



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4112055/2019 (V)

Final Hearing Held by Cloud Video Platform on 2,3 and 4 September 2020

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**Employment Judge A Kemp
Tribunal Member A Smiles
Tribunal Member J Torbet**

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Mr O Al Manasrah

**Claimant
In person**

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HMRC

**Respondent
Represented by:
Dr A Gibson
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**The unanimous decision of the Tribunal is that the Claim does not succeed
and is dismissed.**

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E.T. Z4 (WR)

REASONS

Introduction

- 5 1. This was a Final Hearing on the claims made by the claimant. He represented himself. The respondent was represented by Dr Gibson.
2. The hearing took place by cloud video platform remotely in accordance with the orders made at the Preliminary Hearing on 20 May 2020. The hearing
10 was conducted successfully, with the claimant, Dr Gibson and the witnesses attending (in the case of the witnesses they did so individually when called to give their evidence) and being able to be seen and heard, as well as being able themselves to see and hear. The Tribunal members each had a paper copy of the Bundle of Documents. There were occasions when the audio and
15 then video for Dr Gibson failed, but he was able to re-join using a new device. There were a number of breaks taken during the evidence.
3. The Tribunal was satisfied that the arrangements for that hearing had been conducted in accordance with the Practice Direction dated 11 June 2020, and
20 ascertained that the appropriate notice as to that hearing was on the cause list. It was satisfied that the hearing had been conducted in a fair and appropriate manner such that a decision could be made on the basis of the evidence before me.

25 Issues

4. The Tribunal identified the following issues for determination, and raised them with the parties at the commencement of the hearing. They confirmed their agreement. The list of issues is:
- 30 (i) Did the respondent directly discriminate against the claimant under section 13 of the Equality Act 2010 (“the Act”) because of his race or religion?

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- (ii) Did the respondent indirectly discriminate against the claimant under section 19 of the Act by applying a provision, criterion or practice of the interview panel asking questions of the claimant or interrupting his answers, putting those of the claimant's race or religion at a particular disadvantage, and the claimant at a particular disadvantage?
 - (iii) If so has the respondent shown that doing so was a proportionate means of achieving a legitimate aim under section 19?
 - (iv) If any claim is successful, to what remedy is he entitled?

10 **Evidence**

5. Evidence was given by the respondents first, by agreement, with their witnesses being Ms Sandra Wright, Mr Jim Carroll, Ms Julia Layton and Mr David Abbinett, and then the claimant himself.

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6. The parties had prepared a bundle of documents, most but not all of which was spoken to in evidence. The parties had also helpfully agreed a Statement of Agreed Facts, which has been incorporated into the facts found below.

20 **Facts**

7. The Tribunal found the following facts to have been established:

8. The claimant is Mr Osama Al Manasrah.

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9. The respondent is Her Majesty's Revenue and Customs.

10. The claimant was born in Amman, Jordan, and lived there initially before moving to Saudi Arabia. He worked in the Middle East before moving to the United Kingdom.

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11. The claimant identifies that he is of Middle Eastern Arabic race, and is a member of the Muslim religion.

12. The claimant applied to the respondent for a permanent role as a Customer Services Consultant in Edinburgh or Bathgate on or about 20 May 2019. He did so by an online application form in which he did not disclose his race, but stated that he preferred not to disclose it. The role had a salary range of £19,160 - £20,640 per annum, and part time work was possible. Seventy five posts were available. He passed an online Civil Service Judgment Test and was invited for interview on 19 June 2019.
13. He was asked the following questions at that interview:
- (i) Tell me about a time you were faced with a difficult issue or situation involving other people (e.g. colleagues/customers). What attributes did you use to solve the problem?
 - (ii) Tell me about a situation where you worked effectively and efficiently in order to achieve a successful outcome within a given time-frame?
 - (iii) How would you use your communication skills and abilities to successfully persuade someone else to see things your way?
14. The respondent has a scoring matrix for assessing interview questions such as these, from 1 – 7. A score of 4 and above is a pass. A pass is required for each of the three behaviours addressed by each question asked. The behaviours are, respectively (i) Managing a Quality Service (ii) Delivering at Pace and (iii) Communicating and Influencing. At the interview there was a measure of prompting of the claimant for his answers for the second but primarily for the third behaviour.
15. The claimant scored 5,4, and 4 respectively for the three behaviours addressed at his interview. That was a pass for all three behaviours. He was not offered employment, but placed on a reserve list. The procedure followed by the respondent for the interview on 17 June 2019 was the same as that utilised for the interview held on 17 July 2019 as referred to below.

16. On or about 11 July 2019 the claimant applied to the respondent for a role as an Administrative Officer in Dundee. It had a salary range of £19,160 to £20,640 per annum, and part-time working was possible. It was a fixed term contract for up to six months. There were 100 such roles which were to be available. The role involved working in the Customer Services Group in a call centre to respond to telephone or online queries from members of the public, primarily in respect of tax credits but for a range of other issues as well. The online information informed applicants that they would be assessed against three behaviours during the selection process, being Managing a Quality Service, Delivering at Pace, and Communicating and Influencing.
17. The online information for that role referred to Success Profiles, a document prepared by the respondent, and that an applicant's behaviours would be assessed. That was a change from the earlier process that had been used within the Civil Service, prior to the interview in Edinburgh, which involved assessment of competencies. There was a link to a number of other documents which could be accessed online, including that titled Success Profiles.
18. The claimant completed an online application form. The claimant's application form, which was not before the Tribunal, was considered to have passed a first check for that, he passed the online Civil Service Judgment Test referred to above, and was then invited for interview.
19. The interview took place in Dundee. It was conducted in accordance with a procedure the respondent had prepared for interviews nationally ("the procedure"). It had the following provisions, inter alia:
- "Prior to the interviews the panel members need to:**
1. Have completed the online Diversity and Inclusion (2019) learning in CS learning. This learning has recently been updated, so please ensure everyone has completed this prior to interviews....
 3. The interview usually lasts 30 mins and the planned interview slots are 45 mins to allow 15 mins review for interviewers....

The interview

.....Explain that the interview will last approximately 25-30 minutes & that you will be asking questions relating to three behaviours from the Civil Service Success Profiles guidance, we may ask follow up questions on each to get the best out of them.

- Managing a quality service
- Delivering at pace
- Communicating and influencing

Explain that you don't want to trip them up during the interview and that you want them to do well: so you may be asking lots of questions because you are trying to get the best from them – there are no trick questions.

These are situation based interviews where candidates are asked questions that allow them to demonstrate the required behaviours, and you will start by giving the candidate a 'setting the scene' scenario/information and then asking the question (You can use supplementary probing questions if needed).

Questions

Managing a Quality Service

Set the scene: In HMRC everyone we deal with are our customers. In Customer Services Group it is all about providing a great service. To do this we are looking for people who work well in teams while using their own individual expertise and skills to deliver every time.

Q1. Can you describe a time when you solved a difficult problem when working with others (e.g. colleagues/customers/students)? What attributes did you use to solve the problem?.....

