



EMPLOYMENT TRIBUNALS

Claimant: Mr M Furlong

Respondent: The Chief Constable of Cheshire Police

HELD AT: Liverpool

ON: 10, 11 and 13 December 2018
14 December 2018
(in Chambers)

BEFORE: Employment Judge Grundy
Ms H D Price
Mr W K Partington

REPRESENTATION:

Claimant: Ms S Sleeman, Counsel
Respondents: Mr N Grundy, Counsel

JUDGMENT

1. The unanimous judgment of the Employment Tribunal is that the claimant's claim in respect of direct discrimination under Section 13 of the Equality Act 2010 on the grounds of sexual orientation, race and sex is well founded and succeeds.
2. The parties are ordered to supply their availability by 4 March 2019 for all available dates after 1 April 2019 for two days.

REASONS

Introduction

1. By a claim form dated 6 April 2018 the claimant presented a claim in respect of direct discrimination on the grounds of sexual orientation, race and sex. The circumstances of the claimant's application are that he applied for a position as a Police Constable in the 2017/18 recruitment process for the intake of Police Officers

with the Cheshire Constabulary. The claimant is a white heterosexual male without a disability. Despite a successful completion of the assessment centre and interview the claimant was told on 23 November 2017 that he had been unsuccessful with his application. The respondent asserts that it applied positive action measures within Section 159 of the Equality Act 2010. The claimant believes that the respondent treated successful candidates in interview with protected characteristics more favourably than he was treated but did so unlawfully because they were not as well qualified as the claimant, the respondent had a policy of treating persons with protected characteristics more favourably in connection with recruitment than persons who did not share those protected characteristics and that taking that action was not a proportionate means of achieving a legitimate aim.

The Hearing

2. The Tribunal was provided with an agreed bundle of documents running to over 1300 pages, during the course of the hearing a further document was produced obviously late by the respondent, it having been requested earlier headed "PC Recruitment 2016 Summary of Recruitment Process". The parties had agreed that the respondents' evidence would proceed first and the respondents called Jeanette McCormick who is the Acting Chief Constable of Cheshire Constabulary since August 2017. Her substantive position being Deputy Chief Constable of Cheshire Constabulary and Mrs Hayley Tickle who is a Human Resources Manager with responsibility for recruitment and promotions on behalf of the respondent. The claimant himself gave evidence on his own behalf and Christina Hill who is a Paralegal with the claimant's solicitors.

3. The Tribunal accept that Ms McCormick was a witness of truth who feels passionately about positive action and a diverse Police Force. She is clearly a trailblazer who feels strongly that the Force requires some significant change. So far as Ms Tickle's evidence was concerned the Tribunal accept that she was an honest witness however her professionalism was brought into question in two specific respects regarding the evidence she gave orally that she had not been directly involved in interview panels regarding this particular recruitment exercise about which she was shown to be mistaken as she clearly had been involved in interview panels and further, in assuring the Tribunal that three people had always been present for each interview when on occasion it appeared only two persons had signed the relevant paperwork for a particular interview. This was surprising as Miss Tickle was responsible for overseeing the recruitment exercise from the Human resources perspective. The Tribunal makes comment because clearly a Tribunal claim regarding untraversed waters of Section 159 of the Equality Act 2010 would plainly be a significant matter for the Human resources Manager concerned, Mrs Tickle seemed genuinely surprised to be faced with the matters which were properly put on the claimant's behalf.

4. The Tribunal found the claimant's evidence to be straightforward and honest. In respect of Christina Hill, her evidence was of limited value to the Tribunal but was clear and largely uncontentious in the facts of the calculations that she had made at the time she made them.

The Issues

5. The parties were ordered to file an agreed List of Issues. The parties did file a list of issues but unfortunately, the list of issues was not agreed in totality, the contentious parts of the agreed lists of issues are shown where the respondents proposed wording is in single square brackets and the claimant's proposed wording is in double square brackets. This is set out below and underlined to show the disputed parts.

Direct Discrimination/Race Sex and Sexual Orientation

Relevant Protected Characteristics

C is white, heterosexual and male.

1. Whether C was treated less favourably than candidates sharing a protected characteristic by R in its recruitment exercise for the role of Police Constable following panel interviews held on 17 November 2017.

2. If so, whether R can show that it reasonably thought that persons who share a protected characteristic suffer a disadvantage connected to the characteristic, Section 159(1)(a) of the Equality Act 2010,

3. Alternatively, whether R can show that it reasonably thought that participation in [an activity namely R's police service in the role of Police Constable] [[appointment following a panel interview for the role of Police Constable]] by persons who share a protected characteristic [was] [[is]] disproportionately low pursuant to Section 159(1)(b).

4. If so, whether R's actions in giving preferential treatment to candidates with one or more protected characteristics was done with the aim of enabling persons who share the relevant protected characteristics to overcome or minimise that disadvantage (Section 159(2)(a) or to participate in [the activity namely R's Police Service in the role of Police Constable] [[appointment to the role of Police Constable following a panel interview]] (Section 159(2)(b) and

5. If so, whether R can rely on Section 159(4) of the Equality Act 2010, in particular whether:

(a) The candidates with one or more protected characteristics who were given preferential treatment in being appointed ahead of candidates who did not have that or those protected characteristics were as qualified as C to be recruited and

(b) R can show that it did not have a policy of treating persons who share the protected characteristics more favourably in connection with recruitment to the role of Police Constable than persons who do not share it: and

- (c) R can show that its action in appointing to the role of Police Constable candidates with one or more protected characteristics ahead of candidates who did not share it/them was a proportionate means of achieving a legitimate aim. R relies on the legitimate aim of increasing diversity in its workforce (which falls within sub-section (2). C does not dispute that this is a legitimate aim but disputes that the action taken was proportionate. Given the matters in square brackets and double square brackets it is necessary for the Tribunal to consider the `activity' which is relevant in Section 159(1)(b) and whether that was/is disproportionately low.

The Law

6. Section 13 of the Equality Act 2010

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.
 2. Sub sections 2, 3, 4, 5, 6 7 and 8 do not appear relevant to this case.
7. Section 42 of the Equality Act 2010 provides in respect of Police Officers
1. For the purposes of this part holding the office of Constable is to be treated as employment.
 - (a) By the Chief Officer in respect of any acts done by the Chief Officer in relation to a Constable or appointment to the Office of Constable.
 - (b) By the responsible authority in respect of any act done by the authority in relation to a Constable or appointment to the Office of Constable.
8. The nub of this case relates to the application of Section 159 of the Equality Act 2010 which was brought into force on the 6 April 2011, Section 115 headed "Positive Action – Recruitment and Promotion" provides as follows:-
1. This section applies if a person P reasonably thinks that –
 - (a) Persons who share a protected characteristic suffer a disadvantage connected to the characteristic or
 - (b) Participation in an activity by persons who share a protected characteristic is disproportionately low.
 2. Part 5(work) does not prohibit P from taking action within subsection 3 with the aim of enabling or encouraging persons who share the protected characteristics to –
 - (a) Overcome or minimise that disadvantage; or

- (b) Participate in that activity.
3. That action is treating a person:
- (a) More favourably in connection with recruitment or promotion than another person
 - (b) Because A has the protected characteristic but B does not.
4. Subsection 2 only applies if –
- (a) A is as qualified as B to be recruited or promoted.**
 - (b) P does not have a policy of treating persons who share the protected characteristics more favourably in connection with recruitment promotion than persons who do not share it and**
 - (c) Taking the action in question is a proportionate means of achieving the aim referred to in subsection (2).**
5. “Recruitment” means a process for deciding whether to:-
- (a) Offer employment to a person;
 - (b) to (h) do not appear to be relevant
6. This section does not enable P to do anything that is prohibited by or under an enactment other than this act.
9. There are no decided cases in England and Wales upon the application of Section 159 of the Act. There is some European jurisprudence to which the Tribunal was referred and is considered later in this judgement. There are explanatory notes to the Act itself and some guidance in the supplement to the Employment Statutory Code of Practice and the Equality and Human Rights Commission Code of Practice itself. The Tribunal was also referred to guidance from the Government Equality Office "Quick Start Guide to positive action in recruitment and promotion" and the College of Policing Positive Action practical guide 2014. The Tribunal considered the guidance carefully. In the Tribunal’s bundle the explanatory notes to Section 159 appears at page 44 of the bundle and the examples are as follows:
- “a Police Service which employs a disproportionately low number of people from an ethnic minority background identifies a number of candidates who are as qualified as each other for recruitment to a post, including a candidate from an under represented ethnic minority background. It would not be unlawful to give preferential treatment to that candidate provided the comparative merits of other candidates were also taken into consideration”.*
10. The other example is as follows
- “an employer offers a job to a woman on the basis that women are under-*

represented in the company's workforce when there was a male candidate who was more qualified, this would be unlawful direct discrimination"

