Appeal No. UKEAT/0260/18/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 4 April 2019
Judgment handed down on Friday 31 May 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

SCIENCE MUSEUM GROUP — APPELLANT

MS JANE WESS — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR TOM BROWN (of Counsel) Instructed by: Bates Wells & Braithwaite LLP 10 Queen Street Place London EC4R 1BE
For the Respondent	MS JANE WESS (The Respondent in person)

SUMMARY

PRACTICE AND PROCEDURE – Bias, misconduct and procedural irregularity

VICTIMISATION DISCRIMINATION - Detriment

The Claimant before the ET worked for the Respondent for 33 years until she was made redundant in the context of a restructuring in 2012. She subsequently pursued Employment Tribunal claims, including of age and sex discrimination, unsuccessfully.

In 2017 the Respondent advertised two posts of Assistant Curator. The Claimant applied. Her application was sifted out for the given reason that she was overqualified. The Respondent also advertised a post of Curatorial Project Manager. The Claimant was not among those shortlisted. In two claims, one relating to each application, she claimed victimisation by reference to her 2012 ET claims. In both cases the ET found that the burden shifted to the Respondent, but, in relation to the Assistant Curator posts, was not discharged, so the first claim succeeded. The other claim failed. This appeal related to the successful first claim only.

Held:

(1) Very unfortunately, on two occasions on day one of the hearing, the Employment Judge fell asleep. In all the circumstances, a fair-minded informed observer would conclude that there was a real possibility that the fairness of the hearing was affected. The appeal therefore succeeded on this ground alone. **Stansbury v Datapulse plc** [2004] ICR 523 (CA) applied. **Shodeke v Hill and Others** [2004] UKEAT/0394/00 considered.

(2) The appeal would not have been upheld by reference to the grounds of appeal challenging the ET's decision that the burden of proof passed to the Respondent. Although the specific matters relied upon by the ET as shifting the burden were too narrow, the wider undisputed facts were such as to justify that decision.

(3) The appeal would, in any event, have been allowed, on the basis that the ET did not reach a sufficiently clear and specific conclusion in respect of the Respondent's case as to the explanation for the decision to sift out the application, being that the Claimant was regarded as significantly overqualified for the position.

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HIS HONOUR JUDGE AUERBACH

Introduction

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1. I shall refer to the parties to this appeal as they were in the Employment Tribunal, as the Claimant and the Respondent. This appeal has been brought by the Respondent.

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2. The Respondent runs six museums including the Science Museum in London. The Claimant was employed by the Respondent from March 1979. After promotions, from 2003 she held the position of Senior Curator for Science, until she was dismissed by reason of redundancy in November 2012. Thereafter she presented claims to the Employment Tribunal ("ET") of unfair and wrongful dismissal, age and sex discrimination. All of those claims were dismissed. An appeal to the EAT was unsuccessful. That litigation concluded in 2013.

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3. In January 2017 the Respondent advertised two Assistant Curator positions. The Claimant applied. She was informed by letter that her application would not be taken further, as she was "significantly overqualified for the role". She presented a claim to the ET to the effect that that decision amounted to victimisation, contrary to sections 27 and 39 **Equality Act 2010**, relying on her previous ET claims as protected acts. I will call that the first ET claim.

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4. In February 2017 the Respondent advertised a position of Cultural Project Manager – One Collection Project. The Claimant applied. She was informed by email that she was not among those who were invited for interview. She submitted a further claim of victimisation to the ET relying on the same protected acts. I will call that the second claim.

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5. At a preliminary hearing ("PH") in the ET the Claimant was ordered to pay a deposit as a condition of being permitted to continue with the first claim, which she duly did.

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6. The first and second claims were heard together by the ET sitting at London Central (Employment Judge P Stewart, Mr M Smith and Ms L Jones), over three days on 27, 28 and 29 March 2018. The Claimant, who was throughout a litigant in person, represented herself. The Respondent, which had acted throughout by solicitors, Bates Wells Braithwaite, was represented by Mr Tim Sheppard of Counsel.

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7. The Tribunal reserved its decision and its Judgment and Reasons were promulgated on 26 June 2018. The first claim succeeded. The second claim failed.

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8. The Respondent appealed the decision to uphold the first claim. Upon consideration of the notice of appeal HHJ Shanks directed that the matter should proceed to a Full Hearing. There was no appeal in respect of the decision to dismiss the second claim.

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9. At the hearing of the appeal before me the Respondent was represented by Mr Tom Brown of Counsel. The Claimant represented herself. As I will describe, as well as considering written skeleton arguments, and hearing oral arguments, I heard some live evidence, and the hearing took the full day allocated to it. I therefore reserved my decision.

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The Employment Tribunal's Decision

10. The ET's decision begins by setting out the background history, drawing on an agreed document which had been tabled to it by the parties. To add to the brief background which I have already given, I can draw out the following additional details from the ET's decision.

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11. After the Claimant had been placed at risk of redundancy in 2011, she raised two internal grievances. One was against the then Head of Collections, who was overseeing the restructuring exercise, and included allegations of discrimination. The other was against the then Deputy Director of the Science Museum, and alleged bullying. Both grievances were investigated, and dismissed, prior to the Claimant being made redundant in 2012.

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12. After describing the litigation which ended in 2013 the Tribunal turned to the two job applications in 2017. In the application for the Assistant Curator position the Claimant set out her work history, including that, since 2013, she had been a PhD student with Edinburgh University. Those positions commanded a starting salary of £18,500.

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13. On 27 January 2017 the Keeper of Science Collections, Alison Boyle, wrote to the Claimant. The ET set out the letter in full, as will I.

> **"Dear Jane,**
>
> **Thank you for applying for the position of assistant curator. I am sorry to inform you that we will not be taking your application further.**
>
> **Whilst we do not normally provide feedback on individual applications at this stage, in the present circumstances we feel it is appropriate to do so.**
>
> **As you will appreciate, the role of assistant curator is an entry-level position. Whilst some experience of, as an example, handling and assessing objects, and cataloguing is deemed advantageous, it is not a central requirement of the post. You are, therefore, significantly overqualified for the role.**
>
> **We believe it is in the best interest of the curatorial team that there is a degree of alignment between the requirements of the post and experience of the prospective post-holder. On this basis we have decided not to progress your application. However, we feel that it is only right**

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that we raise a separate issue, which would have required careful consideration, had you been short-listed.

To recap, following your departure from the science museum after your role was made redundant in 2012 you submitted claims to the employment tribunal and, subsequently, an appeal to the employment appeal tribunal. To be clear, the organisation does not take issue with your right to pursue such claims and this is not a barrier to employment with the organisation.

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Our concern relates to the apparent interpersonal difficulties, which predates your claim. In March 2012, an internal grievance report concluded that there had been a significant build-up of issues, incidents and actions, which were not conducive to a positive working environment. We are concerned, therefore, that it is at least possible that these issues would resurface. For the reasons stated above, we have not had to resolve this concern in this particular situation as this application is not being taken forward. It is, however, something that would need to be addressed in the event that you are shortlisted for any future vacancy.

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Thank you for your interest in this position and for the time and effort you have put into your application. We wish you every success in your job search and future career.

Best wishes.

Ali Boyle

Keeper of Science Collections"

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14. The ET described the Claimant's first claim, noting that she referred in it to the two 2011 grievances, the subjects of which no longer worked for the Respondent. She claimed that the decision on her application was at least partly linked to the interpersonal issues set out in Ms Boyle's letter, which were in turn "directly and inextricably linked" to the 2012 ET claim.

