

Case Number 1318158/2011



90Mi
(RESERVED JUDGMENT)

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Ms W B Williams

AND

Ministry of Defence

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham

ON 18 – 22 March 2013

25 – 26 March (Reserved Judgment)

EMPLOYMENT JUDGE Dean

MEMBERS Ms B Farrow

Mr M G Murray

Representation

For the Claimant: Ms C Musgrave, Counsel

For the Respondent: Mr E Beaver, Counsel

JUDGMENT

The unanimous judgment of the tribunal is that:

1 The claimant has been subject to unlawful discrimination by the prohibited conduct of direct discrimination contrary to s13 Equality Act 2010 because of the protected characteristic of sex.

Case Number 1318158/2011

- 2 The claimant has been subject to unlawful discrimination by the prohibited conduct of indirect discrimination contrary to section 19 Equality Act 2010 by the respondent because of the protected characteristic of sex.
- 3 The claimant is entitled to compensation to be determined following further representation of the parties at a remedy hearing.
- * 4 The Tribunal shall following further representations of the parties at a remedy hearing make appropriate recommendations that within a specified period the respondent shall take specified steps for the purpose of obviating or reducing the adverse effect of the matters to which the successful claims relate on the claimant and on any other person.

REASONS

1 By way of background in this case the claimant who is the highest ranking nurse serving in the RAF presented a complaint to the Employment Tribunal (on 13 December 2011) that she has been subject to discrimination because of a protected characteristic of sex both in terms of direct discrimination and indirect discrimination. The claimant joined the RAF in 1984, progressed through the ranks and was appointed to rank OF5 as Group Captain on 1 July 2003. Her attempts to progress to the rank of OF6 which is a 1* position have not been successful. It is accepted that there are a limited number of OF6 positions, which are senior positions within the MOD and particularly within the Royal Air Force, the service to which the claimant was commissioned.

2 The claimant was considered at Air Rank Promotion Board (ARPB) in July 2011 to be considered for promotion to OF 6 grade. She and four other officers were graded by the promotion board as promotable to that rank. At a committee Air Rank Appointing Board (ARAB) the claimant and two other candidates were considered for selection to be put forward as the RAF candidate to compete against candidates from the Royal Navy and the Army in a tri-service competition for the post of Commodore Defence Medical Group. The claimant was not selected as the RAF preferred candidate and this claim concerns, amongst other things the failure of the respondent to select the claimant, a female nurse as the RAF candidate for the role.

3 The claim was presented on 13 December 2011 and responded to by the respondents. The case which was originally listed for Hearing in October to commence for a three day hearing starting on 22 October 2012 was postponed and case managed on that day and re-listed to be heard for seven days commencing on 18 March to 26 March before this tribunal. This claim is brought against the named respondent, the Ministry of

Case Number 1318158/2011

Defence (MOD), the claimant was commissioned to serve the MOD in the Royal Air Force (RAF).

Issues

4 One of the many reasons why the case was not ready for hearing in October was that the parties had not agreed the list of issues in respect of the various complaints brought by the claimant. The parties have presented to the tribunal an agreed list of issues as at 15 March 2013 to be determined by the tribunal. The list of issues set out both the claimant's assertions and the respondent's response. We set out only the bare issues in respect of which we have to reach conclusions to enable us to determine whether or not the claimant's complaints or part of them succeed or not.

Direct sex discrimination

4.1 Did the respondent directly discriminate against the claimant because of the protected characteristic of sex contrary to sections 13 and 39(2)(b) the Equality Act 2010, when it failed to select her as the RAF candidate for the role of Commodore Defence Medical Group on the 12 July 2011? The respondent denies the claimant was not selected because of her sex.

4.2 Did the respondent treat the claimant less favourably in comparison to persons of a different sex? The claimant's comparator is Group Captain John Gaffney who was selected as the RAF candidate. The respondent alleges Group Captain Gaffney was the most likely candidate to succeed in competition with the candidates put forward by the other services and therefore he was selected on that basis.

Indirect discrimination

4.3 Did the respondent indirectly discriminate against the claimant in relation to her sex, contrary to sections 19 and 39(2)(b) of the Equality Act 2010, when it failed to select her as the RAF candidate for the role of Commodore Defence Medical Group on 12 July 2011?

4.4 Did the respondent apply to the claimant and to persons of a different sex a provision, criteria or practice? The claimant relies upon the following PCPs:-

(a) The respondent's practice of only appointing doctors to rank 1* roles in the tri-services Defence Medical Services. The claimant relies on:

a. the respondent's practice of restricting posts to doctors only, even though nurses may be just as capable of fulfilling the job requirements (for example ACOS Health, ACOS Medical and Head of Medical Strategy and Policy) and

Case Number 1318158/2011

b. the respondent's practice of only appointing doctors to the posts that are labelled as suitable for both doctors and nurses;

(b) The respondent's practice of preferring those candidates with greater 'potential' to achieve further promotion. The claimant relies on the respondent's different retirement age provisions for medical officers and nursing personnel;

(c) The respondent's practice of preferring those candidates who have attended the Advance Command Course. The claimant relies on the respondent's practice of reserving places for doctors on the course.

4.6 Did the PCPs place the persons with whom the claimant shares the protected characteristic of sex at a particular disadvantage when compared to persons of a different sex? The claimant alleges the PCPs place nursing personnel (the majority of whom are female) at a particular disadvantage when compared to doctors (who are predominantly male).

4.7 Did the PCPs place the claimant at a disadvantage? The claimant alleges they do as she is a nurse.

4.8 The appropriate comparator pool is that of all OF5s (doctors and nurses) who were eligible to be considered for the Commodore Defence Medical Group role across all three of the armed services.

4.10 Is the respondent's practice of only appointing doctors to rank 1* roles a proportionate means of achieving a legitimate aim?

4.11 Is the respondent's practice of different retirement ages for medical officers and nursing personnel a proportionate means of achieving a legitimate aim?

4.12 Is the respondent's practice of reserving places for doctors on the Advanced Command and Staff Course a proportionate means of achieving a legitimate aim?

Remedy

4.13 What remedy is the claimant entitled if successful? The claimant seeks compensation for loss of earnings, pension loss, and injury to feelings award, interest and recommendations.

4.14 In what bracket and sum should the injury to feelings award be made?

Case Number 1318158/2011

4.15 Are there appropriate recommendations that the respondents take any specified steps for the purpose of obviating or reducing the adverse effect of any matter to which these proceedings relate?

Glossary of Terms

5 In addition to the agreed list of issues the claimant has prepared a glossary of military terms which have proved to be of great assistance to the tribunal as acronyms are used widely by the respondents both in the documentation and in their delivery of evidence to this tribunal. We set out below the glossary of military terms to which we were referred. The respondents have not sought to challenge the appropriateness of the glossary of terms that we have used as a tool to assist us in understanding the documentation presented to us. We set it out below:

JMC – Joint Medical Command

The JMC supports Permanent Joint Headquarters, single Services, (Royal Navy, Army and RAF) Director of Special Forces and other Joint users in delivering medical operational capability, healthcare, education, training and research in order to maximise fighting power and medical excellence within the Armed Forces. It is staffed by all 3 services of HM Forces.

JMC overview

JMC will support the provision of continuously improving healthcare on operations and in peacetime. It will build on past training and research achievements, develop increasingly responsive ways of capturing operational evidence and lessons to ensure that they are incorporated at the earliest opportunity into the training given to personnel deploying on operations and into the treatment at every level of the Force's patients.

HQ JMC: the HQ is responsible for providing direction and support to JMC.

Led by Commander JMC – Air Vice Marshall Evans Sep 2009 – Oct 2012

Now Surgeon Rear Admiral Callum McArthur (previously SJC Med and Comd DMG)

DMG: Defence Medical Group: DMG is responsible for providing secondary healthcare personnel to meet operational exercises, placing staff into the NHS to maintain clinical skills and the Role 4 pathway. This Role 4 pathway is the treatment of operational casualties from arrival at Royal Centre of Defence Medicine through to rehabilitation at the Defence Medical Rehabilitation Centre at Headley Court.

Case Number 1318158/2011

MDHUs: Ministry of Defence Hospital Units these are secondary care military units which are embedded in NHS Trusts at Portsmouth, Peterborough, Frimley Park, Derriford (Plymouth) and Northallerton. Military personnel are placed in MDHUs to ensure they maintain acute medical skills and competencies for their operational roles.

DMS: Defence Medical Services The DMS encompass the entire medical, dental, nursing, allied health professionals, paramedical and support personnel. It is staffed by around 7,000 regular uniformed medical personnel and provides healthcare to 196,000 servicemen and women from all 3 services.

CO: Commanding Officer is the officer in command of a military Unit. Typically, the commanding officer has ultimate authority over the unit, and runs the unit within the bounds of military law. In this respect, commanding officers have significant responsibilities including finances, equipment, duties (to higher authority, mission, effectiveness, duty of care to personnel) and powers (for example, discipline and punishment of personnel within certain limits of military law).

IG: Inspector General-Responsible for providing the Surgeon General with an efficient and effective governance and assurance framework, inclusive of patient safety, quality improvement and health information across Defence.

COS Health (RAF): Chief of Staff Health/Director General Medical Services (RAF) is Leader of the RAF Medical Services.

Reporting Glossary

OJAR: Officer Joint Appraisal Report

OPG: Overall performance grade

RO: Reporting Officer

Levels of Casualty Care from Point of Wounding to Definitive Care

Medical care is provided progressively, ranging from first aid to definitive, specialised care as the casualty is evacuated rearwards to the medical chain. In NATO terminology, military land based medical Units are traditionally designated a "Role" number to describe their functional capability to deliver a specific level of care.

Role 1 – Emergency treatment (resuscitation and stabilisation)

Role 2 – Reception of patients, further resuscitation and treatment of shock, damage control surgery.

Case Number 1318158/2011

Role 3 – Field Hospital care with major specialist facilities including intensive care, holding and nursing capabilities in preparation for aeromedical evacuation to Role 4.

Role 4 – This facility provides definitive acute trauma, plastics, burns and reconstructive surgical and medical care and acute specialised rehabilitation outside the combat zone in the home country. In UK the Role 4 Units comprise 2 Units-RCDM and DMRC.

RCDM: Royal Centre for Defence Medicine is a large military medical unit which is the UK's Main Receiving Hospital and acute Role 4 Unit for all worldwide military aeromedical evacuations, including battle casualties. It is based within the Queen Elizabeth Hospital Birmingham. The Role 4 care pathway involves prioritising the clinical care delivery to high numbers of severely injured service personnel and providing critical welfare and administrative support to devastated families.

DMRC: Defence Medical Rehabilitation Centre at Headley Court is the other UK Role 4 Unit and is the Services premier rehabilitation facility. The wide skill base of it's personnel allow for the treatment of the most complex of rehabilitation cases offering support to the Regional Rehabilitation Units and forming an integral part of the Defence Medical Rehabilitation Programme.

