



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 65

IN THE MATTER OF THE BERMUDA POLICE ACT 1974 AS AMENDED

**AND IN THE MATTER OF THE BERMUDA POLICE SERVICE PROMOTION POLICE AND POLICE
CONDITIONS OF SERVICE ORDER 2002**

**AND IN THE MATTER OF AN APPLICATION TO SET ASIDE THE DECISION OF THE BERMUDA
POLICE SERVICE SERGEANT TO INSPECTOR PROMOTION PANEL 2018 RESULT**

**AND IN THE MATTER OF AN EX PARTE APPLICATION TO A JUDGE IN CHAMBERS FOR
JUDICIAL REVIEW UNDER SECTION 53 OF THE RULES OF THE SUPREME COURT**

BETWEEN:

DAVID BHAGWAN

Applicant

-and-

(1) STEPHEN CORBISHLEY

(COMMISSIONER OF POLICE)

(2) MARTIN WEEKES

(ASSISTANT COMMISSIONER OF POLICE, INTERVIEW PANEL CHAIRMAN)

(3) ANTOINE DANIELS

(ASSISTANT COMMISSIONER OF POLICE, INTERVIEW PANEL MEMBER)

(4) MICHAEL TROTT

(BPS HUMAN RESOURCE MANAGER INTERVIEW PANEL MEMBER)

(5) JOHN PAYNE

(INTERVIEW PANEL MEMBER)

Respondents

Before: **Hon. Chief Justice Hargun**
Appearances: **Mr. Philip Perinchief, PJP Consultants, for the Applicant**
Mr. Allan Doughty, MJM Limited, for the Respondents

Dates of Hearing: **8-9 March 2021**
Date of Judgment: **26 April 2021**

JUDGMENT

A. Introduction

1. These proceedings were commenced by Detective Sergeant (“**DS**”) David Bhagwan by filing Form 86A on 15 February 2019, seeking leave to issue judicial review proceedings in relation to certain decisions of the Bermuda Police Service (“**BPS**”) 2018 Sergeant to Inspector promotion Interview Panel result dated 21 September 2018. Specifically, DS Bhagwan sought the following relief:

- (1) An order of certiorari quashing the decision and the result of the BPS 2018 Sergeant to Inspector Interview Panel result dated 21 September 2018.
- (2) A declaration that the Commissioner of Police and the Interview Panel overreached their duties and responsibilities and acted unlawfully pursuant to the Police Act 1974 (“**the PA 1974**”) and the Police (Conditions of Service) Order 2002 (“**COSO 2002**”) in relation to the 2018 promotions.
- (3) A declaration that the interview process of the 2018 Sergeant to Inspector Interview Panel was conducted with bias and was ultra vires.
- (4) An order of mandamus requiring the Respondents to comply with the provisions of the PA 1974 and COSO 2002 relating to promotion.

2. By order dated 19 February 2019, the Court granted leave to issue the Originating Notice of Motion seeking judicial review, on papers pursuant to section 64 of the Supreme Court 1905 and RSC Order 53.

B. The background

3. DS Bhagwan served the Royal Anguilla Police Force as a Police Constable from June 1994 to June 2000. On 1 July 2000, he joined the BPS as a Police Constable on a three years non-renewable contract. However, in 2003 he was offered a five-year contract to continue to serve as a Police Constable which he accepted.
4. At the date of the commencement of these proceedings, DS Bhagwan had served altogether in excess of 20 years as an officer with the BPS and 11 years as a Police Sergeant.

Promotions within the BPS

5. Common with other Police organisations, the BPS operates a structured promotion policy within its ranks of officers. As set out in the First Affidavit of the Assistant Commissioner of Police (“**ACOP**”), Mr. Martin Weekes, the 2nd Respondent, the BPS Promotion Policy (“the Policy”), is a document which has been revised on a periodical basis. In recent years the Policy has been revised following consultation at all levels of the Service, including the Bermuda Police Association (“**BPA**”).
6. ACOP Weekes explains that there exists no entitlement to promotion within the BPS and the members are not automatically promoted in any circumstances. Promotions are made based on merit and operational needs and always subject to the decision of the Commissioner of Police (“**COP**”). The Promotion Policy (“**the Policy**”) does not guarantee promotion. Passing any part or indeed the whole of the extended Promotion Process (“**the Process**”) simply provides an applicant with the opportunity to then be considered for promotion by the COP. In all cases, promotion is at the discretion of the COP and in the case of the ranks of Inspector and Chief Inspector following the COP’s recommendation

to the Public Service Commission (“**PSC**”) and their subsequent approval. This lack of entitlement is reinforced at every stage of the Process to ensure that all expectations are properly handled.

7. The earlier Process and Policy, such as followed in 2013, was radically different from the previous policies in that it provided for a very strict drawn-out process designed to “filter out” as many candidates as possible in order to limit the amount of formal interviews that took place. The Process for each rank promotion had an application form which had multiple questions to answer as well as a career summary document to prepare. All candidates’ applications were marked and many were “*failed*” on the answers they gave to the questions. The applicants had to submit two Performance and Development Review (“**PDR**”) documents completed pursuant to the Performance and Review Policy (“**the P&R Policy**”). These PDRs were then screened by the Assessment Panel (“**the Panel**”), and where entries were not deemed strong enough the candidate was rejected. The idea was to only have 10 candidates in each rank progressed through to the Interview stage. Following the Process, all applicants were invited along with the BPA to submit written feedback on the Process.
8. ACOP Weekes recalls that when it was suggested in 2017 that a revised Process needed to be established, he volunteered to take the lead in re-promulgating it. It took the written feedback from 2012-2013 Process and invited volunteers from across the Service to form a Working Group to refine the Policy and presented a revised Policy to the COP.
9. A Working Group was formed with membership from Constable to Chief Inspector as well as representatives from the BPA. DS Bhagwan asked to become a member and was made member of this Working Group. The feedback from the Working Group was that the 2013 Process was unduly time-consuming and that a number of candidates felt it unfair that their PDR’s, which had been signed off by the supervisors, were found not to be strong enough for them to continue in the Process. The Working Group proposed a new Policy to the COP. The COP directed that the new Policy should be “*inclusive*” as possible and not

designed to “*exclude*” candidates like the previous one had. To that end, the COP allowed the following changes:

- (a) Removal of the lengthy questions from the application form leaving only the requirement to complete all sections (including the Career Summary and details of professional development undertaken by the candidate at their own volition).
- (b) Removal of the requirement for PDR to be graded by the Panel. The COP declined to remove the PDR requirement completely but did agree to only require an applicant to attach the two completed PDR’s for the last 2 years. The COP agreed that the applicants would not be marked down on the contents and they must just prove compliance with the PDR Policy by completing one each year.

10. The result of this was that there was no limit on how many candidates could go through to the interview stage and so, over the course of next year, the panel interviewed 80 candidates across the various ranks. This was done to ensure that everybody who successfully completed the application Process received a fair chance to interview face-to-face which was a big criticism of the previous policy.

11. ACOP Weekes points out that Mr. Bhagwan was instrumental in the development and formulation of the Policy which is the subject matter of these judicial review proceedings. He was and is, contends ACOP Weekes, fully conversant with exactly how it works.

The 2018 Promotion Policy

12. The relevant provisions of the 2018 Promotion Policy (“**the 2018 Policy**”), amended in October 2017 under ACOP Weekes, provided as follows:

- (a) It shall be the policy of the BPS to maintain standardised procedures pertaining to promotions. Under the guidelines of the Policy, the promotion process will

be fair and transparent and will result in the appointment of individuals who best demonstrate the prerequisite skills, knowledge, and abilities necessary for the BPS to achieve its overall mission, goals and objectives (paragraph 2.1).