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15. For the second post advertised in 2017, the Respondent received 21 applications. Shortlisting was handled by Ms Jessica Bradford. Six people were invited to interview. The Claimant was informed that she was not among them by a letter of 6 June 2017. This led to the second claim, in which she asserted that she was being "blacklisted" for matters related to her 2012 ET claim.

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16. After noting the making, and paying, of the deposit, the ET described the conduct of the hearing before it. On the morning of day one it dealt with some issues concerning the bundle, and was then reading. The Claimant gave evidence on the afternoon of day one and the

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morning of day two. Then the Respondent's witnesses gave evidence: Ms Boyle and, on day three, by video link, Ms Bradford. Closing arguments were completed on day three.

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17. The ET described the Claimant as an acknowledged expert in the fields in which she had previously worked for the Respondent. It found that, after her former employment had ended, she had wanted to continue to have access to the collections on which she had worked, and which she had loved, but had not been successful in this.

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18. The ET noted (paragraph 18) that the Claimant had acknowledged in evidence that the Assistant Curator role was an entry level role. But she had said that she believed she ticked all the boxes for it and stated that:

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> **"…There was no mention of 'up to a certain limit' after which experience becomes negative. I now know that the successful candidate has just finished a PhD so nobody could say I was overqualified…"**

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19. The ET found (paragraph 19) that:

> **"The Claimant's prime motivation in applying for this job was that, if she got it, she would have enhanced access to the collections which she knew and loved. However, she was motivated also by the prospect of augmenting her retirement pension with a small salary."**

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20. During her previous time with the Respondent the Claimant had worked with both Ms Boyle and Ms Bradford. After her employment ended, she kept in professional contact with Ms Boyle. She attested to positive relationships with them both. Both had been among the signatories of a letter expressing concern at the prospect of her loss to the museum when her job was at risk in 2012. After the conclusion of the litigation in 2013 the Head of Collections had circulated some staff about the outcome, including Ms Boyle, but not including Ms Bradford.

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21. The ET referred (paragraph 23) to Ms Boyle's evidence about the Assistant Curator positions. They were at the lowest level within the team. Academic research was not a part of the role. Any post-holder with research interests would have to pursue them in their own time. Ms Boyle described the role as having little autonomy, which contrasted with the Claimant's former role of Senior Curator.

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22. The ET further (paragraph 24) described Ms Boyle's evidence that there had been a rapid turnover of Assistant Curators in recent years, because of the lack of autonomy. Therefore, she said, they were looking for people who might remain happy and productive in the role for a longer time, before developing to the point of suitability for promotion.

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23. The ET then said this:

> **"25. The initial sift for the Assistant Curator jobs was performed by two of the staff who reported to Ms Boyle. She carried out a review of their sift and discussed with them which of the candidates should proceed to interview. For the two posts, the Respondent received 133 applications although Ms Boyle described most of these as being generic applications with no relevant skills or experience for the role.**
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> **26. One of her staff brought it to her attention that the Claimant had applied for the job. Ms Boyle knew that the Claimant was interested in working closely with the Science Museum collections again and had repeatedly expressed an interest in conducting academic research on the collections. For this reason, Ms Boyle was surprised that the Claimant had applied for the role of Assistant Curator, a job which did not entail academic research."**

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24. After setting out extracts from the Claimant's application, the ET (paragraphs 29 and 30) said that Ms Boyle "had in mind" that the appointees would have to be content to do a lot of administrative and housekeeping work, rather than research. Ms Boyle interpreted the Claimant's application as a "statement of intent" that the position would allow here to resume her previous work with the collections in question. The ET observed that this was borne out by an email the Claimant sent to a proposed referee describing the post as "essentially my old job" though Ms Boyle did not see that email until after she had taken her decision.

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25. The ET then said this:

> **"31 Ms Boyle sought advice from the group with the Respondent's organisation known as the People and Culture Team – which we understand to be the vogue name for what has previously been referred to as Human Resources or Personnel Management. In her written statement, Ms Boyle said that the advice she received was that shortlisting applications should be made on an objective assessment of the quality and suitability of the application and not on any personal knowledge of the applicants. When giving evidence, Ms Boyle elaborated on that advice. She said she had spoken to Ms Deborah Hall within the People and Culture Team. Ms Hall had then consulted with Mr Richard Barnett who is the source within that team of legal advice, although we were not told whether Mr Barnett was a qualified lawyer or merely the conduit of legal advice from elsewhere. Mr Barnett had advised that, when someone is very over-qualified, you can take them out of the sift. "So..." said Ms Boyle "…in discussion with Jane and Richard, my feeling was that there was no need to take the application forward."**

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26. The ET went on (paragraph 32) to describe Ms Boyle's evidence that she conducted what she called a thought experiment. Had she received an application from a retired member of staff (who she named), who was extremely experienced in senior curatorial roles, she would have been equally concerned, and not have considered him suitable for the role.

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27. The ET found (paragraph 33) that the decision not to progress the Claimant's application was taken by Ms Boyle. The drafting of the letter of 27 January 2017 was not undertaken by her, but she "contributed to it and did not shy away from endorsing the message conveyed in the second half of the letter." While she had enjoyed a good working relationship with the Claimant "she had observed that the Claimant had formed a number of difficult working relationships" the most difficult of which were with the two subjects of the grievances. Ms Boyle had also "observed first hand" what she called a "lack of successful integrations with colleagues and peers", and, in the period since the Claimant's redundancy, "several instances where the Claimant's interpersonal behaviour troubled her". The ET recounted a specific example given by Ms Boyle, dating from 2015.

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28. I need to set out the next few paragraphs of the ET's decision in full.

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"34 The advice Ms Boyle received from the People and Culture Team as disclosed in her written statement was entirely appropriate. The process of shortlisting applications for any post, if done on the basis of an objective assessment of the quality and suitability of the application and not on any personal knowledge of the applicants, should ensure that personal knowledge of any applicant does not form part of the decision whether to shortlist or not.

35 However, Ms Boyle did not follow that advice. She did not score the Claimant's application against essential criteria in the systematic manner which she applied to other candidates. Rather, she conducted her 'thought experiment' and used it as the basis of a decision 'not to take the application forward'. In effect, she eliminated the Claimant's application on the sift before conducting any systematic objective assessment of the merits of all applications that survived the sift to establish a shortlist of candidates to be interviewed.

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36 So, we never received from Ms Boyle a comparison of the merits of the Claimant's application vis a vis the merits of the applications of other candidates. We were told, as was the Claimant in the rejection letter of 27 January 2017, that the Claimant was 'significantly over-qualified for the role.' We were not told how, after the sift, the surviving applications were assessed so as to determine the most meritorious applicants to be interviewed i.e. the short list. But the assertion that the Claimant was significantly over-qualified for the role suggests to us that we can assume that, had the Claimant's application survived the sift, and had Ms Boyle then subjected it to the same objective assessment as was used to determine the short list, the Claimant would have been shortlisted. And this would have been the case notwithstanding that Ms Boyle suspected from the Claimant's application that the Claimant may have had an elevated view of the positions being advertised.

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37 We therefore were suspicious as to why, when Ms Boyle had, per her written statement, been properly advised as to how the Claimant's application should be treated, it came to be that she rejected the Claimant's application.