DMRC offers access to all specialists engaged in rehabilitation with on-site consultants, physiotherapists, remedial instructors, occupational therapists, speech and language therapists, social workers, prosthetics, podiatrists, a psychologist and a cognitive therapist. It has 5 gymnasiums, a large hydrotherapy pool to support the clinical departments and the new H4H swimming pool.

The evidence

6 In case management by Employment Judge Harding on 22 October 2012 the way in which this case was to be timetabled was proposed. The case was listed to be heard between 18 March and 26 March. We were allocated a day to read all witness statements and all documents referred to therein which proved useful to the tribunal in the preparation for hearing witness evidence and cross examination. A bundle of documents has been presented to us extending over 390 pages. We observe that we have been referred to remarkably few of those documents within the witness statements as indeed in cross examination. We have equally been somewhat surprised that documents we might have expected to see within an agreed bundle, for example minutes of interviews in selection boards, policy documents relating to recruitment and selection and equal opportunities are not included. It is surprising to us that included within the documents have been documents that have been disclosed to the claimant in piecemeal form and it was necessary for the respondents to provide further piecemeal disclosure to the claimant

Case Number 1318158/2011

on the second day of hearing evidence, that was disclosed on Wednesday 20 March, Thursday 21 March and indeed it took until Friday 22 March for the respondents to present to us a structure chart, though not in an agreed form, which the respondents undertook to forward to the tribunal when making their reserved decision on Monday 25 March. That document, albeit a tool to assist us in our understanding of the structure and not led by evidence by the witnesses has not, in the event, been forthcoming for our consideration.

7 We have heard evidence from the claimant in an initial witness statement extending over 18 pages and then a supplemental witness statement which extended over an additional 20 pages. The respondent's case we have heard evidence first from Air Vice Marshal (AVM) Lloyd who is HQ Air Command RAF High Wycombe in Buckinghamshire who at the relevant time was the Air Secretary with the responsibility for career management of Royal Air Force personnel, a post which he had held since April 2009. AVM Lloyd has since retired from the service. We heard next from Air Commodore (AC) Malcolm Fuller retired who at the relevant time held the appointment of Air Secretary 1 Headquarters Air Command who through the Air Secretary was responsible for the Chief of the Air staff A C Fuller as Air Secretary 1 provides secretariat function to the Air Rank Appointments Board (ARAB) and the Air Ranks Promotion Boards (ARPB) which AVM Lloyd was Air Secretary responsible for presenting the alternatives and recommendations to the Chief of Air Staff (CAS) in his role at the quarterly Air Rank Appointment Boards and annual Air Rank Promotion Boards.

8 We heard also from Air Vice Marshal Morris CB RAF who at the relevant time was the Air Vice Marshal with responsibility for RAF Medical Services. AVM Morris retired in 2012 and his involvement in the claimant's case was in providing advice to the Air Secretary 1 in his preparation of a report to the Air Secretary prior to the Air Rank Appointment Board (ARAB) considering the relevant selection of an RAF candidate for the tri-service appointment of Commander DMG.

9 Finally we heard in relatively brief terms from Wing Commander Bradley of HQ Air Command RAF High Wycombe who was the Desk Officer within MANNING at HQ Air Command with the responsibility for the appointments of Princess Mary Air Force Royal Air Force Nursing Service and Medical Support Officers in the ranks of Flight Lieutenants, Squadron Leader and Wing Commander. The witness had no personal knowledge of the case but gave evidence on a number of issues in relation to the access to the Advance Commander and Staff Course, (ACSC) and how that applied to the claimant's case and the discretionary policy of extending time by two years at the end of an officers commission and how the question of how "potential" within individuals appraisals was factored into decision making and terms of appointments.

10 All witness evidence in chief was from written statements taken as read and brief further oral examination before cross-examination and re-examination. (AV Lloyds witness statement was five pages long that Morris provided an initial witness statement of

Case Number 1318158/2011

six pages and a supplemental witness statement of six pages Fuller gave a witness statement of five pages and Bradley a witness statement of three pages)

11 The Law

11.1 Relating to Direct Discrimination because of the protected characteristic of race.

S4 Equality Act 2010 provides that

The following characteristics are protected characteristics—

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

11.2 The prohibited conduct that amounts to Direct Discrimination is described at s 13 to be:

13 Direct discrimination

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

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

11.3 The prohibited conduct that amounts to Indirect Discrimination is described at s19 of the Equality Act to be:

19 Indirect discrimination

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

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

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- race;
- religion or belief;
- sex;
- sexual orientation.

11.3 In the context of Employment

39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

- - (a) in the arrangements A makes for deciding to whom to offer employment;
- - (b) as to the terms on which A offers B employment;
- - (c) by not offering B employment.

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

- - (a) as to B's terms of employment;

Case Number 1318158/2011

- - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
- - (c) by dismissing B;
- - (d) by subjecting B to any other detriment.

11.4 In the context of identifying an appropriate comparator for allegedly discriminatory treatment, s23 provides:

23 Comparison by reference to circumstances

- (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

11.5 Accordingly it is for the claimant to show that because of race the claimant received less favourable treatment than others whose circumstances are the same or not materially different.

Section 136 of the Equality Act provides:

136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

11.6 In Igen Ltd V Wong 2005 EWCA Civ 142 the Court of Appeal considered and amended the guidance contained in Barton v Henderson Crosthwaite Securities Ltd 2003 IRLR 332 on how to apply Section 54A, the predecessor legislation dealing with burden of proof that has now been enshrined in s136, namely:

- (1) It is for the claimant who complains of discrimination to prove on the balance of probabilities 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 claimant which is unlawful. These are referred to as "such facts"
- (2) If the claimant does not prove such facts the claim fails
- (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.
- (4) In deciding whether the claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inference it is proper to draw from the primary facts found by the tribunal.
- (5) It is important to notice the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage the tribunal is looking at the primary facts proved by the claimant to see what inferences of secondary fact could be drawn from them and must assume that there is no adequate explanation for those facts. These inferences can include any inferences that may be drawn from any failure to reply to a questionnaire or to comply with any relevant code of practice. It is also necessary for the tribunal at this stage to consider not simply each particular allegation but also to stand back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.
- (6) Where the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on the proscribed ground, then the burden of proof shifts to the respondent and it is for the respondent then to prove that it did not commit, or as the case may be, is not to be treated as having committed that act.
- (7) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities that the treatment was in so sense whatsoever on the proscribed ground. This requires a tribunal to assess not merely whether the respondent has proved an explanation for such facts, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not a ground for the treatment in question.
- (8) Since the facts necessary to prove an explanation will normally be in the possession of the respondent, a tribunal will normally expect cogent evidence to discharge that burden of proof. In particular a tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any relevant code of practice.

11.7 The tribunal has applied the guidance offered by the Employment Appeal Tribunal in Laing v Manchester City Council [2006] IRLR 748 and Network Rail Infrastructure v Griffiths-Henry [2006] IRLR 865. The reasoning in the former decision has been approved by the Court of Appeal in Madarassy v Normura [2007] EWCA Civ 33

which contains the following material guidance:

55. In my judgment, the correct legal position is made plain in paragraphs 28 and 29 of the judgment in **Igen v. Wong**.

"28.The language of the statutory amendments [to section 63A(2)] seems to us plain. It is for the complainant to prove the facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the employment tribunal could conclude that the complainant "could have committed" such act.

29. The relevant act is, in a race discrimination case, that (a) in circumstances relevant for the purposes of any provision of the 1976 Act (for example, in relation to employment in the circumstances specified in section 4 of the Act), (b) the alleged discriminator treats another person less favourably and (c) does so on racial grounds. All those facts are facts which the complainant, in our judgment, needs to prove on the balance of probabilities.[The court then proceeded to criticise the Employment Appeal Tribunal for not adopting this construction and in regarding "a possibility" of discrimination by the complainant as sufficient to shift the burden of proof to the respondent.]

56. 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.

57. "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 complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the

Case Number 1318158/2011

complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.
71. Section 63A(2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy.
72. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground. As Elias J observed in **Laing** (at paragraph 64), it would be absurd if the burden of proof moved to the respondent to provide an adequate explanation for treatment which, on the tribunal's assessment of the evidence, had not taken place at all.

11.8 We have considered this guidance and the authorities to which we have been referred by the parties and in particular in this case:

King v Great Britain China Centre [1992] ICR 516
Anja v University of Oxford [2001] IRLR 377
West Midlands Passenger Transport Executive v Singh [1988] ICR 614 CA
Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601

We have also considered the Guidance contained in the statutory Code of Practice issued by the Equality and Human Rights Commission as it relates to the Equality Act in particular Chapters 2,3,,11,15,16,17 and 18.

Case Number 1318158/2011

12 Findings of fact

Having heard evidence and these documents that have been introduced into evidence, we make the following findings of fact relevant to the issues we are asked to determine:

12.1 The claimant, who is a registered nurse and midwife is accepted by the parties to be the highest ranked nurse serving within the RAF. She became a serving member of the Royal Air Force in 1984 and currently holds the rank of Group Captain which is OF 5. She was appointed to that rank on 1 July 2003. The RAF has 10 ranks, OF 1 to OF 10. The claimant although she is currently the highest rank nurse in the RAF has aspired to attain the rank of OF6 Air Commodore which is a rank 1* position. Regrettably the role of Director of Nursing a position to which she was appointed ceased to be a 1* ranking appointment in 2002 when the 1* and OF 6 weighting of that rank as Director of Nursing Service was withdrawn and the 1* was given to a doctor's position. The claimant had been promoted to Director of Nursing Services RAF in July 2003. Her predecessors in the post had been appointed to the rank of 1* Tri-Service namely a rotational post of the Defence Director of Nursing Services. At the time that had been the only rank 1* nursing specific role in the Armed Services. Following the disestablishment of the post of Defence Director of Nursing Services the claimant's promotional opportunities existed within the Joint Medical Command where she competed against medical (doctors) and dental officers and in particular against doctors.

12.2 The claimant was assigned on 5 June 2006 to Defence Nursing Advisor/Assistant Director of Nursing for a period of three years. It was the claimant's second Group Captain role and was as a position that replaced the previous 1* Defence Director of Nursing Services role that had been disestablished in 2002. We accept the evidence given by the claimant, that has not been challenged by the respondent, that the responsibilities of Assistant Director of Nursing remained identical to that of the Defence Director of Nursing Services. Prior to her appointment as temporary Assistant Director of Nursing, the claimant who was a qualified midwife had been based as Nursing Officer in Cyprus in 1998 then as an officer in the Princess Mary's RAF Hospital Halton and Ward Manager in RAF Hospital, Wroughton. She was posted to Headquarters at Allied Forces Central Europe in 1995 and was Senior Nursing Officer at a Military District Hospital in Peterborough in 1998 before returning as Officer Commanding Nursing Wing at RAF Akrotiri in Cyprus. In 2003 she returned to Headquarters Personnel and Training Command as Matron in Chief of the Princess Mary's RAF Nursing Service and in 2006 took up the post as temporary Assistant Director of Nursing in 2006. The claimant's appraisals during that relevant time were extremely favourable. Having been promoted to the OF 5 position in 2003 her appraisal in 2007 at page 45j confirmed

Case Number 1318158/2011

“Group Captain Wendy Williams has performed outstandingly over the past year, the first full year of leading defence nursing from the Centre, in the re-established post after the demise of the 1* centre nursing lead.”

