FAIR EMPLOYMENT TRIBUNAL

CASE REF: 58/17FET
5602/17

CLAIMANT: **DR SURESH DEMAN**

RESPONDENT: **QUEEN'S UNIVERSITY BELFAST**

DECISION

1. The Tribunal unanimously concludes that, whilst the claimant's complaints were lodged out of time, it is just and equitable to extend the time. The Tribunal therefore has jurisdiction to deal with them.

2. The Tribunal unanimously concludes that the claimant was not treated less favourably on the grounds of his race. His claim in that regard is therefore dismissed.

3. The Tribunal unanimously concludes that the claimant was not treated less favourably on the grounds of a protected act for the purposes of the Race Relations (Northern Ireland) Order 1997. His claim is therefore dismissed.

4. The Tribunal unanimously concludes that the claimant was not treated less favourably on the grounds of his religion. His claim is therefore dismissed.

5. The Tribunal is unanimously satisfied that the claimant was not treated less favourably on the grounds of a protected act for the purposes of the Fair Employment and Treatment (Northern Ireland) Order 1998. His claim is therefore dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Browne**

Members: **Mr A Barron**
Mr I Rosbotham

APPEARANCES:

The claimant represented himself.

The respondent was represented by Mr C Hamill, Barrister-at-Law, instructed by Pinsent Masons, Solicitors.

ISSUES AND EVIDENCE

1. The claimant's case arose from the fact that he was not shortlisted for interview in June 2017. He applied for the post of Professor in Finance at the respondent university on 9 May 2017, but was informed by email on 9 June 2017 that he had not been shortlisted for interview.

2. On 18 August 201, upon seeking feedback as to why he had not been shortlisted, he was informed by Mrs Una Short, a Business Partner of the respondent's HR section, that he had failed to demonstrate two criteria, named as being essential, namely, "sustained publication record of international excellence in field of specialisation"; and "record of securing external research funding".

3. The claimant was at the same time additionally, erroneously informed that no-one had been shortlisted. In fact, three candidates out of eighteen applicants were shortlisted and interviewed, but no-one was appointed in that recruitment exercise. Of the three candidates interviewed, two were white and one was Chinese.

4. It is the claimant's case that, not only should he have been shortlisted; but that he should also have been appointed. It further is his case that the recruitment was abandoned by the respondent to victimise him, as he otherwise was the best candidate for the job.

5. The claimant's additional belief is that the decision of the respondent's shortlisting panel not to select him for interview was because he had brought successful tribunal claims against the respondent in 1995, alleging therein discriminatory conduct by the same respondent on the grounds of race and religion.

6. The substance of the claimant's case in the current proceedings is direct religious and race discrimination, in that he was not interviewed because he is of Indian ethnicity; and because his religion is Hindu; and that he also was not interviewed, as victimisation for previously bringing those earlier claims.

7. His complaints in 1995 arose from his not being confirmed in his post, and his case was settled in 2005 between the parties, before adjudication by a tribunal. One of the terms of that confidential compromise settlement was that the claimant agreed not to apply for any more posts with the respondent for a period of five years.

8. The claimant gave evidence that he had kept his side of the agreement, but claimed that the respondent had materially breached it by divulging its contents in public. The clamant did not refer the Tribunal to any independent evidence of this alleged breach, which the respondent denied.

9. The respondent also asserted that its policy where someone is not confirmed in their post is that that person is ineligible to apply again for any post within a period of four years. The respondent pointed out that both periods no longer applied to the claimant, whose application in this case was accepted for consideration.

10. It was apparent from the claimant's evidence and in his cross-examination of the respondent's witnesses that a prominent issue for him was his belief that people from Roman Catholic backgrounds were more likely than not predisposed to

discriminate against him on the grounds of race and religion. He later in his evidence expanded this theory to white people, Protestants, and other Christians generally.