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38 Ms Boyle in her oral evidence spoke of how the suggestion had come from Mr Barnett that 'when someone is over-qualified you can take them out of the shortlist' and how, in discussion with Ms Hall and Mr Barnett, her "feeling was there was no need to take the application forward." There was no suggestion that either Ms Hall or Mr Barnett had reviewed the job description, the Claimant's application or any other person's application: they had merely been told by Ms Boyle, who said in her oral evidence that she "felt that the Claimant was over-qualified and not suitable for the role" that the Claimant had made an application."

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29. The ET then turned to the application for the other post (paragraphs 39 – 44). It found that Ms Bradford knew of the Claimant's previous ET claims, but not that they included discrimination. She was surprised that the Claimant had applied for the Project Manager post. So, she spoke to Ms Hall and Ms Boyle. Both advised her to score the Claimant's application on the basis of the information in it, as she would in any other case. She did so. The ET had the evidence of the scoring method, and the scores she gave to all 21 applications, which it described. The Claimant's score placed her tenth. The top six were interviewed. The ET accepted that her score was reached solely on the basis of the contents of her application.

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30. The ET reminded itself of the terms of sections 27 and 136 of the **2010 Act**. I shall set out the relevant parts of those sections as well:

> **27 Victimisation**
>
> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
>
> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act;**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**
>
> **…**
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> **136 Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
>
> **…**
>
> **(6) A reference to the court includes a reference to—**
>
> **(a) an employment tribunal;**

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31 The ET then cited extensively from the guidance on the statutory regime in relation to the burden of proof given in **Igen Ltd v Wong** [2005] ICR 931 (CA).

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32 The ET turned to its conclusions. It accepted that the Claimant had done protected acts. It then said this:

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> **"50 Second, in respect of both complaints, we consider that the Claimant has proved facts from which we could conclude in the absence of an adequate explanation that the Respondent has victimised, or is to be treated as having victimised, the Claimant because of her protected acts. In each case she applied for posts which, in the light of her considerable experience as a curator within the Respondent's organisation, she might reasonably expect to get, or, at least, to be short-listed."**

33 The ET then continued:

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> **"51 We move therefore to consider the Respondent's explanation in each case. In respect of the first complaint relating to the Claimant's application for the posts of Assistant Curators, we do not consider the Respondent to have proved that it did not victimise the Claimant. Ms Boyle was alerted to the fact that the Claimant had made her application by the people who conducted the sift of the applications. She sought and obtained advice. The advice she stated she obtained in her written statement was, in our view, exemplary – to base her decision on an objective assessment of the quality and suitability of the application and not on any personal knowledge of the applicants. She did not follow it. Her thought experiment involved comparing the Claimant's application to a hypothetical application from another older ex-employee, extremely experienced in curatorial roles and a leading authority on scientific instruments. Rather than exclude from her consideration her personal knowledge of the Claimant, she elected to concentrate on her personal knowledge by comparing the Claimant's application with that which might have been made by another of whom she had personal knowledge.**

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> **52 Ms Boyle knew the Claimant to have done protected acts in the past because she had seen the email which the Head of Collections had circulated in 2013 announcing that the Claimant's claims – which included the protected acts – had been rejected. Her decision, after receiving advice from the People and Culture Team, to discard the Claimant's application before she considered its merits in comparison to other candidates on the ground that the Claimant was overqualified strikes us as most odd. The second part of the letter of 27 January 2017 – which highlighted apparent interpersonal difficulties pre-dating her protected acts – demonstrates to us that the history of the Claimant's employment with the Respondent, and its immediate sequelae in the Employment Tribunal, was well-known by both Ms Boyle and those from whom she sought advice and to whom she deputed the drafting of the letter. Ms Boyle's endorsement of that second part of the letter does nothing to persuade us that the rejection of the Claimant's application was unconnected with the protected acts."**

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34 The ET went on (paragraphs 53 and 54) to find itself satisfied, in relation to the second application, that the Claimant was not shortlisted purely because the contents of her application did not warrant a higher mark than it got; and, in any event, that Ms Bradford had not known that the previous ET complaints included complaints of discrimination. It accepted that an explanation for the treatment had been shown in the case of the handling of that application, which was not because of the protected acts.

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35 However, the ET concluded (paragraph 55) that it was not persuaded of that by the explanation advanced for the treatment in relation to the Assistant Curator posts. So, the first claim succeeded, and the second claim was dismissed.

The Grounds of Appeal

36 There were eleven numbered grounds of appeal, although there was considerable overlap among them. I may summarise them as follows;

(1) The Judge appeared to fall asleep twice during the cross-examination of the Claimant and so the Respondent did not receive a fair trial;

(2) The basis on which the ET found the burden of proof to have shifted was inadequate and wrong in law;

(3) The finding that the burden of proof shifted was perverse;

(4) The failure of the second claim undermined the reasoning in relation to the burden of proof as it pertained to the first claim;

(5) The ET failed to properly evaluate the reason given by the Respondent, being that it genuinely took the Claimant's application no further because it believed she was over-qualified. If that was true, then the Claimant was not victimised;

(6) The ET wrongly proceeded on the basis that it was irrelevant that the Claimant was overqualified;

(7) Alternatively, the ET failed to make necessary findings about the relevance of overqualification to the recruitment to the Assistant Curator post;

(8) The ET fell into error in assessing the reasonableness of the process, rather than making a factual finding as to the reason for the decision;

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(9) The Claimant's case had been not that Ms Boyle had victimised her, but that Ms Boyle had been coerced by others into rejecting the application. The ET had decided the matter on a basis at variance with the Claimant's own case;

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(10) The ET wrongly treated the internal advice given to Ms Boyle about shortlisting as applicable also to longlisting;

(11) The ET erred in relying on its view that, had the Claimant passed the sift, she could have expected to be shortlisted. The ET did not reject the genuineness of Ms Boyle's account

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that the Claimant did not pass the sift, because she regarded her as overqualified, nor her evidence that she suspected the Claimant had an elevated view of the role. Yet it disregarded the Respondent's evidence as to its "real world" reasons.

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37 In written and oral argument, however, as I will describe, Mr Brown considerably boiled down the grounds that followed ground 1. Given the nature of ground 1, the Notice of Appeal

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properly gave further particulars, as set out in statements from Mr Sheppard, and Paul Jennings, a partner in Bates Wells Braithwaite who had attended the hearing on day one.

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38 The Claimant's Answer to the appeal joined issue on all of the grounds, and, as well as relying on the ET's reasons, raised a number of further points. The Answer was later amended to take account of the provision, in the course of preparations for the appeal hearing, of copy extracts from the Employment Judge's notes.

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Evidence in Relation to Ground 1

39 When a ground of appeal turns on the alleged conduct of a member of the Tribunal

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panel during the course of the hearing, and there is a factual dispute about what did or did not

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actually occur, it is the responsibility of the EAT to determine that dispute and make the requisite findings of fact. See: **Stansbury v Datapulse** [2004] ICR 523 (CA).

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40 The same procedural approach is taken, whether the allegation is of actual or apparent bias, or some other conduct on the part of a Tribunal member said to have affected the fairness of the process. Statements are obtained from the parties' witnesses, who may be cross-examined at the hearing before the EAT. Statements are also sought from the Judge, or all members of a three-person Tribunal, and, as relevant, the Judge's notes may be obtained. However, members of the Tribunal panel are not called for cross-examination before the EAT. See: **Facey v Midas Retail Security Limited** [2001] ICR 287 (EAT) and the EAT's Practice Directions of 2013 at paragraph 13 and of 2018 at paragraph 12.

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41 The following written evidence was before me.

