EMPLOYMENT TRIBUNALS

Claimants ***Respondent***
Mr D Chaytor & 100 Others **Disclosure & Barring Service**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT MIDDLESBROUGH ON 6th-13th September 2018
EMPLOYMENT JUDGE GARNON Members Ms C Hunter and Mr G Gallagher
Appearances
For all Claimants: Mr D Chaytor
For the Respondent: Mr R Stubbs of Counsel

JUDGMENT

The claims are struck out on the ground they stand no reasonable prospect of success

REASONS (bold is our emphasis, and italics quotation from statements or documents, unless otherwise stated)

1. Introduction and Issues

1.1. The issues to be decided at this public preliminary hearing are whether all or any parts of the claims should be struck out on the ground they have no reasonable prospect of success, alternatively, whether the claimants should be ordered to pay a deposit as a condition of being permitted to continue with their claims, on the ground those claims have little reasonable prospect of success.

1.2. Mr Stubbs has earlier made a formal concession that Executive Officers (EOs) in Darlington do work of equal value to EOs in Liverpool and Higher Executive Officers (HEOs) in Darlington do work of equal value to HEOs in Liverpool. The root cause of the pay differential is the "***legacy"*** pay arrangements at the two constituent parts of what now forms the Disclosure and Barring Service ("DBS"). Those were the Criminal Records Bureau ("CRB") created in about 2001 and based in Liverpool, and the Independent Safeguarding Authority ("ISA") created in 2008 and based in Darlington . The claimants are male and female EOs and HEOs at Darlington. DBS was created on 1 December 2012 . The terms and conditions at CRB and ISA differed, for example employees at CRB had a contractual right to pay progression, those at ISA did not. Those at ISA had 30 days annual leave compared to 25 at CRB. It is accepted there is a difference in pay in favour of employees in Liverpool.

1.3. DBS argues there is a Defence of Material Factor (DMF) based upon different historical origins of the terms and conditions of the claimants in Darlington and their comparators in Liverpool. It says the dispute between Darlington and Liverpool staff is over a difference in pay between one set of men and women, compared to another set of men and women in a different location with no causal link to sex and such a difference cannot form the basis of a valid complaint under the equal pay provisions of the Equality Act 2010 (EqA). If necessary, it also argues its pay practices are objectively justified.

1.4. With effect from 1 July 2014 terms and conditions of former CRB and ISA employees were "harmonised" . The claimant's claim is from this point onwards. Until then they and their comparators were until 1 December 2012 employed by different employers and from then until 1 July 2014 by the same employer but at different establishments where common terms and conditions did not apply. From then the difference in pay has reduced, so the respondent argues as a result of the buy out of contractual pay progression in Liverpool and fixed amount pay rises thereafter. The respondent says the reason for the remaining, reduced, difference in pay continues to be the legacy terms at the two sites.

1.5. The claimants' opening submissions say DBS's remuneration policy has been indirectly discriminatory against females at EO/HEO grade in Darlington in relation to male EOs/HEOs in Liverpool. Mr Chaytor then writes "*We also say that indirect discrimination is also present in the disparity in pay between male EOs/HEOs in Darlington against their female counterparts in Liverpool".* Any indirect sex discrimination must disadvantage one gender compared to the other, it cannot disadvantage both simultaneously . The provisions of the EqA apply to both men and women. If women are disproportionately disadvantaged and win their claim, their equality clause gives them more pay for the arrears period. The men then have a so called "contingent male" or " piggy back" claim. If Darlington men do not get the same arrears of pay, they are directly discriminated against when compared to Darlington women which cannot be justified **.** Mr Chaytor agreed to put the "women's case " first.

1.6. In our view the real issues are (a) does the respondent show the difference in pay is due to a material factor (b) if so , does the claimant have any reasonable prospect of showing that factor put women at a particular disadvantage when compared with men, or vice versa , (c) if so, what were the respondent's legitimate aims and (d) were the means they adopted to achieve them proportionate to any continuing indirect discrimination they entailed ?

2 Relevant Background and Facts

2.1. When DBS was created, the claimants and their comparators transferred into it on their existing terms and conditions. Broadly speaking men and women on the same grade earn the same in Darlington. The same applies in Liverpool.

2.2. The evidence we heard was from the Chief Executive of DBS, Ms Adele Downey, and, on the topic of Equal Pay Audits , Mr Ralph Hughes. We had a 1000 page bundle. The claimants called no evidence.

2.3. The EO workforce in Darlington is approximately 80% female, whereas at Liverpool it is approximately 60% female. The HEO workforce in Darlington is approximately 65% female, whereas at Liverpool it is approximately 50% female.

2.4. The CRB terms and conditions provided for movement up the pay scale by 3 spinal column points per year equating to about 3% pay increase per year . CRB staff recruited or promoted post November 2012 did not have such a term. The ISA terms and conditions did not contain any contractual entitlement to pay progression. Staff at ISA had pay determined by Performance Related Review. In 2010 they might receive a 0.5% - 3.5% pay increase depending on performance rating.

2.5. Ms Downey joined the CRB in 2008, as the Director for Change & Corporate Services. When DBS was formed she became Deputy Chief Executive. In December 2015 she was appointed as Interim Chief Executive and fully so in June 2016.

2.6. CRB and ISA both ceased to exist, and all staff transferred into a completely new Non-Departmental Public Body (NDPB), sponsored by the Safeguarding and Public Protection Unit (SPPU) of the Home Office (HO). Ex-CRB staff continued to work in Liverpool, and ex-ISA staff in Darlington. Both did the same work as before. The transfer was in accordance with the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector, which provides staff transfers within Government Bodies have the same protection as under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) so changes to terms and conditions could not be effected where the reason for the change was the transfer or a reason connected to it . Any economic or organisational reason would not entail changes in the workforce. Cabinet Office Guidance in 2011 – 2012 said contractual progression rights must be honoured and so CRB had to award the three point annual increase .

2.7. All staff had been notified by letters in about November 2012 from the Head of SPPU they would retain their existing terms and conditions when they transferred. A DBS Staff Welcome Pack confirmed staff "*transferred to the DBS on your existing terms and conditions*", and this would remain the case "*until work to harmonise them takes place*". Probably, this was a situation in which TUPE guaranteed that result anyway. So, DBS came into existence based in two geographical locations, with the staff in those locations on different terms and conditions. Mr Chaytor in his submissions took issue with Ms Downey's reluctance to use the term "merger". The terminology is not relevant to any issue we have to decide, but the effect was certainly to merge the two services into one.

2.8. Staff working in CRB and ISA had completely different pay grades and scales, ISA had staff at grade AA (Administrative Assistant the lowest Civil Servant Grade) The lowest grade at CRB was one higher, Administrative Officer (AO). Grade equivalence was discernible despite different terminology, eg. a CRB EO was equivalent to an ISA Level 3. The pay **scales** for equivalent grades were different , not only in pay but the number of "spinal column" progression points in each scale .

2.9. A table showing the pay scales is at page 67. Ms Downey understands it was created when DBS was formed . The general pattern is CRB (Liverpool) salary minimum for each grade was slightly lower than for ISA (Darlington), but the maximum was higher in CRB. For EO's, the maximum was £24,913 as opposed to £23,978; for HEO's it was £32,108 as opposed to £29,978. Following 1 December 2012 DBS staff were still paid the same salary as they had been paid at CRB or ISA. From the start staff at two sites were doing work of equal value for different pay.

2.10. Following the Government's Spending Review in October 2010, the 2011

Autumn statement from the Chancellor of the Exchequer announced a two-year public sector pay **freeze** on all staff earning £21,000 or above. Pay awards for the public sector would then average 1% for the following two years (2013/14 and 2014/15). The 2013 Budget extended this to 2015/16. The effect of the pay freeze for ISA staff earning more than £21,000 was no pay increase. The remainder received a flat £350 increase. ISA staff were also entitled to 1% of the total pay-bill as non consolidated performance related pay. Negotiations with the trade unions resulted in this being paid by dividing the £88,000 available among the 263 employees as at 1 June 2012, resulting in each member receiving around £355 . Eligible CRB staff had their contractual entitlement to a 3 spinal column points increase, roughly 3%.

2.11. The final year CRB and ISA negotiated separate pay settlements was 2012. ISA received much the same as the previous year while CRB staff recruited or promoted before 1 November 2012 again received their contractual 3 spinal point pay progression. The pay band minima and maxima remained unaltered. From the end of the pay freeze, pay restraint was in force across the public sector with pay awards limited to an average of 1%. CRB staff continued to enjoy a contractual right to pay progression and so would have benefited more after the creation of DBS.

2.12. It was DBS's intention from the start that terms and conditions for all staff should be harmonised, but, having only come into existence on 1 December 2012 it needed to consider the next year's pay settlement to take effect (albeit back-dated as is often the case) from 1 July 2013. From a practical point of view, there was simply not enough time to negotiate harmonised terms and conditions, as well as a pay settlement within 7 months. The DBS Remuneration and Nomination (R&N) Committee, chaired by a Non-Executive Director, decided initially the 2013/2014 pay award would be **based on** the existing arrangements. DBS was expected to include the contractual progression entitlement in Liverpool as part of the 1% average pay cap. That meant ISA staff would receive nothing.

2.13. Every pay rise has to be approved by the Home Office (HO). A business case was drafted to be presented to SPPU and HM Treasury (HMT). The initial proposals were (i) contractual pay progression for CRB would not be included in the 1% award as that would be inequitable (ii) DBS would attempt to get agreement to use 1% of the total pay bill to make a non-consolidated payment to ex ISA staff (to a maximum of 3%) to achieve better parity across sites.

2.14. On 5 September 2013, Ms Downey put a business case for the 2013/2014 pay award to the HO. The offer became (i) 3.06% increase for Liverpool; (ii) a 1% consolidated increase for Darlington (iii) moving the minima on Darlington pay scales up by 1% and (iv) a non-consolidated payment of £375 (worth up to 1.8%). This was against Civil Service Pay Guidance of a 1% pay increase. Eventually Ministerial approval was given and SMT approved the award on 17 December 2013. Due to the proactive steps taken by DBS a further widening of the gap between Liverpool and Darlington, to the benefit of Liverpool, was largely averted.

2.15. During October 2013 some staff had raised concerns over the delay to the 2013/2014 pay award. There was no more delay than in other years in many government departments. Ms Downey and the Senior Management Team (SMT) suspected this unrest was really due to dissatisfaction among some staff that legacy

conditions were being followed, which would result in different pay awards depending on where staff worked. The SMT shared that view so thought harmonisation was needed urgently. Ms Downey drafted a paper for the SMT on 29 October 2013 setting out the range of different terms, not only pay, across the two sites.

2.16. There was no argument advanced by anyone at that time that any pay differences perpetuated in the 2013/2014 pay settlement were related to gender in any way. Ms Downey's own view was any differences related solely to the previous organisation for which the individual had worked , regardless of gender. Thus far it is vital to realise no woman at Darlington could compare her pay to a man in Liverpool because the two were employed at different establishments where no common terms and conditions applied.

2.17. Looking to the future, a slide presentation from December 2013 makes the DBS position clear. There were two entirely pay scales at the two sites and different terms and conditions on annual leave, overtime, childcare vouchers and family leave. DBS wished to (i) "buy out" contractual pay progression at Liverpool, in line with the general policy being pursued by HM Government at the time (ii) create a pay system with one set of salary scales (iii) focus on a so-called "Total Reward Strategy", encompassing not just pay and benefits but wider issues, such as improved development opportunities and working environment. Mr Chaytor in his submissions and cross examination revealed he and his colleagues at Darlington viewed the term "harmonisation" as equivalent to "equalisation" in terms of pay. We can understand why they did so, but it was never so intended by DBS , and is not the way we, or those who deal with public sector pay, would interpret the word. Rather it means the creation of one coherent **system** in place of two fundamentally different systems.

2.18. An R&N Committee paper dated 13 December 2013 set out the proposed strategy. DBS would look to (i) a single pay settlement date of 1 July 2014 (ii) a one-off deal to buy out contractual pay progression; (iii) moving all staff onto a single pay scale and (iv) negotiate terms and conditions (revised ones for existing staff and new for DBS entrants and promoted staff) from a date between July and October. This would entail alterations to existing terms at both sites to remove the differences, such as the equalisation of leave allowances, giving all staff the same pay dates, removing the provision of childcare vouchers at Darlington, and buying out of contractual pay progression in Liverpool.

