Appeal No. UKEAT/0272/18/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 March 2019

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MR K TABIDI — APPELLANT

BRITISH BROADCASTING CORPORATION — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR K TABIDI (The Appellant in Person)
For the Respondent	MR NATHANIEL CAIDEN (of Counsel) Instructed by: BBC Employment Law Department Room 8442 New Broadcasting House Portland Place London W1A 1AA

SUMMARY

SEX DESCRIMINATION – Costs

The Claimant presented a complaint of direct sex discrimination on favour of the female candidates for the post of Broadcast Journalist in the Respondent's Arabic Service. The claim was dismissed and costs awarded against him in the sum of £4550. He appealed on grounds, as amended after the Rule 3(10) hearing, that the ET had erred (1) in failing to consider whether he had been treated less favourably than his comparator and (2) in making the award of costs.

The appeal was dismissed on both grounds. As confirmed by the answers to questions asked of ET, the Claimant had not advanced his case on sex discrimination before the ET in the way now presented. He did not reply on the other candidates as actual comparators or argue that a hypothetical comparator should be constructed. On the contrary, it was specifically stated that not much could be gained from a comparison of the interview scores and the performance of the other potential comparators. In any event, the ET had made an unchallenged alternative finding that, even if a prima facie case of discrimination had been established, the Respondent had discharged the burden of proving that the difference in sex played no part in the relative scoring of the candidates: Brown v LB Croydon [2007] IRLR 259 considered. As to the award of costs, there was no error of law or perversity in the decision.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal against the Decision of the London (Central) Employment Tribunal (Employment Judge Grewal and members), sent to the parties on 8 January 2018, with Written Reasons sent on 13 April 2018, whereby the Claimant's complaint of sex discrimination was dismissed and costs were awarded against him in the sum of £4,550. The essential claim was that there had been sex discrimination in favour of the female candidates for the post of Broadcast Journalist in the Respondent's Arabic Service.

2. The Claimant was represented at the Hearing below by Counsel acting through the Free Representation Unit and the Respondent by Counsel. The Claimant had representation by Counsel at the Rule 3(10) Hearing but today has appeared in person. I am most grateful for the courtesy and clarity of his submissions presented today.

3. At the Rule 3(10) Hearing on the 14 November 2018 HH Judge Eady QC allowed the appeal to go forward to a Full Hearing but on amended grounds that the Tribunal had erred in law (1) in failing to consider whether he had been treated less favourably than his comparators, either the actual comparators in terms of the other candidates or a hypothetical comparator constructed using the cases of the other candidates and (2) in making the award of costs.

4. Following that Order the Respondent served an Answer dated 6 December 2018 which included the contentions that the Claimant's case as argued before the Employment Tribunal ("ET") (1) had placed no reliance on the other candidates as actual comparators and (2) had not alleged a difference in treatment of the Claimant at the shortlisting and interview stage.

Furthermore, in respect of the challenge to the calculation of the award of costs, this had been expressly based on Respondent's Counsel's brief fee and two refreshers.

5. By a request dated 13 December 2018 the Respondent applied for the Employment Appeal Tribunal to adopt the **Burns/Barke** procedure and ask the ET the following three questions: (1) In relation to ground 1, having regard to paragraph 26 of the ET Judgment, did the Claimant rely upon actual and/or hypothetical comparators? How was the case put, if at all, in relation to the use of comparators in closing? (2) In relation to ground 2(a) what case, if any, was pursued in relation "a different assessment of the Appellant at the shortlisting and final interview stage?" (3) In relation to ground 2 (b-c) what basis, if any, was there for calculating the sum of costs to be awarded at £4,550? What was the amount/calculation, if any, sought in the Respondent's application for costs at paragraph 32 of the ET Judgment that it considered?

6. HHJ Eady QC on 13 February 2019 made a further Order which asked the ET to answer those questions. By its reply dated 15 February 2019, the ET stated that the Claimant's case had not been argued on those bases; and that the sum awarded as costs had been based on the Respondent's application for the brief fee and the refreshers of its Counsel at the Hearing.

7. The Judgment of the ET records its findings of fact to which I now refer. The Claimant, who is male, worked between 30 October 2014 and February 2017 as a freelance or casual Broadcast Journalist in radio in the Respondent's Arabic Service, working on average four shifts a week.