- (b) The BPS will conduct all examinations and interviews for promotions of police officers within the Service. The only external involvement in the process, involve the roles played by the PSC and the Governor. The COP will make all promotion appointments to the rank of sergeant. The promotions for ranks above sergeant will be upon the recommendation of the COP to the PSC and with the final ratification from the Governor. The BPS may utilize a person from outside the Service as assessors or role players during the Process (paragraphs 2.2 and 2.3).

- (c) The COP is responsible for the overall administration of the Process within the Service. Any changes to the Process for the ranks of Sergeant to Superintendent will be made after consultation with the BPA in accordance with COSO 2002 (paragraph 4.1).

- (d) The BPS will utilise an extended promotion process to ensure that the most appropriate component is used to measure the various competencies that have been identified as part of the process. For promotion to the rank of Sergeant and Inspector, the extended promotion process will include (i) knowledge examination which involves multiple choice examination used to assess the candidates knowledge of law, policy and procedures; (ii) review of Promotion Process Application Form; (iii) Structured Interview for which questions will be provided to the candidate two hours in advance of the interview to provide time to prepare and will include one Presentation Question; and (iv) In-Box problem-solving exercise where the candidate assumes the role of the next rank and is directed to respond to a predecessor's in-basket items in writing (paragraph 6.1 and 6.2).

- (e) To achieve a degree of consistency and ability, a group of assessors will be identified and trained to effectively assess an extended promotion process. Assessors from within the BPS will be of a higher rank than the candidate. To demonstrate objectivity and to promote transparency, one of the assessors will be a known BPS member. Assessment Panels will consist of at least two senior police officers, a Human Resource professional, and one non-BPS member in order to provide a rich assessment base. Only suitable trained persons may participate in the role of an assessor. All examination papers will be marked independently by at least two assessors to ensure accuracy of marking. Exam papers will utilise candidate coding to ensure that assessors are unaware of which candidate completed the paper. On the written application, candidates may request that a BPA representative may be present during the Structured Interview (paragraphs 8.1, 8.2, 8.3, 8.4, 9.6 and 13.8).
- (f) Candidates will be scored for each component of the extended promotion process. These scores will be prorated as a percentage. Candidates must achieve an overall passing rate of 60%. Candidates who successfully passed the promotion process will be rank ordered based on their overall scores. They would be eligible for promotion for a period of four years. Passing the process and being deemed eligible for promotion does not guarantee that the candidate will be promoted within the period of eligibility. Where a candidate is not promoted during the period of eligibility, the process must be retaken with the exception of the knowledge-based examination (paragraphs 11.1 to 11.4).
- (g) Candidates who do not pass the process will have the opportunity to repeat the process during the next promotion period (paragraph 13.7).
- (h) In the interest of fairness and transparency, candidates may appeal their scores related to their performance in the process. Candidates would be allowed 14 days to appeal from the date of the notification. Appeals concerning scores by assessors for the extended process components (not examinations) may be made

where the candidate perceives that there has been bias or errors in process. Candidates have the right to use the Service’s established grievance procedure for an appeal when applicable (paragraph 14.1, 14.2, 14.3 and 14.6).

- (i) The Inspector, Training & Development Department is responsible for the safekeeping of all test materials, rating forms, interview binders, and all other relevant documents to the inspector level (paragraph 15.1).

Grounds for challenging DS Bhagwan’s 2018 promotion results

13. DS Bhagwan participated in the 2018 Sergeant to Inspector Promotion Process. He was advised by a letter dated 21 September 2018, signed by ACOP Weekes and ACOP Daniels that he did not achieve the minimum passing grade of 60%. DS Bhagwan was advised that his scores (rounded up to the nearest .5 point) were as follows:

Application Form (maximum 5%)	3.5%
Presentation (maximum 25%)	11.5%
Structured Interview (maximum 50%)	32.5%
In Basket Exercise (maximum 20%)	8.5%
TOTAL SCORE	55%

14. DS Bhagwan pointed out that there was in fact an arithmetical error in that the total score when added up should be 56% and not 55%. This was accepted by the Panel and a revised letter showing the total score of 56% was issued on 2 October 2018.

15. Under the section “*Comments from the Assessors*”, DS Bhagwan was advised that the Panel was impressed with DS Bhagwan’s Application Form that highlighted clear and strong links between the examples that he cited and the relevant behaviors. The panel also took note of his track record in relation to self-initiated development.

16. DS Bhagwan’s presentation showed a good understanding of the key performance indicators of the Community Confidence. However, his use of the Service Decision Model

could have been more effective as some panel members were confused by the structure of the presentation. The Panel advised that his performance would have been enhanced by stronger examples of Problem Solving and Team Working.

17. The Panel considered that DS Bhagwan's performance in the Structured Interview section was strong with an above average score in the area of Professional Ethical Conduct and good scores in other competencies.
18. The Panel noted that there were some areas that require development in the In-Basket Exercise which had a negative impact on his final scores. However, the Panel considered that Problem Solving and Leadership and Management were his strong areas.
19. The decision of the Panel is challenged by DS Bhagwan on the grounds of illegality, irrationality, procedural impropriety and lack of compliance with the proportionality principle.
20. In relation to the ground of illegality, it is said that (i) ACOP Weekes acted in violation of section 20.1 and 20.3 of COSO 2002 in that he unilaterally made changes to the Policy without any meaningful input from the BPA; (ii) ACOP Weekes did not ensure, in the interests of fairness and transparency, that a BPS observer was present for the Interview stage of the Process held on 25 July 2018; and (iii) given the alleged history between ACOP Weekes and DS Bhagwan, ACOP Weekes ought to have recused himself from the Panel on the grounds of "*personal biases (real, apparent or imagined) against this applicant personally, and against Caribbean police officers generally.*"
21. In relation to the ground of irrationality, DS Bhagwan contends that the process utilised by the Panel was flawed, arbitrary, unreliable and questionable at best in that (i) certain Panel members were omitted or excluded from the "*assessing*" or "*scoring*" process altogether or partially, whilst other parts of the examination were excluded from others or reserved exclusively for other members such as ACOP Weekes and ACOP Daniels; and (ii) the fractured approach and conduct of the assessment process utilised by the Panel was

unreasonable and unfair under the circumstances and no independent and reasonable arbiter, correctly applying his mind to the facts averred by the DS Bhagwan, would find it safe to rely on the alleged final scores or its constituent parts, in respect of the DS Bhagwan.

22. In relation to the ground of procedural impropriety, it is alleged that (i) not all of the Panel members were qualified to competently undertake or administer or understand the subject assessment assignment in part or in its entirety, as some of them lacked the mandatory International Association of Chiefs of Police (“**IACP**”) training in order to conduct such a promotion interview in line with the 2013 PDR process and the 2018 promotion policy; (ii) ACOP Weekes acted irrationally, unlawfully, and contrary to section 15.1 of the 2018 Policy in that he personally and solely retained the written examination questions, interview questions, rating forms, interview binders and other miscellaneous but relevant documents; and (iii) Mr. John Payne, the 5th Respondent, acted inappropriately, unprofessionally and with extreme bias when he allegedly interrupted DS Bhagwan in mid-sentence at the Structured Interview and stated words to the effect that “*with your experience we should transfer you to the Training School*”.

23. In relation to the breach of the proportionality principle, it is alleged that the arithmetical error in calculating the total score at 55% (as opposed to 56%) gives rise to uncertainty or unreliability concerning each and every individual score in respect of the overall segmented promotion examination, and thus in reality, its true final score. It is said that under the circumstances it is not reasonably or humanly possible for an arbiter to now “balance” proportionately all the competing interests of the Applicant in receiving a successful or just result of a fair and transparency conducted examination, with the interests of the public in having and deserving competent policing.