2.19. The Civil Service Pay Guidance 2014 – 15 again was there should be only a 1% increase to the overall pay bill unless a business case was advanced for "transformation", meaning radical change which will in the long term save money. A Paper dated 13 December 2013 included DBS's **aspirations** to have a single **model** fair to all , accepting Darlington staff due to the pay freeze had not kept pace with their colleagues in Liverpool. A business case would be needed for buying out contractual progression and problems to be faced included (a) relations with PCS, the recognised union, were becoming strained with PCS potentially rallying their members to work to rule as they had previously (b) Liverpool staff becoming disgruntled or disengaged at attempts to remove pay progression and (c) Darlington staff becoming disgruntled or disengaged at failure to address pay disparities across the two sites . All this could impact service delivery if left unaddressed.

2.20. Bringing all employees immediately to the same level of pay was not a realistic

option because (i) staff in Darlington were, in general, paid less than staff in Liverpool and the only way to alter this would be to give only Darlington staff a pay-rise (ii) from the outset, PCS adopted a firm line it would not agree to anything that amounted to Liverpool staff funding Darlington staff, so giving only Darlington staff a pay-rise would simply never be accepted by PCS (iii) the contractual entitlement to 3% progression pay each year in Liverpool, was simply unaffordable for DBS in the current financial climate of the 1% pay policy. Ms Downey had had to negotiate a special case for extra funding for the 2013/2014 pay settlement just to ensure all staff obtained some benefit from it. Reform could only be achieved by agreeing with the PCS a deal to buy out that right. This put PCS in an extremely strong position, which they used primarily to defend what they saw as the interests of staff at Liverpool. **The plain fact is union membership in Liverpool was about 90% compared to 45% in Darlington As there were twice as many staff at Liverpool it would cast 4 times more union votes than Darlington.**

2.21. Achieving harmonisation was further complicated by the nature of the work carried out at the two sites, and the balance of staff grades this had created. This pre-dated the existence of DBS, but largely remains in place even today. In Liverpool, as in CRB before 2012, the bulk of the work is routine, involving a check of criminal records, largely carried out by staff at AO grade, there are fewer HEOs and they "manage" EOs who in turn manage AOs who carry out the core work. In Darlington the work is more complicated, in that it involves researching and considering an individual's history, evaluating evidence and making a decision whether to bar him or her from working with children and/or vulnerable adults. This involves analysis and judgment largely carried out by staff at HEO grade (previously Level 4 in ISA). In Darlington, AOs provide administrative support to enable HEOs to carry out the core work. Those HEOs do not have management responsibilities. The relative complexity of tasks is reflected in the numbers of staff at these two grades. **PCS appeared in negotiations keen to safeguard their lower paid members , which was in line with government policy at the time that pay restraint should " bite" less on the lower paid . As many staff at Liverpool were in the lower grades, this too would tend to channel the limited available funds to Liverpool.**

2.22. During Mr Chaytor's cross-examination and submissions, we detected from him, and colleagues who accompanied/assisted him, (it must be noted most of the claimants are HEO's) a matter which caused them to feel considerable resentment. Mr Chaytor did an extremely good job presenting a case on behalf of his colleagues in an area of law which is fraught with difficulty. On two occasions he said he was feeling "emotional". In most equal pay cases we do not see emotion from anybody, because the claims are about "cold hard cash". In this instance **the HEO's at Darlington feel not only underpaid but undervalued**. What they do, if not done properly, may result in a job applicant being barred from pursuing his desired career, or, at the other extreme, a person not being barred who should have been with the consequence that a child or vulnerable adult is neglected or abused.

2.23. Many of the HEO's at Darlington had previous experience in other employment before ISA was formed, to give them the skills to make these fine value judgments. In comparison an HEO in Liverpool spends his or her time, "managing" others. In very many walks of working life, the latter type of role attracts more remuneration than the former. The starkest example our Employment Judge can give is from a case tried in

this very room involving an NHS Trust, where witnesses on both sides who had entered their professions to deliver clinical care to patients, and reached the highest pay level within their grade , all agreed the only way to earn more money was to stop, or reduce dramatically, time they spent delivering clinical care, and move into a managerial role. As a respondent's witnesses put it, she was better paid for doing staff rotas, shortlisting job applications, monitoring sick absence and approving leave requests, than she ever was for spotting early signs of cancer on a scan.

2.24. Differentiating between staff who do core work and those who manage others, involves a value judgment in which people's views will differ greatly, but it usually has absolutely nothing, directly or indirectly, to do with gender. As Mr Stubbs rightly says in his submissions this is not a case where the claimants or their comparators do stereotypically male or female jobs, or where pre-existing pay arrangements at CRB or ISA were discriminatory, or where the employer has been the same for years. **The inequality in pay between staff at the two sites was certainly not directly caused by gender , and no obvious indirect link to gender exists either**.

2.25. The 2014 Equal Pay Audit, the first carried out by DBS, gives details as of 7 April 2014: (i) at Liverpool 492 staff, of whom 215 (about 43%) were AO and 67 (about 13%) were HEO (ii) at Darlington 250 staff, of whom 56 (about 22%) were AO and 122 (about 49%) HEO (iii) the numbers of EO's were 161 (about 33%) in Liverpool and 35 (about 14%) in Darlington. Ms Downey's statement says "*Arguably perhaps, DBS should have embarked on a far more extensive re-structure of the whole of its operation. However, the cost of such an exercise, coupled with significant disruption it would cause to DBS's ability* ***to provide the service it had been formed to provide****, meant this was not an option the organisation was in a position to take, and this has remained the case".* **This encapsulates the abiding aim of the SMT which was to keep the service running properly at both sites. Everything they did subsequently was a means of achieving that aim.**

2.26. Many Darlington HEOs, probably due to their previous experience of safeguarding gained in the employment of such bodies as a local authority, were directly recruited at that grade, so started on the minimum salary on the ISA pay scale. Government policies limiting pay increases following 2010 caused many to remain on that minimum salary. In Liverpool, staff who started on the minimum moved to progressively higher salaries due to their contractual pay progression entitlement. Length of service and seniority within the Civil Service was, due to historic IT systems, an added complication dealt with more fully by Mr Hughes later.

2.27. The primary focus of the SMT was buying out the contractual pay progression entitlement in Liverpool as, while it existed, the basis for progression up a pay scale was so different in Liverpool and Darlington it would be impossible to put all staff onto a single pay scale.Throughout 2014, there were many meetings of the SMT and the R&N Committee and extensive negotiations with PCS. A Business Case was gradually drawn up to be presented to HO and HMT for approval. **DBS had no authority to implement, or even to offer, any pay increase without the permission of one, or sometimes both**.

2.28. The first draft business case was produced on 4 February 2014. It evolved through 24 versions, culminating in version 25 dated October 2014, which was the

final one presented to the HO and HMT. In the Bundle are e-mails, letters, and minutes of meetings which show all the detail. Ms Downey had a first informal pay discussion meeting with Lawrence Dunne of PCS on 31 January 2014. The R&N Committee was presented with the first draft business case on about 17 February 2014 with main recommendations for :

(i) Contractual pay progression in Liverpool being bought out at 7.56%;

(ii) A single set of pay scales based on the highest minima and maxima of the two legacy arrangements and with only a 15% difference between them to help address the situation in Darlington where many staff were still near the minima of their pay scales (due to the pay freeze limiting their progress up the scales)

(iii) Other benefits would be amended or removed

(iv) Darlington staff (only) would receive a pay award of three spinal column points to move up the pay scale and "*help address potential equal pay claims*".

2.29. A vital part of Ms Downey's evidence was her explanation of references to "equal pay" in management documents from this time. Many documents from 2014 onwards produced by management contain references to averting "equal pay" issues. Ms Downey's understanding and belief, based on discussions she had, briefing notes she drafted, and the nature of the issue DBS was seeking to address, was that "fair pay" to replace the significantly different pay at the two sites being referred to. We accept it is clear from the context the reference to "*equal pay claims*" is not to gender based equal pay. As far as she is aware, at no stage had there been any suggestion by either the PCS or individual staff members there was a gender basis to the pay disparity between Darlington and Liverpool. That was first mentioned in grievances in December 2016. There was considerable resentment at the differences, and a view by management the situation was unfair due historical arrangements which were simply not appropriate in a single organisation. The SMT was satisfied no action to address gender inequality was needed in response to the 2014 Equal Pay Audit because the disparity was explained by the legacy arrangements. Although it might be possible to demonstrate a woman in Darlington was paid less than a man in Liverpool, all men and women in Darlington were on equally lower pay compared to women and men respectively in Liverpool.

2.30. A document produced later, called an Equal Pay Analysis (page 573) showed as of 30 June 2014:
(i) in Liverpool the pay gaps at EO and HEO between males and females was only 1.2% and 1.5% respectively;
(ii) in Darlington the pay gaps at EO and HEO between males and females were only 1.1% and 0.5% respectively;
(iii) a comparison of male EOs and HEOs in Liverpool with male EOs and HEOs in Darlington reveals comparative average salaries of £23,221 to £20,982 and £29,228 to £26,452 respectively; and
(iv) a comparison of female EOs and HEOs in Liverpool with female EOs and HEOs in Darlington reveals comparative average salaries of £23,493 to £21,216 and £29,682 to 26,585 respectively.
These figures show the root cause was the legacy and no obvious disparate impact between genders was apparent .

2.31. Throughout DBS took advice from the HO and HMT as well as its own HR department. None of that advice was that their proposals for the future may be discriminatory for a very good reason – the law at the time was as set out in Armstrong-v-Newcastle NHS (see later) that if the difference in pay was clearly not **because of sex**, direct discrimination, it would not be unlawful. Mr Chaytor in his submissions and cross examination said "equal" in terms of pay cannot mean "fair" , and it is not credible it was thought to be by DBS . We disagree. People may be treated unequally , directly or indirectly based on characteristics which are not protected, and that is often described as " unfair".

2.32. The advice received, coupled with the position taken by PCS, shaped the business case . By February 2014 three options were under consideration, the "Holistic Option" being preferred. Ms Downey believes the reference in paragraph 29 of that draft (page 304) *" This proposal goes some way to reducing the risk of* ***an equal pay claim*** *but does not entirely address it "* is a reference to the unfair pay position across the two sites. It contrasts to paragraph 34 headed "Diversity" "*any* ***disproportionate impact on gender*** *or other diversity groups will be addressed in our final proposals"*.(page 305)

2.33. On 1 April 2014, Ms Downey had a meeting with HMT following which correspondence continued with HMT trying to answer the points it raised. By this stage PCS were demanding AO grade be paid a "spot rate". The SMT approach up to then had been the bulk of any pay increases should go to Darlington staff, given Liverpool staff would be receiving a payment to buy-out their contractual pay progression. PCS were of the view Liverpool staff were being used to "subsidise" Darlington staff and demanded a better deal for them.

2.34. By 9 July 2014 the SMT made a revised offer to PCS (i) The AO spot rate would be at £18,844; (ii) 7% would be paid on a non-consolidated basis to staff in Liverpool to buy out the contractual pay progression; (iii) Darlington staff who did not benefit from moving to the new minima in the single pay scale would receive 2.5% on a consolidated basis; (iv) Liverpool staff would receive 0.5% on a consolidated basis on top of their payment at (ii) above.

2.35. This offer was later revised in the face of hard informal negotiating by PCS. The AO spot rate increased as did the amount to buy out from 7% to 7.65%. The claimants' case relies heavily of a version of the proposed buy out and new pay scales put to PCS on 24 July 2014 at page 445 which included: (i) An AO spot rate of £18,938 (ii) Pay scale minima of £23,000 (EO) and £28,000 (HEO); (iii) 2.5 years buy out (7.65%) offset by move to minima;(iv) 2.5% consolidated increase for Darlington staff; and (v) 0.5% consolidated pay award to Liverpool staff who had contractual pay progression. HMT approval for this offer was given and mentioned "*equal pay vulnerabilities should not be allowed to further drift or deteriorate*". The vulnerabilities were those shown in the 2014 Equal Pay Audit which focussed on "fair pay" at the two sites, rather than true "equal pay".

