was represented by Mr N Phillips, of counsel, instructed by Worthingtons Solicitors.

The respondents were represented by Miss R Best, of counsel, instructed by the Crown Solicitor's Office.

BACKGROUND

1. The following background is common case between the parties. The claimant is a Constable in the Police Service of Northern Ireland (PSNI) and is attached to the Armed Response Unit (ARU). The claimant has extensive experience within the PSNI, having joined the former RUC in November 1995. The ARU is an elite unit

within the PSNI and responds in situations where lethal force or potentially lethal force could potentially be used.

2. On 7 January 2018 the Uniform and Protective Measures Committee (UPMC) within the PSNI introduced a policy which revised and set out certain minimum standards for dress and appearance within the PSNI. It also identified equipment to be worn in compliance with health and safety legislation. This policy was entitled the Corporate Appearance and Protective Equipment Standard (CAPES). On 7 January 2018 PSNI published the CAPES policy, which included a new policy on facial hair. Assistant Chief Constable Gray's email, which circulated the new policy to all staff, stated the primary policy aim, which was *"protecting Officers and staff who wear Respiratory Protection Equipment (RPE) on a regular basis. This relates solely to officers in certain specialised roles and has been subject to robust consultation with PSNI internal stakeholders including Health & Safety Branch, Equality & Diversity Unit and Police Federation for NI."*

3. Section 1.3 of CAPES included: *"Some police officers/police staff occupy roles where there is routine respiratory exposure to occupational hazards. These officers/staff members may be required to wear Respiratory Protection Equipment (RPE) at short notice and must therefore always remain clean shaven whilst on duty."* This was the iteration of the CAPES policy at the relevant time when the actions which are the subject matter of the claimant's complaint occurred. (Tribunal's emphasis.)

4. On or around 20 February 2018 the wording at section 1.3 was revised as follows: *"Some police officers/police staff occupy roles where there is a routine possibility of respiratory exposure to occupational hazards. These officers/staff members may be required to wear Respiratory Protection Equipment (RPE) at short notice and must therefore always remain clean shaven whilst on duty."* (Tribunal's emphasis.) However, by this time the claimant had already been advised that he was to be transferred out from his unit on the basis of the application of the original iteration of CAPES policy to him.

5. The claimant and his colleagues within the ARU had been issued with Respiratory Protection Equipment (RPE) in the form of an Avon FM12/S10 respirator some years before the promulgation of the CAPES policy, but the claimant, and a number of his witnesses, maintained that he had not been trained in the use of RPE by PSNI, that he did not carry RPE and that he had never been required to deploy whilst using RPE at any time in the past. The FM12 is a "full-face" type respirator which provides protection against a range of risks including chemical, biological, radiological and nuclear (CBRN) and CS gas (depending on canister used).

6. FM12 full face type respirators are not the only form of RPE deployed by the PSNI. The claimant's uncontroverted evidence was that at the time of the introduction of the CAPES policy and the consequent action, which gave rise to his complaint to the tribunal, neither he nor other members of his unit had been supplied with half face FPP3 particulate filters. The ARU was one of a number of specialist units which the PSNI deemed to be subject to the RPE provisions of section 1.3 of the CAPES policy, requiring officers to be clean shaven.

7. Prior to December 2017 the claimant wore a beard. In anticipation of the introduction of the new policy the claimant shaved off his beard and retained a moustache.

8. It is a recognised health and safety requirement that users of RPE require to be tested periodically to ensure that the RPE functions as intended on the individual wearer. This testing is referred to as "porta-counting" or "fit testing". The claimant was porta-counted in respect of his FM12 respirator on 11 December 2017, whilst wearing his moustache, and passed. This is because the length and style of his moustache at that time did not interfere with the seal or the valves of the respirator. In order for RPE to function as intended, it is necessary for a good seal to be achieved with the individual wearer's face. It is accepted by all the parties that facial hair in the area of the mask seal may interfere with that seal and thus prevent the RPE from functioning as intended.

9. However, the claimant does not accept that the safe use of RPE required the removal of all facial hair, whereas the policy promulgated by PSNI required the removal of all facial hair, including moustaches.

10. The claimant was also appointed as a Federation representative for the Police Federation of Northern Ireland (PFNI) for the ARU with effect from the end of January 2018. On or about 1 February 2018 the claimant was contacted by a federated member of his unit who had been ordered by his line management to shave off his beard to achieve compliance with the new Policy. That officer declined to do so and as a consequence he was informed on or about 2 February 2018 that he would be moved to alternative duties in roads policing with effect from Tuesday,
6 February 2018. This move to alternative duties would comprise a change of station, unit and shift.

11. On Friday, 2 February 2018 the claimant met with his Inspector and his Sergeant at 11.00 am. The claimant was asked if he intended to shave off his moustache. The claimant declined to do so. The claimant was informed that if he didn't shave off his moustache he would be transferred out of the ARU. The claimant again declined to do so and handed his Inspector a document entitled "Direct Discrimination against me by the PSNI". This document was treated as a grievance complaint. Following his refusal to remove his moustache, the claimant was informed that he was being transferred to roads policing with effect from Tuesday, 6 February 2018. He was also advised that he could not complete his rota shifts for the ARU in the interim.

12. The claimant did not report for his new duty on 6 February 2018, having commenced a period of sickness absence. He remained on sickness absence until he returned to duties within the ARU on Wednesday, 14 March 2018, having agreed to remove his moustache.

13. The claimant presented a claim to the Industrial Tribunal on 19 February 2018 in which he alleged that he had been unlawfully discriminated against by the respondents contrary to the Sex Discrimination (Northern Ireland) Order 1976.

14. The claimant made claims of direct sex discrimination, indirect sex discrimination and victimisation. The respondents resisted the claimant's claims in a response dated
20 April 2018.

15. The claimant's claim of direct sex discrimination consists of the assertion that he has been treated differently than female colleagues who are likewise in breach of the CAPES policy, in that he has been transferred/demoted, suspended from Firearm use, forced to withdraw his grievance and forced to shave off his moustache in February 2018, whereas those named female colleagues have not been subject to such treatment in the enforcement of the CAPES policy. The claimant seeks to compare his treatment to that of two female officers within his unit, namely Sergeant Maguire and Constable White. The claimant relies on the provisions of section 1.2 'Hair' of the CAPES policy which states: *"In the interests of health and safety, hair should be worn so that it is cut or secured above the collar."* It was not disputed that both female officers had long hair which was not secured above the collar during ARU deployment, at the relevant time. Neither officer was subject to a requirement to cut their hair or face redeployment to alternative duties in consequence of the introduction of the new CAPES policy. The respondents do not accept that these officers are appropriate comparators, whose relevant circumstances are the same, or not materially different, from those of the claimant.

16. The claimant also asserts that section 1.3 of CAPES is indirectly discriminatory against men and is not justified, as it is not a proportionate means of achieving a legitimate aim.

17. The claimant's victimisation claim is that he was forced to withdraw the grievance he had lodged as a pre-condition of being allowed to return to active duty within his unit. The claimant relies upon the communication of his decision to shave, enquiries made on Chief Inspector McCreery's instruction as to his intentions regarding his grievance and the subsequent delay in communicating to him the decision to allow him to return to duty. The grievance complaint itself is the protected act relied upon. The claimant had also referred to discrimination when notifying his superiors of his sickness absence on 2 February 2018.

18. The respondents contend that their actions were not discriminatory. It is contended by the respondents that the action taken against the claimant was on grounds of his non-compliance with section 1.3 of the CAPES policy and to comply with PSNI's health and safety obligations, and not on grounds of his sex. Further, PSNI asserts that if the policy was found to be capable of being indirectly discriminatory, it was nevertheless justified as a proportionate means of achieving a legitimate aim, and was necessary in order to comply with the requirements of Health and Safety law.

SOURCES OF EVIDENCE

19. The witnesses provided written witness statements which were adopted as their evidence in chief and witnesses were then subject to cross examination. The tribunal heard evidence from the claimant, Constable Kelly, Sergeant Leathem, Sergeant Buxton and Sergeant Maguire (one of the comparators) on behalf of the claimant. The claimant also adduced expert evidence in the form of a report by Richard Gates of Hazmat Control. As this report was not agreed between the

parties, Mr Gates attended the tribunal in person and was cross examined on behalf of the respondents. The tribunal also heard evidence from Chief Inspector McCreery, Ms McCurdy (Equality Officer, PSNI), Ms Howell (at the relevant time HR Partner for Ops Support Department), Detective Chief Inspector Lewis (Chief Firearms Instructor, PSNI), Superintendent Foy, Constable Bunting (Combined Operational Training), Constable Orr (Chief Health and Safety Adviser, PSNI), Constable Smyth (CBRN Regional Support Officer) and Sergeant Dillon on behalf of the respondents. The tribunal also considered two lever arch files of documents which had been exchanged between the parties and which were provided to the tribunal.

20. The tribunal did not hear from Sergeant Murray who was not available to give evidence. The tribunal did not hear from Inspector Hamilton who provided a statement but was not called to the hearing. The tribunal was asked to disregard his statement, which has accordingly been disregarded.

21. The tribunal was not greatly assisted by the expert evidence of Mr Gates. Mr Gates gave evidence that he was a director in a commercial company which was a distributor of health and safety equipment, including RPE. In particular, Mr Gates admitted under cross-examination that he was not trained in porta-counting and had no expertise in the manufacture or testing of RPE equipment. He offered his opinion, which was not supported in his report by any excerpt from any policy, on the practice within British armed forces. Mr Gates' opinion was that it was not possible for a well-kept moustache which was not longer than the *mentolobial sulcus* to interfere with the sealing or the valves of a respirator. Mr Gates' report contained unreferenced images which he admitted he had downloaded from Google. Mr Gates gave evidence that he had sought the opinion of Major Wills on his draft report. He stated that he had deferred to Major Wills, a former Chief of Staff of "NATO Reaction Force 13", given that he had experience in porta-counting and had worked at the Porton Down laboratories. Mr Gates, during cross examination, introduced for the first time an entirely new standard protocol which had not been mentioned in his report. This protocol was that PSNI officers should be allowed to retain a "grade 8 moustache". He later admitted that he had made this suggestion "off the top of his head". The tribunal was assisted by the parties' inclusion of British Standard documents and Health and Safety publications within the bundle. The tribunal accepted the evidence of Mr Gates where it was supported by those standards and publications. In addition, a number of the respondents' witnesses during their oral evidence agreed that it was not necessary to be completely clean shaven (i.e. free of a moustache or similar well kept facial hair not in the vicinity of the seal area) in order to achieve an effective seal on RPE.

22. The tribunal found that all of the other witnesses gave their evidence in a generally straightforward and consistent way, and this assisted the tribunal in considering the issues before it.

THE ISSUES FOR DETERMINATION BY THE TRIBUNAL

23. In advance of the hearing a statement of legal and factual issues for determination by the tribunal was agreed by the parties and is attached to this judgment. The tribunal does not consider it necessary to make a finding in respect of each and

every factual issue listed in order to determine the claimant's claims. Accordingly, findings of fact have been made only where necessary for the determination of the claims before the tribunal. The issues required the tribunal to consider only whether the second respondent was guilty of the alleged discrimination, namely direct discrimination, indirect discrimination and victimisation, notwithstanding that the claims were directed against Chief Inspector McCreery also.

24. At the submissions hearing, the claimant's Counsel conceded that the chronology of the transfer did not support the claim that the claimant was victimised by being threatened with transfer as a result of having raised his complaints as set out in his grievance document dated 2 February 2018. Accordingly, the only victimisation claim being pursued related to the claimant's withdrawal of his grievance following enquiry at Chief Inspector McCreery's direction.

25. The respondents made the following concessions relating to the claim of Indirect Discrimination in Replies dated 17 October 2018:

> *"As regards the claimant's request for additional information the respondents now provide further replies as follows:*
>
> *Do the respondent's accept that the CAPES policy constitutes a provision, criteria or practice applied to police officers within the ARU? If not, please confirm the factual basis upon which the respondent relies on to refute this.*
>
> The CAPES policy applies to all officers within the Police Service of Northern Ireland and not just those officers serving in the ARU. Section 1.3 of the policy headed "Facial Hair" applies to police officers or police support staff who occupy roles where there is a routine possibility of respiratory exposure to occupational hazards. This applies to units outside of the ARU.
>
> *Do the respondents accept there is a disparate impact on men in the ARU on the application of the CAPES policy, specifically section 1.3? If not, please confirm the factual basis upon which the respondent relies on to refute this.*
>
> The respondent's accept that there is a disparate impact on men in the ARU on the application of section 1.3 of the CAPES policy."

26. During the hearing, the tribunal had expressed its concern that a provision, criterion or practice (PCP) governing facial hair could be indirectly discriminatory, given that the growth of facial hair is a secondary sex characteristic for males, just as the development of breast tissue is a secondary sex characteristic for females. The respondents were given the opportunity to consider this concession and the submissions hearing was adjourned to facilitate this. It was recognised and acknowledged by PSNI in their EQIA assessment document that section 1.3 of the CAPES Policy affected "males only" (see paragraph 78.8 below). The respondents did not withdraw the concession referred to above, and informed the tribunal that they were content to stand by their stated position, thus confirming the applicability of the impugned section 1.3 to both males and females and confirming that there was a "disparate impact" within the pool of the ARU. Whilst this request and reply used the language associated with the traditional formulation of Indirect

Discrimination, before the 2005/2011 amendment Regulations, the concession is clear and unambiguous. The tribunal has therefore made its determination of the Indirect Discrimination claim taking account of the respondents' concession in this regard, the evidence before it and the legal and evidential submissions made on behalf of the parties.

SUBMISSIONS

27. The parties lodged written submissions and also made further oral submissions. The written submissions are attached to this decision. Where necessary, this decision summarises the relevant submissions and sets out the tribunal's view regarding them. The tribunal is grateful to Counsel for their well-researched and helpful submissions, which were of much assistance to the tribunal.

FORMAT OF THIS DECISION

28. This decision sets out the relevant case law in respect of the direct discrimination, indirect discrimination and victimisation claims along with the relevant findings of facts in respect of these claims.

RELEVANT LAW

29. **Sex Discrimination (Northern Ireland) Order 1976**

Direct discrimination on the ground of sex

3. In any circumstances 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

Indirect discrimination on the ground of sex

3A.—(1) In any circumstances relevant for the purposes of any provision of this Order, a person ("A") discriminates against another person ("B") if A applies to B a provision, criterion or practice which is discriminatory in relation to B's sex.

(2) For the purposes of paragraph (1), a provision, criterion or practice is discriminatory in relation to B's sex, if –

(a) A applies, or would apply, it to persons of a different sex,

(b) it puts, or would put, persons of the same sex as B at a particular disadvantage when compared with persons of a different sex,

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

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

Sex discrimination against men

4.—(1) The provisions of Parts III and IV relating to sex discrimination against women, are to be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite.
…

Discrimination by way of victimisation

6.—(1) A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Order if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and does so by reason that the person victimised has—

…

(d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Order … ,

or by reason that the discriminator knows the person victimised intends to do any of those things, or suspects the person victimised has done, or intends to do, any of them.
…

Basis of comparison

7. Each of the following comparisons, that is—

(aa) a comparison of the cases of persons required for the purposes of Article 3,

(a) a comparison of the cases of persons of different sex under Article 3A,

(b) a comparison of the cases of persons required for the purposes of Article 4A or 4B , and

…

must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

Office holders

13B…

(3) It is unlawful for a relevant person, in relation to a woman who has been appointed to an office or post to which this Article applies, to discriminate against her—

(a) in the terms of the appointment,

(b) in the opportunities which he affords her for promotion, a transfer, training or receiving any other benefit, or by refusing to afford her any such opportunity,

…

(d) by subjecting her to any other detriment in relation to the appointment.

….

Burden of proof: industrial tribunals

63A.—(1) This Article applies to any complaint presented under Article 63 to an industrial tribunal.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent—

(a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part III, …

…

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.

Remedies on complaint under Article 63

65.—(1) Where an industrial tribunal finds that a complaint presented to it under Article 63 is well-founded the tribunal shall make such of the following as it considers just and equitable—

(a) an order declaring the rights of the complainant and the respondent in relation to the act to which the complaint relates;

(b) an order requiring the respondent to pay to the complainant compensation of an amount corresponding to any damages he could have been ordered by a county court to pay to the complainant if the complaint had fallen to be dealt with under Article 66;

(c) a recommendation that the respondent take within a specified period action appearing to the tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of any act of discrimination to which the complaint relates.

(1A) In applying Article 66 for the purposes of paragraphs (1)(b), no account shall be taken of paragraph (3) of that Article.

(1B) As respects an unlawful act of discrimination falling within Article 3A or Article 5(1)(b), if the respondent proves that the provision, criterion or practice in question was not applied with the intention of treating the complainant unfavourably on the

ground of his sex or (as the case may be) fulfilment of the condition in Article 5(2), an order may be made under paragraph (1)(b) only if the industrial tribunal—

(a) makes such order under paragraph (1)(a) and such recommendation under paragraph (1)(c) (if any) as it would have made if it had no power to make an order under paragraph (1)(b); and

(b) where it makes an order under paragraph (1)(a) or a recommendation under paragraph (1)(c) or both) considers that it is just and equitable to make an order under paragraph (1)(b) as well.

Para. (2) rep. by SR 1993/478

(3) If without reasonable justification the respondent to a complaint fails to comply with a recommendation made by an industrial tribunal under paragraph (1)(c), then, if they think it just and equitable to do so,—

(a) the tribunal may increase the amount of compensation required to be paid to the complainant in respect of the complaint by an order made under paragraph (1)(b), or

(b) if an order under paragraph (1)(*b*) was not made, the tribunal may make such an order.

(4) Where compensation falls to be awarded in respect of any act both under the provisions of this Article and under any other statutory provision, an industrial tribunal shall not award compensation under this Article in respect of any loss or other matter which has been taken into account under that other statutory provision by the court in awarding compensation in an action in respect of that act.

Shifting the Burden of Proof

30. The proper approach for a tribunal to take when assessing whether discrimination has occurred and in applying the provisions relating to the shifting of the burden of proof was reviewed and restated by the Northern Ireland Court of Appeal in the case of **Nelson v Newry & Mourne District Council [2009] NICA**:-

> *"22 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.*

*23 In the post-****Igen*** *decision in* ***Madarassy v Nomura International PLC [2007] IRLR 247*** *the Court of Appeal provided further clarification of the Tribunal's task in deciding whether the Tribunal could properly conclude from the evidence that in the absence of an adequate explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the* ***Igen*** *approach, the* ***Madarassy*** *decision is in fact an important gloss on* ***Igen****. 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.'

That decision makes clear that the words 'could conclude' is not to be read as equivalent to 'might possibly conclude'. The facts must lead to an inference of discrimination. This approach bears out the wording of the Directive which refers to facts from which discrimination can be 'presumed'.