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42 Mr Jennings, in a statement of 26 July 2018, describes how the Claimant gave evidence between about 2.30 and 4.30 pm on the afternoon of 27 March 2018. He states: "During this two-hour period, I witnessed Employment Judge Stewart fall asleep twice." He continues:

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> **"6 At around 3.00 PM, I noticed Employment Judge Stewart's hands slide off the desk in front of him. At the same time, his head slumped and his eyes were closed. He stopped taking a note of the exchange between Mr Sheppard and the Claimant and had stopped engaging with the documentation in front of him. He appeared to lose consciousness entirely. After a short time, perhaps a minute or two, he regained consciousness and composed himself.**
>
> **7 At approximately 3.30 PM Mr Sheppard noticeably increased the volume of his voice, and then on a number of occasions landed his cup loudly against the desk in front of him. I looked up and, again, Employment Judge Stewart's head was slumped and his eyes were closed. Mr Sheppard tried to get his attention. On three or four occasions Mr Sheppard (assertively) said "Sir". Judge Stewart visibly regained consciousness and composure. At that point Mr Sheppard suggested a short break."**

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43 Mr Jennings goes on to describe discussing what had happened with Mr Sheppard, and their clients, during that break.

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44 Mr Sheppard, in a statement sent in on 26 July and signed on 17 August 2018, endorses what is said by Mr Jennings. He adds:

> **"5 I too noticed Employment Judge Stewart fall asleep twice, albeit, on the first occasion, I only witnessed a loss of consciousness briefly, as I was focussed on cross-examination of the Respondent.**
>
> **6 On the second occasion, which was at approximately 3.30PM, I raised my voice and banged my cup on the table a few times in order to command Employment Judge Stewart's attention. I then stated "Sir" on a few occasions, at which point Judge Stewart visibly regained consciousness and composure. Thereafter I suggested a short break, to which the Judge agreed."**

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45 The Claimant put in a statement from her husband, Mr David Pinto, dated 2 August 2018. He begins by saying that he accompanied her "at the hearing during its second day". He states that his recollection differs from Mr Sheppard's. It is that the Judge "now and then adopted what called be called a meditative posture: upright with hands placed together on the desk before him, head cast down, even possibly eyes closed, for about 5 – 8 seconds at a time." His opinion is that the Judge was "summarising or reframing internally issues raised" as part of a process of mediating between a Claimant who is a litigant in person and counsel. He adds that if Mr Sheppard felt that he needed to attract the Judge's attention, it was never apparent; and that there was no cup, only a glass water-flask and beaker.

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46 There is a revised version of Mr Pinto's statement, dated 22 November 2018, giving a somewhat revised description of the meditative posture that he says he saw the Judge adopt, and the way in which the Judge's hands were placed together, with the fingers of each hand aligned.

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47 There is also a further statement of Mr Jennings, dated 27 February 2019, exhibiting an extract from the note of evidence made by a then trainee from his firm, covering the point at which, according to Mr Jennings, the Judge fell asleep for the second time.

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48 Finally, in terms of evidence from attendees at the Tribunal hearing, there is a statement from Emeritus Professor Susan Corby, of 4 March 2019, put in by the Claimant. She states that she observed the hearing on 28 March 2018 with some students who she had brought to the Tribunal. She did not observe the Judge falling asleep, nor did any of her students mention any such thing to her. She confirms she was not present on 27 March.

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49 In accordance with the established practice, written comments on the witness evidence were sought from the three members of the Tribunal.

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50 EJ Stewart, in a statement of 22 March 2019, writes:

> **"…I do not recall being asleep during the afternoon of 27 March 2018" during the Claimant's cross-examination. "However, I was – and remain – very conscious that the absence of such a memory does nothing to rebut the allegation."**

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He exhibits his notes of evidence for the relevant part of the hearing. He notes that he and the Respondent's note-taker have a different note-taking style, but observes that after 15.40 she records three further questions and answers where he records none.

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> **"…I have no explanation for my failure to record those questions and answers. It seems consistent with inattention. It might, of course, be consistent with me ruminating on the evidence being given."**

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51 Ms Jones, in a statement of 22 March 2019, says that she "made no note that the Judge was asleep during cross-examination" that afternoon, and "I have no recollection of being concerned about the Judge's conduct of the hearing."

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52 Mr Smith, in an email of 21 March 2019, says that he has not noted that the Judge fell asleep, and he feels that, as it would have been a significant occurrence, he would have noted it,

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had he observed it or felt it to be the case. He has a good memory of the case, does not recall at any time thinking that the Judge had fallen asleep or lost concentration, and would have expected to have remembered it, despite the passage of time. He adds that during cross-examination he is looking at the people asking and answering the questions, and at his note-book, not at the facial expression or appearance of the Judge or the other member.

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53 Prior to the EAT hearing both parties indicated that they had no wish to cross-examine the other party's witnesses at the hearing. In his written skeleton Mr Brown also indicated that the evidence of Mr Pinto and Emeritus Professor Corby was of no assistance, since neither related to the first hearing day, which was when the Judge's conduct was said to have occurred.

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54 During the course of Mr Brown presenting his argument at the hearing before me, however, the Claimant indicated that it was her understanding that Mr Pinto had intended his evidence to relate generally to the two days on which he was in fact present, being the first and second of the three hearing days. In discussion it was confirmed that there was no dispute that he had, indeed, been present on both of those days. He was also present at the hearing before the EAT, and, in discussion, it was agreed that the fair way forward (to both sides) would be for Mr Pinto to give oral evidence confirming his position, and on which he might be relevantly cross-examined by Mr Brown. Mr Pinto was entirely content to do that, and so, after a break to make the necessary logistical arrangements, this took place. The remainder of the hearing day was then spent in completing both sides' oral arguments on all grounds, including, in relation to ground 1, drawing on the live evidence that he had had given, and to which I will return.

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55 I shall consider, first, ground 1, and then the other grounds, which, as I have said, were boiled down and given greater focus by Mr Brown than they had in the Notice of Appeal.

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Ground 1

56 The applicable legal principles have been authoritatively set out by the Court of Appeal (in the speech of Peter Gibson LJ, with which Latham LJ and Sir Martin Nourse concurred) in **Stansbury v Datapulse** (above). As already noted, where there is a factual issue about what happened at an ET hearing, the EAT must resolve it (paragraph 24). While it is desirable for any concern to be raised at the ET hearing itself, it is unrealistic not to recognise that this may pose a difficulty, even for a legal representative (paragraph 23). Neither the fact (if fact it be) that the decision was unanimous nor the fact (if it be) that the substantive decision of the ET is otherwise upheld by the EAT is of relevance (paragraph 26).

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57 At paragraph 27 Peter Gibson LJ said:

> **"27 The question is whether, on the factual assumptions by the Employment Appeal Tribunal, there was a proper hearing. In Whitehart v Raymond Thomson Ltd, (unreported) 11th September 1984 of the EAT, Popplewell J presiding, this was said by the Employment Appeal Tribunal in relation to a case where a member of the tribunal had dozed off once, if not twice:**
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> **"It is axiomatic that all members of a tribunal must hear all the evidence and to have a trial in which one member of the tribunal is asleep even for a short part of the time, cannot be categorised as a proper trial. Justice does not appear to have been done."**
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> **That is cited in the Red Bank case [1992] ICR 204,209…"**

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58 At paragraph 28 he said:

> **"The Employment Appeal Tribunal in Kudrath v Ministry of Defence 26 April 1999 were, in my judgment, right to say that it was the duty of the Tribunal to be alert during the whole of the hearing, and to appear to be so. It seems to me that an analogy with cases of bias is appropriate. In cases of bias the appearance of bias, as observed through the eyes and ears of a fair-minded and informed observer, will vitiate a hearing: see, for example, Porter v Magill [2002] AC 357 at 494 per Lord Hope of Craighead. A member of a tribunal who does not appear to be alert to what is being said in the course of the hearing may cause that hearing to be held to be unfair, because the hearing should be by a tribunal each member of which is concentrating on the case before him or her. That is the position, as I see it, under English law, quite apart from the European Convention on Human Rights. It is reinforced by article 6(I) of the Convention…."**

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59 **Podkowka v Kensington and Chelsea RLBC** UKEAT/0433/12/BA, 28 April 2014 confirms (at paragraph 25) that, while it is desirable that a matter of this sort to be raised with the ET itself, there is no duty to do so, as a precondition of it being a ground of appeal.