8. In August 2016 Ms Vanessa Twigg, HR Business Partner, gave managers in the Arabic Service advice in an email about what they could do to reduce the number of grievances relating

to recruitment. At the end of the email she pointed out that they needed to improve their diversity figures in the Arabic Service and that they needed more women throughout the Service, but especially at the Senior Broadcast Journalist level and above. The Judgment continues at paragraph 6:

> **"6. …The managers who received that email did not understand it to be an instruction or advice to recruit women, regardless of whether or not they were the best candidates for the job, but as a reminder that the under-representation of women was a diversity issue that needed to be addressed. Safaa Faisal was not at a managerial level at that time and did not receive that email."**

9. In 2016 the World Service was given funding by the Government for a project known as Worlds 2020. In respect of the Arabic Service the main objective of the funding was to reach new audiences with a distinctive and dynamic range of programmes and product across the Gulf and North Africa. These would be aimed specifically at digital and social platforms, and the new audiences to be targeted were younger and female audiences.

10. The funding was used to create a number of new roles within the Arabic Service, including two Broadcast Journalists ("BJ") roles and one Senior Broadcast Journalist ("SBJ") role. They were advertised internally on 30 November 2016. The job description for the BJ role made it clear that it required a strong understanding of digital journalism for radio and of social media and its relevance to both finding and sharing stories.

11. The required competencies included a thorough understanding of the target audience and the ability to get one's message understood by adopting a range of styles, tools and techniques appropriate to the audience and the nature of the information. The job description did not specifically identify the target audience because it was expected that anybody applying for a 2020 funded role would know that; and if they did not, would do some research to find out about it.

12. At around the time the roles were advertised, Mr Soliman (Editor, radio, Arabic Service) had a discussion with the Claimant about applying for a permanent role. In December 2016, Caroline Hamilton drew the advertised roles to the Claimant's attention. The roles were advertised internally first, which included those who had been part of the casual pool for six months or more.

13. The Respondent had guidance on its intranet about interviews and how best to prepare for them. Casual staff had access to this. The guidance made it clear that the key to interview success lay in careful preparation and thorough research; and that the interviews were almost exclusively competency-based with an explanation of what that meant. It also provided a number of useful tips, including that when interviewed for a created job the candidate should be prepared to come up with ideas which demonstrated his or her innovative skills.

14. The Claimant applied for the BJ role on 6 December 2016. There were 17 applicants for the two roles, 7 men and 10 women. Mr Soliman and Ms Faisal, (Radio Programme Editor, Arabic Service), agreed the shortlist criteria by reference to the skills, knowledge and experience required in the job description. They scored the application forms against these criteria.

15. Sixteen of the applicants, including the Claimant, were shortlisted. They scored between 13 and 17. The Claimant scored 16. 13 of the 16 were required to take written tests, the other three being exempt as existing BJs who had taken the test previously. Those three were all women. Women who were casual employees were required to take the test just the same as male casual employees.

16. 11 candidates took the test, 2 having failed to attend. The test scripts were anonymised and marked by Mr Soliman and Ms Faisal. There was no way of knowing the identity or the gender of the candidates. 5 passed the test; 2 men, one of whom was the Claimant, and 3 women. Together with the 3 candidates exempt from the test this produced a total shortlist of 8, namely 6 women and 2 men.

17. The interview panel comprised Mr Soliman, Ms Faisal and Mr Khalid Abdullah who was from outside the Arabic Service. The panel identified from the job description four competencies against which they would judge the candidates and devise two to three questions to test each competency. Candidates were also required to do a voice test by reading a page of Arabic script. Candidates were given a score of between 1 and 4 on each competency.

18. The interviews took place on 2 and 3 February 2017. The Claimant did not access the intranet guidance beforehand. The Tribunal observed in paragraph 16:

> **"16. …That was unfortunate because it was clear from the answers that he gave to the Tribunal that he did not understand what a competency-based interview required and that he did not appreciate the importance of doing research on the role. His view appeared to be that if he simply set out what he had done as a casual BJ that that would demonstrate that he was the best candidate for the role. That completely failed to take into account that this was a new role targeting a particular audience with a focus on using digital formatting and social media to get stories and reach that audience. It also demonstrated a lack of understanding of what a competency-based interview requires."**

19. The Claimant brought to the interview and handed to the panel three USB sticks containing a sample of his radio work. The Tribunal observed that "quite properly" the panel, having decided to assess and score the candidates on the identified competency questions, did not listen to the material on the sticks or take them into account. To do so would have been to give one candidate an unfair advantage over others.