24 This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the 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. In ***Curley v Chief Constable of the Police Service of Northern Ireland [2009] NICA 8****, Coghlin LJ emphasised the need for a Tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the Tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The Tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."*

31. In **S Deman v Commission for Equality and Human Rights & Others [2010] EWCA Civ 1279**, the Court of Appeal in England and Wales considered the shifting of the burden of proof in a discrimination case. It referred to **Madarassy** and the statement in that decision that a difference in status and a difference in treatment 'without more' was not sufficient to shift the burden of proof. At Paragraph 19, Lord Justice Sedley stated:-

> *"We agree with both counsel that the 'more' which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be forwarded by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."*

32. The Supreme Court considered the statutory test in **Hewage v Grampian Health Board [2012] IRLR 870**. Lord Hope stated**:**

> *"29. In* ***Igen v Wong****, para 16, Peter Gibson LJ said that, while it was possible to offer practical help…, there was no substitute for the statutory language. And in* ***Madarassy v Nomura International plc [2007] ICR 867****, para 9 Mummery LJ emphasised that the Court of Appeal had gone out of its way in Igen to say that its guidance was not a substitute for statute. As he put it, "Courts do not supplant statutes. Judicial guidance is only guidance." In para 11 he said that there was really no need for another judgment giving general guidance: "Repetition is superfluous, qualification is unnecessary and contradiction is confusing." And in para 12:*
>
> > *"Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts. It is vital that, as far as possible, the law on the burden of proof applied by the fact-finding body is clear and certain. The guidance in* ***Igen Ltd v Wong*** *meets these criteria. It does not need to be amended to make it work better."*
>
> *30. Nevertheless Mummery LJ went on in paras 56 and following of his judgment in* ***Madarassy*** *to offer his own comments as to how the guidance in* ***Igen v Wong*** *ought to be interpreted, which I would respectfully endorse. In para 70, having re-stated what the tribunal should and should not do at each stage in the two stage process, he pointed out that from a practical point of view, although the statute involved a two-stage analysis, the tribunal does not in practice hear the evidence and the argument in two stages:*

"The employment tribunal will have heard all the evidence in the case before it embarks on the two-stage analysis in order to decide, first, whether the burden of proof has moved to the respondent and, if so, secondly, whether the respondent has discharged the burden of proof."

31. In para 77, in a passage which is particularly in point in this case in view of the employment tribunal's reference in para 107 to its being required to make an assumption, he said:

"In my judgment, it is unhelpful to introduce words like 'presume' into the first stage of establishing a prima facie case. Section 63A(2) makes no mention of any presumption. In the relevant passage in ***Igen Ltd v Wong*** *… the court explained why the court does not, at the first stage, consider the absence of an adequate explanation. The tribunal is told by the section to assume the absence of an adequate explanation. The absence of an adequate explanation only becomes relevant to the burden of proof at the second stage when the respondent has to prove that he did not commit an unlawful act of discrimination."*

The assumption at that stage, in other words, is simply that there is no adequate explanation. There is no assumption as to whether or not a prima facie case has been established. The wording of sections 63A(2) and 54A(2) is quite explicit on this point. The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be proved, and it is for the claimant to discharge that burden."

Direct or Indirect Discrimination

33. Harvey on Industrial Relations and Employment Law sets out the interaction of direct and indirect discrimination at paragraph 289ff. In **R (On the application of E) v Governing Body of JFS [2009] UKSC 15, [2010] IRLR 136** Lady Hale said at paragraphs 56–57:

"The basic difference between direct and indirect discrimination is plain: see Mummery LJ in **R (Elias) v Secretary of State for Defence [2006] EWCA 1293, [2006]** 1 WLR 3213, para 119*. The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality, or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.*

Direct and indirect discrimination are mutually exclusive. You cannot have both at once. As Mummery LJ explained in Elias at para 117 "the conditions of liability, the available defences to liability and the available defences to

remedies differ". The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim."

DIRECT DISCRIMINATION – CASE LAW

34. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11** the issue of the comparison required in discrimination cases was considered. Lord Nicholls remarked:

> *"10. In deciding a discrimination claim one of the matters employment tribunals have to consider is whether the statutory definition of discrimination has been satisfied. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.*
>
> *No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.*
>
> *…*
>
> *11. This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*
>
> *…*
>
> ***110***
> *In summary, the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. But the comparators that can be of evidential value,*

sometimes determinative of the case, are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim."

35. The issue of the comparison was also considered in **Hewage**. In that case, the comparator relied upon by the claimant was appropriate, even though the relevant circumstances were not identical. The Supreme Court observed that:

> *"The question whether the situations were comparable is, however, a question of fact and degree …"*

36. **Shamoon** is authority for the proposition that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought to suffice. While an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute "detriment", a justified and reasonable sense of grievance about the decision may well do so.

37. Elias LJ in **Deer v University of Oxford [2015] EWCA Civ 52, [2015] IRLR 481** held:

> *''That although the concepts of less favourable treatment and detriment are distinct, there will be very few, if any, cases where less favourable treatment will be meted out and yet it will not result in a detriment. This is because being subject to an act of discrimination which causes, or is reasonably likely to cause, distress or upset will reasonably be perceived as a detriment by the person subject to the discrimination even if there are no other adverse consequences. That is perhaps more starkly the position in cases of discrimination on race or sex grounds where it can be readily seen that the act of discrimination of itself causes injury to feelings. But similar reasoning applies to victimisation discrimination."*

38. Lord Hoffman in **Watt (Carter) v Ahman [2007] UKHL 51; [2008] 1AC 696** at Paragraph 36, summarised the test for discrimination as follows:-

> *"(1) The test for discrimination involves a comparison between the treatment of the complainant and another person ('the statutory comparator') actual or hypothetical, who is not of the same sex or racial group as the case may be.*
>
> *(2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in each case should be (or assumed to be) the same as, or not materially different from, those of the complainant.*
>
> *(3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect*

different) may nevertheless be evidence from which a Tribunal may infer how a hypothetical comparator would have been treated ... This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question ('the evidential comparator') to those of the complainant and all the other evidence in the case."

39. In **The Law Society v Bahl [2003] IRLR 640**, Elias J gave the following guidance:

> *"The fundamental question is why the alleged discriminator acted as he did. If what he does is reasonable, then the reason is likely to be non-discriminatory. In general, a person has good non-discriminatory reasons for doing what is reasonable. This is not inevitably so since sometimes there is a choice between a range of reasonable conduct, and it is of course logically possible the discriminator might take the less favourable option for someone who is, say black or a female, and the more favourable for someone who is white or male. But the tribunal would need to have very cogent evidence before inferring that someone who has acted in a reasonable way is guilty of unlawful discrimination. By contrast, where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again there should be proper evidence from which such an inference can be drawn. It cannot be enough that the victim is a member of a minority group… The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short it goes to credibility"*

Uniform Policy Case Law

40. The application of uniform policies has been considered in a number of cases including **Schmidt v Austicks Bookshops Ltd [1978] ICR 85, Burrett v West Birmingham Health Authority [1994] IRLR 7 EAT; (unreported), 3 March 1994; Court of Appeal (Civil Division) Transcript No. 351, CA; Smith v Safeway Stores Plc [1996] ICR 868** and **Department for Work and Pensions v Thompson [2004] IRLR 348.** The claimant's representative sought to distinguish these cases which had different and specific uniform requirements for males and females, whereas the CAPES policy was drafted in gender neutral terms. These cases were also in the context of claims of direct discrimination and not indirect discrimination.

41. In **Smith v Safeway Stores Plc [1996] ICR 868** the Court of Appeal, applying **Schmidt**, held that an employers' code governing the appearance of employees was not required to make provisions which applied identically to men and women, and the appropriate and sensible approach was to consider the effect of the code overall, not item by item; that such an approach was not confined to dress but could extend to an employee's more permanent characteristics such as hair length and hair style; that a code which applied conventional standards, as far as the criterion of appearance was concerned, in an even-handed approach between men and

women was not discriminatory; and that a non-discriminatory code was one which, when looked at as a whole, showed that neither sex was treated less favourably when it was enforced.

42. Gibson LJ stated

> *"If discrimination is to be established, it is necessary to show not merely that the sexes are treated differently, but that the treatment accorded to one is less favourable than the treatment accorded to the other. That is the starting point of the reasoning adopted in* ***Schmidt v. Austicks Bookshops Ltd. [1978] I.C.R. 85*** *and, in my judgment, it is plainly correct.… The final, and it seems to me the most important, element of the approach in the* ***Schmidt case [1978] I.C.R. 85*** *is that, looking at the code as a whole, neither sex must be treated less favourably as a result of its enforcement. This element of the principle is plainly correct. So it follows that I consider the approach recommended by Phillips J. in the Schmidt case to be as sound in law as it was when he enunciated it."* (Tribunal's emphasis.)

RELEVANT FINDINGS OF FACT – DIRECT DISCRIMINATION CLAIM

Whether the second named respondent directly discriminated against the claimant on the grounds of his sex contrary to Article 3 of the Sex Discrimination (NI) Order 1976?

Are the comparators appropriate comparators?

43. The claimant seeks to compare the treatment he, as a man with facial hair who was in breach of section 1.3 of the CAPES policy, received compared to female comparators in the same unit, the ARU, who were in breach of section 1.2 of the CAPES policy. Section 1.2 of the CAPES policy stated that *"In the interests of health and safety, hair should be worn so that it is cut or secured above the collar…"* The uncontroverted evidence of both Sergeants Buxton and Maguire to the tribunal was that Sergeant White and Sergeant Maguire, who were two female officers within the ARU with long hair, were not able to secure their hair above collar length under their ballistics helmets (Personal Protective Equipment (PPE)). Accordingly, their long hair was secured in a pony-tail which remained below collar length. This action of allowing hair to remain below the collar was in breach of the CAPES policy and was a known health and safety risk. The risk comprised by securing long hair in a visible and accessible ponytail were well known, following a riot situation in 2013, which resulted in a Safety Notice issuing and an email being issued to all Police Officers (see pages 738-743 of the Bundle). The visible ponytail constituted a "grab risk", with potential for that officer to be overpowered, with consequent effects on the rest of the team deployed.

44. The tribunal accepts the evidence of both Sergeant Maguire and Sergeant Buxton that the provision of a larger ballistics helmet to accommodate the long hair would have resulted in the helmets being ill-fitting, and could have placed those officers at risk of serious injury in the event of a live fire incident. Despite the ongoing breach, the female comparators were not required to cut their hair or be transferred out of the ARU.

45. The tribunal finds that the comparators identified by the claimant are appropriate comparators for the purposes of the direct discrimination claim. The CAPES policy as a whole affected both men and women. The failure of the claimant to remove his facial hair was a breach of section 1.3 of that policy. The failure of Sergeant Maguire and Sergeant White to secure their hair above the collar when wearing ballistic helmets was also a breach of section 1.2 of that policy. Both requirements were in place in the interests of health and safety.

46. Both comparators were deployed within the same unit as the claimant, both were in breach of the requirements of the CAPES policy by maintaining long hair which was not secured above the collar and in both instances this potentially gave rise to serious adverse health and safety consequences. The claimant was also in breach of the CAPES policy. Whilst different sections of the policy had been breached, the breaches potentially gave rise to a health and safety risk to both the officer and the whole team. In these circumstances, the tribunal finds that the PSNI could reasonably have required the female officers deployed within the ARU to have cut their hair to a shorter style for health and safety reasons (to allow the hair to be secured whilst maintaining a good fit from the ballistics helmet) or face a transfer out.

47. The tribunal rejects the respondents' submission that the comparators are not appropriate comparators, as set out at paragraph 40 of the respondent's written submission and in Chief Inspector McCreery's evidence for the reasons set out below.

    a. **Submissions a and b (no complaint was made to C/I McCreery or Supt. Foy in relation to female hairstyles/complaints were made to C/I McCreery and/or Supt. Foy regarding the claimant's non compliance with section 1.3).**

       Whilst it may be true that no complaint was made to Chief Inspector McCreery or Superintendent Foy about the female officers being in breach of the policy, the fact of that breach was known to the comparators' supervising Officers, Sergeant Buxton's evidence was that he raised the non-compliance of Sergeant White (Constable White, as she was before promotion) with Inspector Hamilton, asking whether she would be removed from duties. Sergeant Buxton's evidence was that Inspector Hamilton informed him that *"she would not and at that time the focus was on facial hair on male officers".* Inspector Hamilton was not called as a witness by the respondents (despite having provided a witness statement that the tribunal were told to disregard.) The tribunal holds that the female officers being in breach of the CAPES policy would have been known to their supervising Officers, and would have been as obvious as a failure to remove facial hair features in male officers.

    b. **Submission c – that the women were in breach of a different section is comparing apples with oranges.**

       The tribunal find that even though the claimant and the comparators were in breach of different sections of the CAPES policy, the relevant circumstances of the claimant and the identified comparators in the case are "not materially

different". Both actions (the failure to shave and the failure to secure hair) constituted a breach of the same policy and the relevant sections breached were grounded in concern for the health and safety of Officers.

c. Submission d – the actions of the respondents can only be judged on what they knew or what was before them at the time.

The tribunal finds that in light of Sergeant Buxton's uncontroverted evidence, the PSNI had knowledge of the breach of the policy by the comparators.

d. The respondents' representative's additional oral submission.

At the submissions hearing, the respondents' representative contended that as it had been conceded by the respondents that section 1.3 applied to female officers, the appropriate comparator should be a hypothetical female officer with facial hair who had refused to shave. In the respondents' submission such a comparator would have been treated the same as the claimant. This was not the comparison relied upon by the claimant, and the tribunal has considered the claimant's case as brought. The legislation allows for a comparison in two circumstances: (i) when the circumstances are the same or (ii) when they are not materially different. The claimant advanced his case by comparing his treatment to actual comparators in breach of the same CAPES policy. The tribunal has considered the case that has been made by the claimant. The tribunal finds as per **Shamoon** that the comparators, identified by the claimant, were in the same position in all material respects as the claimant. As per **Hewage,** the circumstances do not have to be precisely the same to be comparable. It is a question of fact and degree. The tribunal, in light of the facts and the circumstances, finds that the circumstances of the comparators identified by the claimant were not materially different to those of the claimant. In light of that finding, the tribunal does not consider it necessary to consider the hypothetical comparator put forward by the respondents' representative, which is introducing the type of *"arid dispute"* that **Shamoon** counsels against. If the tribunal focuses on the question of the *"reason why"* the claimant was treated as he was, the tribunal reaches the same conclusion, namely that "*the treatment, afforded to the claimant on the proscribed ground, was less favourable than [what was] …afforded to others"*. If the tribunal is in error in finding that the comparators identified by the claimant were appropriate comparators, the tribunal finds that the hypothetical comparator advanced by the respondents' representative would not have been treated in the same way as the claimant and his male colleagues. In making this finding, the tribunal has found the actual treatment of female officers in breach of section 1.2 of the CAPES policy to be persuasive evidence of how the hypothetical female comparator advanced by the respondents' representative would have been treated, and to be determinative of that issue.

e. Chief Inspector McCreery's evidence.

At paragraph 56 of his statement, Chief Inspector McCreery also contended that the comparison between facial hair and hair length was invalid. The

tribunal does not accept his evidence that the protection afforded by a ballistics helmet is not compromised by long hair in light of the evidence of Sergeant Maguire and Sergeant Buxton. Constable Orr did not endorse the solution suggested by Chief Inspector McCreery, namely wearing a larger (and thus ill fitting) ballistics helmet, as a permanent solution, but rather it had been suggested as something to try. The tribunal notes that Chief Inspector McCreery was unaware of the "grab risk" created by ponytails. However, this risk was the subject of a separate PSNI Safety Advice email to all Police in 2013.

Less favourable treatment

48. The tribunal finds that the claimant was treated less favourably than his comparators as per **Shamoon**. This is obvious and self-evident. The claimant's evidence to the tribunal was that he regards his deployment to the ARU as the pinnacle of his career. He was required to change his appearance as a condition of staying in the ARU, and informed he would be subject to an enforced move against his will when he refused. The transfer was to a traffic unit, and the claimant's evidence was that this was a backward step in terms of his career. However, the female comparators were not made the subject of the equivalent choice, namely comply with section 1.2 of the CAPES policy (if necessary by cutting your hair to a shorter style) or be redeployed outside the ARU. Sergeant Leathem described to his Superior, Inspector Hamilton, the enforcement action against the claimant and his colleagues as *"being punished and humiliated in front of their peers."* The tribunal rejects the respondents' submission that repositioning with minimal notice (whether temporary or otherwise) is not a detriment or less favourable treatment. The tribunal finds that even though the transfer did not amount to a formal "demotion", applying **Shamoon**, an enforced transfer with minimal notice (against the claimant's will) away from a highly trained and specialised unit to a less specialised unit, with consequent loss of reputation and prestige, disruption to childcare arrangements did amount to a detriment. The fact that the transfer was stated to be a temporary transfer or that there was scope within SP58/2007 to effect a temporary transfer, does not affect this conclusion.

49. Chief Inspector McCreery's evidence was inconsistent around the nature of the transfer. In his witness statement, at paragraph 40, he acknowledged that 29 days' notice is normally required for a transfer (15 days' notice in the case of an internal transfer), and he made reference to transfers on a non-voluntary basis. However, during cross examination, his evidence was that the claimant was transferred on the basis of a separate mechanism under SP 58/2007, namely a temporary transfer. This evidence was not included in his witness statement. Further, such a power to temporarily transfer is expressly stated to be for a pre-determined period. No such period was specified in this case.

50. The tribunal finds that the claimant has discharged the burden of proof resting upon him in respect of direct discrimination in the face of the following evidence set out below, which amounts to the "more" required by **Madarassy.**

    50.1 **Unreasonable enforcement.**

The tribunal views the enforcement action taken against the claimant and his colleagues as unreasonable (and requiring an explanation by the respondent as per **Bahl**) in light of the following evidence set out below.

(a) **The lack of training in RPE to allow safe deployment**

(i) Chief Inspector McCreery's evidence was that the claimant and his colleagues had been trained in the use of the RPE, that this training had been delivered by Constable Smyth on issue of the RPE, and that the training was refreshed annually by him through the porta-counting process. Chief Inspector McCreery's evidence was that, having received this training, the claimant and his colleagues could be safely deployed using RPE. Constable Smyth conceded during cross examination that he was not a qualified trainer. Further, his evidence was that he only became aware that the claimant and his unit had been issued with RPE in 2013. Accordingly, he did not provide training to the claimant and his colleagues upon the issue of the RPE. He further explained what he would do during the porta-counting process and accepted that this did not amount to the training recommendations set out in the British Standard BS:EN 529:2005 and HSE guidance. The tribunal prefers Constable Smyth's evidence. Constable Bunting provided what was termed "familiarisation training" to officers who carried RPE in August/September 2018. Constable Bunting delivered training provided by the Policing College on RPE. Constable Bunting accepted during cross examination that his training did not meet the requirements of the BS:EN 529:2005 and the HSE guidance. In any event, this training was some 6-7 months after the enforcement action against the claimant and his colleagues. The evidence on behalf of the claimant is that tactical training with RPE has not been provided.

(ii) The uncontroverted evidence of the claimant was that he did not receive training on mode of entry, using the FPP3 mask until 6 September 2018.

(b) **The fact that the claimant had not been issued/portacounted with an FPP3 half face mask.**

The uncontroverted evidence of the claimant that, at the time of the enforcement action he had been portacounted (successfully in the presence of his moustache) only on his FM12 full face respirator, and his unit had not been issued with the FPP3 half face mask.

(c) **The inability of all within ARU to safely deploy using in date equipment.**

The tribunal was surprised to learn that not all officers within the claimant's unit could have safely deployed using their full face RPE masks at the time of the enforcement action, as a number of the

canisters within the unit were out of date. This matter came to light during the hearing and further statements and discovery were provided, before the hearing was reconvened. Accordingly, it was not within the claimant's knowledge at the time of the enforcement action. However, this does not alter the fact that the inability of all officers within the ARU to safely deploy because canisters had expired ought to have been known by the respondents at that time.

50.2 **The evidence of gender bias on enforcement action.**

Unusually, in this case the tribunal has before it evidence that the difference in treatment was subject to gender bias. Constable Kelly's statement said that he had *"raised the daily problem of female police officers currently unable to tie up their long hair when wearing a ballistic helmet"* with Inspector Hamilton. Sergeant Buxton's evidence was that Inspector Hamilton informed him when he raised the breach by a female officer that *"the focus was on facial hair on male officers".*

50.3 **The failure to call Inspector Hamilton.**

The respondents were aware of the content of the statements of Constable Kelly and Sergeant Buxton. If these contained any misrepresentation of what had been said to Inspector Hamilton, then Inspector Hamilton needed to give evidence and set the record straight. He was not called by the respondents.