C. Preliminary issue: are police promotions subject to judicial review

24. Mr. Doughty, on behalf of the Respondents, wishes to take a preliminary point and argues that this Court should not have granted leave to issue judicial review proceedings on the basis that (i) the decision complained of is, on its face, operational in nature and is not

properly the subject of judicial review; (ii) DS Bhagwan was not prompt in making his application, to the prejudice of third-party rights and good administration of the BPS; (iii) DS Bhagwan did not, in good faith, avail himself of the internal grievance procedure, which may have led to a faster resolution of his complaint.

25. Having regard to the history of the appeal/grievance process pursued by DS Bhagwan and as set out in paragraph 7 to 13 of the first affidavit of Mr. Michael Trott, the 4th Respondent, I am satisfied that it would not be appropriate to dismiss these proceedings on the basis that either DS Bhagwan was not prompt in making his application or the allegation that he did not, in good faith, avail himself of the internal grievance procedure. The issue whether judicial review is appropriate and available in relation to promotions within the Police Service does require further consideration from this Court and it is this issue which I now turn to consider.

26. The statutory framework governing the BPS is set out in the PA 1974. Section 3(1) provides that the Service shall be under the command of the Commissioner who, subject only to such general directions of policy with respect to the maintenance of the public safety and public order as the Governor may give him, shall determine the use and control the operations of the Service, and shall be responsible subject to such directions as the Governor may give him, for the administration of the Service.

27. Section 32 (1) provides that the Governor may by order provide for the better carrying out of the Act and the general government and discipline of the Service and, without derogation from the generality of this provision, any such order may relate to conditions, conduct, performance of service. Pursuant to this power the Governor has made COSO 2002. Order 20 of COSO 2002 deals with the subject matter of promotion within the Service and provides:

“ 20. PROMOTION

20.1 Promotions are made on merit. There are opportunities for members of the right calibre to be advanced eventually to the higher (gazetted) ranks.

20.2 The Commissioner of Police will seek the input of the Bermuda Police Association when any changes to the promotion process policy for the ranks of Chief Inspector and below is under consideration.

20.3 The Commissioner of Police will permit a Bermuda Police Association “observer” position at the interview stage of the promotion process for the ranks of Chief Inspector and below.”

28. Mr. Doughty for the Respondents relied upon three decisions of Baker LJ (and JA) in relation to the operations of a Police Service in which Baker LJ draws a distinction between decisions which are disciplinary in nature and decisions which are operational in nature. These cases support the proposition that disciplinary decisions are judicially reviewable by the courts. However, operational decisions within a Police Force are in general not susceptible to judicial review and decisions in relation to promotion within the Service are of a kind which the Court should “*only in the most exceptional circumstances, if ever, interfere.*”

29. In *R (ex p Morgan) v Chief Constable of South Wales* [2011] EWHC Admin 262, the Claimant was a police inspector in the South Wales Constabulary and was seeking judicial review of the decision to withdraw his qualification for promotion (“**his white ticket**”). The Chief Constable decided to withdraw the Claimant’s promotable grade because he concluded that his lack of objection, evidenced by his handling of an incident involving violence between youths of different races, outweighed the positive reports by his line manager. He decided he did not have the confidence in the Claimant’s judgment, sufficient to promote him to Chief Inspector. The Claimant argued that the withdrawal of his white

ticket was either a disciplinary sanction or something akin to it. Baker LJ, delivering the only reasoned judgment of the Court of Appeal, disagreed and held at paragraph 19:

“...Furthermore, the decision under challenge in the present case is one of a kind with which the courts should in my judgment only in the most exceptional circumstances, if ever, interfere. It is quite erroneous to look at the decision as one relating to discipline; it was a question of suitability for promotion. I am quite unpersuaded by the first limb of Mr. Eicke’s argument. The removal of the Claimant’s white ticket was neither a disciplinary sanction nor anything akin to it. The Chief Constable did not act in a procedurally unfair way and he was not required to follow the procedure laid down within the Police (Discipline) Regulations.”

30. Baker LJ revisited his earlier ruling in *ex p Morgan* in the later decision of *R (ex p Tucker) v Director of the National Crime Squad* [2003] EWCA Civ 57. In this case the Appellant, a Detective Inspector in the Derbyshire Constabulary, was seconded for 5 years to the National Crime Squad (“NCS”). The secondment was extended until May 2002, but in April 2001 it was terminated and he was summarily returned to his local force. His claim for judicial review of that decision failed before Harrison J who held that the decision was amenable to judicial review but that the Director General of the NCS had acted fairly notwithstanding the absence of reason for the decision and lack of opportunity for the Appellant to make representations. In the Court of Appeal, Baker LJ disagreed that the decision was susceptible to judicial review and relying upon his earlier decision in *ex p Morgan* drew a distinction between operational and disciplinary decisions. At paragraph 27 and 32 Baker LJ held:

“27. A police officer is in a different position from other employees. On becoming an officer he forfeits certain advantages, for example the right to strike or bring proceedings for unfair dismissal. He is subject to the discipline of his force and has by and large to go where and do what he is told. On the other hand he gains certain advantages for example the right to remain in service, health permitting, and to ill

health and injury pensions. Dismissal or other disciplinary punishment is governed by statutory procedures that are amenable to judicial review in the event of any breach of public law principles, such as fairness.

In contradistinction to the decision with regard to the other officers, there was no disciplinary element to decision in the Appellant's case. He was returned to his force because the Respondent had lost confidence in his ability to carry out his responsibilities. It seems to me that this was an entirely operational decision similar to the kinds of decision that are made with officers up and down the country every day of the week. Examples are transferring officers from uniform to CID or from traffic to other duties. These, to my mind, are run of the mill management decisions involving deployment of staff or running the force. They are decisions that relate to the individual officer personally and have no public element. They are, if you like, the nuts and bolts of operating a police force, be it the NCS or any other. It is, in my judgment, quite inappropriate for the courts to exercise any supervisory jurisdiction over police operational decisions of this kind. There is, quite simply, no public law element to them. The position is different where, however, disciplinary proceedings have been taken against an officer and the ordinary principles of fairness have been breached.”

32. In relation to *ex p Tucker* it should be noted that the Privy Council in *Prime Minister Manning v Feroza Ramjohn* [2011] UKPC 20, after citing paragraph 32 in the judgment of Baker LJ, held at paragraph 34 that: “*On the issue of reviewability, the Board has some doubt as to the correctness of the Court of Appeal’s conclusion in Tucker that the DDG’s decision was altogether beyond the Court’s supervisory jurisdiction.*”

33. Baker JA returned to this topic in the Bermuda Court of Appeal’s decision in *Commissioner of Police v Romeo Allen and Others* [2011] Bda LR 13. Baker LJ referred to paragraphs 27 and 32 of his earlier judgment in *ex p Tucker* as representing the line of demarcation between reviewable and unreviewable decisions within the Police Service and in particular the distinction between operational and disciplinary decisions. He also referred to as the decision

of the Pitchford J in *R (Hopley) v Political Health Authority and another* (unreported) 3 July 2002, where the learned judge identified 3 matters to be considered when considering whether a public party with statutory powers was exercising a public function amenable to judicial review or a private function that was not namely:

- (i) Whether the defendant was a public party exercising statutory powers.
- (ii) Whether the function being performed in the exercise of those powers was a private or public one.
- (iii) Whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration.

34. As Baker LJ held in *ex p Tucker* (at [13]), the boundary between public and private law is not capable of precise definition, and whether a decision has a sufficient public law element to justify the intervention of the courts for judicial review is often as a matter of feel, as deciding whether any particular criteria are met. Here, it seems to me that the complaint made by DS Bhagwan is not merely confined to the decision of the Panel to give him a failing grade for eligibility for promotion to Inspector, but challenges the entire 2018 Policy put in place to regulate promotion within the entire Service. As a result of this challenge DS Bhagwan obtained from Bell AJ and Order on 4 April 2019 that “*the decision of the Inspector Panel is stayed until further order.*”

35. As noted earlier, the COP has a statutory responsibility under section 3 (1) of the PA 1974 for the administration of the Service which necessarily includes promotions within the ranks. Order 20 of COSO 2002 recognizes this statutory responsibility and gives effect to it by establishing a promotion process policy for the ranks of Chief Inspector and below with the input of the BPA. The 2018 Policy is established for the purposes of discharging the COP’s statutory duties referred to in section 3 (1) of the PA 1974.

