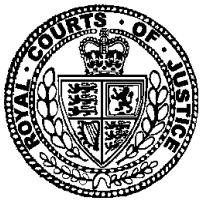

Neutral Citation Number: [2021] EWCA Civ 650

Case No: A2/2020/1407

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE KERR
UKEATPA/0946/19

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 May 2021

Before:

LORD JUSTICE PETER JACKSON
LADY JUSTICE SIMLER
and
LORD JUSTICE LEWIS

- -

Between:

MR ALEXANDER WISBEY	**Appellant**
- and -	
COMMISSIONER OF THE CITY OF LONDON POLICE & ANR	**Respondent**

- -
- -

Ms Karon Monaghan QC and Mr David Stephenson (instructed by **Penningtons Manches Cooper LLP**) for the **Appellant**
Ms Ijeoma Omambala QC (instructed by **Comptroller and City Solicitors**) for the **Respondent**

Hearing date: 21 April 2021

- -

Approved Judgment

Lady Justice Simler:

Introduction

1. The principal question raised by this appeal is whether the provision in the Equality Act 2010 dealing with remedies in a case of unintentional unlawful indirect discrimination is incompatible with EU law; and whether that incompatibility resulted in a failure to award compensation to the appellant, Mr Wisbey (who succeeded in establishing unlawful indirect discrimination), for injury to his feelings in this case.

2. The question arises in the following way. Mr Wisbey is a police officer in the City of London Force (the first respondent in the proceedings before the Tribunal, and the respondent in this appeal). He was an authorised firearms officer ("AFO") deployed to the Tactical Firearms Group ("the TFG"). Throughout his employment as a police officer he has had a form of defective colour vision. This has had no obvious effect on his ability to discharge his duties, but it led his employer, the respondent, to remove him from both his AFO role in March 2017 and later, from advanced driving duties as well. Following a series of further colour vision tests he was reinstated to both roles in February 2018.

3. Since as a matter of statistical fact, about 8% of men and only 0.25% of women suffer colour vision defects, Mr Wisbey made a claim of unlawful indirect discrimination in the Employment Tribunal. He contended (among other things) that the requirement to pass certain colour vision tests in order to remain authorised for firearms and advanced driving duties, and not be removed from such duties, unlawfully discriminated against men on the ground of sex.

4. The claim was heard by the London Central Employment Tribunal (Employment Judge Goodman, Ms Breslin and Ms Jaffe) and by a judgment with reasons sent to the parties on 19 August 2019, the claim based on his removal as an AFO was dismissed, but his claim for unlawful indirect sex discrimination in removing him from rapid response driving was upheld. The Tribunal declined to make an award of compensation for injury to feelings in light of the evidence. It found that the unlawful indirect sex discrimination was unintentional in the sense that the respondent did not know, in applying the various colour vision requirements for driving to Mr Wisbey, that he would be put at a particular disadvantage as a man, and did not intend that consequence. There was an unsuccessful attempt to appeal to the Employment Appeal Tribunal on grounds that do not arise on this appeal.

5. The single ground of appeal on which leave to appeal to this court was granted by Lewison LJ by order sealed on 27 October 2020 has not been advanced previously in these proceedings. It is a pure question of law raising an issue of some importance, and for that reason it was permitted to proceed. It challenges the compatibility of section 124(4) and (5) of the Equality Act 2010 ("EA 2010") with EU law, in particular, Council Directive 2006/54/EC ("the Recast Directive") and the Charter of Fundamental Rights ("the Charter"); and with the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

6. On behalf of Mr Wisbey, Ms Karon Monaghan QC and Mr David Stephenson contend that the provision is not compatible because it imposes an additional threshold or hurdle before any consideration can be given to awarding compensation with the result that

the remedies available for this form of discrimination are neither effective nor dissuasive. For the respondent, Ms Ijeoma Omambala QC contends that section 124(4) and (5) do not have the effect of restricting the availability of an award of compensation where unlawful but unintentional indirect discrimination has been established, and there is no incompatibility. I am grateful to all counsel for the fair and measured way in which their clients' cases were put, both in writing and orally.