Delivering at pace

Set the scene: In this role you will be dealing with high volumes of customer contact throughout the day. It will require you to work at

speed, taking responsibility for your performance and actions while maintaining a high standard of work.

Q2. Can you describe a time when you delivered results to a tight deadline, and what obstacles did you encountered?

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.....

Communicating and influencing

Set the scene: This job requires you to be in regular contact with customers and colleagues. It needs you to communicate with purpose, clarity and enthusiasm while respecting the needs and opinions of others.

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Q3. Describe a time when you needed to put forward your own views in a clear and constructive manner?"

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20. Under each question was a series of questions which could be asked titled "possible prompts", and a series of "some positive behaviours". For the second question the some positive behaviours list was:

- "Work with energy/pace to get the job done
- Took responsibility
- Showed drive and passion
- Sets own goals
- Use initiative to achieve results
- Worked well with others to meet targets
- Overcoming barriers"

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21. For the third question the some positive behaviours list was:

- "Use various communication methods to get point across
- Build rapport and engage with others
- Listen to other opinions
- Make sure what they are saying is correct
- Use open body language"

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22. The document had a number of checklists. Checklist Five was headed “Running the interview” and included

“Each panel member keeps their own notes....

5 Help the candidate to come back on track if they go off message”

23. Checklist Six was headed “After the interview”, and had two sections.

24. The first section stated, inter alia

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“**On your own** – Independently assess your notes and consider the evidence you have gathered against the criteria

Record your score for each behaviour in Section two of the Interview Evaluation Form

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Comment on the quality and strength of the evidence in the Comments section ...

Record your overall rating in Section three of the form

Draft some brief notes in Section Four comments..... You will discuss these with your fellow interviewer and a final version will be in putted

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onto the system and used as feedback for the candidate....

25. The second section stated, inter alia:

“**With your fellow panel member**

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Discuss your evidence and scores.....

Decide on the overall panel score and your overall rating

Complete the Interview Evaluation Form ...

Ensure notes are kept documenting any disputed assessment and details of the lead interviewer’s decision”

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26. The document referred to nine Factsheets, the eighth of which was “Helping candidates to stay on track”. It was not before the Tribunal.

27. 175 applicants required to be interviewed. Arrangements were made to do so involving panels of two drawn from about 35 volunteers. Those on the panel required to be at least one grade above that for the post applied for.
- 5 28. The interview of the claimant was conducted by a panel of two on 17 July 2019. The lead interviewer was Mr Jim Carroll. The second member was Ms Sandra Wright. The panel knew only the claimant's name. They did not have his application form or other information about him. That was part of the procedure and applied to all interviewees. By chance the claimant had met
10 Mr Carroll on his way towards the respondent's premises for the interview, and had asked him for directions.
29. Both Mr Carroll and Ms Wright had prior experience of interviewing applicants for posts, and attended a meeting with a senior manager as a Single Point of
15 Contact prior to the interviews for the posts for which the claimant applied starting at which the procedure was discussed and guidance on applying it given.
30. Ms Wright had completed the Diversity and Inclusion (2019) training. She
20 worked at the Officer grade of the respondent.
31. Mr Carroll had not undertaken the Diversity and Inclusion (2019). He had undertaken training in diversity and equality issues with the respondent in earlier years, details of which were not given in evidence. He had undertaken
25 many other interviews during his employment with the respondent. He worked at the Higher Officer grade of the respondent. He had returned from holiday on Sunday 14 July 2014 and seen an email asking about volunteers to conduct interviews. He replied to volunteer. He attended a meeting with Ms Jane Turner, the respondent's Single Point of Contact in Dundee at which
30 the procedure to conduct the interviews was discussed, as had Ms Wright. Interviews had commenced shortly thereafter.
32. The Diversity and Inclusion Training (2019) was conducted online and had six tutorials, which included four in respect of unconscious bias. The training

had a total estimated learning time of two hours. It had been amended from the training earlier conducted.

- 5 33. At the interview of the claimant Mr Carroll was the lead interviewer. After initial introductions and questions, Mr Carroll read out each of the set the scene wordings, and each of the three questions, from the document referred to above. The claimant then provided answers to each question.
- 10 34. Each panel member took their own handwritten notes. Those notes were not before the Tribunal. Those made by Mr Carroll were destroyed at or about the time he left the respondent's employment on or around 20 September 2019. Those made by Ms Wright were retained in her office.
- 15 35. The claimant gave answers to each question which are reasonably accurately recorded in a complaint he made by email on 21 August 2019 as hereafter referred to. The claimant had prepared for the interview by taking written notes with him. Applicants were permitted to do so. He did not read out those notes when giving his answers, but used them as a basis for his answers.
- 20 36. For the second question the claimant's answers were considered by Ms Wright to be straying from what she was seeking, and she spoke to the claimant to ask him for information more directed to the question. She thought that he was giving an answer that was more a description of the job that he did. As he was giving his answer to the third question she considered that he was not answering it with regard to what he himself had done, and she intervened whilst he was giving his answer to ask him to provide detail directed to what he himself had done as a specific act. The claimant did not provide the detail she sought.
- 25 37. The interview took about 30 minutes. After it concluded Mr Carroll wrote down the scores he had considered appropriate for the claimant. Ms Wright did not. Mr Carroll and Ms Wright spoke about the interview. Mr Carroll intimated that he had scored the claimant 4,2 and 2 for the three behaviours respectively. He stated that he did not think that the claimant had provided the detail being

sought, that the answers were more like a job description and that his answers had been given as if he were reading from a script. Ms Wright made him aware that she had not independently assessed her own scores. She indicated that she agreed with the scores Mr Carroll had informed her of and his assessment of the interview. Those scores were then the agreed scores for the panel. Under the procedure adopted by the respondent for the interview process a score of 4 had the following standard “The applicant has provided acceptable levels of evidence to demonstrate effectiveness in their response to the question”. For scores of 1 – 3 it had the following standard “The applicant has not provided enough/very little evidence to demonstrate effectiveness in their response to the question.”

38. Mr Carroll completed an Interview Evaluation Form for the claimant which recorded the jointly held views of Ms Wright and him. It had the following comments for each of the three behaviours respectively:

- (i) “Acceptable evidence given for behaviour over other examples ...covered all aspects over other behaviour questions
- (ii) Vague info, not specific in example more of job overview than example. No evidence of delivery at pace, limited evidence of managing work priorities.
- (iii) Felt example better suited to Q1. Limited positive behaviour evidence. Prompted with questions but still not specific or direction towards example”.

39. Section 3 with Results/Outcome stated minimal demonstration and unsuccessful. Section 4 “General Comments on Overall Performance” stated “Has to be more specific. Talked confident and knowledgeable of role. Needs to be more specific in his own actions within examples.”

40. The outcome that his application had not succeeded was provided to the claimant, on a date not given in evidence. He sent an initial email to the respondent on 9 August 2019 to state that that outcome was not fair, and received a reply from Ms Julia Layton, the respondent’s Recruitment Senior

Officer, who sought more information, although neither message was before the Tribunal.