36. The present action as framed, does not merely affect DS Bhagwan but affects all the officers who participated in the promotion process. As noted above, the action seeks to challenge the 2018 Policy, promulgated for the purposes of discharging the COPs statutory duties under section 3 (1) of the PA 1974. Given that the decisions made by the Panel, which are the subject of this challenge, affect the validity of the 2018 Policy and affect the Service as a whole, those decisions, in my judgment, do raise public law issues which as such are amenable to judicial review.

D. Discussion on grounds advanced by the DS Bhagwan in support of Judicial Review

(1) Illegality: the allegation that BPA was not consulted in the revision of the 2018 Promotion Policy

37. DS Bhagwan alleges that ACOP Weekes acted in violation of Order 20.2 of COSO 2002 for allegedly failing to consult with the BPA prior to making changes to what became the 2018 Policy. Order 20.2 provides that the COP will seek the input of the BPA when any changes to the promotion process policy for the ranks of the Chief Inspector and below is under consideration.

38. In paragraphs 14, 16, 17, 18 and 21 of his First Affidavit, ACOP Weekes addresses this allegation made by DS Bhagwan. At paragraph 14, ACOP Weekes confirms that the Policy is an ever-changing document and has been revised multiple times in his career. He confirms that in recent years the Policy has been revised following consultations at all levels of the service, including the BPA. DS Bhagwan's response to each paragraph in ACOP Weekes' First Affidavit is set out in his 3rd Affidavit (at paragraph 78 to 156). DS Bhagwan makes no response to paragraph 14 of ICOP Weekes First Affidavit.

39. At paragraph 16, ACOP Weekes states that when it was suggested in 2017 that a revised Process needed to be established, he volunteered to take the lead in re-promulgating it. He took the written feedback from the 2012-2013 Process and invited volunteers from across the service to form a Working Group to refine the Policy and present a revised Policy to the COP.

At paragraph 17, he states that a Working Group was formed with membership from Constable to Chief Inspector as well as representatives from the BPA. At paragraph 21, he states that DS Bhagwan was instrumental in the development and formation of the Policy about which he now complains. In response to paragraph 16, DC Bhagwan states that he does not dispute the fact that he volunteered to be part of the Working Group and his criticism is confined to the fact that he “cannot recall during the 2017 working group meeting that ACOP Weekes presented the 2013 feedback for the group discussion.” In light of this evidence I am entirely unable to accept DS Bhagwan’s assertion that the BPA was not consulted in the formulation of the 2018 Policy.

(2) Illegality: the allegation that DS Bhagwan should have been reminded of his entitlement to have a BPA member as an observer

40. DS Bhagwan complains that in breach of Order 20.3, ACOP Weekes failed to remind DS Bhagwan that he could request an observer to attend the interview from the BPA. The allegation by DS Bhagwan is not that he was denied his right to have an observer from the BPA but that he was not reminded of that right by ACOP Weekes and that failure to remind constitutes a breach of Order 20.3 of COSO.
41. In considering this allegation, it is relevant to keep in mind that DS Bhagwan was a member of the Working Party which reviewed the amendments to the Policy document which resulted in the 2018 Policy. In the circumstances, it is reasonable to assume that DC Bhagwan was aware of this provision in the Policy. Secondly, the entitlement to have an observer arises from Order 20.3 of COSO 2002 which again DC Bhagwan would have been aware of. Thirdly, in paragraph 16 of this First Affidavit, DC Bhagwan recalls that in 2007 when he participated in the Constable to Sergeant Structured Interview process, Supt. Jackman wrote to his attention his legal entitlement as per Order 20.3 of COSO 2002 to have a serving BPA member in an “observer” position during the interview to ensure transparency. Again, this indicates that DC Bhagwan was aware of his entitlement to have as an observer at the interview session.

42. It seems to me that it is clear from the provision in the COSO 2002 and the 2018 Policy that the burden is upon the applicant to make such a request. Order 20.3 provides that the COP “will permit a Bermuda Police Association “observer” position at the interview stage” and paragraph 13.8 of the 2018 Promotion Policy provides that “on written application candidates may request that a BPA representative may be present during the Structured Interview.” It is clear that these provisions contemplate that it is for the candidate to make this request and there is no obligation upon any of the Panel to advise the applicants of this right. In any event, having regard to the evidence set out above, I am satisfied that DS Bhagwan was aware of this right to have a BPA member as an observer at the Structured Interview. Like all the other candidates who participated in the 2018 Promotion Process, DS Bhagwan elected not to ask for a BPA member present as an observer. In the circumstances, I am satisfied that DS Bhagwan’s complaint in this regard is entirely unjustified.

43. Furthermore, I accept Mr. Doughty’s submission on behalf of ACOP Weekes that there is no evidence which suggests that DS Bhagwan was substantially prejudiced by the alleged failure to advise him that he could have an observer which created “a very substantial error leading to a demonstrable injustice” (See *Neill v North Antrim Magistrates’ Court* [1992] 1 WLR 1220 (HL) at 1230D-1231 per Lord Mustill).

44. In all the circumstances, I am satisfied that DS Bhagwan’s complaint that ACOP Weekes breached the duty of fairness by failing to have an observer present at the Structured Interview, is entirely unjustified.

(3) Illegality: allegation of bias against ACOP Weekes

45. DS Bhagwan complains that, given the highly questionable history between DS Bhagwan and ACOP Weekes, ACOP Weekes ought to have recused himself from the Assessment Panel on the grounds of the inescapable likelihood of his “*personal biases (real, apparent or imagined)*” against DS Bhagwan personally, and against Caribbean police officers generally.

46. In his closing submissions, Mr. Perinchief made it clear that the allegation of bias against ACOP Weekes is one of appearance of bias. From the affidavit evidence of DS Bhagwan, it appears that the allegation of appearance of bias is primarily based upon two incidents. First, DS Bhagwan relies upon an incident in September 2007. He says that shortly after his sergeant promotion, he was transferred to Southside Police Station, Eastern Division to manage a uniform shift deployment. During this Department, Chief Inspector Weekes (“CI Weekes”) was his Divisional Commander.
47. On the 7 September 2007, about 3 Weekes prior to DC Bhagwan’s sergeant confirmation, CI Weekes summoned DS Bhagwan to his office and during that meeting, according to DS Bhagwan, CI Weekes intimidated him as a senior officer and led him to believe that he would not support DS Bhagwan’s sergeant confirmation. DS Bhagwan states that during the meeting with CI Weekes, he shouted at the top of his voice to get out of his office and his station.
48. DS Bhagwan was in fact transferred in September 2007 to the old Hamilton Police Station a few days prior to his confirmation as a sergeant. He says that at that time, Superintendent Jackman brought to his attention “*a character victimization report*” submitted by CI Weekes with the recommendation not to confirm DS Bhagwan as a sergeant. DS Bhagwan states that Superintendent Jackman advised him that he will not support the report as it had nothing to do with his leadership and management qualities and the report was based on personality differences.
49. ACOP Weekes recalls the meeting referred to and states that a summary of this meeting was sent to his then Divisional Commander in a report dated 7 September 2007 which in material part states:

“PS 2042 David Bhagwan was promoted to Sergeant on 15 March 2007 and was posted to E watch Southside Police Station when the new shift system was put in place on 16 April 2007. Since 1st August 2007 when I return from vacation under the Service realignment I became PS Bhagwan’s direct line supervisor. Since that time I had to speak to PS Bhagwan on a number of issues including failure to attend

meetings when instructed and misuse of the police email system. I have found PS Bhagwan's attitude to be a problem although once spoken to he has complied with instructions.