2.36. Now ministerial approval had been obtained, the negotiations with PCS moved onto a formal basis. The negotiations were hard and the offer was amended on a number of occasions. Mr Chaytor in his submissions is extremely critical of the DBS position, as revealed in an email of 15 August 2014 from Mr Christopher Scott to Mr Graham Ford, the DBS Employee Relations Lead, entitled" *distributing non-con pot-*

identifying winners and losers" .The email shows certain steps would make HEO's and EO's at Darlington "losers" . The winners would be AO's on both sites and probably EOs in Liverpool. Of this evidence Mr Chaytor says "*at the first sign of pushback from the Liverpool dominated PCS, the DBS shamefully negotiated the Darlington pay rise down to minima of £22750 and £27150*". This was not the first sign of pushback. Ms Downey's evidence was credible and fully supported by documents , though we have one criticism of it . When our Employment Judge asked whether she felt at the time PCS " had her over a barrel" , her response was she did not use those words . That is true but when he urged her not to "sugar coat " her terminology, she did accept she was left with very little choice as to what to do due to the stance taken by PCS combined with the policies on pay restraint .**No Tribunal could possibly find DBS *shamefully negotiated the Darlington pay rise down* when it had no choice , for reasons we will explain, if it needed to procure the end of contractual entitlement to increments.**

2.37. By 2 September 2014 PCS were threatening to recommend rejection by their members of the offer as it then stood. In the report to the R&N Committee of 4 September 2014 it was explained that when what was tactically labelled the 'final offer' had been made, PCS accused DBS of using 'Liverpool money' to subsidise and achieve parity for Darlington (para 4.1); PCS objected to Liverpool's buyout being non consolidated whereas Darlington received a consolidated award (para 4.2); PCS objected to Liverpool receiving a much lower consolidated pay award of 0.5% against 2.5%; the AO spot rate was considered too low. PCS said the Border Agency had acceded to its employees receiving the 3 spinal column point increase in addition to the buyout.

2.38. The R&N Committee agreed to make an improved offer which was put to PCS on 5 September 2014. On 8 September 2014 PCS e-mailed it would agree to Option B, subject to some amendments proposed In a covering letter. It specified that ahead of any agreement PCS would "*need to be in receipt of a Policy Equality Statement and an Equal Pay Audit to consider whether the proposals have any adverse impact on any of the protected groups as specified in the Equality Act 2010…*".. This was probably said because PCS recognised it, as a union, could be liable to members whose interests it failed to protect , as in Allen-v-GMB. For DBS to be able to agree to the PCS proposals, fresh HO/HMT approval would be needed. Ms Naomi Robson (Associate Director for HR who has since left DBS) sought this, and Ms Downey in a letter of 12 September explained how the amendments to the offer had come about The latest proposals were a little more costly , but on 17 September 2014 HMT gave approval for DBS to proceed.

2.39. The DBS letter confirmed the differences in the proposed pay deal (i) lowering of pay scale minimas at EO, HEO grades to £22,770 (EO) and £27,150 (HEO); (ii) increase of Liverpool consolidated pay increase to EOs from 0.5% to the contractual 3.06% traded off by reducing the non-consolidated buy out for EOs from 2.5 years to 1.5 years (iii) changing the AO spot salary from £18,938 to £19,409 on 1 July 2014 and £19,880 on 30 June 2015 (AOs did not receive a buy out of contractual pay progression so the offer had to be attractive to them) (iv) Liverpool HEOs (who had a right to pay progression) would receive a 0.5% consolidated increase plus such part of a non consolidated buy out of 7.65% as was not taken up by the move to the new grade minimum and a non consolidated payment of £325 (v) Darlington staff would

receive such of a 2.5% consolidated pay rise as was not taken up by the move to the new pay grade minima.

2.40. This offer (which was accepted) constituted consolidated pay increases for Darlington staff of 2.5% - 11.86% at EO and 6.68% at HEO in a year of 1% pay restraint. The consolidated pay increases for Liverpool were mainly less than those received by Darlington. The final version of the Business Case dated October 2014 is at pages 628 – 645. It refers to 91% of Darlington staff being close to the minima of their pay scales (page 631) giving an indication of the numbers who would benefit from the higher consolidated increases due to the change to the pay grade minima.

2.41. The oral evidence from Ms Downey was illuminating. In 2014 the 1% ceiling could only be exceeded if DBS was able to put forward a "transformation "case to the HO and HMT showing buying out the right going forward would pay for itself in the foreseeable future She accepts the original minima of £23,000 and £28000 would have been affordable . A drop of £250 for EOs and £ 850 for HEO's would adversely affect many people in Darlington The increase in the AO's spot rate was to the benefit of Darlington as well as Liverpool but there were more AO's in Liverpool.

2.42. If DBS had not achieved a negotiated solution with PCS the contractual pay increases would have remained, and for as long as they did and pay restraint was in place, the gap between Darlington and Liverpool staff would worsen to the disadvantage of Darlington. It had increased from 2010 to 2013 during the freeze and subsequent austerity measures from which Liverpool staff were "insulated" by their contractual entitlement **and probably TUPE**. One option explored was headed " Do Nothing". **The claimants appear not to recognise that had that happened, they would have no claim at all as they would still be at different establishments to their comparators and common terms still would not apply**.

2.43. There is more than enough complicated law in this case already, so we will just summarise, rather than set out in full, what the legal position would been had DBS done what Mr Chaytor said in his submissions they should , which was essentially: first give a performance related pay rise to Darlington staff, second not reduce pay band minima for EO's and HEO's which would have had a significant beneficial effect on all Darlington staff at those grades , as he puts it "*after objections from the (Liverpool dominated) Trade Union,* but "brave out" the inevitable consequence of PCS not agreeing to anything and force contractual change upon it as DBS , according to Mr Chaytor, had threatened to do.

2.44. As for the first suggestion, pay limits are set by HMT but all pay rises have to be approved by a Minister in the HO . Ms Downey would have to put forward how they were going to distribute the 1% . To give a substantial performance related pay rise to Darlington staff would absorb most or all of the 1% of payroll , and be wholly unacceptable to Liverpool staff . HO ministers would conduct an assessment of such things as risk of industrial action, of which we say more in paragraph 2.47 . That alone would prevent giving everything to Darlington . Mr Gallagher asked who was present when they had the discussions about the 2014 terms. The PCS negotiator leading it was based at Liverpool but there were four members of PCS in the negotiations one or more of whom represented staff at Darlington. HO and HMT approval would never have been given to the step Mr Chaytor suggested and there

is no reasonable prospect of any Tribunal finding otherwise .

2.45. As for the second, if TUPE applied, as Mr Stubbs agrees it probably would, ending the contracts of Liverpool staff and offering new contracts on less favourable terms would amount to a dismissal within the meaning of the Employment Rights Act 1996. Those affected would claim unfair dismissal. The reason for dismissal would be connected to the transfer and not fall within the limited exception of being an economic or organisational reasoning entailing changes in the numbers or functions of the workforce. On that basis, the dismissal would be automatically unfair. If TUPE itself did not apply but Cabinet Office Guidelines made clear, as they do, equivalent protection would be granted to employees , no sensible tribunal could come to any other conclusion than that the dismissals were unfair by the normal test . The successful claimants would then ask for the remedy of reinstatement, an order by the tribunal they be re-employed on their original terms and conditions. They would be likely to receive such an order, but if for any reason they did not, a substantial award of compensation for their future losses would be made. In short, DBS would not have a leg to stand on if it tried to force change.

2.46. DBS is self-funded through fees charged for criminal records checks of £44 of which £8 goes to fund ISA checks which are done without a fee. Liverpool provides the revenue stream for the whole service and even an overtime ban would be very harmful. Demand for criminal records checks is somewhat seasonal, but predictably so. DBS depends upon staff doing overtime to fill the seasonal demand. At one point PCS had an overtime ban in place and if that returned , DBS would come nowhere close to being able to meet the demands on the service. Mr Chaytor was a PCS member at the time, and although he should have given this in evidence rather than submissions, we accept, PCS probably did not have members approval for **strike** action. However, they could have caused a great deal of damage without what he describes is that apocalyptic scenario. Liverpool staff have a target of 87% of requests responded to within 21 days including the time taken by the police. Without their cooperation the whole service would be severely affected.

2.47. In her letter of 12 September 2014 Ms Downey said PCS would recommend rejection of any offer that did not meet its demands. She then wrote at page 550 "*I am confident that PCS will recommend this offer to their members because our union membership is highest in our Liverpool site at AO and EO grades. These revisions improve the offer to staff in these grades and will carry the vote. In addition the offer to Darlington staff has not been revised but is above the 1% the civil service pay guidance. We are extremely confident that staff will vote yes in the ballot due to(a) obtaining unanimous recommendation from PCS and (b) 95.9% of the total workforce will benefit in a big way , the vast majority of who are members of PCS* .

2.48. When asked by the Employment Judge, Ms Downey said she thought it would be "unfair" to give **all** of the money available to Darlington staff. It would be, in the sense that in times of austerity every worker expects some share of a "capped" increase just to keep pace with the rising cost of living. But whatever she thought the PCS would definitely rebel against her doing so.

2.49. In her view there would have been industrial action in Liverpool if any greater funding was given to Darlington than DBS managed to secure. During the hearing, Mr Chaytor did not disguise the disappointment he and his colleagues felt at the way

they had been represented by PCS. Quite simply unions are there to represent their members not their non-members. For the reasons we explained in 2.20 and 2.21 above, Liverpool staff and the lower paid AO's simply had more "clout" in the negotiations . Darlington staff had no contractual entitlement to enforce. The primary cause of the widening gap between Darlington staff and their colleagues at Liverpool had been the existence of Liverpool's contractual right, and without a deal it would continue to be for at least the next two years .

2.50. In short though Ms Downey recognises the continuing disparity is unfair, in the real world and with all the constraints upon her, what she negotiated was infinitely better than the alternative of "no deal" , and the best possible outcome she could have achieved for Darlington.

2.51. On 19 September 2014 Ms Robson formally wrote to PCS with the final offer broken down into that for Liverpool employees by grade, and that for Darlington employees by grade. Details of all changes to other terms and conditions were set out. In terms of pay, there was now a new, single pay scale, with a spot rate for AO staff and salary ranges for staff from EO to Grade 6. For any AO staff who did not receive an increase of at least £1000 by moving to the spot rate, there would be a top-up payment to ensure that level of increase. Since the new spot rate was higher than the previous AO maxima in both the CRB and ISA pay scales, this had the effect of bringing the salaries of all AO staff across both sites much closer together.

2.52. For Liverpool staff at grades EO already above the new minimum, there was a 3.06% consolidated payment plus a further 4.59% payment (representing 1.5 years) a total of 7.65%, to buy out contractual pay progression rights. For Darlington staff, where there was nothing to buy out so the offer was different.(a) AO grade staff moved onto the same spot rate as Liverpool (b) EO and HEO grades were moved to the new minimum for their salary scales if not there already. They would receive a top-up payment of 2.5% to the extent their move to the new minimum had not provided that level of salary increase. This way all Darlington staff would receive a 2.5% minimum increase which should have some impact on the salary discrepancies at these grades between Darlington and Liverpool.

2.53. On 24 September 2014 Mr Graham Ford e-mailed an Equal Pay Analysis of the DBS offer to PCS as it was a pre-requisite for PCS agreement. A table headed "Cross site" showed pre harmonisation pay differences at EO and HEO grades of about 10% if a Liverpool woman is compared to a Darlington man or a Darlington man to a Liverpool woman . The pay offer would go some way to reducing the pay differences across the two sites. The bottom table on page 573 shows, the **average** differences were reduced to 6.6%/-6.3% for EOs, and 8.4%/-7.59% for HEOs.

2.54. Mr Lawrence Dunne, on behalf of PCS, expressed himself as being satisfied with this position. As he noted, the DBS offer had reduced the gap considerably and this could be further improved over following years. After notices ,presentations to staff and a recommendation in favour from the PCS , DBS staff voted overwhelmingly to accept the offer The final version of the business case (Version 25) was provided to HMT on 24 October 2014.