- 5 41. On 21 August 2019 the claimant emailed Ms Layton making a complaint that he had “been treated in a biased and unfair manner”. He referred to being interrupted by the female board member, being Ms Wright, and added that there was a “huge problem of racial inequality where I live. People of ethnic minorities get shortlisted in blind recruitment applications but they do not pass the interview stage”. He added links to documents that included a speech by
10 Ms Lesley Evans, the Permanent Secretary to the Scottish Government, and other publications on the issue of racial equality in Scotland. He set out what he had stated at interview for each behaviour question under section for each headed “My competency”.
- 15 42. For that for the second question he provided information on his role in the Sheriff Court related to custody cases, setting out tasks he seeks to complete by 11am. He referred to making new suggestions, and added in the interview that there could be very urgent matters “for instance if there is an accused has to be transferred across the border from Scotland to England” in which
20 case he sends the cases to the custody court as soon as possible.
43. For that for the third question he provided information as to the custody team and its use of a high court video link and stated that he had emphasised that there was a “need to establish a more effective way, i.e sending us a list each
25 week”, he communicated the outcome to his team when his suggestion was accepted, and added in the interview that one of the team was doubtful about the list being consistent, and that he informed him that it can be consistent as long as they kept communicating with the High Court Function Team. He further added that the HFC team started to come to their office.
- 30 44. Ms Layton spoke to Mr Wright on 28 August 2019 to inform him that there had been a complaint and ask him about the interview. She kept a file note of that conversation which is a reasonably accurate record of it. In that Mr Carroll had said “there was no relevance to what he was talking about”.

He stated that he had carried out the mandatory training and agreed to send the evidence of that to Ms Layton.

5 45. Ms Wright was at that time on annual leave. Ms Layton spoke to her on 11 September 2019. She kept a file note of that conversation which is a reasonably accurate record of it. Ms Wright stated that the interview started quite well but that the second two examples did not reflect the behaviours required. She thought that they were more of a job description. She had “tried to get the candidate to give particular examples but despite prompting he was
10 unable to do this.”

46. On 13 September 2019 Ms Layton wrote to the claimant to reject his complaint. She had reviewed the notes of the interview within the claimant’s complaint, and had conversations with the panel, and “there was no evidence
15 to suggest that you had failed your interview on discrimination grounds.” She added “What is evident on this occasion is that you had failed to provide the relevant examples required during the interview to meet the minimum standard.”

20 47. She further stated

“HMRC prides itself on undertaking a fair and open recruitment process. To [e]nsure we meet this we require our people to undertake relevant training before taking part in the recruitment process. There
25 is evidence to support the correct actions were taken throughout the process in Dundee.”

48. She made that comment on the basis of the evidence provided by Ms Wright that she had undertaken the Diversity and Inclusion (2019) training, and the
30 assurance given to her by Mr Carroll that he had done so, although he had not at that stage sent any evidence of that. She sent the letter immediately before going on annual leave. Mr Carroll replied to her to state that he had not done the training which she saw after she had returned from annual leave. No action was taken by her in response to that information.

49. The claimant was informed in the letter from Ms Layton that he could take his complaint to the Civil Service Commissioners. Details were provided by an online link. He did so. It was not successful.

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50. The claimant had applied separately for a role with HMRC in Salford/Manchester as an Administrative Officer in about May 2019. He attended an interview and was scored 3,4 and 4 against criteria of Managing a Quality Service, Delivering at Pace and Developing Self and Others. He had given as examples of each behaviour essentially the same detail as he had provided the respondent in his interview conducted by Mr Carroll and Ms Wright.

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51. The claimant had also applied separately for a role with Department of Work and Pensions in Dundee on a date not given in evidence. He had attended an interview and was scored 4,4 and 5 against criteria of Managing a Quality Service, Making Effective Decisions and Communicating and Influencing. He had given as examples of each essentially the same detail as he had provided the respondent in his interview conducted by Mr Carroll and Ms Wright.

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52. At the time of the interview held with the respondent on 17 July 2019 the claimant was in receipt of Universal Credit. He was residing in Guardbridge with a friend.

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53. He continued to make applications for employment after being informed of the outcome of that interview.

54. In January 2020 he was offered a role by the respondent for Edinburgh following from that interview and being placed on the reserve list, but did not accept it.

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55. He obtained new employment in July 2020.

56. On 22 February 2019 Ms Lesley Evans the Permanent Secretary to the Scottish Government gave a speech at the BAME Into Leadership

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Conference. She noted that “minority ethnic people make up 4% of Scotland’s communitiesyet are still underrepresented in senior management, and on average are more likely to be unemployed or in low-paid work.”

5 57. A report into the ethnicity make-up of staff employed by the Civil Service in the UK in 2019 indicated that in Scotland 97.2% were white, 1.2% Asian, 0.5% Black, 0.1% Chinese, 0.6% Mixed and 0.4% Other. The summary in respect of Scotland stated that “2.8% of civil servants in Scotland.....were from Asian, Black, mixed or Other ethnic groups combined, compared with
10 4.3% of the Scottishworking age population...”

58. The Coalition for Racial Equality and Rights published a paper entitled “Changing the Race Equality Paradigm – key concepts for public, social and organisational policy”. in relation to discrimination, including unconscious
15 bias. It is a body established by the Scottish Government.

59. In his assessments of other applicants, which involved being on about 50- 60 such interviews, Mr Carroll was on a panel which rejected some who were white British, and not Muslims, and on a panel which accepted some who
20 were from an ethnic minority background. He has a number of friends from an ethnic minority background.

60. Ms Wright also has friends from an ethnic minority background. She sat on fewer such panels, details of which were not given in evidence.

25 61. After the interviews in Dundee, of which that of the claimant on 17 July 2019 was a part, were concluded the respondent undertook assessment of the outcome by what it termed an “Ethnicity Profile” There had been a total of 449 applicants. 175 passed were invited for interview. 68 passed the interview.
30 60 were made offers of employment (it is likely that eight in the interim period withdrew their applications). 233 applications were rejected, and a total of 155 applications were withdrawn at some stage.

62. The ethnicity of the applicants was broken down into the following categories
35 – (i) Asian/Asian British (ii) Black/African/Caribbean/Black British

(iii) Mixed/Multiple ethnic Groups (iv) Other ethnic group (v) White (vi) Prefer not to disclose.

5 63. For the first category there were 35 applicants, 19 were invited for interview, and 5 passed and were offered positions.

64. For the fourth category there were 3 applicants, 1 was invited for interview but did not pass it.

10 65. For the fifth category there were 361 applicants, 137 were invited for interview, 53 passed it and 47 were offered positions.

66. For the sixth category there were 14 applicants, 7 were invited for interview, 3 passed the interview, and 2 were offered positions.