12.3 We would observe that the claimant’s assessment that was undertaken at times mid term her appointments, on an annual basis at least and at the end of assignments. The assessments were completed by two officers the claimant’s First Reporting Officer (“1RO”) being her immediate superior and the Second Reporting Officer (“2RC”) completing an assessment being an officer two ranks ahead of her. We have analysed the claimant’s assessments and the claimant’s 1RO in her appraisal for the period ending 15 December 2007 confirmed that the claimant:

“Demonstrated the ability to perform at a high level within this very demanding OF5 at a time of high operational tempo....

She has excelled and demonstrates the ability to operate at 1*.....

I agree that any other nursing post would be a retrograde step for this outstanding nurse leader, she should either continue to lead from the top, potentially in the future Joint Medical Command, or consider an OF5 post outside nursing, broadening her portfolio for promotion opportunities to 1*. She has the experience to undertake any medical joint staff posts, and would inevitably succeed at any such challenge. I believe that she should set her sights at promotion to 1*”.

12.4 The claimant’s second reporting officer 2RO p45k reports:

“Group Captain Williams could fill now a re-established 1* nursing post, but as none currently exists she will have to compete for a wider DMS appointment.”

He continues:

“Therefore she should be considered for an OF5 post within the non-nursing area of the DMS. Her performance in such a post should enable her to build the credentials to enable her to demonstrate her suitability for such a 1* post. However, time is not on her side, and early decisions are required to enable her to fit in an appropriate OF5 post.”

12.5 In 2008 as Defence Nursing Adviser as the Assistant/Director Nursing whilst the claimant identified her aspirations as:

“I need to be developed for wider appointments....as a high achiever, I should be considered for a 1* post within the medical any arena” Page 47.

Case Number 1318158/2011

Her IRO confirmed that the claimant:

“is effectively demonstrating a 1* span of influence on nursing matters.”

He described her as:

“a highly effective negotiator and influencer, she has shown innovative thinking, flexibility and responsiveness, successfully networking with external regulatory bodies as well as internal training providers.”

12.6 The claimant’s potential was identified, page 48:

“As a leader and inspirer of others, Group Captain Williams is ready to be considered for an OF6 appointment and would benefit from exposure to senior leadership development such as the Defence Strategic Leadership and Management Programmes to enhance her CV with respect to promotion. She is an ideal candidate for a 1* appointment in the JMC, and should be considered for a 1* role at the next opportunity.”

12.7 The 2RO in terms of the claimant’s potential acknowledged that:

“With limited staff operational experience might limit her to certain posts, she is ready for promotion selection now. I agree that she would benefit from DSLP to build upon her credibility for promotion. Time and opportunity will prevent her from moving up to 2*.

12.8 In 2009 the claimant in her end of tour appraisal in her position as Defence Nursing Adviser, page 55 detailed again her aspiration that:

“I need to be developed for wider appointments”.

It states:

“As a high achiever I should be considered for 1* post within the med any arena.”

12.9 Her performance continued to be performing at the best standard expected in most respects at B+ or at A- performing above standard expected in all respects. Her IRO commenting upon the claimant’s potential confirmed:

“Group Captain Williams has been consistently operating at 1* star level during her tenure as Defence Nursing Adviser. As the most senior member of the OF5 Defence Nursing cadre, she has fully demonstrated her ability to lead at the strategic level and is undoubtedly ready for appointment to a 1* post. Her background makes her best suited to the

Case Number 1318158/2011

Joint Medical Command area. Her new appointment as Standing Joint Commander Medical will allow her to build on her experience in non-nursing areas enabling her to demonstrate her proven abilities in the wider medical sphere, and thus improve her prospects as a strong contender for competitive 1* appointments.”

12.10 The claimant's 2RO in that appraisal reports, page 58:

“I agree with 1RO that Group Captain Williams has performed at 1* level during this appointment, the post previously filled by a 1* tri-Service lead, and requiring an ability to influence senior professional colleagues within and outside the MOD.”

It continues:

“She has successfully negotiated with external bodies within the Department of Health, Royal College of Nursing and other government departments, placing Defence Nursing in a more prominent position nationally as a result of her efforts. She is ready for promotion to a 1* post now, and will build that reputation ever more strongly in the next appointment as SJC (Med) where her commitment, hard work, diplomatic and political skills will be used and tested to the maximum. She is to be congratulated on a job well done as Defence Nursing Adviser, and hopefully poised to be selected into a Centre or single Service 1* post at the earliest opportunity.”

12.11 Both her first and second reporting officers confirmed that her overall performance was B+ and that for promotion one rank up she was rated as high and her second reporting officer identified for promotion two ranks up she required some development. We would observe that only the second reporting officer reports upon the prospect of promotion two ranks up.

12.12 On 22 June 2009 the claimant was appointed to the role of Standing Joint Commander Medical (SJC Med). In effect, she was the Medical Officer who was responsible for the management of the Defence Medical Services based at Queen Elizabeth University Hospital NHS Trust in Birmingham and at Headley Court. The role, as described in the job specification, page 60 was:

“To provide highly capable secondary healthcare personnel to support operations and in combination with UHBFT deliver the UK's acute Role 4 receiving capability in order to support the physical and moral components of fighting power.”

The claimant was:

Case Number 1318158/2011

“Responsible for the command and control of all military and civilian personnel, as well as to ensure the efficient coordination of the clinical, military and welfare aspects of the Patient Care Pathway and the wider Patient Group”.

12.13 In the role as commanding officer at the Royal Centre for Defence Medical Clinical Unit the claimant’s appraisal in post completed for the period 27 June 2009 to 30 November 2009 (page 62 to 67) the claimant continued to cite as her aspiration:

“As the most senior nurse in the DMS, there is no strategic nurse post available. I need to be developed for wider appointments. A post in the new Joint Medical HQ is preferred. As a high achiever, I should be considered for 1 star posts within the med any arena”.

12.14 The claimant’s IRO Brigadier Parker confirmed in terms of the claimant’s potential:

“Group Captain Williams performance during a very demanding period has revealed an officer of great skill, energy, drive and potential as well as with an excellent understanding of the operational environment of an NHS SHC Trust. She stood in for her 1* most ably during parts of this period and certainly demonstrated an ability to lead the military part of the Joint and Combined operation that is the Role 4 unit in Birmingham. She is therefore a definite candidate and strong contender for the soon to be created OF5 CO post in the revised RCDM Clinical Unit.”

Brigadier Parker confirmed:

“This officer also has potential for employment in OF6 rank. She has bags of drive and energy and much still to offer Defence; of particular relevance I believe Gp Capt Williams would be especially suited to a role such as that of Inspector General.”

12.15 The claimant’s second reporting officer Air Vice Marshal Evans confirmed:

“Group Captain Williams has been an outstanding success as SJC (Med) at a time when the Role 4 Medical Group have had to manage an unprecedented number of seriously injured operational casualties. She has used all her clinical and nursing experience to ensure that the care pathway for patients has been maintained and delivered the highest quality care and support. She has been the DMS lead on developing the patient care pathway and transitional arrangements for the seriously injured Service leavers as well as contingency planning to deliver the military effect from an alternative NHS facility.”

Case Number 1318158/2011

In terms of the claimant's potential Commander Evans stated:

"I have known Gp Capt Williams for many years and I encouraged her name to be put forward for the appointment of SJC (Med), a post that had previously been designated as a medical officer post. I am not surprised that she has been an outstanding success, which has been recognised both within the DMS by SG and DCDS(H) ("Deputy Chief of Defence Staff Health 3*) and by senior NHS Trust Executives. Her drive, enthusiasm and professional effectiveness is exceptional and her outputs are of the highest quality, using her considerable experience as a nurse and medical manager."

He confirmed:

"She has demonstrated her ability to negotiate successfully with the Trust Executive and also has worked very effectively with LF to improve the interface between Role 4 and primary care. I consider her to be one of the top OF5 clinicians within the RAF MS, with a proven track record in both the single and tri-Service environment; she is a very strong candidate for promotion to Air Rank as IG ("Inspector General") or Comd DMG.

In terms of the recommendation summary in respect of the period the claimant's overall performance is ranked B+ promotion one rank up in the appointment year and promotion two ranks up was noted as not suitable.

12.16 The claimant's final appraisal in the relevant period, that for the period 1 December 2009 to 30 November 2010 (pages 73 to 77) was completed by Surgeon Commander McArthur as 1RO and again by Air Vice Marshal Evans as 2RO. The claimant's performance was marked as an overall performance grade A- performing above standard expected in all respects. In terms of performance her first reporting officer's assessment was that:

"A steady casualty rate places considerable demand on RCDM Clinical Unit and attracts regular Royal, Ministerial and 3-4* visits. RCDM's success in handling this is – in large part – down to Gp Capt Williams and the way she leads a Unit that has grown to 400 pers."

He stated:

"Her vision, clear and firm direction, determination and courage ensures a highly effective Role 4 receiving capability – essential to sustaining the Physical and Morale components of fighting power during the current campaign. Gp Capt Williams thoroughly deserves an A- OPG and is top equal of a cohort of 35 OF5 within DMG.

Case Number 1318158/2011

In terms of potential SG McArthur reports of the claimant having:

“Shown consistently over the reporting period that she produces work of a 1* standard and has the ability, skills and professional standards to be able to influence at 1* and beyond. She deserves a High recommendation for promotion and is ready for 1* NOW. Her excellent leadership and management qualities and her Role 4 expertise make her a must for the Joint Comd DMG post. She would also make her a good candidate for the Joint Hd Healthcare of Inspector General (if IG is available to Nursing Officers) post.”

AVM Evans, 2RO, confirms the claimant's potential endorses what her first reporting officer said and states:

“She is now a very experienced OF5 and I fully endorse the 1RO's high recommendation for promotion and equally consider that she would be a highly effective 1* now. I certainly place her amongst the top of the OF5s within the DMS. She is most suited to be Commander of the Defence Medical Group at 1* rank given her considerable nursing experience and more recently her roles as SJC (Med) and CO RCDM Clin, where I am confident she would be very effective and successful. She would also be a very suitable candidate for IG given her vast clinical experience.”

12.17 In June 2009 the claimant had been selected as the RAF candidate for the vacancy of Commander Defence Medical Group (DMG). In respect of the Service Secretaries meeting held on 26 June 2009 we know nothing other than that the claimant who had been selected as the RAF candidate for the competition, had not been successful and the appointment was ultimately made to Surgeon Captain McArthur.

12.18 The claimant was the subject of an Air Ranks Appointment Board meeting (ARAB) and we have been referred to a heavily redacted extract from the document that was the brief to the ARAB (pages 52 to 53). The claimant had in 2009 been put forward as a candidate for the appointment of the role Command DMG which was required to provide highly capable and secondary healthcare personnel for operations. The brief indicated that the Air Secretary at the time

“would like to put selection for this post on hold for the moment.”