2.55. So, with effect from 1 July 2014 the pay **structure** under which the claimants and their comparators were paid was harmonised. From then all employees were

placed onto civil service grades with a minimum and maximum. The EO pay band was £22,770 to £26,451 and the HEO band £27,150 to £32,269. The minimum entitlement at each grade increased. Employees moved into the pay band at the rate they were currently on plus the 2014 pay increase so harmonisation narrowed pay differentials between the two sites. **The provision or practice (PCP) , and material factor relied upon by DBS, is the whole package of measures adopted at that time. From then, the PCP was to make annual pay awards based on the starting point achieved in 2014, which itself was based on "legacy" arrangements albeit varied to enable sensible pay negotiation every year going forward for staff across the DBS**..

2.56. By the time negotiations started on the pay settlement for 2015, updated guidance on Civil Service Pay had been issued. Any pay increases would continue to be limited by the 1% pay policy. Discussions proceeded with PCS, and a new business case was completed. The SMT decided the fairest distribution of the limited funds available would by making flat rate payments to all staff. **This inevitably narrows differences because £X to everyone by grade means those lower in grade do better than if X% were awarded.** The AOs spot rate would simply be increased. EOs would be offered £300 and HEOs £335 at Liverpool and Darlington, and increased minima of grades by 1.5% and maxima by 1%, shortening the grades. The offer was confirmed by email dated 31 July 2015, which included *"Shortening of the pay ranges and increasing them... This supports our commitment last year to try and shorten the pay ranges when we could within the constraints of the 1%".* This was specifically to address the gap between Darlington and Liverpool.

2.57. By now PCS was in dispute with the Government over the 1% pay policy so, on a point of principle, rejected all terms offered. There was nothing DBS could do to amend its offer and so the terms put forward stood as the 2015 pay settlement, backdated to June 2015.PCS requested an Equal Pay Audit in respect of this offer. Taking DBS as a whole, there was a minimal difference in pay between males and females – 0.26/-0.26 for EOs and 1.16/-1.17% for HEOs. The HEO figures across the two sites showed a difference of 7.5%/-7.4%, with the staff in Darlington being paid less than staff in Liverpool. A significant number of new staff were recruited in Darlington at HEO grade, many of whom were female and started on the grade minimum salary. This pulled down the average HEO salary in Darlington. DBS thought HO would not support fixed amount increases but approval was sought and received from HO for £240 consolidated for EOs; £300 consolidated for HEOs;0.8% increase to minimum and maximum of EO grade and 1% and 0.8% increases to minimum and maximum of HEO grade.

2.58. Civil Service Pay Guidance for 2016/2017 confirmed the limit of 1% on increase in staff costs remained in place. Negotiations were opened with PCS who now said they wanted differentials between Liverpool and Darlington addressed. Mr Dunne's letter of 19 May 2016 does not suggest PCS believes there is a gender **equal** pay problem to be addressed. PCS were taking a different stance , as between sites, to the one they had taken in 2014 A business case was prepared based once again on flat rate increases benefitting staff on the minimum for their pay scales . There were more staff in Darlington in this position so it would be of some effect in reducing the differences between their pay and staff in Liverpool.

2.59. When PCS briefed its members on the pay offer it highlighted the comparison between the salaries of HEOs in Darlington and Liverpool and referred to the latest Equal Pay data, noting across the organisation there was no significant pay difference between men and women . It further observed there were such differences if the comparison was made across sites, attributing to DBS the explanation this was the result of the legacy pay, but not disagreeing with that explanation. It acknowledged that, although the 2014 agreement had not closed the gap between the two sites, it had "*narrowed*" it.

2.60. In responding to the pay offer on 23 November 2016, PCS referred to the "*deep feeling of resentment and anger felt by members in Darlington regarding* ***the lack of funding being made available*** *to close the significant pay gaps (as much as 7.5%) which exist between them and their Liverpool equivalents*". Although PCS urged DBS to take steps to "*close the gap*" and said it would be considering whether there had been any breach of legal obligations, it nonetheless did not suggest this was a gender based equal pay issue.

2.61. This was discussed by the R&N Committee on 24 November 2016 who concluded that, although on average Darlington HEOs received £2,000 less than Liverpool HEOs, it was a legacy issue not discrimination.

2.62. This is a good point at which to deal with Mr Hughes evidence. He joined the CRB in Liverpool in 2007 and transferred to DBS in 2012. At that point he worked in its Information Directorate and later transferred to its Human Resources (HR) department in September 2015. He has knowledge of the salary differences across the two DBS sites from preparing Equal Pay Audits over a number of years but was not involved in the steps taken by the SMT to harmonise pay structures, negotiate the buy-out of contractual pay progression, or determine pay offers on a yearly basis.That we deal comparatively shortly with his evidence does not reflect adversely on him, rather acknowledges his honesty in volunteering the limitations of statistics.

2.63. The first DBS Equal Pay Audit was prepared by his predecessor but he prepared all following that. He explains how they are carried out, and some of the complicating factors faced by DBS. Prior to 2017, when legislative changes were introduced, DBS Equal Pay Audits were based on the **mean salary** for men and women both across the whole organisation and then in respect of each of the two sites. Mean salary is the sum of basic consolidated salary of all employees' pay divided by the number of employees. These figures can then be used to identify the "pay gap" by subtracting mean male pay from mean female pay, dividing by mean male pay and multiplying by 100 to obtain a percentage figure. Where women are paid less than men this produces a negative figure; where they are paid more it produces a positive figure. His 2016 Equal Pay Audit (pages 1002-1016) contains a section headed "Methodology" giving further details of this process. In a nutshell when he says a gap is "**6/-5,"** it means, on average, Liverpool women are paid 6% more than Darlington men and Liverpool men 5% more than Darlington women.

2.64. Mr Hughes accepts this is a fairly crude method of analysis. The figures it produces can be compared across sites to reveal percentage differences which show a significant pay difference between genders. However, there are significant differences between the two sites (i) a different balance of staff in different grades (ii)

a considerable difference in where staff stood in their pay scales, many in Darlington on, or near, the minimum for their grade while staff in Liverpool were more widely spread across their pay scales. The most likely reason for point (ii) is since 2010 in Darlington, Government limited pay increases would result in little movement up a salary scale while Liverpool staff were guaranteed a move of 3 points up their salary scale each year, so however minimally the value of the entire band might increase, CRB staff were progressing up that band more rapidly on an annual basis.

2.65. Another way of going up a band is by length of service or service in grade. The HO and DBS use an IT system known as Adelphi, which records the start date of an individual's career and where they stand currently in terms of grade and salary. CRB staff at Liverpool were recorded on this system since it was first introduced in April 2010, but ISA staff were not until their transfer to DBS in 2012, so it difficult to know length of service in grade of staff in Darlington who worked there prior to the formation of DBS some of whom may also have a prior Civil Service career. Where, as here, length of service has any impact on where they are on their salary scale this may "skew " the results of an audit . The 2014 audit was based on staff numbers and salaries as at 7 April 2014. The overall DBS staff were 57% female and 43% male but figures for each location, varied considerably: EOs in Liverpool were 59%/41% female/male but in Darlington they were 80%/20% female/male; HEOs in Liverpool were 46%/54% female/male but in Darlington they were 62%/38% female/male.The Audit did compare males and females across the two sites showing a pay gap 11%/-8.7% at EO 10.9%/-9.6% at HEO These figures are higher than the Equality & Human Rights Commission (EHRC) guideline of a maximum of 5%. However, the audit notes the explanation can be found in the legacy arrangements.

2.66. Prior to the next Equal Pay Audit being produced in its final form two tables on page 691d show the pay gaps across the sites in September 2014 were 6.6%/-6.3% at EO and 8.4%/-7.6% at HEO. a narrowing of the gap from April 2014.

2.67. The next Audit, entitled "Equal Pay Audit 2016" was based on information as at November 2015. Mr Hughes prepared this with a slightly more detailed approach but the same basic methodology . Pay increases as of 1 June 2015 had not been on a percentage basis, AOs were on a spot rate and all other grades had received a flat-rate pay increase. The gender balance was now 59%/41% female/male across DBS . Looking at each site in Liverpool EOs were 105/67 (60.6%/39.4%) female/male and HEOs 39/35 (52.7%/47.3%) female/male and in Darlington EOs were 32/7 (82%/18%) female/male and HEOs 81/43 (65.3%/34.7%) female/male. Mr Hughes calculated the pay gaps at each grade across DBS finding these were very small: 0.26%/-0.26% at EO and 1.16/-1.17 at HEO, well within EHRC guidelines. As the ongoing concern was the pay differences between the sites, he made the same calculations as in the previous audit. These showed 6%/-5.55% at EO, and 7.5%/-7.4% at HEO. Although still above the 5% threshold, these figures were lower than for April 2014, and slightly lower than for September 2014.

2.68. In response to a Freedom of Information (FOI) Act request by one of the claimants in 2016 , the figures provided for the pay gap in 2015 were those set out above as based on ***mean*** salaries However, the FOI request also sought a breakdown based on ***median*** salaries, which produced comparative figures across the two sites of 5.82%/-5.5 and 6.8%/-6.37 for the pay gap at EO and HEO respectively. Median figures are obtained by analysing the range of salaries and

using the figure which falls exactly in the middle of that range. This is a recognised way of obtaining an "average figure" but produces a different result to a mean figure. Both median and mean can be seen at page 861.

2.69. In each Equal Pay Audit prior to 2017 (when legislative requirements changed) DBS had used mean not median figures. In their claim form the claimants cite ***median*** figures as being those provided by the 2015 Equal Pay Audit. This is not correct as the audit figures were ***mean*** figures. Based on this, the claimants argue the figures for the 2016 Audit show a widening of the pay gap. The argument is fundamentally flawed because it fails to compare like with like. The EO grade figures were in any event lower in 2016, but the HEO figures of 6.65%/-6.19% higher **by the claimant's reasoning.** The ***mean*** figures, used in both the audits reveal a narrowing of the pay gap, not a widening.

2.70. The next audit, entitled "Equal Pay Audit **& Gender Pay Gap** Report 2016" is based on information as at October 2016. The approach is the same as previously, but the audit is broader because it also analyses pay gaps based on other protected characteristics as well as gender. The figures show the overall gender balance within DBS was now 61%/39% female/male. The overall gender pay gap was -3.93%. Looking at the two sites, in Liverpool EOs were 105/68 (61%/39%) female/male and HEOs 35/36 (49%/51%) female/male and in Darlington EOs remained as 31/7 (82%/18%) female/male and HEOs 101/54 (65%/35%) female/male. The pay gaps across DBS were very small (-0.63% and -0.8% for EO and HEO respectively). Mr Hughes analysed gender pay gaps at each site, in Liverpool 0.14% and 0.28% for EO and HEO; and in Darlington 0.81% and 0.33% for EO and HEO respectively.

2.71. He then carried out the same comparison across the two sites as previously. This showed a pay gap of 5.32%/-4.41% at EO grade, and 6.65%/-6.19% at HEO grade, a reduction on the previous years' figures, and moving closer to the 5% maximum target figure.

2.72. Mr Hughes freely accepts male and female staff in Liverpool were on average paid more than male and female staff in Darlington. Given the virtual parity in pay between the genders at each site, he argues, and we accept, the only logical explanation is the on-going impact of the legacy arrangements. DBS had now been in existence for 4 years and gradual narrowing of the gaps across sites suggests the steps taken by SMT from 2014 onwards were having the desired effect, albeit slowly.

2.73. Legislation in 2017 altered equal pay audit and reporting. For example, whereas previously Mr Hughes based calculations on the basic consolidated salary figures, various other elements of pay had to be taken into account (meaning an hourly rate is used instead). Departments must produce details of both mean and median pay gaps and proportions of male/female employees in each pay quartile. For this reason, the Gender Pay Gap Report 2017 has a different format and contains different statistics to previously. The different methods of calculation produce different results, meaning care should be taken if trying to compare the information in the 2017 report to that from previous years. With those caveats: (i) mean and median gender pay gaps in DBS (based on average hourly pay) were 5.5% and 4.5% respectively (ii) at EO and HEO grades DBS has a 0% and a 0.8% gender pay gap.