15 67. The fifth category made up 80.4% of all applicants, and 78.3% of the posts offered. The sixth category made up 3.1% of all applicants, and 3.3% of the posts offered. The fourth category made up 0.7% of all applicants, and 0% of the posts offered.

20 68. 14.86% of those applicants from a Black, Asian, or Minority Ethnic background were offered posts. 13.25% of those applicants who were White were offered posts.

25 **Submissions for respondent**

69. The following is a basic summary of Dr Gibson's submission. He argued that the decision not to appoint the claimant to the role was solely due to his not performing at interview. There was statistical evidence as to hypothetical comparators, who were not named within the statistics but clear from them, that showed that those not sharing the claimant's protected characteristics were treated in the same way, and that those who did were appointed. The claimant's case was based on inferences to be drawn from his scoring, and against other scoring on other interviews. There was no evidence to make

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such inferences. It was not ideal that Mr Carroll had not done the training. He had been asked to become involved at the last minute, and had knowledge from other training.

5 70. It was extremely unlikely that both interviewers would have had the same unconscious bias. It was right not to make assumptions as to an applicant. The process was robust and consistent, and would make it more difficult to bring unconscious bias to bear on the decision. That was shown by the statistics. It was significant that the claimant had different scoring at different
10 interviews, but did not criticise the Manchester one as biased on race or religious grounds. At an interview you have to think on your feet, but the claimant wanted to give the presentation he had prepared. He may have been complacent. The interviewers had the same opinion, and that was significant more than that Ms Wright had not undertaken scoring. Both had been able to
15 explain the scoring when asked to do so. There was no evidence of unconscious bias. Contrast was drawn with the facts in ***Governing Body of Tywyn Primary School v Aplin UEAT 0298/17.***

20 71. On the claim of indirect discrimination the respondent accepted that it did apply the PCPs relied on. There was no evidence that those PCPs placed or would place those of the claimant's race or religion at a particular disadvantage. That was sufficient to defeat that claim. Even if the Tribunal accepted that the answer was interrupted that did not place the claimant at any disadvantage. If that was not accepted, the respondent had discharged
25 the onus of showing that the PCPs were a proportionate means of achieving a legitimate aim. The respondent sought to give as much chance to applicants succeeding as possible.

Submission by claimant

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72. The following again is a basic summary of the submission given by the claimant. He wished to highlight that Mr Abbinett had been disappointed that Mr Carroll had not done the training. There had been direct discrimination

because of unconscious bias. The complaint had not been handled as it should have been. Ms Layton should have telephoned him. Mr Carroll had called Ms Wright, and broke the core value of the Civil Service of impartiality. Unconscious bias was based on the notion of being tribal. Ms Wright had been asked about her training but did not know the difference between identity and religion. There was contradiction in the evidence of Mr Carroll and Ms Wright about body language, and she had failed in her duty to score.

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73. What Dr Gibson had said about the roles in Edinburgh against Dundee was wrong. He was also wrong to suggest that he, the claimant, was within the Asian category for the respondent's statistics. Ms Wright had given evidence about giving time off to attend a festival as if she was giving a favour.

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74. The direct discrimination happened when the process of interruption started. He had told them that that was wrong. They had carried on. Ms Wright had made a huge mistake and never listened to what he was saying. She decided that she would take whatever Mr Carroll said. That was not her role. She could not know if he was off track, or what he was going to say. She had not read Factsheet 8.

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75. He had suffered injury to feelings. The doctor cannot do much about that. He did not completely understand the law, but people have made mistakes and could destroy someone's life by not having the training.

25 **Law**

(i) *Discrimination*

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76. The law relating to discrimination is complex. It is found in statute and case law, and account may be taken of guidance in a statutory code.

(i) *Statute*

77. Section 4 of the Equality Act 2010 (“the Act”) provides that race and religion are each a protected characteristic.

78. Section 13 of the Act provides as follows:

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“13 Direct discrimination

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

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79. Section 19 of the Act provides as follows:

“19 Indirect discrimination

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(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

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

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

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

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

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

(3) The relevant protected characteristics are—

.....

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race;.....religion”

80. Section 39 of the Act provides:

“39 Employees and applicants

An employer (A) must not discriminate against a person (B) –

(a) In the arrangements A makes for deciding to whom to offer employment....

5 (c) by not offering B employment””

81. Section 136 of the Act provides:

“136 Burden of proof

10 If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.”

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82. Section 212 of the Act states:

“212 General Interpretation

In this Act -

20 'substantial' means more than minor or trivial”

83. Section 124 provides the following on remedy:

“124 Remedies: general

25 (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may—

(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

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(b) order the respondent to pay compensation to the complainant;

(c) make an appropriate recommendation.

(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant] of any matter to which the proceedings relate

5 (4) Subsection (5) applies if the tribunal—

(a) finds that a contravention is established by virtue of section 19, but

(b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

10 (5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.”

84. The provisions of the Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC***. Its terms include Article 5 as to the taking of “appropriate measures, where needed in a particular case”, for a disabled person, “unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.”

25 (ii) *Case law*

(a) *Direct discrimination*

85. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport***

[1999] IRLR 572. In some cases, such as **James**, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as **Nagaragan**, the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in **R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15.**

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10 86. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of **Anya v University of Oxford [2001] IRLR 377.**

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87. General guidance, including an overview of the relevant authorities, was provided by the EAT in **Ladele v London Borough of Islington [2009] IRLR 154** which was later approved by the Court of Appeal in **McFarlane v Relate Avon Ltd [2010] IRLR 872.**

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Less Favourable Treatment

88. In **Glasgow City Council v Zafar [1998] IRLR 36**, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

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Comparator

30 89. In **Shamoon v Chief Constable of the RUC [2003] IRLR 285**, also a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated

as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

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90. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***, in the Court of Appeal.

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91. The EHRC Code of Practice on Employment provides, at paragraph 3.28:

“Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?’”

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Substantial, not only or main, reason

92. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a “substantial reason” for the decision. In ***O’Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause.

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93. In ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal an employee who was disabled was made redundant. The disability was as a result of a back injury. The employee worked in financial services. The scoring was based around the size of the client base. He claimed that his client base was smaller and that that was because of his disability, but the evidence was that there would have been a redundancy for any employee with a smaller client base. The Tribunal held that there had been direct discrimination but the EAT and Court of Appeal disagreed. Lord Justice Elias said this in summarising the law:

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Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: see the observations of Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285 paragraphs 8–12. That is how the tribunal approached the issue of direct discrimination in this case.

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In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason”.

(b) Indirect discrimination

94. Lady Hale in the Supreme Court gave the following guidance in ***R (On the application of E) v Governing Body of JFS*** [2010] IRLR 136

5 "Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins."

(a) Provision, criterion or practice

10 95. The provision, criterion or practice applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In ***Hampson v Department of Education and Science [1989] ICR 179*** it was held that any test or yardstick applied by the employer was included in the definition, for example.

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96. The Equality and Human Rights Commission Code on Employment at paragraph 4.5 states as follows:

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"The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision."