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60 In **Shodeke v Hill** [2004] UKEAT/0394/00, after reviewing the **Stansbury** guidance, the EAT said this, at paragraph 98

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> **"98 The basic principle of that decision is clear, namely that justice must be done and be seen to be done; and that the justice purportedly administered by a manifestly inattentive tribunal may deserve the criticism that it was neither justice nor seen to be justice. The case in question was a two-day case, with the evidence justifying the conclusion that Mr Eynon had misbehaved on both days. The present case was a 28-day case. Does Stansbury establish that proof, for example, that one of the tribunal members was asleep for, say, three minutes on each of two of the 28 days is sufficient to entitle the losing party to have the decision set aside and a re-trial ordered? If so, it would appear to establish a principle whose consequences could in some cases be devastating, particularly if, for example, the moments of proved inattention were exclusively during parts of the case which could not rationally be regarded as having any impact one way or the other on the ultimate decision: for example, during the unnecessarily extended reading by counsel from a demonstrably irrelevant law report. In such an example, we question whether the informed and fair-minded observer would regard the member's brief inattention as inevitably fatal to the quality of the decision. As it seems to us, it will always be a question of fact in all the circumstances of the case whether the nature and extent of the proved inattention will be sufficient to require the conclusion that the hearing was an unfair one whose decision cannot be allowed to stand."**

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61 I turn to my findings of fact, as to what occurred in this case.

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62 Messrs Jennings and Sheppard are unequivocal in their statements. They both observed the Judge fully asleep at two distinct points during the afternoon of day one. A comparison of the Judge's notes of evidence, and those of the trainee, show that there were questions noted by the trainee, running up to the point where there was a break, which were not noted by the Judge. That is consistent with, and does not undermine, these two witnesses' account of the second of the two episodes. Nothing in the statements of the Judge himself, or the other two Tribunal members, contradicts or undermines that evidence. The Judge is candid and straightforward. He does not say he did not fall asleep, nor that he is confident that he can rule out such a thing. Nor do his colleagues say that he did not fall asleep. The fact that neither of them observed him

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do so, or anything else untoward, does not mean that it did not happen. Emeritus Professor Corby's evidence does not assist. She was not there that afternoon.

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63 Mr Brown referred to the fact that 27 March 2018 was two days after the first day of British Summer Time that year; and to research evidence suggesting a "jet lag" effect on judicial alertness, of the clocks going forward. However, I attach no weight to this material, which would not, in my view, be sufficient to support an inference in a particular case such as this, or otherwise to tip the scales, were the remaining evidence unclear.

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64 So, I come to Mr Pinto. He said in oral evidence that, when he produced his first statement, he had been confused by, and misunderstood, the reference to Mr Sheppard cross-examining the "Respondent", because of the differing nomenclature before the ET and the EAT. He produced his second statement by way of clarification, and to remove other material which he had been given to understand was not appropriate. Mr Brown observed that it was nevertheless striking that the preamble to the second statement still referred to the second hearing day. Mr Pinto said in oral evidence that, while his original statement had referred specifically to what he had observed during the evidence of Ms Boyle on day two, it equally applied to what he observed at any other time; and that he observed no significant change in the Judge's behaviour across the two days. As to his comment that there was no "cup" on counsel's table, he accepted that there were jugs of water and plastic beakers, and said that if there was any banging of any item on the table, it was not to a degree that he heard or saw.

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65 I accept that Mr Pinto's evidence, taken as a whole, covered what he had to say about what he heard and saw over the course of the two days he was at the hearing. I accept (and Mr Brown did not suggest to him or me otherwise) that he was giving his genuine recollection.

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However, he was, though a naturally interested one, an observer at the hearing. He had no need to pay close attention to the Judge at all times; and he did not suggest that he was doing so when his wife was being cross-examined. His observations of the Judge's posture and mannerisms, at times when he did observe the Judge, were, I accept, accurate recollections. But nothing in his evidence undermines or contradicts what Mr Jennings and Mr Sheppard say they saw. Mr Pinto may simply have not seen it; and he may also simply not have noticed Mr Sheppard's efforts to attract the Judge's attention, if his own attention was on other things.

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66 Standing back, I conclude that the accounts given by Mr Jennings and Mr Sheppard accurately and fairly describe what in fact happened. It could be said that, in the absence of the Judge himself stating that he was asleep, they cannot be *sure* that he was, only that they observed behaviours from which he *appeared* to be. But the very specific and clear nature of what they both say they saw leaves me in no doubt as to what I must find, on the balance of probabilities, did occur. I find as a fact that, very unfortunately, on the afternoon of day one, 27 March 2018, during the course of the Claimant's cross-examination, the Judge fell fully asleep not once but twice, on each occasion more than just momentarily, and on the second occasion to the point where Mr Sheppard had to deliberately make a noise more than once, physically and verbally, in order to alert the Judge.

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67 The authorities make it clear that it is irrelevant that the ET's decision was unanimous, and no barrier to this ground of appeal that the matter was not raised with the ET itself.

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68 In argument, with reference to the passage in **Shodeke** that I have cited, Mr Brown said that he accepted that, even in this area, there must be some *de minimis* principle, though he

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suggested the language of that passage was hard to square with the language of **Stansbury**. Either way, he said, the extent and nature of what happened in this case was too great.

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69 I do not think that this passage in **Shodeke** was intended to soften, or is at odds with, the guidance in **Stansbury**, which the EAT faithfully reviewed. The EAT in **Shodeke** did not use the language of a *de minimis* test, nor do I think it is particularly helpful to think about this area in that way. Realistically, there may be cases where, during the course of a hearing, a Judge or member's attention briefly wanes or lapses, but no harm is done. The matter is acutely fact sensitive, and depends, in each case, entirely on a careful finding and evaluation of what happened: the nature and extent, and what was going on at that point in the proceedings. It is not the case that any and every lapse of attention must affect the fairness of the trial. But either what happened in a given case is such that it undermined the fairness of the trial – applying the **Stansbury** guidance – or it did not. This passage in **Shodeke** does no more than envisage a particular type of scenario in which that might be found not to be the case. But if, in the given case, the fair-minded and informed observer would conclude that there was a real possibility that the fairness of the trial was affected, then the decision cannot stand.

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70 In this case, the Judge did not appear momentarily to be inattentive, or to nod his head. He appeared to, and I have found, did, fully fall asleep on two occasions, and, on the second occasion, only became fully alert again after significant intervention from a representative. This occurred during the course of the cross-examination of a witness, specifically, one of the parties. The Claimant argued that it could be seen that the ET was aware of all the issues covered in this part of the cross-examination. But the cross-examination of the Claimant on points at issue was a material and important part of the process. Applying the **Stansbury** guidance, the fair-minded and informed observer would conclude that there was, at least, a real

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A possibility that the fairness of the trial was affected. This, very unfortunately, does, in my judgment, vitiate the decision, and I would allow this appeal on ground 1 alone.