51. The tribunal, following the application of **Nelson v Newry & Mourne District Council [2009] NICA**, finds that the claimant has shifted the burden of proof, which in turn passes to the PSNI. The tribunal finds that there is a difference in the status of the claimant and the comparators, a difference in the treatment of the claimant and the comparators and that the respondents were on notice of reasons to delay a strict enforcement policy against men with facial hair. The unreasonable, one sided and heavy handed approach with evidence supporting gender bias on enforcement amounts to "the more" referred to in **Madarassy.**

52. The respondents have not persuaded the tribunal that the treatment complained of was in no way on grounds of the claimant's sex. In so far as health and safety grounds arising from the claimant's non-compliance with section 1.3 were relied upon as the non-discriminatory reasons for the difference in treatment, the tribunal notes that the non-compliance by the female officers to the requirements of the CAPES policy gave rise to similar, immediate and very serious health and safety concerns. The force of the argument of the need for an *immediate* transfer of the claimant and his colleagues in light of their breach of section 1.3 of the CAPES policy is also significantly undermined by the fact that training in Mode of Entry was provided *after* the CAPES policy went live. In addition, as the RPE had not been maintained, it could not have been safely deployed by all officers in the ARU at the time of the enforcement. The fact that RPE was not current and maintained and that training had not yet been delivered ought to have been relevant factors which militated against the PSNI's decision to insist upon immediate compliance with the CAPES policy for affected male officers, or be subject to an immediate non-voluntary transfer.

53. Over and above this the evidence of Sergeant Buxton suggesting gender bias in the enforcement of the policy was not challenged. The tribunal notes the suggestion made by Chief Inspector McCreery during cross examination that if a decision was made to enforce the CAPES policy in a discriminatory way, it was made at a local level. Even if this suggestion was right, and Inspector Hamilton had failed to report the female ponytail breaches up the line, the PSNI would still be liable for the discriminatory approach to enforcement of the local manager. In any event, the tribunal was not convinced by Chief Inspector McCreery's suggestion in this regard, as when he was pressed, he conceded that when he became aware of the breach of the CAPES policy by female officers with ponytails, he reported it up the line. He informed the tribunal that he was advised not to *"deal with the issue of hair in isolation in this unit".* This can be contrasted with the fact that he was given authority to deal with male non-compliance in the unit, arising from facial hair. The claimant's claim of direct sex discrimination is, in these circumstances, bound to succeed.

54. Accordingly, the claimant's claim of direct discrimination in the enforcement of the CAPES policy succeeds against the second respondent. The CAPES policy has been enforced in an inconsistent and discriminatory way as per **Smith**. The tribunal finds that the claimant was discriminated against on grounds of his sex, contrary to Article 3 of the Sex Discrimination (Northern Ireland) Order 1976. The tribunal accepts the uncontroverted evidence of Chief Inspector McCreery, that he personally was not aware of the female officers non-compliance at the time the decision was made to transfer the claimant and his colleagues, and that he was not personally responsible for any focus in the enforcement of the policy in respect of facial hair. Moreover, the actions taken by him were discussed and agreed by more senior management. Accordingly, there is no finding of direct discrimination against the first respondent.

INDIRECT DISCRIMINATION – CASE LAW

55. In 2005 and 2011 the relevant definition of Indirect Sex Discrimination was subject to amendment by Regulations to give full effect to Council Directive 2006/54/EC. This "new definition" is also repeated in the Equality Act 2010 in Great Britain. In **Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601, [2012] ICR 704, SC**, Lady Hale pointed out that the current wording in [Article 3A(2)] (b) ('particular disadvantage') was intended to change the law 'to do away with the need for statistical comparisons where no statistics might exist'. In **Games v University of Kent [2015] IRLR 202, EAT** it was held that if statistics exist they can be important, but lack of them is not fatal to a claim.

56. In **Essop v Home Office (UK Border Agency); Naeem v Secretary of State for Justice [2017] UKSC 27, [2017] IRLR 558** Lady Hale set out six 'salient features' of indirect discrimination, drawing on case law under the pre-2010 case law:

> *"24. The first salient feature is that, in none of the various definitions of indirect discrimination, is there any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others. …*

25. A second salient feature is the contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.

26. A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various … These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem.

27. A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. …

28. A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. … Recital (15) to the Race Directive recognised that indirect discrimination might be proved on the basis of statistical evidence, while at the same time introducing the new definition. It cannot have been contemplated that the "particular disadvantage" might not be capable of being proved by statistical evidence. …

29. A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question - fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in Essop, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds

that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result.

…

Essop also set out the need for the causal link between the PCP and the particular disadvantage.

32 *That leads to the second argument – that 'undeserving' claimants, who have failed for reasons that have nothing to do with the disparate impact, may 'coat tail' upon the claims of the deserving ones. This is easier to answer if the disadvantage is defined in terms of actual failure than if it is defined in terms of likelihood of failure (because only some suffer the first whereas all suffer the second). But in any event, it must be open to the respondent to show that the particular claimant was not put at a disadvantage by the requirement. There was no causal link between the PCP and the disadvantage suffered by the individual: he failed because he did not prepare, or did not show up at the right time or in the right place to take the test, or did not finish the task. A second answer is that a candidate who fails for reasons such as that is not in the same position as a candidate who diligently prepares for the test, turns up in the right place at the right time, and finishes the tasks he was set. In such a situation there would be a 'material difference between the circumstances relating to each case', contrary to s.23(1) (paragraph 4 above). A third answer is that the test may in any event be justified despite its disparate impact. Although justification is aimed at the impact of the PCP on the group as a whole rather than at the impact upon the individual, as Langstaff J pointed out, the less the disadvantage suffered by the group as a whole, the easier it is likely to be to justify the PCP. If, however, the disadvantage is defined in terms of likelihood of rather than actual failure, then it could be said that all do suffer it, whether or not they fail and whatever the reason for their failure. But there still has to be a causal link between the PCP and the individual disadvantage and it is fanciful to suppose that people who do not fail or who fail because of their own conduct have suffered any harm as a result of the PCP. It must be permissible for an employer to show that an employee has not suffered harm as a result of the PCP in question."*

57. In **London Underground Ltd v Edwards (No 2) [1997] IRLR 157, EAT*;*** on appeal **[1998] IRLR 364*,* [1999] ICR 494, EWCA,** the proportions showed that 100% of male train drivers could comply with a specific requirement of shift working, compared to 95% of female drivers. But the male drivers amounted to 2023, and there were only 21 females (of whom 20 could comply with the new shift patterns). Against that background, the tribunal was held entitled to find indirect discrimination and a need for the employers to provide objective justification for the requirement imposed.

Particular Disadvantage

58. Harvey on Industrial Relations and Employment Law at Division L Paragraph 330 states: "*The new definition of indirect discrimination removes the requirement for*

the claimant to show that s/he could not comply with the requirement or condition imposed. Now all that has to be proved is that the provision, criterion or practice puts or would put persons who share a protected characteristic at a particular disadvantage *when compared with those who do not have that characteristic,* and *the claimant is put to that disadvantage. Provided that it is also not justifiable for a reason irrespective of the protected characteristic of the person to whom the PCP is applied, the requirements for discrimination are made out. This change makes it unnecessary to consider whether actual compliance on the part of the individual is possible and so renders superfluous such interesting questions as whether women with substantial resources which allow them to buy child-care facilities 'can comply' with work requirements that demand their full-time presence. Instead, it directs attention rather to a more generalised consideration of the effects of provision, criterion or practice."* (Tribunal's emphasis)

59. The issue of whether a claimant who can in fact comply with a condition can be said to be placed at a 'particular disadvantage' was considered by the EAT in the religious discrimination case of **Eweida v British Airways Plc [2009] IRLR 78*;*** affirmed ***CA:*** **[2010] EWCA Civ 80, [2010] IRLR 322**; considered by **ECtHR:** *[***2013] IRLR 231**. In the EAT Elias P held (at paras 44 and 45):

> "… *the concept [in reg 3(1)(*b)*(ii)] identifies particular disadvantage resulting from the application of a provision, criterion or practice, but it does not link it specifically to non-compliance with the provision or criterion in issue.*
>
> *There is some merit in the argument that the change in wording permits a court to find a particular disadvantage even with respect to those who can and do comply with the provision. An example might be a woman who wishes for childcare reasons to work part time but feels compelled to work full time, which is a job requirement, because her employer will not consider the possibility of part-time work and she cannot afford to lose her job. It may well be that the current definition would permit a claim of that nature. Equally, when determining whether there is a group disadvantage, such a person could be considered to be part of the disadvantaged group notwithstanding a reluctant willingness to comply with the requirement, although we suspect that examples of people prepared to compromise strongly held religious beliefs in that way would be rare."*

60. In **Chez Razpredelenie Bulgaria AD v. Komisia za Zashtita ot Diskriminatsia - [2015] IRLR 746** the ECJ held

> ***"99***
>
> *It follows neither from the words 'particular disadvantage' used in Article 2(2)(b) nor from the other detail contained in that provision that such a disadvantage would exist only where there is a serious, obvious and particularly significant case of inequality."*

61. If there is evidence of indirect discrimination, the burden shifts to the respondents to show that the measure is justified. ***(*MacCulloch v ICI [2008] IRLR 846, EAT*;* Lockwood v DWP [2013] EWCA Civ 1195*,* [2013] IRLR 941*,* [2014] ICR 1257**)**.

Justification

62. **Seldon v Clarkson Wright and Jakes [2012] UKSC16** confirmed that the issue of justification is to be considered when the difference of treatment is applied to the person who brings the complaint*: "Furthermore, the time at which the justification for the treatment which is said to be discriminatory must be examined is when the difference of treatment is applied to the person who brings the complaint."* (paragraph 78) This case also allowed that the justification may be an ex post facto rationalisation. **O'Brien v Ministry of Justice [2013] UKSC 6** confirmed that an employer can advance a different and better justification at the Hearing for maintaining the measure or policy. The Supreme Court went on to observe:

> "*48. However, in this as in any other human rights context, this court is likely to treat with greater respect a justification for a policy which was carefully thought .... In particular, as Mummery LJ pointed out in* **R (Elias) v Secretary of State for Defence** ***[2006] EWCA Civ 1293, [2006] 1 WLR 3213****, at paras 128 to 132, it is difficult for the Ministry to justify the proportionality of the means chosen to carry out their aims if they did not conduct the exercise of examining the alternatives or gather the necessary evidence to inform the choice at that time."*

63. **Seldon** stated:

> *"**61** Once an aim has been identified, it has still to be asked whether it is legitimate in the particular circumstances of the employment concerned. For example, improving the recruitment of young people, in order to achieve a balanced and diverse workforce, is in principle a legitimate aim. But if there is in fact no problem in recruiting the young and the problem is in retaining the older and more experienced workers then it may not be a legitimate aim for the business concerned. Avoiding the need for performance management may be a legitimate aim, but if in fact the business already has sophisticated performance management measures in place, it may not be legitimate to avoid them for only one section of the workforce."*

Further**,** the Supreme Court, in discussing the issue of whether the measure has to be justified, not only in general but also in its application to the particular individual, stated:

> ***"66** There is therefore a distinction between justifying the application of the rule to a particular individual, which in many cases would negate the purpose of having a rule, and justifying the rule in the particular circumstances of the business."*

64. In **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15** Lady Hale, giving judgement, provided guidance on the issue of justification, in the context of an age discrimination claim. However the principles are applicable in the consideration of justification in an indirect sex discrimination claim:

"19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: ***Bilka-Kaufhaus GmbH v Weber von Hartz, Case 170/84, [1987] ICR 110.***

20. As Mummery LJ explained in ***R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213****,* ***at [151]:***

> *". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*

He went on, at [165], to commend the three-stage test for determining proportionality derived from ***de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:***

> *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"*

As the Court of Appeal held in ***Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32]****, it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.*

…

22. *Although the regulation refers only to a 'proportionate means of achieving a legitimate aim', this has to be read in the light of the Directive which it implements. To be proportionate, a measure has to be* both *an appropriate means of achieving the legitimate aim* and *(reasonably) necessary in order to do so."*

65. In **Hardy & Hansons plc v Lax** Pill LJ stated:

"32

Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word 'necessary' used in Bilka is to be qualified by the word 'reasonably'. That qualification does not, however, permit the margin of discretion or range of reasonable

responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances." (Tribunal's emphasis)

30. In **Sargeant v London Fire and Emergency Planning Authority [2018] IRLR 302** the EAT stated *"the Supreme Court in* **Seldon *[2012] IRLR 590*** *sought to reconcile the two lines of authority by enabling an Employment Tribunal in an appropriate case, to consider for itself whether the aim is legitimate in the particular circumstances of the employment, and to scrutinise the means used to achieve the aim in the context of the particular business to see whether they meet the objective, and whether there are other less discriminatory measures which would do so."*

66. **MacCulloch v ICI [2008] IRLR 846, EAT,** and approved by the Court of Appeal in England and Wales in **Lockwood v DWP [2013] EWCA Civ 1195, [2013] IRLR 941, [2014] ICR 1257,** established:

"(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardys & Hansons plc v Lax [2005] IRLR 726** *per Pill LJ at paragraphs [19] –[34], Thomas LJ at [54]–[55] and Gage LJ at [60].*

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: **Hardys & Hansons plc v Lax [2005] IRLR 726, CA***."*

67. In **Chief Constable of West Yorkshire Police and West Yorkshire Police Authority v Homer [2009] IRLR 262, [2009] ICR 223** (considered on other grounds by the Supreme Court [**2012] UKSC 15, [2012] IRLR 601),** the EAT stated (at [48]):

"… it is an error to think that concrete evidence is always necessary to establish justification, and the ACAS guidance should not be read in that way. Justification may be established in an appropriate case by reasoned

and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions'.'

31. However the Supreme Court made it clear in the **Homer** case that in determining whether the measure used was proportionate, the answer to some extent depended on whether *"there were non-discriminatory alternatives available."*

68. In **City of Oxford Bus Services Ltd v Harvey UKEAT/0171/18/JOJ,** HHJ Eady QC provided a further summary of the law of justification:

"22. Provided a Claimant has established disadvantage, the burden of establishing the defence of justification, on the balance of probabilities, lies squarely on the employer; the assessment of which is for the ET and is objective in nature, see ***Singh v British Rail Engineering Ltd [1986] ICR 22 EAT****. As for how the ET is to approach its task in carrying out the requisite assessment, this has been considered in a number of cases, in particular:* ***Allonby v Accrington & Rossendale College [2001] IRLR 364 CA****;* ***Hardys & Hansons plc v Lax [2005] IRLR 726 CA; Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601 SC****; and* ***Seldon v Clarkson Wright & Jakes (A Partnership) [2012] IRLR 590 SC****. From these authorities, the following principles can be drawn:*

(1) Once a finding of a PCP having a disparate and adverse impact on those sharing the relevant protected characteristic has been made, what is required is (at a minimum) a critical evaluation of whether the employer's reasons demonstrated a real need to take the action in question (Allonby).

(2) If there was such a need, there must be consideration of the seriousness of a disparate impact of the PCP on those sharing the relevant protected characteristic, including the complainant and an evaluation of whether the former was sufficient to outweigh the latter (Allonby, Homer).

(3) In thus performing the required balancing exercise, the ET must assess not only the needs of the employer but also the discriminatory effect on those who share the relevant protected characteristic. Specifically, proportionality requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment. To be proportionate, a measure must be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (Homer).

*(4) The caveat imported by the word "reasonably" allows that an employer is not required to prove there was no other way of achieving its objectives (****Hardys****). On the other hand, the test is something more than the range of reasonable responses (again see* ***Hardys****).*

23. When carrying out the requisite assessment <u>there is, however, a distinction between justifying the application of the rule to a particular individual and justifying the rule in the particular circumstances of the business</u>. In Seldon, the Supreme Court observed as follows:

"There is therefore a distinction between justifying the application of the rule to a particular individual, which in many cases would negate the purposes of having a rule, and justifying the rule in the particular circumstances of the business" (paragraph 66)." (Tribunal's emphasis.)

69. In **Pulham & Others v London Borough of Berking and Dagenham (2010) IRLR184,** the EAT held that *"While a tribunal is certainly entitled to have regard, in assessing the justifiability of a discriminatory measure, to the fact that it has been negotiated with the representatives of the workforce, it cannot abdicate the responsibility of itself carrying out the necessary proportionality exercise."*

RELEVANT FINDINGS OF FACT – INDIRECT DISCRIMINATION CLAIM

Whether the second named respondent's policy on facial hair (CAPES Policy section 1.3) and application of same, indirectly discriminated against the claimant on the grounds of sex, contrary to Article 3A of the Sex Discrimination (NI) Order 1976?

70. The tribunal, in light of the concessions by the respondents that "*Section 1.3 of the policy headed "Facial Hair" applies to police officers or police support staff who occupy roles where there is a routine possibility of respiratory exposure to occupational hazards"*, that "*there is a disparate impact on men in the ARU on the application of section 1.3 of the CAPES policy*", and the clarification provided during the submissions hearing when the respondents agreed that section 1.3 of the CAPES policy applied to all Officers (whether male or female), is constrained to find, in the context of an indirect discrimination claim, that section 1.3 of the CAPES policy is a PCP which applied to both males and females and which placed males within the ARU at a particular disadvantage over females within the ARU. It is therefore unnecessary for the tribunal to consider the alternative submission set out at paragraphs 70 -73 of the claimant's submission, namely, that section 1.3 of the CAPES policy was directly discriminatory.

71. In any event, even apart from the concession regarding "disparate impact", the tribunal notes the information contained in the Replies, namely, that the ARU was comprised of 69 male officers and 3 female officers. Of the 69 male officers, 6 shaved voluntarily upon request and 4 officers did not. No female officers within the ARU were required to change their appearance as a result of the introduction of the CAPES Policy, whereas 14.5% of the males within ARU were subject to this disadvantage. The first Respondent, Chief Inspector McCreery did provide total numbers of Officers in other units, namely HMSU, SOBSU, and TSG to whom section 1.3 applied (amounting to approximately 429 Officers). However, no information was provided as to the male/female breakdown of these Officers. The Replies set out at paragraph 25 above were given in response to the request and correspondence dated 18 September 2018, when the respondents were specifically asked to confirm that they accepted that there was a "disparate impact on men in the ARU, SOB, TSG, DST, CSI, DVI, PSNISAR and HES." The respondents chose to restrict the relevant pool for their reply to the ARU. Even if the pool is set to include the Officers in the other units referred to by Chief Inspector McCreery, then

on the authority of **London Underground Ltd v Edwards (No 2)** the tribunal still finds that particular disadvantage has been demonstrated within the pool.

72. The tribunal note the respondents' submission at paragraph 58 of the written submission to the effect that the PCP is untainted by sex, but arises because of the claimant's deployment within the ARU. However, the tribunal do not need to find that the PCP is tainted by sex, it needs only to identify that it causes a particular disadvantage to males, something which has been the subject of a concession by the respondents in relation to the pool of the ARU. Further, the claimant was placed at the particular disadvantage. However, the tribunal is satisfied that the respondent has proved that the provision, criterion or practice in question was not applied with the intention of treating the complainant unfavourably on the ground of his sex. This finding is irrelevant to liability, but is relevant to the question of remedy.