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(b) Objective justification

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97. The test in section 19 derives from an equal pay case ***Bilka Kaufhaus GmbH v Weber von Hartz [1987] ICR 110***, which was applied to discrimination cases in ***Hampson***. It was decided at Court of Appeal level and although later

appealed to the House of Lords the issue of justification was not addressed. It is for the employer to establish the defence on the balance of probabilities. It has the elements of:

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- (i) The means to achieve the aim must correspond to a real need for the organisation
 - (ii) They must be appropriate with a view to achieving the objective
 - (iii) They must be necessary to achieve that end.

10 *Burden of proof*

98. There is a two-stage process in applying the burden of proof provisions in discrimination cases as explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***,
15 both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If he does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this
20 regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

99. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as
25 a matter of European law, and that the onus did remain with the claimant at the first stage. As the Court of Appeal then confirmed in ***Efobi v Royal Mail Group [2019] EWCA Civ 19*** unless the Supreme Court reverses that decision the law remains as stated in ***Ayodele***.

30 (iii) *EHRC Code*

100. The Tribunal also considered the terms of the Equality and Human Rights Commission Code of Practice on Employment, some aspects of which are referred to above. It has commentary on issues of race and religion

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Observations on the evidence

101. Generally the Tribunal considered that all witnesses were seeking to give honest evidence to it.

102. **Ms Wright** gave her evidence in a clear and straightforward manner. She rejected the allegations that she had discriminated against the claimant. She was distressed to be accused of such a matter. The claimant asked her a series of questions as to some concepts of discrimination including issues as to identity and what someone's religion may be, and although there was some lack of clarity in her answers at times the Tribunal did not consider that this was a matter of concern. One question for example appeared to be whether one could tell a person's religion from their name, and she said that one could not assume that. She was right to say that. One issue that was not agreed on the respondent side was whether Ms Layton had told the two interviewers what the complaint the claimant had made was about. She said that she knew only that it was a complaint, and had not been told until much later that it was about discrimination on grounds of race or religion. That is addressed further below. What is clear from the evidence is that Ms Wright did not follow the procedure and score the claimant independently of Mr Carroll. That is a significant matter. Independent scoring by two panel members is an obvious safeguard against bias.

103. **Mr Carroll** also gave evidence in a clear and straightforward manner. There was however one area in particular that caused the Tribunal concern. He had told Ms Layton when having a call with her after the complaint was made by the claimant that he had undergone the Diversity and Inclusion (2019)

training. That is referred to in at least general terms in her note of that conversation, and she followed that up with Ms Wright too. He told her later, at or about the time he left the respondent's employment on 20 September 2019, that he had not had that training. In evidence he said that he had spoken to Ms Turner and it had been agreed that he did not need to do it as he had done similar training before. That is not however consistent with what he told Ms Layton at the time of their conversation. What he told her, which the Tribunal find did happen, was that he had done that training. No date was given as to when that was introduced, but given the date of 2019 it must have been no more than about eight months prior to their conversation. The Tribunal did not regard his evidence on this point as reliable. It appears to the Tribunal that he ought to have completed that training before starting the interviews, and that it takes up to two hours to do online. For someone like him with substantial experience and having undertaken similar training in earlier years it may have taken much less time. Although there was a short time from his return from holiday to the interview with the claimant there were two full working days in between, being a Monday and Tuesday. That the training was not undertaken may infer a lack of appreciation of its importance and the importance of diversity and inclusion issues more generally, and that is referred to further below. Not to have told Ms Layton about his not having undertaken it however is also a matter of comment later.

104. **Ms Layton** gave evidence about her investigation of the complaint. There were three matters that arose from it. Firstly, she wrote her decision on the basis of an assertion from Mr Carroll about training, when she had asked for written confirmation of it quite properly. She sent her letter immediately before going on annual leave, but simply she should have waited to obtain what she had asked for. Had she, it would have been apparent that the procedure had not been followed. Secondly, she conducted a brief telephone call with the two interviewers. They were based in Dundee and she is based in Cardiff, making direct investigation more difficult, but the discussion with them lasted some ten minutes or so and was documented in about half a page. For a matter as serious as an allegation of race and religious discrimination that

was barely more than a cursory investigation. She did not ask whether there were still notes available of it. She did not ask about the scoring. Had she done either, she would have discovered that Ms Wright had not followed the procedure. The third is that when she learned from Mr Carroll that he had not undertaken the training she did not re-open her investigation or raise that with her manager. That tends to suggest a too-ready acceptance that the procedure had been followed, and that there had been no discrimination, in circumstances which at the least called for a more detailed investigation.

10 105. **Mr Abbinett** was, the Tribunal considered, an impressive witness. He was not cross-examined by the claimant. He is Ms Layton's line manager, but had not been aware until the day before he gave evidence that Mr Carroll had not undertaken the necessary training. He confirmed that under the procedure that was needed, and that if he had not undertaken it he should not have conducted the interviews. He had also not been aware that Ms Wright had not undertaken her own scoring independently of the other panel member, and that that is what the procedure required. He further accepted that what the procedure required for the recording of that independent scoring – that that should be entered on the interview evaluation form – was not what happened in practice. He further spoke to the emails and spreadsheet which provided statistical information. That was not undertaken by him directly, as that area is addressed by a different department within the respondent, but the Tribunal was satisfied that the statistics were reliable.

25 106. **The claimant** clearly believes that he has been the victim of discrimination and could not understand why he had scored differently in other interviews, when he was not interrupted, and what he thought was so badly in the Dundee interview about which he claimed. There were some aspects of his evidence that require comment however. Firstly he could not recall exactly how the interview had gone, as he candidly accepted. Secondly, he did not appear to appreciate that there were differences between each of the interviews, either as to the questions asked, or the behaviours that were being addressed, for example that at the DWP. Thirdly he accepted that he had not

in his answer for the second behaviour addressed the part of the question relating to obstacles. Fourthly although he thought that he had answered the third question, and did not accept that the answer was more directed to the first question, the Tribunal did not consider that it did so, for reasons set out more fully below. Fifthly he accepted that he had not passed the Manchester interview as he had not given a good answer for the first question asked, and that that was not discriminatory. He also had been offered a position following the Edinburgh interview later on, which he declined. Sixthly he described preparing potential answers to questions for each of the interviews, using what he said was a STAR system to do so, (Situation, Task, Action and Result) but in evidence said that he gave essentially the same answer for each of the interviews for the respondent in Dundee, the respondent in Manchester, the respondent in Edinburgh and DWP in Dundee. That is most surprising where the questions, and in certain respects, the behaviours, are different. Finally the claimant suggested that he was asked the questions in a different order to that appearing in the procedure, which the Tribunal considered most unlikely to be correct for the reasons given below.