We are unable to make any findings other than that the claimant was not appointed by the Service Secretaries meeting in the selection to the position of the 1* rank Command Defence Medical Group (page 54) the appointee being Surgeon Captain McArthur who had

Case Number 1318158/2011

“the greater medical operational experience”.

12.19 We observe that following the 2009 tri-Service appointment board the claimant's experience broadened in light of her appointment as Standing Joint Commander Medical in 2009. In her subsequent appraisals Air Vice Marshal Evans and Brigadier Parker recommended the claimant for promotion and in an appraisal for the period to 30 November 2010 Surgeon Commander McArthur page 75 IRO and Air Vice Marshal Evans 2RO page 76 both rated the claimant's performance to be A- and gave her a high recommendation for promotion to “1* NOW”.

12.20 In this tribunal claim the claimant asserts when she was considered for selection for the Comd DMG role in July 2011. Group Captain Gaffney a doctor was selected instead of her and the claimant asserts that he was not the most suitable candidate for the job. The claimant asserts that the decision not to select her as the RAF candidate for the Tri-Service competition was discrimination because of her sex. We have considered the appraisals of Group Captain Gaffney in much the same way as we have considered the appraisals of the claimant.

12.21 The claim that Ms Williams brings is that she has been treated less favourably than her comparator Group Captain Gaffney a doctor who also held the OF5 grade. Group Captain Gaffney was promoted to that position on 1 January 2007 some three and a half years after the claimant. The earliest appraisal to which we have been referred in respect of Mr Gaffney was that in 2007, page 45a. He, like the claimant, was scored generally as B+ and in terms of promotion ability and his recommendation summary (page 45e) he was marked as requiring development compared to the claimant who in the same year (page 45j) was rated with an overall performance grade of B+ and promotion rank 1 was marked as high by her IRO officer and a yes by her 2RO. Like the claimant Group Captain Gaffney was respected by his reporting officers. He was marked by his IRO as:

“Clearly developing the skills and competencies required of an OF6 and should aim to consolidate those in that appointment. He is a prime candidate for HMM, which I strongly support, and he would be well suited to a senior staff post in either a single Service or Joint environment.”

His 2RO comments:

“To the near future; posts in PJHW or the Royal College of Defence Medicine as the Standing Joint Commander (Medical) would broaden his operational cv. After that I would see him as very competitive across the full range of OF6 posts within the Defence Medical Services. A sojourn at RCDS would provide rounding and he would have much to contribute as member.”

Case Number 1318158/2011

11.22 We pause to reflect on the fact that Mr Gaffney's second reporting officer then Lieutenant General Baxter was of the view that an appointment at the Royal College of Defence Medicine as Standing Joint Commander (Medical) would broaden Group Captain Gaffney's operational cv. We reflect upon the fact that the evidence that we have heard from AVM Morris has suggested that the position at Royal College of Defence Medicine as Standing Joint Commander (Medical) was not an operational role. We have found it hard to recognise the credibility of AVM Morris's view in his evidence, that the claimant lacked operational experience, particularly in face of the fact that Lieutenant General Baxter identified that role which were Group Captain Gaffney to be assigned to it, would be one which would broaden his operational cv. We have been referred to Group Captain Gaffney's annual appraisal in 2008 (page 54a) when he was Commander Medical at Cyprus. In that position he was the most senior medical commander at the Hospital site although we remind ourselves that the hospital in Akrotiri was one which had a staff of about 160 staff. As the most senior medical officer in command of the Hospital his reports were Air Commander Dey and Major General Gordon both of whom were non-medical officers. Gaffney was rated with overall performance of B+ and his promotion ability was ranked as "high" by both his first and second reporting officers. The reports by his reporting officers suggested that he had

"strong potential to work effectively in the next rank"

and that on his performance

"he should be reading for promotion ahead of the majority of his peers"

Group Captain Gaffney 2RO officer, who considered that he had and was rated high with promotion one rank up and as "yes" by his second reporting officer for promotion two ranks up. Though not the report of Medical Servicemen the reported officers suggested that Gaffney was

"widely employable within RCMD and he would make an excellent Comd Joint Medical Command or DMSD."

12.23 The following year in 2009 page 61A Mr Gaffney was again rated in overall performance as B+ with high promotion ability at one rank and confirmed promotion ability by his 2RO two ranks up. Major General Gordon the 2RO considered that the claimant was seen by him "as a 1* with clear potential for 2*" and commented

"His experience as COTPMH make him a strong runner for such a post as Commander RCDM responsible for the casualty pathway as he understands both the clinical, but perhaps more important, the welfare needs our critically injured personnel. He is also a strong candidate for 1 star MOD staff posts as Dir Med Policy or Dir Med Ops. Were he

required to do another Gp Capt appointment, then he should be put forward for the SJC (Standing Joint Commander) Medical at Selly Oak."

12.24 We remind ourselves that that role was one of which the claimant was at the time being incumbent as RCDM Standing Joint Commander Medical at Birmingham QE/Selly Oak and Headley Court. Major General Gordon commented:

"I see his next posting as DACOS Med Air, as being useful but more marking time".

12.25 In 2010 Group Captain Gaffney had moved to DACOS Medial Ops. His first reporting officer was Air Commander Broadbridge and his second was Air Vice Marshal Morris. Although Air Vice Marshal Morris has given an account in his evidence is that his contact with Group Captain Gaffney was only at regular fortnightly meetings as Gaffney's second reporting officer he confirmed:

"Group Captain Gaffney is most definitely one for the future and is one of my best ever finds. Promotion to 1* is within his grasp and he will, in addition, be competitive in the tri-Service environment. He certainly has the ability to progress further and his attendance at RCDS is highly recommended."

Group Captain Gaffney at DACOS Med Ops was given an overall performance rating at B+ and his prospects were identified for promotion ability one rank was affirmative "yes" by both his first and second reporting officer and Air Vice Marshal Morris his second reporting officer ranked Gaffney as an affirmative yes for promotion two ranks up.

12.26 We remind ourselves that, in the same appraisal period, the claimant who at the time was Commanding Officer RCDS having formerly being RCDM Standing Joint Commander Medical was marked by her first reporting Surgeon Commander McArthur as at A- with high potential of one rank up and by Air Vice Marshal Evans who as overall performance A- and prospects of promotion one rank up as "high".

12.27 We have compared the annual appraisals of the claimant with that of Group Captain Gaffney. We note Group Captain Gaffney's seniority date was 1 January 2007 compared to that of the claimant which was 1 July 2003. Whilst their respective career paths had been different and Gaffney as a doctor had open to him the opportunity to act as the commander of a hospital in Cyprus, we find that the claimant's operational experience, based upon comments drawn from Group Captain Gaffney's own commanding officers was one, which particularly in her placement as RCDM Standing Joint Commander Medical in 2009 and then as commanding officer at Royal Centre for Defence in 2010, was in operational roles that had been commended to Group Captain Gaffney to develop and broaden

Case Number 1318158/2011

his service experience. The claimant's experience was one that we objectively determine was as broadly operational as was Group Captain Gaffney's.

12.28 Although we focus upon the appraisals that predate the selection competition that the claimant refers to in respect of her claims of sex discrimination, we find that it is enlightening to consider the appraisals of both the claimant and Group Captain Gaffney that postdate the relevant selection exercise. We have been referred to Group Captain Gaffney's annual appraisal in 2011 page 155A Group Captain Gaffney's post continued to be that of DACOS Med Ops and his first reporting officer was Air Commander Wilcock and his second reporting officer was again Air Vice Marshal Morris. Undoubtedly Gaffney's first reporting officer Air Commander Wilcock considered Gaffney to be

"An ideal ACOS Health and would top my list of those within HQ Air...he had deservedly been selected for the 1* competition post of Inspector General in HQ Surgeon General. Although Gaffney would be a good candidate for RCDS, this is less significant in light of his promotion. I believe he has future potential for 2* rank."

12.29 Air Vice Marshal Morris states:

"Group Captain Gaffney undoubtedly has considerable potential. I have been most pleased with his progress over the last year; he has well demonstrated the strategic vision required for advancement in rank together with the necessary 'steel' which he has not been reluctant to utilise at the appropriate time and place. It therefore came as no surprise to me that he turned out to be the RAFMS's leading candidate for tri-Service OF6 appointments. His broad portfolio is really quite impressive and he was unlucky to miss out at the first attempt, but it has all worked out well for him in the end. His background makes him another ideal RAF IG and I am sure he will be successful. He will need to make it his own and his future performance will define his remaining career."

12.30 We have no doubt that it came as no surprise to Air Vice Marshal Morris that Gaffney was the RAF's leading candidate for tri-Service OF6 appointments. We remind ourselves that it is precise because AVM Morris recommended Gaffney as his preferred candidate in providing a briefing to Air Commodore Fuller as Air Secretary 1 to be presented in the paper to the Air Secretary, Air Vice Marshal Lloyd that Gaffney was the RAF's preferred candidate. Whilst no doubt Gaffney is a very well regarded officer with a full fleet officer qualities we find that Air Vice Marshal Morris's assessment, as was communicated by him to Air Commodore Fuller, was partisan and not unbiased, as an objective brief ought to be.

12.31 We have for the fullness of our understanding considered the claimant's 2011 appraisal to which we have been referred page 160E. In the role as

Case Number 1318158/2011

Commanding Officer Clinical Unit for Defence Centre the claimant's first reporting officer, now Surgeon Commander Buxton and her second reporting officer, again Air Vice Marshal Evans rated her overall performance as A- and her promotion ability to one rank up to be 'high', exactly the same as Group Captain Gaffney. Her first reporting officer confirmed that the claimant had

"Shown she can deal with the great variety of issues from purely tactical to the strategic in a calm, logical manner and at a level commensurate with OF6."

He observes:

"She moves to an OF5 position at JMC HQ in what is likely to be her last appointment, however if circumstances change she is a very competent officer who could easily manage the responsibilities of the next higher rank and she merits a strong recommendation for promotion."

Air Vice Marshal Evans commented:

"Group Captain Williams credentials for promotion were high even before completing this tour as CO Clinical Unit at RCDM. As stated above her performance in this tour has been exceptional, a fact that has been recognised by the senior echelon in both the military and political arena. This post has exposed her to complex managerial and social issues and she has transformed such purpose and cohesion demonstrating her considerable leadership capability. This coupled with her drive, attention to detail and excellent interpersonal skills make her a very strong candidate for promotion to Air Rank now and I therefore have no hesitation in highly recommending her for promotion. I consider her to be in the top three clinical OF5s within the RAF Medical Services and I strongly believe that she has the necessary qualities to be very successful and would be a strong ambassador for the RAF. She would be eminently suitable for a number of the OF6 appointments within JMC or the newly forming Defence Primary Health Service Headquarters." Page 160H

Training

12.32 We are mindful that having considered the appraisals the claimant has in large part remained in roles that remain operational rather than MOD office based appointments. Although we have been led to understand that all officers within the RAF are provided with assistance in managing their careers we are mindful that the claimant, whose seniority dates from 2003 though rated by all of her reporting officers as performing at either B+ or A- and suitable for promotion, had not attended the Advance Command and Staff Course "ACSC".