73. The particular disadvantage identified by the claimant's representative was a significant proportion of male Officers within the ARU (including the claimant) being required to change their appearance by shaving off facial hair in order to remain within the unit. Refusal to do so gave rise to the risk of enforced transfer. In the Replies dated 25 July 2018 the particular disadvantage was described as the removal *"of their personal choice to have facial hair."*

74. The tribunal rejects the respondents' submission that the removal of facial hair does not amount to a particular disadvantage, because, according to that submission, the claimant "could comply" with the requirement by being clean-shaven. This submission is grounded in the pre 2005/2011 formulation of the test for indirect discrimination (*"Article 3(b)(iii) - which is to her detriment because she cannot comply with it"*). The tribunal accepts that the disadvantage identified by the claimant's representative, namely being required to change their appearance by being clean shaven, does amount to a particular disadvantage as per **Chez Razpredelenie Bulgaria AD.** The claimant asserted that the wearing of some facial hair was an important aspect of his self-expression and that it served to improve his self-image and confidence. The tribunal is satisfied that the requirement to change his appearance against his will and upon threat of a forced transfer could and did amount to a particular disadvantage to the claimant. The tribunal finds that there is a causal link between the PCP and this particular disadvantage as per **Essop.**

Is the policy a proportionate means of pursuing a legitimate aim?

75. The issue for the tribunal is whether section 1.3 of the CAPES policy is justified, that is whether the policy is a proportionate means of achieving a legitimate aim. The case advanced on behalf of the claimant maintained that the CAPES policy, when introduced, did not apply to him. The claimant's submission is technically correct, as upon consideration of the wording of the first iteration of the Policy which stated section 1.3 applied "*where there is routine respiratory exposure to occupational hazards"*, the tribunal accepts the evidence on behalf of the claimant that he did not, at that time, have routine respiratory exposure to occupational hazards. However, the tribunal finds that this was merely a misstatement of the Policy applicability which was quickly remedied. The claimant's own statement shows that he was in no doubt of the proposed applicability of the Policy to him, given that he shaved off his beard in anticipation of the promulgation of the Policy. His statement confirmed that

he had shaved off in his beard, leaving a moustache, in the belief that this would render him compliant with the requirements of the new policy.

76. The claimant properly conceded at Paragraphs 27 and 28 of his submission that the aim of section 1.3 of the CAPES Policy, namely the health and safety of Officers who may have exposure to respiratory hazards, was a legitimate aim. It appears that what was not conceded by the claimant is that section 1.3 of the CAPES policy was properly applied to the ARU at that particular time, in the absence of what was termed "proper training", in the absence of "tactical training" for the ARU, before half faced masks had been issued to the ARU and in circumstances where the management of the ARU equipment was not sufficient to ensure that all Officers within the unit were carrying canisters which remained in date. In this regard, "application" of the Policy is treated as a separate issue from its "enforcement", (the enforcement grounds the claim of direct discrimination). The claimant's submission is that at the time of the introduction of section 1.3 of the CAPES policy it was unnecessary to apply it to the ARU, and accordingly, that it could not be proportionate to have done so. The tribunal can see the logic of the claimant's position in this regard, which may be sufficient to maintain the distinction described in **Seldon** between justifying the application of the rule to an individual and justifying the rule in the particular circumstances of [the PSNI] at that time.

77. In considering the issue of justification, the tribunal is required to consider whether the means chosen are no more than is necessary to accomplish the objective, as per **R (Elias)** and **de Freitas**.

78. The tribunal has no issue in accepting that *some restriction* of facial hair in the case of Officers who may have had to deploy using RPE is justified. The claimant also accepts the necessity of some restriction on facial hair. However, the tribunal finds that a complete ban on facial hair has not been justified by PSNI, as it has failed to persuade the tribunal that it corresponded with a real need of PSNI *at that time* as per **Hardy and Hansons PLC** and **Harvey**, and that the measure was proportionate, that is, no more than was necessary to achieve the aim, as per **R (Elias)** and **de Freitas**. The tribunal make this finding in light of the following evidence before it:

78.1 **The ARU were not ready to deploy operationally using RPE at the time of the introduction of the CAPES Policy –** Not all officers within the ARU had canisters for their FM12 respirators which were not expired, the claimant and his colleagues had not received training (beyond portacounting) in the maintenance and use of RPE or tactical training using RPE, the claimant and his colleagues had not been issued with or portacounted for FPP3 masks and they had not received mode of entry training. Superintendent Foy accepted that UPMC was not aware of the out of date canister issue at the time the CAPES policy was under discussion. To that extent, the PSNI justification was a prospective justification, rather than a real business need which existed at that time.

78.2 **Manufacturer, EN 529:2005 and HSE Guidance -** Neither the Health and Safety Executive guidance, EN 529:2005 nor the RPE manufacturers' guidance require the wearers of RPE, whether full face or half face

respirators, to be completely clean shaven. Rather, the only requirement is to be clean shaven in the area of the face seal. BSEN 529:2005 states: *"tight-fitting face pieces (filtering face pieces, quarter masks, half masks and full face masks) rely heavily on a good seal between the mask and the wearer's face."* At section 9.3.3 it is assumed that some facial hair may be retained in assessing the suitability of RPE for the task. At appendix D, section D.4.2 it states *"facial characteristics such as scarring or unshaven facial hair can significantly affect the protection offered by some devices. This will particularly be true for devices such as half and full face masks which rely on a tight face seal to achieve protection. These devices should not be selected where there is unshaven hair or on an irregular facial feature in the area of the face seal."* (Tribunal's emphasis). The PSNI Safety Notice SAN 01/2016 also referred to the content of EN529:2005 before concluding that wearers of RPE must be clean shaven. This appears to the tribunal to overstate the required restriction on facial hair. HSE guidance which was included in the bundle of documents before the tribunal also recognises that some facial hair may be retained as long as it is not in the area of the face seal. HSE operational circular 0C282/28 states: *"a tight-fitting face piece, a full face mask, half mask, or a filtering face piece (commonly referred to as disposable mask). The performance of these types of face pieces, irrespective of whether they are used in negative pressure respirators, power assisted respirators or compressed air supplied breathing apparatus, relies heavily on the quality of fit of the face piece to the wearer's face. An inadequate fit will significantly reduce the protection provided to the wearer. The presence of facial hair in the region of the face seal will significantly reduce the protection provided."* (Tribunal's emphasis). At section 110, dealing with fit testing (otherwise porta-counting), the guidance states: *"A fit test should not be conducted if you have any facial hair growth in the area where the face piece seal meets your face. This is because a reliable face seal can only be achieved if you're clean-shaven in the area where the face piece seal touches your face."* (Tribunal's emphasis.) HSE guidance entitled "Respiratory protective equipment at work" at section 82 states that: *"The wearer needs to be clean-shaven around the face seal to achieve an effective fit when using tight-fitting face pieces. Training is a good opportunity to make employees aware of this."* (Tribunal's emphasis.)

78.3 **Insufficient evidence to support the necessity of a complete ban on facial hair -** The case advanced by the respondents was that a complete ban on facial hair was necessary to guard against the possibility of an Officer presenting himself for duty in the mistaken belief that his retained facial hair would allow a good seal to be maintained. Constable Smyth's evidence was that a handful of individuals had in the past attended for porta-counting with the mistaken belief that a good seal could be achieved with their facial hair. However, in cross examination, Constable Smyth conceded that maintaining facial hair so as not to affect the effectiveness of the seal was a matter which could have been addressed through training. This is a view shared by the HSE, as set out at paragraph 78.2 above. Constable Orr, during oral evidence, stated that he had discussed with Sergeant Murray and Constable Smyth the viability of providing a template, but had discounted this option as unworkable. This evidence was not in his witness statement, nor was it

corroborated by the statements or oral evidence of Sergeant Murray or Constable Smyth. The tribunal did not have any evidence before it to show that UPMC had given any consideration to implementing a restriction on facial hair, which was less extensive than a complete ban. Further, Superintendent Foy's evidence confirmed that alternatives with a lesser impact were not considered by UPMC. Applying **R(Elias),** as approved by the Supreme Court in **O'Brien**, the PSNI has sought to justify the policy and show proportionality in circumstances when UPMC does not appear to have gathered the evidence needed to inform its choice.

78.4 **Provision of Training** – As noted above, the tribunal finds that a less restrictive measure was available to the respondents, namely the retention of facial hair that facilitated an effective seal, supported by training. One of the issues for determination by the tribunal was: Has the second named respondent trained the claimant on RPE? If so, why has the second named respondent not trained the claimant on RPE? Is this training necessary? Chief Inspector McCreery gave evidence that Constable Smyth had given training to the claimant and his colleagues. Constable Smyth's evidence was that he had merely fitted the RPE and gave some very basic instruction on donning and doffing RPE. In cross examination, he conceded that this instruction did not amount to the training recommended by the HSE (page 702 of the bundle). Further, the "refresher training" that was provided in July/August 2018, (some 6 months after the CAPES Policy was introduced) did not include operational/tactical training with RPE deployed. BSEN 529: 2005 sets out recommendations in relation to training. This is set out at section 11 – Operating information, instruction and training. 11.1 states: *"The training of all those involved in the programme should be kept up to date through a process of regular refresher training. The refresher training should take place at least annually. The training should be matched to the complexity of the device and the extent of the health/life risks against which the devices used."* (Tribunal's emphasis.) HSE guidance entitled "Respiratory protective equipment at work" states that: *"RPE at work should be used by properly trained people who are supervised."* At section 32 it states *"For RPE to be effective, you should integrate its use into normal workplace activities."* Sergeant Leathem gave evidence of his view that the ARU was still (as at the time of the hearing) not in a position to be safely deployed as no tactical/operational training had been given, and he believed this was a necessary pre- requisite to safe deployment. The respondents will wish to carefully consider the adequacy of the training provided to the claimant and other Officers in light of the potential use of lethal force by Officers in the claimant's unit, in circumstances where RPE has been deployed. Any such training could address the need to maintain the sealing area free from facial hair.

78.5 **A Pre-Deployment Fit Check –** The tribunal rejects the justification of a complete ban on facial hair put forward by the second respondent, namely that in the absence of a complete ban on facial hair there could be no assurance that Officers' RPE would give adequate protection and that portacounting would be required on every occasion before deployment. There was no evidential basis before the tribunal for the respondents'

submission at paragraph 9 of their submissions that *"compliance with legislation would require [PSNI] to porta count (test) each officer who has facial hair immediately prior to each occasion on which they wear RPE."* The respondents, in their submissions, invited the tribunal to discount any suggestion of personal responsibility in maintaining facial hair in a manner which would not impact upon health and safety, submitting that any such suggestion lacked credibility and failed to recognise the fast pace operational environment within which these officers worked. The tribunal rejects this submission of the respondents. The tribunal accepts the evidence given by the claimant and confirmed by Constable Smyth that users could carry out a "fit check" as described in paragraph 80 of HSE guidance on using RPE, at page 701 of the bundle. The claimant demonstrated such a fit check on his full face respirator during his oral evidence at the hearing. Such a fit check would have allowed individual Officers to be satisfied and assured as to the effectiveness of the seal of their RPE, without any need to carry out a porta-counting exercise in advance of deployment. PSNI accepted that these Officers, described in the respondents' submissions as *"usually the best trained and best equipped resource immediately available to support District Policing"*, could be trusted to make life and death decisions, in the context of responding with what could be lethal force, utilising specialist training and equipment. The suggestion that such highly trained and specialised Officers could not be trained and then trusted to maintain appropriate facial hair is not accepted by the tribunal.

78.6 **Consideration of Options by UPMC** - Superintendent Foy was the chair of the Uniform and Protective Measures Committee (UPMC). Her statement set out this background and history to the CAPES policy. This included considering an options paper on facial hair put forward for consideration by the UPMC in July 2017. In the conclusion/recommendations section of this paper it stated that a tight fitting seal *"cannot be achieved in the presence of facial hair".* (Page 270 of the Bundle). The tribunal holds this statement to be inaccurate in light of the evidence of the respondent's own witnesses (Constables Orr and Smyth both accepted that a seal could be maintained as long as the wearer of RPE was clean shaven in the area of the seal), and the HSE guidance and manufacturer's guidance referred to above. The minutes of this meeting record that *"for RPE to be effective there must be a tight fitting seal and <u>this cannot be achieved with the presence of facial hair.</u>"* (Tribunal's emphasis). This statement also recurs in the minutes of UPMC dated 25 October 2017. During cross examination Superintendent Foy stated she was unaware that there had been any alternative to a clean shaven policy. Whilst Constable Orr, who was from Health and Safety Branch, gave evidence during cross examination that UPMC had been made aware of the possibility of retaining facial hair, he agreed that this discussion was not recorded in the minutes of the meeting. The tribunal prefers Superintendent Foy's evidence in this regard, given the clear content of the briefing paper and the content of the minutes. Accordingly, it is clear that no proper consideration was given to allowing Officers to retain some facial hair, as long as same did not interfere with the RPE. The tribunal therefore cannot be satisfied that proper consideration was given to less discriminatory measures which could have achieved the aim. In this context, a less

discriminatory measure would have been to allow some facial hair, so long as it did not interfere with the seal. As per **R (Elias)**, as approved in **O'Brien**, the second respondent is in considerable difficulty justifying the proportionality of the CAPES policy, where the UPMC has not properly examined the less discriminatory alternatives.

78.7 **Trade Union consultation -** the respondents in their submission placed reliance upon the fact that the CAPES Policy had been considered by the Police Federation on behalf of its members, and no objection had been raised to the Policy. It is true that as per the respondents' submission, this is a relevant factor in determining whether the measure is justified, but it is by no means determinative of the issue. In the case before the tribunal, the outcome of the consultation with the Police Federation has been tainted with the same factually inaccurate information which was provided to them in the Options Paper referred to at paragraph 78.6 above, as well as what appears to have been the lack of proper consideration of less restrictive measures at subsequent UPMC meetings which the Federation representatives attended.

78.8 **The timing and adequacy of the EQIA assessment -** The tribunal also noted that the EQIA assessment carried out on section 1.3, supporting the introduction of the CAPES Policy, (included at pages 114-116 of the Bundle), was not completed until 25 June 2018, some 5 months after the promulgation of the Policy (and after the claimant lodged his claim). This is not good practice. The EQIA included the statement that *"There is verifiable research and evidence from the Health and Safety Executive which proves that facial hair breaks the seal."* This did not equate to a recommendation that no facial hair could be maintained. The EQIA screening document identified that section 1.3 had a high impact on Gender. It further stated that it impacted on "Male only" because of "Physiology". The assessment continued *"With regard to Gender, this will affect men due to the natural process of 'growing beards', there is no way to reduce or mitigate this disproportionate impact this policy will have on this gender group."* This EQIA does not appear to have given any consideration to whether a less extensive provision, which would have allowed for the retention of facial hair not in the area of the seal of RPE equipment, would have been a proportionate alternative.

79. PSNI has failed to persuade the tribunal that the complete ban on facial hair for some Officers comprised within section 1.3 of the CAPES policy was a proportionate means of achieving a legitimate aim which corresponded to a real business need which existed at that time (rather than a prospective aim) and that it was no more than was necessary, as per **de Freitas** and **R(Elias)** in achieving the legitimate aim identified. The tribunal is not satisfied that proper consideration was given to measures (including training) which would have allowed some facial hair which did not interfere with a seal to be maintained. The tribunal finds in light of the evidence before it that a complete ban on facial hair was disproportionate, when the respondents had not considered addressing these issues through training and monitoring.

80. The tribunal acknowledges that the relevant section of the policy was introduced with good intentions. If the PSNI had demonstrated that it had properly considered

whether a less restrictive policy was sufficient to meet the legitimate aim, and trialled a partial restriction on facial hair, it may have been in a position to persuade the tribunal that the complete ban was necessary. This decision does not preclude a review of the policy in the future retaining a complete ban on facial hair for officers in certain deployments or in certain situations, where this can be demonstrated to be justified. However, in the absence of such evidence, and taking account of the other evidence before it from the relevant British Standards and HSE guidance, which supports the finding that the measure went beyond what was necessary to achieve its aim, the justification defence is not made out.

81. Accordingly, the claimant's claim of indirect sex discrimination arising from the introduction and application of section 1.3 of the CAPES policy succeeds against the second respondent. For the avoidance of doubt, the claim of indirect discrimination against the first respondent is dismissed. Whilst he was involved in meetings of the UPMC he was not responsible for the policy or deciding the applicability of the policy.

VICTIMISATION – CASE LAW

82. In **McCann v Extern [2014] NICA 1** the Northern Ireland Court of Appeal summarised the law relating to victimisation.

[14] … The IDS Handbook states at paragraphs 9.41 and 9.42:-

"9.41 To succeed in a claim of victimisation, the claimant must show that he or she was subject to the detriment because he or she did a protected act or because the employer believed he or she had done or might do a protective act …

9.42 …. The essential question in determining the reason for the claimant's treatment is always the same: what consciously or sub-consciously motivated the employer to subject the claimant to the detriment? In the majority of cases, this will require an inquiry into the mental processes of the employer …"

[15] As Harvey said at paragraph [468] in respect of the test for victimisation:

"Analysing the elements of any potential victimisation claim requires somewhat different considerations as compared to the other discrimination legislation.

…

A claim of victimisation requires consideration of:-

The protected act being relied upon

The correct comparator

Less favourable treatment

The reason for the treatment

Any defence.

Burden of proof."

83. A claim of victimisation also requires a comparison with an appropriate comparator. In **Chief Constable of West Yorkshire Police v Khan, [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065** Lord Nicholls stated (at para [27]): *'The statute is to be regarded as calling for a simple comparison between the treatment afforded to the complainant who has done a protected act and the treatment which was or would be afforded to other employees who have not done the protected act.'* The case of **Khan** also considered the wording of "by reason that":

> ***"29***
>
> ***(3) 'by reason that'***
>
> *Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in* **Nagarajan v London Regional Transport *[1999] IRLR 572, 575–576***, *a causation exercise of this type is not required either by s.1(1)(a) or s.2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."*

84. In **Pothecary Witham Weld and another (appellants) v Bullimore and another (respondents) and the Equality and Human Rights Commission (intervener) [2010] IRLR 572** the EAT confirmed that the reverse burden of proof does apply to victimisation claims under the equivalent of the Sex Discrimination (Northern Ireland) Order 1976.

VICTIMISATION – RELEVANT FINDINGS OF FACT

85. During the submissions hearing, the claimant's representative accepted that the chronology of the transfer did not support the claim that the claimant was victimised by being threatened with transfer/actually transferred as a result of having raised his complaints as set out in his grievance document dated 2 February 2018. Accordingly, the claimant was only pursuing his claim of victimisation in so far as it related to being prevailed upon to withdraw his grievance, and the consequent delays in communicating to him that he would be permitted to return to his unit.

86. The claimant did not identify a comparator during the course of the hearing. The respondents' representative highlighted the similarity of the treatment received by Constable Kelly, who had not done a "protected act" (namely issuing a grievance making allegations of unlawful discrimination). He was asked by Inspector Hamilton on 9 February 2018 if he would shave, if he would confirm he would not submit a medical appeal, if he would confirm that he would not challenge the decisions of Chief Inspector McCreery and if he would confirm that he would not instigate a complaint or grievance under the bullying and harassment policy, before being readmitted to the ARU.

87. The tribunal did not hear argument on the point, but the tribunal notes from his witness statement that Constable Kelly had expressed his belief that his treatment was *"wrong and unlawful"* when the matter was discussed on or about 1 February 2018. This could arguably have given rise to a belief by management of an intention on the part of Constable Kelly to make an allegation which would amount to a protected act.

88. The alternative for the tribunal was to consider whether the claimant had been treated less favourably than a hypothetical comparator, who had raised a grievance complaint which did not amount to a protected act and for whom there was no belief in an intention to make an allegation.