Discussion

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107. The Tribunal applied the law set out above to the facts that it had found, as follows in relation to each of the issues identified:

(i) *Section 13*

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108. The first issue for the Tribunal was whether the claimant had established a prima facie case. The Tribunal concluded that he had, for the following reasons:

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(i) Mr Carroll had not undertaken the 2019 diversity and inclusion training, which was needed under the respondent's procedure for the interviews. He had however assured Ms Layton that he had done so, on her evidence, which is why she wrote the letter of decision in terms that stated that the processes had been followed. That comment by him can

only have been in respect of a date within an eight month period of their conversation, but it was clear that he had not done such training. She stated that on that basis he ought not to have been on the panel. His evidence was that it had been agreed that he could undertake the role as he had been on the training many times before, but as the procedure itself stated it had been updated, and his own evidence was not consistent with what he told Ms Layton.

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(ii) Ms Wright was required by the procedure to carry out an independent assessment of the claimant, and prepare her own scoring for that. She did not do so.

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(iii) The process followed by Mr Carroll and Ms Wright did not follow the written procedure in that they did not have their own assessments, and a discussion separately about that, yet when it became clear to Mr Carroll that Ms Wright had not done so he did not question that.

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(iv) Although written notes of the interview were maintained by both of the panel members, they were not provided to the Tribunal.

(v) Ms Layton had not requested them when the claimant complained, which given the nature of his complaint was surprising to the Tribunal

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(vi) Ms Wright stated that the notes were still in her office, yet no attempt to obtain them appears to have been made, and none at least was given in evidence

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(vii) There was a difference in evidence as to whether Ms Wright and Mr Carroll were told by Ms Layton that the claimant had complained of race discrimination, with the two panel members stating only that they had been told that there was a complaint, and Ms Layton stating that she had explained what the complaint was, that it was about race discrimination and that she had read out sections of that complaint to them. On balance the Tribunal preferred the evidence of Ms Wright and Mr Carroll on that issue, as had they been aware of the complaint their response to what was asked of them is likely to have been more lengthy, detailed, and reflect their reaction of upset at having been the subject of such a claim.

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- (viii) The claimant produced some evidence that there was a lesser success rate in interviews for the Civil Service in Scotland, including HMRC, than the equivalent by proportion of the population.
- (ix) Whilst the respondent produced statistical information in relation to the particular interview campaign in Dundee of which the claimant's interview as a part, for those in the category of "other ethnic group" which the claimant stated was that into which he may fit if not as someone who prefers not to disclose, there were three applicants, one taken forward to interview, and he or she did not succeed.
- (x) The claimant speaks with an accent that is Middle Eastern in origin, and his use of English is not always perfect, particularly in relation to word order, such that at interview it is likely that that was noticeable to the interviewers. English is not his first language.
- (xi) Mr Carroll's evidence about his own notes changed, initially he said that they were destroyed when he left the respondent's employment, which was on 20 September 2019, but latterly he said that it was after the interviews had taken place.
- (xii) Mr Carroll stated to Ms Layton that the claimant's answers for behaviours two and three were not relevant, which was not accurate, and not a phrase Ms Wright agreed with. The answer for behaviour two may have not been specific sufficiently, in his mind, but could not properly be said to be wholly irrelevant.
109. What the Tribunal considered to be of particular relevance is that Mr Carroll did not candidly disclose to Ms Layton that he had not undertaken the necessary training. That training was on Diversity and Inclusion. The inference may be drawn from that that he did not regard that training to be necessary for him, and that the reason for such a view was or might be that diversity was not an important matter. At this stage one takes the claimant's case and assesses whether or not he has presented a prima facie case. The Tribunal concluded that there was just enough evidence to do so from all of the foregoing.

110. The next question therefore is whether the respondent has discharged the onus of proving that the reason for the decision not to pass the claimant at interview, and therefore offer him employment, was not his race or religion, the second stage of the process referred to above. The Tribunal accepted that the claimant's complaint contained a reasonably accurate summary of what he had said at interview. It was not seriously disputed by either Mr Carroll or Ms Wright, and there were no notes provided from that meeting that either took that may have contradicted that. His own recollection was not sufficient to add to his notes in the complaint, which had been framed about a month after the interview but reasonably close in time to it. The Tribunal also noted that neither of the respondent's witnesses could recall in evidence what precisely had been said by Ms Wright when she intervened, and what precisely the claimant had said in answer thereafter.

111. The claimant, and all applicants, required to have at least a score of 4 for all three behaviours. He achieved that for the first behaviour. That was one factor that indicated that the interviewers were undertaking a scoring based on performance, as if they were simply acting out of bias, it is at the least possible that they would fail the claimant for all behaviours. For the second, he gave an example that appeared to the Tribunal to be within the first part of the question asked. The respondent's witnesses stated that it was not a matter out of the ordinary run of his work and that that is what they sought, but that is not what the question was directed to. It was about working to a deadline, and his answer addressed that. What the claimant did not however address was the issue of the obstacles he had encountered, mentioned in the second part of the question. On that basis, the Tribunal concluded that he had provided a part answer, but not a sufficient one. Despite the concerns over the lack of notes or clear evidence as to what precisely had been stated, the Tribunal considered that there was sufficient evidence before it to come to that conclusion. The claimant's own evidence was that his complaint had set out his recollection of what he had said and when the claimant was asked by the Tribunal to state how he had answered that second part of question two, he accepted that he had not.

112. The Tribunal then considered the third behaviour, both the question, and the answer. Again the Tribunal was concerned at the lack of clear evidence, and asked the claimant to state how he had answered that question in a manner that addressed it. He said that his answer recorded in his complaint did so, but he did not proffer any detail which would have done so beyond that. He thought that he had addressed the question, on his evidence. It appeared to the Tribunal clear however that the claimant had not addressed the question asked for this behaviour. The question related to putting forward his own views, and the method by which he did so. There is nothing in his record of the answer he gave within his complaint or his oral evidence to the Tribunal that addresses either of those points in any detail. There is a cursory mention of a list in the complaint, but that is not something that, of itself, addresses his having a “view”, and then how that view was communicated to others. It appeared to the Tribunal that there was a proper basis for an intervention by Ms Wright, to tell him as she did that what was sought was something about what he did, focussed on his own behaviours. The claimant did not however respond to provide such information. It appeared to the Tribunal that he had not answered that question during his presentation about it, and that a score of less than 4, and in this case one of 2, was appropriate for it.

113. That conclusion was reached from the evidence from Ms Wright and Mr Carroll, which despite its deficiencies was clear that the answers were not adequate in their respective opinions, by the terms of the interview evaluation form which supported that, by the answers they gave to Ms Layton which also did so, and to Ms Layton’s own view when she reviewed matters on the basis of what was stated in the complaint and thought that what was there had not adequately answered the questions, together with the Tribunal’s assessment of the answers given to the questions asked.

114. The claimant alleged that the order of the questioning for the behaviours was (1) (3) (2), such that the Communicating and Influencing question was second. That was not the evidence of Ms Wright or Mr Carroll. It appeared to

the Tribunal most unlikely that that would have occurred, as Mr Carroll read out the questions from the procedure. There would be no reason not to follow that procedure and the order of questions there. The order in which questions were asked was not mentioned in the claimant's complaint, and when he came to set out the questions asked in that complaint he followed the sequence set out in the procedure, ie (1) (2) (3), and not that which he said had been followed. The Tribunal concluded that the claimant was most unlikely to be correct on that point, and preferred the evidence from Ms Wright and Mr Carroll.