11. He appeared also to impute the respondent's counsel and solicitor with the same discriminatory characteristics, based upon their religious and ethnic backgrounds, alleging, without producing evidence, that they consequently were prepared to compromise their professional ethics and obligations, in order to undermine his case.

12. The claimant also sought to impute the independence of the Tribunal panel on the basis of his guessed perception as to its "tainted" religious composition.

13. The claimant's case was that the shortlisting panel's collective less favourable treatment of him on the grounds of his religion and/or his ethnic background resulted in his not being shortlisted for interview.

14. It was the claimant's contention that its collective failure to do so could be attributed to what the claimant asserted was the individual shortlisting panel members' inherent tendency, rooted in their own ethnic and religious backgrounds, to discriminate against him on the grounds of his ethnic and religious background.

15. The claimant initially appeared to confine his beliefs of an inherent tendency to people from a Roman Catholic background. Under cross examination however, he expanded the categories to include those from other Christian and white backgrounds.

16. The claimant neither adduced nor referred to any independent evidence to connect any of these theories to this case, relying only upon putting them to the respondent's witnesses as being the potential catalyst for unconscious bias.

17. The main strand of the claimant's case was that the two white, Christian comparators he identified were not as suitable under the established essential criteria for interview as he was.

18. Those essential criteria were established as such before the competition was advertised. There was a list of eighteen essential criteria. The first four were: (i) A PhD in Finance, which the claimant satisfied; (ii) Recognised excellence and reputation in the subject specialism; (iii) Sustained publication record of international excellence in field of specialisation; and (iv) Record of securing external research funding.

19. In order to satisfy the shortlisting panel, it was incumbent upon every candidate to provide specific information on each essential criterion. The respondent's written appointments process specifies that panel members must not "make assumptions or include any personal knowledge they may have of applicants".

20. The written appointments process also states that "applicants who do not meet the essential criteria must not be shortlisted".

21. The respondent's witnesses were clear that the claimant failed in his application form to provide enough information to satisfy them, individually or collectively, of his ability to meet those core criteria above the candidates shortlisted for interview.

22. They also were clear that the claimant's application failed to satisfy those three essential criteria, making it pointless to progress to the remaining fourteen. Whilst there were eighteen, the respondent's appointment process instructions include that the shortlisting panel has the ability to prioritise the desirable criteria.

23. The evidence in support of criterion (iii) supplied by the claimant in his application form in effect stopped in 2000. Whilst he cited a number of "papers in revision/ submission", the most recent of these was in 2010. The panel members in their evidence considered that this was not of sufficient weight to satisfy criterion (iii), especially as the candidates shortlisted for interview had much more recent publications.

24. It also was the view of the shortlisting panel members, in their notes and in their evidence, that the claimant's potential publications were not in journals of sufficient prestige to carry as much weight as those of other candidates' much more recent, peer-reviewed and published work.

25. The respondent's witnesses also consistently recorded the view, when considering the claimant's evidence in support of attracting funding, that, as his last funding had been obtained in 2000, this fell well short of what they were looking for in order to meet that essential criterion.

26. The claimant's case regarding one of the shortlisted candidates was that he had a gap in publishing of some three years. The respondent's case that this gap was offset by the fact that that candidate had published seven papers since 2012, peer-reviewed in prestigious publications, whereas the claimant had no such publications in that timeframe.

27. It also was the respondent's case that, in contrast to the claimant, that candidate during the gap period had been actively involved in other relevant academic and administrative duties, which satisfied Pro Vice Chancellor Scullion. She considered that the claimant by contrast had not demonstrated to her satisfaction any such reason for his lack of academic productivity.

28. The claimant appeared to readily ascribe a lapse in relevant output to another candidate as evidence of being "burnt out", but had no ready explanation for any such prolonged, and apparently enduring, gap in his own.

29. The claimant was often preoccupied by his substantial litigation, and latterly had been extremely ill. It was the respondent's case that, for the panel to comply with the claimant's view that it should have given him a chance (presumably based upon his previous output), would have breached the clear meaning of the selection process criterion that those candidates who failed to provide evidence to meet the essential criteria "must not be shortlisted".