The facts

7. Because the question raised by the appeal is a pure point of law it is unnecessary to rehearse the facts in detail. It is necessary, however, to provide a brief outline, in particular to provide the factual context for the Employment Tribunal's finding that no compensation for injury to feelings should be awarded for the unlawful indirect sex discrimination Mr Wisbey succeeded in establishing.

8. There are a number of standard tests used by police forces to detect colour vision defects. One of these, the Ishihara test, identifies people who confuse red and green but does not show the severity of the defect. There are other more sophisticated tests but the expert evidence before the Employment Tribunal was that no single test accurately indicates which defects can be tolerated for particular tasks nor what level of colour vision is required for armed firearms officers. Mr Wisbey was recruited in 1993 with a colour vision defect and was known to have failed the Ishihara screening, both then and later, and the Tribunal therefore concluded that the colour vision requirement for applicants for the police (in place until 2004) could not have been applied consistently. A report dated April 2003, commissioned to review what standards were required for policing tasks and to set evidence-based standards in this context, concluded that colour vision defects should not exclude police officers from most operational policing but should be maintained for fast response drivers and firearms officers.

9. Mr Wisbey became an AFO in 1997 and in 1998 he trained as a rapid response driver. There were no performance issues in relation to either qualification. He was passed medically fit for the TFG post in December 2009 and each year from then to 2016, he underwent a medical examination, including the Ishihara test (which he must have failed).

10. In September 2016 Mr Wisbey was identified as an officer with a colour vision defect. An investigation of the extent and severity of his defect ensued and he was required to undertake a number of different tests. Ultimately, a decision was taken that Mr Wisbey did not meet the required standard for colour vision for firearms officers and should not be permitted to continue in this role. This was communicated to him on 22 March 2017 and the Tribunal made the following findings in this regard:

> "91. Next day, 22 March 2017, an email was sent to the firearms group stating that the College of Policing had issued new guidance around eyesight standards for colour deficiency, and that the claimant had regrettably failed to meet the standards, such that his ability to be an AF had been removed. He was thanked for his professionalism and told this was no reflection on his ability.

> 92. The claimant was devastated to be removed from firearms duties. The Tribunal comments that although the decision will always have been difficult for him, this was a brutal way to deliver the news."

Mr Wisbey challenged the decision and there was an investigation of his grievance.

11. Meanwhile, it appears that Mr Wisbey was also moved from advanced driving duties in March 2017 (as the Employment Tribunal's declaration at paragraph 131 confirms).

12. In the course of his grievance, Mr Wisbey was tested again using a number of different methods and at a meeting on 29 November 2017, which included occupational health representatives, a decision was taken that his results on testing on the last two occasions showed that he met the current colour vision standard and he should be returned to firearms duties. The Tribunal found that there was a delay in implementing this decision because Mr Wisbey had to undergo training and updated medical examinations so that he did not ultimately return to work as a firearms officer and rapid response driver until 12 February 2018.

13. In the proceedings before the Employment Tribunal, Mr Wisbey relied, individually or cumulatively, on five provisions, criteria or practices (referred to collectively as "PCPs") that he contended put him as a man, at a particular disadvantage on the ground of sex. These concerned the various testing requirements to be satisfied by officers with colour vision defects in order to remain in an AFO role, and who would otherwise be removed from advanced driving duties. By the time of the hearing it was admitted that a number of PCPs (though not all) involving colour vision requirements were applied by the respondent to Mr Wisbey. The Tribunal found that the two PCPs relating to driving duties were applied by the respondent to him as well. The Tribunal found that on the evidence of the incidence and cause of colour vision defects, there is a clear link to biological sex and the PCPs put men at a particular disadvantage accordingly. The real question was therefore the question of justification.

14. It was accepted by Mr Wisbey that the respondent's aims were legitimate, namely to ensure officers carry out their duties safely and to enhance public confidence and trust in the deployment of armed officers and rapid response drivers. The critical disputed issue before the Tribunal was whether the practice of requiring an officer to undertake and pass follow-on tests for colour vision defects was a proportionate means of achieving the legitimate aims identified.