B 71 As they were also fully argued before me, I will also consider the remaining grounds.

Other Grounds of Appeal

C 72 As I have described, the Notice of Appeal ostensibly raised ten other grounds; but there was considerable overlap and interaction among them. Recognising this, Mr Brown structured his written skeleton and oral submissions by focussing on the main themes or topics that emerged from those grounds. He advanced two general propositions: firstly, that the ET had

D erred in its finding that the burden of proof had shifted to the Respondent, and secondly, that it had erred in its approach to five particular features of this case, such that, even if the burden had properly shifted to the Respondent, the ET's decision that it had not discharged that burden was

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F 73 This was a more helpful and coherent way of drawing out the main themes of the challenge from these grounds of appeal, and I will structure my consideration in the same way.

Shifting of the Burden of Proof

G 74 As to the law, as I have described, the ET's decision cited section 136 of the **2010 Act**, and cited extensively a key passage in **Igen Ltd v Wong** [2005] ICR 93 (CA). Mr Brown did not quarrel with the ET's self-direction as far as it went, but suggested that, in its subsequent

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were highlighted, or amplified, by the Court of Appeal in its later decision (not cited by the ET) in **Madarassy v Nomura International plc** [2007] ICR 867.

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75 First (as was discussed, at paragraphs 56 and 57 in **Madarassy**) "could conclude" (in the relevant part of what was then section 63A(2) of the **Sex Discrimination Act 1975** – corresponding to "could decide" in section 136(2) of the **2010 Act** – means "a reasonable Tribunal could properly conclude from all the evidence before it". So, (see also paragraphs 69 and 72) that may include evidence adduced by the respondent to the complaint, other than the proffered explanation. The Tribunal should have regard to all the evidence, from any source, in judging what inferences (absent the explanation) "could" be drawn, and whether it would be enough to support a proper inference of discrimination, absent an explanation.

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76 Mr Brown also referred me to the recent decisions of the Court of Appeal in **Ayodele v Citylink Ltd** [2018] ICR 748 and **Royal Mail Group Limited v Efobi** [2019] EWCA Civ 18, to similar effect, and confirming the continued application of the earlier authorities on the predecessor legislation, to the wording of section 136 of the **2010 Act**.

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77 In the present case the ET had found, in paragraph 50, that the thing which shifted the burden was that these were posts which, in the light of her considerable experience with the Respondent, the Claimant might reasonably expect to get, or at least to be short-listed for. However, said Mr Brown, that was not properly regarded as sufficient to shift the burden. He referred here to **Efobi** at paragraphs 47 and 48 where Sir Patrick Elias (Baker and Underhill LJJ concurring) said he understood Mr Efobi's disappointment that he had not got the jobs he had applied for, when he was well or highly-qualified, but that this "establishes nothing in the abstract without relating it to the comparator's knowledge and experience."

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78 The Claimant, in her answer and submissions, highlighted other evidence which, she submitted, would support the shifting of the burden. She referred in particular to the contents of the second half of the 27 January 2017 letter, what she said was its unpleasant tone, and Ms Boyle's evidence about "interpersonal" issues. That aspect, said the Claimant, was inextricably linked to her protected acts. Further, the job description and application information did not put any upper limit on qualifications, and (to her understanding) the candidate who was appointed had also since gained a PhD, which undermined the argument that the Claimant (who was a PhD student at the time) was over-qualified.

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79 My conclusions on this aspect are these.

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80 On the face of it, reading paragraph 50, the Tribunal appears to have concluded that the following specific features were (alone) sufficient to shift the burden, namely (a) the fact that the Claimant did the protected acts (and which was known to Ms Boyle), (b) the fact that she had the necessary experience for these posts (and more); and (c) the Tribunal's view that, in light of her considerable experience as a curator within the Respondent's organisation "she might reasonably expect to get, or at least to be short-listed" for these positions. The last of these chimes with the ET's observation, in paragraph 36, that, since she was viewed as over-qualified, had her application survived the sift "we can assume" that, if it had then been objectively assessed, as the others were, she would have been short-listed.

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81 I do not think that this was, by itself, a sufficient basis on which to conclude that the burden had shifted. The ET could not, from the facts that there was knowledge of the protected act, and that the Claimant met (and exceeded) the necessary requirements of the post, properly draw the inference that the failure to short-list was because of the protected acts. Whether, in

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the case of a particular recruitment exercise, a candidate who met the job requirements could reasonably expect to be short-listed, would depend on what the short-listing criteria in fact were, whether a limit was placed on how many people would be interviewed, and so forth. What would be required, therefore, to shift the burden, would be some further facts, about the basis on which short-listing was carried out, and/or what happened to other candidates who did or did not meet the essential requirements at the short-listing stage, or some other additional salient factual feature of the case.

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82 However, in respect of these Assistant Curator posts, the undisputed evidence that the ET had was that the Claimant was eliminated at an *earlier* stage than short-listing. There was an initial process, described as a sift, in which a large number of applications were eliminated, leaving a "long list"; and then a further process, of assessing those candidates who were on the long list, to decide which of them would be short-listed for interview. Although the ET's somewhat compressed fact-finding does not spell out as clearly as it might, what was involved in these two stages, I was shown a table that had been put together for the ET. This showed that, of the 133 applications, all but 14 were sifted out. The table showed information about the 14 who were longlisted, and whose applications were scored by Ms Boyle.[1] It also showed that the five highest scorers were then invited for interview and, of the five, two were successful in getting the two Assistant Curator jobs. It was confirmed to me that there was no dispute before the ET, as such, that this was, factually, the process that had been followed.

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83 So, in this case, the evidence before the ET was that the Claimant's application was sifted out at the very outset, and did not make the long list of 14. It was not that she did not

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[1] It also had a line showing the same information in respect of the Claimant – but that was to assist the ET, as part of a document created for it. There was no dispute that she was not, in fact, on the long list.

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score well enough, against the long-listed competition, to be in the short list of highest scorers on the long list who were invited to interview. She was not long-listed, and hence not scored against other candidates who did make it on to the long list, at all.

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84 On the face of it, reading paragraph 50 (and having regard also to paragraph 36), it nevertheless appears that the ET, in determining that the burden had shifted, relied not on the fact that the Claimant had not been *longlisted*, but only on the fact that she had not been

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shortlisted.[2] For reasons I have given, to treat the burden as having shifted, merely on that basis, was, in my view, an error.

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85 However, given that there was no dispute before the ET that the Claimant's application *was* sifted out, and not long-listed, that the ET was plainly fully aware of this, that Ms Boyle's evidence was that most of the applications that were sifted out were generic applications which

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did not meet the essential requirements, and that there was no evidence that there was any other application which was sifted out for the same reason, in my judgment the ET was entitled to conclude in respect of this claim (even if it might have been wrong to do so in respect of the

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second claim[3]) that the burden shifted, and that the exclusion of the Claimant's application at the sift stage called for an explanation.

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86 So, even though it may have founded its conclusion that the burden had shifted on too narrow a basis, the conclusion itself was not wrong, and was sustainable in light of the facts found. So, had the only grounds of appeal been those that related to the decision that the burden of proof shifted, I would not have allowed the appeal on that basis.

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[2] The reference to not being shortlisted appears deliberate, because the ET decided in this one paragraph, that the burden shifted in relation to both complaints, and there was no long-list in relation to the other job.
[3] But, of course, that did not affect the outcome in that case, as the ET found that the burden was discharged.