...

Recommendations:

- 1. At this stage of PS Bhagwan's probation, I believe that he is in need of immediate mediation in order to attempt to develop him into an effective supervisor. If left to continue in his current vein he will not be an effective supervisor and I would recommend that he NOT be confirmed as a Sergeant, but returned to duties as a constable at the end of his probationary period.*
- 2. In order to develop PS Bhagwan, I believe he will need to be mentored by a senior Sergeant and be closely supervised by an Inspector at all times and in particular when he is conducting briefings to ensure compliance with instructions.*
- 3. To this end I asked that he be immediately transferred to Hamilton Station CPD when he can receive the mentoring of a senior Sergeant and supervision of an Inspector was on shift, which he cannot receive was posted to Southside Station.*
- 4. If he is allowed to remain as a Sergeant, I also request that he be given priority on the next available first-line supervisors course run at Service Training Centre."*

50. ACOP Weekes states that DS Bhagwan was transferred to the Hamilton police station at his request as per the contents of his report dated 7 September 2007, where he makes this recommendation to his Divisional Commander. ACOP Weekes also states that Superintendent Jackman did not discuss his report or the DS Bhagwan's response (or any meetings between

the two) with him other than to tell him that he would be transferring DS Bhagwan as per his recommendation.

51. The second aspect relied upon in support of the allegation of appearance of bias, is the allegation by DS Bhagwan that ACOP Weekes has demonstrated his personal bias towards Caribbean Police Officers. DS Bhagwan relies upon the 2013 Sergeant to Inspector promotion process where ACOP Weekes was the chairman and it is alleged that he influenced the selection of five United Kingdom officers but only allowed two Caribbean officers to progress to the extended process.
52. DS Bhagwan also relies upon the assertion that, in 2015, when the BPS was challenged with austerity measures to reduce their budget operating costs, Superintendent Weekes prepared the list indicating which BPS service officers' contracts should not be renewed. DS Bhagwan further asserts that in that list Superintendent Weekes discriminately listed below value to several Caribbean officers whose contract was up for renewal.
53. In response, ACOP Weekes states that he cannot explain DC Bhagwan's belief that he has discriminated against him due to his Caribbean heritage. He points out that many other officers from the Caribbean had been successful in the Process he has chaired. In the 2018 Process, of the 11 officers that were successful the breakdown is as follows: West Indian Officers 1 (passed in 2nd place) British 2 (8th and 9th place), white Bermudian 1 (7th place) and all of the successful candidates were black Bermudians. There were 6 West Indian Officers who were unsuccessful (including DS Bhagwan). By contrast, in the Constable to Sergeant Process, out of the 24 candidates who were successful 13 were West Indian.
54. ACOP Weekes refutes that there are instances where he has been shown to be openly biased against officers from the West Indies. The scores and results of the 2013 Processes were overseen by DCOP Paul Wright, ratified by the COP and signed off by the PSC. No allegation of racial bias has been made against ICOP Weekes until the allegations in the First Affidavit of DS Bhagwan sworn on 15 February 2019.

55. In relation to the list drawn up as part of the austerity measures, the list referred to by DS Bhagwan was drawn up by the COP's Staff Officer (Constable Julie Gardiner) at the COP's request using language directed, ACOP Weekes understands, by then DCOP Jackman, a West Indian Officer. The "high value/low value" criteria listed against each officer was, according to ACOP Weekes, rightly criticised in court. However, ACOP Weekes points out that he was not the author of the list and was instructed to tick boxes against names by the then COP using the system he had authorised.
56. There is no dispute between the parties in relation to the relevant test to be applied in the case of an issue of appearance of bias. This Court considered the relevant test in *Athene Holdings Limited v IMran Siddiqui and Others* [2019] SC (Bda) 20 Com (15 March 2019) and held at [43]:

"43. In considering this application I remind myself of the test of apparent bias, which I take from the recent judgment of Turner J. in Charles Thomas Miley v Friends Life Limited [2017] EWHC 1583, [21-22]:

"21. The law relating to apparent bias is uncontroversial and is set out in the defendant's submissions: "The test for apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude there was a "real possibility" that the judge was biased" (Porter v Magill [2002] 2 AC 357)... In Helow v Secretary of State for the Home Department [2008] 1 WLR, Lord Hope described the attributes of the 'fair-minded and informed observer' at paragraphs 1 to 3 of the speeches. These paragraphs include the following extracts:

"The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious ... Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test

ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done ... may make it difficult for them to judge the case before them impartially."

"22. At the risk of stating the obvious, any judge who is invited to recuse himself on the ground of apparent bias must be very careful not to allow any personal considerations whatsoever to contaminate his conclusions. Nevertheless, this should not preclude such a judge from acting with the same level of robustness and proportionate scepticism, where this is necessary, as he would approach any other application. To proceed otherwise would be unfairly to prejudice the other side out of an undue sensitivity to the perception that such robustness may be wrongly attributed to the personal feelings of the judge as opposed to the legitimate demands of firm management with the aim of applying the overriding objective."

57. Having reviewed the evidence, in my judgment, a fair-minded and informed observer, having considered the facts, would not conclude that there was "*real possibility*" that ACOP Weekes was biased.

58. In relation to the September 2007, the incident in question took place 11 years before the 2018 Promotion Process. The recommendation made by ACOP Weekes in the report of 7 September 2007, that DS Bhagwan be transferred to the Hamilton Police Station so that he can receive the mentoring of a senior Sergeant and supervision of an Inspector, was accepted by DCOP Jackman. Finally, no allegation of appearance of bias, based on this incident, was made by DC Bhagwan until his First Affidavit sworn on 15 February 2019, 11 years after the event.

59. In relation to the allegation of appearance of bias based upon the list prepared showing “*high value/low value*” criteria listed against each officer, the short answer is that ACOP Weekes was not responsible for preparing this list. Again, no allegation of appearance of bias was made by DC Bhagwan, based upon this allegation, until his First Affidavit sworn on the 15th of the 2019, 6 years after the event.
60. In any event, any allegation of appearance of bias in this case must be considered to have been waived by DC Bhagwan. It is common ground that the names of the individuals appointed as Assessors for the 2018 Process were advertised well in advance. Any applicant, including DS Bhagwan, who wish to object to any member of the Panel had ample time to do so on the ground of appearance of bias. However, DC Bhagwan elected not to make any such objection and it appears that he simply reserved his position until he saw how the decision went.
61. In relation to the allegation of bias, I note that in his First Affidavit (paragraph 55), DS Bhagwan complains that he was allowed to leave the Structure Interview with about 35 minutes remaining and he is of the firm belief that this was a deliberate attempt by the Panel not to ask probing questions to solicit the additional response as they did with the other candidates. He contends that this is evidence of bias. I am entirely unable to accept this contention. Section 7.4 of the 2018 Policy makes it clear that the Assessors are only required to pass probing questions in order to “*clarify the meaning of the responses and remove any ambiguity.*” There is no further obligation upon the Panel to continue to ask the candidate questions until the time limited for the Structured Interview expires. I accept ACOP Weekes’ evidence that all candidates were given exactly the same opportunities to answer questions including follow up and probing questions from the Panel.
62. Authorities make it clear that in cases of allegations of appearance of bias, the applicant is required to make the necessary objection at the earliest opportunity. If the applicant does not object and allows the tribunal to render a decision, the applicant would be deemed to have waived any objection on the ground of appearance of bias.

63. In *R v Secretary of State for the Home Department, ex parte Al Fayed* [2001] Imm AR 134 at [84]-[89] and [120], Kennedy LJ held that a person such as this applicant who had information which might entitle him to object to someone such as the Home Secretary making a decision in this case could not simply reserve his position until he saw how the decision went. If with the relevant information he pressed for a decision he thereby waived any right he might have had to object to the decision maker.