11. . The supplement to the Employment Statutory Code of Practice appeared at pages 45 to 62 of the bundle. In respect of positive action at paragraph 12(3) on page 51 the supplement to the Employment Statutory Code of Practice reads as follows *"in certain circumstances this allows an employer or other body with responsibilities under the provisions addressing work under the Equality Act to treat a person more favourably in connection with recruitment or promotion because they have a particular protected characteristic. Those circumstances are where the employer reasonably thinks, see paragraphs 12, 14 – 15 that a person who share a protected characteristic suffer a disadvantage connected to the characteristics (see paragraph 12 – 16) or participation in an activity by persons who share a protected characteristic is disproportionately low, see paragraphs 1220 – 1223, the employer may then treat a person with that protected characteristic more favourably in connection with recruitment or promotion than another person, so long as the aim of doing so is to enable or encourage persons who share the protected characteristic to overcome or minimise that disadvantage, or participate in that activity, however the more favourable treatment in these circumstances is only permissible where the person with the particular protected characteristic is as qualified as the competing candidate and the employer does not have a policy of treating people who share that protected characteristic more favourably in connection with recruitment or promotion as compared to those who do not share it and taking the action is a proportionate means of achieving the aim of overcoming or minimising the relevant disadvantage or participating in the relevant activity, see paragraphs 1225 to 1228. "*

12. The note then provides this provision, and essentially allows positive action in recruitment and promotion in relation to a "tie breaker". It allows an employer faced with making a choice between two or more candidates who are of equal merit to take into consideration whether one is from a group that is disproportionately under represented or otherwise disadvantaged within the work force. There then follows an example:

"a counselling service for teenagers has no Muslim employees but is in an area with a high Muslim population, where a vacancy arises two candidates of equal merit are in a tie breaker situation with the employer having to find some way to choose between them, one candidate is Muslim, the other candidate is not, the Service Manager could choose to offer the job to the Muslim candidate, this would be allowed under the Positive Action Provisions provided that taking action is a proportionate means of achieving the aim of increasing the number of under-represented group employed and the employer does not have a policy of treating that group more favourably in connection with recruitment or promotion, so the non-Muslim candidate could not claim discrimination".

13. As to what is meant by "equal merit" employers should establish a set of criteria against which candidates will be assessed when applying for a job, this can take into account a candidate's overall ability, competence and professional experience together with any relevant formal or academic qualification as well as any other qualities required to carry out the particular job. The example is, *"a retailer advertises for a Trainee Fashion Buyer, one applicant has a Degree in French, none of the other*

applicants has a degree in any subject, the fact that one candidate has higher academic qualifications than the others does not automatically make that person better qualified for this particular job, the employer will need to decide if that qualification is a relevant factor in assessing who might be best for the job. Employers must consider whether candidates are of equal merit in relation to the specific job or position they are applying for, while two candidates may be considered to be of equal merit for one particular post, the same two candidates might not be equally suitable for another job.
"

14. Within the Code of Practice, Chapter 12, deals with positive action. The introduction explains that the Act permits employers to take positive action measures to improve equality for people who share a protected characteristic as well as explaining the general positive action provisions in the Act, Chapter 12 outlines the benefit of using these measures and describes the circumstances when positive action could be appropriate and illustrates the law with examples of approaches that employers might consider taking. The code at paragraph 12(9) indicates that positive action is optional and not a requirement, however as a matter of good business practice, public and private sector employers may wish to take positive action measures to help alleviate disadvantage experienced in the labour market by groups sharing a protected characteristic, take action to increase their participation in the work force where this is disproportionately low or meet their particular needs relating to employment.

15. At paragraph 12(10) the code states "in addition employers who use positive action measures may find this brings benefits to their own organisation or business, benefits could include

- A wider pool of talented, skilled and experienced people from which to recruit;
- A dynamic and challenging workforce able to respond to changes;
- A better understanding of foreign/global markets;
- A better understanding of the needs of a more diverse range of customers both nationally and internationally.

16. The code at 12(14) in respect of disadvantage or disproportionately low participation provides:

"in order to take positive action an employer must reasonably think that one of the above conditions applies, that is, disadvantage, different needs or disproportionately low participation. This means that some indication or evidence will be required to show that one of the statutory conditions applies, it does not however need to be sophisticated statistical data or research, it may simply involve an employer looking at the profiles of their workforce and/or making enquiries of other comparable employers in the area or sector. Additionally, it could involve looking at national data such as labour force surveys for a national or local picture of the work situation for particular groups

who share a protected characteristic, a decision could be based on qualitative evidence such as consultation with workers and trade unions”.

17. At 12(15):

“more than one group with a particular protected characteristic may be targeted by an employer, provided that for each group the employer has an indication or evidence of disadvantage, different needs or disproportionately low participation.

18. In paragraph 12.4 the Act permits action to be taken to enable or encourage people who share a protected characteristic to participate in that activity, provided that the action is a proportionate means of achieving the aim of enabling or encouraging participation, the Act does not limit what action could be taken. It could include:

- Setting targets for increasing participation of the targeted group;
- Providing bursaries to obtain qualification in a profession such as journalism for members of the group whose participation in that profession might be disproportionately low;
- Outreach work such as raising awareness of public appointments within the community;
- Reserving places on training courses for people with protected characteristics, for example in management;
- Targeted networking opportunities, for example in banking;
- Working with local schools and FE colleges, inviting students from groups whose participation in the workplace is disproportionately low to spend a day at the company;
- Providing mentoring.

19. Within the Code, under the title “What does ‘proportionate’ mean?” at paragraph 12(25), dealing with section 158(2), the guidance provides:

“To be lawful, any action which is taken under the positive action provisions must be a proportionate means of achieving one of the stated aims described in paragraph 12(12) above.”

20. At paragraph 12(26):

“Proportionate’ refers to the balancing of competing relevant factors. These factors will vary depending on the basis for the positive action. Whether it is to overcome a disadvantage, meet different needs or address underrepresentation of a particular group. Other relevant factors will include the objective of the action taken or to be taken, including the cost of the action.”

21. At paragraph 12(27):

“The seriousness of the relevant disadvantage, the degree to which the need is different and the extent of the low participation in the particular activity will need to be balanced against the impact of the action on other protected groups and the relative disadvantage need or participation of these groups.”

22. At paragraph 12(28):

“Organisations need to consider ‘is the action an appropriate way to achieve the stated aim? If so, is the proposed action reasonably necessary to achieve the aim? That is, in all of the circumstances would be possible to achieve the aim as effectively by other actions that are less likely to result in less favourable treatment of others”

23. Further, the paragraph 12(30) records:

“If positive action continues indefinitely without any review it may no longer be proportionate as the action taken may have already remedied the situation which had been a precondition for positive action. This could make it unlawful to continue to take the action.”

That paragraph appears under the heading “Time limited positive action”.

24. At paragraph 12(31) it states:

“Therefore, when undertaking measures under the positive action provisions it would be advisable for employers to indicate that they intend to take the action only so long as the relevant conditions apply rather than indefinitely. During that period, they should monitor the impact of their action and review progress towards their aim.”

25. The guidance also contains a paragraph at page 1192 of the bundle of documents regarding "implementing positive action lawfully" (paragraph 12(35):

“An employer does not have to take positive action but if they do they will need to ensure they comply with the requirements of the Act to avoid unlawful discrimination. To establish whether there is any basis to implement a positive action programme, employers should collate evidence, for example through their monitoring data, and analyse that evidence to decide on the most appropriate course of action to take.”

26. At paragraph 12(36) the guidance says:

“In considering positive action measures employers might consider drawing up an action plan which:

- sets out evidence of the disadvantage, particular need and/or disproportionately low levels of participation as appropriate, and an analysis of the causes;
- sets out specific outcomes which the employer is aiming to achieve;
- identifies possible action to achieve those outcomes;

- shows an assessment of the proportionality of the proposed actions;
- sets out the steps the employer decides to take to achieve these aims;
- sets out the measurable indicators of progress towards those aims set against a timetable;
- explains how they will consult with relevant groups such as all staff, including staff support groups and members of the protected group for whom the programme is being established;
- specifies the time period for the programme;
- sets out periods for review of progress of the measures towards the aim to ensure it remains proportionate.”

27. The Tribunal was also referred to the Equality Act 2010, Government Equalities Office document entitled “What do I need to know? A quick start guide to using positive action in recruitment and promotion”. The guidance appears at page 1214. On page 1219 the question of equal merit is considered. The discussion in respect of equal merit talks about the use of positive action provisions:

“In a tiebreaker situation, the employer must first establish that the candidates are of equal merit.

Employers should establish a set of criteria against which candidates will be assessed when applying for a job. This can take into account a candidates overall ability, competence and professional experience together with any relevant formal or academic qualifications, as well as any other qualities required to carry out the particular job.”

28. It is expected that in the vast majority of cases any use of positive action as a tiebreaker between candidates who are of equal merit for a particular post will be at the end of the recruitment process at the actual point of appointment. At that stage all of the relevant factors that the employer will need to know in order to determine whether or not the candidates are truly as qualified as each other should have been established. The example given is as follows:

“An accountancy firm is recruiting for its graduate training scheme. After the first round of assessment the firm decides to shortlist 20 candidates. There is a tiebreaker situation for the 20th place on the shortlist as there are a number of candidates of equal merit. The firm decides to use the positive action provisions to advance a candidate from a BME background to the next round of recruitment, because people from BME backgrounds are underrepresented in the firm. This would mean that the non BME candidates could not claim unlawful race discrimination for not being put on the shortlist.”

