



# THE EMPLOYMENT TRIBUNALS

**Claimant**                    **Ms N Sivanandan**

**Respondents**            **(1) Independent Police Complaints Commission**  
**(2) Penna PLC**

**HELD AT:**                **London Central**

**ON:**                        **26 September 2016-5 October 2016**  
**Chambers 5 and 6 January 2017**

**Employment Judge:**   **Mr J Tayler**                    **Members: Ms S Plummer**  
**Ms S Samek**

## *Appearances*

**For Claimant:**        **In Person**

**For Respondents:** **(1) Ms E Misra, Counsel**  
**(2) Mr D Panesar, Counsel**

## **JUDGMENT**

The unanimous Judgment of the Tribunal is that:

The claims of direct and indirect race and sex discrimination fail and are dismissed.

## **REASONS**

### **Issues**

1. The Issues for determination were agreed as set out in Annex 1 to these reasons

### **Evidence**

2. The Claimant gave evidence on her own behalf.

3. The Respondents called:
  - 3.1 William Moir Stewart, IPCC's Director of Investigations between January 2010 to January 2015
  - 3.2 Colin Woodward, IPCC's head of HR at all material times
  - 3.3 Frances Cutts, Self-employed recruitment consultant engaged by Penna; who assessed the Claimant's application form at the first stage of the sift
  - 3.4 Samantha McNeilly, Penna's client manager on the IPCC campaign
  - 3.5 Daryl Murray, Occupational psychologist; Penna's director of assessment for recruiting solutions at the time of the IPCC campaign
  - 3.6 Joanna Taylor, Penna's head of delivery at the material time (née Clifton)
  - 3.7 Robert Diggins, Self-employed recruitment consultant engaged by Penna
4. The witnesses who gave evidence before us did so from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.
5. We were provided with an agreed bundle of documents. References to page numbers in this Judgment are to the page number in the agreed bundle of documents. Those documents to which we were referred are marked in the Employment Judge's copy of the bundle.

### **Findings of fact**

6. The first Respondent is accurately described by William Moir Stewart, the first Respondent's Director of Investigations from January 2010 to January 2015, at paragraph 5 onwards of his statement:
  5. The IPCC is a non-departmental public body funded by the Home Office. It was established by statute (the Police Reform Act 2002) and has been operational since 2004.
  6. The IPCCs primary purpose is to increase public confidence in the Police complaints system in England and Wales. ...
  7. The IPCC discharges its main function in a variety of ways, one of which is by investigating serious conduct, death and injury matters involving the Police. The IPCC has its own Directorate (department) of Investigations for this purpose. Certain types of complaints or events (for example Police shootings or deaths in custody) must be referred to the IPCC. The IPCC then has a

choice about how to deal with those investigations - it can either conduct the investigation itself, or refer it to the Police's Professional Standards team to conduct some or all of the investigation under its supervision.

7. For each investigation a lead investigator (Grade 11) with overall responsibility for the investigation is appointed. The lead investigator will generally delegate responsibility for certain aspects of the investigation to investigators (Grade 10).
8. We accept that for appointment as an investigator it is necessary for the candidate to have relevant experience. We accept Mr Stewart's evidence from paragraph 30 as follows:
  29. The standard of both the Grade 10 and Grade 1 1 investigator role is that of a professional investigator. Therefore it is not possible, in my experience, to effectively undertake the IPCC's substantive investigator role at Grade 10 without having direct investigator experience. This is the case even where an individual possesses transferable skills from a different type of job. It is also not possible in my experience to move quickly (as was expected) up to the Grade 1 1 lead role without having direct investigator experience.
  30. For example, preparing for and conducting witness interviews in a detailed and forensic manner requires experience of undertaking that task. Effectively probing a witness in those circumstances - often where the witness is reluctant to assist or requires significant support - is a skill based on experience of doing that same thing. Interviewing people in a different context may give you some relevant skills for this purpose but it is not enough to be ready to interview witnesses in a IPCC investigation.
  31. Similarly, gathering and handling evidence which can be particularly complicated - requires experience and training, as does liaising with families or other stakeholders, systematically scoping investigations and writing appropriate reports and recommendations.
  32. To be suitable to commence a substantive Grade 10 investigator role with IPCC a prospective investigator needed to have experience across these areas. It was simply too difficult for someone to 'hit the ground running' in the role (i.e. commence unsupervised investigation work following a short period of induction/training) without actual direct experience. It would also be simply too difficult for someone to immediately start working towards their professional Lead/Grade 1 1 accreditation without actual direct investigatory experience.
  33. To give an example, a death in custody case requires liaison and meeting with the coroner and pathologist straight away. It involves managing crime scenes, exhibits logs and records and seizing

CCTV for analysis. It might involve searches of officers, their lockers and homes. It might even require an immediate arrest. All of these matters had to be considered and carefully thought through, but actioned promptly. A decision log was required to demonstrate why something was done and also why a particular action was not completed. In addition, liaising with the families is a key role and requires training and certain skills. It is not just about keeping families updated and often there are conflicts to discuss and resolve. For example, a family may wish to have access to certain evidence which is sensitive and for evidential reasons cannot be shared at that stage. This is a difficult task which requires experience to be able to handle appropriately.

9. While significant training is provided to newly recruited investigators and they are not required to be able to carry out all the above duties from day one, it is not sufficient to obviate the need for relevant experience.
10. We accept Mr Stewart's evidence from paragraph 36 as to the training that is provided for new investigators:
  36. Experienced investigators recruited at Grade 10 would start their role by attending a 4 week residential induction and training course. The purpose of the course was to educate the new investigators on the IPCC's policy and processes for investigations. It also included training on for example conducting interviews in line with the IPCC's procedures and standards. The course is set at a relatively advanced level and assumes a good level of investigative backgrounds of those attending.
  37. Following that induction, these substantive investigators would commence their roles and would be immediately involved in carrying out unsupervised investigatory work. This would either be delegated parts of an investigation or even managing the majority of a smaller investigation.
  38. A Personal Development Plan (PDP) would be developed for all such Grade 10 investigators. This would look at any areas for development, for example specific tasks the individual had limited experience in. For example, a newly recruited substantive investigator would be expected to be sufficiently experienced to conduct investigatory interviews with witnesses from the outset, however they may have had less experience in specifically interviewing officers under caution. In this case, as part of their PDP an investigator would be accompanied by a supervisor or experienced investigator at interviews under caution to ensure they could demonstrate they could do this to the standard required.
  39. In addition to this, the IPCC requires its investigators to be accredited as investigators by an external organisation called EdExcel. This accreditation is made up of 4 modules which are assessed through work based assessment and then externally

verified by EdExcel. Once accredited the investigator would be promoted to our Grade 1 1 Lead investigator level and we would expect them to be able to lead on most types of our investigations. We would expect our Grade 10 investigators to reach accreditation within 12 months. This could be achieved more quickly but as it is a work based assessment, cannot be fully completed until the individual has had the opportunity to demonstrate all of the required elements through their actual case work. Investigators did not require accreditation to start undertaking unsupervised investigatory work.