64. To the same effect is in *Amjad and others v Steadman-Byrne* [2007] 1 WLR 2484, where Sedley LJ held that appellate and reviewing courts “*tend not to look favourably on complaints of vitiating bias made only after the claimant has taken his chance on the outcome and found it unwelcome.*”

65. In all the circumstances, having regard to the reasons set out above, I reject the allegation that the decisions of the 2018 Panel should be set aside on the ground of appearance of bias on the part of ACOP Weekes.

(4) Irrationality: the 2018 Policy was arbitrary and unreliable because certain members were excluded from “assessing” or “scoring”

66. In relation to the general allegation that the 2018 Policy was “*arbitrary*”, I accept the evidence of ACOP Weekes that the document was the result of the consultation process that was held with the BPA which sought to simplify procedures and removed the arbitrariness of judging candidates on whether they were able to follow PDR policy or whether they drafted their PDR entries correctly and instead sought to focus on the merits of the candidate. The 2018 Policy, furthermore, was itself drafted on the basis of a previous Policy which governed prior promotions and processes. I also accept that ACOP Weekes, who received training in this area and also had a wealth of experience, did not have the final word on the issue of the 2018 Policy which was ultimately approved by the then COP, Mr. Michael DeSilva.

67. DS Bhagwan also claims that it was irrational to exclude certain members from the scoring of certain components of the Process. In relation to this issue it is relevant to keep in mind that

the 2018 Policy expressly contemplates that some of the Assessors on the Panel will be from outside the BPS and may not necessarily have the technical expertise expected from senior members of the BPS. In this regard reference can be made to:

(a) Section 2.3 of the Policy provides that the BPS may utilize persons from outside the Service as assessors or role players during the promotion process.

(b) Section 8.3 of the Policy sets out a mandatory requirement that Assessment Panels will consist of at least two senior police officers, a Human Resource professional, and one non-BPS member in order to provide a rich assessment base.

68. Section 8.3 of the 2018 Policy provides a mandatory requirement that two members of the panel must comprise a Human Resource professional and a person from outside the BPS. In the circumstances, in my judgment, the 2018 Policy itself contemplates that at least two members of the Panel may not necessarily have the professional expertise expected from the two senior police officers.

69. The membership of the 2018 Panel comprised ACOP Weekes, ACOP Daniels (as the two senior officers and CO-Chairs), Mr. John Payne (“**Mr. Payne**”) and Mr. Michael Trott (“**Mr. Trott**”). Mr. Payne is a former President of the Bermuda Public Service Union; has served as a senior manager of the Bermuda Hospitals Board and later for the Government of Bermuda. He has never been an officer of the BPS and does not possess the expertise of policing procedures and operations. Mr. Trott is the Human Resource Manager for the BPS. As can be readily seen, Mr. Payne and Mr. Trott had been appointed as members of the Panel in order to comply with the mandatory requirements of section 8.3 of the 2018 Promotion Policy. The participation of a member of the public on the Assessment Panel is not the new development. The 2012 Promotion Policy (amended 18 December 2012) provided for a minimum of three assessors on a promotion panel including a member of the public, where available.

70. In order to obtain a passing grade in the 2018 Promotion Process, a candidate was required to obtain a minimum of 60% of the total marks available for all the components of the Promotion Process.
71. The 2018 Policy contemplates that BPS will utilise an extended promotion process and to ensure that the most appropriate component is used to measure the various competencies that have been identified as part of the process. For promotion to the rank of Inspector, the Promotion Process included the following four components.
72. First, review of the Application Form to determine the suitability of the candidate to participate in the extended promotion process. The Process contemplates that the Assessors will mark the Application Form and this component carries with it 5% of the total marks of the Process. The review of the Application Form is divided into 3 separate subsections: Form and PDR (Performance and Development Review) completed; Self Development; and Career Summary. Each subsection carries an equal weighting in terms of marks to be allocated to the candidate. Thus, it can be seen that an Assessor is expected to mark separately three separate competencies and/or components of the Application Form section.
73. In relation to marking these competencies and/or components, the Assessor is not expected to mark as a percentage of the total allocated to the section (being 5%) or as a percentage of the total marks for the Process (being 100%). Instead, the Assessor is expected to mark each competency and/or component by applying the 5 point Likert scale, where an award of 1 denotes a poor performance and an award of 5 denotes an excellent performance.
74. The application of the 5 point Likert scale to score each competency and/or component means that with four Assessors assessing the competency and/or component, the maximum points a candidate can receive is 20 and for all 3 competencies and/or components the maximum points a candidate can receive is 60. Maximum score of 60 in this section relating to the Application Form is equivalent to 100% of the marks allocated to this section, being 5% of the total marks of the Process.

75. Second, the component relating to the Presentation Question. Under this section the candidate is given a subject or topic on which the candidate makes a presentation and the Assessors can ask questions arising from the content of the presentation. The process contemplates that the Assessors will mark the Presentation Question and this component carries with it 25% of the total marks of the Process. The Presentation Question component is divided into four separate subsections: Effective communication; Problem Solving; Community & Customer Focus; and Team Working. Each subsection carries an equal weighting in terms of the marks to be allocated to the candidate. Thus, it can be seen that an Assessor is expected to mark separately for four separate competencies and/or components of the Presentation Question.
76. In relation to marking these competencies and/or components, the Assessor is not expected to mark as a percentage of the total allocated to the section (being at 25%) or as a percentage of the total marks for the Process (being 100%). Instead the Assessor is expected to mark each competency and/or component applying the 5 point Likert scale.
77. The application of the 5 point Likert scale to score each competency and/or component means that with four Assessors assessing the competency and/or component, the maximum point a candidate can receive is 20 and for all 4 competencies and/or components the maximum points a candidate can receive is 80. Maximum score of 80 in the section relating to the Presentation Question is equivalent to 100% of the marks allocated to the section, being 25% of the total marks of the Process.
78. Third, the component relating to the Structured Interview. The Structured Interview is used to evaluate the candidate's experiences, and potential performance. The questions for the interview are provided to the candidate two hours in advance of the interview to provide time to prepare and includes one Presentation Question. Assessors may ask probing questions to clarify the meaning of the responses and remove any ambiguity. The Process contemplates that the Assessors will mark the Structured Interview and this component carries with it 50% of the total marks of the Process. The Structured Interview component is divided into 4 separate subsections: Professional Ethical Conduct; Planning & Organising; Leadership & Management; and Personal Responsibility. Each subsection carries an equal weighting in terms

of marks to be allocated to the candidate. Thus, it can be seen that an Assessor is expected to mark separately four separate competencies and/or components of the Structured Interview.

79. In relation to marking these competencies and/or components, the Assessor is not expected to mark as a percentage of the total allocated to this section (being 50%) or as a percentage of the total marks for the Process (being 100%). Instead, the Assessor is expected to mark each competency and/or component by applying the 5 point Likert scale, where an award of one denotes a poor performance and an award of 5 denotes an excellent performance.
80. The application of the 5 point Likert scale to score each competency and/or component means that with the four Assessors assessing the competency and a component the maximum points a candidate can receive is 20, and for all four competencies and/or components the maximum points a candidate can receive is 80. Maximum score of 80 in the section relating to the Structured Interview is equivalent to 100% of the total marks allocated to the section, being 50% of the total marks of the Process.
81. Fourth, the component relating to the In-Basket Exercise. In this exercise the candidate assumes the role of the next rank and is directed to respond to a predecessor's in-basket items in writing. Additionally, candidates are required to demonstrate their decision-making using the Service Decision Making Model (SDM). The process contemplates that the Assessors will mark the In-Basket Exercise and that this component carries with it 20% of the total marks of the Process. The In-Basket Exercise is divided into 5 separate subsections: Effective Communication; Problem Solving; Leadership & Management; Planning & Organising; and Personal Responsibility. Each subsection carries an equal weighting in terms of marks to be allocated to the candidate. Thus, it can be seen that an Assessor is expected to mark separately 5 separate competencies and or components of the In-Basket Exercise section.
82. In relation to marking these competencies and/or components, the Assessor is not expected to mark as a percentage of the total allocated to this section (being 20%) or as a percentage of the total marks for the Process (being 100%). Instead the Assessor is expected to mark each competency and/or component by applying the 5 point Likert scale.