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Other Grounds

87 I turn to the second general question raised compendiously by the remaining grounds of appeal, namely whether the Tribunal erred in its consideration of other aspects of the evidence, and/or its reasoning, in coming to its conclusion (having decided that the burden had shifted) that the Respondent had failed to show that the decision to sift out the Claimant's application was not taken because of her protected acts.

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88 It may be observed, at the outset, that, where the burden does shift, the task of a Respondent then becomes, strictly, to prove a negative: that is, in the words of section 136(3), to "show" that it "did not contravene" the relevant provision. As the **Igen** guidance explains, the way, in practice, that a respondent can do that, is by providing evidence of a positive explanation, which, if accepted (on the balance of probabilities) as true, satisfies the ET that the protected characteristic or act was not (also) any material part of the reasons for the decision in question. Lacking a more elegant shorthand in a case where the claim is of victimisation rather than direct discrimination, I will call that a "non-discriminatory" explanation.

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89 In this case, it was the Respondent's *evidence* that there *was* a non-discriminatory explanation for the decision, namely that the Claimant was considered to be over-qualified for these positions, and, allied to this, that Ms Boyle was concerned that she had a misguided expectation that getting this position would enable her to resume her research interests. Mr Brown drew out of the remaining grounds of appeal, five topics or themes in respect of which, he submitted, the ET's reasoning, leading to the conclusion that the Respondent had not satisfied it of that explanation, was inadequate or defective in law. In practice they themselves overlapped and/or interacted with one other. So, I will set out the main points of his arguments in relation to them all, and then of the Claimant's case, before turning to my conclusions.

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The Respondent's Arguments

90 The first, and chief aspect on which Mr Brown focused, concerned the ET's treatment of the proposition that the Claimant was "over-qualified" for the job. Mr Brown, as a preliminary observation, noted that what Ms Boyle, and the Respondent, meant by that, in this case, was not that the Claimant had too many, or too high a level of, formal qualifications, but that her skills and experience were far in excess of what the job demanded. I think that is a fair depiction of the Respondent's case, and Ms Boyle evidence, as such.

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91 The heart of the Respondent's case was that, since this was its claimed explanation for why the Claimant had been excluded from consideration, and Ms Boyle had given evidence to that effect, including that there was a background concern about the past high turnover of overqualified incumbents of this particular post, the ET needed to make a clear finding of fact as to whether it accepted that this *was* the genuine and whole material explanation for what happened *or not*. But, he said, nowhere in this decision did the ET actually do that.[4]

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92 Allied to this, the second feature highlighted by Mr Brown was the evidence that not just Ms Boyle, but her two colleagues who were involved in the sift, were surprised that the Claimant, given her extensive experience, had applied for these jobs (as indeed was Ms Bradford, that she had applied for the job that was the subject of the second complaint). While the ET recorded this evidence, said Mr Brown, it did not engage with the natural implication of it, which was that it leant credence to Ms Boyle's own evidence as to *her* surprise and concern that the Claimant had applied for these particular entry-level positions, given her experience.

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[4] Mr Brown referred in this regard to **Iteshi v London Borough of Hammersmith and Fulham** UKEAT/0491/10 and **Rudzki v University College of St Martins**, UKEAT/1336/99. I do not think either decision establishes any particular point of law, but they do provide examples of cases where a finding of fact that a candidate was considered to be overqualified was made, and provided a complete answer to the claim.

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93 The third aspect raised by Mr Brown, was the ET's approach to the evidence about the advice that Ms Boyle got from her two colleagues, and what she did or did not do in response to that advice. In summary, said Mr Brown, the evidence was that there were *two* distinct strands to the advice: first, that someone regarded as significantly overqualified could be excluded at the initial sift stage, and secondly that shortlisting from the longlist should be done by objective assessment and scoring of candidates by reference to the contents of their applications.

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94 But, said Mr Brown, whilst the ET, at paragraph 31, recorded both aspects of that advice, it then focussed solely on the second part, when describing the advice that she got as "entirely appropriate", observing that she "did not follow that advice" and expressing its "suspicion" as to how the Claimant's application had come to be rejected, when she had been "properly advised" as to how it should be treated (paragraphs 34, 35 and 37). That, said Mr Brown, ignored the evidence that Ms Boyle *had* followed the first part of the advice, that it was permissible to sift out the Claimant's application if she thought she was clearly overqualified, and, hence, if that was true, that the second part of the advice simply did not bite in her case.

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95 Mr Brown acknowledged that the ET did specifically return to the first part of the advice in paragraph 38; but, he said, it seemed there to attach weight to the fact that neither Ms Hall nor Mr Barnett had themselves reviewed the job description, the Claimant's application or anyone else's application, without explaining why it thought that this was significant.

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96 The fourth aspect highlighted by Mr Brown was the ET's finding that Ms Boyle's endorsement of the second part of the letter "does nothing to persuade us" that the rejection of the Claimant's application was unconnected with the protected acts. But, said Mr Brown, it was never the Respondent's case that the "interpersonal issues" were the reason, or part of the

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reasons, why this particular application was rejected. Nor could Ms Boyle's endorsement of this passage have properly been regarded (if it was) as undermining her evidence as to the true reason, or supporting an inference that the protected act had something to do with her decision.

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97 Finally, said Mr Brown, a number of passages, such as paragraph 36 and indeed paragraph 50, conveyed that the ET felt strongly that the Claimant had been unfairly treated, by not having the merits of her application objectively compared to those of other applications that did make the long list, and/or by her not being at least among those short-listed, and by the decision instead to discard her application on the basis of "personal knowledge". That aspect gave rise to a concern, said Mr Brown, that the ET had fallen into the error, discussed in **Glasgow City Council v Zafar** [1997] 1 WLR 1659 and **The Law Society v Bahl** [2003] IRLR 640, of jumping from the view that the treatment was unfair or unreasonable, to the conclusion that it was therefore because of the protected act.

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The Claimant's Arguments

98 The Answer, skeleton argument, and oral submissions, were detailed and wide-ranging. A certain amount of the content reflected the Claimant's own strength of feeling that she had been unfairly treated by not having her application judged purely on its competitive merits (and that a practice of sifting out those deemed to be overqualified would – if it was applied – particularly adversely affect older women). However, I shall highlight and summarise what I think were those of the Claimant's main arguments which could be said most directly to support the integrity of the ET's decision on whether the Respondent had shown that the protected acts had not materially influenced its decision to sift out the Claimant's application.

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99 Firstly, the application materials contained no mention of what the Claimant called an upper limit on qualifications or experience. It was only in respect of her application that Ms Boyle had sought advice. It had not been suggested that she was concerned that any other candidate was over-qualified, nor that any other application had been sifted out for that reason. Next, the Claimant had *not* accepted before the ET that she had been correctly viewed as over-qualified for the position; nor did she accept the Respondent's depiction of her motives for seeking it. Thirdly, it had not been her stance before the ET that she absolved Ms Boyle of having been motivated by her protected acts. Crucially, it was the Claimant's case that the evidence of the 27 April 2017 letter, and the evidence given by Ms Boyle, showed that the interpersonal issues *had* influenced the decision; and that those issues were inextricably linked to the issues raised by her 2011 grievances and protected acts. The evidence showed that Ms Boyle had all of this very much in mind. It also supported the inference that Ms Hall had played a part in this decision; and she had in turn been a key player in the handling of the Claimant's grievances in 2011, so there was here another inextricable link to her protected acts.