15. In relation to firearms duties, the Tribunal concluded that applying a colour vision requirement was appropriate and to the extent that the challenge was to the suite of tests required to detect different defects, that it was proportionate for the respondent to check what seemed to be equivocal test results given the risk of harm if an officer with a significant defect was allowed to use a firearm. Mr Wisbey's claim in this regard accordingly failed.

16. In relation to driving duties, although the Tribunal accepted that it is a legitimate aim that innocent bystanders should not be killed or injured by police rapid response drivers, and that those suspected of lesser offences should not be killed or injured in the process, it found that it was not clear that barring those with colour vision defects from rapid response driving was reasonably necessary or appropriate. For example, DVLA

guidelines do not bar bus and lorry drivers with colour vision defects and although these vehicles are not expected to be driven at high speed in urban areas, there was no evidence that the police had considered this risk in detail, whether nationally or at a local level. The Tribunal concluded:

> "129. …There was no basis of evidence to show it was necessary to bar a driver with any but the most severe (and very rare) colour vision defects, and those with severe defects would probably fail a normal test of visual acuity anyway. … In our finding the restriction was not proportionate to the aim. Consequently, there was indirect discrimination by the first respondent when the claimant was barred from rapid response driving because of a colour vision defect."

17. The Tribunal dealt with remedy at paragraphs 130 and following, but only in relation to driving duties for obvious reasons. It is helpful to set out in full the section of the Tribunal's judgment dealing with remedy:

> "**Remedy for driving ban**
>
> 130. Section 124 of the Equality Act 2010, which concerns remedies for discrimination awarded in the Employment Tribunal provides:
>
> "(1) This section applies if an Employment Tribunal finds that there has been a contravention of a provision referred to in section 120(1).
> (2) The Tribunal may –
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
> (b) order the respondent to pay compensation to the complainant;
> (c) make an appropriate recommendation.
> (3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.
> (4) Subsection (5) applies if the Tribunal –
> (a) finds that a contravention is established by virtue of section 19, but
> (b) is satisfied that the provision, criterion or practice was not applied with the intention of discrimination against the complainant."[1]
>
> 131. We make a declaration that the first respondent subjected the claimant to indirect sex discrimination in banning him from

[1] Oddly the Tribunal did not set out subsection (5).

rapid response driving between March 2017, and November 2017 when the ban was lifted.

132. It is not necessary to make a recommendation about obviating adverse effects. This was done by reversing the ban.

133. We must now consider whether to make an award of compensation. This concerns injury to feelings only. There is a special damage claim for loss of overtime and loss of promotion opportunity, but it relates only to firearms duties, not driving.

134. Intention is not, in law, the same as motive. In *JH Walker Ltd v Hussain* (1996) IRLR 11, an employer refused to allow his Muslim Asian employees to take holiday to celebrate Eid. This was held to be indirect discrimination because of race. The employer knew that certain consequences would follow, and in that sense he intended the consequences of his decision – that Asian employees would not be able to celebrate with their families – even if race discrimination was not his motive. Intention was discussed in *London Underground v Edwards* (1995) IRLR 355, where a single parent, female, was disadvantaged by a change in driver shift patterns, held to be indirect sex discrimination. If there were circumstances showing that a requirement or condition (the wording applied was that of the Sex Discrimination Act) was applied with knowledge of its unfavourable consequences for members of the particular class, an intention to produce this consequence could also be inferred. The Tribunal should examine the intention with which the requirement was applied to the individual, rather than the intention of generalised introduction of the requirement.