89. There was no evidence before the tribunal to suggest that such a hypothetical comparator would have been treated any differently than the claimant. Further, even if the tribunal is in error in this respect, the tribunal does not find the treatment complained of was done on grounds of the protected act. The tribunal accepts the reason given by the respondents for the enquiry, namely that it was a simple enquiry made to keep senior management apprised of developments.

90. The first respondent wrote to the claimant's Inspector (as the claimant was on sick leave and had no access to a computer terminal to access his email) by email dated 9 February 2018 at 13:23. It stated: *"So that ACC Gray and Superintendent Foy are fully informed please ascertain the following: *Does Constable Downey intend to pursue his appeal on religious grounds?" *Does Constable Downey intend to pursue his formal complaint of Bullying and Harassment/Grievance?"* The email was copied to a number of others including the Superintendent, P Foy. In his evidence Chief Inspector McCreery stated that this email was sent following consultation with Superintendent Foy, and at her direction. Superintendent Foy in her evidence confirmed this and stated that this information was required by Assistant Chief Constable Gray. Superintendent Foy maintained that she was the sole decision maker as to whether the claimant would be permitted to return to his unit, and that whether or not he continued with his grievance was not a factor in this decision.

91. The tribunal is also confirmed in its view that a hypothetical comparator would have received the same treatment upon consideration of the enquiries made of both the claimant and Constable Kelly and the fact that the scope of the enquiries made was wider than just asking about the pursuit of the claimant's grievance. The queries included religious and medical appeals.

92. The claimant's victimisation claim against both respondents therefore fails on the grounds of the claimant not having discharged the burden of proof, in that the claimant has not shown facts from which the tribunal could conclude the respondents, or either of them have victimised him. He has failed to show that the appropriate comparator would have been treated differently. Further, the tribunal is in any event satisfied on the balance of probabilities that the reason for the treatment was not by reason of the protected act, but accept the evidence of the respondents that the enquiry was made to keep management informed.

SUMMARY

93. The claimant's claims of direct discrimination in respect of the enforcement of the CAPES policy is well founded against the second respondent. No particular allegation of direct discrimination against the first respondent was identified in the agreed statement of issues, pursued at the hearing or in the submissions. The claimant's claim of direct discrimination against the first respondent in respect of the enforcement of the CAPES policy is dismissed. The claimant's claim of indirect discrimination against the second respondent is well founded. The claimant's claim of indirect discrimination against the first respondent is not well founded and is dismissed. The claimant's claim of victimisation against both respondents is not well founded and is dismissed.

REMEDIES

94. The tribunal has found at paragraph 72 above that section 1.3. of the CAPES policy was not applied with the intention of treating the complainant unfavourably on the ground of his sex. By way of remedy, the tribunal makes a declaration that the claimant has been subject to unlawful indirect discrimination in the application of section 1.3 of the CAPES policy, contrary to Article 3A of the 1976 Order. The tribunal, in pursuance of its powers at Article 65(1) (c) of the Sex Discrimination (Northern Ireland) Order 1976, also makes a recommendation that the PSNI review the operation and wording of section 1.3 of the CAPES policy, in order to lessen its discriminatory impact.

95. An award of compensation may only be made in the case of unintentional indirect sex discrimination where a declaration (Article 65(1)(a)) and/or a recommendation (Article 65(1)(c)) are considered as if there were no power to award compensation, and then where either a declaration or a recommendation is made, if it is just and equitable to also award compensation. The tribunal finds that, in the case of the indirect discrimination claim, the making of the above declaration and recommendation is a sufficient remedy for the claimant, and that, in light of the finding that there was no intention to discriminate against the claimant, the tribunal holds it is not just and equitable to make a separate award of compensation for the indirect discrimination claim.

96. The tribunal also makes a declaration that the claimant has been directly discriminated against in the enforcement of the CAPES policy. The tribunal finds that in respect of this head of claim it is just and equitable to also make an award of compensation.

97. In **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102**, the Court of Appeal stated:

> *"It is self-evident the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedence. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anxiety, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise."*
>
> *"Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The Court and Tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available on the calculation of financial loss or compensation for bodily injury".*

98. **Vento** also established that regard was to be had to equivalent awards under the JSB guidance, as well as establishing the bandings to be used for assessment of injury to feelings. The top band for a claim brought at the relevant time was normally within £25,200 and £42,000 and is restricted to the most serious cases, for example where there has been a lengthy period of discriminatory harassment. The middle band at the relevant time was generally £8,400 to £25,200 and is appropriate for less serious cases and the lowest band, at the relevant time was between £800 and £8,400, and is for even less serious cases including where an act of discrimination is an isolated or one off occurrence.

99. The fifth edition of the JSB Guidelines for the Assessment of General Damages sets damages for minor psychiatric damage as up to £15,000.

Compensation

100. The tribunal awards £392.00 net for loss of overtime, which it finds the claimant would have completed had it not been for the discriminatory treatment. This figure was not challenged by the PSNI. The tribunal accepts that the claimant would not have been absent on sick leave but for the actions of the respondents in seeking to redeploy him on short notice against his will.

101. The tribunal finds that the act of direct discrimination falls towards the bottom of the middle Vento banding. The tribunal notes the evidence of the claimant as to the effect on his health, and the corroboration of this from his medical and counselling notes and records. The tribunal accepts the uncontroverted evidence of the claimant that his sleep was affected and that the stress caused to him exacerbated symptoms from another health condition he was subsequently diagnosed with. The tribunal also notes that the claimant did not in fact substantively deploy to traffic duties. He was allowed to return to his duties within the ARU upon his return from

sick leave, albeit having, on his evidence, felt humiliated by first having to shave. The tribunal awards the claimant £8,500.00 for hurt feelings. The tribunal awards interest in accordance with the Industrial Tribunals (Interest on Award in Sex Discrimination and Disability Discrimination Cases) Regulations (Northern Ireland) 1996. There is no indication that serious injustice would be caused by calculating interest over this period.

102. Interest at 8% is therefore awarded on the award for hurt feelings from 2 February 2018 to date:

Interest at 8% per annum	£680.00 per year	
2 February 2019 to date – 680/365 daily rate £1.86 x 609 days		= £1,132.74

103. Interest at 8% is awarded on the loss of overtime from the mid point:

Interest at 8% per annum	£31.36 per year	
2 February 2018 to date – 31.36 daily rate £0.09 x 609 days /2 to reflect interest from mid point		= £27.41

104. **TOTAL AWARDED:**

Compensation for hurt feelings	£8,500.00
Loss of overtime	£ 392.00
Interest on hurt feelings	£1,132.74
Interest on overtime	£27.41
	£10,052.15

105. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 12-14 November 2018, 25-27 February 2019 and 7 June 2019, Belfast.

Date decision recorded in register and issued to parties:

Legal Issues

1. **Direct Discrimination**

   Whether the second named respondent directly discriminated against the claimant on the grounds of his sex contrary to Article 3 of the Sex Discrimination (NI) Order 1976 by:

   a) transferring the claimant from the ARU in February 2018;
   b) suspending him from firearm use in February 2018;
   c) requesting him to withdraw his grievance in February 2018;
   d) requesting that he shave off his moustache in February 2018;
   e) applying the CAPES policy, specifically section 1.3.

2. **Indirect Discrimination**

   a) whether the second named respondent's policy on facial hair (CAPES Policy section 1.3) and application of same, indirectly discriminated against the claimant on the grounds of sex, contrary to Article 3A of the Sex Discrimination (NI) Order 1976?

   b) if the answer to [a.] above is yes, whether the policy is a proportionate means of pursuing a legitimate aim?

3. **Victimisation**

   Whether the second named respondent victimised the claimant on grounds of his sex contrary (the protected act: grievance raised on 02/02/2018) contrary to Article 6(1) of the Sex Discrimination (NI) Order 1976 by:

   a) transferring the claimant from the ARU in February 2018;

   b) suspending him from firearm use in February 2018;

   c) requesting him to withdraw his grievance in February 2018;

   d) requesting that he shave off his moustache in February 2018.

Factual Issues

1. Why was the claimant suspended from his normal duties, transferred station, transferred unit and had his shift cycle changed with three days' notice on Friday, 2 February 2018?

2. Whether the above was in contravention of SP 58/2007.

3. Who made the decisions referenced at 28.2 above?

4. Has the second named respondent trained the claimant on RPE? If so, why has the second named respondent not trained the claimant on RPE? Is this training necessary?

5. Did the second named respondent prevent the claimant from returning to his normal police role, duty station, unit and shift cycle until he had withdrawn his internal grievance and shaved off his moustache? If so, why?

6. Are Constables Maguire, White and Black appropriate comparators?

7. If so, are Constables Maguire, White and Black permitted to be in breach of the CAPES (were previously the Uniform Dress Code) policy and having hair that sits below the collar?

8. Has the second named respondent not taken any action against these officers? If not, why not?

9. Whether the CAPES policy has a detrimental impact on male police officers who may be required to wear RPE? If so, whether the second named respondent has sufficiently considered the negative impact that the CAPES policy would have on male officers?

10. Whether the second named respondent considered alternatives to section 1.3 of the CAPES policy, prior to implementing same? If so, what were they?

11. Whether the second named respondent was aware of, or considered, HSG 53 'Respiratory Protective Equipment at Work, A Practical Guide'? Is this guide relevant?

12. Whether the 'catch all' second named respondent definition of facial hair unnecessarily restricts the rights of male officers?

13. Whether the second named respondent considered the welfare of the claimant in their course of action, so as not to cause a negative effect on the claimant's mental and physical health?

14. Whether the second named respondent considered how much professional embarrassment and humiliation their course of action would cause the claimant?

15. Where in the CAPES policy does it show that 'Corporate Appearance' is a driving factor, other than on health and safety grounds, to preclude male officers, within the Armed Response Unit from wearing facial hair?

16. What were the circumstances of the implementation of the facial hair policy as set out in the 'Corporate Appearance and Protective Equipment Standards' (CAPES)?

17. Whether the primary aim of CAPES was to protect officers and staff who wear Respiratory Protective Equipment (RPE)?

18. Whether the policy was a proportionate means of achieving a legitimate aim in the corporate appearance and the protection of officers and health and safety grounds?
19. What were the circumstances surrounding the non-compliance by the claimant in relation to the CAPES policy in the ARU?

20. How was the claimant's non-compliance managed?

21. Why was the claimant transferred?

22. If the claimant is successful in some or all of his claims, what detriment has the claimant suffered?

CASE REFERENCE 4182/18IT

IN THE INDUSTRIAL TRIBUNAL

BETWEEN:

GORDON DOWNEY

Claimant

-and-

CHIEF INSPECTOR MCCREERY

and

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Respondents

WRITTEN SUBMISSIONS ON BEHALF OF THE CLAIMANT

1. This case concerns the Respondent's Corporate Appearance and Protective Equipment Standard (CAPES) and the impact of this policy.

2. The Claimant alleges that he was subjected to direct discrimination, indirect discrimination and victimisation. The victimisation claim is based on him having raised a grievance on 2nd February 2018. The agreed Statement of Issues can be found at pages 42 - 44 of Section 1 of the bundle.

3. The agreed Statement of Issues includes the following matters:

   Direct Discrimination

   1. Whether the second named Respondent directly discriminated against the Claimant on the grounds of his sex contrary to Article 3 of the Sex Discrimination (NI) Order 1976 by:

      a. Transferring the Claimant from the ARU in February 2018.

      b. Suspending him from firearm use in February 2018.

      c. Requesting him to withdraw his grievance in February 2018.

d. Requesting that he shave off his moustache in February 2018.

e. Applying the CAPES policy, specifically Section 1.3.

Indirect Discrimination

2. Whether the second named Respondent's policy on facial hair (CAPES policy Section 1.3) and application of same, indirectly discriminated against the Claimant on the grounds of his sex, contrary to Article 3A of the Sex Discrimination (NI) Order 1976?

3. If the answer to (2) above is yes, whether the policy is a proportionate means of pursuing a legitimate aim?

Victimisation

4. Whether the second named Respondent victimised the Claimant on the grounds of his sex contrary (the protected Act: grievance raised on 02/02/2018) contrary to Article 6 (1) of the Sex Discrimination (NI) Order 1976 by:

a. Transferring the Claimant from the ARU in February 2018.

b. Suspending him from firearm use in February 2018.

c. Requesting him to withdraw his grievance in February 2018.

d. Requesting that he shave off his moustache in February 2018.

INDIRECT DISCRIMINATION

4. Under s3A of the Sex Discrimination (NI) Order 1976, a provision, criterion or practice applied by an employer, "A", indirectly discriminates against an employee, "B", if –

(a) A applies, or would apply, it to persons of a different sex,

(b) it puts, or would put, persons of the same sex as B at a particular disadvantage when compared with persons of a different sex,

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

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

5. The Tribunal raised an issue with the parties' representatives regarding whether the policy could be properly categorised as indirectly discriminatory if it applied only to one sex. The Tribunal referred to Baroness Hale's comments on the issue of requirements or conditions applying to both sexes for indirect discrimination to apply. In the case of the *Secretary of State for Trade and Industry -v- Rutherford* (No. 2) [2006] ICR 785 Baroness Hale's judgment includes the following (at p806):

> -that the essence of indirect discrimination is that an apparently neutral requirement or condition or provision, criterion or practice in reality has a disproportionate adverse impact upon a particular group.
>
> -it is of the nature of such apparently neutral criteria or rules that they apply to everyone, both the advantaged and disadvantaged groups.
>
> -a smaller proportion of one group can comply with the requirement, condition or criterion or a larger proportion of them are adversely affected by the rule or practice.
>
> -once disproportionate adverse impact is demonstrated by the figures, the question is whether the rule or requirement can be objectively justified.

6. Therefore, it is accepted that for a policy to be indirectly discriminatory it must be a policy which applies or would apply both to the disadvantaged and non-disadvantaged group. In a case of alleged indirect sex discrimination this means the policy applies or would apply to both men and women. If the Claimant's indirect discrimination case was to be defeated by this argument this would require the Tribunal to make a finding of fact the CAPES facial hair policy could apply only to men and not women. The Claimant submits that this is not a finding which is open to the Tribunal in this case.

7. One can anticipate that there may be policies within the workplace which can only apply to one sex, for example a maternity leave policy or a policy in relation to the working conditions of pregnant employees. However, the CAPES policy does not apply solely to one sex and even Section 1.3 of the CAPES policy does not apply solely to one sex. Whilst the Tribunal may have it in mind that a policy in relation to facial hair will quite naturally be more often applied to men, this does not mean that the policy exclusively applies only to those who are male. There is the potential for females to have facial hair also. Whilst it may well be the case that female facial hair is not as prevalent as male facial hair, there is no evidence whatsoever before the Tribunal on the issue of female facial hair. It may well be, and it is emphasised that there is no evidence before the Tribunal, that the infrequency of females presenting with facial hair is a combination of physical make up, hormonal make up and perceived societal norms regarding female appearance. However, there can be no doubt that there is the potential for some

females at least to have facial hair. It is respectfully submitted that the Tribunal cannot find in this case that Section 1.3 of CAPES can only apply to those who are male. Indeed, the policy itself (at page 12 of the policy which is at page 144 of Section 3 of the bundle) states as follows:

> *"The standards of CAPES is applicable to both genders in order to be non-discriminatory and in keeping with the PSNI commitment to equal opportunities. There may be cases where the detail is required to be slightly different between genders but the standard of acceptability will remain equal."*

8. Section 1.3 of the CAPES policy (at page 147 of Section 3 of the bundle) does not state that it is only applicable to male officers.

9. In addition, in correspondence of 17th October 2018 the Respondent's Solicitors in reply to matters raised in the claimant's request for additional information stated as follows: (Page 67 of Section 1 of the bundle):

> *"As regards the Claimant's request for additional information the Respondents now provide further replies as follows:*
>
> *"2. Do the Respondents accept that the CAPES policy constitutes a provision, criteria or practice applied to police officers within the ARU? If not, please confirm the factual basis upon which the Respondent relies on to refute this."*
>
> *The CAPES policy applies to all officers within the Police Service of Northern Ireland and not just those officers serving in ARU. Section 1.3 of the policy headed "Facial Hair" applies to police officers or police support staff who occupy roles where there is a routine possibility of respiratory exposure to occupational hazards. This applies to units outside of the ARU.*
>
> *"3. Do the Respondents accept there is a disparate impact on men in the ARU in the application of the CAPES policy, specifically Section 1.3? If not, please confirm the factual basis upon which the Respondent relies on to refute this."*
>
> *The Respondents accept that there is a disparate impact on men in the ARU in the application of Section 1.3 of the CAPES policy."*

10. The Respondents did not seek in replies to contend that the relevant section of the CAPES policy was specific only to men. Indeed by recognising the disparate impact on men the Respondents implicitly recognise that the policy applies to all officers whether male or female albeit that the effect of the impact of the policy is disparate to the disadvantage of men.

11. The Respondent has not sought to raise an argument during the running of the case or in the legal or factual issues or, as stated above, in its Replies to the Claimant's Notice for additional information, that there cannot be an indirect discrimination case as this section of the policy applied only to men. Therefore, whilst the Tribunal has raised this issue as it was in the mind of the Tribunal and has quite properly given the parties the opportunity to address this issue and to make submissions, in this case the Tribunal is compelled to find, for the reasons outlined above, that s1.3 of the CAPES policy applied to all officers, regardless of gender.

    Did the policy and enforcement of the policy put male officers at a particular disadvantage when compared with female officers?

12. In relation to whether a disadvantage is suffered for the purposes of the legislation, "particular disadvantage" does not refer to serious, obvious or particularly significant cases of inequality. The term is apt to cover any disadvantages as confirmed by the ECJ in *Chez Razpredelenie Bulgaria AD v Komisia Za Zashtita Ot Diskriminatsia* [2015] IRLR 746 (see also Harvey Division L paragraph 310).

13. In the Respondent's Replies to the Claimant's Notice for additional information (at page 59 - 61 of the bundle) the Respondent states that as of 21st August 2018 there are three female officers within ARU and 69 male officers.

14. The disadvantage caused by the policy was that those with facial hair had to either change their appearance or fall foul of the policy thereby exposing themselves to the potential for temporary and ultimately permanent transfer away from their chosen unit. The evidence shows that only men either had to change their appearance or refused to shave and therefore fell foul of the policy.

15. All of the officers who were required to remove facial hair and thereby change their appearance were male. In addition to those men who shaved voluntarily to comply with the policy, there were four men who did not initially shave to comply with the policy. At paragraph 32 of Chief Inspector McCreery's statement he stated that at least six officers in ARU who normally wore facial hair removed it so they complied with the policy. It appears that three further officers refused to comply with the policy and one officer went on sick leave. By falling foul of the policy these officers exposed themselves to the potential for temporary and ultimately permanent transfer away from their chosen unit.

16. It is therefore clear that solely within ARU 10 men were disadvantaged by the policy. These 10 were made up as follows:

    -the 6 who shaved voluntarily;

-the 3 who refused to comply with the policy;

-the 1 officer who went off sick.

10 out of the total of 69 male officers in ARU is 14.5%.

17. Therefore, 14.5% of the male group either had to change their appearance or refused to shave and therefore fell foul of the policy exposing themselves to risk of transfer.

18. It is clear that a larger proportion of male ARU officers were adversely affected by Section 1.3 of CAPES than the proportion of female officers who were so adversely affected. As far as we are aware, 0% of female officers had to take steps to alter their appearance in order to comply with Section 1.3 of CAPES.

19. It is abundantly clear that a policy which requires officers within the ARU to be clean shaven will cause male officers to be at a 'particular disadvantage' when compared to female officers. It is further clear, for the reasons outlined above, that the policy in this case did cause male officers to be at a particular disadvantage compared to women.