20. All the candidates were asked the same questions at the interview. At the end of each interview the panel discussed the answers given on each competency and agreed the score. The witness statements of Mr Soliman and Ms Faisal set out in detail the reasons they gave for the Claimant's score on each competency. This was supported by the comments made at the time on the interview grid.

21. These showed in particular that the Claimant had not done any research on the role and objectives of the 2020 project and was thus unable to provide a satisfactory answer as to why he was interested in the role and what he could bring to it. When asked about the stories from that day's news which would be included in the Maghreb programme, he talked only about a story that had been reported two days previously. When asked about any new angle he could bring to that story, he was unable to give a satisfactory answer; and then when asked about covering stories without a reporter on the ground, he relied on traditional methods, i.e. talking to officials and journalists and did not refer to the use of social media or other sources. He did not demonstrate any innovation or imagination in tackling things a different way; and when asked about targeting younger audiences he mentioned social media and digital platforms, but did not give details of which social media he would use and how he would use it. He received scores of 2 or 2.5 for those competencies because that was what the panel thought his answers merited.

22. The result of the overall scoring was that the two highest scored 18.5 and 17.5. They were both women. The next two scored 15 and 14.5; the first a woman, the second a man. The Claimant scored 13, which was the second lowest score. The lowest was 10.5 and that was given to a woman. The same panel interviewed for the SBJ role and the candidate who scored highest and was successful was a man.

23. The Claimant was advised on 7 February that he had not been successful. He asked for written feedback but was offered verbal, i.e. oral feedback, which he made clear he did not want.

24. On 21 February the Claimant complained that he had been discriminated against in an interview panel. He was advised that, as a casual, he was not entitled to raise a grievance; and that the best course was to obtain feedback. In the course of further exchanges, he again stated that he was not interested in verbal feedback and suggested that Ms Faisal's conduct might amount to harassment.

25. Ms Faisal passed this on to Vanessa Twigg who suggested a brief response which Ms Faisal supplied. In a further email dated 6 March 2016 from Ms Faisal to Ms Twigg, she explained that the purpose of the 2020 project (and implicitly the roles which it funded) was to cater for North Africa and the Gulf; that it was aimed at a younger audience with emphasis on "women agenda"; and that in consequence digital formatting and social media integration had been essential criteria of the assessment of the candidates. In that respect the role was different from a usual BJ role.

26. On 5 April the Respondent's HR Director Clive Ahmed advised the Claimant that he had looked into his complaint and was satisfied that the recruitment had been carried out in a way which was fair and consistent with its practices.

27. In its summary of the relevant law the Tribunal referred to the relevant terms of sections 13, 23 and 136 of the **Equality Act 2010**, and the earlier decisions of the Court of Appeal in **Igen Ltd v Wong** [2005] IRLR 258 and **Madarassy v Nomura International Plc** [2007] IRLR 246.

From the latter it particularly noted that the bare facts of a difference in status and in a difference in treatment are not, without more, sufficient to shift the burden of proof.

28. At this point it is to be noted that, since the Tribunal's Judgment and Reasons, the Court of Appeal has reaffirmed the principles in those two authorities on the shifting burden of proof; and has rejected the argument that the subsequent change in statutory language in section s.136 has removed the burden of proof on the Claimant at the first stage of the inquiry: see **Ayodele v Citylink Ltd & Anor** [2018] ICR 748 and **Royal Mail Group Ltd v Efobi** [2019] EWCA Civ 18.