2.74. As there were no comparisons across the two sites in this report , Mr Hughes

analysed DBS pay data for EOs and HEOs as at October 2017 using the same methodology as in the 2015 and 2016 Equal Pay Audits to identify the pay gap between the two sites It showed the gap had reduced to 3.24%/-4.24% at EO grade, and 5.26%/-5.31% at HEO grade. As at October 2017, the pay gap for EOs was less than the 5% maximum target figure, and for HEOs had narrowed to very near 5%.

2.75. On 14 February 2017, against the background of staff grievances Mr Hughes produced a summary of the gender pay gap between the Liverpool and Darlington sites based **only** on staff working in operational roles thus excluding management and administrative support staff. Most management staff are in Liverpool. Most operational staff, especially HEO's, are in Darlington . Mr Hughes tried as best he could to obtain information, to include length of service (when an employee joined the Civil Service rather than DBS) and service in other grades. The results, attached to his e-mail of 14 February, show, if the pay of males and females is considered at each site, the differences are minimal (0.02% in Darlington and 1.6% in Liverpool). However, the gaps across sites are 8.3%/6.68%. Mr Hughes statement says *"this exercise shows how vulnerable the statistics are to distortion depending on the range of information used.* We accept an individual woman "operational" HEO in Darlington may be able to identify a man in Liverpool of similar length of service to herself paid considerably more her. Averages show a "direction of travel" of a cross site gap diminishing. In his submissions Mr Chaytor says this important evidence shows pay gaps between operational staff are worse than the equal pay audits suggest. This may be ,but it does not follow that shows indirect sex discrimination .

2.76. Mr Hughes produced a precis of the 2016 Audit to the SMT on 21 March 2017 One key finding, was the overall DBS gender pay gap was between 3% and 5%. Under EHRC guidelines this situation should be "*regularly monitored*" – although the actual figure (3.93%) was close to the 3% threshold for "*no action necessary*".

2.77. Mr Stubbs in his submissions took us through the Audits in a way largely recorded in his thorough written submissions. We accept women in Darlington and in Liverpool at EO and HEO earn more than men at the same site on average. Averaged figures show steady decline in the "cross site" gender pay gap year on year, since harmonisation. We accept there is strong statistical evidence any pay gap is due to legacy pay arrangements not indicative of disparate impact on either gender when the pool for comparison is , as it should be for reasons we will explain later, both sites together. However, the evidence of Mr Hughes , as he candidly accepts, shows the limitations of statistical evidence.

2.78. The 2017 Pay Award was constrained by the 1% pay policy and that pay awards should be applied in a "targeted manner". The SMT remained very aware of the need to try to close the site gap .While the grievances were being considered, Naomi Robson held discussions with the HO about the possibility of making a business case for **truly extra funding** to address the problem. Her e-mailed report on 27 April said (i) regardless of whether it had sufficient funds, DBS would need to demonstrate a business imperative to HMT before being permitted to release such funds (ii) any such business case could not be free-standing but must be made within the context of the annual pay award; (iii) targeting specific groups and/or freezing some pay ranges were options, but that would result in some staff receiving no pay award. and impact on industrial relations. In May 2017 the HEO staff at Darlington

told Mr Whiting during the grievance they did not wish to see the 1% overall fund used in this way since they did not want others disadvantaged.

2.79. On 23 May 2017 Farha Bhatt, Group Head of Reward for Home Office Corporate & Specialist HR, emphasised the unlikelihood of HMT approving a pay flexibility business case in the circumstances. It would expect DBS to "*tidy up pay structures* " using only the 1% funding pot .Our Employment Judge asked Ms Downey where she would find the money to pay if DBS lost this case. She said she would have to find the money from other sources at the expense of delivering some aspect of DBS's work. The email from Ms Bhatt shows even under threat of an equal pay claim , which the claimants were by now openly contemplating, the HO would offer no way out of the 1% pay cap to help DBS and its Darlington staff. The options available were put forward in the R&N Committee in a brief dated 5 June 2017. The recommended way forward was to adopt a targeted approach along with seeking to narrow further the DBS pay ranges. On 7 August Mr Whiting told PCS DBS was unable to put forward a business case to HMT as had been hoped

2.80. On 12 September 2017 Ms Robson submitted the proposed pay award for approval .The main elements were an increase in all minima of salary scales by 1%, the freezing of all maxima, and flat rate payments to staff of different amounts depending on their grades. This was affordable within the 1% pay policy and would be a further step towards the long-term aim of removing the pay differences between Darlington and Liverpool. Ministerial approval was given, and the pay award implemented with effect from 1 July 2017, being paid with the November 2017 salary payments **.** On principle, PCS rejected the offer.

2.81. On 1 December 2016 a collective grievance had been lodged, bearing 66 signatures of men and women at HEO grade in Darlington related to the "*significant pay gap that exists between Darlington and Liverpool staff at the HEO grade…*"; it accepted this was "*partly due*" to the terms and conditions prior to the formation of DBS; and said that, combined with the public sector pay constraints, had left Darlington HEOs lower down the pay scale than Liverpool HEOs. Although it referred to Equal Pay Audit figures, the grievance did not clearly argue there was a gender-based difference but expressed disappointment DBS had not addressed the situation more quickly. On 13th December 2016 an identical grievance was received from 24 Darlington EOs, men and women

2.82. We agree with Ms Downey going through the handling of these grievances, despite there being many pages of documents in the Bundle, is irrelevant to the matters to be determined in this hearing. We accept the grievances were taken seriously, meetings were held with representatives of both groups, the points raised considered and responses duly issued, by Paul Whiting, Deputy Chief Executive and Chief Financial Officer (who took over following the departure from DBS of Peter Waller-Flynn). Ms Downey was kept informed but played no part since, as Chief Executive, she would consider any appeals. There were no appeals since some of the claimants instead commenced these Employment Tribunal proceedings.

2.83. Mr Whiting's decision set out the legacy terms and the steps taken in 2014 to achieve harmonisation. Although sympathetic to the Darlington staff, he concluded there existed no basis for an equal pay claim based on gender differences. He explained the SMT was doing what it could to resolve the situation, hampered by the

pay restraints in place for the whole Civil Service. With only 1% of the DBS salary bill to work with there was little scope for resolving the situation in the near future, especially given PCS would doubtless block the one possible option, namely the entire 1% be given only to Darlington staff for a number of years.

3 The Relevant Law, Submissions and Interim Conclusions

The Law relating to striking out, deposits and procedure generally

3.1. Before we embark on the complexities of the law relating to equal pay, Rule 37 of the Employment Tribunal Rules of Procedure 2013 (the Rules) includes :
At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim .. on any of the following grounds—
(a) that it … has no reasonable prospect of success;

3.2. The standard **no** reasonable prospect of success is high . As Lady Smith said in Balls v Downham Market High School and College [2011] IRLR 217 :
"to state the obvious, if a Claimant's claim is struck out, that is an end of it. He cannot take it any further forward. From an employee Claimant's perspective, his employer 'won' without there ever having been a hearing on the merits of his claim. The chances of him being left with a distinct feeling of dissatisfaction must be high. If his claim had proceeded to a hearing on the merits, it might have been shown to be well founded and he may feel, whatever the circumstances, he has been deprived of a fair chance to achieve that. It is for such reasons that 'strike-out' is often referred to as a draconian power. It is. There are of course, cases where fairness as between parties and the proper regulation of access to Employment Tribunals justify the use of this important weapon in an Employment Judge's available armoury but its application must be very carefully considered and the facts of the particular case properly analysed and understood before any decision is reached."

3.3. At paragraph 6, Lady Smith said of the 'no reasonable prospect of success' test:
*"I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short a high test. There must be no reasonable prospects***."**

3.4. In Ezsias v North Glamorgan NHS Trust [2007] ICR 1126 Maurice Kay LJ said
"It would only be in an exceptional case that an application to an Employment Tribunal would be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts are thought to be established by the Claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. "

3.5. Rule 39 includes
(*1) Where at a preliminary hearing .. the Tribunal considers any specific allegation or argument in a claim or response has little reasonable prospect of success, it may*

make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
Wilkie J. in Sharma-v-New College Nottingham UKEAT/0287/11 said even the little reasonable prospect test should rarely be satisfied where there is a factual dispute and in Hemdan v Ishmail [2017] IRLR 228, Simler P said a deposit order should not be used to "*impair access to justice*".

3.6. Rule 2 of the Rules sets out the overriding objective is to deal with cases fairly and justly which includes ensuring the parties are on an equal footing and , in so far as practicable, dealing with a case in ways proportionate to the complexity or importance of the issues , avoiding expense, formality and delay , so far as compatible with proper consideration of the issues.

3.7. In this case the central facts are not in dispute. The documents show what happened and why. The differences between the parties are almost entirely points of law on which Mr Stubbs knowledge and experience compared to Mr Chaytor's means the parties are not on an equal footing so we must take steps to " level the playing field " .

The Law relating to Equal Pay

3.8. Section 66 of the EqA includes
(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.

*(2) A **sex** equality clause is a provision that has the following effect—*

(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;

(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.

3.9. Section 79 includes
(2) If A is employed, B is a comparator if subsection (3) or (4) applies.

(3) This subsection applies if—

(a) B is employed by A's employer or by an associate of A's employer, and

(b) A and B work at the same establishment.

(4) This subsection applies if—

(a) B is employed by A's employer or an associate of A's employer,

(b) B works at an establishment other than the one at which A works, and

(c) common terms apply at the establishments (either generally or as between A and B).

3.10. Section 69 sets out the Defence of Material Factor (DMF)

*(1) The sex equality clause in A's terms **has no effect in relation to a difference between A's terms and B's terms** if the responsible person shows the difference is because of a material factor reliance on which—*

(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and

(b) ***if*** *the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.*

(2) A factor is within this subsection if A shows that, ***as a result of the factor****,* ***A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.***

(3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.

(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.

3.11. Section 19 defines indirect discrimination (relevant protected characteristics include sex)
(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

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

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

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

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

3.12 . Lord Nicholls' speech in Glasgow City Council v Marshall [2000] ICR 196, at 202 - 203 remains the leading authority on the DMF:
"… a rebuttable presumption of sex discrimination arises once ***the gender-based comparison shows*** *that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not* ***tainted with sex****. In order to discharge this burden the employer must satisfy the tribunal on several matters. First, that the proffered explanation, or reason, is genuine and not a sham or pretence. Second, that the less favourable treatment is due to this reason. The factor relied upon must be the cause of the disparity. In this regard, and in this sense, the factor must be a "material" factor, that is, a significant and relevant factor. Third, that the reason is not "the difference of sex." The phrase is apt to embrace any form of sex discrimination, whether direct or indirect. Fourth, that the factor relied upon is or, in a case within section 1(2)(c), may be a "material" difference, that is, a significant and relevant difference, between the woman's case and the man's case.*

... it is apparent that an employer who satisfies the third of these requirements is under no obligation to prove a "good" reason for the pay disparity. In order to fulfil the third requirement he must prove the absence of sex discrimination, direct or indirect. If there is ***any evidence of sex discrimination, such as evidence that the difference in pay has a disparately adverse impact on women****, the employer will be called upon to satisfy the tribunal that the difference in pay is objectively justifiable. But if the employer proves the absence of sex discrimination he is not obliged to justify the pay disparity."*

3.13. There is no dispute in relation to the first two parts of the test in Marshall The material factor is the legacy terms and conditions at the two former constituent employers whose staff transferred to DBS which in turn shaped the 2014 pay deal . This is the genuine reason and the pay differential is definitely due to it. The claimants advanced no evidence to suggest otherwise and appeared to accept this.

3.14. The respondent says it is an absolute answer to all the claims the material factor is **not** directly or indirectly ***tainted with sex***. The claimant accepts there is no direct discrimination but avers there is indirect. The pithiest explanation of the latter is by Mummery L.J. in a disability case of Stockton Borough Council-v-Aylott

27. In the case of indirect discrimination the aim is to secure equal treatment results for members of a group to which that individual belongs. The essential inquiry is into whether the members ***of that group****, who appear not to have been discriminated against on the ground of disability, have not in fact had equal treatment protection on the basis of the prohibited ground* ***as a result of the disproportionate adverse impact of a neutrally worded provision, criterion or practice****.*

The group in this case is **women (or men)** in the employ of DBS, **not** only such women or men in Darlington.