20. The Tribunal is also referred to the acceptance by the Respondents of the disparate impact on men (see paragraph 9 above).

21. The Tribunal is therefore entitled to find that the policy put male officers at a particular disadvantage when compared to female officers and therefore Article 3A(2)(b) of the Sex Discrimination (Northern Ireland) Order 1976 is met.

Was the Claimant put at that disadvantage?

22. The next question then is whether the Claimant was "at that disadvantage" (Art 3A(2)(c) Sex Discrimination (NI) Order 1976). Again this is entirely clear in this case. The Claimant was a man who had a beard and then a moustache. He initially was told that he was being temporarily transferred to another unit for failing to comply with the policy. In order to avoid being transferred he was required to comply with the policy and alter his preferred appearance in terms of facial hair. Therefore he has suffered the disadvantage himself.

23. The Claimant submits therefore that requirements (a), (b) and (c) of Art 3A are met in this case. The real issue in this case is whether the Respondent can show that the policy was a proportionate means of achieving a legitimate aim.

Proportionate means of achieving a legitimate aim

24. The Claimant submits that it is entirely clear that this policy, and application of the policy to those within ARU, were not proportionate means of achieving a legitimate aim. The Claimant submissions on these issues are outlined below.

25. In the Supreme Court case of *Homer -v- Chief Constable of West Yorkshire* [2012] IRLR 601, Lady Hale gave guidance on the issue of justification within the context of an indirect age discrimination case, however the principle should apply equally to justification of other forms of indirect discrimination. She stated:

> "The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from Articles 6(1), 4(1) and 2(5) of the Directive, but can encompass a real need on the part of the employer's business: *Bilka-Kaufhaus GmbH v Weber von Hartz*, case 170/84, [1986] IRLR 317.
>
> **20**
> As Mummery LJ explained in *R (Elias) v Secretary of State for Defence* 2006] EWCA Civ 1293, [2006] IRLR 934, at [151]:
>
> > '... the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group.'
>
> He went on, at [165], to commend the three-stage test for determining proportionality derived from *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*[1999] 1 AC 69, 80:
>
> > 'First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?'
>
> As the Court of Appeal held in *Hardy & Hansons plc v Lax* [2005] EWCA Civ 846, [2005] IRLR 726 [31], [32], it is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."

26. It is clear that Lady Hale approved the comments of Mummery LJ in commending the three stage test for determining proportionality derived from the

de Freitas case. The key issue in the case before the Tribunal is the third of the three stages of that test namely:

> Are the means chosen no more than it is necessary to accomplish the objective?

Legitimate aim

27. The Claimant accepts that there is a legitimate aim in this case. That legitimate aim is clear from the wording of the policy at the time that it was introduced. It is clear that the legitimate aim was the protection of the health and safety of officers or staff who "occupy roles where there is routine respiratory exposure to occupational hazards. These officers/staff members may be required to wear respiratory protection equipment (RPE) at short notice".

28. It is accepted by the Claimant that it is a legitimate aim to seek to protect the health and safety of his officers or staff who were routinely exposed to respiratory occupational hazards and who may be required to wear RPE at short notice. However, the Claimant states that the methods adopted by the Respondent in order to achieve this were not proportionate.

Were the steps taken by the Respondents a proportionate means, i.e. no more than was necessary, to achieve the legitimate aim?

(i) The policy generally

29. It is entirely clear from the guidance from the British Standard, the Health and Safety Executive and the manufacturers that there is no requirement for users of respiratory protective equipment to be clean shaven. It is entirely clear that it is only the area where the respiratory equipment meets the fact that must be clean shaven. Therefore on this ground alone a policy that requires the user to be completely clean shaven is disproportionate to the aim which the employer sought to achieved.

30. Guidance from the FM12 User Manual (page 89 of the bundle), the British Standard (D.4.2 AT page 222 of the bundle), the British Occupational Hygiene Society (page 262 of the bundle) and the Health and Safety Executive (at pages 699 and 702 of the bundle) all make clear that for safe use only the area underneath the seal needs to be clean shaven. However, none of this guidance was put before the UPMC. Indeed, the Chair of the UPMC, Superintendent Foy, who chaired the Committee on behalf of the Chief Constable, was of the view that it was necessary for the users to be completely clean shaven in order for the necessary safety aim to be achieved. She was not informed that the RPE could be used safely with some facial hair being present provided it was not in the area of the seal.

31. It is clear in this case that by requiring officers to be completely clean shaven that this is more than is necessary, as stated by the manufacturer, the Health and Safety Executive and the British Standard.

32. The briefing paper drawn up by Andrew Murray found at pages 263 - 272 of the bundle does not make any reference to the potential for officers to retain some element of facial hair. Therefore, it seems that this information was not placed before the Committee in the briefing paper.

33. The Respondent also failed to make enquiries regarding other organisations such as the Armed Forces. The Respondent specifically states at paragraph 11 of its ET3 response that the London Ambulance Service has a similar clean shaven policy. This seems to be in fact completely contrary to the contents of the e-mail from Mark Rainey, Head of CBRM and HART at the London Ambulance Service NHS Trust at pages 120 and 121 of the bundle which states that "We have never taken the stance that staff are not permitted to wear a moustache, provided it does not hinder the seal, nor extend below the joint of the upper and lower lip."

34. In addition, the Health and Safety Executive guidance states (at paragraph 82) that the wearer needs to be clean shaven around the face seal to achieve an effective fit when using tight fitting face pieces and that training is a good opportunity to make employees aware of this.

35. It is clear that a complete ban on facial hair was unnecessary and therefore not proportionate to the aim which the Respondent sought to achieve.

(ii) Application of the policy to ARU

36. In addition to the point outlined above that to require officers to be clean shaven was not proportionate in general, there is also the further issue that it was unnecessary and therefore not proportionate to apply and to enforce Section 1.3 of CAPES against officers within the ARU.

37. It does not appear to be in dispute that at the relevant time of the introduction of the policy ARU officers were supplied only with an FM12 respirator or similar.

38. Chief Inspector McCreery, at paragraph 3 of his statement, quotes the e-mail accompanying the CAPES policy from Assistant Chief Constable Gray (pages 131 and 132 of the Hearing bundle) which explained that the new policy had:

> "The primary aim of protecting officers and staff who wear Respiratory Protective Equipment (RPE) on a regular basis."

39. When the policy was introduced it specifically applied to officers or staff who occupied roles where there was "routine respiratory exposure to occupational hazards" (see page 148 of the Hearing bundle for the original wording of the

policy when first introduced). The Claimant and his colleagues within the ARU were not routinely exposed to respiratory hazards and nor did they wear RPE on a regular basis. The Claimant's evidence included the following:

> -although members of the ARU are issued with the FM12 respirator, to his knowledge, no one actually carried it in their kit bags or vehicles (at paragraph 8 of his statement at page 3 of the witness statement bundle).
>
> -in his 10 years as an authorised firearms officer he had not been deployed to one job that would have required him to don an FM12 respirator. To his knowledge, nor has any other ARV officer (paragraph 9 of his statement).

40. In addition Sergeant Leathem stated (at paragraph 5 of his statement page 22 of the witness statement bundle) that he has never been called upon to wear a respirator in 10 years as an authorised firearms officer.

41. Sergeant Buxton stated in his statement (paragraph 5 of page 24 of the witness statement bundle) that in the previous 10 years there has been no requirement to wear respirators operationally.

42. It does not seem to be in dispute that ARU officers had not been called upon to wear FM12 respirators prior to the introduction of this policy. Nor does it appear to be in dispute that at least some of those officers did not even carry the respirator when carrying out their duties. The evidence of Sergeant Leathem, which did not appear to be disputed, was that his respirator stayed in his locker for many years.

43. Therefore, the aims of the policy, to protect officers where there was routine respiratory exposure to occupational hazards and to protect officers and staff who wore RPE on a regular basis, did not require the policy to be applied to and enforced against officers in ARU. It was completely unnecessary to achieve the aims of the policy for it to be applied to and enforced against officers in ARU. Therefore, the application of this policy and enforcement of this policy against officers in ARU was not a proportionate means of achieving the legitimate aim.

44. Although it is perhaps not strictly necessary for the Tribunal to make a determination as to why the policy had been erroneously applied to ARU officers, it seems clear that the alleged extensive consultation[1] and the alleged robust consultation[2] does not appear in fact to have been extensive or robust at all as regards the use of RPE by ARU officers. It does not appear that any input was sought from any ARU officers. It seems that the Uniform and Protective Measures Committee (UPMC) were led into error due to there being insufficient

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[1] paragraph 10 of Chief Inspector McCreery's statement.

[2] see the e-mail from Assistant Chief Constable Grey at pages 131 and 132 of the Hearing bundle as referred to in paragraph 3 of Chief Inspector McCreery's statement.

information before them in relation to ARU officers. It seems that the Committee relied on Chief Inspector McCreery who was in charge of the ARU but for whatever reason he completely and utterly failed to properly inform the UPMC regarding the relevance of RPE to the ARU or the extent of use of RPE within ARU. Superintendent Foy indicated in cross-examination that it was her understanding that the ARU did wear RPE on a routine basis.

45. It does appear that the Respondent belatedly recognised that the FM12 respirators were not used by ARU. At page 748 and 749 of the Trial bundle is Julie Howell's note of a meeting of 8th February. She refers in her witness statement to those who were in attendance at this meeting (at paragraph 4 of her statement at page 64 of the witness statement bundle). It appears the implementation of the CAPES policy was discussed. In her notes of the meeting she specifically records (at page 749):

> "ARU never used full face mask but should use FPP3 on regular basis".

46. It is quite frankly astonishing that it was not recognised during the alleged extensive and robust consultation process that ARU officers never used the full face mask. It also does not appear to be in dispute that at the time of introduction of the policy the Claimant had not been provided with any other RPE. It is also not in dispute that when Portacounting/fit testing took place that this was only in relation to the full face mask and not any other type of face mask.

47. It was not necessary to apply the policy and enforce the policy against officers who never used a FM12 respirator and had not been fit tested for any other type of respirator.

(iii) Application of the policy to those who had not been properly trained in the use of RPE

48. In addition to the reasons outlined above, it was also not necessary to apply this policy to and enforce the policy against officers who had never been trained in the use of the respirator. The issue of training was one which gave rise to some extraordinary evidence on the part of Chief Inspector McCreery. The Claimant, Constable Kelly, Sergeant Buxton, Sergeant Maguire and Sergeant Leathem all highlighted there had not been training in the use of the RPE. Familiarisation training did not take place until August/September of 2018. However, Chief Inspector McCreery repeatedly asserted that the officers within ARU had been trained in the use of the RPE by Rodney Smyth when they were Portacounted. It was abundantly clear that this was entirely incorrect.

49. The British Standard from 2005 states at paragraph 11.3 (at page 195 and 196 of the Hearing bundle) the matters which should be included in training. These are listed (a) to (m) and the Tribunal is referred to this document. In addition it states that supervisors should be trained to monitor the correct use of the respiratory

protective devices. It is entirely clear that the first time training took place was the introduction of familiarisation training in August/September 2018[3].

50. The Health and Safety Executive guidance from 2013 states at paragraph 25 (at page 688 of the Hearing bundle) that RPE at work should be used by properly trained people who are supervised. It was accepted by Rodney Smyth on behalf of the Respondent that this therefore means that if employees are not properly trained in relation to the RPE they should not be using it. The Health and Safety Executive guidance goes on at paragraph 81 (page 701 of the bundle) to highlight the matters that should be covered in training.

51. Therefore, the officers within the ARU should not even have been using RPE as they were not properly trained. Luckily it does not appear that they were required to go into a situation where they were asked to use the RPE without training, otherwise they could have been exposed to a very significant risk to health and safety. There seems to be no real explanation provided as to why these officers had not been given the proper training as recommended within the British Standard and as referred to by the Health and Safety Executive.

52. It is entirely clear that there was no necessity to apply this policy and/or enforce this policy against people who had not been trained to use RPE. Therefore the application of the policy to ARU officers and enforcement of the policy against ARU officers was not a proportionate means of achieving a legitimate aim.

(iv) The revised policy

53. The Respondent revised the wording of the policy. This appears to have taken place in and around 20th February 2018 (see e-mails at page 154 of the Hearing bundle). It is important to bear in mind that the introduction of this newly worded policy came after the Claimant had been ordered to shave his moustache (2nd February 2018 as per paragraph 15 of his statement) and had been informed that he was being transferred to Maydown (roads policing). The Claimant outlined in his statement that he left work on 2nd February 2018 feeling tired and unwell, victimised, bullied and harassed (at paragraph 21). He gives an account of his symptoms. On 6th February 2018 he reported sick to Inspector Hamilton which he indicated was due to management induced stress caused by discrimination, intimidation and victimisation (see paragraph 22 of his statement). On 9th February he was told by Inspector Hamilton that if he continued to refuse to shave off his moustache he would be transferred to a local policing team (see paragraph 25 of his statement). It is clear the transfer to a local policing team would be a detriment. The Claimant then informed Inspector Hamilton on 9th February 2018 that he would shave (paragraph 28 of the Claimant's statement).

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[3] For the avoidance of doubt these submissions should not be interpreted as an acceptance that the familiarisation training is sufficient to comply with the British Standard. This point does not require to be determined in this case.

54. This new version of the CAPES policy amended the wording to state that:

> "Some police officers/police staff occupy roles where there is a routine possibility of respiratory exposure to occupational hazards".

55. Even if the changed wording in this new policy meant that the policy would apply to officers within ARU, none of those officers had been trained in the use of the RPE and therefore should not have been using the equipment. Therefore, even after the new wording was introduced on 20th February 2018 it was unnecessary to apply a policy and enforce a policy against officers in relation to equipment which they were not trained to use and therefore should not have been using.

(v) The out of date canisters

56. In addition to the points outlined above there is the issue of out of date canisters. It seems that a considerable number of officers had out of date canisters. Therefore, it is unnecessary to apply a policy to officers and enforce that policy against officers allegedly in order to protect their health and safety, when many of them have equipment that is out of date and therefore they should not have been using it anyway.

57. The Tribunal is referred to the evidence in the witness statements and in cross examination of Rodney Smyth and Frank Dillon. Even at this point in time, some months after the initial hearing was adjourned around the issue of out of date canisters, it seems that the Respondent is still not in a position to identify why certain officers within ARU as of November 2018 still had out of date canisters.

58. It really does appear that the management of respiratory equipment within ARU was entirely dysfunctional and inadequate. It further seems that Chief Inspector McCreery had no notion of what proper training should be. It really is quite concerning given that the RPE is to prevent inhalation of toxic substances that the PSNI was providing out of date equipment and failing to train its officers in the proper use of that equipment.

(vi) Tactical training

59. There is the further issue of tactical training. It seems clear that if ARU officers were to wear RPE when on operational duties they are likely to be deploying their tactics during many of those operations. It seems clear from the cross-examination of Norman Lewis that vision and communication abilities to some extent may be impacted by the wearing of the RPE and therefore tactical training should take place with the RPE being worn in order to ensure that officers can become accustomed to carrying out their tactics wearing this equipment and adapt their tactics if necessary. It is of note that the Special Operations Branch do undertake tactical training wearing their RPE. However, although this point

featured in evidence it is not necessary for this point to be determined for the Claimant's case to be successful.

(vii) Could the legitimate aim have been achieved in a proportionate way?

60. It is clear that the Respondent could have applied the policy in a way which would have been a proportionate means of achieving the legitimate aim of protecting the health and safety of those whose health was at risk from respiratory exposure. In the future the Respondent should include the following steps in its policies covering RPE:

> -carry out proper consultation including officers from relevant units to identify those officers who do require RPE;
> -ensure that officers who are identified as requiring RPE are properly trained in its use including tactical training where required;
> -have regard to guidance from the British Standard, Health and Safety Executive etc;
> -ensure that all officers who are identified as requiring RPE are issued with the correct equipment which is in date;

61. When these steps are taken then a policy which permits facial hair which does not interfere with the seal of the respirators together with training of officers regarding the extent of facial hair that is permitted may well adequately deal with the issue.

(viii) Equality impact assessment/equality advice

62. It is entirely unsatisfactory that that the Respondent's equality impact assessment did not take place until many months after the policy had been introduced and some months after the Claimant's proceedings had been issued.

63. It is also unsatisfactory that when the Respondent sought advice via Lorraine McCurdy, the Equality Officer, from the Equality Commission, that this advice did not extend to the gender impact of the policy.

ENFORCEMENT OF THE CAPES POLICY AS DIRECT DISCRIMINATION

64. There was evidence before the Tribunal that female officers within ARU had not complied with the CAPES policy by failing to ensure that their hair was cut or secured above the collar (Section 1.2 of the CAPES policy). Constable Maguire's evidence was that she could not wear her hair up under her helmet. Sergeant Buxton also referred to Constable White.

65. It is clear from Section 1.2 that the failure to wear hair secured above the collar is a health and safety issue. This was reinforced by the contents of pages 739 - 742 of the bundle which referred to an incident when female officers had been

assaulted and dragged to the ground, the method being by grabbing them by the ponytail and forcibly dragging them to the ground. They were then incapacitated and received a number of kicks and punches. The e-mail at page 739 clearly stated that hair worn loose or in ponytails/pigtails presented a health and safety risk to officers as an assailant could grab the hair to inflict pain or to disable an officer and to mitigate against this risk hair should be clipped up and contained within the cap.

66. However, even though female officers within ARU had not complied with the CAPES policy there were no steps taken against them.

67. There was evidence before the Tribunal from Sergeant Buxton (paragraph 6 of his statement at page 24) that he pointed out to Inspector Hamilton that a female officer, Constable White, was also in breach of the policy. He asked would Constable White be removed from AFO work. He was told she would not and that at that time the focus was on facial hair on male officers. Therefore it seems there was a clear gender bias when determining how the policy should be enforced and against whom the policy should be enforced. Inspector Hamilton was not called to give evidence by the Respondents. Chief Inspector McCreery's evidence on cross-examination was to effectively suggest that if there was sex discrimination at a local level within the ARU then that was Inspector Hamilton's fault.

68. Based on the evidence from Sergeant Buxton and Constable Maguire there are facts from which the Tribunal could properly conclude that there was sex discrimination in the enforcement of the CAPES policy. Under the *Barton* guidance approved in *Igen v Wong*[4], once the Claimant has proved facts from which the Tribunal could properly conclude that the Respondent treated the Claimant less favourably on the grounds of sex, the burden of proof then moves to the Respondent. It is then for the Respondent to prove that it did not commit the act. To discharge that burden it is necessary for the Respondent to prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of sex. That requires the Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question. The Tribunal will normally expect cogent evidence to discharge that burden of proof from the Respondent.

69. The Respondent has not called evidence to rebut Sergeant's Buxton's evidence. Therefore, the Respondent has not proved that the actions taken in the

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[4] See the comments of Girvan LJ in *Nelson v Newry & Mourne District Council* [2009] NICA 24 (03 April 2009) in relation to *Igen* and also in relation to *Madarassy v. Nomoure International plc* [2007] IRLR 246

enforcement of the policy were in no way discriminatory. Therefore, the Claimant's claim on direct discrimination in relation to the enforcement of the policy must succeed.

CAPES POLICY BEING A DIRECTLY DISCRIMINATORY POLICY

70. If the Tribunal finds that the Section 1.3 of the CAPES policy applied only to men and therefore was not a neutral requirement which could found a case of indirect discrimination, then in those circumstances the Claimant submits that Section 1.3 was directly discriminatory. If the Tribunal finds that Section 1.3 applied only to men then the Respondent introduced a gender specific criteria. Bases on *James v Eastleigh Borough Council* [1990] IRLR 288 and Lady Hale's comments in *Essop*, as discussed below, it is submitted that such a gender specific criteria would amount to direct discrimination.