11. There has been a concern for a number of years that the requirement for such experience has favoured applications for investigator roles from ex-police officers which has undermined confidence in the first Respondent's impartiality and, because of the makeup of the police, tends to favour applications from white men. Mr Stewart accepted in cross-examination that the IPCC Commission was particularly concerned about the under-representation of BME investigators.
12. As a result, a new role of trainee investigator has been introduced that will allow for greater training and maximise the opportunity for candidates to be able to rely upon transferable skills. It is expected that it will take at least 12-18 months to sufficiently train a trainee investigator to work independently on substantive investigations. It is hoped that in time recruitment of trainee investigators will become the norm which will improve the diversity of the first Respondent's workforce.
13. The first Respondent has a Diversity in Employment Policy. It is troubling that:
  - 13.1 It has not been reviewed and updated since it was introduced in 2004; so: for example, it makes no reference to the Equality Act 2010.
  - 13.2 While Mr Stewart read the Diversity in Employment Policy when he joined the first Respondent in 2010 he had not refreshed his memory before the 2012/13 recruitment exercise
  - 13.3 The Diversity in Employment Policy was not brought to the attention of the second Respondent
14. We were also troubled by the evidence of Colin Woodward, the first Respondent's head of human resources that:
  - 14.1 Despite concerns about under-representation of BME candidates no formal equality impact assessment had been carried out
  - 14.2 At the time of the 2012/13 recruitment exercise there was no equality officer or similar post at the first Respondent
  - 14.3 Despite the fact that the Lawrence Enquiry was pivotal in the decision to set up the first Respondent, Mr Woodward had not read the report

- 14.4 Not all the records from the 2012/13 recruitment exercise were preserved.
15. Mr Stewart accurately sets out the background to the 2012/13 recruitment round from paragraph 54 of his statement as follows:
- 54. In 2011/2012, as part of a cost saving exercise, the IPCC closed its office in Coalville. It had been hoped that a number of the investigators that worked at that office would choose to transfer to other offices and continue in investigator roles. However, this did not happen and it left a gap in both numbers and skills for our Investigations Directorate.
  - 55. In 2012 it was discussed and later confirmed that the IPCC would take on the Hillsborough enquiry which would be one of the biggest and most important investigations the country had ever seen.
  - 56. There was also around this time a decision taken that the IPCC would have an additional remit for Corruption work (e.g. allegations of corruption within the Police), which would also require more resource.
16. As a result, a decision was taken to recruit both trainee investigators and investigators, to ensure that the first Respondent's capacity could be increased sufficiently quickly.
17. On 13 June 2012 Mr Stewart produced a briefing paper about the future recruitment; noting the adverse effect that the tendency to recruit ex-police officers had on race and gender diversity (p384).
18. On 12 September 2012 Mr Stewart reported to the IPCC Commission on the need to recruit investigators and noted the importance of seeking to recruit them from diverse employment backgrounds (p410).
19. The first Respondent decided to utilise the services of an external recruitment agency. On 6 November 2013 staff of the first Respondent met with staff of the second Respondent to discuss how the second Respondent might undertake the 2012/13 recruitment exercise.
20. A project meeting was held on 26 November 2016 (p442). It was noted that up to 40 investigators were to be recruited of whom 12 would be trainees. It was stated that the essential criteria were designed to make the roles more open to people with a non-police investigative background.
21. On 3 December 2012 the first Respondent and the second Respondent agreed that candidates would only be offered feedback after attendance at the assessment centre, which would be the last stage of the process. Lilly Harris of the first Respondent suggested that feedback might be provided to "persistent people who keep coming back" but stated that "saying we won't upfront does deter the vast majority" (p469).

22. On 10 December 2012 the second Respondent's Occupational Psychologist provided a report with recommendations on the 2012/13 recruitment exercise to the first Respondent. An initial paper sift was suggested.
23. On 12 December 2012 the first Respondent and the second Respondent entered into a Service Level Agreement (p539ff). It is concerning that in setting up the 2012/13 recruitment exercise:
- 23.1 The first Respondent did not provide the second Respondent with a copy of the Diversity in Employment Policy, and so did not require that it be complied with
- 23.2 The first Respondent did not check that the second Respondent recruitment consultants would be referred to and comply with the ECHR Code of Practice
- 23.3 The first Respondent accepted the suggestion from the second Respondent that it was not possible to anonymise application forms (although it transpires that it would have been possible to do so).
24. On 2 January 2013 an advertisement was placed in the Guardian that stated in respect of the investigator position (p609):
- “These roles ... offer very high levels of challenge and variety for resilient, committed and confident investigators. Our investigations are often complex and high profile, and our standards of investigation must always be beyond reproach. As a result our investigators are highly talented and committed experts who work closely with bereaved families, complainants and the police to establish the facts.
- The role
- Our investigators can be called on to take on any kind of investigation. So from day to day you could be obtaining witness statements, visiting incident scenes, preserving evidence, preparing casework, liaising with complainants, attending post mortems or writing investigation reports. All investigators embark on an initial period of training ...”
25. On 4 January 2013 the first Respondent provided the second Respondent with some job titles to give examples of where transferable investigatory skills might come from, in addition to the police (p683):
- “Investigators in Fraud, HMIC, HMRC, Insurance, NHS or Healthcare, Local Authorities or government, DWP, Finance/Compliance, MOJ, Private Investigators, other government agencies.”
26. On 4 January 2016 a briefing session was arranged for those undertaking the initial paper sift (p69A). It was stated that sifters should be open-minded about where applicants gained their investigative experience and should screen for evidence rather than making any assumptions based on job titles.

27. On 10 January 2013 the second Respondent and the first Respondent agreed to change a criterion of investigative experience in the last 12 months to “recent investigative experience”. The first Respondent suggested that “recent” should be defined by reference to the last 5 years.

28. The finalised guidance for those conducting the paper sift provided (p291):

*“App Form Q; In this section please ensure you fully demonstrate your relevant experience. Proven experience of conducting investigations in the public or private sector is required for this role including recent experience of carrying out Investigative interviews, evidence gathering, analysis and presentation, contributing to planning and scoping investigations.*

Please check evidence from their employment history (current position) and previous employment history.