3.15. We, and Mr Stubbs, agree with Mr Chaytor it is no longer open to DBS to avoid any finding of particular disadvantage by demonstrating the underlying reason for any disparate impact is not related to sex. Lady Hale in the conjoined appeals of Essop v Home Office and Naeem-v- Secretary of State for Justice [2017] 1 WLR 1343 stated "*Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment… but aims to achieve a level playing field where people sharing a particular protected characteristic are not subject to requirements which many of them cannot meet but which cannot be shown to be justified."* and "… *there is no requirement in the EA 2010 or the predecessor legislation that the claimant show* ***why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does*****"**

3.16. The claimants say the defence that because all EOs and HEOs, be they men or women, in Darlington are disadvantaged there is no gender discrimination despite the respondents figures that 82% of EOs and 65% of HEOs in Darlington are female must fail in light of McNeil-v- HM Revenue & Customs UKEAT/0183/17 where Simler P held "*to the extent the line of authority based on Armstrong v Newcastle upon*

Tyne NHS Hospital Trust [2006] IRLR 124, has been understood as holding that it is open to a respondent to ***rebut a finding made of particular disadvantage by showing the underlying reason for the particular disadvantage was not itself related to the protected characteristic,*** *it is inconsistent with the ratio of Essop/Naeem and can no longer be regarded as good law*" and "*no further connection would have had to be shown* ***if it was established*** *[length of service] as a determinant of pay caused women* ***disproportionately*** *to be paid less than their male comparators and caused each claimant that disadvantage*".

3.17. The claimants refer to Article 4 of the Equal Treatment Directive (the Directive) '*For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated'* Article 2(1) (b) provides indirect discrimination occurs '*where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary*'. Mr Chaytor also cites the EHRC Code of Practice on Equal Pay (the Code), (using incorrect paragraph numbers we have corrected) and says the determinant of pay which causes women in Darlington to paid less than men in Liverpool was the differing terms and conditions on which staff from the CRB and ISA entered the DBS and **the PCP was to continue to pay less to Darlington staff albeit aiming gradually to reduce the differential** . This causes women in Darlington disproportionally to be paid less than men in Liverpool due to the gender mix of the grades in Darlington (82% female at EO, 65% female at HEO). Paragraph 80 of the Code states: *To be a valid defence, the material factor must not be directly discriminatory and if it is indirectly discriminatory, the difference in terms must be justified*. Paragraph 84 states: *Indirect discrimination arises where a pay system, policy or arrangement has a disproportionate adverse impact on women compared to their male comparators. If the employer cannot objectively justify it, the defence will not be made out*".

3.18. Mr Chaytor says **women in Darlington** would **by pure weight of numbers** be disproportionately adversely affected by any gap in the pay of people doing work of equal value in Darlington and Liverpool. He also says in the example of HEO grade, the disadvantaged group is predominantly women (65%) and the advantaged group predominantly men (51%). Para 86 of the Code states in such a case it will be difficult for the employer to prove the absence of indirect sex discrimination.

3.19. Mr Chaytor has done well to research the law as he has, but we must point out he is , in important respects, wrong .What is now Article 157 of the Treaty on the Functioning of the European Union (TFEU) extends to 'indirect' as well as 'direct' pay discrimination, Bilka-Kaufhaus GmbH v Weber von Hartz 1987 ICR 110, The two types of indirect discrimination which can occur in the context of an equal pay claim are indirect discrimination arising from the application of a provision, criterion or practice ('"PCP") and, the broader concept of indirect discrimination arising from Enderby v Frenchay Health Authority and anor 1994 ICR 112, which held compelling statistics can demonstrate **women as a general group** are being adversely affected with regard to pay when compared with men. That is not the case here. If the claimants alleged it , it would , on the facts, be a hopeless argument.

3.20. In the EqA. there are two similar, but not identical, definitions of indirect discrimination, section 19 in areas other than equal pay, where there must be a PCP applied by the employer and s69 for equal pay cases where there is no express need for the employer to have applied PCP . But a material factor may well amount to an ostensibly gender-neutral PCP applied equally to all relevant employees but which disadvantages women **when compared with men** with regard to pay. **Where this is so,** there will be a " taint" of sex discrimination, requiring the employer to objectively justify the pay disparity Jenkins v Kingsgate (Clothing Productions) Ltd 1981 ICR 715, EAT. In order to establish sex taint by the 'PCP route', the Tribunal must have some basis for finding the material factor adversely affects one sex more than the other or, to use the statutory language, puts one gender at a particular disadvantage **in the group to which it is applied** .

3.21. To make such a finding, it is not enough simply to identify a number of disadvantaged women, or men. In Essop/ Naeem,Lady Hale said
"[indirect discrimination] ***requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual...***
it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence... Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But ***a correlation is not the same as a causal link****.*
... ***In order to succeed in an indirect discrimination claim, it is not necessary to establish the reason for the particular disadvantage to which the group is put. The essential element is a causal connection between the PCP and the disadvantage suffered****..."*

3.22. Mr Chaytor appeared to think Essop and McNeil had swept away the need to find even indirect discrimination as a pre-requisite to requiring the respondent to show objective justification. Reading the last emboldened sentences in isolation we can see why he may think that, but he is wrong. The PCP must disadvantage women **in a group as compared to men** (or vice versa) **and** the women bringing the claim.

3.23. How a tribunal should determine disparate adverse impact is not straightforward. PCP cases entail a comparative exercise, i.e. whether women are put at a particular disadvantage when compared with men(or vice versa), so it will usually be necessary for the tribunal to identify the appropriate "group", commonly called "pool", of people in respect of whom the comparison can be made. Lord Justice Sedley said in Grundy v British Airways plc 2008 IRLR 74, "A comparison '*needs to include, but not be limited to, those affected by the PCP of which complaint is made, which can be expected to include both people who can and people who cannot comply with it*'. In Allonby v Accrington and Rossendale College 2001 ICR 1189, Sedley LJ said identification of the pool is '*a matter neither of discretion nor of fact-finding but of logic*" but logic may on occasion be capable of producing more than one outcome. But **once the relevant PCP has been defined,** '*there is likely to be only one pool which serves to test its effect'*. Allonby does not mean there can never be more than one appropriate pool. In Grundy Sedley LJ observed: '*The correct principle, in my judgment, is that the pool must be one which suitably tests the particular discrimination complained of: but this is not the same thing as the proposition that there is a single suitable pool for every case. In fact, one of the*

striking things about both the race and sex discrimination legislation is that, contrary to early expectations, three decades of litigation have failed to produce any universal formula for locating the correct pool, driving tribunals and courts alike to the conclusion that there is none.'

3.24. In Naeem the reason for the difference in pay was known , length of service. There was a dispute over what the appropriate pool was to test whether indirect discrimination was present. Lady Hale stated (at [40] – [41]:
"the pool chosen should be that which suitably tests the particular discrimination complained of…

…

In other words, ***all the workers affected by the PCP in question should be considered****. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact on the group without it…*
There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison."

In R (Unison) v Lord Chancellor [2017] UKSC Her Ladyship said of the two tier fees formerly charged for bringing and continuing to trial claims in Employment Tribunals where the higher fees, Type B , included discrimination claims :
"the PCP in question should be the higher fees for all Type B claims, not just for discrimination claims. ***Section 19(2)(a) provides that the PCP must apply to everyone, whether or not they share a particular protected characteristic, so in this case to everyone who brings a Type B claim. Section 19(2)(b) then requires that the PCP puts a sub-group of those people, who have a particular protected characteristic, at a particular disadvantage when compared with others who do not share that characteristic. It is at this point, rather than the earlier point, that a sub group is carved out.*** *Even if, for the sake of argument, we concentrate on the sub group of women who bring discrimination claims, it is difficult to see how they are put at any greater disadvantage by the higher fees than are all the other Type B claimants. They are all in the same boat, the women who bring discrimination claims and the men who bring unfair dismissal claims."*

3.25. Mr Chaytor's error is understandable if , as we at first were instinctively tempted to do, one identifies the PCP as **paying those in Darlington less than those in Liverpool**. That leads to a pool comprising only those in Darlington, who are mainly women. However, Mr Stubbs correctly says the PCP, and material factor, is on any reasonable analysis the respondent's remuneration policies, as applied to all staff at both sites, created first in 2014 and used thereafter as the starting point for each annual pay negotiation. A pool only of those employed in Darlington, does not test the protected characteristic of sex, but the unprotected characteristics of geographical location and previous employer . There is no suggestion there was any sex discrimination in pay at CRB or ISA prior to the creation of DBS and the transfer of employees into it. Indeed, women and men at the two sites are accepted to earn broadly the same. The correct group is that to which DBS remuneration policy is applied, this is staff at both sites at EO and HEO grade.

3.26. A hypothetical example may help explain the problem. Imagine an employer has an equal number of people in Job A (predominantly male) Job B (predominantly male) Job C (predominantly female) and Job D (predominantly female) all of which are of equal value but Jobs A and C receive a productivity bonus whereas Jobs B and D do not. A woman in Job D brings an equal pay claim, pointing to a man in Job A as her comparator. In attempting to show the pay differential is tainted by sex, she invites the tribunal to compare the gender make-up of her Job D group and the Job A comparator group, and conclude, statistically, women are placed at a disadvantage by the employer's pay practice. This comparison would not paint a true picture. The appropriate pool should comprise all four groups, two of which (one mostly male, one mostly female) receive the bonus and two of which (one mostly male, one mostly female) do not. On this analysis, no sex taint would be revealed. The discriminatory impact of a PCP is only ascertained by analysing a pool comprising all those to whom it applies. Mr Chaytor's approach fails to take account of the **women in Liverpool** , **and maybe some at other grades in Darlington**, who faired better from the new pay regime and should be " offset" against those who faired worse.

3.27. In support of his case Mr Stubbs cites Navy, Army and Air Force Institutes v Varley [1977] ICR 11, Ms Varley worked for the NAAFI at Nottingham, where she was employed on the same terms as the men there. They all worked a 37 hour week. NAAFI workers in London (both men and women) worked only a 36 ½ hour week. Ms Varley sought a reduction in her hours of work to 36 ½ based on comparison with men employed in London. The EAT noted the claim was one which, if successful, could also have been brought by men at Nottingham relying on women in London and there was no discrimination as between men and women based in Nottingham or men and women in London. The EAT held:

"... For historical reasons which it is unnecessary to go into, there is a geographical distinction between the conditions operated by NAAFI in respect of their employees in London and those outside London. That is by no means a unique situation; it is common to the Civil Service and to all sorts of other employment. Again, we would wish to stress that it has nothing whatever to do with us whether it is a good or a bad thing, whether it should be continued or discontinued. In other words, ***the variation between her contract and a man's contract is due really to the fact that she works in Nottingham and he works in London. It seems to us it is quite plain that is the difference between her case and his case, namely, she works in Nottingham where this old custom operates and he works in London where the custom of a shorter working week operates****...*

... [the MF defence] is not to be used to deprive claimants of the benefit of the equality clause to which prima facie they are entitled, ***except in the clearest possible case where it is established that the difference is not one of sex****, but is a genuine and a material or real difference between her case and his. It seems to us to be entirely clear on the facts that in this case it is.*

3.28. Mr Stubbs says this case is a good parallel, and we agree. There, as here, the difference in outcome is fully explained by the difference in site. Gender does not, even indirectly, come into it. To introduce a cross site subdivision corrupts the valid comparison for indirect discrimination purposes because it does not test sex discrimination, but unfairness due to previous different employers at different sites, which is not a protected characteristic. That is why the Equal Pay Audits refer to

there being an explanation for the differential and why it was not considered to be an equal pay issue. The respondent has taken steps to reduce the cross site differential in any event. Those measures are objectively justifiable if such was needed but Mr Stubbs says, as there is no causal link between gender and particular disadvantage, this case should not get that far.