30. It is worthy of note that, in the absence of clear supporting evidence from a candidate of a cogent reason for a pause in sustained output, reliance upon

[historic] achievements could potentially have breached the clear guidance to panel members “not to make assumptions”.

31. The deficit in relevant evidence regarding sustained publication also applied in relation to the essential criterion for the role of securing funding. The shortlisted candidates all provided evidence of recent successful or pending applications. The claimant’s most recent funding was received in 2000, with no evidence supplied by him of any applications pending.

32. In addition to the claimant’s case that the shortlisting panel might be predisposed due to their racial and religious backgrounds to discriminate against him on the grounds of his race and religion, he also alleged that the panel in effect acted in unison to victimise him, arising from his previous legal proceedings against the respondent.

33. The victimisation alleged was that his exclusion from the shortlist was because he had brought those proceedings, which themselves had arisen due to alleged discrimination against the claimant on the grounds of race and religion.

34. Those proceedings ultimately were settled between the parties. Whilst there was no adjudication or admission of liability, the tribunal is satisfied that the bases of those complaints potentially qualify them as “protected acts” for the purposes of the present case.

35. The claimant was of the opinion that there was a causal connection between his previous proceedings against the respondent and the fact that he was not shortlisted for interview.

36. Whilst some of them were aware that he had previously brought proceedings, which ended by way of settlement in 2005, none had specific knowledge; nor had any been directly involved.

37. The only panel member who had had direct dealings with the claimant was Professor McKillop. His contact with the claimant started in around 1994. He was accused by the claimant as partly responsible for the claimant not being confirmed in his probationary period at the respondent university. As a result of that failure in 1995 to confirm him in his post, the claimant was not reappointed, which resulted in the claimant’s initial litigation.

38. Professor McKillop denied in evidence that he had had any such role, as he had no line management for the claimant. He further stated that, in the proceedings arising from that failure to confirm the claimant in his role, he had been asked to provide any evidence as part of the respondent’s defence.

39. Immediately after the non-confirmation, Professor McKillop was accused by the claimant’s wife in a formal complaint to the respondent that he had behaved inappropriately towards her. It was apparent from his written and oral evidence that he was deeply affronted by this allegation, which was investigated by the respondent, and was found to have no basis.

40. It was also apparent that Professor McKillop believed at the time, and still, that the claimant was instrumental in his wife's complaint. The claimant at the hearing emphatically denied that he had any role in or knowledge that his wife was going to make a complaint.

41. Professor McKillop was also accused by the claimant of in effect sabotaging applications to other universities in or around 1995, by failing to provide references. Professor McKillop denied this, and gave evidence of extra efforts he said he had made to assist the claimant.

42. Professor McKillop was unable due to other commitments to attend the shortlisting meeting. Instead, he sent a typed list of applicants, each with a one-line typed synopsis of his assessment of each, and a simple "x" to indicate whether or not each should progress to interview.

43. His comment regarding the claimant was "research not relevant", and "x" in the column to indicate that he did not think the claimant should be interviewed.

44. There was no evidence that Professor McKillop was in contact with any other panel member, to discuss individual candidates, or to seek to influence them. There further was no evidence that this had occurred between any of the other panel members, whose clear evidence was that each of them had acted entirely independently of each other in making their assessment of each candidate before the shortlisting meeting.

45. There also was no evidence that there had been any discussion of the claimant's previous litigation, or of his or any other candidate's ethnic or religious background.

46. Professor McKillop's evidence was that his comment about research arose from the claimant's lack of recent publications, and made the point that the journals cited by the claimant were not of sufficient quality to impress him.

47. Other members of the shortlisting panel gave similar evidence as to their not regarding the claimant's cited location of publications as impressive. The Tribunal received no independent evidence as to the standing of the publications, and is not qualified to reach a conclusion as to their standing.