29. The Tribunal began its section headed "Conclusions" as follows:

> **"24. In order to establish a prima facie case of sex discrimination the Claimant has to prove facts from which we could conclude that the three members of the interview panel had given him lower scores than what they believed his answers at the interview merited and had given the two successful candidates higher scores than they thought their answers merited and that they had done so because he was a man and that they were women and that gender had played some part in the scores they gave.**
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> **25. We put it that way because if the panel gave all the candidates scores that genuinely believed they deserved on the basis of their answers at interview and gender played no part in the scores given (consciously or unconsciously), then the Claimant's case must fail."**

30. It then recorded the submission by the Claimant through his Counsel that it could conclude that there was sex discrimination from four facts:

> **"(1) He scored 13 and the two successful candidates scored 18.5 and 17.5 i.e. more than him.**
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> **(2) He is a man and they are women.**
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> **(3) Six months before the interview the HR Business Partner for the Arabic Service had reminded managers in the service that women were under represented and that needed to be addressed.**
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> **(4) The selection criteria for the role had changed and that the Respondent had added a criterion about targeting women audience but it had not formulated a question in the interview to assess this. It had done so by having regard to the gender of the candidates, i.e. it had made an assumption that women would be better able to target female audiences. The Claimant's case was that Ms Faisal's e-mail of 6 March clearly demonstrated this point."**

31. Returning to its findings of fact, the Tribunal did not accept the fourth matter as a fact. The target audience was younger people and women and this was accordingly an important part of the role. Thus "…targeting women audience was not a new selection criteria that was belatedly added but it was an important part of the role and every candidate in answering all the questions had to demonstrate that he knew and understood what the role was." Furthermore, Ms Faisal's email of 6 March said precisely that.

32. As to the other three matters, those facts were not in themselves sufficient to establish a prima facie case of sex discrimination. Thus, the Tribunal concluded at paragraph 28 "…We could not on the basis of those facts have concluded that the Respondent had directly discriminated against the Claimant because of gender." The Tribunal added that its conclusion that there was no prima facie case was supported by other facts which it was entitled to take into account. Thus, leaving aside the Respondent's explanation for the difference in scores, Mr Soliman and Ms Hamilton had both encouraged the Claimant to apply for the role; the person who received the fourth highest score and was deemed to be suitable to be appointed was a man; and the same panel had appointed a man to the SBJ role.

33. The Tribunal then went on to consider the case on the alternative basis that it was wrong in its conclusion on prima facie discrimination, and that the burden of proof had shifted. Having considered the explanation given by the Respondent for the scoring account of the candidates, it concluded that the Respondent had positively established that no sex discrimination had occurred. Thus:

> **"30. However, in case we are wrong in our conclusion, and the burden of proof has shifted the Respondent has satisfied us that no sex discrimination occurred. We are satisfied that Mr Soliman and Ms Faisal gave the candidates the scores for the reasons which they said they did and that gender played no part whatsoever in their scores. They gave clear and detailed explanations for the scores on each question. Their evidence was credible and consistent with their contemporaneous notes and interview grades. In some cases there was no dispute between them and the Claimant about the answer that the Claimant gave. The dispute between them was as to whether the answers were good answers and merited the higher score or not.**

> **31. We are satisfied that the Claimant did not perform well at the interview for a number of reasons. He did not understand what a competency based interview required. He did not understand what a competency based interview required. He had not done enough research about what the role involved and, in particular, the implication of it being a role funded by the 2020 project. He did not seem to appreciate that it was a different role from the Broadcast Journalist role that he had done as a freelancer for a couple of years."**

The claim was accordingly dismissed.

34. The Respondent then made an application for costs, on the basis that the claim had had no reasonable prospect of success: ET Rule 76(1)(b). In support of the application it also relied on a costs warning letter which it sent to the Claimant and which set out the weaknesses and difficulties in this case. That letter is not before me, but included a deadline for withdrawal of the claim without incurring costs. The Respondent applied to the Tribunal for its disbursements in respect of Counsel's brief fee and refreshers for the second and final day, i.e. £2,750 plus £900 plus £900 = £4,550. That fact and those details are set out in the Tribunal's answers to the EAT's questions. The Tribunal concluded that the claim, having failed to pass the threshold of a prima facie case of discrimination, had no reasonable prospects of success.