3.29. **Our first interim conclusion is the claimants have no reasonable prospect of showing the right pool to be used should comprise only people employed at Darlington .** Once an appropriate pool has been identified, it is necessary for the tribunal to determine whether the statistics **are enough** to disclose a taint of indirect sex discrimination. In Homer v Chief Constable of West Yorkshire Police [2012] ICR 704, Lady Hale said what was required was *"a particular disadvantage when compared with other people who do not share the characteristic in question".* In McNeil Simler P stated at [24] – [28]:

*"… **a causal connection must be established between the factor (or PCP) and the disadvantage suffered by the group and individual…***

*I do not understand it to be contentious that where statistics are relied on to demonstrate particular disadvantage**, a mere difference in the statistical outcome for men and women is not sufficient: the disparate effect must be "to such a degree as to amount to indirect discrimination"**... Different adjectives have been used by the courts to describe the extent of the difference that must be shown. For example... " a substantial and not merely marginal discriminatory effect (disparate impact) as between men and women, so that it can be clearly demonstrated that a prima facie case of (indirect) discrimination exists."*

...

Although not binding, guidance in the Equality and Human Rights Commission 'Equal Pay Audit Toolkit' classifies as "significant" any pay gap of 5% or more...

Finally ... it is for the Employment Tribunal as the tribunal of fact, to make the relevant assessment as to whether the statistics relied upon and any other evidence or inferences that arise from the evidence, demonstrate particular disadvantage...

3.30. Once the pool is established, three questions arise (a) are tribunals obliged to focus only on the make-up of the 'advantaged' group of individuals, as some case law has suggested, or is the make-up of the 'disadvantaged' group also relevant, (b) whether the statistics should only be analysed by reference to **the proportions** of men and women who are advantaged (or disadvantaged), or whether the **numbers** of women and men in the pool might also be relevant; and (c) how great a disparity is required in order for sex taint to be established.

3.31. In Secretary of State for Trade and Industry v Rutherford (No.2) 2006 ICR 785,) the employment tribunal, in deciding a material factor was tainted by indirect discrimination, focused only on the 'disadvantaged' group. The Court of Appeal rejected the claimants' argument the primary focus should be on the disadvantaged rather than on the advantaged group. It explained concentration on the disadvantaged group can lead to seriously misleading results, especially in cases where most people in the pool are advantaged. In the House of Lords, Lord Walker acknowledged, it was not possible to extract '*a single easily stated principle'* from the speeches of his four colleagues by which employment tribunals could be guided. The speeches of Lords Walker, Nicholls and Rodger lend support to the view that in most

cases the advantage-led approach should prevail but Lord Walker said there may be circumstances in which some 'disadvantage-led' analysis might be helpful.

3.32. In Grundy -v-British Airways 2008 IRLR 74 the Court of Appeal went through all of the relevant case law, including Rutherford, and Sedley LJ held assessment of **disparate impact is a question of fact for the tribunal,** limited like all questions of fact by the dictates of logic. These did not prevent the tribunal in the instant case from focusing on those disadvantaged by the arrangements in question: there is no legal principle tribunals must always focus on the advantaged group.

3.33. Sections 19 and 69 of the EqA are worded in terms of women (or men) placed at a 'particular disadvantage' but do not refer to proportions. It will sometimes be appropriate for tribunals to look beyond percentage differences to the actual numbers affected. In Harvest Town Circle Ltd v Rutherford 2002 ICR 123, Mr Justice Lindsay said there will be some cases where, on the statistics, a disparate impact is so obvious that a look at numbers alone or proportions alone will suffice. However, it will never be wrong for a tribunal to look at more than one form of comparison and if there is any doubt as to the obviousness of the case, the tendency should always be to look at a further form of comparison. Thus, in less obvious cases it will be proper for the tribunal to look not at proportions alone but also at numbers, and to look at both disadvantaged and non-disadvantaged groups, and even to the respective proportions in the groups expressed as a ratio of each other. After looking in detail at such figures, the tribunal in less obvious cases must then stand back and judge whether the apparently neutral PCP in issue has a disparate impact on one gender that could fairly be described as considerable or substantial.

3.34. There is no simple equation to determine how much disparity is sufficient to show a PCP is tainted by sex discrimination. In Homer Lady Hale said none of the legislative changes in wording of indirect discrimination over the years condition show an intention to '*do away with the complexities involved in identifying… how great the disparity had to be'*.

3.35. Mr Stubbs submitted it is **obvious** the PCP is **not** sex tainted. He derives this form , among other matters men and women at the two sites at EO and HEO level earning approximately the same. Also, though women at Darlington earn less than men at Liverpool, women at Liverpool earn more than men at Darlington; the proportion of women doing EO and HEO jobs in Darlington is slightly more than in Liverpool and the limited statistical difference is not enough to establish particular disadvantage for women.

3.36. Before dealing with that, we address the issue of for how much time a factor material at its inception remains material. The authorities show factors which triggered a variation between a claimant's and a comparator's contracts cannot amount to a material factor **if they are no longer operative**. In Marshall , staff were employed as instructors at a special school for children with learning difficulties. The staff also included professionally qualified teachers who were paid substantially more than the instructors. The reason for the disparity went back to the days when children with severe or profound learning disabilities were not regarded as 'educable' in mainstream schools so were placed in day care centres and cared for by instructors. After legislation in 1974 all children were deemed to be educable. The day care

centres were renamed 'schools' and began to employ qualified teachers. Six female instructors claimed they were employed on like work with male teachers The tribunal agreed and found the employer had failed to prove the material factor defence, all it had done was point to a 'historical basis for the disparity', which in the circumstances was not sufficient. The tribunal's decision was overturned by the House of Lords. Lord Nicholls' held historic factors can amount to a material factor but if the historic material factor is tainted in some way by sex discrimination and the employer is required to objectively justify the difference in pay in order to avoid liability, **purely** historic factors will not be sufficient.

3.37. Mr Chaytor cites Paragraph 92 of the Code "*Where a material factor applies at a particular point in time **but subsequently ceases to apply**, it will no longer provide a defence to differences in contractual terms*". He accepts the differences in terms and conditions between ISA and CRB might have been regarded as a material factor at the time DBS was created on 1 December 2012, but argues after harmonisation in 2014, the different terms and conditions ceased to apply and therefore no longer provide a DMF to differences in pay between people working in Darlington and comparators in Liverpool. That is not so, **if the effect of the old terms lasts** .

3.38. In Secretary of State for Justice v Bowling [2012] IRLR 382, Ms Bowling and her comparator started in the same job at about the same time, but her comparator was placed two points above her on the applicable incremental scale because of his substantially greater skill and experience. By the time of the next pay review Ms Bowling had matched the performance of her comparator. The tribunal found the original reasons for the differential ceased to be a material factor after she had been in her job for about a year. The EAT (Underhill P) disagreed. The explanation for the differential had a continuing effect in the context of an incremental pay scale. *"The explanation was not time-limited; on the contrary, the initial decision to place [the comparator] two points up the scale had consequences for the following years.*" Thus the employer had satisfied the burden of showing an explanation that was not 'tainted by sex'. That the Secretary of State might, in theory, have acted to remove the pay differential was not the point, what was important was the **explanation for the continuing differential**.

3.39. The employer in Coventry City Council v Nicholls 2009 IRLR 345, argued so-called trade union 'intransigence', which hampered negotiations and delayed agreement on equal pay, amounted to a material factor explaining the disparity in pay between the claimants and their comparators. The Council had in the past a pay structure which directly discriminated against women and said it would have changed it earlier to one which did not had the unions agreed. The EAT stated it could not be said the unions' stance had **negated sex as a cause of the difference in pay.** While it might explain why the discrimination was not removed earlier, it did not replace the original discriminatory explanation for the difference. Elias J's judgment shows what caused a difference may have **a lasting effect** "*The union's position does not cause the pay levels to be where they are in the sense that market forces may cause the comparators rate to be where it is. Rather it provides an explanation as to why the sex discrimination continues.*

3.40. As we agreed to look at the women's case first, the question is whether women as a group are put at a particular disadvantage by the pay policy? Mr Stubbs says

not, as the differences that can be calculated are at most -1.17% and at least -0.26%. Those differences are not significant in EHRC terms. Further, Mr Stubbs says men and women at the two sites at EO and HEO level earn approximately the same and it appears women do better at both sites. Proper comparisons in fact suggests women do better cross site than men, the opposite of disadvantage. Using 2015 Audit figures, there are 144 women at HEO and EO in Liverpool and 113 women at HEO and EO in Darlington. The Pay Audits show a greater difference in favour of women in Liverpool. The jobs are not stereotypical male/female jobs.

3.41. Highly persuasive though these submissions were, they are predicated upon statistics which Mr Hughes frankly admitted could not be relied upon with certainty. They show the gaps narrowing when the same methodologies used throughout. However, with more statistics and targeted argument, might it be found groups of either men and women were placed at a substantial disadvantage? As we explained earlier, this is a preliminary hearing to consider striking out . It could have been a preliminary issue hearing where our remit was to decide an issue as we would at a full hearing. **What we have to do in this instance is ask whether , if the claimants were now using the correct pool of comparison it might be found , at some point between 2014 and now, there was a statistical imbalance sufficient in percentages or numbers to show "sex taint" against women , or against men.**

3.42. Starting with the wrong pool, Mr Chaytor has fallen well short of showing sex taint , but if the claimants approached that point properly and perhaps engaged the services of Counsel as experienced and knowledgeable as Mr Stubbs, to use all available statistics at various points in time, and every one of the many legal arguments available, would they have any reasonable prospect of successfully showing "disparate impact" so as to require the respondent to objectively justify its PCP ? We can, and must, look at possibilities which have not occurred to the claimants, or which they have expressed less than perfectly. **Our second interim conclusion is , although we see no likelihood of them doing so, they might.**

Objective Justification

3.43. Mr Stubbs says even if, on the PCP route, disparate impact is shown what the respondent has done is a proportionate means of achieving a legitimate aim, a concept which in older cases is called "justification" . The law is well established.

3.44. Mr Stubbs cites Homer where. Lady Hale, provided the following principles:
It should be asked firstly whether the objective is sufficiently important to justify limiting a fundamental right? Secondly whether the measure is rationally connected to the objective? And thirdly whether the means chosen are ***no more than is necessary*** *to accomplish the objective?*
It is not enough that a reasonable employer might think the criterion justified. ***The Tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement.***
To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so.
Part of the assessment of whether the criterion can be justified entails a comparison of the ***impact of that criterion upon the affected group as against the importance of the aim to the employer****.*

3.45. Though well put, this is nothing new . Balcombe LJ in Hampson v Department of Education and Science [1989] ICR 179, at 191 said :

""justifiable" requires an objective balance between the discriminatory effect .. and the reasonable needs of the party who applies the condition."

and Sedley LJ in Allonby v Accrington and Rossendale College [2002] ICR 1189 said

" 27. The major error, which by itself vitiates the decision, is that nowhere, either in terms or in substance, did the tribunal seek to weigh the justification against its discriminatory effect. …
28. Secondly, the tribunal accepted uncritically the college's reasons for the dismissals. They did not, for example, ask the obvious question why departments could not be prevented from overspending on part-time hourly-paid teachers without dismissing them. They did not consider other fairly obvious measures short of dismissal which had been canvassed and which could well have matched the anticipated saving of £13,000 a year. In consequence they made no attempt to evaluate objectively whether the dismissals were reasonably necessary – a test which while of course not demanding indispensability, requires proof of a real need.

29 Once a finding of a condition having a disparate and adverse impact on women had been made, ***what was required was at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal …; and an evaluation of whether the former were sufficient to outweigh the latter****.*

3.46. In our view, Pill LJ in Hardys and Hanson plc-v-Lax provides a perfect overview from which we quote selectively. He first cited Lord Nichols in Barry-v-Midland Bank
More recently, in Enderby v Frenchay Health Authority Case C-127/92 [1994] ICR 112, 163 the Court of Justice drew attention to the need for national courts to apply the principle of proportionality when they have to apply Community law. In other words, the ground relied upon as justification must be of sufficient importance for the national court to regard this as overriding the disparate impact of the difference in treatment, either in whole or in part. The more serious the disparate impact on women or men as the case may be, the more cogent must be the objective justification. There seem to be no particular criteria to which the national court should have regard when assessing the weight of the justification relied upon. "

3.47. Pill L J cited extensively from Allonby then said :

32 Section 1(2)(b)(ii) requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably

*necessary**. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.***

33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight.