Case Number 1318158/2011

12.33 The ACSC is a tri-Service course designed to prepare selected officers for high grade appointments at Wing Commander/Group Captain level and potentially above by developing their command, analytical and communication skills to the provision of broadening the standard and knowledge of joint military operations in the context of an integrated approach to defence and security as a whole. The course is one which runs for a year. It is not a short term course undertaken by candidates during a particular posting and attendees are selected for the course when in the rank of squadron leader or wing commander provided that the candidates are not above the age of 42. Attendance on the ACSC is a tri-Service course and the selection in the case of RAF officers are undertaken by "Manning" in what is known as the Number 3 Combined Selection Board each year. The Selection Board considers the merits of the individuals and their eligibility for advanced staff training in the evidence contained in their annual appraisals Specialist branches that is doctors, lawyers, nurses, dentist and cadres are considered by Manning to be in competition between each other for two places within the RAF's nomination. We have heard evidence from Wing Commander Bradley who is a desk officer within Manning at HQ RAF Command who has given an account that the completion of the ACSC does not of itself directly influence whether or not a person is subsequently promoted. However the evidence before us suggests that certain jobs within the RAF require attendance on the ASCS course to be "highly desirable". Although the claimant held the ranks of squadron leader and wing commander prior to reaching age 42 on 28 August 2000 she had not been sent on the course. Her evidence contained initially in her first witness statement served on the respondents in October 2012 the date when this case was first listed for hearing the claimant's evidence was that:

"To the best of my knowledge places are reserved on that course for doctors but not for any other medical personnel including nurses who are required to compete with other specialists for a limited number of places."
Paragraph 56 of W/S

12.34 In her supplementary witness statement, that was not challenged by the respondent, the claimant's evidence was that the first nurse to attend the course, Wing Commander Pippa Ward had prompted a hostile reaction from RAF Medical Services as in the year that she attended the course no doctor had been selected to attend also. The claimant spoke to Air Cadre Desonie at the end of 2003/2004 and was shown a copy of a letter from Air Vice Marshal Pike who then Head of RAF Medical Services, which specifically requested that two places were reserved for doctors in the future (2 April witness statement paragraphs 33 to 35). We heard evidence from the claimant that in October 2012 she made a Freedom of Information request to obtain a copy of that letter from the respondents and she has made further requests for disclosure of it during these proceedings. The RAF respondents have informed the claimant that it would be too costly to search for the letter and the respondents in these proceedings have informed the claimant that the letter could not be found. We have heard no

Case Number 1318158/2011

evidence from the respondents as to the nature of the search that they have undertaken nor have we heard evidence from Air Cadre Desonie or AVM Pike. We have received no statistical information to show that nurses do in fact attend the course other than the claimant's own evidence that Wing Commander Pippa Ward attended in 2003, by which time the claimant was already over 42, the cut-off age for attending.

12.35 The respondents make a bare assertion that places are not reserved for doctors. We find it surprising that in the time since the claimant raised her service complaint that the respondents have not provided statistical information nor disclosed documents relating to the attendance at the courses. We have heard the evidence of Wing Commander Bradley who has, given her relatively limited experience, confirmed that to her knowledge nurses have attended the course. We are surprised however that the respondents have not put before us any statistical evidence of attendances on the course nor have they given evidence of the nature of the search of the documentation or provided evidence from Air Cadre Desonie or AVM Pike to refute the evidence and account given by the claimant. Whilst we may accept the evidence given by Wing Commander Bradley that now the respondents may choose nurses to attend the course, we have no doubt that at a time when the claimant would have been eligible to attend the course, following her appointment as Squadron Leader on 18 February 1993 and as Wing Commander on 1 January 1999 in the period up until her 42nd birthday on 28 August 2000 she did not attend the course. We find that as a matter of fact the respondents carried out a practice of requiring attendance on an ACSC course as a "desirable qualification" for promotion to rank OF6 1* and that that practice favours doctors in selection for attendance on the course. We find the respondent's response to this request for information to be not unlike their response to many of the claimant's requests for information. In light of the time in bringing this case to a hearing and their failure to disclose relevant documentation to the claimant, we draw an adverse inference from that fact. We find that practice and the policy was in fact to reserve places on the course for doctors and that the requirements in practice that attendance on the course favoured individuals in consideration for promotion, placed the claimant at a disadvantage in being able to satisfy that criteria which, as AVM Lloyd in his evidence confirmed, was an important course for those who wished to be appointed to senior command posts, witness statement paragraph 8.

12.36 In line with her aspirations, the claimant was to be considered for the position of Commander DMG that became available as a tri-Service post and the RAF considered their nominee at an ARAB was held on 13 July 2011.

ARAB and ARPBs

12.37 Not unexpectedly the respondents and in particular the RAF operate procedures to consider annually promotions and, on a quarterly basis, to consider appointments. The Air Rank Promotions Board ("ARPB") is an exercise held

Case Number 1318158/2011

annually to consider whether or not officers are eligible to be considered for appointment at the next rank. ARPBs are held in respect of promotions of rank OF5 and above. Within the RAF the Promotion Board comprises of three panel members and the Air Secretary. We have referred to and relied in no small part on the evidence of Air Vice Marshal Lloyd who at the time of the relevant promotions was Air Secretary with the responsibility for career management of Royal Air Force personnel. It is a post that AVM Lloyd had held since April 2009, in effect more than two years, when he was Air Secretary for the ARAB which selected the RAF's candidate to be put forward to the tri-Service competition for the post of Commander DMG. The Air Secretary reports directly to the Chief of the Air Staff (CAS) for all senior officers career management matters. For appointments and promotions at Air Commodore and Air Vice Marshal level the Air Secretary presents alternatives and recommendations for consideration by CAS in his role as Chairman of the Quarterly Air Rank Appointment Board and the Annual Air Rank Promotion Board. These boards draw on specialist advice as appropriate and the secretariat function supporting this appointing and promotions process is provided by the Air Secretary One. For the sake of expediency when an appointment falls not approximate in time to the Air Rank Appointment Board the appointments are boarded out of committee. Air Vice Marshal Lloyd has given evidence that he has had extensive equal opportunities training and is extremely familiar with the RAF's Equal Opportunities Policies and Frameworks. Surprisingly we have not been referred in this tribunal hearing to those RAF Equal Opportunities Policies and Frameworks and that is a matter of some concern to us. In answer to questions in cross examination AVM Lloyd confirmed that an Equal Opportunities Policy and Framework existed but that he was not familiar with the Equality and Human Rights Commission Report on Sex and Power in 2011. He was however familiar with the outcomes of that report which he had picked up from media and Human Resources that there was a wider problem in terms of equality in relation to the protected characteristic of sex within the Armed Services. Although not familiar with the MOD personnel statistics and the Biannual diversity dashboard published (page 363) AVM Lloyd confirmed that the Armed Services and MOD monitor diversity and react dependent upon what is discovered. AVM Lloyd referred to the fact that the RAF had received awards from the Lesbian, Gay and Bisexual community for their diversity however he was not able to specify precisely what those awards were, nor what, if any, awards had been awarded to the RAF in relation to the promotion of Equal Opportunities based on protected characteristic of sex. AVM Lloyd suggested that the RAF were a highly successful employer of females, although he was not able to inform the tribunal of what awards he believed the RAF had been awarded in that regard. We are mindful that there is no documentation to which we have been referred in the bundle that has been placed before us. Notwithstanding this having regard to the Ministry of Defence Biannual Diversity Dashboard it confirmed based upon figures available from 2011 and 2012 within the Armed Forces that of 470 jobs in the rank OF6 to OF9 only six of those 470 positions were held by women. AVM Lloyd confirmed that women represent between 1 and 1.3% of the senior rankings. Indeed, it was

Case Number 1318158/2011

confirmed in evidence before us that only in 2012 was there an appointment of an OF6 female doctor the first female to be ranked OF6 within the RAF. It is against the background of an extremely low representation of females within the ranks of OF6 and above that we consider the evidence that has been given by the respondents in relation to the conduct of the Air Rank Promotion Board and the Selection and Air Rank Appointments Board in July 2011.

12.38 In readiness for the ARAB and ARPB a brief was circulated to the Board on 13 June 2011. The brief, extending over some 7 pages, was prepared by Air Commodore M J Fuller (Air Secretary 1). It set out the proposed ARPB and ARAB to be held at HQ Air Command on 21 and 22 June 2011. The ARPB and ARAB each comprised as president Chief of Air Staff and members being C in C Air and AMP, the presenting officer was the Air Secretary in this case Air Vice Marshal Lloyd and the secretary to the Board was Air Sec 1 Air Commander Fuller. As part of pre board activity the Staff Personnel, Air Secretary 1 and Air Secretary 2 had conducted preliminary reports placing the candidate into four categories A, B+, B and C. The Board normally only read the As and because of time constraints only some of the B+'s to validate the Air Secretaries pre boarding. All Board members were provided with electronic access via JPA to all of the candidate's appraisal reports in rank as well as major course reports such as HCSC and RCDS. In addition, details of each officer's promotions as rank in file reflected by OPGs and a career summary by appointment was also available on a 40" monitor. We have been provided with career briefs of the claimant, page 94 Group Captain Gaffney page 93 and Group Captain Bruce page 95. The briefing document as well as setting out a timetable of events over 21 and 22 June which suggested that after a sandwich lunch in CINC Air's office between 12.30 and 13.15 the Promotion Board would continue in the afternoon. The members of the ARPB were also the same members of the ARAB.

12.39 The matters to be taken into consideration for candidates on the ARPB are set out, page 83 and the basis of assessment is identified at paragraph 23 to be:

“Board Members are asked to assess candidates on the information provided, initially on merit taking into account potential, experience and present performance. It is not always easy to detect where all-round quality and potential lie, and it is thus wise for members to settle in their own minds the qualities to be identified and how best to recognise them. Older officers may demonstrate fitness for promotion without showing much potential, whereas younger officers may show strong signs of potential although they have not yet proved their full ability in their present rank. For younger officers, and those with narrow overall experience or only limited experience in rank, it is therefore necessary to make a judgment as to whether the implications of early promotion, both for the individual and the Service justify a high marking based solely on

Case Number 1318158/2011

merit. Where an officer has only limited experience a high marking is helpful only in cases where potential is judged exceptional.”

Dealing with implications on career structure at paragraph 25 the briefing states:

“If an officer has exceptional potential he should be promoted at an early age. The remainder may be promoted at any age, varying with their potential, normally up to within 3-months of the compulsory retiring age. Officers who on promotion to the higher substantive rank have less than the required service remaining would, under normal circumstances, have to be retained in the Service until they have completed the required 2 years in the higher substantive rank. Retention beyond the normal retiring age tends to block promotion so each case needs to be carefully considered.”

Somewhat in contradiction with the provisions of paragraph 23 relating to block on promotion affect certain individuals beyond normal retirement age the final promotion list order as detailed at paragraph 26 which states:

“Seniority and Age. When a choice has to be made between two officers of broadly equal merit the older, or more senior officer should be preferred unless age structure considerations dictate otherwise.”