29. In the paragraph regarding “proportionate” at page 1221, the discussion is as follows:

“Proportionate’ refers to the balancing of all the relevant factors. In considering using the positive action provisions an employer will need to balance the

seriousness of the disadvantage suffered or the extent to which people with a protected characteristic are underrepresented against the impact that the proposed action may have on other people. When thinking about proportionality an employer may find it helpful to consider if the proposed action is the only way to address the underrepresentation or disadvantage effectively, or if it would be possible to achieve the same effect by other actions which are less likely to result in the less favourable treatment of other people. However, it should be acknowledged that some protected characteristics are more readily identifiable than others. For instance, a person's gender may be easier to establish than their religion, belief or their sexual orientation and so it may be more difficult to determine if there is any underrepresentation of those with certain protected characteristics."

30. The example on page 1222 is as follows:

"A Local Authority wishes to diversify its workforce and undertakes a large recruitment exercise. In an attempt to create a large pool of qualified people from which it can cherry-pick those with the relevant protected characteristics to make its workforce more diverse it sets a very low pass mark for the assessment to make sure that a lot of people pass. Picking someone with a particular protected characteristic from the pool in preference to someone who achieved a higher score and was clearly better qualified for the job but did not have a targeted protected characteristic would not be allowed by the positive action provisions and would be likely to be unlawful discrimination."

31. The dialogue on page 1222 of the guidance provides that:

"The new positive action provisions make it clear that employers must not adopt policies or practices designed to routinely favour candidates with a certain protected characteristic, even when there is evidence of underrepresentation or disadvantage. All suitably qualified candidates must be considered on their individual merits for the post in question. Where one candidate is clearly superior or better qualified for the job than the others then an employer should offer the position to that candidate. However, this does not prevent an employer having a routine policy of being prepared to use positive action where it is appropriate for it to do so. An employer may go into an appointment exercise prepared to use the tiebreaker provisions only to identify a clearly superior candidate. Any notion of using the tiebreaker would then become irrelevant."

32. There is then a heading "Artificially low thresholds" which states:

"Appointments should always be made on merit. If one candidate is superior to another the position should be offered to that candidate. If the pass mark in an assessment is set at 70% and one candidate scores 71% and another scores 91% it would generally be wrong to consider that just because both passed the minimum success threshold the two candidates are of equal merit."

33. A further example is given of a call centre, which wishes to diversify the ethnicity of its workforce, as it is aware that it is currently predominantly white despite being based in an area with a large Indian population. After interview the top two candidates are both white, but in a bid to create greater diversity the company appoints the third

placed candidate because he is Indian. This will be positive discrimination so would be unlawful.

34. The College of Policing positive action practical advice “Considerations for the Police Service and Stakeholders on the use of positive action initiatives to promote equality in the Police Service workplace” (dated 2014) is in the bundle at page 1226. In particular, the section 159 Equality Act 2010 paragraphs begin at page 1242 part 2(9). The discussion regarding its application indicates:

“The section does not allow employers to have a policy or practice of automatically treating people who share a protected characteristic more favourably than those who do not have it. Each case must be considered on a case by case basis and its merits.”

The example given is:

“A sexual offences unit that currently has only female officers and support staff could use positive action to recruit a male candidate who is as qualified in preference to a female candidate to address the disproportionate underrepresentation of men in the unit.”

It goes on:

“Even if employers choose to use positive action all recruitment or promotion must still be based on the individuals being ‘as qualified as or of equal merit’. According to the explanatory notes to section 159 of the Act the question of whether one person is as qualified as another is not a matter only of academic qualification assessment but a judgment based on the criteria on who is best for the job, which could include suitability, competence and professional performance.”

The example is as follows:

“A Police Force which has disproportionately low numbers of officers and staff from ethnic minority backgrounds identifies a number of candidates who are as qualified as each other for recruitment to a post. This includes a candidate from one particular underrepresented ethnic minority background. It would be lawful to give preferential treatment to that candidate by appointing them over other candidates, provided they are as qualified as other candidates in the pool for selection.”

35. The guidance from the College of Policing at paragraph 2(10) assists in how to identify if a group is underrepresented or disadvantaged within the organisation by ensuring assessments are made, using records which are up-to-date and reflective of the workforce as possible. The guidance says that this does not require exhaustive data or records to be kept on staffing makeup or numbers. The guidance goes on at paragraph 2(11):

“Police Forces do not have to take positive action and cannot be compelled to do so. However, Police Forces have a public-sector equality duty to act and take action to address underrepresentation, and this may be achieved by taking

positive action measures. In addition, positive action can allow Police Forces to better understand the communities they serve.”

36. On page 1244 the consideration of when to use positive action indicates that:

“A Police Force recruitment process must not have a blanket policy or practice of automatically treating people who share a protected characteristic more favourably than those who do not share that characteristic. The department must still appoint the best person for the job even if they do not share the particular protected characteristic being targeted by positive action.”

The example is:

“A Firearms Department identifies from its monitoring data that women and BME group are underrepresented as firearms officers. During its next recruitment campaign, the department makes clear that it welcomes applications from women and those from BME groups. The department holds an open day for potential officers where they can meet candidates. However, the department must not guarantee that all female or BME candidates will get through all the initial stages of the application process.”

37. The paragraph on page 1245 dealing with equal merit talks about using candidates who are as qualified as each other and using the protected characteristic as a tiebreaker after taking into account a candidate’s overall ability and professional experience together with any qualifications as well as any other qualities required to carry out the role.

38. Further on in the guidance, at page 1250, the College of Policing says this:

“How can the tiebreaker approach be used lawfully to favour minority ethnic candidates in a recruitment exercise involving large numbers of candidates. For example, if candidates are divided into bands based on their percentage score in an assessment test, how narrow would the bands need to be for all candidates in a particular band to be regarded as of equal merit so that minority ethnic candidates within the band could be favoured?”

The guidance goes on:

“What you cannot do: the starting point is that it is unlawful to apply a tiebreaker in favour of a disadvantaged group to all candidates with a sufficient level of qualification so that a lower qualified member of the disadvantaged group is selected over a more qualified member of the advantaged group simply because of their membership of the disadvantaged group.”

The guidance refers the reader to the Court of Justice Judgment in **Abrahamsson v Fogelqvist Case C-407/98 [2000] IRLR 732** at paragraphs 45 and 52-56. The Court held that such a selection method was disproportionate as it ignored the specific personal situations of all the candidates and it amounted to selection, which was ultimately based on the mere fact of belonging to the underrepresented sex. What it is said in the guidance then that you can do is:

“The tiebreaker can only be applied where both candidates are equally qualified and the candidates are the subject of an objective assessment which takes into account the specific personal circumstances of all candidates.” (See the Court of Justice Judgment in the **Badeck** case at paragraph 23).

Whether the proposal is lawful depends on what “equal merit” means in this context. There is some flexibility here. Advocate General Saggio pointed out at paragraph 37 of his opinion in **Badeck** and at paragraph 28 of his opinion in **Abrahamsson** that:

“A requirement of absolute equality between two candidates before the tiebreaker could be used was a fiction in that it is impossible and extremely difficult for two or more candidates to be on an equal footing.”

39. There are other relevant authorities to which the Tribunal was referred. in submissions. These are considered further from paragraph 122 of this decision. These are as follows:

- MacCulloch v Imperial Chemical Industries PLC [2008] IRLR 846;
- Allonby v Accrington & Rossendale College [2001] IRLR 364;
- Hardys & Hansons PLC v Lax [2005] IRLR 726;
- Lockwood v The Department of Work and Pensions [2013] IRLR 941.

40. The legal position is therefore of wider interest and import in respect of the application of section 159.

Findings of Fact

41. So far as the facts are concerned in this matter, the Tribunal makes the following findings of fact.

42. The claimant, who is a white male heterosexual, was born on 13 October 1993, now aged 25. He lives in Frodsham in the Cheshire Constabulary area. His father is a serving Police Inspector with the respondent. This was the claimant's first application to be a police officer. His application was acknowledged on 7 September 2017 and he was shortlisted on 3 October 2017. He attended the Police Assessment Centre on 17 October 2017 and was notified that he had passed and would be invited to an "In Force interview" on 1 November 2017, the interview to take place on 17 November 2017. He was successful in the interview and on 23 November 2017, despite his pass at the interview stage, was told he was unsuccessful and put on hold as there were not enough vacancies for all who were said to have passed at that stage. On 1 December 2017 the claimant's father raised a complaint on his behalf.

43. In respect of the respondent, there is no issue that the Cheshire Constabulary serves the Local Authority areas of Cheshire East, Cheshire West and Chester, Halton and Warrington. The area comprises in excess of one million residents spanning large rural areas as well as significant urban and industrial areas to the north of the Constabulary area. The Constabulary comprises officers, staff, special constables and volunteers.