83. The application of the 5 point Likert scale to score each competency and of component means that with four Assessors assessing the competency and or component the maximum point a candidate can receive is the 20 for all 5 competencies and/or components the maximum point a candidate can receive is 100. Maximum score of 100 in this section relating to the In Box-Exercise is equivalent to 100% of the marks allocated to the section, being 20% of the total marks of the Process.

84. The actual scores for DS Bhagwan are shown in the table below which is taken from the spreadsheet populated by ACOP Weekes and as corrected by him in evidence to the Court.

Component/Element	Assessor one	Assessor two	Assessor three	Assessor four	Actual Likert score points	% of the total marks for the assessment
Application Form (5% of the total marks - max 60 points on the Likert scale)						
Form & PDR completed	3	3	3	3	12	
Self Development	4	4	4	4	16	
Career Summary	3	3	3	3	12	
Total score on Likert scale					40	3.33%
Presentation Question (25% of the total marks - max 80 points on the Likert scale)						
Effective Communication	2	2	2	2	8	
Problem Solving	2	2	2	2	8	
Community & Customer Focus	3	3	3	3	12	
Team Working	2	2	2	2	8	
Total score on Likert scale					36	11.25%
Structured Interview (50% of the total marks - max 80 points on the Likert scale)						
Professional Ethical Conduct	4	4	4	4	16	
Planning & Organising	3	3	3	3	12	

Leadership & Management	3	3	3	3	12	
Personal Responsibility	3	3	3	3	12	
Total score on Likert scale					52	32.5%
In Basket Exercise (25% of the total marks - max 100 points on the Likert scale)						
Effective Communication	2	2	2	2	8	
Problem Solving	3	3	3	3	12	
Leadership & Management	3	3	3	3	12	
Planning & Organising	2	2	2	2	8	
Personal Responsibility	2	2	2	2	8	
Total score on Likert scale					48	9.6%
Total percentage for the entire process						56.68%

85. I should note that the original calculations carried out by ACOP Weekes contained a minor arithmetical error in that the total Likert score for In-Basket Exercise was calculated in error to be 42 when it should have been 48 with the result that percentage of the total marks from this component should have been 9.6% as opposed to the original 8.4%. This arithmetical error meant that the original percentage score of 55.48% should be amended to the corrected percentage score of 56.68%. The original letter advising DS Bhagwan of the result rounded up the component results to the next half percentage point and showed that DC Bhagwan’s total score was 55% when in fact it should have been 56%. ACOP Weekes accepts that this was an error and it was corrected immediately. I should also note that the PSC was advised that DC Bhagwan’s total percentage score was 58%. According to Mr. Trott, the BPS Human Resources Manager, this was due to the insistence of the PSC that the PSC will not accept any fraction of a number in a result for any component of the Process but will only accept whole numbers. As a result, the fractions were rounded up to make whole numbers. According to ACOP Weekes, the corrected result remains at 56.68% which is below the percentage mark required for passing the Process.

86. DC Bhagwan contends that it is irrational to exclude certain members from scoring of certain components. In particular, he complains that Mr. Payne and Mr. Trott (the two non-BPS Assessors) did not participate in marking the Application Form (5% of the total marks) and the In-Basket Exercise (20% of the total marks). Instead only ACOP Weekes and ACOP Daniels marked the Application Form and the In-Basket Exercise and entered identical marks given by ACOP Weekes and ACOP Daniels for Mr. Payne and Mr. Trott.
87. ACOP Weekes explained to the Court that Mr. Payne and Mr. Trott could not sensibly be asked to assess and mark those components of the exercise which required specialised knowledge of Police operations and procedures. In particular, in relation to the In-Basket Exercise, he explained that as the two most senior operational officers in the Service, it was felt that they were best placed to mark a test that required the candidates to produce police reports using specific police jargon and standards, standards and language that would not have been familiar to either the HR Manager, Mr. Trott, or the non-BPS member, Mr. Payne.
88. It is for this reason, only ACOP Weekes and ACOP Daniels marked the sections dealing with Application Form and In-Basket Exercise. Given that the spreadsheet in both exercises used for computing the overall results contemplated that there would be four Assessors in both exercises and that the Likert score of 60 was required to obtain 5% of the total marks in the Application Form component; and Likert score of 100 was required to obtain 20% of the total marks in the In-Basket Exercise, it was necessary that Mr. Payne and Mr. Trott enter the same Likert scores as ACOP Weekes and ACOP Daniels to obtain the true overall percentage marks for these two exercises. The alternative method would have been to recognise that Mr. Payne and Mr. Trott were not assessing these components of the Process and as a result reduce the maximum Likert score for the Application Form to 30 (representing 5% of the total marks) and reduce the Likert score for the In-Box Exercise to 50 (representing 20% of the total marks).
89. I accept the evidence of ACOP Weekes in relation to why it was not sensible for Mr. Payne and Mr. Trott to assess and participate in awarding the Likert scores for the Application Form and the In-Box Exercise. I also accept the rationale as to why and how it was necessary for Mr.

Payne and Mr. Trott to enter the same Likert scores as ACOP Weekes and ACOP Daniels to obtain the true overall percentage marks for these two exercises.

90. It seems to me that the 2018 Promotion Policy, in particular paragraphs 8.1, requires that all the assessments must be made by the Assessors and not by any third party. Clause 8.1 does not require that all members must assess and mark all aspects of all the components of the exercise even if they do not have the expertise to do so.
91. DS Bhagwan also appears to complain that the In-Box Exercise papers were not marked by independent Assessors in breach of section 9.6 of the Policy; and that the In-Basket Exercise questions were not written by BPS trained persons.
92. I accept ACOP Weekes evidence and explanation that DS Bhagwan is under a misapprehension as the In-Box Exercise is not part of the Promotion Examination to which he refers. The In-Basket Exercise is not an “*exam*” within the meaning of section 9 of the Policy and is otherwise intended to be an assessment tool which existed outside of section 9 of the Policy. The In-Box Exercise is governed by section 7 of the Policy. I also accept ACOP Weekes’ evidence that the In-Box Exercise was marked independently by the two ACOPs and then each paper was discussed and finally marked.
93. In relation to the content of the In-Box Exercise, I accept ACOP Weekes’ evidence that whilst two questions appearing in the 2018 Exercise resembled the structure of that of the earlier exercise, they differed in their content and it is not reasonable to contend that any unfair advantage was afforded to other candidates or officers in the BPS.
94. DS Bhagwan also appears to take issue with the weighting in terms of percentage of marks given to various components which make up the Process. For example, in the written submissions of Mr. Perinchief, he complains that DS Bhagwan was given the Likert score of 42 for the In-Basket Exercise and he received 8.4% of the overall assessment whilst he received the Likert score of 40 for the Application Form, but was only given 3.3% of the overall assessment. It seems to me that the appropriate weighting to be given to any component of the Process must rest with those organising the Process and is not a matter with which the Court

can properly interfere. It may well be that the real complaint of DS Bhagwan in this regard is, as Mr. Perinchief in his written submissions contends, that a “*slavish and unquestioned adherence to the outmoded and unsuited 1932 Likert Scoring Scale system of attempting to “transpose” ordinal (feeling state assessments about “attitudes and opinions” scored with a 1= Poor, 5= Excellent etc.) into precise numerical or mathematical percentage “scores” is a mistake.*” He submits that “*transposing*” exercise leads to the miscalculations which have vitiated, root and branch, the entire 2018 promotion process.