12.40 We have heard that during the course of the ARPB during which the Board considered a total of some 140 or so candidates for promotions in addition to considering the career briefs of the relevant officers that were available to be seen upon a 40” screen, the Board also had access to all of the candidates appraisal reports in rank via JPA by way of an electronic means though not paper access. We have been informed that on average some 5 or 6 appraisals in rank would be available for each of the candidates being considered by the Board. AVM Marshal confirmed that the Board would have considered in excess of 500 appraisals in respect of the candidates for promotion. We have no doubt that the ARPBs were an intense consideration of the promotions of officers to consider their appointability to promotion posts when such posts became available. We have not been referred to the detailed notes of the ARPB meeting but have been informed that both the claimant and her comparator were assessed at the ARPB as promotable to OF6 rank as were a number of other.

12.41 We have no doubt that the senior officers who sit on the ARPB are all extremely busy and accomplished officers. However we do not doubt that their recall of the intimate detail contained in the assessment forms of the 140 officers, whose details were considered by them at the Promotion Board was time limited and focused upon the purpose of the Promotion Board. Somewhat surprisingly the ARPB were not informed during the ARPB that a number of the candidates to be considered for promotion to higher grade were also to be considered in ARAB. Had they been, the ARAB members, the same members as sat on the ARPB may, at the time when sight of the assessments was available to

Case Number 1318158/2011

them, have focused upon individuals who might also be considered at ARAB to scrutinise their appraisal history and their careers and assessment by first and second ranking officers. In the event, we find that this was not done.

12.42 We have been informed by AVM Lloyd and by Air Commander Fuller that in the normal course at a quarterly ARAB the Board, in considering the appointments of individuals to new appointments would be provided with the job description of the new job, the appraisals of the prospective candidates and their career briefs and a clear indication as to what an ARPB had previously ranked the officers in terms of promotion. Unusually on 23 June 2011 after the ARPB had closed and the Commander of Air Staff, Chief of Air Staff and Air Member for Personnel who had comprised the ARPB had been despatched to go about their various business, a report was prepared by A C Fuller dated 23 June 2011, pages 92a to 92c. We would observe A C Fuller was acting as Air Sec 1, A C Fuller being retired from the Air Force and now working as a Civil Servant for the Service. In cross examination and in his evidence in chief AVM Lloyd referred to the document 89 to 92 which is an incomplete document, referring to an out of committee ARAB in respect of prospective appointments to HoC Theatre Airspace and Comd Defence Medical Group DMG. The reason for the out of committee ARAB in respect of the second appointment for the purposes of this tribunal to Comd Defence Medical Group DMG was because the appointment, which was a tri-Service appointment would be completed at the next Service Secretaries Meeting namely a tri-Service Secretaries Meeting be held on 15 July 2011 and before the next expected ARAB.

12.43 Dealing with the ARPB we have some concern that there is no direction in the ARPB to note the discussions that were held relating to the selection of the appropriate candidates for promotion. That is in stark contrast with direction given in respect of the Air Rank/OF5 Redundancy Boards ARRB page 80 which in relation to the selection for redundancy states:

“The President will also need to ensure that adequate notes are taken to provide evidence on decision making. Such notes will be used to help inform subsequent report writing. Once the Board has completed its deliberations, the President should mark their decisions in red ink on the schedule and as AMP to sign the schedule as well.”

12.44 Although the Redundancy Board were directed to make notes and evidence their decision making the ARPB were not. We find that fact surprising in the extreme, particularly in light of the Code of Practice on Employment (2011) provided by the Equality and Human Rights Commission which at Chapter 16, 17, 18 and 19 provide the Code of Practice on Employment in relation to avoiding discrimination in recruitment during employment, policies and practice in the workplace and termination of employment. It is surprising that, given his sphere of expertise and the post which he had held for two years preceding the June 2011 ARAB, AVM Lloyd professes no knowledge of the Code of Practice in

Fax from :

Case Number 1318158/2011

Employment, is ignorant of the provisions of the Equality Act 2010 and indeed professed no understanding of the previous Guidance that related to its predecessor legislation.

12.45 Although no brief was prepared for the Air Rank Appointment Board that was held on 23 June 2011 we have been referred to a brief prepared on 13 December 2011, page 143 which sets out the appointing procedure that would ordinarily apply in relation to ARAB committee appointments which sit four times a year to make selections. Somewhat surprisingly the June 2011 ARAB in relation to the Comd DMG post did not have a similar brief circulated. The brief in committee suggests that:

“The Air Secretary will then consider candidate fields for each appointment, consulting when necessary with Heads of Branch or job owners. To help him identify the right candidates, the Air Secretary will consider the latest job specification for the post which invariably describes the appointment, and highlights the personal attributes and experience required. Having settled on the candidate list for each appointment, Air Secretary 1 writes a background brief for the Board and provides Board members with the Air Secretary’s recommendation for each appointment. This brief, along with the last 5 years of appraisal reports on each officer, is delivered to Board members 7-days prior to the meeting. Ahead of the meeting, Board members are invited to indicate their order of candidate preference for each appointment and the consolidated score sheet becomes the start point for discussion at the ARAB.”

12.46 Having heard evidence from AVM Lloyd and A C Fuller we find that in respect of the ARAB held on 13 June 2011 the Air Secretary did not consult with the Heads of Branch, he did not consult with the job owners, he appears to not have had regard to the personal attributes and experience required. Whilst Air Secretary 1, A C Fuller wrote a background brief to the Board and the brief included the Air Secretary’s recommendation for the appointment, it did not include in the brief to the ARAB the last five years appraisal reports on each officer being considered. The brief was not delivered to the Board members 7 days prior to the meeting and there was no meeting. The Board members were invited to indicate their order of candidate preference for each appointment, which they did. However they did so without sight of the appraisals and the consolidated score did not become the start point for a discussion at the ARAB. There was no ARAB meeting and the Board members simply confirmed acceptance of the Air Secretary’s recommendation the integrity of which we consider below.

12.47 In the event, we have been taken to the brief that was sent to the ARAB members on the day after they had been in the meeting at the ARPB. Neither AVM Lloyd nor A C Fuller were able to identify when they first became aware that it would be necessary to consider at an ARAB selection of the RAF candidate

Case Number 1318158/2011

to go forward to the tri-Service Appointment Panel of the Secretaries to appoint to the role of Comd DMG. However we have been referred to an email sent by the claimant on 21 June to Air Secretary 1 Fuller, page 87 in which she sought to clarify whether or not, as she understood that the Comd DMG post is likely to become vacant in August, she would be run again as the RAF candidate. A C Fuller retired Air Sec 1 responded by email of 22 June 2011, page 87 confirmed:

"I am aware of your credentials for this post and will be discussing the RAF candidate with COS Health before making recommendations to the Air Secretary and the Air Rank Appointments Board. I'll get back to you as soon as we have the way ahead. Your position on today's Air Rank Promotion Board will be a factor."

12.48 It is a matter from which we have no alternative than to draw an inference that, knowing that an ARAB would need to be convened to consider the appointment to the position of Comd DMG on 21 June, and we must presume before that date, Air Secretary 1 and the Air Secretary did not make the Promotion Board aware that they should pay particular attention to the appraisals in relation to those who may have been appointable to OF6 in the Promotion Board as they would be asked to consider the candidates for selection to a tri-Service appointment.

12.49 We conclude that the members of the ARAB were not provided with access to the electronic versions of the candidate's appraisal forms. We do not accept that, having considered those appraisals in electronic form to consider whether the candidates were suitable for promotion in the context of viewing in excess of 400 appraisals for 140+ officers subject to the ARPB Promotion Board the information considered in one context which equipped the ARAB suitably to consider the candidacy of the claimant and Gaffney and Group Captain Bruce, who were the proposed candidates, to be considered at the ARAB.

12.50 Following the ARPB, once the results of the Air Rank Promotion Board had been made known to him, A C Fuller met with AVM Morris from COS Health on 22 June to ask for his professional advice as to the strengths and weaknesses of the potential RAF candidates against the competencies demanded by the job specification. We have heard evidence of the discussion from AVM Morris and A C Fuller. AVM Morris has confirmed that he did not see the appraisal forms of the three candidates who would be considered GC Gaffney, GC Williams and GC Bruce and indeed for him to have done so would to have been a breach of Data Protection. AVM Morris has given evidence that he was aware of the job titles of the three candidates but no more and on that basis he gave his opinion as to the suitability of the three candidates for undertaking the job of Comd DMG. We remind ourselves that AVM Morris was the second reporting officer of GC Gaffney and his reports of GC Gaffney were full of praise, page 70D

Case Number 1318158/2011

“ Group Captain Gaffney is most definitely one for the future and he is one of my best OF5s.”

Speaking with the benefit of having worked for Group Captain Gaffney and having a detailed knowledge of his previous clinical staff and operational experience AVM Morris considered himself well qualified to comment upon GC Gaffney's abilities. AVM Morris had previously been Air Secretary who had spoken for the claimant when he had put forward her appointment for the role in 2009. We remind ourselves however that the documentation concerning the 2009 appointment that we have considered took the claimant forward then as the RAF's most suitable candidate for the appointment, was in fact a competition run when politically the RAF appeared to prefer to not succeed in that appointment so that subsequent positions in the tri-Service arena, that would be more advantageous to the RAF, were more likely to be allocated to the RAF candidate as they had not recently succeeded in the competition.

12.51 We have been referred by A C Fuller to the note which he asserts was the briefing note dated 23 June 2011 that he circulated to the ARAB, 92a through to 92c. It is unfortunately a characteristic of the respondent's disclosure exercise that this version of the briefing note was produced only in the course of A C Fuller's evidence before us and not an early disclosure exercise when pages 89 through 92 were disclosed. In the event, the briefing note confirms the key elements of the job specification for Comd DMG, page 97 the summary is with respect to A C Fuller and not a faithful representation of the responsibilities of the role but simply summaries the performance attributes from the job specification and identifying the education, training and experience that was required. It referred at paragraph 8 to the Air Secretaries having discussed options with COS Health namely AVM Morris via A C Fuller which concluded that there were three viable candidates whose career briefs were attached namely Group Captains Bruce, Gaffney and Williams. We would observe that AVM Morris's view of the job undertaken by Group Captain Williams would appear to be predicated upon his role in proposing her for the candidacy in the 2009 competition and most importantly did not take full regard to her more recent appraisals. Based upon the feedback from AVM Morris the view was held that Group Captain Gaffney was judged by him to be

“the most likely to win this appointment in competition with the other services”.

The Air Secretary AVM Lloyd confirmed that in light of reading A C Fuller's brief he would recommend to the ARAB that Group Captain Gaffney's command of TPMH, the Hospital in Cyprus and his previous MOD and PJHQ exposure gives him the edge.