44. This case has to be considered within the national context of a lack of representation of individual communities within their police force and in particular within the respondent as it has in particular a question mark over the lack of diversity which higher management was seeking to address. The Tribunal was referred to a number of reports from the Home Affairs Committee on Police diversity. In particular, the House of Commons Home Affairs Committee Police Diversity First Report of Session 2016/17 dated 18 May 2016 at pages 250-278, and the House of Commons Home Affairs Committee Police Diversity Government dated 20 July 2016 (pages 288-297). In that report at page 254 on the key facts the particular concern had been around black or ethnic minority background officers, and the statistics indicated on page 254 that in 1999 2% of police officers in England and Wales were from black or minority ethnic background compared to 6.5% of the population and 9.5% of the UK workforce. In 2015 5.5% of police officers were from BME background compared to 14% of the population, and 11.4% of the UK workforce. No Police Force in England and Wales had a BME representation, which matched its local demographic, and in the Metropolitan Police Service the BME police officer representation was 12.4% compared to 40.2% of the population. Only two Police Chief Officers self-identify as BME and four Police Forces at that time, including Cheshire, North Yorkshire, Stafford, Powys and Durham, employed no black or black British police officers, and 11 Forces had no BME officers above the rank of Inspector. Clearly the ethnic diversity of the Police Service has been an enormous concern for politicians and the Police Force itself. Although the BME representation in Cheshire at that time was zero, at the time of this case steps had been taken to improve in respect of those with a protected characteristic relating to BME, gender, sexual orientation and disability.

45. The respondent had put in place a positive action plan in which was said, in the People Strategy quarterly report to the Scrutiny Board dated 29 April 2015 at page 166, the plan was “in place to attract, recruit and develop BME and female officers”.

46. At page 169 the objective of the people strategy was to “implement positive action, attraction, recruitment, retention and progression plans”:

“A positive action plan for the attraction and recruitment of females and BME has been implemented with CKP providers being targeted and National Associations enlisted for support with ideas and networks. Promotion processes for Senior Officers external to the Constabulary have encouraged applications from BME and female applicants. Familiarisation events have been held to encourage interest and an insight programme is being developed with North West employers to support and develop applicants from diverse communities. Materials have been rebranded and social media has been used extensively to promote the Constabulary. A buddy and a mentor scheme have been relaunched for new recruits to provide support for development. Monitoring has ensured that all BME staff and female officers have a PDR development plan in place. Leadership development has been commissioned for senior female officers.”

47. The statistics referred to in the Appendix of the Strategy Board attached to document 17 in April 2015 show, in terms of establishment profile (page 170, Appendix 1) in respect of ethnicity in relation to Police Officer Constables a total white population of 1,468, five Asian Constables, no black Constables, four mixed race Constables and 21 Constables who indicated their ethnicity was not known or not provided, totalling

1,498 Police Constables. Table 4 at page 172, which was indicative of Police Officers, PCSOs, police staff and Special Constables compared to the Cheshire demographic in respect of ethnicity, showed in 2013 as against the 2011 Census for Cheshire 1.08% of BME staff and officers in 2013, 0.91% in 2014 and 0.85% in 2015. The statistics in respect of female staff and officers were, as against the 2011 Census for Cheshire, 41.68% in 2013, 41.74% at 2014 and 42.46% in 2015 (page 172). In respect of disability, the percentage staff and officers with a self-declared disability as against the 2011 Census the figure for 2013 was 1.9%, the figure for 2014 1.91% and the figure for 2015 1.76%.

48. Looking at the figures in the table on page 171 in respect of gender and disability, the figures in respect of Police Officer Constables, of the figure of 1,498, 1,014 were male and 484 were female. In respect of disability of the 1,498 Police Constables 17 declared a disability, 1,399 declared that they were not disabled and 82 were unspecified.

49. In a document which post-dated the recruitment process for the claimant's round of recruitment at document 75 on page 1099, the Assistant Chief Constable indicated that her office had produced a review of the Police Officer recruitment and the application of positive action for the Police and Crime Commissioner. The briefing paper begins at page 1100. The rationale for the use of positive action is stated as follows:

“Cheshire can show through data that there is underrepresentation across a range of protected characteristics. For example, female, BAME, LGBT. If the Force is to be effective in preventing crime and bringing offenders to justice, whilst maintaining trust and confidence, it needs to show that it reflects and understands the diverse communities it serves by attracting, recruiting and promoting talented people from diverse backgrounds.”

50. The data relied upon is at page 1105. In the first instance the Police Officer total is given as 2,020 with a breakdown of eight Asian officers, three black officers, 16 mixed race officers and 74 not provided or unknown. White officers are said to comprise 1,919 officers. There is no specific breakdown in respect of constables in this document. The document states that Cheshire is “proportionately working towards 3%”.

51. In respect of gender, again there are Police Officer totals rather than Police Constable totals. Of the grand total of 2,020, 640 are female and 1,380 are male. In percentage terms 32% as against 68%. Cheshire is said to be “proportionately working towards a national representation target of 50/50”.

52. In respect of disability, the statistics given in respect of Police Officer total of the grand total of 2,020, 20 declared a disability and 1,804 did not declare any disability. 196 did not specify. The document records that the Constabulary was “proportionately working towards national representation of 6% of the adult working population who are disabled”.

53. In respect of the LGBT data, the Police Officer total was said to break down in terms of eight identifying as bisexual, 32 as gay/lesbian, 863 as heterosexual, 1,005 as “not known/not provided”, and 112 as “prefer not to say”. Therefore, just under half

were not giving any information in respect of sexual orientation. The document records that Cheshire were “proportionately working towards national representation of 4.5%.

54. Prior to the exercise being undertaken, the HR Manager Workforce Planning and Positive Action, Kate McSteen, gave a presentation to the Ethics Panel in October 2016. The respondent did not call direct oral evidence from Kate McSteen and there was no statement from her. The document sets out the voluntary use of positive action and put forward, in respect of statistical evidence at page 427, that Cheshire can show through data that there is still underrepresentation across a range of protected characteristics, for example females currently represent 30% of all officers and BME only 1%.

55. It was suggested that positive action initiatives, which had already been used were targeted recruitment campaigns and familiarisation events, the insight programme, promotion decisions where equal scores exist and selecting candidates for assessments where equal scores existed. On the slide on page 428 it was headed “What else could we do?”

- Reviewing where the Force can apply equal scores, specifically in relation to the shortlisting element of officer recruitment;
- Reviewing when and for how long we open our campaign windows.

56. In the People Board minutes on 25 January 2017 in respect of workforce planning, “Build on success with Stonewall re positive action”, then planning a balancing intake in March to max numbers and will be mostly positive action intake. A letter reference is to “positive action work is not quick” (page 430).

57. At page 431 the Positive Action Strategy 2017 as detailed in the index was presented to the People Board for March 2017 at page 431. The Positive Action Strategy was to sit within the People Board, and the Positive Action Team were responsible for pulling together the delivery of the plan, working across the wider HR Department and Force Departments to utilise the most appropriate resources required. The approach and initiatives for the period were said to be as follows:

- We will develop the Force’s approach to understanding the makeup of its staff through appropriate monitoring mechanisms which help in the development of appropriate schemes and programmes and work.
- We will launch a Force Ally Scheme training and supporting those staff who volunteer to become a member of the scheme, being advocates for all strands of diversity.
- We will work with our Learning and Development Teams to develop a Development Programme aimed at building confidence and changing mindsets for those groups of staff from protected characteristics that are looking to develop laterally, personally or professionally within the Force, supporting them through an action learning set approach to develop their plans.

- We will continue to work with our staff networks and Force Diversity Champions to ensure that they are as effective as they can be, working and influencing the Force to ensure that plans and resources are aligned to achieve the most effective change for the staff within their groups.
- Introduce a staff passport which is designed to support staff with discussions around removing any barriers and maximising the potential of each employee in the workplace by allowing staff to register with information they believe is affecting or that may impact on their work at present or sometime in the future.
- Developing the Force's understanding and learning in relation to invisible difference.
- The Force will continue to support staff through promotions, processes, opening all processes externally to maximise opportunity to diversity.
- We will design a comprehensive attraction plan that allows the Constabulary to ensure that information on how to join any of the policing family routes is taken to the most diverse communities of Cheshire.
- Develop the work of our ACPO Force Diversity Champions to ensure they are supported in the work they do to support the Force as the highest level of advocates.
- Review all of our HR policies and procedures to ensure they are fully inclusive to all protected characteristics.
- We will ensure that our training delivery plans in relation to all equality and diversity inputs are mapped to where they are most needed and that accurate records are maintained to highlight the breadth of training being undertaken and its impact.
- We will work to nationally recognise external benchmarking and quality assurance standards, including Stonewall, Business in the Community, dyslexia and National Autism standards.
- Work the Corporate Communications Team to develop a diversity conference which highlights work and progress being done internally and externally.
- Ensure the Force engages with the communities of Cheshire, building confidence in the Force through events such as Force open days, surgeries and events.

58. Further statistical information relied upon by the respondent at page 1107 was data charts which tracked BME, gender, sexual orientation and disability. The document at page 1107 indicates as follows:

“Across the last four years there has been a 0.45% increase in the number of BME employees.”