135. We examined what the respondent knew about the discriminatory impact of its decisions and standards. The Pulman report which guided the meeting at which the decision was made is 8 pages long, with half a page devoted to the *Ingledew* judgment. Nothing is said anywhere, even in the discussion of the judgment, about any sex difference in colour vision, not is this mentioned in the minutes. Mr Wedge may have known more, as he had attended the tribunal hearing, but he is not minuted as saying anything about sex differences in colour vision defects. (It cannot be said he influenced the driving ban, he was not asked to and did not comment on that). It cannot be assumed that there is general knowledge that colour vision defects are more prevalent in men. As in fact most armed officers (those primarily in contemplation) are men, as was the claimant, there was no reason why the question of different impact on men and women should have come up. Unlike a group of Muslim employees (predominately of Asian origin, as Muslims in Britain tend to be), or Ms Edwards, a single woman when most drivers were men, and in the absence of any evidence of actual knowledge of sex difference in colour vision defects, it

> cannot be held that the first respondent knew that in applying the colour vision requirement for driving to the claimant he would put him at comparative disadvantage, or that he intended the consequences of his act, whatever the motivation.
>
> 136. In view of our finding we do not need to assess injury to feelings, but add that on the evidence the real injury to feelings was the ban on use of firearms, so excluding him from the camaraderie of the TFG, and the lack of involvement in discussion, not the ban on driving, whose consequences are not mentioned in the 179 paragraph witness statement, in contrast to the effect of being barred from firearms. We would have to speculate as to the effect of the driving ban as distinct from the firearms ban. We find it worthy of note that apart from the way the announcement was made on 22 March, the first respondent treated the claimant with respect and sympathy throughout, while holding the line on checking whether he did or did not meet the standard, permitting review if there was fresh evidence. He was not moved away to general policing until July when the grievance was concluded."

18. The reference to the *Ingledew* judgment is a reference to *Ingledew v Chief Constable of West_Midlands Police*, a West Midlands Employment Tribunal decision sent to the parties in January 2016, dealing with the question whether the application of a colour vision test standard to armed officers amounted to unlawful indirect sex discrimination. The Tribunal in that case concluded that the test requirements were justified and no unlawful indirect discrimination was established.

19. Mr Wisby appealed against the Tribunal's judgment on three grounds. The first two concerned challenges to the liability findings. The third ground challenged the Tribunal's conclusion that the unlawful indirect discrimination in relation to the ban on driving duties for officers with colour vision defects was unintentional. At a preliminary hearing the Employment Appeal Tribunal (Kerr J) refused to allow the appeal to proceed to a full appeal hearing on the basis that no arguable error of law had been raised by the appeal. The Employment Appeal Tribunal concluded that the third ground was in effect an allegation of perversity: the Tribunal was aware that material derived from *Ingledew* pointed to a disparate impact on men but reasoned that this was something not widely known about and this contrasted with other forms of disparate impact which are widely known about, arising in areas such as religious observance or maternity leave. The Employment Appeal Tribunal concluded that there was no arguable flaw in the Tribunal's reasoning, and that conclusion was open to the Tribunal on the evidence available.

20. As already indicated above, Mr Wisbey sought permission to appeal to this court and permission was granted by Lewison LJ limited to the compatibility challenge in relation to section 124 EA 2010.

The legal framework

21. Section 19 EA 2010 prohibits indirect discrimination, including on the grounds of sex. It provides:

> "(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 - … sex; …"

22. Section 39 EA 2010 (which is contained in Part 5 dealing with "Work") provides that an employer must not discriminate in the way he affords access or by not affording access to opportunities for promotion etc. Sections 42 and 43 make clear that police officers are treated as being in employment by the relevant chief officer of police for the police force to which the appointment relates. By section 120 EA 2010 employment tribunals have jurisdiction to determine complaints relating to a contravention of Part 5 or contraventions in other sections of the Act related to Part 5.

23. Section 124 EA 2010 deals with remedies where there has been a finding of a contravention of a provision in Part 5 or a related provision. It provides as follows:

> "(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may –
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) order the respondent to pay compensation to the complainant;
>
> (c) make an appropriate recommendation.
>
> (3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.

> (4) Subsection (5) applies if the tribunal –
>
> (a) finds that a contravention is established by virtue of section 19, but
>
> (b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.
>
> (5) It must not make the order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).
>
> (6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the County Court…
>
> (7) If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation, the tribunal may –
>
> (a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid;
>
> (b) if no such order was made, make one."