71. In *James* the House of Lords held:

> "The simple question to be considered under s.1(1) (a) is: "would the complainant have received the same treatment from the defendant but for his or her sex?" This test embraces both the case where the treatment derives from the application of a gender-based criterion and the case where it derives from the selection of the complainant because of his or her sex. Adopting that test in the present case, the question became "would the plaintiff, a man of 61, have received the same treatment as his wife but for his sex?" An affirmative answer was inescapable."

72. In *Essop v Home Office (UK Border Agency)* and *Naeem v Secretary of State for Justice*, [2017] IRLR 558 Lady Hale stated:

> "*James v Eastleigh Borough Council* also shows that, even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used (in that case retirement age) exactly corresponds with a protected characteristic (in that case sex) and is thus a proxy for it."

73. In addition if s1.3 of the CAPES policy was gender specific that would mean that it was a policy that required men to change their appearance. It is respectfully submitted that if the PSNI were introducing a policy that required women to change their appearance it would have been carried out in a much more sensitive manner and with a much more informed consultation process. Men were treated less favourably then women would have been in similar circumstances.

VICTIMISATION

74. As highlighted at paragraph 15 of the Claimant's witness statement, on 2nd February 2018 he raised what was in effect a grievance to Inspector Hamilton alleging that he believed he was being directly discriminated against on the grounds of gender and religious grounds. He further highlights (at paragraph 22 of his witness statement) the text message that he sent to Inspector Hamilton on

6th February 2018 which referred to management induced stress caused by discrimination, intimidation and victimisation. He stated in the text message that he was more than happy to engage with HR over his complaint against Chief Inspector McCreery.

75. The Claimant states (at paragraph 25 of his statement) that on 9th February 2018 he was contacted by Inspector Hamilton by telephone and was informed there had been a high level meeting the previous day. He was advised that if he were to continue to refuse to shave his moustache off he would be transferred to a local policing team. He informed Inspector Hamilton that he would shave under duress. Later that day he again spoke to Inspector Hamilton who informed him he could not guarantee that he would be permitted back into his unit (paragraph 28 of his statement). Inspector Hamilton asked if he wished to pursue the religious aspect of his discrimination complaint and also if he wished to pursue his complaint against the Chief Inspector. The Claimant states that at that point he realised he had no option but to withdraw his grievance. Therefore, on the Claimant's unchallenged evidence, he was being questioned regarding pursuing his grievance at the same time as being told that it was not guaranteed that he would be permitted back into his unit. The clear implication to the Claimant was that he would be treated more favourably if he withdrew his grievance.

76. During cross-examination Chief Inspector McCreery stated that Superintendent Foy had asked him to find out what the Claimant's intentions were and it became apparent that those higher up wished to know if the Claimant was still pursuing a complaint. It seems therefore it was not unreasonable for the Claimant to take the view that the issue of whether he was continuing with his complaints/grievances was a factor when it was being determined whether he would be permitted back to his role or not.

77. In an e-mail of 9th February 2018 (at page 341 and 342 of the bundle) Chief Inspector McCreery e-mailed Inspector Hamilton and also cc'd in Superintendent Foy amongst others. He highlighted that even though he had been informed that the Claimant and others had advised Inspector Hamilton of their intention to comply with the facial hair policy, a senior management response to this new situation would not be available until early the next week. Chief Inspector McCreery specifically asked, so that ACC Grey and Superintendent Foy were fully informed, whether the Claimant still intended to pursue his formal complaints/grievance. It therefore seems that those in a more senior position within the police wished to be informed of these matters when arriving at their decision as to whether or not the Claimant could be permitted to return to his normal duties having decided to comply with the facial hair policy. The Claimant in fact withdrew his grievance and thereby suffered a detriment as a consequence of this. In addition he was not informed immediately that he could return to his unit. This was a further detriment.

78. Therefore, the Claimant has made out his victimisation claim.

INJURY TO FEELINGS

79. Paragraph 42 of the Claimant's statement outlines the impact that these matters have had on him. He has undergone counselling. Counselling notes and GP notes are available within the bundle (section 5).

80. The *Vento -v- Chief Constable of West Yorkshire Police (No. 2)* case in the Court of Appeal was 2003. This placed the lower band for less serious cases such as where the act of discrimination was an isolated or one off occurrence. The middle band of £5,000 to £15,000 was to be used for serious cases which did not merit an award in the higher band. Given the impact upon this particular Claimant as outlined in his witness statement and the fact that he had to attend counselling and was absent from employment through illness, it is respectfully submitted that this is a case that would be appropriate for the middle band.

81. In the *Da-bell -v- NSPCC* EAT case in 2010 it was recognised that the *Vento* guidelines should be updated in line with inflation as measured by the retail prices index. The Bank of England's inflation calculator at www.bankofengland.co.uk states that goods and services costing £5,000 in 2003 (when the *Vento* decision was given) in 2018 would cost £7,765.66. The higher band figure of £15,000 would be £23,296.98 in 2018. Figures for 2019 are not yet available according to the Bank of England's website.

82. It is respectfully submitted that the current figures for the middle Vento band updated in line with inflation are a range between £7,765.66 and £23,296.98.

CONCLUSIONS

83. There has been a considerable amount of documentary and oral evidence in this case. However, stepping back from the case the indirect discrimination case is actually quite straightforward. The policy and the enforcement of the policy had a disparate impact on men. That is accepted by the Respondent. It is therefore not controversial that that men were at a particular disadvantage. Clearly the Claimant was also at that disadvantage.

84. The real issue in the indirect discrimination case concerns justification/proportionate means of achieving a legitimate aim. It is clear for the various reasons outlined above that the application and enforcement of this policy within ARU was completely unnecessary and not in any way proportionate. In addition the policy was generally disproportionate (see paragraphs 29-35 above). Therefore, the Claimant succeeds.

85. The direct discrimination and victimisation claims do not require consideration of as much detailed evidence as the indirect discrimination case. The direct discrimination case in the enforcement compared to female officers and the victimisation cases are also made out for the reasons outlined above.

86. The Tribunal is therefore invited to make findings in the Claimants favour that he was discriminated against both indirectly and directly and also victimised and to make an appropriate award for injury to feelings.

Noting further occurs.

NEIL PHILLIPS
Bar Library

12th March 2019

IN THE INDUSTRIAL TRIBUNAL IN NORTHERN IRELAND

CASE REF NO 4182/18 IT

BETWEEN

GORDON THOMAS DOWNEY

CLAIMANT

-and-

CHIEF INSPECTOR GARRATH MCCREERY

and

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

RESPONDENTS

RESPONDENTS' SUBMISSIONS FOR HEARING ON 15.03.19

FACTS AND BACKGROUND

1. The Corporate and Protective Equipment Standard (CAPES) was introduced to PSNI on 7th January 2018 by the Uniform and Protective Measures Committee (UAPM) and replaced the existing Corporate Uniform Standard. The UAPM was comprised of representatives of a number of bodies including the Police Federation for Northern Ireland.

2. CAPES provides officers and staff with a guide on all aspects of uniform and protective measures. It outlines the minimum standards for dress and appearance that must be adhered to in order to ensure a corporate and professional image. It also identifies equipment to be worn in compliance with health and safety legislation.

3. The new standards introduced a new policy on facial hair. When publishing the document ACC Gray explained that the new policy had,

"the primary aim of protecting officers and staff who wear Respiratory Protective Equipment (RPE) on a regular basis. This relates solely to officers in certain specialised roles and has been subject to robust consultation with PSNI internal stakeholders including Health and Safety Branch, Equality and Diversity Unit and Police Federation for Northern Ireland (PFNI)."[1]

4. The review of the existing facial hair policy in the Corporate Uniform Standard was prompted by PSNI's Health and Safety Branch. A Safety Alert Notice (01/2016)[2] had been issued by Health and Safety Branch in 2016 which emphasised the importance of maintaining an effective seal between the skin and any RPE worn.

5. The Notice stated,

"*The Health and Safety Executive (HSE) has established that facial hair can significantly reduce or prevent an effective seal with the mask exposing the wearer to risk.*"

[1] See pages 131-132 of Bundle 1
[2] See 175-177 of Bundle 1

6. HSE advice was that facial hair which had not been shaven within the previous 8 hours prior to the work shift could increase facial seal leakage. The view of officers in Health and Safety Branch was that the existing PSNI policy on facial hair in the Corporate Uniform Standard did not adequately reflect legislative requirements on PSNI and left the organisation vulnerable to litigation in the event of officer injury.

7. CAPES therefore introduced a new policy which stated at section 1.3,

"Some police officers/police staff occupy roles where there is routine respiratory exposure to occupational hazards. These officers/staff members may be required to wear RPE *at short notice and must therefore always remain clean shaven whilst on duty."*

8. To ensure absolute clarity about who this directive applies to the policy has since been amended to read,

"Some police officers/police staff occupy roles where there is routine possibility of respiratory exposure to occupational hazards. These officers/staff members may be required to wear RPE *at short notice and must therefore always remain clean shaven whilst on duty."*

9. There was a suggestion at tribunal that there was much that turned on the use of the words "routine" and "possibility". This is a distraction from the true questions that the Tribunal must focus on which are laid out in the course of these submissions.

10. There is a legislative obligation on PSNI to take reasonable steps to ensure that RPE is used properly. It is possible for RPE to afford full protection around some facial hair providing that facial hair does not interfere with the seal. [3] The problem arising for PSNI is that compliance with legislation would require it to porta count (test) each officer who has facial hair immediately

[3] This has been the case for the Respondent as pleaded in its response to the tribunal. It did not just" occur" in the course of the hearing. However, the issue is avoidance of risk to life and health and safety.

prior to each occasion on which they wear RPE to ensure that the facial hair is not interfering with the seal. This would be logistically impossible in the face of the events that would require such equipment to be worn. These situations often evolve a short notice and require immediate action. To stop to shave or test the seal wastes valuable time in a life or death situation.

11. The suggestion by the Claimant in the course of his cross-examination that it should be a "personal responsibility" or the responsibility of supervisors to ensure compliance is ill thought out and illogical in the cut and thrust of the role within which the Claimant occupies.

12. In addition the Tribunal has heard evidence from Rod Smyth in particular who attested to the fact that there were some individuals who presented themselves for porta counting with a moustache or some facial hair and had to be asked to return once they had trimmed their facial hair. These individuals clearly thought they would pass the porta count and the fact they were required to come back once they had appropriately trimmed their hair highlights the very problem when it is left to individual discretion/responsibility. Why take the risk?

13. The PSNI has, therefore, adopted a "clean shaven" approach to ensure it complies with legislation. It is not the only large organisation to do so for example the London Ambulance Service, has a similar policy.

14. Prior to the adoption of CAPES it had been subject to a strict governance process. It was conducted under the auspices of the Uniform and Protective Measures Committee (UPMC) chaired by Superintendent Foy, Head of Operational Support Department's Protective Services Branch. The committee meets regularly and has representation from Districts and Departments across PSNI. It ensures that all items of uniform and protective equipment are subject to robust evaluation prior to availability to the Service.

15. The CAPES policy on facial hair was ratified by UPMC following extensive consultation during the course of 2017. Health and Safety Branch, Equality and Diversity Unit, Legal Advisor, and PFNI all contributed to the process

16. The UPMC decided that because of the potential personal impact of the policy on individual officers approval for its implementation should sit at ACC level. ACC Gray was briefed by Superintendent Foy and approval was given resulting in publication of the policy in CAPES in January 2018.

17. The key point to note is that PSNI's facial hair policy in respect of RPE exists to ensure officer safety.

Applicability of CAPES Facial Hair Policy To Armed Response Unit (ARU)

18. Throughout the 2017 consultation process undertaken by UPMC it was envisaged that any new policy on facial hair would apply to all officers in PSNI who might routinely be exposed to occupational hazard at short notice. The policy would by implication be relevant primarily to officers in specialist units including PSNI's three firearms units (Headquarters Mobile Support Unit, HMSU, Specialist Operations Branch Support Unit, SOBSU, and Armed Response Unit, ARU), Tactical Support Group (TSG), District Support Teams (DST), Crime Scene Investigators (CSI) and the Police Search and Rescue Team. The officers in ARU (the unit within which the Claimant was positioned) would, therefore, be among a large number of officers attached to a variety of teams across PSNI who would be subject to the policy.

19. UPMC briefing papers and minutes confirm that throughout the consultation process it was accepted that the policy would apply to ARU, HMSU and SOBSU. There was no suggestion by

any representative from Health and Safety Branch, Equality and Diversity Unit, PFNI or Legal Services that the policy should not apply to ARU.

Respiratory Protective Equipment (RPE)

20. RPE is issued to ARU to provide protection against:

(1)CSGas

RPE is issued to firearms officers in PSNI to provide protection should they have to operate in an environment in which police have deployed CS gas. The Claimant is correct in stating that ARU officers have not received training in their tactics whilst wearing RPE. This is because ARU officers are not trained to deploy CS gas. They may, however, be required to support HMSU officers (trained to a higher level than ARU officers and with capability to deploy CS gas) following an operation where HMSU officers have used CS gas[4].

Operations in which police deploy CS gas are obviously rare. The tactic, however, exists and ARU must be capable of supporting HMSU at short notice should HMSU use CS gas during an operation.

It is accepted by HMSU senior management that the CAPES facial hair policy applies to HMSU officers even though operational use of CS Gas is rare.

(2) Other Occupational Hazards

[4] See Respondent's response form, C/I McCreery's WS and T/D/ C/I Lewis 'S WS

As well as issuing RPE to firearms officers PSNI also issues RPE to officers in other specialist teams, albeit these officers are not trained and equipped to the same level as firearms officers. These teams include TSG, DST, and CSIs. They are issued with FFP3 masks which do not offer the same protection as FM12 Respirators but do provide protection when officers are working in, for example, attics, farm environments, waste sites, cannabis factories, or commercial premises (workshops).

21. ARU officers operate across all Policing Districts in Northern Ireland on a 24/7 basis. They are usually the best trained and best equipped resource immediately available to support District Policing. As such they could be tasked as first responders to any critical or major incident. It is precisely because of their enhanced levels of training and equipment and the specialist support they provide to District Policing that ARU officers must be capable of deploying in situations where occupational hazards exist and RPE is required. It is not just in situations where HMSU has deployed CS gas that ARU officers may need RPE. They could be tasked to support District colleagues in any number of situations where RPE is necessary for officer safety.

22. It would make no sense for ARU officers to be incapable of deploying in situations where RPE is required whilst less well-trained officers are capable of doing so.

23. The key point at issue is ensuring that officers in ARU, in whom PSNI invests considerable time and money in training and equipping, are capable of providing the optimum range of specialist support consistent with their training and equipment.

24. ARU officers have now also been trained in new cutting equipment. This enhances their capability to defeat composite doors and enter premises quickly. Use of this equipment requires

respiratory protection.

25. In light of all of this ARU officers are "portacounted" (i.e. tested) annually. This is a test to check that the respirator fits the wearer properly. Officers are given instruction in how to fit the respirator correctly during this process.

26. Officers have also been provided with "familiarization" training which was provided by Constable Robert Bunting[5]. This course provided awareness of the subsystems, component parts and limitations of FM12 respirator. It consisted of a classroom lesson, with power point presentation[6] and a practical demonstration of the donning and doffing of the FM12 in Garnerville PSNI. There was also a practical RTF procedure at Palace military base, including one emergency procedure, namely a canister change inside the RTF.

27. The new facial hair policy in CAPES has been consistently applied across all specialist teams in PSNI in which officers might routinely be exposed to occupational hazard requiring respiratory protection at short notice.

28. In the application of the policy, the Claimant has not been treated differently to officers in ARU or in other specialist disciplines.

Management Of Non-Compliance of Section 1.3 In ARU

29. As part of the implementation process ACC Gray directed that District Commanders and Heads of Branches should be briefed about the new facial hair policy prior to its implementation

[5] See Con Bunting's WS in Supplemental Bundle (Folder 3) at bottom of page 8.
[6] See Bundle 2 pages 560- 589

in January 2018. C/I McCreery whilst not a Head of Branch, due to his line management responsibility for ARU, attended a briefing in December 2017. C/I McCreery was aware that some officers in ARU wore beards and/or moustaches and was mindful of the impact the new policy would have on them. He was keen to ensure that all officers in the unit, and especially those who had facial hair, knew about the forthcoming implementation of the policy and understood the reasons for it. He therefore sent the PowerPoint presentation he had seen at the briefing together with a HSE information video to all ARU officers towards the end of December 2017.[7]

30. During January 2018 C/I McCreery became aware that some officers in ARU were not complying with section 1.3 of CAPES. C/I McCreery discussed this on a number of occasions with the two Unit Inspectors and attempted to achieve compliance by officer agreement. Eventually it became clear that this agreement would not be forthcoming from a small number of officers. It was clear that consistent application of a new organisational policy across the unit would be impossible if some officers simply chose to ignore it. There was no alternative but to set a date by which all officers would be required to comply.

31. The Claimant was one of four officers out of an establishment of almost seventy who either refused to comply or went on sick leave before refusing to comply. In effect, by their non-compliance, these officers were failing to meet their own obligations under health and safety legislation, and were also making it impossible for PSNI to meet its legislative obligations.

32. C/I McCreery discussed at length how the situation should be managed with his line manager, Superintendent Foy. She agreed with the suggestion that the officers should be temporarily repositioned to roles where there was no requirement to wear RPE until applications

[7] See page 321 bundle 1.

for exemption to wear RPE on the medical or religious grounds allowed for by the policy could be submitted and considered, or a permanent HR solution be found where no such applications were submitted. This approach had the support of Deputy Chief Constable Harris.

33. C/I McCreery advised Inspector Colin Hamilton that the Claimant would be temporarily repositioned to Roads Policing Support Group, Maydown, if he remained non-compliant with the policy. Maydown was of similar distance from the Claimant's home address as his ARU base station in Cookstown and C/I McCreery believed that this was the best temporary solution to the problem that could be achieved for him within the Department. In the event the Claimant went on sick leave prior to commencing duty in Maydown citing management induced stress as the reason for his absence.

34. On Thursday 8th February 2018 C/I McCreery attended a meeting chaired by Chief Superintendent Knox to review the HR implications of the non-compliance of the officers concerned. Superintendent Foy (UPMC), Superintendent Goddard (TSG), Mr Ralph Roche (Legal Advisor), Mr David Orr (Health and Safety Branch) and Ms Julie Howell (HR Branch) also attended.

35. At the meeting Chief Superintendent Knox confirmed that the new facial hair policy should apply to ARU as well as the other two firearms units in PSNI (HMSU and SOBSU). He endorsed the arrangements that had already been made for the temporary repositioning of those officers who were not complying with it. He directed that the two officers who had not identified medical/religious grounds for their non-compliance should be permanently transferred out of ARU. He also directed that applications for exemption from the other two officers

(including Constable Downey) who had cited medical/religious grounds should be considered in accordance with the new policy.

36. On Friday 9th February 2018 Inspector Hamilton reported to C/I McCreery that after communicating the outcome of the meeting chaired by Chief Superintendent Knox to Constable Downey the officer had indicated that he would comply with the facial hair policy and wished to return to his unit. C/I McCreery was unable to provide an immediate response as to whether this would be possible because he needed to refer back to Superintendent Foy. Superintendent Foy was unable to provide an immediate response because she needed to refer to ACC Gray or Chief Superintendent Knox and neither was available until the following week. Inspector Hamilton was advised accordingly.