12.52 Having heard all of the evidence and having considered the brief, we conclude that AVM Lloyd's recommendation was based in very large part upon

Case Number 1318158/2011

the opinions of COS Health AVM Morris. We conclude that AVM Morris's assessments were based upon the job titles that the three candidates held and in particular his very close knowledge of his views of Group Captain Gaffney's performance on AVM Morris's own staff in the MOD. We conclude the recommendation that Group Captain Gaffney was "the most likely to win this appointment and competition against the other services" is entirely subjective, is opaque and the rationale and discussions between AVM Morris and A C Fuller were not noted other than A C Fuller said that the content of the discussion was summarised in the briefing report at 92c. We have heard no convincing evidence from AVM Lloyd as to the reasons why Gaffney was considered by him to be the RAF candidate most likely to succeed in the tri-Service competition. The decision communicated by the ARAB is one which AVM Lloyd is not certain whether he communicated by email or by telephone or other communication forum. It is however clear to us that neither AVM Lloyd nor AVM Morris spoke to the claimant's most recent reporting officers who occupied the tri-Service community and who in their appraisals of the claimant had said as recently as 2010 that:

"She is most suited to be Comd of the Defence Medical Group at 1* rank given her considerable nursing experience and more recently her roles as SJC (Med) and CO RCDM Clin".

12.53 In the event the recommendations by AVM Lloyd were accepted and Group Captain Gaffney was put forward as the RAF candidate for the role of CDM DMG and he was not successful. During the course of evidence before the tribunal we have also heard that in the event the RAF were of the view that the strongest candidate before the Service Secretaries for the role of CDM DMG was the candidate from the Royal Navy. We have not been provided with sight of the successful candidate's appraisals or CV however we have been made aware that the successful candidate - Buxton was a direct report also to AVM Evans and crucially AVM Evans considered the claimant to be the most likely successful candidate for the appointment as evidenced by the claimant's own appraisal documentation.

12.54 Having considered the evidence that we have heard, it is clear that having made the recommendations A C Fuller provided the briefing document and advises the Board on the assessments of candidates. However it does not include a scoring matrix as to how the factors namely on merit taking into account potential experience and present performance are to be demonstrated or what weight is to be given to each of these factors. With regard to the ARPB A C Fuller in his email exchange to the claimant relating to the scoring of the ARAB Promotion Board, in answer to the question how the grading system in use (1 to 9 which is the highest score) and how is the scoring matrix broken down. A C Fuller refers in his email response:

"2 Subjective judgment of Board members".

Case Number 1318158/2011

In his evidence A C Fuller explained that points were not provided for individual elements and totted up but rather represent

“the overall impression of their suitability to hold Air Rank”

The subjective elements of such assessments failed to provide any objective assessment of individual candidate's availability or suitability for promotion against the other and in light of ARPB assessments of the claimant was rated with 16 points as opposed to G C Gaffney 17 and G C Bruce with 18. Of all of the Air Rank Promotion Board the claimant was placed 36. However amongst Group Captains however in relation to the medical profession in which the claimant was considered to be one the claimant was ranked 5th. We must conclude that the Promotion Board included a significant degree of subjectivity and no evidence has been presented to substantiate the subjective decisions made. Discussions were not minuted and we, in the absence of objective evidence, consider that absent appropriate safeguards the process was subject to conscious or indeed unconscious discrimination and, in the absence of evidence to the contrary, is one which is potentially discriminatory and in the event discriminated against the claimant.

12.55 We conclude that Air Vice Marshal Lloyd in his determination of the recommendations to the ARAB failed to carry out any competency based assessment of the claimant's suitability for selection and failed to adequately justified why he favoured Group Captain Gaffney for selection in the absence of taking advice from the claimant's reporting officers and obtaining full understanding of the claimant's abilities to match the job description for the Comd DMG role. We are mindful that the claimant was in fact the respondent's highest ranking nurse within the Service of the Royal Air Force not only was she the highest ranking nurse but not until Alison Amos a female doctor within the RAF was appointed to a 1* post at OF6 in 2012 the claimant was the highest rank held by females.

12.56 We conclude that in light of AVM Lloyd's recommendation, the ARAB in effect rubberstamped his recommendation. We do not accept the respondent's assertion that the members of the ARAB would have remembered the detail of the appraisals that had been viewable on the systems during the ARPB and, given that AVM Lloyd has referred to the fact that the ARAB members were all busy people, we do not accept that they would in the face of his recommendation have called for sight of the relevant appraisals or challenged his suggestion. Rather they, to a person, were willing to act upon AVM Lloyd's recommendation without the need for an ARAB meeting or even a telephone conference call between all the members of the board. Amos was appointed between 12 December 2011 and 16 October 2012 a date of the appointment has not been provided by the respondents.

Case Number 1318158/2011

12.57 The claimant refers to the respondent's practice of only appointing doctors to 1* roles in the tri-Service Defence Medical Services. We have been referred to the table at page 385 which includes all medical practitioners in the MOD of rank OF5 or OF6 including the individual in tri-Services. It is apparent that from that schedule that only doctors reached the rank of OF6. The respondent's practice of only appointing doctors to rank 1* posts has continued. It has been put to AVM Morris that a number of the jobs could have been undertaken by nurses even though they were identified as doctor posts, for example ACOS Health, ACOS Medical and Head of Medical Strategy and Policy. AVM Morris in relation to the ACOS posts has suggested that the claimant complains that the respondent have indirectly discriminated against the claimant because of her protected characteristic of sex insofar as they applied to the claimant and to persons of a different sex provision, criteria or practice. In particular as well as referring to the practice of appointing doctors to rank 1* roles in the tri-Service Defence Medical Services, the claimant refers to their practice of restricting posts to doctors only even though nurses were as capable of fulfilling the job requirements. In particular she refers to the positions of ACOS Health, ACOS Medical and Head of Medical Strategy and Policy. The claimant in her supplemental statement has given a wealth of evidence in respect of the job descriptions that were provided by the respondents in response to the directions given by Employment Judge Harding at the October case management discussion. The claimant has already referred to the fact that completion of the ACSC course that can directly influence whether or not a candidate is subsequently promoted attended on the ACSC course is essential for Head of Medical Capability, page 160o is high for the appointment of Inspector General, page 100 and PSC (Passed Staff Course) is desirable for the role of Comd DMG, pages 75 and ACSC is desirable for the appointment to ACOS Medical, page 70N. In the claimant's supplemental witness statement she gives a full analysis of the job specification for the role of ACOS Medical terms of reference page 70K ACOS Health job specification page 45F and the respondents in February 2013 conceded that the Head of Medical Strategy and Policy was a role that did not need to be carried out by a doctor although prior to that time they had asserted that it was. The concession given by the respondents would seem to demonstrate that prior to the concession the job specification having not changed was one which could be carried out by a nurse and did not need to be carried out by a doctor as had previously been required.

12.58 We find that the claimant gives an account which demonstrates to the tribunal that in fact she was qualified and capable of satisfying the duties and terms of reference of each of the job specifications that she has referred to. Air Vice Marshal Morris has led the respondent's evidence to resist that presumption. Whilst the claimant has pointed to AVM Morris whose own background is that of a Occupational Therapist was of the view that only a doctor is capable of operating at a tactical strategic high level to be accountable for professional standards. AVM Morris does not accept the proposition put to him by Ms Musgrave on behalf of the claimant that strategic medical positions within the Army are held by nurses and the Surgeon General of the United States Army is a

Case Number 1318158/2011

female nurse. Notwithstanding these assertions Air Vice Marshal Morris did not concede that the professional standards meant that only a doctor could be accountable for the professional standards of doctors although he did concede that a doctor could be responsible for the professional standard of nursing staff and other medical experts would rely upon those with particular knowledge namely nurses and other medical qualifications in final professional accountability. We do not accept the logic of Vice Marshal's argument. We find that the respondent's practice of restricting posts to doctors only in circumstances where nurses were as capable as fulfilling the job requirement as a doctor was not a logical conclusion (it is not logical to contend that a doctor can delegate specific areas of clinical decision making down his line of command but that a nurse cannot do the same). The respondents fail to accept the cabinet responsibility of a senior individual for those within the line of command of whatever discipline.

12.59 In conceding that the Head of Medical and Strategic Policy is no longer required to be a doctor the respondents have not brought forth to the tribunal any evidence to suggest that a restriction that previously applied is no longer justified. We conclude that the restriction previously was not justified and in respect of roles that restrict to posts available to doctors only that the restriction is not justified in light of any of the evidence produced to us.

Conclusions

13 We have referred during the course of our findings of facts to a number of situations where the respondents have been reticent in making concessions or have failed doggedly to provide evidence and disclose documentation to the claimant that has been requested. We refer for example to the respondent's failure to search their correspondence records to confirm the existence or not of the letter that sought to guarantee places to two doctors on the ACSC course. We are concerned that the respondents had not disclosed to us their equal opportunities policy or any audit trail to confirm that the job specifications and job competitions were regularly audited or indeed audited at all to ensure that they do not breach good employment practice and in particular the Codes of Practice. It is incredulous to us that Air Vice Marshal Lloyd was not familiar with the Code of Practice on Employment (2011) and in particular with the provisions of Chapter 16 in relation to avoiding discrimination in recruitment and to selection and promotion. The abject failure of the respondents to follow the guidance of Chapter 16 and in particular the provisions of sections 16.5, 16.6, 16.7, 16.10, 16.12, 16.43, 16.44, 16.46, 16.47 from all of these matters and the generality of the Code of Practice the respondents in their practices which failed to observe the Code of Practice cause us to draw an adverse inference in respect of their conduct particularly as in other selection exercises a compliant procedure has been followed.

14 After the claimant was unsuccessful in being selected as the RAF's candidate for the position of Comd DMG, somewhat reluctantly we have to say, the claimant submitted a Service Complaint, page 108 on 4 October 2011. The claimant, prior to submitting the

Case Number 1318158/2011

Service Complaint attached to that letter, had taken advice of the Legal Department and had been advised to submit the Service Complaint to Wing Commander G Bettington RAF as her own commanding officer was implicated in the Service Complaint and could not act as the Prescribed Officer in relation to that Service Complaint. Although the act complained of by the claimant was the decision not to select her as the RAF's candidate on 23 June 2011, in accordance with the provisions of section 121 of the Equality Act 2010 and in compliance with the respondent's redress of individual grievances: Service Complaints Issue 2.2 it was necessary for the claimant to submit a Service Complaint which she did. However since that time the respondents have failed to investigate her complaint as they were required to do. Evidence has been put before us that the explanation for the respondent's failure to act the complaint's complaint relates to the respondent's failure to select her as the RAF candidate for the role of Commodore Defence Medical Group on 12 July and her Service Complaint was brought within the time limit of three months following that act complained of. We have been informed that the respondents have not progressed the Service Complaint that was presented on 4 October 2011 and they have deferred the investigation of that complaint pending the outcome of this tribunal hearing. Whilst the claimant has not raised an Equality questionnaire and there is no statutory obligation on this tribunal to draw an adverse inference from an employer's failure to deal with a grievance or an appeal, we find that the respondents reluctance and failure to progress the claimant's Service Complaint which led to her having to file a tribunal claim as she did when the complaint was presented to the tribunal office on 13 December is a matter which causes us a significant concern. In light of the respondent's reluctance to comply with directions to disclose documentation and their continuing delays to disclose documentation even at this tribunal hearing we find that their failure to deal with the Service Complaint in a timely manner is a matter from which we do in fact draw an adverse inference.