59. This was the summary of data as at 31 March 2018 so postdates the claimant's recruitment exercise. However it does give data from 2016 and 2017 which is informative. The document in terms of data says as follows on page 1107:

"Across the last four years there has been a 0.45% increase in the number of BME employees (officers and staff). This equates to 1.3% of the Force strength compared to 3.09% of the population of Cheshire. The Force have seen a drop in overall numbers from 2017 which can be attributed to a data cleanse in Special Constable records in the last quarter of 2017/18 plus a reduction in one BME PCSO. Positively, data for officers only shows that the number of BME officers has more than doubled since 2015 from 0.61% of the Force strength to 1.46%, which is positive outcome to many of the positive action initiatives undertaken by the Force in relation to recruitment and promotion. The graphs in respect of percentage BME officers show, as against the 3.09% strength in the population of Cheshire, that **the percentage BME officers has moved upwards in a steady graph from 0.61% in 2015, to 0.78% in 2016, to 1.32% in 2017 and 1.46% in 2018.**"

60. In respect of female officers and staff, this has also increased steadily since 2015 with an overall increase of 2.93% across the four years. There has been an increase in female police officers from 577 in 2015 to 674 currently as at 31 March 2018, which is 32.78% of the overall officer strength. Overall, females currently make up 45.39% of the Force's strength compared with 51% within the population of Cheshire. The graph in respect of **female officers shows a steady increase from 2015 from 29.24% to 30.5% in 2016, 31.06% in 2017 and 32.78% in 2018.**

61. The figures were also collated in respect of sexual orientation as at 31 March 2018. The document on page 1108 states:

"Across the last four years the number of staff who are bisexual, gay or lesbian has increased by 1% across all staff types, and by 1.53% for officers in particular, to make up 2.68% of officer strength overall. The proportion of those who prefer not to declare their sexuality has decreased by almost 1% across all staff types and by 1.55% for officers. This shows increasing confidence in disclosing this information to the Force and will continue to be a Force focus for 2018."

62. The graph in respect of sexual orientation, in particular regarding officers, appears on page 1109. The figures in respect of sexual orientation for officers are as follows:

2015: Heterosexual 41.83%; bisexual, gay and lesbian 1.15% and 7% preferring not to say.

2016: Heterosexual 41%; 1.26% bisexual, gay or lesbian and 6.32% preferring not to say.

2017: Heterosexual 42.2%; 1.81% bisexual, gay and lesbian and 5.73% preferring not to say.

2018: Heterosexual 43.39%; 2.68 bisexual, gay and lesbian and 5.45% preferring not to say.

63. The document at page 1109 also contained a graph in respect of staff and officers with self-declared disability, not a separate graph with officers' disability, and the text was as follows:

“The number of employees who are disabled has remained consistent across the last three years with 70 disabled employees at the end of 2015 compared to 71 currently, which is 1.73% of the Force's strength. This compares to 18.26% of the population of Cheshire.”

64. The **figures show a slight increase from 1.76% in 2015, going down to 1.58% in 2016, up again to 1.73% in 2017** and up to 2% in 2018.

65. The statistics show, therefore, over the four years to March 2018 that positive action measures were having a small effect on increasing recruitment from those protected characteristics highlighted, which at that stage the data identified as BME, gender, sexual orientation and disability. Further and significantly before the exercise in which the claimant was involved there had been a steady increase in those numbers of BME, female and LGBT individuals recruited as evidenced in the highlighted numbers in the paragraphs above for 2015, 2016 and to an extent 2017.

66. The Tribunal was also referred to an Equality and Diversity Review which was commissioned by external auditors to assist the respondent headed “Equality and Diversity Recruitment Review Assignment Report 2016/17” by the Mersey Internal Audit Agency. The final report appears at page 298 of the bundle. It quotes in its introduction the Public-Sector Equality Duty, the general equality duty which came into effect on 6 April 2011, which has three aims:

- It requires public bodies, including the Constabulary, to have regard to the need to firstly eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act;
- Advance equality of opportunity between people who share a protected characteristic and people who do not share it, and foster good relations between people who share a protected characteristic and people who do not share it.

67. The priority included at priority number (2) “improving the representation of protected characteristics across the Police Force, maximising the opportunities of positive action to recruit and develop a workforce more representative of the community”. At page 302 it detailed the Positive Action Team developing the Insight Programme. It explained the Insight Programme:

“To support all interested and potential recruits who identify with protected characteristics. The Programme has been in operation since February 2016 and is a two-day course aimed to provide potential officers and staff with an insight into Cheshire Constabulary and provide awareness of the recruitment process. The course provides an overview of the Force, the necessary skills required, and provides information on the interview process and Assessment Centre. The scheme also operates a buddy scheme to assist and encourage individuals through the different stages of the recruitment process.

As at the time of the initial review there had been six cohorts. The buddy scheme matches candidates to internal contacts within the organisation to assist in all stages of the process. The buddy will offer help with providing information on key contacts, informal support, knowledge, and will be able to answer any questions and share learning experiences. The course also provides an overview of unconscious bias.

Success of candidates and their progress through the application process is monitored by the Positive Action Team. From Cohort 1 consisting of 13 applicants, three were successful at interview with two commencing employment in July 2016 and one in September 2016. From Cohort 2, five out of 23 applicants were successful. At the time of the initial testing there had been no further appointments from Cohorts 3-6.

68. The conclusion of the external auditors was (page 303):

“Overall, the Constabulary are demonstrating good processes with regards to equality and diversity within the recruitment process and the results from recent campaigns demonstrate that progress is being made on achieving success in this area.

Review of the performance information held confirmed that there has been an increase in applicants with protected characteristics progressing through the recruitment processes for both Police Office and PCSOs. There has also been an increase in successful appointments of applicants with protected characteristics, with some having previously engaged with the Insight Programme.”

69. At page 304 the external review confirmed that:

“The HR department retains information for each recruitment campaign that monitors applicants against each stage of the process. Following every campaign there is a review carried out of this information to identify trends and provide statistical analysis for each stage of the process. This will help measure the effectiveness of the People Strategy with regards to applying equality and diversity as well as identifying any areas for improvement. The report also provides the percentages of males, females and BME applicants, analysed between those successful and unsuccessful at interview. This information will be reported to the People Board as part of their monthly reporting.

During the fieldwork visit the recruitment campaigns for November 2016, January and March 2017 were at the pre-employment stage. The latest recruitment campaign for Police Officers was reviewed and it was noted and confirmed by the HR Manager that Cheshire received the highest number of applicants who identified themselves at the application stage as either BME or LGBT.

During the recruitment process all recruitment and assessment received unconscious bias training and attend a presentation. Unconscious bias refers to a bias that we are unaware of and which happens outside our control. It is a bias that happens automatically and is triggered by our brain making quick

judgments and assessments of people in situations influenced by our background cultural environment and personal experiences.”

70. The information on positive action was presented to the Tribunal in a scattergun form due to the nature of the reports, some of which were redacted, containing the information regarding the effect of positive action which the respondent had been taking to date prior to the recruitment exercise.

71. It is accepted that the respondent Constabulary had worked to improve representation across all of the protected characteristics. The Tribunal accepts and finds that the positive action team was active within the HR department focussing on the mantra “join us, develop with us, stay with us”. The Tribunal accepts that those measures included targeted advertisements to encourage BME and female applicants to undertake the Certificate of Knowledge in Policing, that there was a BME forum to generate ideas and consult on initiatives led by Force Leader for Constabulary minority ethnic group. A buddy scheme to support recruits with protected characteristics through appointment and during service, the police NOW scheme to attract highly qualified graduates leading to develop new leaders from diverse backgrounds, the insight programme already described above, the unconscious bias training already described above, there was work with the College of Policing BME programme to understand barriers, there were female and BME seminars and recruitment workshops to challenge barriers and understand opportunities and there were fast track programmes to bring potential into the organisations through non-traditional routes.

72. The Tribunal accepts and finds that there were promotional events held with other organisations like Cheshire West and Chester Council and Cheshire Fire and Rescue Service, including a master class on Faith and the LGBT community, there were recruitment fairs at local Mosques and Sikh Temples within the force area and adjacent force areas, there was a GADO radio station question and answer session and PRIDE events which the constabulary attended across the region. There was a Diversity Ally Scheme to ensure contact points and support for individuals across the force and targeted Social Media campaigns, for example LGBT Positive Action Adviser was in daily engagement with the community via social media. It was noted that in January 2017 the constabulary were 16th in the Stonewall guide top 100 employers for inclusivity. There was a review of all processes in relation to disability in 2016 including promoting Disk net, work on the disability confidence standard and familiarisation and support events connected to recruitment for internal and external staff.

73. The respondent was given a number of national awards and recognitions relating to diversity, these included being chosen to host the National Black Police Associations Conference in 2017, being placed 16th in the Stonewall top employers in 2016 as above, placed in the Business in the Community Employers for Race Awards and in the top fifty UK employers, a positive action trainer being elected onto the National Board for the National Black Police Association as Deputy General Secretary, being placed fifth in the top fifty UK employers list in 2017 and thirteenth place in 2018, recognising the respondents efforts to attract and maintain a diverse workforce to achieve equality, diversity and inclusion.

74. The Tribunal accepts and finds that the respondent was working extremely hard to develop a diverse work force and notwithstanding the measures taken from 2015

onwards the representations had shown a steady increase but did not meet that of the 2011 census.