37. The relevant procedure for dealing with the Claimant and his non-compliance is found at pages 69- 88 of bundle 1. In particular Section 19 of the policy deals with "temporary transfers"[8] and relates to the circumstances of the Claimant on the basis that for health and safety reasons as the Claimant was non-compliant regarding the facial hair policy, he had to be repositioned until he would comply or alternative posting be found. The Claimant suffered no loss of pay and by virtue of Section 33 (1) of the Police (NI) Act 2000 the Chief Constable has the power to direct his Officers to go where is required. It is not accepted that a temporary repositioning is a detriment or less favourable treatment.

38. Prior to the meeting on 8th February 2018 Constable Downey had made a formal Bullying and Harassment Complaint against C/I McCreery. On 9th February 2018 when he advised Superintendent Foy that he had indicated he would comply with policy and wished to return to ARU she asked him to clarify if he wished to pursue the formal complaint, he had made against the First Respondent. Superintendent Foy needed this information so that she could update

[8] See page 81 of bundle 1.

ACC Gray about the new situation in full. It was this request from Superintendent Foy which led to the conversation that C/I McCreery had with Inspector Hamilton which Constable Downey refers to in his submission. Constable Downey's complaint against C/I McCreery was not a relevant factor in the decision- making process about his future role.

39. The Claimant was not "requested" to withdraw his Bullying and Harassment complaint (as per the legal and factual issues[9]) nor does he make this complaint in his witness statement (see paragraph 28). The wording from Inspector Hamilton in his email of 9 February 2018[10] simply states that the Claimant *"no longer intends to make a complaint of bullying and harassment/grievance".*

The "Female Hair style" Issue

40. The Respondents will say that the issue of females and their how their hair is worn is not relevant to this claim. The basis of this assertion is as follows:

a. No complaint was ever made to C/I McCreery or Supt Foy in relation to females and their hair styles.

b. Complaints were made to C/I McCreery and/or Supt Foy about the Claimant (and 3 others) being non complaint with section 1.3 of CAPES.

c. The assertion that women were in breach of a different section of CAPES than the Claimant was is comparing apples with oranges.

d. The actions of the Respondents can only be judged on what they knew and what was before them at the relevant time.

THE CLAIMS

[9] See pages 42-44
[10] See page 314

Burden of Proof & Relevant Test

41. The court in ***Igen v Wong [2005] IRLR 258*** *CA* set out a two-stage test. The 1st stage requires the claimant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The 2nd stage requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld.

42. It is submitted that the following authorities are useful in determining a claim for discrimination, ***McDonagh and Others –v- Hamilton Thom Trading As The Royal Hotel, Dungannon (2007) NICA, Madarassy -v- Nomura International Plc (2007) IRLR 246 ("Madarassy"), Laing –v- Manchester City Council (2006) IRLR 748 and Mohmed –v- West Coast trains Ltd (2006) UK EAT 0682053008.*** It is clear from these authorities that in deciding whether a claimant has proved facts from which the tribunal could conclude in the absence of an adequate explanation that discrimination had occurred, the tribunal must consider evidence adduced by both the claimant and the respondent, putting to the one side the employer's explanation for the treatment.

43. The Court of appeal affirmed this test in the case of **Madarassy *v Nomura International Plc [2007] IRLR 246.*** As Lord Justice Mummery stated in Madarassy at paragraphs 56 and 57: -

> ***"The Court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate***

a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

44. In The case of ***London Borough of Islington v Ladele [2009] ICR 387, EAT*; upheld by CA: *[2010] IRLR 211***, the EAT gave some helpful guidance, stating (at para 40):

"The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:

(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in Nagarajan v London Regional Transport [1999] IRLR 572, 575—"this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in Nagarajan (p 576) as explained by Peter Gibson LJ in Igen v Wong [2005] EWCA Civ 142, [2005] ICR 931, [2005] IRLR 258 paragraph 37.

(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in Igen v Wong.

(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So, the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. …

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test: see the decision of the Court of Appeal in Brown v Croydon LBC [2007] EWCA Civ 32, [2007] IRLR 259 paragraphs 28–39.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in Anya v University of Oxford [2001] EWCA Civ 405, [2001] IRLR 377 esp. paragraph 10.

(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in Watt (formerly Carter) v Ahsan [2008] IRLR 243, [2008] 1 All ER 869 … paragraphs 36–37) …"

Ladele was applied and approved in *McFarlane v Relate Avon Ltd [2010] IRLR 196, EAT*; affirmed by CA *[2010] IRLR 872*.

DIRECT DISCRIMINATION CLAIM

45. The Claimant asserts that he suffered the following treatment on the grounds of his sex[11]:

    a. Transferring him from ARU in February 2018;

    b. Suspending him from firearm use in February 2018;

    c. Requesting him to withdraw his. Grievance in February 2018[12]

    d. Requesting he shave off his moustache in February 2018;

    e. Applying the CAPES policy, specifically section 1.3

46. The legislative test is generally broken into two elements: less favourable treatment and the reason for that treatment. Whilst that division reflects the manner in which a tribunal will usually approach the issue, in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] ICR 337, [2003] IRLR 285* a number of their Lordships took the view that it may sometimes be appropriate to ask the latter question first.

47. ***Burrett v West Birmingham Health Authority [1994] IRLR 7, EAT*** established that the test of what amounts to less favourable treatment is an objective one. In the first instance the Claimant must prove "less favourable" treatment.

48. The Respondents respectfully submit that the Claimant has not satisfied his burden both in terms of the identification of a comparator or in satisfying the tribunal that the treatment complained of was in fact "less favourable treatment". Accordingly, the burden of proof does not shift to the Respondent.

[11] As per Article 3 of the Sex Discrimination (NI) Order 1976

[12] To note the Claimant did not actually make this allegation in his evidence – see paragraphs 28 &29 of his WS

49. Should the Tribunal conclude that the burden of proof does shift then the Respondents say that the reason for the treatment was not on the grounds of his sex but because of his non-compliance with section 1.3 of CAPES.

SUMMARY OF THE RESPONDENTS' ARGUMENTS UNDER THE CLAIM OF DIRECT DISCRIMINATION

a. The Claimant has not suffered less favourable treatment;

b. The Claimant has not shown any alleged less favourable treatment was suffered as compared to a suitable comparator;[13]

c. Any alleged "less favourable treatment" as identified by the Claimant was because of his non-compliance with section 1.3 of CAPES and not on the grounds of sex.

INDIRECT DISCRIMINATION CLAIM

50. The Claimant alleges that the Second Respondent's policy on facial hair as defined in the Corporate Appearance and Protective Equipment Standard (CAPES) and its application is indirectly discriminatory on the grounds of the Claimant's sex contrary to Article 3A of the Sex Discrimination (NI) Order 1976.

51. The impugned paragraph of CAPES section 1.3 is as follows:

[13] To note the Claimant relies on the application of CAPES policy "specifically section 1.3" as less favourable treatment, therefore female officers are not the correct comparator- see discussion on this point further in these submissions

"Some Police Officers/police staff occupy roles where there is routine respiratory exposure to occupational hazards. These officers/staff members may be required to wear Respiratory Protection Equipment (RPE) at short notice and must therefore always remain clean shaven whilst on duty"

52. The CAPES policy applies to all Police Officers but specifically this section of the policy applies to those Officers in SOB, ARU, TSG, DST, CSI, DVI, PSNIAR and HES.[14]

53. As recognised by Lady Hale in Essop[15] at paragraph 19,

Although EU law has always recognised both direct and indirect discrimination, the first legislative definition of indirect discrimination was contained in Council Directive 97/80/EC on the burden of proof in cases of discrimination based on sex, *Article 2(2) of which provided that, for the purposes of the principle of equal treatment:*

'indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.'

This introduced the term 'an apparently neutral provision, criterion or practice' (or PCP as it is generally known) and the concept of disproportionate group disadvantage. There was no reference to individual

[14] See page 292 of Bundle 1
[15] **Essop and others (appellants) v Home Office (UK Border Agency) (respondent); Naeem (appellant) v Secretary of State for Justice (respondent)** [2017] UKSC 27

disadvantage, but Article 4 required that, where persons who considered themselves wronged by the non-application to them of the principle of equal treatment established facts from which it might be presumed that there had been direct or indirect discrimination, it was for the respondent to prove that there had been no breach of the principle of equal treatment.

54. The relevant section is not neutral in that facial hair and requirement to be clean shaven effects only men. The Respondents say that the relevant section cannot constitute a PCP in the circumstances and in accordance with the dicta of Lady Hale.

55. If the Tribunal accept that the relevant section of CAPES (1.3) constitutes a PCP the Respondent says that having to be clean shaven is not a detriment/substantial disadvantage. The tenor of Essop is concerned with whether the Claimant could comply with the PCP and in the present case the Claimant could comply with the relevant provision. The debate was whether he was required to.

56. In *Cheshire & Wirral Partnership NHS Trust v Abbott* [2006] IRLR 546, [2006] ICR 1267, *CA*, it was emphasised that a claimant is not entitled to identify an artificial comparator group, and in that sense unlike in claims of direct discrimination, she has no 'right' to choose her comparators. The court observed that in general it will be appropriate to define the pool widely rather than narrowly, a view which militates against attempts by claimants to ensure a favourable statistical result by choosing a particularly favourable pool.

57. The Claimant has identified his comparators as Constables White and Maguire (female Officers in ARU[16]). The Respondent does not accept that they are proper comparators. That "PCP" can never apply to those female Officers (which is why it is not a PCP for the purposes of indirect discrimination) and therefore the correct comparator group is Organisation wide.

58. It is apparent if that the "PCP" applies not because the Claimant is a man but because he is a man in the ARU. Therefore, any perceived less favourable treatment is not because the Claimant is a man but because he is a man in one of the specified units. Therefore, the PCP is untainted by sex.

59. Should the Tribunal not accept the above arguments the Respondents will say that the policy was a proportionate means of achieving a legitimate aim.

60. In particular the Respondents will say that the policy is justified on the grounds of health and safety. If risk to life can be avoided then why take the risk?

61. There has been a substantial focus by the Claimant on the role of ARU, the training they are given with the RPE, and the use of cannisters. Respectfully this is a distraction from the main question that faces the Tribunal. According to Tolley's[17] the employer is required to justify the PCP itself and is not required to justify the application of it to the Claimant.

[para 12.9]

[16] See Reply 4 page 48 of Bundle 1
[17] Tolley's Employment Handbook/12 Discrimination and Equal Opportunities - II: Exceptions, Defences and Non-Employers covered by the Employment Rules/Justification

"An issue that has arisen in the cases is whether it is necessary for the employer 'merely' to justify the PCP itself or whether it is also necessary to justify the application of the PCP to the claimant. The SC in Seldon accepted that it will normally suffice if the employer succeeds in showing that the PCP was a proportionate means of achieving a legitimate aim in general, although did not rule out that it might be necessary in certain cases for the employer to demonstrate that the application of the provision, criterion or practice to the particular employee was justified in that particular case. In Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15, [2012] ICR 704, however, the SC held that what needed to be justified was the rule itself. See also Rajaratnan v Care UK Clinical Services Ltd (7 October 2015), UKEAT/0435/14/DA, UKEAT/0076/15/DA in which the EAT held that a requirement for GPs to work night-shifts was justified by the need to provide healthcare services 24 hours per day. ***The employer did not need also to justify the application of the rule to the claimant.*** *Further support for this approach is to be found in Chief Constable of West Midlands Police v Harrod and ors where the EAT ([2015] ICR 1311) and CA ([2017] EWCA Civ 191) both took the view, in slightly differing terms, that provided the rule was justified (in that case a provision of the Police Pensions Regulations 1987 that permitted compulsory retirement only of those who had become entitled to a pension), there was no need to justify the exercise of the discretion to apply the rule in any particular case."* [Emphasis added]

62. The classic test for establishing whether or not discrimination may be justified is found in *Bilka-Kaufhaus GmbH v Weber Von Hartz (Case 170/84) [1986] IRLR 317*. There the Court of Justice of the European Union said that the national court (or tribunal) must be satisfied that the measures having a disparate impact 'correspond to a real need ... are appropriate with a view to achieving the objectives pursued and are necessary to that end'

(para 36). In subsequent cases (see especially R *v Secretary of State for Employment, ex p Seymour-Smith and Perez [1999] IRLR 253* and also *Kutz-Bauer v Freie und Hansestadt Hamburg*: C-187/00 *[2003] IRLR 368*) the CJEU expanded on this, ruling that is for the national court (or tribunal) to ascertain:

> *(1) whether the measure in question has a legitimate aim, unrelated to any discrimination based on any prohibited ground;*
>
> *(2) whether the measure is capable of achieving that aim; and*
>
> *(3) whether in the light of all the relevant factors, and taking into account the possibility of achieving by other means the aims pursued by the provisions in question, the measure is proportionate.*

63. To be legitimate, an aim must correspond to a "real need" on the part of the employer's business: *Bilka-Kaufhaus* (ibid), R *(Elias) v Secretary of State for Defence [2006] 1 WLR 3213.*

64. It is not sufficient for an employer to convince a tribunal that the PCP had a legitimate aim it also required to show it was appropriate and reasonably necessary in order to achieve that aim.

65. The requirement that a measure be proportionate means that tribunals must seek to balance the discriminatory effect of the requirement or condition against the legitimate aim in question (see *Ojutiku v Manpower Services Commission [1982] ICR 661*;

66. The fact that a discriminatory measure has been negotiated with the trade union or other workforce representatives[18] will usually be a relevant factor in assessing whether or not the measure is justified. (This is consistent with the fact that achieving a stable workforce may be a legitimate aim, see *Rolls Royce Plc v Unite the Union [2010] ICR 1*, CA.)

67. The Claimant has attempted to challenge the requirement to be clean shaven and adduced evidence from a purported "expert". This expert was in fact a business man who had a vested interest in the sales of RPE and did not hold any qualifications such as the Second Respondent's Health & Safety Adviser (Mr. David Orr).

68. The Respondents respectfully request the Tribunal prefer the evidence of Mr Orr over Mr. Gates.

69. The Respondents also invite the Tribunal to discount any suggestion of a template/personal responsibility/training in length of facial hair. These suggestions lack credibility or recognition of the fast pace operational environment within which these officers work.

SUMMARY OF THE RESPONDENTS' ARGUMENTS UNDER THE CLAIM OF INDIRECT DISCRIMINATION

a. The Respondents do not accept that the relevant section of CAPES constitutes a PCP – as per Essop there is a requirement that it be an apparently neutral provision.

[18] See emails at Page 409 and 414-415

b. It is not accepted that having to be clean shaven constitutes a substantial disadvantage. The Claimant could comply with the PCP the debate was whether he had to.

c. If it is deemed to be a PCP and if it is deemed to be a substantial disadvantage to have to be clean shaven the Respondents will say that the treatment was not on the grounds of sex but because of membership of certain specialised task forces such as ARU/SOB.

d. If the Tribunal is against the Respondents on all of the aforementioned arguments then the Respondents will say that the policy is a proportionate means of pursuing a legitimate aim- namely Health and Safety.

VICTIMISATION CLAIM

70. The Claimant alleges that by virtue of raising a grievance on 2/02/19 that he was treated less favourably by the Second Respondent (see legal issue 4 – page 43).

71. Victimisation arises where a claimant has performed a 'protected act'. The claimant must identify an appropriate comparator and the doing of the protected acts must be the cause of the less favourable treatment. The appropriate comparison is between the claimant and someone who has not done a protected act. (See ***Chief Constable of West Yorkshire Police v Khan***[19])

72. In ***Simpson v Castlereagh Borough Council***[20], Girvan LJ stated, *at Paragraph 14* of his judgment that: -

[19] ***[2007] ICR 2065 HL***
[20] ***[2014] NICA 1***

"A tribunal determining the question of victimisation must address the issues, firstly, whether the claimant suffered a detriment, and, secondly, whether she was subjected to less favourable treatment as compared to an actual or hypothetical comparator by reason of the fact that she had done a protected act."

73. More recently, in ***McCann v Extern Organisation Ltd***, Horner J at *Paragraphs 14, 15 and 17* summarised the law on victimisation as follows: -

"(14) ... The IDS Handbook states at Paragraphs 9.41 and 9.42: -

'9.41 To succeed in a claim of victimisation, the claimant must show that he or she was subject to the detriment because he or she did a protected act or because the employer believed he or she had done or might do a protective act ...

9.42 .... The essential question in determining the reason for the claimant's treatment is always the same: what consciously or sub-consciously motivated the employer to subject the claimant to the detriment? In the majority of cases, this will require an inquiry into the mental processes of the employer ...'

(15) As Harvey said at Paragraph [468] in respect of the test for victimisation

'Analysing the elements of any potential victimisation claim requires somewhat different considerations as compared to the other discrimination legislation.

A claim of victimisation requires consideration of: -

The protected act being relied upon

The correct comparator

Less favourable treatment

The reason for the treatment

Any defence

Burden of proof'

(16) ...

(17) As Harvey says at Paragraph 488: -

'The key issue in such situations will be the tribunal's understanding of the motivation (conscious or unconscious) behind the act by the employer which was said to amount to victimisation.'."

74. The Claimant relies on his grievance he has submitted on 02/02/19 as his "protected act".

75. The Respondents repeat their position as adopted in the course of these submissions in relation to the alleged detrimental treatment. However, should the tribunal conclude that the matters complained of occurred and in fact constitute detrimental treatment the Respondents will say that the reason for the treatment was not because the Claimant lodged a grievance but because he was non – compliant with section 1.3 of CAPES.

76. In addition, the Claimant has not set out with sufficient clarity who he says are his comparators. The evidence before the tribunal however is that 3 other Officers who were non-compliant were treated in the same way and there is no evidence, they raised a grievance. Therefore, the Claimant cannot satisfy the requirement that the treatment was because of his protected act

SUMMARY OF THE RESPONDENTS' ARGUMENTS UNDER THE CLAIM OF VICTIMISATION

a. The acts complained of either did not occur or do not constitute less favourable treatment

b. If the Tribunal concludes that they do constitute less favourable treatment it was not because the Claimant lodged a grievance but because he was non-compliant with Section 1.3 of CAPES.

c. The Claimant has not shown that he was less favourably treated than any actual or hypothetical comparator (who must be in breach of section 1.3 of CAPES and not lodged a grievance). The others who were non-compliant with section 1.3 were treated the same.

REMEDY

77. If the Tribunal find against the Respondents in relation to this matter then it would appear any award would be in the lower band of the Vento guidelines.

OVERVIEW

78. It is important not to lose sight of the reality of the situation presented to the tribunal.
79. This is fundamentally a question of health & safety, for both Officers and member of the public.
80. The Chief Constable, properly and correctly has determined that in order to avoid unnecessary risk to life and health & safety, has taken the decision to implement section 1.3 of CAPES.
81. It is understood that not all will like the policy, which is why there was such a degree of consultation with the various stakeholders.
82. Under the **Health and Safety at Work Act 1974** an employer's responsibility to those in their employ and to others not in their employ are set out in sections 2 and 3 of the Act.

Section 2: General duties of employers to their employees.

(1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

Section 3: General duties of employers and self-employed to persons other than their employees.

(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.

83. The aforementioned duties are replicated throughout the plethora of health and safety legislation[21].

84. It is not difficult to imagine the criticism that would be levied at the Chief Constable if he did not take steps to ensure the Health & Safety of his Officers and to members of the public. It is therefore inconceivable that he should be criticised for taking the steps, as in this case, to avoid any risk to health and safety.

85. To be clear, as per the evidence heard, it is not just an immediate reaction to exposure to a chemical/CS gas that is of concern but the longer-term impact on health. If the seal is not in tact/ broken of the RPE then for the Officer the impact of that could be devastating. Why take the risk when it can be easily avoided?

86. The Respondents invite the Tribunal to dismiss the Claimant's claims in their entirety.

R BEST BL

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12.03.19

[21] See Mr Orr's witness statement.