95. I accept that converting the Likert scale into percentage results is a rough and ready exercise but any lack of precision in this case, as it seems to me, is all in favour of DS Bhagwan. It is reasonably clear that what ACOP Weekes has done is to scale the 5 point Likert scale up to a 100 point scale where the value given by the Panel becoming equal to 1=20, 2=40, 3=60, 4=80, 5=100. It can be seen that this conversion has limitation in that it only gives the Assessor 5 choices out of what should be 100. Thus, when an Assessor gives Mr.. Bhagwan a score of 4, that score converts to 80 using a scale of 100. However, if the Assessor had been given 100 point scale, the Assessor may have answered 61, 80 or anywhere in between. As can be seen, this conversion entirely favours DS Bhagwan as it allocates the highest number which could be allocated in the conversion from the Likert scale of 1 to 5 to a scale of 100 (for example, the score of 1 converts to 20 and not 1 or any number in between). In the circumstances, in my judgment, DS Bhagwan’s criticism of the conversion of the Likert scale results into a percentage mark is misplaced and appears to be based upon a misunderstanding of the simple conversion equation used by ACOP Weekes.

96. In relation to the legal challenge based upon irrationality, the Court is reminded of the seminal judgment of Lord Greene MR. in *Associated Provincial Picture Houses Ltd v Wednesbury* [1948] 1 KB 133 (CA) where he held at pages 233 and 234 that:

“The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters that they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which the order to take into account...[or whether]...They have

nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.”

97. I accept the submission made on behalf of the Respondents that there is no evidence before the Court which suggests that those who assessed and/or marked DS Bhagwan, took into account that which they should not have considered or failed to take into account that which they should have considered. In all the circumstances, I am satisfied that it cannot be said that the conclusion of the Panel that DS Bhagwan’s overall score did not reach the threshold of 60 was one which no reasonable assessment panel could have reached.

(5) Procedural impropriety: whether the Assessors were qualified

98. DS Bhagwan complains that not all the panel members were qualified to competently undertake or administer or understand the subject assessment assignment in part or in its entirety and in particular, that some of them lacked the mandatory IACP training in order to conduct such a promotion entity.

99. In the end, this ground of appeal boils down to the allegation against Mr. Payne that he was not qualified to be an Assessor because he did not attend in its entirety December 2012 IACP training standards workshop held from 3 to 5 December 2012 at the BPS Training Center. It is said on behalf of DS Bhagwan, that whilst civilian Assessors Mr. Trott and Mr. Payne feature as selected under the General Orders 48/2012 for this highly specialised and technical workshop billed “*Promotion Assessor Training*” by the IACP, Mr. Payne is not mentioned anywhere as attending that training session.

100. Both ACOP Weekes and Mr. Payne were cross-examined in relation to this issue to explore whether Mr. Payne did or did not attend the IACP training workshop. Both ACOP Weekes and Mr. Payne confirmed under oath that Mr. Payne did indeed attend this workshop in December 2012. Mr. Payne remembers that clearly partly due to the fact that this was around the week when ACOP Weekes’ home had been burgled. I have no hesitation in accepting the evidence of ACOP Weekes and Mr. Payne in this regard.

(6) Procedural impropriety: security of assessment materials

101. DS Bhagwan contends that ACOP Weekes behaved irrationally, unlawfully and contrary to section 15.1 of the Promotion Policy because ACOP Weekes sought to secure the In-Basket Exercise materials in a manner which “*led to the integrity of the process of being compromised*”. Section 15.1 of the Promotion Policy provides that:

“The Inspector, Training & Development Department is responsible for the safekeeping of all test materials, rating forms, interview binders, and all other relevant documents to the inspector level.”

102. I accept ACOP Weekes’ evidence that once the In-Basket Exercise materials were collected from the applicants, they were stored in a locked cabinet by the Assistant to the COP (“**Mrs. Flood**”), to which ACOP Weekes did not have access. The materials remained in the cabinet until such time as they were to be marked. The materials remained anonymized throughout the marketing process. In the circumstances, I do not accept DS Bhagwan’s contention that the security of the In-Basket Exercise materials was compromised; that there was a breach of section 15.1 of the Promotion Policy; or that he was prejudiced by the alleged breach.

(7) Procedural impropriety: the alleged inappropriate comment by Mr. Payne

103. DS Bhagwan complains that whilst he was in mid-sentence of answering a question from the panel, Mr. Payne exhibited extreme “*negative decisional conclusion*” to DS Bhagwan when he told DS Bhagwan words to the effect that “*with your experience we should transfer you to the Training School*”. It is said on his behalf that this alleged intervention unnerved DS Bhagwan in the completion of answering of the question he had been asked by the panel member, and may have negatively influenced other panel members in assessing a law score for DS Bhagwan.

104. Mr. Payne was cross-examined by Mr. Perinchief in relation to this allegation and having heard his evidence given in the witness box, I am satisfied that he would not intentionally make any comment which would adversely affect DS Bhagwan. In this regard it is to be noted that Mr. Payne does not know DS Bhagwan and would have no reason, financial or otherwise, for making a negative comment calculated to adversely affect DS Bhagwan's performance at the Structured Interview. As he explained in his witness statement, he agreed to act as a "*Community Partner*" for the BPS in its promotion processes, partly for the reason that if perceived bias were to be claimed against individuals serving on the Assessors panel, who were also members of the BPS, his presence would mitigate, if not eliminate, that perception on account of his status as a long-standing trade unionists and an "*outsider*".

105. It is also to be noted that it is Mr. Payne's evidence that he marked DS Bhagwan four out of 5 for the Structured Interview and DS Bhagwan score for the Structured Interview was the highest out of all the components of the Process (65% of the available marks). There is no credible evidence that any statement as alleged by DS Bhagwan had any negative effect, in terms of marking the Structured Interview, upon DS Bhagwan or any other Assessors.

106. In conclusion, I accept the evidence of Mr. Payne when he says that he does not recall making a statement that DS Bhagwan should be transferred to the training school for the BPS and I also accept his evidence that if he did make such a statement it would be in the nature of praising DS Bhagwan's performance as opposed to the allegation that this statement created a toxic environment that harmed DS Bhagwan.

(8) Appeal to the principle of proportionality

107. I have no clear understanding of how it is said that the principle of proportionality has any application to the facts of this case. I have reviewed the Privy Council decision in *de Freitas v The Permanent Secretary of Ministry of Agriculture* [1998] UKPC 30, relied

upon by Mr. Perinchief, and do not understand how it is said that the principle articulated by the Privy Council applies to the facts of this case.

108. It has been said an exercise of discretion which is disproportionate is indicative of administrative action which is *Wednesbury* unreasonable (See *R (McGrath) v Secretary of State for Work and Pensions* [2012] EWHC 1042 (Admin) at [33]. To the extent that there has been reliance upon *Wednesbury* unreasonableness, I have dealt with those submissions at paragraphs 66 to 97 above. I consider that I have dealt with all the substantive factual allegations made by DS Bhagwan in the Form 86. Beyond that, I do not consider that a freestanding reliance upon the principle of proportionality has any relevance to the facts of this case or the complaints made by DS Bhagwan.

E. Conclusion

109. In conclusion, I have accepted that there is sufficient public law element in the decisions of the Panel in relation to the 2018 Policy and Process, and those decisions are in principle subject to judicial review. However, having considered the grounds upon which these decisions are challenged by DS Bhagwan, this Court is satisfied that there was no breach of the public law principles of fairness or breach of the 2018 Policy. Accordingly, DS Bhagwan's claim for an order of certiorari, quashing the decision and result of the BPS 2018 Sergeant to Inspector Panel result dated 21 September 2018, is dismissed.

110. The Court will hear the parties in relation to the issue of costs within the next 21 days, if required.

Dated this 26th day of April 2021

NARINDER K HARGUN

CHIEF JUSTICE