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115. The Tribunal considered whether a comparator would have been treated any differently. It considered that a white British person, and someone who was not a Muslim, would firstly have been prompted in the same manner had that applicant given the answers that the claimant did, and then would have been assessed on the answers given in the same manner, which is to say 4,2,2 for each of the three behaviours, which would therefore have meant not passing the interview. The Tribunal accepted that other applicants had been rejected who were white and not Muslim, and that that was fortified by the statistical evidence from the respondent Mr Abbinett spoke to. It was also satisfied that applicants who were non- white, and/or Muslim, were accepted for the post. Mr Carroll spoke in evidence of an African American, whose religion was not provided (and may not have been known to Mr Carroll) who had given full answers to questions two and three stating how he had as a fire-fighter addressed a wild fire, what he had himself done, and what that resulted in. Mr Carroll spoke to that being a good answer, and he was clearly highly impressed with the applicant. The detail of that answer did contrast with the answer given by the claimant.

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116. The claimant sought to rely on his assessment at another interview process in Edinburgh and Bathgate. That was however for a different role, and crucially the questions asked were different. The answers he gave for them may have been the same as he gave to the interview with Mr Carroll and Ms Wright, but the fact of that is not sufficient evidence against that of the

respondent set out above. In the circumstances of his giving the same answer to what were different questions does rather call into question whether he was wise to do so. Although the behaviour may be the same, the question asked did address different elements and was in simple terms a different question to that asked in Dundee, and had the effect of seeking not identical details in a response.

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117. Similarly the claimant sought to rely on other interviews for roles in Manchester or Salford, and the DWP in Dundee. He failed the former and accepted that that was because he had not performed well at that interview, and for the latter the criteria were not the same, in that the third behaviour for the interview held with the respondent was not repeated. The Tribunal did not consider that these matters helped the claimant, or its assessment of what had happened. The differences between the questions asked, and the inevitability that there was a different presentation in some way by the claimant to a different interview panel meant that his having the scores that he did from those interviews did not provide evidence to support the inference that the reason for the scoring by Mr Carroll and Ms Wright was his race or religion. One of the criteria used to determine the application at the DWP was in any event different.

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118. The claimant also referred to some differences in the evidence given by Mr Carroll and Ms Wright. The latter had said that the claimant's body language had not been positive, but Mr Carroll had not thought that it was other than normal. Mr Carroll had said that he thought that the claimant had been reading from his script, had told Ms Layton that it was as if he was doing so, and different terms had been given for his presentation which included that it was "wooden". These differences, together with others on which the claimant sought to found, did not however appear to the Tribunal to be particularly significant. Different interviewers will generally have different impressions of the person being interviewed. They come to it with different experiences, expectations and views generally, and some differences are therefore to be expected. It would be suspicious if the assessment was

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exactly the same, as that may infer collaboration in advance, or an agreement as to what evidence should be.

5 119. The claimant sought to rely on evidence of disparity of treatment more generally in the Civil Service in Scotland, including evidence from Ms Evans referred to, and statistics. There is, from that evidence, a concern that merits comment. Fewer ethnic minority applicants were employed in the Civil Service, of which the respondent is a part, having been successful at interview, than in direct proportion to the percentage of the population according to the documents provided. That is a fact that gives rise to the possibility of discrimination in the case of the claimant. It does not of itself establish that it took place when the claimant was interviewed. It is a fact that requires consideration in the balance, amongst other facts. They include the investigation of the complaint, which was not as full as the Tribunal would have expected, and it was surprised that on Ms Layton learning that Mr Carroll had not conducted the training she did not appear to take any further action. Under the procedure Mr Carroll ought not to have conducted the interview, although undertaking the training could have been completed in two hours and by online study. Ms Layton had further not been aware that 10 Ms Wright had not undertaken her own scoring, as she had not asked for the interview notes. Seeking such notes is an obvious step to take if a thorough investigation of a complaint is to be undertaken, particularly where it is one which is as serious as or race or religion discrimination.

15 120. Despite those concerns however the Tribunal considered that the issue required to be addressed from the evidence of the interview that was conducted, and the assessment of it that was made, on the evidence before it. The Tribunal was clear in its judgment that the claimant had not answered questions two and three in a manner that merited an assessment of at least 20 four. The assessment made was undertaken purely on his answers, in the Tribunal's judgment.

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121. The Tribunal can fully understand why the claimant relied on the statistical information that he did. These are indicative of there having been a disparity within the Civil Service in Scotland at the time of those documents. That is relevant evidence, but it is not determinative. The Tribunal considered that the statistical evidence produced by the respondent into the recruitment campaign at Dundee of which the claimant's application was a part was of greater significance for the purposes of the present claim. It did not reveal a pattern of discrimination. If there had been unconscious bias the Tribunal considered that it was likely to have been shown to at least some extent in those statistics, but that was not the pattern that the Tribunal considered was found within the statistics. There was no apparent disparity between the numbers of those who were non-white being offered a post after interview. Whilst the claimant did not identify within his application which group he was a member of, and indicated that it was "prefer not to disclose", whether that particular category, or of Asian (which Dr Gibson proposed) all had statistics that were broadly similar to those in the category of white.
122. This evidence has its limitations. It does not break down the categories particularly fully, and there is no category for someone of Middle Eastern, Arabic, descent. The category of "other ethnic group" had three applicants, one was invited for interview but did not pass it. No detail was given about that applicant, for understandable reasons given that these were general statistics, but it is possible that that person was of Middle Eastern and Arabic descent, and was someone who was interviewed by Mr Carroll, but equally it is possible that that was not the position. The numbers in that category are very low, and it is difficult to make extrapolations from those details because of that. More broadly, taking all non-white categories together, the percentages shown for being invited for an interview, passing it, and being offered a position are broadly the same, indeed remarkably similar. The total offered posts is much higher than the percentage given for BAME people of working age given in the documentation provided by the claimant, which was 4.3% although that was historic such that it is likely now to be higher.

123. It is possible that an interviewer did have some form of bias whether conscious or unconscious against such a person but that not then be shown in statistics. But taking it broadly, the evidence before the Tribunal from statistics did more to support the conclusion that there had not been bias, than that there had been bias, conscious or unconscious. It was significant that Mr Carroll had been on about one third of all of the interviews.