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100 In summary, the Claimant's case was that there was ample evidence to support the conclusion that the protected acts had at least materially influenced the decision to sift out her application and/or that the Respondent had not shown that they did not. Finally, in so far as the grounds of appeal suggested that the ET's conclusion was perverse, that high threshold was certainly not surmounted.

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Discussion and Conclusions

101 My conclusions on this aspect of the grounds of appeal are as follows.

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102 Firstly, as has often been said, the EAT should not subject a Tribunal's decision to a hyper-critical or over-detailed textual or semantic analysis. The decision needs to be read as a whole, to get a proper sense of the Tribunal's conclusions, and the reasons that have led it to them. Nevertheless, where a respondent has put forward, in evidence, what it says is a non-discriminatory explanation for its conduct, it is important, if the Tribunal concludes that the burden has passed but not been discharged, that the reader of the decision be left in no doubt as to why not. It is not sufficient that it might be said that the material before the Tribunal *would have* fully supported such a conclusion; nor should the reader be left to surmise, or infer, reading between the lines, what the Tribunal probably thought, but did not state.

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103 In this case, reading the decision as a whole, I think that Mr Brown's arguments do have some traction, and that, in respect of a number of strands of the evidence, and the relations between them, the ET's overall reasoning stops short of a clear and explicit concluded view.

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104 While the ET described fairly fully Ms Boyle's *evidence* that there were real concerns about a high turnover of overqualified Assistant Curators in the past, and that this informed her approach to the Claimant's application (at paragraphs 23, 24 and 29), it does not anywhere say whether it actually accepted that these concerns were genuinely held by her, and/or at least played some part in her decision. While it was critical of her evidence that she conducted a "thought experiment", it does not say whether it regarded this as a pretence or a sham to mask her true reasons. Nor does it address what significance it did or did not attach to its own findings that Ms Boyle was right to have misgivings about how the Claimant viewed these posts (the ET itself found that her prime motivation in applying was to have access to the collections), and that others shared Ms Boyle's surprise that the Claimant had applied for them.

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105 In paragraph 51 the ET finds that Ms Boyle concentrated on her personal knowledge of the Claimant (by contrast with what it found in relation to Ms Bradford, who, it accepted, excluded from her consideration such personal knowledge as she had). In this paragraph the ET seems to be referring particularly to Ms Boyle's knowledge of the Claimant's past extensive experience with the Respondent, and her belief that the Claimant misguidedly saw the position as a means to resume her research interests in the collections she had worked with. From paragraphs 19 and 30, it appears that the ET accepted that this *was* Ms Boyle's view, and considered it to be one that other evidence suggested was accurate. The thrust of this paragraph is not that the ET did not accept this explanation as true; but that Ms Boyle was wrong to take this approach, and not to follow the "exemplary" advice, to assess the application objectively.

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106 Paragraph 52, however, highlights the ET's conclusion that the history of the Claimant's previous employment, and the ET claim which followed it – the protected act – were "well known" by both Ms Boyle and those who advised her. But such knowledge was a necessary, but not a sufficient basis for the success of the first claim.[5] The ET says that her "decision, after receiving the advice from the People and Culture Team" to discard the Claimant's application on the ground that she was overqualified "strikes us as most odd"; and then refers to this knowledge, but without explaining what significance it attaches to it. Its finding that Ms Boyle's endorsement of the second part of the letter "does nothing to persuade us" that the decision was unconnected to the protected acts, hints at an inference that the ET accepted the Claimant's case that the so-called "interpersonal issues" and her protected acts could not be separated out; and that the ET effectively considered that the 27 April 2017 letter protested too much on this subject. But the ET does not actually say so.

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[5] By contrast, the finding, in paragraph 53, that Ms Bradford did *not* know that the Claimant's previous claims had included complaints of discrimination was rightly regarded by the ET as something that would by itself have been fatal to the second claim.

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107 As to the role of advice, these paragraphs focus on the shortlisting advice. They do not address the evidence as to the other strand of the advice that Ms Boyle said she got. As to that, earlier, in paragraph 37, the ET says that it was "suspicious" as to why Ms Boyle, having been properly advised as to how to treat the application, nevertheless came to reject it. It refers in paragraph 38 to the lack of evidence that either adviser to whom she turned had reviewed the job description, the Claimant's application or any other application. They had merely been told by Ms Boyle that she thought that the Claimant was over-qualified. But the ET does not say to what inference or conclusion it thinks this point. Certainly, it does not go so far as to cast doubt on whether the advice was given at all (or to find that it was not). It *may be* that the ET considered that these aspects supported an inference that Ms Boyle and/or Ms Hall were looking for a pretext to sift out the Claimant's application, and that Mr Barnett's advice conveniently provided them with that pretext (in whatever spirit it was given). But, if so, the ET does not go so far as to say that, either in these passages or in paragraphs 51 and 52.

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108 I also see some force in Mr Brown's submission regarding what does emerge as the ET's strong view that it was *unfair* to eliminate the Claimant's application before the shortlisting stage. This is not a passing comment, but the main theme of paragraphs 34 – 36, in which the ET praises the advice to shortlist by objective scoring, criticises Ms Boyle for not following it, observes that, as a result "we never received from Ms Boyle" a comparison of the Claimant application vis a vis those of other candidates, and that, had it been assessed objectively, it can be assumed that she *would* have been shortlisted. It is also an undercurrent of paragraphs 51 and 52. But it is, at any rate, not clear what contribution this view made to the ET's own overall conclusion about the specific complaint that was before it.

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109 I am mindful that this aspect of the grounds of appeal effectively challenges the adequacy and sufficiency of the ET's reasons, in a case where, as I have concluded, the facts found supported the decision that the burden had passed to the Respondent; and, as I have indicated, of the need to consider what emerges from the reasons read as a whole, not from isolated phrases or sentences. I have also borne in mind that this was not necessarily a case of all or nothing. It would, potentially, have been open to the Tribunal to conclude that a belief that the Claimant was overqualified formed no part of the reasons for the decision; or that it was a reason, or even the main reason, why the application was sifted out, but also that it was not persuaded that her protected acts were not a material influence on the decision as well.

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110 However, given that it was the Respondent's case that the whole explanation for the decision was that the Claimant was considered overqualified, that specific evidence was advanced to lend support to that case, that the ET itself seems to have accepted that Ms Boyle considered with justification that the Claimant was looking primarily to further her research interests, to which the position was not suited, and its findings about the first (as well as the second) strand of the advice she received, I consider that it was incumbent on the ET to come to a specific conclusion about the extent to which it did or did not accept the Respondent's explanation as accounting for its conduct, en route to the outcome that it was not persuaded that the protected acts had not formed a material part of its motivation. While the ET approaches such a conclusion at various points, it does not, ultimately, sufficiently state or spell it out.

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111 I have therefore concluded that, had I not allowed the appeal on the first ground, I would, for this reason, have allowed the appeal in any event.

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Outcome

112 My upholding of ground 1, by itself, means that the Tribunal's decision – in relation to the first claim concerning the first job application – must be quashed. The conclusion I have reached in the last section of this decision would also have led to the same result. For the avoidance of doubt, the ET's decision dismissing the second claim that was before it, relating to the second job application that the Claimant made in 2017, stands, as it was not appealed.

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113 The matter must therefore be remitted for a re-hearing in relation to the first claim only. In the circumstances I am inclined to think that I should direct that to be before a fresh panel; but I will invite submissions on that question before deciding, and making a specific order.

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