24. As originally drafted, the power to make a recommendation under subsection (3) was wider than it is now and extended to recommendations which benefited persons other than the complainant him or herself. For example, a tribunal could recommend in an appropriate case, that an employer retrain its entire workforce in equal opportunities practices, or introduce a policy for dealing with standards for colour vision defects in officers on special duties such as AFOs or rapid response drivers. However, following amendments introduced by the Deregulation Act 2015, that extended power has been repealed and replaced with the more limited power to make recommendations "obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate".

The appeal

25. The overarching submission made by Ms Monaghan QC is that section 124(4) and (5) EA 2010 are not compatible or compliant with EU law, the Charter or the Convention. Although all three are relied on to reinforce one another, Ms Monaghan accepted that the same argument is relied on in all three respects but simply through a different legislative lens. She contended that section 124(4) and (5) impose an additional threshold or hurdle to be met by a tribunal before any consideration can be given to awarding compensation in a case of unintentional indirect discrimination, with the result that the remedies available for this form of discrimination are neither effective nor dissuasive. These subsections anticipate that even where loss has been sustained in consequence of unlawful indirect discrimination, there may be no award of compensation because the requirement to consider making a declaration and/or a recommendation first may lead to a decision not to award compensation. In other words, the "consideration" requirement gives a steer to employment tribunals that other remedies are likely to be better or more appropriate than compensation in this sort of

indirect discrimination case. She submitted that this effect is illustrated in this case, by paragraph 136 of the Tribunal's judgment where, having first considered the question of a declaration and a recommendation, the Tribunal made no award for injury to feelings.

26. Ms Monaghan relied on provisions of the Recast Directive, the Charter and the Convention. So far as the Recast Directive is concerned, she relied in particular on recitals (5), (33) and (35) as identifying its aims, and on Article 18 as enshrining the principle that real and effective compensation for loss and damage sustained by a person injured as a result of discrimination must be available in a way which is dissuasive and proportionate to the damage suffered. I set out the relevant recitals below:

> "(5) Articles 21 and 23 of the Charter … also prohibit any discrimination on grounds of sex and enshrined the right to equal treatment between men and women in all areas, including employment, work and pay. …
>
> (33) It has been clearly established by the Court of Justice that in order to be effective, the principle of equal treatment implies that the compensation awarded for any breach must be adequate in relation to the damage sustained. It is therefore appropriate to exclude the fixing of any prior upper limit for such compensation, except where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive was the refusal to take his/her job application into consideration.
>
> (35) Member States should provide for effective, proportionate and dissuasive penalties for breaches of the obligations under this Directive."

27. Article 2 of the Recast Directive provides definitions of direct discrimination, indirect discrimination and harassment within its scope. It defines indirect discrimination in a way that is consistent with the domestic definition of indirect discrimination in section 19 EA 2010. Article 18 deals with compensation or reparation and applies to both direct and indirect discrimination. It provides as follows:

> "18 Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States to determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration."

28. So far as the Charter is concerned, it is given legal effect by Article 6 of the Treaty on European Union which provides that the EU recognises the rights, freedoms and

principles set out in the Charter (and also that the EU shall accede to the Convention) and that these rights shall constitute general principles of EU law. Article 21 of the Charter prohibits discrimination based on any ground such as sex, race, colour, ethnic or social origin (amongst others). Ms Monaghan placed particular reliance on Article 47 which provides, among other things, for the rights to an effective remedy as follows:

> "47. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. …"

29. Finally, Articles 8, 13 and 14 of the Convention are relied on by Ms Monaghan. It is unnecessary to set them all out, but Article 13 provides:

> "13. Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

30. In developing her submission that section 124(4) and (5) EA 2010 are not compliant with EU law, Ms Monaghan emphasised the particular importance placed on the principle of non-discrimination and the task of combating "social exclusion and discrimination" and the promotion of "social justice and protection". She submitted that recitals 33 and 35 and Article 18 of the Recast Directive reflect and enshrine the case law under the predecessor directive, Directive 76/207/EEC, where the Court of Justice took a strict approach to the requirement for an effective remedy. For example in *Levez v TH Jennings* [1999] IRLR 36 the cap on compensation in UK domestic law was held to violate the requirement for an effective remedy in EU law; and in *Marshall v South West Area Health Authority* [1993] IRLR 445, interest was held to be an essential element of compensation for the purposes of restoring true equality. Where financial compensation is the measure adopted to achieve the objective of equality, the CJEU has consistently held that it must be adequate to enable the damage actually sustained as a result of discriminatory treatment to be made good in full: see *Von Colson C-14/83* [1986] 2 CMLR 430; and *Marshall*. A provision allowing for the award of *no* compensation in the face of a finding of unlawful discrimination self-evidently cannot meet the requirement to be "effective" and "dissuasive and proportionate" (especially where compensation is the chosen remedy).

31. Similar arguments by reference to both the Charter and the Convention were advanced. So far as the Charter is concerned, its importance and the binding effect of Article 47 have been recognised in a number of domestic cases (for example, *Benkharbouche v Embassy of Republic of Sudan* [2015] EWCA Civ 33 (approved by the Supreme Court, [2017] ICR 1327) and *R v (on the application of Unison) v the Lord Chancellor* [2020] AC 869). So far as the Convention is concerned, Ms Monaghan submitted that the complaint in this case comprised a claim of unlawful sex discrimination during the course of Mr Wisbey's professional life and accordingly engaged Articles 8 and 13. For the requirements in Article 13 to be met, any remedy must be effective and must include compensation for loss sustained as a consequence of the violation of his fundamental rights.

32. As well as arguing that section 124(4) and (5) fail to afford an effective remedy for unlawful discrimination in these circumstances, Ms Monaghan also contended that a restriction on the right to compensation for a breach of the prohibition on unlawful sex discrimination in circumstances where compensation is available for other claims (for example, unfair dismissal) itself violates the Recast Directive because it indirectly discriminates against women. She relied on the argument advanced to that effect in *Unison*. Justification is accordingly required if it is to be lawful and if the absence of an entitlement to compensation discriminates against women in violation of the Recast Directive, then a remedy must also be provided for men to avoid direct discrimination. Ms Monaghan relied on Article 14 of the Convention to advance a similar argument to the effect that the failure to grant a remedy for indirect sex discrimination in domestic law is a measure that has disproportionately prejudicial effects on women and may be considered discriminatory notwithstanding that it is not specifically aimed at women (see for example *DH v Czech Republic* (2007) 47 EHRR [175]). Moreover, she submitted that the absence of a remedy discriminates against those bringing discrimination claims as compared to non-discrimination claims and this discrimination on the basis of "other status" which, she submitted is covered by Article 14, is not justified.

33. Although Ms Monaghan advanced these submissions with conspicuous clarity and erudition, I do not accept them and have concluded that the submissions advanced by Ms Omambala QC on behalf of the respondent are correct. First, I do not accept that as a matter of statutory construction section 124(4) and (5) EA 2010 restrict the right to adequate and proportionate compensation for a breach of the prohibition on indirect sex discrimination; nor that they do not have appropriate dissuasive effect.

34. Before considering the terms of the domestic legislation it is helpful to look briefly at the predecessor legislation. Both the Sex Discrimination Act 1975 (the "SDA 1975") as originally enacted, and the Race Relations Act 1976 (the "RRA 1976") prohibited an award of damages in respect of acts of unlawful indirect discrimination in employment where the respondent proved that the PCP (or "requirement or condition" as it was termed under the predecessor legislation) in question was not applied with the intention of treating the claimant unfavourably on sex or race grounds. Section 57(3) RRA 1976 was in the following terms:

> "(3) As respects an unlawful act of discrimination falling within section 1(1)(b), no award of damages shall be made if the respondent proves that the requirement or condition in question was not applied with the intention of treating the claimant unfavourably on racial grounds."

35. As originally enacted, the SDA 1975 made similar provision (in almost identical terms) in section 66(3). Intention in this context was held to require knowledge on the part of the employer that the application of the PCP would result in indirect discrimination and a desire for this consequence to follow: see *Walker v Hussain* [1995] ICR 991 (EAT, Mummery J). This no doubt reflected the balance struck by Parliament at that time, in prohibiting indirect discrimination on race and sex grounds, but where it was proved that the indirect discrimination involved no knowledge or desire that the provision applied would disadvantage persons on race or sex grounds, affording protection from having to pay an award of damages.

36. Section 66(3) SDA 1975 was amended by the Sex Discrimination and Equal Pay (Miscellaneous Amendments) Regulations 1996 SI 1996/438 which came into effect on 25 March 1996 (prompted in all likelihood by a challenge to the prohibition on awarding damages for unlawful unintentional indirect sex discrimination in section 66(3) as more restrictive and therefore incompatible with Directive 76/207/EEC in *MacMillan v Edinburgh Voluntary Organisation* [1996] IRLR (EAT, Mummery J)). The wording of the amending regulation, Regulation 2(2), was convoluted, and it is unnecessary to set it out. Its effect was to disapply the prohibition in section 66(3) in an unintentional indirect sex discrimination case, and permit tribunals to award compensation where it would not be just and equitable to grant a recommendation and/or a declaration alone. This was an evolution away from the stark prohibition on a damages award in such cases, to a clear legislative steer requiring consideration of other remedies first, and only permitting a compensation award to be made if it was considered just and equitable to do so as well. No change was made to the identical prohibition contained in section 57(3) RRA 1976, which remained in force until the EA 2010 took effect and repealed both the RRA 1976, and the SDA 1975 (as amended).

37. The EA 2010 was an Act designed among other things to "reform and harmonise equality law and restate the greater part of the enactments relating to discrimination and harassment related to certain personal characteristics". It applies to a range of protected characteristics including age, disability, race and sex and the earlier legislation dealing separately with these particular protected characteristics was repealed by it.

38. Section 124 EA 2010 applies in any case where a tribunal has found a contravention of any provision in Part 5 of the EA 2010 or a contravention in other sections of the Act related to Part 5. Part 5 deals with "work" and covers employment including in relation to police officers. Section 124(2) provides in general, for three remedies that an employment tribunal can order once unlawful discrimination has been established. These are a declaration as to the rights of the parties in relation to the matters to which the proceedings relate, an order that the respondent pay compensation to the complainant, and an appropriate recommendation. The remedies are not mutually exclusive; all three can be made in an appropriate case. There is nothing in section 124(2) to indicate that one remedy has priority over or carries greater weight than another. In practice however, there is likely to be a declaration in any case where a finding of unlawful discrimination is made so it is unlikely that an award of compensation (or a recommendation) would be made without a declaration of unlawful discrimination being made first.

39. Section 124(4) and (5) make special provision in a case where a finding of unlawful indirect discrimination has been made and the tribunal is satisfied that the PCP "was not applied with the intention of discriminating against the complainant". This applies to all protected characteristics to which section 19 EA 2010 applies. In such a case section 124(5) provides that:

> "(5) The tribunal must not make a compensation … order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c)".

The wording is clear and unambiguous. Before it can consider making an award of compensation, a tribunal must first consider whether a declaration and/or a recommendation should be made. Section 124(5) simply sets out a procedure for

considering a declaration and a recommendation by way of remedy first. Beyond that, there is nothing in the wording of this provision that prioritises or emphasises one remedy over another, nor that steers tribunals away or dissuades them from making compensatory awards.

40. Having first considered the remedies of a declaration and a recommendation, there is no restriction or prohibition in section 124(5) on a tribunal's power to make a compensation order where loss is sustained as a consequence of established unlawful but unintentional indirect discrimination. If, after consideration, a tribunal decides that a declaration and a recommendation are appropriate, nothing in the terms of the statute precludes a tribunal from also awarding compensation, still less requiring a tribunal to reach a conclusion that loss sustained by reason of the unintentional indirect discrimination should nevertheless be uncompensated for that reason. The prohibition on awarding damages for unintentional indirect discrimination was repealed by Parliament and has not been reintroduced in any way by the EA 2010. The "consideration" requirement is not and is not to be read as an obstacle to an award of compensation where compensation is due. There can be no doubt that employment tribunals have discretion under section 124(5) to award compensation once the other remedies have been considered and, importantly, if loss and damage have been sustained as a consequence of the indirect discrimination suffered, it is to be expected that compensation will be awarded. Moreover, such compensation should be both adequate to compensate for the loss and damage suffered and proportionate to it.

41. It is common ground that the provisions of the Recast Directive and the Charter referred to above, allow Member States to determine what measures to implement in order to ensure that the Recast Directive is effective in domestic law in accordance with its stated purpose and objective. That is subject to the requirement that the measures adopted provide for real and effective compensation or reparation for loss and damage sustained by a person as a consequence of discrimination, in a way which is both dissuasive and proportionate. These principles of EU law continue to apply in this case. Although the United Kingdom ceased to be a member of the EU on 31 January 2020, Parliament has provided that those provisions of EU law continue to apply to cases that had been started, but not concluded, before the United Kingdom left the European Union: see paragraph 39 of Schedule 8 to the European Union (Withdrawal) Act 2018.

42. However, for the reasons set out above, there is nothing in the terms of section 124(4) and (5) that operates as a restriction on or an obstacle to the right to compensation for loss and damage consequent on a breach of the prohibition on unlawful sex discrimination. For the same reason I do not consider this provision to be in breach of the principle of effectiveness. Requiring a tribunal to first consider whether to make a declaration or a recommendation before compensation can be awarded does not inhibit or make it more difficult for a complainant to vindicate their domestic or EU rights. Accordingly, I do not believe there is a difference in treatment as between discrimination claims and other employment-related claims which could form the basis of an indirect sex discrimination claim. The discretion to make a compensation order in either case is ultimately the same, subject only to the order in which potential remedies must be considered in unintentional indirect discrimination cases, and this is by no means a hurdle or barrier to awarding compensation. It is unnecessary to address the remaining arguments based on EU law, the Charter and the Convention in these circumstances. They add nothing and fail for the same reasons as set out above.

43. Having reached those conclusions, I return to the Tribunal's judgment. The Employment Tribunal followed section 124(4) and (5) in dealing with intentionality and considering the remedies of a declaration and recommendation first. However, I accept the submission that the first sentence of paragraph 136 is at least ambiguous: it can be read as suggesting that the finding of intentionality disposed of any need to consider or assess injury to feelings; or alternatively, as concluding that the findings more generally meant there was no such need. I read it in the former way, and if the former was intended, I am in no doubt that was a misdirection. But, that reasoning was not the result of any incompatibility in the legislation. Rather, it was a product of the Tribunal's own misdirection. As is clear on a proper reading of section 124(4) and (5), the mere fact that indirect discrimination is unintentional does not preclude an award of compensation for loss sustained in consequence of that indirect discrimination.

44. However, even if there was such a misdirection, it seems to me that it was not material in this case because on the findings made by the Employment Tribunal, there is no scope on this appeal to argue that Mr Wisbey suffered damages in the form of injury to feelings as a consequence of the driving ban. As paragraph 136 makes clear, the Tribunal found on the evidence available, that the injury to feelings suffered by Mr Wisbey arose from the ban on being a firearms officer, which excluded him from the camaraderie of the TFG, and from involvement in discussions within that group. It did not flow from the ban on advanced driving, whose consequences were not mentioned in the 179 paragraph witness statement that Mr Wisbey produced. The Tribunal referred to the way that the AFO ban was announced in March 2017 and the devastation it caused (described in paragraph 91 which is set out above). Although Mr Wisbey was banned from advanced driving at the same time, the Tribunal thought it worthy of note that apart from the way the announcement was made on 22 March, the respondent treated Mr Wisbey with respect and sympathy throughout, while holding the line on checking whether he did or did not meet the standard, and permitting a review. This is not, accordingly, a case where there was evidence of injury to feelings that was not assessed by the Tribunal. Rather, there was no evidence of injury to feelings flowing from the unlawful indirect discrimination established in this case.

45. For all these reasons, and if my Lords agree, I would dismiss this appeal.

Lord Justice Lewis:

46. I agree.

Lord Justice Peter Jackson:

47. I also agree.