The Claimant's recruitment exercise

75. The Tribunal accepts and finds that the respondent operated a staged recruitment process for this exercise, this contained three aspects to it. Firstly the Police Constable Application Form defined by the College of Policing, this involves the hard sift to check the eligibility criteria of candidates in relation to convictions/residency as defined by the College of Policing, the process then moves on to a standard competency based questionnaire (CBQ) and motivation questionnaire marked by a trained Assessor against College of Policing set criteria.

76. The second aspect of the process is the "Search" Assessment Centre, candidates who pass the first stage hard sift move on to the Search Assessment Centre. This comprises a competency interview, numerical reasoning test, verbal reasoning test, written exercises and interactive exercises. To be successful the College of Policing national guideline pass mark is now 50%, there have been some changes moving the pass mark downwards from 60% to 50%.

77. The third stage of the process was an interview for candidates who reached the pass mark in the Search Assessment Centre. This comprised a competency -based interview on the personal qualities at practitioner level. These are explained by pages 63 to 69 of the bundle. In particular, on page 68 for a Constable and Police Staff Practitioner the personal qualities breakdown in to - "serving the public, openness to change, service delivery, professionalism, decision making and working with others".

78. The respondents made the decision to apply Section 159 at the conclusion of the interview stage of the process. During the interview each candidate was asked structured questions and assessed against the criterion previously outlined. Having gathered all of the information through the interview process the respondents chose to apply a pass or fail at the end of the interview. The respondent took the view that all candidates who achieved a pass following the Force interview were of "equal merit".

79. The candidates were assessed and the information regarding the interview assessment criteria in documents collated at Section 7 of the bundle beginning at page 1261. The Tribunal were told by the ACC that the scheme regarding the criteria had changed to assess the "values of the candidates" however the College of Policing document at pages 70 talks about the competency and values framework for policing and the areas themselves had not changed from those that are set out above. The process of assessment had changed in that the ultimate areas considered were not scored and only a pass or fail was attributed despite the extensive amount of information which was gathered against each candidate and which would enable some sort of scoring or prioritisation of all of the candidates to be carried out. Indeed from that information stronger candidates could be picked out.

80. Throughout the respondent's documentation regarding the process to be adopted it referred to the candidates as being "deemed equal". The information contained in Section 7 plainly shows that the candidates were not of equal suitability for appointment. There is a further tranche of interview assessment criteria forms following on from document 60 at page 569.

81. The Tribunal finds that it would be a fallacy to describe all of the individuals "as equal or deemed equal," having considered the forms in some detail. Some continued to be scored such as candidate number 63500 beginning at page 574 who at the conclusion of 578 is scored at 27/33 which would be an extremely strong pass and a strong candidate in terms of the positive evidence shown.

82. Candidate 64105 on page 609 is described at page 613 as a candidate who performed at a high level and demonstrated a high level of the behaviours, all the ticks for this candidate appeared to fall in the two very positive assessment criteria boxes. Candidate 63423 was said to have passed yet the other notes said that the panel feel that this candidate did not demonstrate the required qualities despite scoring guide suggesting otherwise. On page 683 there is a pass question mark aligned to that candidate.

83. On page 708 candidate 63760 was said to be a borderline pass in the other box. Candidate number 63411 on page 713 had passed with all analysis of the interview assessed as the two most positive boxes with the comment "this candidate provided excellent answers to questions and gave good credible examples". At 753 candidate 64117 the interview panel commented "good confident delivery style, clear, concise, excellent communication skills" together with that person's pass.

84. The candidate 63928 is marked on page 758 as both pass and fail, there is a query as in the box for candidate used inappropriate language, it is recorded "used the word "scrote" after the interview when referring to people that we deal with". There is the comment on page 754 of 63928 candidate. "I have re-considered this candidate and although the scoring matrix (*and that is how it is described*) provides a weak pass, (*and that is how it is described*) I continue to have concerns about this candidate, the use of the inappropriate language was unacceptable and although I did not challenge it in the interview (my learning) I am absolutely clear that I do not support this candidate on the basis of the interview and the language used." Ms Tickle in evidence confirmed that this candidate was given a pass and was recruited and that the assessment of the inappropriate language was considered to be a learning point for the individual. It was unclear if the candidate held a protected characteristic on the evidence Miss Tickle gave.

85. The person at 1351, 64201 had substantial numbers of ticks on the right and middle boxes, and also ticks in the negative assessment criteria. On page 1351 the note is recorded "I have reconsidered this candidate, they have passed the scoring matrix to the interview but remained the lower end of performance and suitability in my opinion".

86. In submissions the Assistant Chief Constable's evidence in respect of the interview process was referred to as candidates demonstrating that they had the values or they don't "you either demonstrate a value or you don't demonstrate it". To the Tribunal this seems extremely ironic given the comments of negativity as cited above and that those candidates with a negative comment were progressed and also that given the clear information from those carrying out the procedures that there was in their mind a level of scoring.

87. The ticks and crosses reflected the negative or positive answers to questions within the interview and provide qualitative information in respect of the values and

competencies, it seems inevitable therefore that there would be some inequality in the abilities demonstrated and suitability of candidates over the course of a substantial number of interviews. Ms Tickle informed the Tribunal that there was a moderation process carried out, however the Tribunal is unclear how this was effected. Ms Tickle did not recall being on an interview panel in this recruitment exercise but she was taken to documentation, which showed that she clearly had been on interview panels in this recruitment exercise. Furthermore, she was also taken to documentation, which showed on occasion either only two persons being present or two persons signing the relevant paperwork after the interview.

88. The examples continue in respect of those interview sheets where candidates cannot be viewed as being of equal merit after a detailed interview and the recording of data of qualitative assessment. At page 778 candidate 63606 was given a pass but said "the panel feels that the candidate is not ready for the role, she received positives instead of negatives but to prompts from the panel. I question her effectiveness as a Police Officer". Candidate 63939 at page 808 the interview panel commented "the candidate would benefit from understanding the style and smart models to articulate her evidence which would have scored higher." It is difficult to tell whether or not that candidate was a pass or a fail.

89. The claimant's interview assessment criteria appear at page 1037. The claimant passed and had a relatively strong interview looking at the distribution of the assessment criteria crosses on his documentation. The claimant relied on comments that the Chairman of his panel, Inspector Adkins had communicated to him at the conclusion of the interview the Tribunal accepts that the claimant was told "it was refreshing to meet someone as well prepared as yourself" and that he "could not have done any more" but the Inspector would have no way of knowing how others in other interviews had performed in respect of the other interview panels. Unfortunately those comments may have given the claimant a false sense of a qualitatively high performance. They are the types of platitudes often offered at interview situations. The claimant's performance was a relatively strong one at interview but not the strongest, considering the interview assessment criteria documents to which the Tribunal has been referred.

90. The People Board which had ratified the decision to use this method of selection Minutes of meeting were contained in the bundle at document 45, page 471. The Positive Action Strategy, was being "pulled together," by the Assistant Chief Constable from whom we heard evidence. The document itself was hugely redacted, therefore the Tribunal had scant understanding of its thinking- such that at page 474 it records, " HT PC recruitment to open beginning of September positive action, --JMAC packs do not include Insight programme and asked that this is included, KMAC said done by PCSO when go out to communities." Other than that, the Tribunal was provided with no information about how the People's Board and the Ethics Panel had determined that the structure and methodology for the recruitment in the three stages would be "deeming of equal merit" was the appropriate way to proceed in this exercise.

91. It was the evidence of Miss Tickle that the respondent relied upon internal and external research before reaching these decisions. Other than the matters set out above and having heard the evidence of the respondents witnesses the Tribunal were no closer to understanding the internal and external research that Hayley Tickle relied upon in her oral evidence. Other than matters stated within generic guidance, or the

previous statistical evidence quoted- any internal / external "research" was not something which was included in the bundle of documents.

92. The previous method of scoring in relation to assessment of the competencies would have meant that a candidate had failed the interview if they scored any negative assessment of providing "no evidence" or if they scored "two negative criteria" where only limited evidence had been provided. Despite this no longer being the case the interviews did provide qualitative data as has been shown in paragraphs 81-89.

93. Here there were 127 candidates who were successful at interview, the Tribunal cannot accept that 127 candidates could be said to be equally suitable for the post of Police Constable with Cheshire Constabulary. The email at page 556, document 57 from Miss Tickle to Kate McSteen in respect of the November exercise, attached documents for the deliberation of the People Board. The PC recruitment assessment criteria was sent for information, it was said that this will also enable us to apply positive action from a pool of candidates that have "passed the interview stage based on positive/negative assessment criteria" therefore each candidate can be deemed as equal when making decisions on who to progress with. The document analysed the recruitment process, which occurred between August 2017 and March 2018.

94. In respect of the statistics on page 558 there were 675 applications, 444 were from male applicants, 231 from female applicants, 31 were from BME applicants, 62 from LGBT applicants and 34 were disabled persons. The hard sift weeded out 80 male candidates, 24 females, 3 BME, 10 LGBT and 6 disabled. After the hard sift 501 applications were sent for CBQ marking, 211 candidates were successful at CBQ marking with a score of 9 and above and all who scored a national pass of 9 and above were invited to the Assessment Centre.