48. The evidence in that regard was that the same reputational weight of cited publications was attached to each of the other candidates. There was no suggestion by the claimant that this was not a genuine or reasonable opinion by any of the panel members.

49. The claimant focused on individual panel members' shortcomings during the process, such as failure to make extensive notes; or to forward them for filing; or destroying them afterwards. It was his contention that such failings were cogent evidence of, variously: a defective process, so shoddy as to be without merit; or of attempts to subvert his appointment, on the grounds of his religion and/or ethnic background; or that he was deliberately sidelined because he was a persistent litigant.

50. The respondent's case was that any such failings were innocent human error, and pointed away from any notion of a determined effort to discriminate against the claimant, in that such a conspiracy would have been much more careful to conceal its tracks.

LAW AND CONCLUSIONS

51. The relevant legislation regarding the claimant's race discrimination is contained in Article 3 of the Race Relations (Northern Ireland) Order 1997 ("the 1997 Order"):

"**3.**—(1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Order if—

(a) on racial grounds he treats that other less favourably than he treats or would treat other persons; or

(b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but—

(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and

(ii) which he cannot show to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and

(iii) which is to the detriment of that other because he cannot comply with it.

(2) For the purposes of this Order segregating a person from other persons on racial grounds is treating him less favourably than they are treated.

(3) A comparison of the case of a person of a particular racial group with that of a person not of that group under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other".

52. The claimant's related claim of victimisation is contained in Article 4 of the 1997 Order:

"**Discrimination by way of victimisation**

4.—(1) A person ("A") discriminates against another person ("B") in any circumstances relevant for the purposes of any provision of this Order if—

(a) he treats B less favourably than he treats or would treat other persons in those circumstances; and

(b) he does so for a reason mentioned in paragraph (2).

(2) The reasons are that—

(a) B has—

(i) brought proceedings against A or any other person under this Order; or

(ii) given evidence or information in connection with such proceedings brought by any person; or

(iii) otherwise done anything under this Order in relation to A or any other person; or

(iv) alleged that A or any other person has (whether or not the allegation so states) contravened this Order; or

(b) A knows that B intends to do any of those things or suspects that B has done, or intends to do, any of those things.

(3) Paragraph (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith."

53. The relevant legislation for the claimant's case of religious discrimination is contained in Article 3 of the Fair Employment and Treatment (Northern Ireland) Order 1998 ("the 1998 Order").

"Discrimination" and "unlawful discrimination"

3.—(1) In this Order "discrimination" means—

(a) discrimination on the ground of religious belief or political opinion; or

(b) discrimination by way of victimisation;

and "discriminate" shall be construed accordingly.

(2) A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of this Order if—

(a) on either of those grounds he treats that other less favourably than he treats or would treat other persons; or

(b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but—

(i) which is such that the proportion of persons of the same religious belief or of the same political opinion as that other who can comply with it is considerably smaller than the proportion of persons not of that religious belief or, as the case requires, not of that political opinion who can comply with it; and

(ii) which he cannot show to be justifiable irrespective of the religious belief or political opinion of the person to whom it is applied; and

(iii) which is to the detriment of that other because he cannot comply with it.

(3) A comparison of the cases of persons of different religious belief or political opinion under paragraph (2) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

(4) A person ("A") discriminates by way of victimisation against another person ("B") in any circumstances relevant for the purposes of this Order if—

(a) he treats B less favourably than he treats or would treat other persons in those circumstances; and

(b) he does so for a reason mentioned in paragraph (5).

(5) The reasons are that—

(a) B has—

(i) brought proceedings against A or any other person under this Order; or

(ii) given evidence or information in connection with such proceedings brought by any person or any investigation under this Order; or

(iii) alleged that A or any other person has (whether or not the allegation so states) contravened this Order; or

(iv) otherwise done anything under or by reference to this Order in relation to A or any other person; or

(b) A knows that B intends to do any of those things or suspects that B has done, or intends to do, any of those things.