Candidates need to evidence some of the below experience in order to pass the work experience section:

Experience of conducting investigations in the public or private sectors, including recent experience (i.e. within past 5 years or last 5 years of employment) of:

- Carrying out investigative interviews
- Evidence gathering and analysis
- Contributing to planning and scoping investigations
- Experience of making appropriate decisions based on analysis of existing and emerging information”



30. We accept that the way that this was dealt with in practice, certainly in the case of Miss Cutts, was that it was necessary for the candidate to demonstrate experience in respect of some of the relevant bullet points, rather than having to demonstrate that they had experience of a specific number of the examples given in the bullet points.

31. The role description provided:

ROLE DESCRIPTION

MAIN DUTIES AND RESPONSIBILITIES

- Conduct investigations in accordance with agreed guidelines, including obtaining witness statements, interviewing witnesses and suspects, preparing casework and making recommendations for criminal and disciplinary action,
- When accredited, lead investigations, taking responsibility for setting direction of investigations and taking decisions on investigative policies and strategy
- Visit Incident scenes and assist in supervising scene management ensuring that all necessary action is taken to preserve and recover evidence.
- Liaise with complainants and bereaved families to provide briefings on progress of investigations
- Attend post-mortems and brief pathologist as required
- Write investigation reports upon completion of investigation for submission to the assigned Commissioner for approval
- Prepare papers for submission to the Crown Prosecution Service and to IPCC Commissioners
- Liaise with other agencies and personnel as required.
- Take part in court, misconduct and associated proceedings where necessary
- Contribute to the provision of a 24 hour on call facility
- Be prepared and able to work unsocial and extended hours, including working away from home and overnight stays when required
- Any other relevant duties appropriate to the grade as may be required including the participation in the interchange of duties within the Directorate

32. The person specification included significantly different wording about relevant experience (p767):

“The requirements are ...

- Proven experience of conducting investigations in the public or private sectors, including recent experience (i.e. within past 12 months) of:
  - Carrying out investigative interviews
  - Evidence gathering, analysis and presentation
  - Contributing to planning and scoping investigations

- Experience of making appropriate decisions based on analysis of existing and emerging information
- Engaging effectively with people or groups from different backgrounds, adapting communication style as appropriate
- Proven experience of working effectively in a team environment.
- Evidence of effective oral and written communication skills, including writing investigation reports”

33. On 15 January 2013 the second Respondent issued final guidance for telephone interviews regarding work experience of investigator applicants (p720). This was in rather different terms, but we accept that it applied to the telephone interview stage and was not applied at the paper sift. The removal of the bullet point of contributing to planning and scoping investigations so that it was only desirable was in the context of there being a requirement to demonstrate two out of four bullet point examples of investigatory experience at the telephone interview stage: whereas at the paper sift it was necessary to show some experience against some of the bullet points which, included contributing to planning and scoping investigations.
34. On 16 January 2016 the Claimant submitted the first part of her application online. The Claimant was informed that deadline was extended to 21 January 2013 with a reminder that The Claimant should only apply for one of the investigator or trainee investigator roles (p774-775).
35. On 17 January 2013 a sifting benchmarking exercise undertaken. Only a small number of forms were considered and no information was provided about the race or gender of the candidates.
36. On 21 January 2013 the Claimant submitted her completed application online (p1405-1410).
37. In respect of experience the Claimant stated that she was not currently employed. In the Employment History section, the Claimant stated:

<p>Advice for Life, Mill Road, Cambridge, from 01/01/09 to 31/07/09. Post ended due to employers insolvency and staff were made redundant.</p>	<p>Discrimination and human rights advisor at Cambridge Law Centre. I advised clients and groups about UK discrimination law and carried out casework for Individuals with discrimination claims in tribunals and courts. This involved investigating and assessing allegations within the statutory framework in order to determine whether there was a basis for a legal claim and its chances of success, advising on negotiation and mediation to resolve problems and exploring other alternatives to legal action and explaining the law to individuals and groups seeking advice. Made redundant when organisation became insolvent.</p>
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<p>Mitre Chambers, Middle Temple Road, London, from 01/02/08 to 03/10/08.</p>	<p>Self employed barrister in a London Chambers. I carried out mostly criminal defence work and also some employment and discrimination work. I resigned from the post to seek employment in a law centre.</p>
<p>Garden Court Chambers, 57-60 Lincoln's Inn Fields, London, from 01/10/06 to 31/12/08</p>	<p>Pupillage successfully completed. I carried out mostly criminal defence work, including trials and sentencing hearings in the Magistrates and Crown Court. I did some pro bono employment cases and advocacy for pupils who were excluded from school. I left to take up tenancy.</p>
<p>Hackney Campaign Against Racism, 136, Kingsland High Street, London E8 2NS, from 01/10/98 to 08/08/03.</p>	<p>Part-time caseworker of voluntary organisation, advising individuals with problems related to race discrimination. Left to commence studies at City University, (part-time post-graduate diploma In law).</p>
<p>Enfield Racial Equality Council, Hertford Road, Enfield, 22/07/96 to 11/01/97</p>	<p>Race Equality Advisor. Unfairly dismissed by body that was not my employer on spurious grounds following my complaints of financial and other malpractice: 2 reports in 1998 later substantiated my complaints and the organisation had its funding withdrawn by the Commission for Racial Equality, (CRE).</p>
<p>BBC Television, White City, London, from July 1990 to July 1992.</p>	<p>2-year Training Course as a BBC Producer. Acted as researcher for "Newsnight" and then made two programmes, one about sickle cell anaemia and one for BBC Schools TV. I left to have a child.</p>
<p>Brent Education Department, Chesterfield House, Brent, from January 1986 to July 1990.</p>	<p>Race Equality Advisor, advising schools on eliminating race discrimination and improving attainment of black and ethnic minority students. This involved working with departments within the school to which I was attached, giving advice and training about tackling racist stereotypes and low expectations, widening the curriculum, working with parents to resolve complaints and so on. I left as funding for the post was due to expire.</p>
<p>Inner London Education Authority, (ILEA), Anti-Racist Strategies Team,</p>	<p>Race Equality Advisor: advising schools and Head teachers on eliminating race discrimination and improving attainment of black and ethnic minority students. Left as</p>

County Hall, London SEI from Sept. 1984 to Dec. 1985.	ILEA about to be disbanded and I obtained post in Brent.
Inner London Education Authority, (ILEA), County Hall, London SEI, from Sept 1976 to July 1984	Secondary school teacher of English / Drama in Hackney comprehensive schools, mostly boys schools. Left due to promotion to ILEA Anti-Racist Strategies Team.