3.48. We first look at whether what the respondent is arguing constitutes objective justification is, or is not, "valid" . The fact pay of a claimant and her comparator are determined by different collective agreements, can provide objective justification for a pay differential Waddington v Leicester Council for Voluntary Service 1977 ICR 266, EAT. A tribunal should not simply accept such a material factor at face value.

3.49. In Kenny and ors v Minister for Justice 2013 ICR D27, the ECJ considered whether, and to what extent, the interests of good industrial relations could legitimately constitute one of the criteria for justifying indirect sex discrimination in pay. It held it cannot constitute **the sole basis** of objective justification, although such concerns may be taken into account as one element among others.

3.50. Elias P in Coventry City Council-v-Nicholls made a point relevant to objective justification *"We do understand and have some sympathy for the difficult choice the council was facing. It was obviously highly desirable for the council to carry the unions with them in any move to single status, and the risks of industrial action were really serious. We very much doubt whether the threat of industrial action of that nature ever be capable of justifying the continued difference in pay **which originated in sex discrimination** That is not an issue we have to determine .* The difference between that case and this is clear The discrimination which caused the unequal pay in Nicholls was direct and cannot be " justified". Elias P was not saying a union's stance in negotiations is irrelevant to objective justification.

3.51. The respondent does rely on s69(3) which states the long-term objective of reducing inequality between men and women's terms of work is always to be regarded as a legitimate aim. Although it never thought of this as a gender related issue, Mr Stubbs says **if we find** there may be " sex taint" in the different pay regimes at the two sites, the aim of reducing inequality between the sites falls within s69(3) . Mr Chaytor argues DBS can not say the 2014/15 pay award reduced inequality "*when they had a scheme which was within the constraints of central government pay restraint which would have a greater effect in doing so, **but they chose to implement a less equal scheme in order to achieve the real purpose: to remove pay progression and placate the PCS".***

3.52. Mr Chaytor cites paragraph 88 of the Code "*The employer must be able to show that **the measure was in fact employed to reduce inequality***" but DBS' own documents show the aim of the PCP was the "harmonisation" of terms and conditions across sites by "buying out" contractual pay progression in Liverpool. The R&N Committee meetings and SMT reports make no mention of reducing inequality as a

strategic objective so DBS cannot rely on s69(3). Mr Chaytor will say whatever arguments are made subsequently the respondent cannot show that at its inception and in its execution the PCP was employed to reduce gender inequality which was never mentioned in any of the strategic aims set out in the documents. Its focus was on buying out pay progression in Liverpool. We will return to the point, but this is an example of confusing " aims " with "means".

3.53. The justification put forward by the employer for an indirectly discriminatory PCP falls to be judged at the time when the measure was applied to the claimant which is when the PCP was introduced and continuously since. It does not follow the employer is prevented from relying on considerations that were not in contemplation at the time of the PCP's application. In Health and Safety Executive v Cadman 2005 ICR 1546, the Court of Appeal confirmed there is no rule of law whereby the justification must have consciously and contemporaneously featured in the employer's decision-making processes. A similar line was taken by the Supreme Court in re Brewster 2017 1 WLR 519 a case concerning justification of discrimination under Article 14 of the European Convention on Human Rights.. Lord Kerr stated '*if reasons are proffered in defence of a decision which were not present to the mind of the decision-maker at the time that it was made, this will call for greater scrutiny than would be appropriate if they could be shown to have influenced the decisionmaker when the particular scheme was devised. Even retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made bona fide*'.

3.54. The Code is not in itself law. Mr Chaytor's argument conflicts with Cadman and the other authorities. His quotation also omits the earlier passage " *There is no list of aims that are accepted to be legitimate and whether or not an employer's pay practice pursues a legitimate aim will depend on the facts and circumstances in a particular case . However the Act does specify that for the purpose of justifying reliance upon a material factor the long term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim* "

3.55. An aim may be legitimate for another reason and any narrowing of gender pay gaps be incidental to it. On the respondent's case harmonisation and buying out contractual progression were means not the aim , that being to maintain DBS as an effective provider of both services it was tasked to perform, which involved avoiding industrial unrest, industrial action and litigation it was doomed to lose if it tried to force a solution , while acting within the limits of authority imposed by HO and HMT .

4. Conclusions on Objective Justification and Strike Out

4.1. Employment Judge Johnson fixed this preliminary hearing to decide strike out, **not** , as he might have done, to decide finally any preliminary issue. Mr Stubbs explained he did so because there are other defences in individual cases beyond those we are considering now. Employment Judge Johnson's case management decision has in itself levelled the playing field to some extent between an expertly represented respondent and non legally represented claimants by " raising the bar" the respondent has to clear. Mr Justice Megarry once said: *"the path of the law is strewn with examples of open and shut cases that somehow were not, and unanswerable charges that were in the event fully answered."* It is rare a Tribunal can say a claim stands no prospect of success but the wording is 'no **reasonable**

prospect of success'. As will be seen ,that can be said of the claimants' stance on the " objective justification" shown by the respondent in this case.

4.2 . Mr Chaytor criticised more than once Mr Stubbs' failure in his submissions to mention the principle of equal pay for work of equal value. He misses the point that the principle is expressly said to have no effect if section 69 applies. In other words if the material factor causing DBS not to pay equally for work of equal value is not directly or indirectly sex discrimination, or is indirectly sex discrimination which can be objectively justified, no duty on the employer exists.

4.3. We return to the authorities we cited at 3.44 - 3.47 above. We are looking to weigh the real needs of DBS against the discriminatory effects of what they did, that means discriminatory against women or men. Because the claimants are not legally represented we have racked our brains to find some legal flaw in the objective justification argument but we can find none. Had this been a full merits hearing rather than a strike out hearing , it would have been wrong of us to try and make the claimants case better than the one they presented. However, at a strike out hearing we think that is exactly what we should do.

4.4. We start with an assessment of the discriminatory effects .The claimants understandably feel the higher skilled HEO's in Darlington have been the losers in the steps which DBS has taken and if one looks at the figures from, for example, 2015 there were 81 female HEO's Darlington against 39 Liverpool and in 2016 101 in Darlington against 35 in Liverpool. However, the steps taken have benefited a large number of women at both sites especially at a AO grade. We have found there is very little chance the claimants will be able to show indirect discrimination against either women or men. If they managed by taking a different approach to percentages or numbers we agree with Mr Stubbs there is no reasonable prospect of it being found to be more than very limited.

4.5. Now we move to the real needs of DBS. The importance of maintaining the harmonising terms and conditions so as to provide a sensible platform for future pay negotiations and narrowing the pay differential cross site cannot be understated. When set against any limited discriminatory impact of DBS's remuneration policies Mr Stubbs submits it is clear Ms Downey and the SMT has **at least** done what it is able to within the constraints placed upon it , to achieve those legitimate aims.

4.6. Our rehearsal of what are largely uncontested facts in Part 2 of these reasons, we hope largely speaks for itself. DBS took what steps it could to ameliorate the position of the Darlington staff in the 2013 pay award by negotiating from the HO and HMT much more funding than the 1% remuneration increase across all employees . This meant Darlington staff at the start of the 2014 negotiations on pay increases and harmonisation, albeit clearly being paid less than their counterparts in Liverpool, male or female, were closer to them than they would otherwise have been. The claimants can have no claim in relation to this period but it is relevant DBS did all it reasonably could before harmonisation to narrow the differential.

4.7 In the process of harmonisation DBS had to balance the needs of several different groups of staff with differing requirements. The pay limit of 1% increases limited DBS's options but they wrung from HO and HMT sums significantly in excess

of what would otherwise have been available The buy out had to be 'sold' to the employees with contractual rights otherwise they simply would not have given them up. If they were unilaterally removed by DBS there would have been , unfair dismissal /breach of contract claims and industrial action.

4.8. The consolidated pay increases were in the main to Darlington employees. Those towards the minima of the pay scales received increases ranging from 2.5% to 11.86%. The consolidated increases for Liverpool were 3.06% at EO and 0.5% at HEO.By buying out the pay progression right and moving to one pay scale, which represented a significant pay increase for many at Darlington who were below the minimum point of the pay scale, the pay differential was in fact reduced further.

4.9. After harmonisation, DBS shortened pay scales and gave flat rate increases which further reduced the differential all while constrained by the 1% total remuneration limit. Neither PCS nor DBS wanted the whole 1% to be directed entirely to Darlington and it is doubtful the HO would allow this in any event. DBS requires HO (and often HMT) approval for its pay awards and neither have been receptive to a business case to allocate truly extra funds to resolve the differential. Despite this DBS has reduced **average** differentials to a figure which at least approaches what the EHRC regard as acceptable.

4.10. DBS 's case on objective justification in short is that the 2014 deal was the best available and the continuation of pay differentials post July 2014 is due to the legitimate aim of maintaining DBS as an effective provider of both services it was tasked to perform and doing so within the constraints of public sector pay restraint. Mr Stubbs said in his closing submissions the claimants' case is DBS '*should have done more'*. We racked our brains to think of anything DBS could have done which it did not, or could have done to a greater extent than it did. We could think of nothing.

4.11. There is no doubt that the burden of proving objective justification rests on the respondent, but the claimants in our view have to at least suggest what other steps DBS could have taken There is a useful parallel in disability discrimination law in which if, but only if, a PCP of the respondent places a disabled person at a substantial disadvantage in comparison with persons who are not disabled, the employer is under a duty to take such steps as it is reasonable for it to have to take to minimise that disadvantage. In Project Management Institute v Latif 2007 IRLR 579 the EAT explained a claimant must not only establish the duty has arisen but some facts from which it can be reasonably inferred, absent an explanation, it has been breached. By the time the case is heard, there must be evidence of some apparently reasonable adjustments that could be made. It would be an impossible burden to place on an employer to prove a negative – i.e. to show no adjustment could reasonably have been made. If the claimant suggests some adjustments, the Tribunal must decide whether the respondent's given reasons for not doing them are objectively reasonable by critically evaluating them, weighing their importance to the employer against the discriminatory effect .

4.12. For this reason, our Employment Judge decided to tell Mr Chaytor before he made his closing submissions, the question he needed to address was if, on the claimants' case, what the respondent did was wrong, what should it have done? After giving him time to consider, Mr Chaytor said the pay deal in 2014 embedded the long term disadvantages of having been employed by the ISA even after those terms

and conditions no longer applied; the constraints of the public sector pay cap did not put DBS ***above the law*** ;and the way it executed the 2014/15 pay deal under pressure from PCS put it in breach of the law. As for what they should have done, he said DBS should have made pay progression awards to ISA staff before or at harmonisation to lift their pay up to the level of Liverpool and should have resisted pressure from PCS. HO and HMT to harmonise terms and conditions without simultaneously equalising pay. **Neither of these steps was remotely practicable**.

4.13. In 2014 and after that any more rapid progress to equalisation was made impossible by HO and HMT as revealed in the email written by a Ms Bhatt . There was no more money, and what there was could not in practice be channelled exclusively to Darlington.

4.14. We have come to the conclusion **no reasonable tribunal properly directing itself as to the law could fail to find DBS has provided objective justification for any , now more limited, disparate effect**. Nothing it did could solve the problem but everything it did was infinitely better than the alternative. On that basis if the claimants do manage, as they just might, to reach the stage at which the respondent is required objectively to justify the PCP, its justification is not just strong, it is rock solid. That means the claim has no reasonable prospect of success.

4.15 As we told Mr Chaytor at the start of the hearing, whatever its outcome, we admired his attempt to put the claims in their best light. We also sympathise with the unfairness of the position in which skilled employees at Darlington find themselves. However when we look at what Ms Downey and the SMT did, we find it cannot sensibly be criticised but rather should be applauded as producing results which, though not good for these claimants, is vastly better for the majority of men and women than any alternative available in the real world ..

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EMPLOYMENT JUDGE GARNON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 19th SEPTEMBER 2018