(6) Paragraph (4) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.

(7) For the purposes of this Order a person commits unlawful discrimination against another if—

(a) he does an act in relation to that other which is unlawful by virtue of any provision of Part III or IV; or

(b) he is treated by virtue of any provision of Part V as doing such an act".

54. The respondent, in addition to the merits of each claim, argued that all heads of claim were lodged outside the time permitted, as set by Article 65 of the 1997 Order

and Article 46 of the 1998 Order, and that the Tribunal ought not to extend the time as permitted by both Articles on the grounds of justice and equity.

55. It is the claimant's responsibility to prove facts from which the Tribunal could conclude, in the absence of an adequate alternative explanation, that the respondent's treatment of the claimant was on grounds of religious belief or race. Once facts have been established from which discrimination could be inferred, the burden shifts to the respondent to show that there is another explanation for the treatment.

56. It is clear that a difference in status is not enough to establish the inference of discrimination (**Madarassy v Nomura International Plc [2007] IRLR 246**). Where the claimant relies on actual comparators to show less favourable treatment, it is necessary to compare like with like. In addition, the claimant may rely on the evidential significance of non-exact comparators in support of an inference of direct discrimination.

57. Especially since the ruling of the House of Lords in **Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL**, there has been a movement towards treating the question of whether less favourable treatment was on the proscribed ground - the "reason why" issue - as the crucial question for tribunals to address **(Aylott v Stockton on Tees Borough Council [2010] IRWR 994 CA; JP Morgan Europe Ltd v Chweidan [2011] EWCA Civ 648)** rather than focusing on the characteristics of actual or hypothetical comparators. As put by Mummery LJ in Aylott, "Did the claimant, on the proscribed ground, receive less favourable treatment than others?"

58. The Tribunal received valuable assistance from Mr Justice Elias' judgement in the case of **London Borough of Islington v Ladele and Liberty (EAT) [2009] IRLR 154**, at paragraphs 40 and 41. These paragraphs are set out in full to give the full context of this part of his judgement:-

> "Whilst the basic principles are not difficult to state, there has been extensive case law seeking to assist Tribunals in determining whether direct discrimination has occurred. The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:
>
> (1) In every case, the Tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in **Nagarajan v London Regional Transport [1999] IRLR 572, 575** – "this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or sub-conscious) of the alleged discriminator".

59. It must be borne in mind that, in this case, the claimant variously alleged both deliberate collective and mass unconscious bias to be the potential reason for the shortlisting panel's treatment of him.

60. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or

even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in Nagarajan (p.576) as explained by Peter Gibson LJ in **Igen v Wong [2005] IRLR 258,** paragraph 37.

61. As the courts have regularly recognised, direct evidence of discrimination is rare and Tribunals frequently have to infer discrimination from all the material facts, the courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in **Igen v Wong.**

62. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated, and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature.

63. The first stage places a burden on the claimant to establish a prima facie case of discrimination:- 'Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer'. 'Key to this test is that the less favourable treatment has an evidence-based direct or inferential connection to the prohibited ground. It would be rare to have, for example, conduct or records which contained evidence incapable of any other interpretation than that discrimination on prohibited grounds was intended'.

64. The Tribunal therefore remained alert to anything in the evidence which, whilst superficially innocuous, might give even a brief glimpse of something untoward beneath the surface, capable of providing an insight in to something sinister lurking beneath.

65. The Tribunal, in the absence of such direct evidence, was invited by the claimant to ascribe to the process and the conduct of the respondent's witnesses an inference that they individually, and collectively on behalf of the respondent, behaved in such a way that he could have been the victim of discrimination on the grounds of his religion and/or his race, requiring a satisfactory explanation by the respondent.