35. Turning to the exercise of its discretion as to whether to make an award and if so in what sum, it continued:

> **"32…. In deciding how to exercise that discretion, we took into account the fact that a costs warning letter was sent to the Claimant highlighting the weaknesses and the difficulties in his case. We accept that at the time that letter was sent witness statements had not been exchanged and some of the evidence which was relied upon in the Tribunal had not been disclosed to the Claimant. However, the witness statements were exchanged and all the evidence was disclosed before this hearing started. At that stage it ought to have been abundantly clear to anybody that the claim had no reasonable prospect of success. Although the deadline for withdrawing had expired, it was still open to the Claimant and/or his representative to engage with the Respondent and to enquire from them as to whether they would still be willing not to pursue costs if the Claimant withdrew his case. In our experience it is very likely that if such an approach had been made at that stage the Respondent would have extended the deadline and agreed not to pursue costs. Had they failed to do so then the Claimant obviously would have been in a much stronger position today in front of us defending the application for costs but that was not what happened. We, therefore, think that it is appropriate to make an order for costs.**
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> **33. We think that it is right to [award] the costs of the hearing because they could have been avoided had the Claimant engaged with the Respondent after the disclosure of the witness statements and the evidence. We would have taken into account the means of the Claimant but we are not able to do so because he chose not to give us any evidence about his means although we invited him to do so."**

The Judgment but not the Written Reasons, recorded the award in the sum of £4,550.

36. On the first ground of appeal the Claimant contends that the Tribunal wrongly failed to consider whether he had received less favourable treatment than his comparators, namely the other candidates, or to construct a hypothetical comparison using their cases. He submits that as an experienced radio news producer, his comparator, actual or hypothetical, should have been an experienced female radio news producer. It was a requirement of the role, according to the job description, to have "significant recent experience as a journalist, with good knowledge of production techniques" and "comprehensive knowledge of regional and international news."

37. He cites the House of Lords Decision in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 where Lord Nicholls citing the analysis of the House in the victimisation case of **Chief Constable of the West Yorkshire Police v Khan** [2001] ICR 342 said that, "Protected act aside, the hypothetical comparator should be in the same position as Sgt Khan, not in an admittedly different but allegedly comparable position": paragraph 13. Furthermore, Lord Hope in **Shamoon** had said "…the choice of competitor requires that a judgment must be made as to which of the differences between any two individuals are relevant and which are irrelevant. The choice of characteristics may itself be determinative of the outcome": paragraph 39.

38. The Claimant submits that if such a proper like-for-like comparison had been carried out, the result would, alternatively might, have been different. None of the female applicants had such experience. He referred to evidence given by candidates that they wanted to join radio to gain experience. For example, Candidate C said that she wanted to expand her skills by moving to news; and Candidate G said it was a learning experience. These were matters set out in the relevant grids and had been referred to in his cross-examination and his evidence to the Tribunal.

In consequence of this disparity in experience the inference must be that his rejection was on grounds of gender.

39. The Claimant also submits that the Tribunal should have taken account of the evidence of what he describes as similar answers by other candidates to those which he had given. For example, he says that the recent news story which he identified had been selected by four other candidates, one of whom was male; and that another candidate had gone on to suggest a story about Syria, which country did not fall within the North Africa and Gulf region. This was also relevant to the inference to be drawn at the stage of considering whether there was a prima facie case, and indeed at the second stage of the reason why.

40. He further submitted that comparators needed to be identified for that second stage; and that if and to the extent that there was a choice between proceeding in two stages or going straight to the second, this was a matter of election. The Tribunal was not entitled to take the course of considering the matter at the first stage and then if that failed proceeding in the alternative to consider the second stage.

41. Turning to the response from the Tribunal, this was not how the case had been presented. He submitted that the Tribunal was bound to consider all the evidence before it in order to reach its Decision, regardless of the particular terms of the closing submissions.

42. At this point I should set out the response from the Tribunal to the first question. This was as follows:

> **"1. The Claimant's case (as set out in his witness statement) was that he should have been appointed because he had considerable experience in radio journalism (which the successful candidates did not) and that he had performed well at the interview. He believed that the failure to appoint him had been an act of sex discrimination because Ms Faisal's email of 6 March 2017 showed that "women's agenda" had been used as a criterion and he it had been assumed that he could not meet it because he was a man."**

> **In his closing submissions, the Claimant's representative said that there were three facts from which the Tribunal could infer sex discrimination. These were-**
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> > **"(a) Vanessa Twigg's email of 6 August 2016 (paragraph 6 of the Tribunal's Decision);**
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> > **(b) Ms Faisal's email of 6 March 2017 which showed that women's agenda had been used as a criterion although it had never been identified as a criterion and no question had been asked to assess it. It had been assessed purely on the basis of the gender of the candidates; and**
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> > **(c) The answers that the Claimant gave at his interview. The interview grids were not entirely comprehensible and there was little to be gained by going through them.**
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> **It was not the Claimant's case that he had been treated less favourably than any particular female candidate at the interview because she given similar answers to him but had been given higher scores or that there was evidence from which we could infer that had a female candidate given the answers that he did she would have been given higher scores. Had that been the Claimant's case, the Tribunal would have addressed it in its decision. The Tribunal addressed it in the way that it did at paragraph 26 because that was the case advanced by the Claimant."**