15 In light of all of the findings of fact that we have made we do not hesitate to conclude that the claimant has presented facts to us from which we decide in the absence of any explanation that the respondent contravened the provision in relation both to direct discrimination and indirect discrimination and that it is for the respondents to show that they did not contravene the provision in fact. In relation to the claimant's complaints we conclude that for very many reasons the claimant has led us to reach in our findings of fact in which we draw an inference of sex discrimination. We begin first with the statistical evidence that shows that women within the Armed Forces are less likely to be promoted through the ranks and above OF5 level within the MOD than men. The respondents have failed to comply with the Code of Practice on Employment in particular with provisions of Chapter 16 relating to recruitment. The respondents have failed to show an objective competency based assessment of the claimant's suitability for promotion both individually and in comparison with other officers.

16 Although Air Commodore Fuller took advice from AVM Morris regarding the suitability of the candidates for the selection to go forward to the tri-Service Service Secretaries Meeting for the appointment to Comd DMG role, AVM Morris failed to have regard to the claimant's appraisal reports and instead favoured the candidate within his own chain of command who was known intimately to him as the second reporting officer

and referred only to the career profiles and the job titles that the various candidates had held.

17 AVM Lloyd in making the recommendations he did to ARAB members failed to carry out his own competency based assessment of the claimant's suitability of selection to Comd DMG and did not justify why he endorsed the views of AVM Morris and favoured Group Captain Gaffney for selection. We conclude that ARAB Rank Appointment Board simply rubberstamped and endorsed the recommendation given by AVM Lloyd based upon the flawed analysis of AVM Morris.

18 We are mindful of the lack of evidence of the respondent's equal opportunities policy or training in equal opportunities of the decision makers and their advisers and moreover the ignorance shown by AVM Lloyd of the existence of the Code of Practice.

19 Viewed with an objective eye against the job specification we having considered all of the evidence and find that for a number of reasons the claimant was not only equal to Group Captain Gaffney but that an objective review of her appraisals and those of Group Captain Gaffney would have led to the claimant being considered as the properly preferred candidate for the RAF. In terms of most likely to succeed we are mindful that the claimant's second reporting officer AVM Evans was the incumbent of the Comd DMG role.

20 We have been taken to the respondent's practice of appointing doctors only to rank 1* roles in the tri-Service Defence Medical Services, the practice of the respondent in allocating rank 1* posts namely just suitable for both doctors and nurses to appointing only doctors and their practice of restricting certain posts to doctors only even though nurses with the appropriate career history were as capable of fulfilling the job requirements as a doctor to which we refer to ACOS Health, ACOS Medical and Head of Medical Strategy and Policy.

21 The respondent's practice of promoting those with greater potential to progress further to 2* and above had the effect of disadvantaging nurses who were mainly women who are required to retire at a younger normal retirement age of 50 compared to the extended normal retirement age of doctors being 58. We are mindful that in the ACOS briefing in December 2011, to which we have been referred to the requirement to continuing service of three months beyond the appointment date on a promotion beyond the appointment date. We find that in practice, evidenced by many of the appraisals to which we have been referred the practice of promotion favoured those with greater potential to progress further which disadvantaged nurses who were of the majority women, compared to doctors who as a group, were in the majority men. We have regard to the practice of requiring attendance at the Advance Services Course to secure promotions to 1* posts which we have found favoured doctors, in 2002 the claimant was shown evidence that doctors were to be favoured and positions on the course secured for them.

Case Number 1318158/2011

22 We are mindful of the respondent's failure to deal with the claimant's Service Complaint filed on 4 October 2011 which continues to be unanswered at the conclusion of this tribunal hearing. We are mindful that during the course of preparation for this case the respondents have not disclosed documents sought by the claimant which we would ordinarily have expected to be disclosed in such circumstances. Parts of disclosure have been delayed and piecemeal, the respondents did not disclose appraisals documentations of the comparator until the week preceding the postponed October hearing. Additional documents were disclosed at the start of the second day of the hearing of this case and, as late as 20 March, on day three of the trial further documents identified as being the correct ARPB documents were disclosed in substitution for those that had previously existed within the bundle. Furthermore, the respondents in conducting the preparation of this case for hearing did not comply initially with the tribunal's orders to exchange further witness statements and to set out their case in relation to indirect discrimination until February 2013.

23 We have been referred to statistical evidence that, set against the findings of fact, lead us to the conclusion that the statistics show in relation to staff of the 725 male nurses in the three services within the Ministry of Defence 405 of those at officer level, 56% of male nurses reach officer level compared to 685 female nurses of the total number of 1,457 female nurses and a total of 47% of female nurses reach officer rank. None of the nurses had reached the rank of 1* and the claimant continues to be the most senior ranking nurse (pages 70 to 71). In relation to doctors statistics, page 141 and 160A, demonstrate that of 1,027 male doctors in three Services 19 of those are at 1* and above amounting to 1.85% of male doctors reaching 1* rank and of the 406 female doctors in three Services, one of those reached 1* level by 2012 equating to 0.25% of female doctors reaching 1*. Most telling of all in relation to the pool of medical services including doctors and nurses in relation to progress to 1* rank and above regardless of gender, pages 142 and 160A of 1063 female doctors and nurses one reached 1* level by 2012 equating to 0.054% and of the 1,753 male doctors and nurses 19 have reached 1* level and above equating to 1.084%. We consider that the statistical analysis of the figures forces us to draw the inference that on the statistics men are proportionately more likely to reach officer level in the MOD than women, men are proportionately more likely to reach rank 1* and above than women and doctors of whom the greater percentage are male and are statistically more likely to reach 1* rank and above than nurses predominantly a female group.

24 We conclude that based upon our findings of fact, the respondents have discriminated against the claimant directly in treating her less favourably in comparison to persons of the opposite sex being the claimant's comparator Group Captain Gaffney who was selected as the RAF candidate. Whilst the respondents acknowledge that both the claimant and Group Captain Gaffney were competent candidates for the selection, however the respondents assert Group Captain Gaffney was the most likely candidate to succeed in competition with the candidates put forward by the other Services and therefore he was selected on that basis. We consider such a rationale to be entirely subjective and unsustainable in the evidence before us and we conclude that the claimant was not selected because of her sex. We find the respondent directly discriminated

Case Number 1318158/2011

against the claimant because of the protected characteristic of sex contrary to s.13 and 39(2)(b) of the Equality Act 2010 when it failed to select her as the RAF/Commander for the role of Commander Defence Medical Group on 21 July 2011.

Indirect discrimination

25 We have concluded that the respondents directly discriminated against the claimant because of her sex contrary to the provisions of section 13 and section 39(2)(b) of the Equality Act 2010. We consider in any event that the respondents failure to select the claimant as the RAF candidate for the role of Commodore Defence Medical Group on 12 July 2011 was as a result of the respondents applying a provision, criteria or practice that a doctor was more likely to succeed in relation to the competition with the other tri-Services and that the provision, criteria or practice was not a proportionate means of achieving a legitimate aim.

26 We find that the respondents applied the PCP and the respondents have not shown that the provision, criteria or practice was a proportionate means of achieving a legitimate aim. The respondents have sought to justify the selection of appointing only doctors to rank 1* roles in the tri-Service Defence Medical Services in respect only of the roles of ACOS Medical and ACOS Health. In light of the findings of fact that we have made, we find that the respondents have not justified such a practice as being supported by a job requirement.

27 In reference to the respondent's assertion that they did not operate different retirement age provisions for medical officers and personnel, we find that "potential" was a relevant factor in the selection and "potential" is linked to the retirement age insofar as promotion to different ranks was dependent upon service completed at particular stages and potential required an assessment not only of performance but also of ability to progress to a higher rank and more than a single higher rank. A provision, criteria or practice was in fact applied which placed the claimant, a nurse, at a disadvantage compared to doctors, a male dominated group within the medical contingent.

28 In light of the findings of fact that we have made upon the attendance of nurses at the ACSC the respondents accept that it is capable of amounting to a provision, criteria or practice which it would apply to the claimant and in his submissions to the tribunal Mr Beever on behalf of the respondent has confirmed that the respondents do not seek to assert that such a PCP was justified. The PCPs we conclude place persons with whom the claimant shares a protected characteristic of sex at a particular disadvantage and places nursing personnel, of whom the majority are female at a particular disadvantage when compared to doctors who are predominately male. The PCP placed the claimant in particular at a disadvantage she being a nurse. Whilst the claimant and respondent dispute the appropriate pool to be considered for OF5s the claimant asserts that the pool is doctors and nurses, the respondent assert the correct comparators are all OF5s eligible to be considered for the Comd DMG role across all three Services. Having heard the evidence we conclude that the act of discrimination relates to the respondent's selection

Case Number 1318158/2011

of the RAF's candidate for Comd DMG and as such is limited to the pool restricted to doctors and nurses as considered by the RAF Service within the wider respondent Ministry of Defence.

29 We conclude that the respondent's practice of appointing only doctors to rank 1* roles is not a proportionate means of achieving a legitimate aim. We remind ourselves that the respondents have referred to the presence of professional clinical decision making of the operational medicine arenas. With respect to accounts given by Air Vice Marshal Morris it is clear that within the operational arena clinical decisions are taken by the appropriate clinician in the field and that, where professional clinical decisions are required to be made and with the superior officers professional experience that expert assistance is sought. The command chain requires that the most senior officer commanding the chain of responsibilities takes responsibility for a decision whether of his or her own or on advisement from professional reporting to her or him.

30 In determining whether the respondents practice of different retirement ages for medical officers and nursing personnel and their practice of reserving places for doctors on the Advanced Command and Staff Course is a proportionate means of achieving a legitimate aim. We conclude, in light of our findings set out above, that such practices are not a proportionate means of achieving a legitimate aim.

Remedy

31 The tribunal conclude that the claimant has been subject to unlawful discrimination because of the protected characteristic of sex, the respondents having been found to have committed prohibited conduct against the claimant having both directly discriminated against the claimant and indirectly discriminated against her as alleged.

32 The tribunal have listed this case for a Remedy Hearing to determine quantum of the award to be made to the claimant. In light of the findings of fact we make, the parties will be required to make submissions at the remedy hearing in relation to remedy that may include:

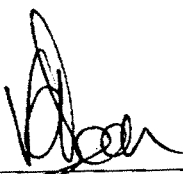
(i) Order the respondent to pay compensation to the claimant
(ii) Make an appropriate recommendation which, having regard to s.124(3), will be a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate -

- (i) on the complainant;
- (ii) on any other person.

The detail of the reasons for this judgment should be considered by the parties with particular attention to the findings of fact which caused the tribunal to draw adverse inferences and the parties are invited to make further representations upon

Case Number 1318158/2011

recommendations to be considered by the tribunal at the remedy hearing in addition to dealing with other appropriate remedy and compensation.

Signed by  on 19 June 2013
Employment Judge

Judgment sent to Parties on

19 JUNE 2013
MR MH Benson