66. If the claimant proves such facts, then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination. The English law in existence prior to the Burden of Proof Directive reflected these principles save that it laid down that where the prima facie case of discrimination was established it was open to a Tribunal to infer that there was discrimination if the employer did not provide a satisfactory non-discriminatory explanation, whereas the Directive requires that such an inference must be made in those circumstances: see the judgment of Neill LJ in the Court of Appeal in **King v The Great Britain-China Centre [1991] IRLR 513**.

67. The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation

of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.

68. As Lord Browne-Wilkinson pointed out in **Zafar v Glasgow City Council [1997] IRLR 229**:-'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

69. Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in **Bahl v Law Society [2004] IRLR 799**, paragraphs 100, 101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn.

70. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself – or at least not simply from that fact – but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

71. It is not necessary in every case for a Tribunal to go through the two-stage procedure. In some cases, it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test: see the decision of the Court of Appeal in **Brown v Croydon LBC [2007] IRLR 259** paragraphs 28-39.

72. The employee is not prejudiced by that approach because in effect the Tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.

73. It is incumbent on a Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in **Anya v University of Oxford [2001] IRLR 377** esp paragraph 10.

74. The Tribunal also received considerable assistance from the judgment of Lord Justice Girvan in the Northern Ireland Court of Appeal decision in **Stephen William Nelson v Newry and Mourne District Council [2009] NICA 24**. Referring to the Madarassy decision (supra) he states at paragraph 24 of his judgment:-

> "This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude in the absence of adequate explanation that the respondent has committed an act of discrimination. In

Curley v Chief Constable [2009] NICA 8 Coghlin LJ emphasised the need for a Tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the Tribunal to retain such a focus is particularly important when applying the provisions of [Article 63A]. The Tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination".

75. The Tribunal unanimously concludes that, whilst the complaints were lodged more than three months from the act or acts complained of, time ought to be extended on the ground that it is just and equitable to do so.

76. Whilst the claimant was aware from an early stage that he had not been successful in his application for interview, he was given incorrect information when told that nobody was shortlisted.

77. The Tribunal is satisfied that the explanation for that was one of genuine mistake, and not a lie told to mislead him. It was communicated to him by Ms Short after the alleged discrimination took place, so it played no part in the acts complained of. The claimant's view of it was that she did so deliberately, in order to deter him from bringing proceedings. Such an act, even if proved as being deliberate, is therefore only evidentially relevant in support of the claimant's argument that it was done to put him off the scent.

78. The Tribunal concludes that provision of that misleading information, whilst in itself unimpressive, the claimant's case is that he was not shortlisted on the grounds of his religion and or his race. Even had nobody else been shortlisted, he remains firmly of the view that he should have been shortlisted and appointed, regardless of who else might have applied.

79. The Tribunal listened carefully to the evidence, and considered the written materials.

80. It concluded that the case brought by the Attorney General should be disregarded as having no bearing upon this case; it must be decided upon its own facts and the available evidence.

81. The Tribunal had regard to the fact of the claimant's previous litigation against the respondent, in assessing the likelihood of it having influenced the shortlisting panel.

82. The Tribunal was unable to find any compelling evidential or inferential connection between the facts of this case and the evidence on behalf of the claimant by Mr Titterington.

83. The Tribunal concluded that the only member of the shortlisting panel who had any real knowledge of or connection with it was Professor McKillop. He was alleged in this case by the claimant to have been instrumental in ensuring that the claimant was not confirmed in his post.

84. The Tribunal accepted Professor McKillop's evidence that he was in no way involved. He was not the claimant's line manager at the time, so it was not his role to confirm or refuse the claimant's confirmation. It also was his unchallenged

evidence that he had never been asked by the respondent to provide evidence in the earlier case, which would tend to confirm his lack of involvement in the facts of that case.

85. The Tribunal considered that Professor McKillop's position would have been much more complicated had the claimant been selected for interview. Despite the claimant's insistence that he played no part in his wife's complaint, it clearly was, and remains, Professor McKillop's belief that the claimant was involved. Even if he had not decided of his own accord to recuse himself from the interview panel, such a history between the two inevitably would have given rise to arguable complaint by the claimant as to his independence.