43. In summary, the Claimant pointed to the Reasons given by HHJ Eady QC when concluding that there was a reasonably arguable case. She had stated that:

> **"…. a reasonably arguable question had been raised by the ET's apparent focus on the Appellant's case, without scrutiny of the cases of the (actual/hypothetical) comparators. That seemed to give rise to two potential points, (1) whether the ET properly had regard to the specific cases of the higher scoring female candidates -it being the Appellant's case that they did not have the relevant experience to meet the requirements of the job specification and that there were aspects of their performance at interview that there were no different from that of the Appellant, which had been criticised in his case but not theirs e.g. the news story used by the Appellant… alternatively, (2) whether the ET considered how a hypothetical comparator in the Appellant's position would have been treated, constructing that candidate from the other (female) candidates, whether or not they were ultimately successful….."**

44. For the reasons substantially advanced by Mr Caiden on behalf of the Respondent, I am not persuaded by these arguments. First, I accept that the Claimant's case was not argued in this way before the Tribunal by his Counsel. The Tribunal is entitled to deal with the matter on the way the case is ultimately presented and in particular in the course of closing submissions.

45. The Claimant approached the issues in the way that is summarised in paragraph 26 of the Judgment and as supplemented and confirmed by the answers from the Tribunal to the questions posed. He did not therefore rely on the other candidates as actual comparators or argue that a hypothetical comparator should be constructed. On the contrary, it was specifically stated that

not much could be gained from a comparison of the interview scores and the performance of the other potential comparators.

46. An appeal is not an occasion to reargue a case which had not been presented below. I add that the clarification as to the way in which the argument was presented was of course received after the date when HHJ Eady QC made the original Order granting permission to appeal.

47. Secondly, the Tribunal made an unchallenged alternative finding that, even if a prima facie case had been established, the Respondent had discharged the burden of proving that the difference in sex played no part in the relative scoring of the candidates. That is a course which is endorsed by the observations of the House of Lords in **Shamoon** and also referred to by the Court of Appeal in **Brown v London Borough of Croydon & Anor** [2007] IRLR 259. In those cases, it was observed that in some cases the better course is not to consider the issues of "less favourable treatment" and "the reason why" sequentially, but to proceed straight to the latter question: see **Shamoon** per Lord Nicholls at paragraphs 8 and 11 to 12 and **Brown** per Mummery LJ at paragraphs 34 to 40.

48. Thirdly, on a fair reading of the Judgment I am satisfied there was no error of law. Thus, the Tribunal correctly cited the relevant statutory provision, including s.23 which states that on a comparison of cases for the purpose of s.13 discrimination there must be no material difference between the circumstances relating to each case. It had correctly cited **Madarassy** for the proposition that a mere difference in status and difference in treatment was not, without more, sufficient to shift the burden of proof.

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49. The Tribunal then considered each stage of the process from first shortlisting to the final scoring of all the answers; and at each stage compared the position of men and women. I also accept that the reason why question does not need to involve comparators nor is it a matter of strict election between the first and second stages. It is equally permissible for the Tribunal, having concluded against the Claimant at the first stage, then in the alternative to consider the second.

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50. Turning to the costs appeal, the Claimant first submits that in concluding that the Claimant had no reasonable prospect of success, the Tribunal had applied too high a burden of proof at the first stage of establishing a prima facie case, and had failed to consider the 'something more' requirement in **Madarassy**, including but not limited to the success rate of women candidates for the journalist and presenter's role; the different assessment of the Claimant at the shortlisting and final interview stages; and the statement by Ms Twigg on 11 August 2016 that there should be more women appointed.

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51. He again pointed to the observations of HHJ Eady QC, when giving her Reasons for the matter to proceed to appeal, that although she had not been prepared to permit a stand-alone ground to proceed in respect of the burden of proof point on liability, she was persuaded that this raised a reasonably arguable question on the issue of costs.