124. The Tribunal also tested the issue by considering what might have been the position had the interviewers not asked questions of the claimant, or sought to intervene and guide him towards the kind of answer they were seeking. The claimant said that he had not been interrupted in any earlier interviews, and although questions had been asked they had come after he had finished giving his answer. The Tribunal considered that had there been no intervention, and the claimant just allowed to complete the answer, the likelihood is that he would have had a stronger claim for direct discrimination. The procedure does refer to prompting claimants, and although it does not specifically state that candidates should be interrupted, the guidance in the checklist does at the very least permit that. Had therefore there been no intervention, it is possible that the claimant's answer may have utilised all the remaining time, and he would then have failed because he had not given the kind of answer that the interviewers were seeking. If he had concluded before the end of the remaining time, he could then have been asked a question. The Tribunal noted that the claimant had been prompted in his Edinburgh interview as the record for that refers to prompting particularly for the third question asked there. The claimant accepted the outcome of that interview, and did not claim discrimination. It appeared to the Tribunal that there was nothing inherently wrong in asking a question in such a situation indeed it was done to seek to help a claimant. The issue may be what question was asked, but that would depend on all the circumstances and there was very little evidence beyond the documentation as to what had happened at that interview in Manchester.

125. The Tribunal considered that when Ms Wright intervened and sought to guide the claimant to an answer that was more specific to the question, and was about what he himself had done, she was acting within the terms of the procedure and seeking to assist the claimant. It may have been that the manner in which she did so came as a surprise to the claimant, and rather put him off his stride. It appears that he did not change tack at all, and simply continued with his answer. He did not say at the time that he was not pleased at it, although he said in evidence that he had indicated that with his eyes, an answer that the Tribunal did not consider was convincing. He did not mention having done so in his complaint, and only referred to being interrupted. The Tribunal did consider that for someone who has English as a second language, preparing an answer or an outline answer in advance is a sensible and understandable step to take, but that simply using that prepared answer as the basis carries a risk of not answering whatever question is asked.

126. The assessment of the answers of the claimant to the questions asked is a mix of the objective and subjective. It is a matter of objective fact, in the sense that it is accepted by the claimant, that he did not address the second part of the second question. It is a matter of subjective opinion as to whether he addressed the third question and if so to what extent. Whilst that is a matter of opinion the Tribunal is unanimous and clear in the assessment that it made in that regard.

127. There are two further matters that are worthy of comment. The claimant has a reasonably good grasp of English, and gave his evidence clearly. He asked questions in cross examination clearly. He demonstrated an ability to understand some complex issues. There were however a number of occasions when he used a word order that was not standard English. That is said not by any means as criticism, but to state a fact that may help to explain why the claimant's view of his answer is not one that was shared by others.

128. The second is that Mr Carroll by chance met the claimant before the interview, outside the premises of the respondent when the claimant was on the way to

it and asked for directions. Mr Carrol had forgotten about that at the time of his giving evidence both of their meeting and a conversation at the start of the interview. That is understandable when someone had about 50 – 60 interviews to conduct. But it does tend to support the impression that this was simply one interview out of that number, not one that stood out in any way, not one that had something within it, from the claimant and his race or religion, that obviously would involve unconscious bias. These are both small points, but they are part of the factual matrix within which the Tribunal's assessment is conducted.

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129. Taking account of all of the evidence, therefore, the Tribunal concluded that the respondent's explanation for its decision was adequate in the sense described in authority, it did not involve direct discrimination based on the claimant's race or religion to any extent, and the claim of direct discrimination must be dismissed accordingly.

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(xiii) Section 19

130. The Tribunal proceeded on the assumption that the panel members asking questions at interview, and interrupting the claimant to seek to direct his answers more towards what they were seeking, were each a PCP. The respondent accepted that the PCPs were applied to the claimant. It was not established on the evidence that that caused those of the claimant's race or religion a particular disadvantage. It is not easy to see that it would, given that the purpose of such interventions was to assist the applicant. The claimant was asked by the Tribunal about what the particular disadvantage was, but he did not set that out despite being asked on four occasions. The Tribunal concluded that that aspect had not been proved, and on that basis the indirect discrimination claim must fail.

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131. Even if that matter had been established, there was the issue of whether what happened was objectively justified by the respondent, as a proportionate means of achieving a legitimate aim. The aim was to seek to have as many

candidates pass as possible. Prompts were suggested within the documentation to achieve that, which demonstrated that the aim did exist in practice. The Tribunal considered that that was a legitimate aim.

5 132. It then addressed whether the asking of questions and the intervention or
interventions that took place was proportionate, on the three stage test set
out above, and concluded that it was. There was a real need for the
respondent, which was seeking to recruit 100 new employees at this grade,
to pass as many applicants as it reasonably could, the means to do so were
10 appropriate with a view to achieving the objective and those means were also
necessary to achieve that end as without the prompts the candidate would
fail, as the answer was not, at that stage, sufficient to lead to a score of at
least 4, and all behaviours had to be passed at least at that level.

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Conclusion

20 133. In light of the findings made above, the Tribunal must dismiss the Claim.

134. It does however wish to add some commentary, as it had concerns over some
aspects of what had happened as revealed in evidence.

25 135. Firstly, the respondent did not follow its own procedure. For an organisation
such as the respondent that is a surprise.

136. Secondly, it appears that that is not uncommon, in that the terms of the sixth
checklist where a panel member recorded his or her score on the interview
30 evaluation form was not what occurred. It was also noticeable that Factsheet
8 was not known about by any of the respondent's witnesses, none of whom
could recall what it said, from memory.

137. Thirdly, it was difficult for the Tribunal to determine precisely what had happened at interview, as no notes taken at the time were before it, but had been prepared by each of the two panel members. Notes are referred to within the procedure, but there was no requirement to keep them specifically, or to destroy them specifically after a set period or otherwise. It appeared to the Tribunal that, particularly where the claimant had complained of race discrimination, the obvious step to take was to obtain the notes taken by the two panel members, and check them. Mr Abbinett said that he would have done so. That would have revealed, either by that or separate enquiry, that Ms Wright had not undertaken her own scoring.

138. Fourthly, the Tribunal required to assess the case pled by the claimant, and argued before it. For someone with English as a second language, where there is a laudable aim for diversity and equality and a recognition of under-representation of ethnic minorities within the civil service and HMRC, more might have been done to assist such an applicant. The information given to applicants does not include specifically informing them that they may be interrupted if going off track, to try and move them back on track. The respondent may wish to consider revising the procedure for this and other issues. It may also wish to consider introducing some form of quality of service monitoring, as the evidence was that none took place.

139. In addition, when a complaint as serious as discrimination is made it is likely to be important to undertake a sufficient investigation of it. Rarely is discrimination obvious, or admitted. An investigation will therefore likely require to be detailed and extensive to be effective. That did not happen in this case. There were two material breaches of procedure – and for one of them being the lack of necessary training Mr Abbinett accepted that that meant that the panel member could not sit on it. For the second, the absence of independent scoring could mean the absence of separate cross checking that bias is not involved. These two matters would be expected to have been disclosed had there been an adequate investigation. The former was not disclosed to the claimant even when known, and when the letter of decision

was known to be in error by what Mr Carroll stated latterly it was not then corrected. These are matters that the respondent, as a public body, may wish to reflect carefully upon.

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Employment Judge:
Date of Judgment:
Date sent to parties:

Alexander Kemp
15 September 2020
15 September 2020

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