95. At that stage the statistics were 121 males, 90 females, 16 BME, 24 LGBT and 10 disabled. There were 70 persons who were transferring Search Assessment scores from other Search Assessments therefore of the 211 who attended the Assessment Centre, in fact only 167 turned up on the day and of those 167, 72 males were successful, 51 females were successful, 7 BME were successful and 14 LGBT and 6 disabled persons.

96. At interview although 192 were invited only 182 attended, of those 127 were successful at interview, 77 of those were male, 50 were female, 8 were BME, 17 were LGBT and 7 were disabled. Those statistics include the transferring individuals with Search Assessment scores from a different search occasion. There were some withdrawals from the interview stage, of the 127 remaining- 85 candidates were informed that their application would be considered for an intake in January/February/March 2018, of those 85, positive action was put in place to recruit any of those with the protected characteristics which the respondents had identified as wanting to recruit, all other individuals were informed that their application would be considered for future intakes.

97. In trying to consider how the respondent applied this positive action at the time that it did the Tribunal has also looked at page 326, which was the People Strategy Quarterly Report for 26 October 2016. In the 2016 intake the campaign had two intakes in July 2016 and September 2016 and received 680 applications and for the further three Officer intakes in November 2016, January and March 2017 received 442

applications. The second campaign of 442 broke down into 306 males, 136 females, 39 BME and 36 LGBT, on page 1371 which was the document that the respondent produced late and detailed the recruitment of Police Constables in 2016 a formal offer was made to 10 female individuals, 4 BME and 1 LGBT and at page 1372 10 females, 3 BME and 5 LGBT.

98. In document 32 at page 353 particularly on 354 it was said there were to be three intakes in January, February and March 2018. The focus in relation to Positive Action was said to be on support through promotion and inclusion in the Insight programme, identifying pre-application those wishing to support them through the initial processes and further work was ongoing.

99. The claimant relied on the evidence of Christina Hill who is a Paralegal with his instructing solicitors who has been assisting in the preparation of evidence for the claimant. She was asked to look at the interview matrix disclosed by the respondent and the scoring matrix for the process in 2016. The Tribunal accepts and finds that the scoring was not attributed to this process in a formal sense in the claimant's round of recruitment. Further the methodology of "no evidence" to show a criteria or "two negative criteria" was not applied. However there was qualitative data considered.

100. The exercise which Ms Hill carried out regarding the interview matrix was on the basis the first boxes (values) were 0, the second worth 1, the third worth 2, the fourth worth 3 and the fifth worth 4 and applying it to those candidates in January/February/March and June respectively the claimant scored as per page 1362 on that analysis, 76%.

101. It is uncontentious that the way in which the respondent made its selections from those whom it said had passed after interview was according to the following principles:-

Firstly candidates who identified a protected characteristic, that being as identified by Ms Tickle in her statement female, BME, LGBT and disability, principle one.

Secondly, candidates who speak English as a second language, principle two.

Thirdly, candidates who are employed by Cheshire Constabulary as a Special Constable, PCSO, FCC or Police Staff, principle three.

And having applied all the above categories still having vacancies to fill the respondents used the Search Assessment Score obtained by the candidate in principle four, meaning that places were offered on that basis to candidates and all positions filled.

102. When Ms Hill made the scoring, she applied the system to the claimant and the principle one candidates successful and principle one candidates who scored lower were disregarded; there were seven who scored higher than the claimant. She disregarded principle three candidates, they were 42 of the candidates in any event, and of the 42 on hold candidates of which the claimant was one she calculated only 3 candidates from the June intake who scored higher than the claimant as at page 1362.

103. Of the remaining 20 on hold who had not withdrawn or been hired in June there were only 4 who scored higher than the claimant, on her calculations 56 of the available 85 places could have been filled before offering appointment to the claimant on a scored basis, relating to the evidence gathered from his interview. The Tribunal finds if scores in this manner were attached the claimant would have been successful and not rejected for recruitment. However the old matrix applied to the new assessment forms may not have been completely reliable, though this exercise did show some form of scoring could have been appropriately applied.

104. The Tribunal views the interview of the claimant as having been relatively strong as against the other candidates and therefore he was likely to be successful, if there were a full analysis of the qualities of the candidates shown at interview and the qualitative data was analysed rather than ignored in the use of a pass / fail after the interview. It would have been likely to he would be assessed as appointable ahead of other candidates with a protected characteristic if the data gathered was considered rather than ignored and a "deeming exercise" undertaken.

105. In essence, the Tribunal find the respondents in using a pass/fail mechanism to assess interview performance at the third stage of the recruitment exercise put forward an artificially low threshold for the recruitment exercise such that substantial numbers were then "deemed equal" when plainly common sense dictates that they could not be so. They did this in order to put in place their action plan of positive action in the recruitment round for PCs.

106. Having "deemed" candidates equal at that stage after the "positive action" candidates were recruited they then reverted to a prioritisation of the quality of candidates by reverting to the Search Assessment scores and appointing in a hierarchy. This shows and undermines any argument of equal suitability.

Submissions

107. The parties made oral submissions and presented both in the respondent's case a skeleton argument and supplemental skeleton argument, and in the claimant's case a skeleton argument, which are read into this judgment by reference. The Tribunal had a day for deliberations and to reach unanimous conclusions. The Tribunal re-considered the Bundle of evidence the notes of the hearing and the written submissions. Considering the list of issues these are the Tribunal's conclusions.

Conclusions

108. The claimant was treated less favourably than candidates sharing a protected characteristic of sex, race or sexual orientation by the respondent in its recruitment exercise for the role of Police Constable following panel interviews held on 17 November 2017.

109. The nub of the Tribunal's view is that there was clear qualitative data collected by the respondent, albeit not reduced to numerical scoring which gave clear indications of which candidates had demonstrated which qualities, by showing evidential examples to the interview panel of the competencies and values for the role required by the College of Policing.

110. The Tribunal struggles with the concept in itself that 127 people could be viewed "as of equal merit" for appointment to the role. The Tribunal rejects the contention that the 127 were of "equal merit" or could be "deemed to be" of equal merit.

111. Given that the claimant's interview was relatively strong although not the strongest interview on an analysis of the extensive number of forms that the Tribunal has been referred to the Tribunal considers he would have been in the quota of individuals who were nearer the top of the qualitative interview process rather than the bottom.

112. In relation to the question whether the respondent can show that it reasonably thought that persons who share a protected characteristic suffer a disadvantage connected to the characteristic, the Tribunal was taken through a plethora of evidence regarding different protected characteristics but particularly gender, BME and sexual orientation. This was not necessarily specific to "disadvantage" but rather to lack of representation. Although disadvantage was not made out the Tribunal did consider the respondent made out its case in relation to the alternative limb of Section 159(1) in respect of participation.

113. The Tribunal determines that the respondents view of the appropriate question is that whether the respondent can show that it reasonably thought that participation in an activity, namely the respondent's Police Service in the role of Police Constable is the more appropriate activity rather than appointment following the panel interview for the role of Police Constable.

114. The claimant criticised that activity as overly wide, but the reality of this situation is that the respondent was seeking to improve the diversity within its Police Service and its not participation within appointment following panel interview for the role of Police Constable which is the activity at stake, it is the activity of being in the Police Service in the role of Police Constable. Section 159(1)(b) requires the Tribunal to consider whether or not participation in the respondent's Police Service in the role of Police Constable by persons who share a protected characteristic was or is disproportionately low. "There was or is" argument falls to be determined at the time that the respondent applied positive action.

115. The Tribunal considered that evidence, and was taken to the very many graphs, the very many statistics which covered the period 2015 to the November 2017 exercise, which shows that the Assistant Chief Constable had analysed this information and it was reasonable for her to reach the view that persons who shared the protected characteristics of gender BME and sexual orientation was disproportionately low at that time. The respondent's actions in applying positive action to candidates with one or more protected characteristics was done with the aim of enabling persons who share the relevant protected characteristics to participate in the role of Police Constable, this was made out on the Tribunal's findings and the analysis and discussion in the previous paragraphs.

116. The respondent relies on section 159(4) of the Equality Act 2010. Firstly, the Tribunal has to determine whether the candidates with one or more protected characteristics who were given preferential treatment in being appointed ahead of candidates who did not have that or those protected characteristics were as qualified as the claimant to be recruited. This is the "equal merit" point. The Tribunal has made

findings in the paragraphs above regarding its view of the assessment of the interview as a pass/fail with over 120 applicants with no further qualitative interpretation of data, which was available to the respondent in this process. The Tribunal did not consider that 127 people were as qualified as each other to be recruited at that stage, and further the respondent in using principle 4 (i.e. reverting to the assessment search centre scores) themselves cannot have believed that qualitatively all candidates were equal, given that that is what they did in that second part of the procedure. This undermines the assertion they were of "equal merit". 'Deeming' it such does not make it so but makes a fallacy of assessment.

117. The Tribunal refers back to the early part of its considerations in respect of the guidance as quoted in the early paragraphs of this decision, and the Tribunal having been referred to cases by the claimant's counsel regarding the European jurisprudence on "equal merit or qualifications". In particular, in the case of **Abrahmsson and Anderson v Fogelqvist C-4074/98 [2000] IRLR 732**. The specific personal qualification of all the candidates must be considered. Further in **Badeck C-1584/97** the European Court of Justice held that, "

"A measure which is intended to give priority in promotion to women in sectors of the public service where they are underrepresented is compatible with Community law if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates. In the present case, the statutory rule giving priority to women was not absolute and unconditional, and therefore it did not discriminate on grounds of sex contrary to the Equal Treatment Directive."

118. It is relevant that **Abrahmsson** allowed special positive treatment when there was an express limit on the difference in the level of qualification of the candidates. In the circumstances of the guidance which is referred to in the earlier paragraphs and in reliance on the authorities previously decided in the European cases, the respondent has not shown that there was equal qualification under section 159(4)(a) when applying positive action to those candidates to deemed to have passed the interview process.

119. The next question the Tribunal determined was whether the respondent could show that it did not have a policy of treating persons who shared the protected characteristic more favourably in connection with recruitment to the role of Police Constable than persons who do not share it. The Tribunal accepts the submission that the respondent's actions in giving preferential access to candidates with one or more protected characteristics did amount to a policy. Whilst in the earlier stages of the recruitment process the candidates were selected on merit, at the interview stage the candidates who demonstrated and evidenced their criteria were not prioritised in respect of qualities; they were all "deemed equal" thereby allowing positive action to in effect, if qualities were visible, pre-select those with the protected characteristics to be appointed. Whilst the respondent sought to argue it did not have a policy it seemed to the Tribunal, the policy was in place post the interview stage of the selection process.

120. Hayley Tickle indicated that the application of the principles within the selection process were as those at page 514, thus the protected characteristics of gender, BME and LGBT were progressed. Principle 2 did not in fact fall to be determined in this

exercise as no-one was of relevance to whom it applied. Principle 3 as in paragraph 101 above fell in followed by Principle 4. Given the size of the exercise post interview the Tribunal concludes that this has all the hallmarks of a policy in that it was a strategic approach and blue print to get those with the three identified protected characteristics across the line first, ignoring qualitative assessment/ evidence.

121. The burden of proof in respect of the Section 159(4) defence falls on the respondent and the final question which the Tribunal had to consider was whether the respondent could show that its action in appointing to the role of Police Constable candidates with one or more protected characteristics ahead of candidates who did not share them was a proportionate means of achieving a legitimate aim.

122. The respondent relies on the legitimate aim of increasing diversity in its workforce which falls within subsection (2), the claimant does not dispute that this is a legitimate aim but disputes that the action taken was proportionate. In this regard, the Tribunal considered **McCulloch -v- Imperial Chemical Industries Limited** at **2008 IRLR 846**. The principles from **Hardys and Hansons Plc -v- Lax (2005) IRLR 726** were noted, in particular that the principles require an objective balance to be struck between the discriminatory effect and the needs of the undertaking. The more serious the discriminatory effect the more cogent must be the justification for it.

123. The EAT also noted that in that case the fact that the rules were fixed and did not vary with individual circumstances was a feature of the scheme which itself needed justifying. The EAT in *McCulloch* identified the legal principles with regard to justification in paragraph 10, firstly the burden of proof is on the respondent to establish justification as per **Starma -v- British Airways 2005 IRLR 862**. Secondly, the classic test was set out in **Bilka-Kaufhaus GMBH -v- Webrvohartz Case Number 172/84 1984 IRLR 317**, in the context of indirect sex discrimination, the ECJ said that the Court or Tribunal must be satisfied that the measures must correspond to a real need or appropriate with a view to achieving the objectives pursued and are necessary to that end.

124. The principles require reference to "reasonably necessary" as per **Rainey -v- Greater Glasgow Health Board 1987 IRLR 206**. Thirdly, the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact the more cogent must be the justification for it.

125. Fourthly, it is for the Employment Tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure, and to make its own assessment of whether the former outweighs the latter. The Tribunal has to conduct a critical evaluation of the scheme in question and critically consider whether it has understood the evidence and assessed fairly the employer's attempts at justification.

126. The Tribunal was also referred to the case of **Allonby -v- Accrington and Rossendale College 2001 IRLR 364**, and further the Tribunal considered **Lockwood -v- The Department of Work and Pensions 2013 IRLR 941**, in this case justification was approached in a structured way setting out the aims of the policy, considering whether the policy was appropriate with regard to its aims and considering whether the policy was reasonably necessary with regard to its aims.

127. Plainly the aim of the recruitment exercise in using positive action was to recruit a diverse population of new Police Constables who came from a wider background and were more representative of the community which it was intended they would serve, so that the hope was more black ethnic minority officers would be recruited, more female officers and more gay/lesbian/bisexual officers and transgender officers would be recruited. This is a laudable aim.

128. The data relied upon has already been described as scattergun. It was produced in the main for the Police Commissioner and not directed solely to this recruitment exercise. The late disclosure of evidence from pages 1368 to 1374 of the bundle shows that by interview stage there was 100% appointment of BME candidates and 73% for LGBT and female candidates. The success rate for male candidates was 89%. There is no explanation of the interview stage as a particular barrier to recruitment by candidates with protected characteristics.

129. The Tribunal accepts and has set out in earlier paragraphs the extensive steps, which the respondent had taken to improve diversity but had not recorded the measurable effects, other than through statistics to March 2018, which were having a desirous impact albeit small on the statistical recruitment of those with protected characteristics. The Insight programme was bearing fruit, albeit in a relatively small way.

130. The College of Policing had identified the measurable effects of the selection process and in particular on sub groups recorded. The subgroup differentials suggest that the Assessment Centre may be the best estimate of the candidates performance and suitability to the role, rather than another tool.

131. This manner of recruitment was applied to a substantial volume exercise rather than a smaller recruitment exercise, such that the radicalness of its impact is stark when one considers the document at page 563 to 564 with the candidates on hold, all of whom are male with no minority ethnic and no disability i.e. all white males and in that particular document the sexual orientation is not recorded.

132. Taking into account the guidance on page 1221 "proportionate" refers to the balancing of all the relevant factors in considering using the positive action provisions an employer will need to balance the seriousness of the disadvantage suffered or the extent to which people with a protected characteristic are underrepresented against the impact that the proposed action may have on other people, the impact on the claimant and on the 34 white male non-disabled candidates.

133. In the Tribunal's view they were rejected where evidence existed in the claimant's case that he was a relatively strong candidate following on from the competency based interview. He had felt he had passed all areas and should have had a green light to appointment. Others of those 34 on analysis may also feel that they were significantly more meritorious candidates than some of those with protected characteristics who were appointed.

134. The knock on effect of discontentment and disillusionment may lead to a lack of confidence in the ability of appointees to the role of police officer and the organisation in general. This would be counter productive and not in the public interest if public confidence in the respondent were undermined.

135. Whilst the Tribunal applauds the respondents attempts to improve diversity and its attempts to recruit from a wider pool to have more police officers with the protected characteristics, applying positive action to the large volume exercise in this way does not seem to us to be reasonably necessary. Certainly at the juncture of this exercise.

136. Previous measures were bearing fruit, applications from those in protected characteristic groups were increasing, the reputational damage of the Force having had no black officers in 2015 were improving on the basis of the recruitment since that time and the improvement in the statistics as shown in the March 2018 documentation. The impact of the Force being chosen to host the National Black Police Association Conference in 2017 whilst symbolic would raise BME profile and policing in a positive light. The method and manner of recruitment has to be considered in this backdrop.

137. This was a radical and substantial change in the recruitment process. Whilst the Tribunal accept there is a need for change this blanket approach was not a proportionate means of achieving a legitimate aim, certainly in respect of the 2016 competition the document disclosed late by the respondent in the Summary of Recruitment Process at page 1368 demonstrates the changes that were being made, the percentage of LGBT and women and BME candidates successful at interview was going up.

138. The application of this selection procedure at the time was in the Tribunal's view premature without a full analysis of the impact of the measures that were already in place. Further there appeared at times a scattergun approach to the individuals with different protected characteristics. The Tribunal considers that the manner of the selection imposed what the Government Equalities Office had counselled against in that it was an artificially low threshold, imposing an artificially low threshold would not be a proportionate response to recruiting to address the issue of a lack of diversity balance.

139. In the circumstances the respondents have not demonstrated the justification for the discriminatory effect of the positive action they applied in this case. The respondents were required to consider first the bedding down of their previous positive action measures, secondly, to measurably assess the impact of those to potentially apply positive action to a smaller exercise in the first place, and to not impose artificially low thresholds in terms of a recruitment procedure, nor to completely ignore a qualitative assessment of candidates and then to re- introduce a merit based analysis in a later part of the recruitment.

140. In the circumstances the Tribunal concludes that the claimant would have succeeded in his application and been appointed as a Police Constable, had the respondent, not applied positive action at the interview stage having obtained and ignored qualitative data and where he was a relatively strong candidate and likely on our assessment to have been positioned on the right side of the number needed to fill the vacancies.

141. In the circumstances the claimant's claim in respect of direct discrimination succeeds and the matter will be listed for a Remedy Hearing in due course. The parties are asked to supply their availability from the first available date after 1 April 2019 for two days.

Employment Judge Grundy

Date 13 FEBRUARY 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

14 February 2019

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FOR THE TRIBUNAL OFFICE