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52. The Claimant submitted that paragraph 24 of the Judgment demonstrated an erroneous approach because it placed a double burden on the Claimant to persuade the Tribunal that (i) the three members of the interview panel had given lower scores than that which they believed his answers at the interview to merit and (ii) had given the two successful candidates higher scores

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than they thought their answers merited; and that in each case that this was on the basis of gender discrimination. The Claimant focused on the word "and" for this purpose.

53. In its answer to the EAT questions, the ET had responded: "The Claimant did not pursue a case in relation to 'a different assessment of the Appellant at the shortlisting and final interview stage.' Had he done so, the Tribunal would have addressed it in its Decision." The Claimant's response reflected his submissions in the appeal on liability. Thus whatever the terms of the closing submissions that evidence was before the Tribunal and should have been considered. Reference to the shortlisting process and to the presenter's role was to be found within the Judgment and accordingly should have been taken into account.

54. Secondly, he submitted that the Tribunal was wrong to rely on its asserted experience, without evidence of the same, as to what the Respondent would have done had he asked for an extension of time to withdraw his claim.

55. Thirdly, that in awarding the sum of £4,550 the Tribunal had failed to comply with the requirement of ET Rule 62(5) which includes: "Where the Judgment includes a financial award the Reasons shall identify by means of a table or otherwise how the amount to be paid has been calculated." There was no such statement in the Written Reasons. The figure only appeared in the Judgment which preceded those Reasons.

56. The Tribunal had responded to the questions as follows: "The Respondent applied for Counsel's costs for the Hearing. They were a brief fee of £2,750 and £900 refresher for two days. That was the sum that we awarded for the Reasons set out at paragraph 32 and 33 of the Decision." The Claimant responded that this provided no justification for the absence of a table or otherwise

for setting out in the Judgment how the award of costs was calculated. Although represented by Counsel, until receipt of that answer he had no idea of how the figure had been reached.

57. For the reasons advanced by Mr Caiden, I am not persuaded by these arguments. The first sub ground of appeal amounts to an attempt to introduce into the argument on costs a challenge to the Decision on the substantive merits. In my judgment there is no basis at the stage of costs to revisit that Decision.

58. In any event, there was no error of law or perversity in the substantive Decision. All the matters on which he had relied through Counsel in his closing submissions had been before the Tribunal and duly considered. In reaching its conclusion the Tribunal took express account of Mrs Twigg's statement in August 2016 and Ms Faisal's email of 6 March 2017. As confirmed by the Tribunal's response, the Claimant had not pursued a case in relation to the alleged different assessment of him at the shortlisting and final interview stages. Nor does the focus on the word "and" in paragraph 24 assist the appeal. On a fair reading of that paragraph the two conclusions represent two sides of the same coin. Another way of approaching it is to conclude that "and" should be read as "or." In either event, there was no enhanced burden on the Claimant and of course his application for permission to appeal on the approach to the burden of proof on the substantive Judgment had been dismissed.

59. Secondly, I see no error of law in the reliance on the cost warning letter or anything associated with it. A cost warning letter is one of the factors which can be considered in the exercise of discretion. Furthermore, there is a generous ambit of discretion in the award for costs for both purposes; see for example **Peat & Ors v Birmingham City Council**

A UKEAT0503/11/CEA. The warning letter had highlighted the weaknesses of his case. The Tribunal was fully entitled to take it into account in the exercise of its discretion.

B 60. I see no error in its observation as to how the Respondent would have been likely to react if the Claimant had sought to extend the time for accepting a drop hands agreement. The essential relevance of the letter was that the Claimant had failed to engage with it and reassess his prospects of success. That factor was relevant regardless of whether or not there would have been C agreement by the Respondent to an extension of time. The ET, as industrial jury, was fully entitled to draw on its experience in this respect. In any event, its award was limited to the costs of Counsel at the hearing.

D 61. As to Rule 62(5), the information as to how the sum of £4,550 was calculated has now been recorded in writing by the answer from the Tribunal. Furthermore, the Claimant's Counsel would have well understood the application that was made and the way in which the sum was E calculated. I see nothing in the Rule which provides any ground of challenge. All in all, the award of costs was comfortably within the exercise of the discretion of the Tribunal.

F 62. For all these reasons, my conclusion is that the appeal must be dismissed.

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