38. We shall come back to the Claimant's answers to the set questions and the comparison between her experience and answers to those of her comparators in our analysis section.
39. The approach adopted at the sifting stage was as follows: first experience was considered. If inadequate, the candidate would be rejected. Next, the question about motivation was considered. If a score of less than 2 was awarded the candidate would be rejected. Next, the remaining questions and written communications skills were considered. Unless the candidate scored 3 or more on each of the questions and for written communications skills the application would be rejected. If the candidate passed the paper sift she would be invited to attend a telephone interview. If she passed the telephone interview they would be invited to an assessment centre.
40. On 28 January 2013 Frances Cutts assessed the Claimant's application (p1405) and sifted her out on the basis of her experience. She stated (p1411):
- "Does not have substantive investigatory experience within the last five years. She has been unemployed since 7/2009 and her last role, which was for 6 months only was Discrimination & Human Rights Adviser for Cambridge Law Centre. While this involved some investigation of allegations to establish a basis for a legal claim, it was not a full investigative role."
41. Miss Cutts spent about five minutes assessing the experience of each candidate, although it varied depending on how much the candidate had written.
42. By email dated 30 January 2013 the Claimant was informed that she had not been successful in reaching the telephone interview stage and that individual feedback could not be given at that stage (p997).
43. On 3 April 2013 the Claimant asked for feedback on why she had been rejected. Feedback was provided orally on 15 April 2013 by Samantha McNeilly. There are two slightly conflicting notes of the conversation. The Claimant provided a handwritten note (p978) in which she stated that Miss McNeilly told her that she had failed because she had lacked recent investigative experience in the public or private sector and that she had failed to show any experience of contributing to planning and scoping investigations. Miss McNeilly stated that she had explained that the evidence provided in the employment history was not enough to progress the Claimant to the next

stage. In her statement Miss McNeilly suggested that the Claimant had produced her handwritten note having seen page 717 on disclosure (in which the bullet point in respect of planning and scoping investigations had been removed – see paragraph 33 above). However, as set out above, this was in respect of the telephone interview not the sifting stage. We do not accept there is anything to suggest that the Claimant produced the note after the event. We accept that reference was made to planning and scoping in the conversation although that was in the context of a general comment about a lack of recent investigative experience. We consider that the best analysis of Miss McNeilly's considered feedback is that provided in writing, in which she stated (p979):

“As discussed, please find a summary of feedback as discussed.

For the investigator role, candidates are required to demonstrate as a minimum recent investigative experience in the public or private sector... As well as recent experience of the below:

- carrying out investigative interviews
- evidence gathering, analysis and presentation
- contributing to planning and scoping investigations

your application stated you have experience of investigation of allegations to establish a basis for a legal claim, however did not provide evidence against the additional points above so our screener was unable to progress you”

44. Even this oral feedback is not entirely accurate as it could be read as suggesting that some experience must be established against each of the bullet points, whereas we accept that a more qualitative analysis of experience was applied whereby it was necessary to show experience against some of the bullet points and an overall assessment was made of whether that established sufficient investigatory experience for the role. In cross-examination Miss McNeilly stated that she did not speak to Miss Cutts before providing the feedback but looked at her assessment sheet and the comments there. We consider this explains why there is a different emphasis in the feedback to the evidence given by Miss Cutts, which we accept, that she looked for some experience as against some of the bullet points on an overall qualitative assessment.
45. On 5 June 2013 Mr Stewart provided feedback to the IPCC commission noting that a significant number of BME applicants had been filtered out because of their lack of investigative experience. He suggested that the language used in the job description required further thought to ensure that transferable skills were properly recognised (p1064).
46. On 11 September 2013 Mr Woodward provided a report on the 2012/13 recruitment exercise (p1069) in which he noted that ex-police officers had continued to predominate in recruitment for the investigator role and that this had an adverse effect on recruitment of BME candidates who were less likely to be able to show relevant work experience. He recommended that consideration should be given to the criteria in any future recruitment exercise, with the possibility of limiting applications from ex-police officers.

47. The statistics in the report are a little hard to follow, particularly as they seem to be based on the number of individuals that started completing application forms rather than those who completed the application. This is why total of applications is 2298 whereas from various sources in the bundle it is clear that the total number of completed application forms is in the order of 1200. There is some variation in the statistics in the bundle with a total number of applicants at p339 of 1182 and at p999 of 1192. Miss McNeilly provided a table in her witness statement setting out a statistical breakdown with a total number of those who completed application forms of 1175. Miss McNeilly was not challenged on her table during cross examination but subsequent to the hearing the Claimant sent a number of emails raising various issues about the statistics although the differences in the numbers are very small. We accept the best evidence that we have as to the statistical breakdown is that set out in the statement of Miss McNeilly and do not think any of the inconsistencies raised would have any effect on our analysis of the statistics. That table with the addition of rows for the percentage of each group that failed the work experience criteria and who pass the work experience criteria is provided at annex 2.

### The Law

48. The Employment Appeal Tribunal in the **Law Society v Bahl** [2003] IRLR 640, made this simple point, at paragraph 91:
- “It is trite but true that the starting point of all tribunals is that they must remember that they are concerned with the rooting out certain forms of discriminatory treatment. If they forget that fundamental fact, then they are likely to slip into error”.
49. The provisions that we are dealing are to combat discrimination. In that context, it is important to note that it is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: see **Glasgow City Council v Zafar** [1998] ICR 120. Tribunals should not reach findings of discrimination as a form of punishment because they consider that the employer’s procedures or practices are unsatisfactory; or that their commitment to equality is poor; see **Seldon v Clarkson, Wright & Jakes** [2009] IRLR 267.
50. Direct discrimination is defined by Section 13 EQA:
- 13 Direct discrimination**
- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
51. Section 23 EQA provides that a comparison for the purposes of Section 13 must be such that there are no material differences between the circumstances in each case. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been

treated if she had not had the protected characteristic. This is often referred to as relying upon a hypothetical comparator.

52. Since exact comparators within the meaning of section 23 EQA are rare, it may be appropriate for a Tribunal to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator: see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196 (Jul).
53. The Courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and of the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516. Statutory provision for the reversal of the burden of proof is now made by Section 136 EQA:

136 Burden of proof

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

54. Guidance on the reversal of the burden of proof was given in **Igen v Wong** [2005] IRLR 258. It has repeatedly been approved thereafter: see **Madarassy v Nomura International Plc** [2007] ICR 867. The guidance may be summarised in two stages: (a) the Claimant must prove on the balance of probabilities, facts from which the Tribunal 'could conclude in the absence of an adequate explanation' that the Respondent had discriminated against her. This means that the Claimant must establish a 'prima facie case' of discrimination including less favourable treatment than a comparator of a different race or gender with circumstances materially the same as the Claimant's, and facts from which the Tribunal could infer that this less favourable treatment was on the grounds of race or gender; (b) having done so, the Respondent must prove that the less favourable treatment was in no sense whatever on the grounds of race or gender.
55. To establish discrimination, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a significant influence: see Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572 at 576.
56. There may be circumstances in which it is possible to make clear determinations as to the reason for treatment so that there is no need to rely on the reversal of the burden of proof: see **Amnesty International v Ahmed** [2009] ICR 1450 and **Martin v Devonshires Solicitors** [2011] ICR 352 as approved in **Hewage v Grampian Health Board** [2012] ICR 1054. However, if this approach is adopted it is important that the Tribunal does not fall into the error of looking only for the principal reason for the treatment but properly analyses whether discrimination was to any extent an effective cause of the reason for the treatment.

57. In **Shamoon** it was stated that, particularly when dealing with a hypothetical comparator, it may be appropriate to consider the reason why question first. But, again, it should be noted that to take account of the burden of proof provisions, if this is done the Tribunal must be satisfied that the treatment was, in no sense whatsoever, because of the protected characteristic.
58. Section 19 of the Equality Act 2010 provides:
19. Indirect discrimination
- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purpose 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.
59. The Supreme Court held in **Essop and others v Home Office (UK Border Agency): Naeem v Secretary of State for Justice** [2017] UKSC 27 that there has never been any express requirement for an explanation of the reasons why a particular PCP puts one group at a disadvantage when compared with others. It is enough that it does. Indirect discrimination, unlike direct discrimination, does not require a causal link between the characteristic and the treatment but does require a causal link between the PCP and the particular disadvantage suffered.
60. The case concerned the use of a test, the CSA, that disproportionately affected BAME candidates. Lady Hale noted that disproportionate impact will usually be established by statistical evidence. Lady Hale also held at paragraph 32:
- “in any event, it must be open to the respondent to show that the particular claimant was not put at a disadvantage by the requirement. There was no causal link between the PCP and the disadvantage suffered by the individual: he failed because he did not prepare, or did not show up at the right time or in the right place to take the test, or did not finish the task. A second answer is that a candidate who fails for reasons such as that is not in the same position as a candidate who diligently prepares for the test, turns up in the right place at the right time, and



finishes the tasks he was set. In such a situation there would be a “material difference between the circumstances relating to each case”, contrary to section 23(1) (para 4 above).”

### Analysis

61. We consider it is appropriate to analyse this matter by first looking at the information about her experience that the Claimant set out in the employment history section of her application form. The application form (p206) made it clear that the Claimant had to **demonstrate** relevant experience of investigation. The only reference to investigation was to the Claimant’s time at Advice for Life in respect of which she referred to “investigating and assessing allegations”. She gave no examples of how she had carried out such investigations and did not state that the role was specifically that of investigator. It is clear to us that she failed to demonstrate the necessary experience needed to pass the sift. Indeed, in cross examination the Claimant accepted that she had “fallen down” by failing to show relevant experience.
62. The Claimant’s case on direct discrimination was that Ms Cutts assumed that she was a woman and of Asian origin because of her name which appeared on the application form. During the hearing, we were taken to many application forms. Although we have tables of all the applications they are not ordered in a way that makes it possible to cross refer the tables with the application forms in the bundle to ascertain the actual gender and ethnic origin of the candidates with whom the Claimant compared her treatment. However, that information would also not have been available to Ms Cutts. The Claimant’s case is that Ms Cutts made assumptions from names about the race and gender of the candidates. That could result in direct discrimination even if it turned out that in some cases those assumptions were incorrect.
63. The Claimant was taken to numerous examples of women and people with names that could suggest the applicant was Asian or from a BME group who Ms Cutts had passed at the experience stage of the assessment and/or who referred to their relevant experience outside of a 12-month period. The Claimant stated that her case on direct discrimination was not in respect of those who did demonstrate the relevant experience but was limited to the “borderline” cases. The case is rather unusual in that the Claimant is essentially stating that while she did not demonstrate the experience necessary to pass the first stage of the sift she contends that there are a limited number of others who also failed to demonstrate the necessary experience but who Ms Cutts allowed through the first stage paper sift, although they all failed at a later stage.
64. The Claimant contended that Ms Cutts by referring to substantive experience in her comments on her application form was applying an additional criterion. We do not accept that that is the case. She was merely using the adjective to explain that she was looking for specific examples that amounted to something of substance.

65. The first of the Claimant's comparators was Mr Boylan (p1687). Mr Boylan referred to his initial period of employment between 1973 and 1980 as a principal investigator of road traffic accidents. He referred to "taking statements, preparing plans and photos of accident scenes.". We accept that this constituted the types of specific examples of undertaking investigations that Ms Cutts was looking for. Although it fell outside of a five-year period, that did not mean that it was excluded from consideration as there was a requirement to evidence experience including recent experience; it was not limited to recent experience. He then went on to refer to his current role as a solicitor stating that for many years he had dealt with four major companies in relation to death and bodily injury claims stating that he had always been very hands on, although once he became a consultant on a three-year contract he began to run down his caseload. In her assessment to Ms Cutts stated he "has had a long career as a solicitor dealing with insurance claims in RTAs and death and injury claims for large companies. It is unclear just how much hands-on investigatory work he has done, but will give the benefit of the doubt". In giving the benefit of the doubt Ms Cutts was prepared to accept that the types of specific examples given in respect of the early period of Mr Boylan's employment would have continued with the hands-on work he did in the later period: i.e. the period for which it was necessary to include some relevant experience. The real difference between his application and that of the Claimant was that he did give some specific examples of investigatory tasks that he had undertaken, whereas the Claimant did not refer to any specific tasks undertaken by her in any of her jobs; or suggest that her main role was as an investigator.
66. The next comparator relied upon at the outset of the case was Kevin Firth. Mr Firth was not scored by Ms Cutts but by Sandy Chidwick. He cannot be a valid comparator in determining whether Ms Cutts consciously or unconsciously discriminated against the Claimant because she read her name and assumed that she was a woman of Asian origin. While it is correct that Mr Firth gave very little concrete evidence of his investigatory experience he did refer to writing reports in respect of investigations into vehicle collisions, disciplinary investigations and public complaints. This was a little better than the Claimant's response. However, we consider that the key issue is that he was scored by a different individual.
67. The Claimant in her closing submissions relied on Mr Beynon (p1736) as a comparator. He was not one of the comparators she referred to in her witness statement. The key criticism she made in respect of Mr Beynon was that in his employment history section the most recent experience he gave was investigating suspected housing benefit, housing fraud and other Social Security benefit fraud while working at the London Borough of Islington. The dates he gave for this work was from July 2000 to 22 July 2001. Ms Cutts explained that she had noted that in the resilience section of the application form he referred to having been in the middle of a trial of eight family members involved in an organised and well-planned housing benefit fraud in 2010 and that he had been investigating for approximately two years and it involved a fraud of over £150,000. From that she assumed that the dates given on the job application were incorrect. We can well understand why she did so, as it seems likely that there was a typographical error the dates of his most recent employment, which would bring the experience within the last five years.

Although this is not a point that was relied upon by the Claimant in her closing written submission she did put to Ms Cutts in cross examination that Mr Beynon did not give specific examples of what he did to investigate. Ms Cutts stated that he had a history of investigatory roles. While, as the Claimant points out in her closing submission, some of these were for relatively brief periods of times, they were roles as a professional investigator, specifically dealing with fraud in housing and benefits. He also gave examples of the types of investigations he undertook. We accept that the reason that Ms Cutts decided that he should be given the benefit of the doubt that he gave a number of examples of working as a professional investigator and it appeared very likely that the dates of his most recent employment were incorrect, which would not only show recent relevant experience within five years, but would indicate that he had held his last role for at least nine years.

68. In cross examination, the Claimant noted that Ms Cutts made positive comments about Elaine Weston (p2011) referring to her experience of working in communities rich in diversity whereas at paragraph 79 of Ms Cutts' witness statement she referred to the Claimant placing a great emphasis on investigations of race discrimination as opposed to the range of matters that the IPCC has to investigate. We consider that there is a distinction between the two in that working with diverse communities could involve any of the types of investigations that the IPCC undertakes. However, we do not see that there is anything to criticise in the Claimant having emphasised her own experience which has particularly been in the field of race discrimination.
69. Analysing the evidence as a whole we have considered whether the Claimant has established facts from which we could conclude in the absence of an adequate explanation that she had been subject to direct discrimination on grounds of race or gender. While we have set out in our findings of fact concerns about the way in which the selection process was set up, the changing of the criteria and a failure to inform the second Respondent of the first Respondent's diversity in employment policy or to require them to comply with the ECHR Code of Practice we do not consider that those failings affected the way in which the scoring exercise was carried out by Ms Cutts. While Ms Cutts had not considered the ECHR Code of Practice she had been trained in fair recruitment practices. We have considered whether the comments that she made in her witness statement about the Claimant's great emphasis on experience in investigating race discrimination might suggest a mind-set that was critical of those that carry out such investigations and made a stereotypical assumption that those interested in race equality are likely to be BME. Firstly, we note that these comments are made about a section of the application form that Ms Cutts had not seen at the time that she sifted the Claimant's application. They cannot have influenced her in the decision she took at the time. We have gone on to consider whether they might evidence a more generally discriminatory mind-set on her part. We consider that in analysing the application form after the event in her witness statement she has emphasised the Claimant's reference to investigations which are a limited part of the investigations undertaken by the IPCC. While we do not agree with any implicit criticism of the Claimant we do not consider that this is sufficient to constitute evidence from which we could draw an inference of race discrimination, particularly in circumstances in which Ms Cutts allowed through

the sift candidates with names that suggested that they were Asian or BME candidates.

70. The Claimant's claim is based on suggestion that there are a few candidates whose applications were as poor as hers in setting out relevant experience that were given the benefit of the doubt. As set out above we consider that there were significant differences between their application forms and those of the Claimant, but do not consider even if they were nearly as bad as that of the Claimant, that when seen against the evidence of her having passed women and those with names that suggested that they were Asian or of some other BME background, that this is material from which we could draw an inference of discrimination.
71. Furthermore, we see no reason to doubt the Ms Cutts' evidence that she paid no attention to the names of the candidates and whether the names suggested the gender of candidates or whether they were Asian or BME.
72. The Claimant referred to the fact that there was an attempt by the second Respondent to directly source some candidates. Ms Cutts was not involved in the process and it provided no evidence to support the direct discrimination claim.
73. Were we wrong in holding the burden has not shifted we consider that Ms Cutts has fully explained the reason for the difference in treatment between the Claimant and her comparators and that it was in no sense whatsoever because of the Claimant's race or gender. We accept she has fully explained why she passed the comparators and not the Claimant. We also accept that she did not consider the names of candidates and whether she could infer from the names that the candidate might be Asian, BME and/or a woman.
74. In determining the claim of indirect discrimination, we consider that the relevant statistics are in relation to the percentages of men as against women and white as opposed to Asian applicants who failed the work experience stage of the paper sift. As can be seen from table 2 whereas 55.6% women failed at the work experience sift only 40.8% of men did: similarly, whereas 57.4% of Asian candidates were sifted out on work experience only 43.9% of white applicants were. We consider these figures do establish disparate impact at the stage of the work experience sift.
75. We have considered what PCP was applied. In respect of recent work experience, the PCP that the Claimant was permitted to rely on by the EAT was the application of a requirement to demonstrate investigative experience in the past 12 months and/or five years.
76. We consider that, although the Claimant was not informed of the change, the criterion applied by the Respondent was one of experience in the last five years. On the face of the written criterion that could include the last five years of employment. We do not accept the Claimant's contention that a criterion of investigative experience in the past 12 months was applied.

77. However, we consider the key to the indirect discrimination claim is that irrespective of whether the requirement for experience was in the last five years or the last year of employment the Claimant did have such experience, and so could comply with the criterion, but failed to demonstrate her experience on her application form.
78. The Claimant suggested in her submissions that the criterion was the change the Respondent made to require candidates to demonstrate experience in the last 5 years without the applicants being told about the change. This was a PCP she had referred to in a response to a request for further formation but which she did not pursue and so was not permitted to rely on it by the EAT. However, even if the Claimant could rely on it we do not consider that it would assist the Claimant as she could show the relevant experience within the last year of her employment. She could have demonstrated such experience within the last year of her employment if she had given examples of the types of investigation she had carried out at Advice for Life.
79. We also do not consider in referring to the private and public sector the Respondent was applying a PCP that excluded experience in the third sector. They were making clear that experience wherever gained could be relied upon. We do not consider that the Claimant felt she was precluded from referring to experience in the Third Sector.
80. The Claimant accepted under questioning that she considered that she could refer to relevant experience in her job at Advice for Life as it was within the last year of her employment. She did not feel limited to referring to experience in the last year, whether in employment or not. The Claimant also felt able to refer to relevant experience in her job at Advice for Life notwithstanding the fact it was in the Third Sector. The Claimant was questioned on whether she could show relevant experience from undertaking this role. For example, she was asked whether she took witness statements. She replied "of course". She stated "I assumed that everyone would appreciate what you do to present to courts and tribunals". She stated "you can't possibly present claims in the Employment Tribunal without presenting evidence". She said that she "could have said that she had taken lots of statements but she assumed they knew what a discrimination and human rights adviser does". She said that she "could have given brilliant examples of how she needed to forensically investigate". It is clear to us that the Claimant could have set out experience when working at Advice for Life that would have been sufficient for her to pass the paper sift. She did not do so because she erroneously thought that assumptions would be made about what the role involved and that she would have the relevant experience.
81. In the Claimant's witness statement, she sets out in considerable detail what she had done in the rest of her employment history. She stated that at Garden Court Chambers she had often had to take witness statements. She stated that because of specialising in criminal law she had to take effective notes at crime scenes, take witness statements, attend inquests, agree pathologists reports and advise bereaved families. She set out none of this in her application form. Even on the basis of the criteria that the Claimant had seen. i.e. to show relevant experience including experience within the last 12 months, there was nothing to prevent the Claimant demonstrating relevant

experience during the entirety of her working life which could have included her period as a barrister.

82. In addition, the Claimant stated that at Hackney Campaign Against Racism she worked on death in custody cases involving taking detailed witness statements, visiting scenes of alleged assaults and racial abuse, taking photographs and measurements, seeking witnesses by distributing flyers, interviewing witnesses, taking detailed statements and preparing all materials for a complaint and instructing solicitors. This was precisely the type of experience that Ms Cutts was looking for. The Claimant could have set it out on her application form.
83. We do not accept that the Claimant, at the time she filled in the application, believed that she could not refer to any experience from the third sector. She considered that Advice for Life was part of the third sector. That is the one role where she did give some very limited material about undertaking investigations. It would be illogical that she should feel that she could refer to investigations but not give particulars. We consider that the key to understanding the Claimant's application form is that she thought that people sifting the application form would assume what she did, rather than her appreciating that she should give examples of what she had done to demonstrate that she had the relevant experience.
84. Although we accept group disadvantage has been established we do not accept that the Claimant was put to that disadvantage by application of the PCP. She could comply with the PCP but failed to do so because she failed to demonstrate the relevant experience that she had. There was nothing preventing her from doing so. She erroneously and unreasonably thought that the experience would be assumed rather than there being a requirement for her to demonstrate it.
85. If the Claimant had established that she had been discriminated against by the application of the work experience sift we consider it is inevitable that she would have failed the full written sift, in particular because of her answers to question 3. The question and the Claimant's answer are at Annex 3. Firstly, the Claimant failed to set out a clear timeline of the facts. Next in considering the investigation she stated "my next steps would be to draw up a timeline and an investigation map in order to identify what I need to do, including reviewing available evidence, listing what other evidence I need to gather and what witnesses need to be interviewed and so on". As Ms Misra put it, in a question designed to elicit what she would do to further investigate the matter the Claimant stated that she would form a plan to investigate. The Respondent expected candidates to set out the specific steps they would take to investigate.
86. The Claimant stated in her answer that the custody Sergeant on his own admission did not follow ACPO and PACE. When it was put to her that he had not made such an admission the Claimant stated that her answer was "incredibly badly worded" and that it was "completely wrong".
87. We consider the Claimant inevitably would not have achieved a pass mark on question 3. The only comparator the Claimant sought to rely upon who was

marked by Ms Cutts was Mr Willis who she contended failed to suggest that the evidence showed that there were breaches of ACPO and PACE. We accept Ms Cutts' evidence that she was not looking for the quotation of specific provisions but for an analysis of the facts that were established, what was not known and the detail of the investigations that should be undertaken. When one looks at Mr Willis's answer, taken as a whole, it is an almost paradigm example of how the question should be answered.

88. The Claimant cross-examined Ms Cutts on numerous other applicants who had been marked by other scorers and who, in one respect or another, had made similar mistakes to her. We do not think that this was of assistance to any significant extent as the Claimant's answers would have been marked by Ms Cutts rather than any of the other scorers. While she was able to point out specific failings in their answer we do not accept that overall they had such significant flaws as the Claimant's answer, which meant that she would necessarily fail to obtain a score of 3 on this question and so would have failed the paper sift. The Claimant suggested that she was unable to answer the question better because of the limited word count. We do not accept that this is the case. The Claimant suggested that she could not answer the question by providing a list of things to be done as this would not demonstrate her written communications skills which was a requirement for the sift. We do not accept this. Written communication skills include concisely conveying information by using lists and bullet points.
89. In the circumstances that Claimant's claims fail and are dismissed.

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Employment Judge Tayler  
9 May 2017

**ANNEX 1**

**SEX DISCRIMINATION**

**Direct**

1. Whether because of the Claimant's sex the Second Respondent treated the Claimant less favourably than actual or hypothetical male comparators by rejecting the Application contrary to section 13 EqA;
2. If so, whether the Respondents are liable to the Claimant pursuant to sections 39, 109 and 110 EqA.

**Indirect**

3. Whether the First alternatively the Second alternatively the First and Second Respondents applied the following provisions, criteria or practices ('PCPs') or either of them to all of the applicants for the investigator role (male and female):
  - a. The requirement to demonstrate investigative experience in the past 12 month and/or 5 years<sup>1</sup>;
  - b. The requirement to demonstrate such experience in public or private sector employment;<sup>2</sup>
4. If so, whether the PCPs or either of them placed or would place women at a particular disadvantage to men (section 19(2)(b) EqA);
5. If so, whether it put or would put the Claimant at that disadvantage (section 19(2)(c)EqA) and whether the Claimant is required to establish the reason why she has been placed at that disadvantage (cf. *Essop* and *Chez*<sup>3</sup>);
6. If both disadvantage limbs of section 19 are met, and, if necessary, if the Claimant has established the "reason why", whether the application of the PCP(s) was in pursuit of a legitimate aim;
7. If so, whether the application of the PCP(s) was a proportionate means of achieving such aim.
8. If so, whether the Respondents are liable to the Claimant pursuant to sections 39, 109 and 110 EqA.

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<sup>1</sup> The reference to the PCP at 3(a) and 12(a) is to a sole criteria applied at the first sift stage. The Claimant disputes the Respondents' contention that the criteria was changed to 5 years' experience as suggested at issues 3(a) and 12(a)

<sup>2</sup> The variation to the PCP set out by Mrs Justice Simler in the EAT by removal of the specific reference to "rather than in voluntary work" was agreed by the parties as the Claimant contended that voluntary work was given as an example of work that would not be in public or private sector employment rather being said to form a part of the PCP: in respect of the PCP at 3(b) and 12(b) the Claimant will contend that there was an exclusion of experience in the "third sector"

<sup>3</sup> Home Office (UKBA) v Essop [2015] IRLR 724 and *Chez Razpredelenie Bulgaria AD v Komisa ZA Zashchita ot Diskriminatsia* [2015] IRLR 746 and/or any other relevant authorities. The Claimant clarified it is her contention that if Essop applies she can establish the reason why she has been placed at a disadvantage by the application of the PCPs.



**RACE DISCRIMINATION**

**Direct**

9. Whether because of the Claimant's race, Asian ethnic origin and Sri Lankan national and ethnic origin, the Second Respondent treated the Claimant less favourably than actual or hypothetical comparators by rejecting the Application contrary to section 13 EqA;
10. If so, whether the Respondents are liable to the Claimant pursuant to sections 39, 109 and 110 EqA.

**Indirect**

12. Whether the First alternatively the Second alternatively the First and Second Respondents applied the following provisions, criteria or practices ('PCPs') or either of them to all of the applicants for the investigator role (irrespective of race):
  - a. The requirement to demonstrate investigative experience in the past 12 month and/or 5 years<sup>4</sup>;
  - b. the requirement to demonstrate such experience in public or private sector employment;<sup>5</sup>
13. If so, whether the PCPs or either of them placed or would place persons of Asian / Sri Lankan ethnic origin at a particular disadvantage as compared to persons of a different race (section 19(2)(b) EqA);
14. If so, whether it put or would put the Claimant at that disadvantage (section 19(2)(c)EqA) and whether the Claimant is required to establish the reason why she has been placed at that disadvantage (cf. *Essop* and *Chez*<sup>6</sup>);
15. If both disadvantage limbs of section 19 are met, and, if necessary, if the Claimant has established the "reason why", whether the application of the PCP(s) was in pursuit of a legitimate aim;
16. If so, whether the application of the PCP(s) was a proportionate means of achieving such aim.
17. If so, whether the Respondents are liable to the Claimant pursuant to sections 39, 109 and 110 EqA.

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<sup>4</sup> The reference to the PCP at 3(a) and 12(a) is to a sole criteria applied at the first sift stage: the Claimant disputes the Respondents' contention that the criteria was changed to 5 years' experience as suggested at issues 3(a) and 12(a)

<sup>5</sup> The variation to the PCP set out by Msr Justice Simler in the EAT by removal of the specific reference to "rather than in voluntary work" was agreed by the parties as the Claimant contended that voluntary work was given as an example of work that would not be in public or private sector employment rather being said to form a part of the PCP: in respect of the PCP at 3(b) and 12(b) the Claimant will contend that there was an exclusion of experience in the "third sector"

<sup>6</sup> *Home Office (UKBA) v Essop* [2015] IRLR 724 and *Chez Razpredelenie Bulgaria AD v Komisa ZA Zashchita ot Diskriminatsia* [2015] IRLR 746 and/or any other relevant authorities. 1.5. The Claimant clarified it is her contention that if *Essop* applies she can establish the reason why she has been placed at a disadvantage by the application of the PCPs.

**ANNEX 2**

Stage	All	Male	Female	White	BME	Black	Asian	Mixed	Non-white
Fail W/E	540	312	228	453	83	37	31	14	165
Fail as %	46.0	<b>40.8</b>	<b>55.6</b>	<b>43.9</b>	<b>62.9</b>	67.3	<b>57.4</b>	70.0	63.2
Pass as %	44.0	59.2	44.4	56.1	37.1	32.7	42.6	30.0	36.8
Fail Motiv'n	213	146	67	194	18	9	6	2	35
Fail Full Sift	241	173	68	211	27	5	17	4	53
Pass sift	181	134	47	175	4	4	0	0	8
Total	1175	765	410	1033	132	55	54	20	261

**ANNEX 3**

3. Scenario Based Question Analytical Thinking and Decision Making:

You have been given the following information by your manager about a police custody case which your colleague started work on two days ago and is now being transferred to you. Complainant, Jay Pinner was taken into custody at 11.45pm on 31st December following a fight outside a pub. He was taken to Tenworth Police Station and admitted to a cell, the custody Sergeant reports that Jay had no personal belongings or ID on him apart from a Bank Debit Card and was not able to answer any questions. On the 1st January he was found unconscious in the cell and taken to Tenworth Hospital A&E by ambulance. The hospital records show that he was admitted at 8.34am on 1st January, he was unconscious, having seizures and had internal bleeding in his abdomen. He was operated on, and then admitted to a ward where he showed good signs of recovery and was seizure free. He discharged himself against medical advice on the 4th January. On the 12th January Jay made a complaint via a solicitor that he had been assaulted by a number of Police Officers at Tenworth Police Station and had been treated with excessive force. Your colleague has already spoken with the Custody Sergeant, Dan Rawlins who admitted Jay to the cell. Sgt. Rawlins reports that they had followed all of the necessary procedures, provided food and a warm drink every 4 hours, completed checks and used only necessary force to admit Jay to the cell. They also stated that Jay was under the influence of alcohol and drugs on arrival at the station, that it was a very busy night in custody, and Jay was verbally abusive and showing aggressive behaviour towards the custody officers. The CCTV footage is of poor quality but does show a man laying motionless on a mattress from 5am on the 1st January. The footage also shows that no Police Officers entered the cell after 2.30am until Jay was found unconscious at 7.45am. Jay has stated in his complaint that he could have died due to the unnecessary excessive force he encountered from the Officers on duty. He also reports to be a victim of racist verbal abuse and that the treatment he experienced has left him feeling vulnerable and anxious, resulting in the need for counselling, losing his job and his financial security.

Please cover the following questions in your answer and respond as if you were in the role of Investigator:

*As the investigator responsible for this case please list the facts so far.*

*What do you not know at this point in the Investigation?*

*What next steps would you propose taking?*

*You are required to make a decision on whether there is a case for disciplinary action what is your decision and why have you reached this decision [300 words]*

The facts are that Mr Pinner was taken into police custody, the police believed he was under the influence of drink and drugs but he was not checked and roused every half hour and, after not being visited for over five hours, he was later found unconscious. He was taken to hospital with serious injuries and was successfully treated.

I do not know how or when Mr Pinner s injuries occurred, nor the cause or extent of the injuries. I do not know what racist abuse is alleged and who is alleged to be responsible. While the hospital records may confirm Mr Pjnnner s injuries they may not be able to identify the cause of the injuries and / or when they were inflicted.

My next steps would be to draw up a timeline and an investigation map in order to identify what I need to do, including reviewing available evidence, listing what other evidence I need to gather and what witnesses need to be interviewed and so on. I need to investigate not only what happened at the police station but also what happened prior to that in order to establish whether Mr Pinner may have sustained any injuries in the alleged fight outside the pub. I also need to check the reliability of the evidence that is available such as the CCTV footage.

I do not have evidence as yet for taking disciplinary action on the complaint of the alleged assault and racist verbal abuse of Mr Pinner, However, there is case for disciplinary action as, on the Custody Sergeant's own admission, he did not follow the ACPO (2012) Guidance on the Safer Detention and Handling of Persons in Police Custody and breached PACE 1984, revised Code C, section 9.3.