86. The Tribunal considered however that Professor McKillop was a truthful and reliable witness as regards his role on the shortlisting panel, which involved no personal interaction with the claimant, and solely required fulfilment of a paper-scoring exercise.

87. It was of particular significance that there was no evidence of any contact between Professor McKillop and the other panel members concerning the merits of any candidate.

88. It was a unanimous decision by all of the panel not to shortlist the claimant. Professor McKillop, with no evidence of consultation or collusion between the shortlisting panel, identified one of the same fundamental failures by the claimant to provide cogent evidence of compliance with the top criteria as the other panel members.

89. It would reasonably have been expected that, had he been seeking to sabotage the claimant's application, he would have been much more specific in his reasoning, and/or referenced other "failures" by the claimant.

90. Professor McKillop was unable to attend the meeting for reasons which were not challenged. Again, had he been attempting to influence the others, it seems likely that he would have ensured that he was able to attend, to stem any votes in favour of the claimant, as there was no evidence that he (or any of the other panel members) had any idea of the others' assessment of the claimant's application.

91. The other panel members' knowledge of the claimant was in the view of the tribunal too remote to sustain the notion that they, personally or collectively, reached their conclusions upon anything other than the materials supplied by him in his application. There also was no evidence that any of them had any knowledge of the complaint against Professor McKillop by the claimant's wife.

92. There was in the view of the Tribunal little doubt that, had the claimant been applying fifteen years ago, he would have been a strong contender for interview.

93. The Tribunal however concluded that the claimant failed to demonstrate that his treatment was in any way connected with his race or his religion. One of the three candidates selected for interview was Chinese; the other two were white. The religious composition of those selected for interview also provided no sound basis upon which any bias might be inferred sufficient to require explanation.

94. On the face of it, the ethnic and religious makeup of the shortlisted candidates is in any event diluted almost to irrelevance because none of them was appointed.

95. The claimant asserts that the recruitment was therefore abandoned by the respondent, in order to victimise him, as he was the best candidate for the job.

96. There was no tangible or inferential evidence of what could only have been achieved by a conspiracy between the panel and potentially other members of the respondent's hierarchy. Such concerted effort would, on the claimant's case, result in the respondent depriving itself of the strongest candidate available. That proposition is unlikely in itself, and was in the view of the Tribunal unsupported by any cogent evidence.

97. The Tribunal is unanimously of the view that the claimant's case consisted overwhelmingly of raising much dust but nothing of any substance. It appeared to flit between a number of propositions. One such was the panel acting as automatons, predisposed to discriminate without knowing it. Another was a large-scale conspiracy to sideline the claimant because of his previous claims arising from twenty years before. Another was that the shortlisting and interview panel colluded with the respondent to abort a recruitment exercise by not appointing anyone, despite having discriminated against the claimant in order to shortlist its preferred candidates, based only upon their ethnic and religious backgrounds.

98. The Tribunal unanimously concludes that the criteria identified and prioritised by the shortlisting panel were entirely appropriate generally, and for the job description of this post particularly.

99. The Tribunal is satisfied from the evidence of the respondent's witnesses that they genuinely and conscientiously applied them to all of the candidates, including the claimant. Their evidence, supported and confirmed by the objective evidence of the candidates' applications, revealed an unbridgeable gulf between what was reasonably required and that which the claimant was able to provide.

100. The Tribunal is therefore satisfied that the panel was not only justified in not shortlisting the claimant, but further would have been significantly at odds with the clear instructions within the respondent's established policies had it done so.

101. The Tribunal unanimously considers that the claimant's case fell well short of even the modest threshold required by the legislation in order to reach the position where it could [reasonably] conclude that any unlawful discrimination or victimisation had occurred.

102. The claimant's case is therefore dismissed in its entirety.

Employment Judge:

Date and place of hearing: 25-29 March 2019, Belfast.

Date decision recorded in register and issued to parties: