



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112445/2019

Final Hearing held in Person in Glasgow on 30 November 2020;
1 and 2 December 2020; and 1, 2 and 3 March 2021;
and Closing Submissions heard remotely by Cloud Video Platform
on 12 March 2021;
with Deliberation by Members' Meeting held remotely on 17 May 2021

Employment Judge Ian McPherson
Tribunal Member Mrs Jean Lindsay
Tribunal Member Mr Andrew McFarlane

Mr David Odigie

Claimant
In Person

Renfrewshire Council

Respondents
Represented by:-
Ms Laura Lilburn -
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **unanimous** Judgment of the Employment Tribunal is that:-

(1) the claimant has not proven any facts from which the Tribunal could conclude that the respondents had committed an act of direct race discrimination against him, arising from his non-appointment to the post of Waste Operations Team Leader, following upon his interview for that post by the respondents on 18 April 2019; and

(2) in these circumstances, the claimant's complaint of unlawful discrimination by the respondents, contrary to **Sections 13 and 39 of the Equality Act 2010**, fails and accordingly it is dismissed by the Tribunal.

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REASONS

Introduction

1. This case first called before the full Tribunal, on Monday, 30 November 2020, for a 4-day Final Hearing in person, for full disposal, including remedy, if appropriate, as per Notice of Final Hearing issued to both parties representatives by the Tribunal on 29 October 2020 assigning 3 days, being Monday, 30 November to Wednesday, 2 December 2020, for hearing of evidence, and Tuesday, 15 December 2020, for closing submissions from both parties.
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2. In the event, over those first 3 days, the Tribunal only heard evidence from the claimant, proceedings having been impacted by time spent on 30 November 2020 addressing the claimant's opposed application for leave to amend his ET claim form, which, despite opposition by the respondents, was allowed by the Tribunal, for the reasons given orally at the time, and later confirmed in writing.
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3. Specifically, we allowed the claimant's amendment to add into his claim those points previously articulated by him in his Preliminary Hearing Agenda intimated to the Tribunal and copied to the respondents on 18 March 2020, in answer to questions S.4(i) and (ii), as per his email to the Tribunal on 26 November 2020 @ 09:41, detailing his direct discrimination complaint, and in particular the less favourable treatment which he alleged he had suffered, and why he considered this treatment to have been because of race as the protected characteristic relied upon by him. We shall return to the terms of the amendment allowed later in these Reasons, under our Discussion and
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Deliberation section, at paragraph 77 below.

4. As a further point, it is convenient to note and record here that, at his answer to question S.1 of his Preliminary Hearing Agenda, the claimant then specified his specific racial group as “Black.” At the first Case Management Preliminary Hearing, held on 19 March 2020, before Employment Judge Ian McPherson, the claimant confirmed he was relying on his Black colour, as per his Agenda, and, further, indicated orally at that Hearing (as recorded by the Judge in his written Note & Orders at Order 1) that his complaint of alleged unlawful discrimination was also based on his Nigerian nationality, but not on his ethnic or national origins. In his subsequent sworn evidence to the Judge, at the time-bar Preliminary Hearing held on 1 May 2020, the claimant described himself as a black Nigerian national, and the Judge made a finding in fact to that effect, at paragraph 27(a) of the Reasons to that Judgment.
5. Reverting again to this Final Hearing, proceedings were yet further impacted by the claimant producing, on 1 December 2020, a covert audio recording of a telephone conversation with one of the respondents’ witnesses, Mrs Lindsey Hepburn, to which the respondents did not object to it forming part of the evidence, but sought to adjourn the claimant’s cross examination part heard, to resume in spring 2021 at a Continued Final Hearing. We refused the respondents’ application to adjourn, for the reasons given orally at the time, and later confirmed in writing.
6. Thereafter, we heard the claimant’s further evidence and, having done so, adjourned the case to fresh dates for Continued Final Hearing on 1, 2 and 3 March 2021. Further, we ordered parties to cooperate and agree, if possible, a full and corrected version of the claimant’s transcript of that audio recording, and provide it to the Tribunal, allowing the respondents to cross-examine the claimant on its terms, by way of further evidence at the Continued Final Hearing. We also issued a fresh, updated Timetabling Order, in that regard for the Continued Final Hearing, made in terms of **Rule 45 of the Employment Tribunals Rules of Procedure 2013.**

7. In all, over those first 3 days, we issued 4 separate written Notes and Orders of the Tribunal, the first dated 1 December 2020, and copied to both parties on that date; the second, dated 2 December 2020, and copied to parties on that date; the third, dated 4 December 2020, and copied to parties on 14 December 2020, along with our fourth Note, dated 7 December 2020, which included our updated Timetabling Order.
8. Notice of Continued Final Hearing for 1, 2 and 3 March 2021 was issued by the Tribunal to both parties on 4 February 2021. When, on account of one of the respondents' witnesses, Mr Kenneth Gray, having to self-isolate, on account of a Covid-19 situation within his household, an application was made by the respondents to hear his evidence on the Tribunal's Cloud Video Platform ("CVP"), via video link, this was agreed by the Tribunal, and not objected to by the claimant.
9. The Judge had, at an earlier stage in proceedings, refused the claimant's application for the Final Hearing to be wholly conducted remotely, by CVP, instead ordering an in person Final Hearing before a full panel at the Glasgow Tribunal Centre, and directing that the preparation and mutual exchange of witness statements was not required by the Tribunal, all for the reasons more fully detailed in the Tribunal's letter to both parties sent by email on 16 October 2020.
10. While it had been intended to conclude the evidence, along with closing submissions, within the 3 further days in March 2021, in the event, that did not happen, and closing submissions from both parties required to be assigned to a further Hearing date, arranged, with their co-operation, as a hybrid Hearing, on Friday 12 March 2021, with both parties attending remotely by CVP, with the full Tribunal in attendance in person at the Glasgow Tribunal Centre, as previously.
11. Notice of Continued Final Hearing by CVP on 12 March 2021 was issued to both parties by email from the Tribunal on 3 March 2021. Further, fresh case management orders regarding that hybrid Hearing on Submissions were

issued to both parties under cover of a letter dated 4 March 2021 issued by the Tribunal to both parties by email.

- 5 12. Having heard oral closing submissions from both parties, on 12 March 2021, each speaking to their own written closing submission, and answering points of clarification raised by the Tribunal, the full Tribunal had initial private deliberation in chambers that Friday afternoon, but we did not conclude our deliberations.
- 10 13. As per the Tribunal's update letter sent to both parties, sent by email on 15 March 2021, we planned to meet again for further private deliberation in early course. Unfortunately, due to the Judge's sick leave absence from the office from 18 March to 3 May 2021, we were unable to meet again to finalise our decision, until recently, and the Judge apologises to both parties for this
15 unavoidable delay. On the Judge's behalf, the Tribunal wrote to both parties explaining the situation, and clarifying that the finalised Judgment and Reasons would be issued as soon as reasonably practicable.

Claim and Response

- 20 14. The claimant, acting on his own behalf, presented his ET1 claim form in this case to the Tribunal, on 9 November 2019, following ACAS early conciliation between 2 and 13 June 2019. He complained of discrimination on grounds of race, having been unsuccessful in his application for a post with the
25 respondents, for which he was interviewed, but not offered the job. His claim was accepted by the Tribunal administration, and served on the respondents by Notice of Claim issued by the Tribunal on 12 November 2019. Their ET3 response was due by no later than 10 December 2019.
- 30 15. On 10 December 2019, an ET3 response, defending the claim, was lodged by Mr Nairn Young, in-house solicitor with the respondents, and that ET3 response was accepted by the Tribunal administration, on 12 December 2019, and a copy sent to the claimant and ACAS. In their response, it was stated,

for the avoidance of doubt, that the respondents denied having discriminated against the claimant in any way, and their response was limited only to the issue of time bar, which they sought to have dealt with at the Preliminary Hearing then fixed for 19 March 2020, stating that, should the Tribunal decide it could consider the claim against them, then they would request further time to address the merits of the case brought against them.

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16. When the case called, on 19 March 2020, before Employment Judge Ian McPherson, for a Case Management Preliminary Hearing held in private, the claimant was in attendance, in person, representing himself, while the respondents were represented by their solicitor, Ms Eilidh Clements. The respondents insisted upon their preliminary issue of time bar, and their argument that the claim should be dismissed or struck out for that reason.

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17. Accordingly, the case was listed for a public Preliminary Hearing to consider the respondents' opposed application for strike out, under **Rule 37 of the Employment Tribunals Rules of Procedure 2013**, on the basis that the claim was time barred, and it had no reasonable prospects of success, as it was argued that it would not be just and equitable to grant any extension of time to the claimant, in terms of **Section 123 of the Equality Act 2010**.

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18. The Judge's written Note and Orders, dated 23 March 2020, were issued to both parties under cover of a letter from the Tribunal on 31 March 2020. The case was thereafter listed for that time bar public Preliminary Hearing, which was held remotely by CVP on 1 May 2020, the claimant attending, again representing himself, and the respondents again represented by Ms Clements, their in-house solicitor.

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Preliminary Hearing Judgment, and listing for Final Hearing

19. Having heard evidence, and thereafter considered parties' closing submissions, in private deliberation following close of that Preliminary Hearing on 1 May 2020, Employment Judge Ian McPherson found that the claim, presented on 9 November 2019, was presented out of time, but that it was just

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and equitable, in terms of **Section 123 of the Equality Act 2010**, to extend the time for lodging the claimant's ET1 claim form with the Tribunal.

20. In these circumstances, the Judge held that the Tribunal did therefore have jurisdiction to consider the claimant's complaint of alleged unlawful direct racial discrimination against him by the respondents, and the Judge refused the respondents' application to strike out the claim. His detailed written Judgment, with Reasons, extending to some 111 paragraphs, over 62 pages, dated 27 July 2020, was issued to both parties on 30 July 2020.
21. In terms of the Case Management Orders made by Employment Judge McPherson, as part of that Judgment of the Tribunal, the respondents were ordered, within no more than 28 days from date of issue of that Judgment, to lodge detailed Grounds of Resistance to the merits of the claim brought against them, by way of Further and Better Particulars fully answering the claimant's complaint, as set forth in the ET1 claim form, and so augmenting the ET3 response previously lodged by the Tribunal in skeletal form, denying the discrimination allegation, but otherwise only addressing the time bar argument. The claimant was ordered, within the same 28-day period, to lodge a detailed Schedule of Loss, with the respondents allowed 14 days after intimation to lodge any Counter Schedule.
22. Thereafter, on 27 August 2020, the claimant intimated his Schedule of Loss seeking total compensation of **£106,752.19** from the respondents, in the event that he was to be successful in his claim against them. On that same date, Ms Laura Lilburn, in-house solicitor with the respondents, intimated to the Tribunal, with copy to the claimant, the respondents' Further and Better Particulars, with detailed grounds of defence.
23. She referred to the successful candidate after interview as being "**LM**", and submitted that it was not necessary or in the interests of justice for the name of the successful candidate to be disclosed, and highlighted that the claimant was seeking to advance a claim of direct race discrimination, where he had not

identified an appropriate comparator (whether hypothetical or otherwise) in his ET1 claim form.

24. Ms Lilburn also took, as a preliminary point, that she felt the claimant's direct race discrimination claim was unclear, and she requested further specification in order to provide the respondents with fair notice of this claim. Further, she called upon the claimant to provide full details and evidence of his efforts to find other work to mitigate his losses, and any subsequent earnings and / or benefits received. On 10 September 2020, Ms Lilburn intimated the respondents' Counter Schedule to the Glasgow Tribunal, with copy to the claimant.

Further Specification of the Claim

25. On 13 September 2020, the claimant, in writing to the Glasgow Tribunal, with copy to Ms Lilburn, confirmed that he was requesting to use the successful candidate (*LM*) as the appropriate comparator, and he provided further specification of his claim, in answer to Ms Lilburn's point 1, that further specification was required, as follows:-

1. ***I was discriminated against by the interviewers by not offering me the job because of I am black.***
2. ***The offering of the job to the successful candidate (LM) was not based on the interview conducted by the respondent for the purpose of selection.***
3. ***The claimant was not given a plain level field to compete for the job based on the colour of his skin.***
4. ***Before the interview, before the interviewer knew that the claimant was black, the claimant received five emails and two phone calls, two weeks after the interview the claimant was still chasing after the outcome of the interview by emails. If***

not, that claimant chased after the outcome of the interview he would not have been contacted.

5 5. *The claimant was informed after the interview that the interviewer would get back to the claimant before the end of the next day, but the respondent interviewers never got back to the claimant as promised.*

10 6. *Even though the claimant presentation was the best among the applicants and the claimant had five top marks (the highest mark) and 4 high mark (second highest mark), the claimant was not given the job because he is Black.*

15 26. Thereafter, on 16 October 2020, Employment Judge McPherson issued various Case Management Orders, via letter from the Tribunal emailed to both parties. He accepted that the claimant's answers (of 13 September 2020) to Ms Lilburn's preliminary points in the ET3 grounds of defence (of 27 August 2020) as Further and Better Particulars of the claim. Also, he noted the claimant's request that witness statements should be used by both parties, and that the claimant would prefer a CVP Final Hearing, whereas the respondents had submitted that there should be an in person Final Hearing, and that witness statements should not be used.

25 27. Having carefully considered both parties' positions, the Judge directed that the preparation and mutual exchange of witness statements was not required by the Tribunal and that evidence would be heard in person, and would not be taken remotely by use of CVP video conferencing. Both parties were so advised in the Tribunal's letter of 16 October 2020.

30 28. Further, the claimant having made no comment or objection in his email of 13 September 2020 to the respondents' request that the successful candidate be referred to as "**LM**", the Judge made an Anonymisation Order of that person in terms of **Rule 50(3)(b) of the Employment Tribunals Rules of Procedure**

2013. That Order, dated and signed by the Judge on 12 October 2020, was issued to both parties, as an attachment sent by email with the Tribunal's letter of 16 October 2020.

5 **Final Hearing before this Tribunal**

29. When this case first called before us, as a full Tribunal, on the morning of Monday, 30 November 2020, the claimant was in attendance, as an unrepresented, party litigant, while the respondents were represented by their in-house solicitor, Ms Lilburn.

30. There was provided to the Tribunal, an agreed Joint Bundle of Documents, duly indexed, and containing 46 separate documents, extending over 244 pages. In the course of the ongoing Final Hearing, the Tribunal allowed a further 4 documents to be received, and added to the Joint Bundle, as follows:-

- Document 47 – candidate pack for **LM** - pages 245-255.
- Document 48 - claimant's email of 26 November 2020 at 09:41 – pages 256 to 258 – **allowed by the Tribunal as the claimant's amendment to his ET1 claim form.**
- Document 49 – jointly agreed transcript of interview feedback call between Lindsey Hepburn and David Odigie: 14 May 2019 – pages 259 to 264.
- Document 50 – updated Schedule of Loss for the claimant dated 3 March 2021 – pages 265 to 268 – seeking **£89,026.53** total compensation from the respondents, but restricted to his alleged losses up to 30 November 2020.

31. On Monday, 30 November 2020, the Tribunal having allowed the claimant's amendment to the ET1 claim form, for the reasons given at that time, and set forth in writing in our written note and Orders, the Judge noted the Freudian slip by Ms Lilburn when she identified **LM** as being a female, but provided no further information.
32. In those circumstances, the Tribunal invited Ms Lilburn to consider voluntary disclosure of further information about the successful candidate **LM**. The following morning, Tuesday, 1 December 2020, Ms Lilburn, as a preliminary matter, stated that she had taken instructions, and she was in a position to provide additional information to the Tribunal, and Mr Odigie, as claimant, about the successful candidate, **LM**, namely that she is white, female and Scottish, whereas the claimant is a black, male Nigerian.
33. As agreed with both parties, the claimant's evidence in chief was elicited by a series of structured and focused questions asked of him by the presiding Employment Judge, following which he was cross examined, in the usual manner, by Ms Lilburn, as solicitor for the respondents. Arising from her cross examination, a matter emerged, which took the Tribunal, and respondents' representative, by surprise, when the claimant stated that he had a recording of his telephone feedback interview with Mrs Lindsey Hepburn on 14 May 2019.
34. On Tuesday, 1 December 2020, the Tribunal, on parties' joint application, decided to adjourn the claimant's cross-examination part heard, to allow for the respondents to consider their position in respect of the audio recording which the claimant wished to produce and rely upon. During the claimant's cross-examination by Ms Lilburn, the claimant had answered her question why he was "**100% certain**" about what Mrs Hepburn had said to him, during a telephone call feedback on his unsuccessful interview, when he disclosed to the Tribunal, and the respondents, for the first time in the course of these proceedings, that he had an audio recording of that conversation, which he asserted showed that he was telling the truth.

35. When the case called again before us the following morning, Wednesday 2 December 2020, Ms Lilburn made an application to the Tribunal to adjourn the claimant's cross-examination part heard, and to resume in spring 2021, at the continued Final Hearing, to allow for parties to agree a full and corrected transcript of the audio recording which the claimant had produced, and which the respondents did not object to it forming part of the evidence before the Tribunal, despite the lateness of its production in these proceedings by the claimant.
36. However, we refused Ms Lilburn's application, for the reasons we gave then, and confirmed in our written Note, including our collective view, that it was a proper use of the allocated judicial resource that we proceed that day, as otherwise the Hearing room, which is a precious commodity for in person Hearings at this difficult time during the Covid pandemic, would lie unused, in circumstances where the panel, Ms Lilburn, and the claimant were all present, and the claimant wished to finish his evidence, given the delays already earlier that week.
37. We stated that the respondents would not be prejudiced by our refusal of Ms Lilburn's application to adjourn there, then, and go part heard, as we had the audio recording and, if necessary, it could be played in the public Hearing from the Judge's laptop, and that is what duly happened. We also allowed Ms Lilburn a further 20 minutes maximum cross-examination of the claimant, on the ring-fenced matter of the transcript, and we built that in to our fresh, updated Timetabling Order for the 3 further days assigned for 1, 2 and 3 March 2021.

Findings in Fact

38. We have not sought to set out every detail of evidence which we heard nor to resolve every difference between the parties, but only those which appear to us to be material. Our material findings, relevant to the issues before us for judicial determination, based on the balance of probability, are as set out

below, in a way that is proportionate to the complexity and importance of the relevant issues before the Tribunal.

5 39. While Ms Lilburn, in her written skeleton closing submissions for the respondents, presented to us her suggested findings in fact, we have had regard to that, but not considered ourselves bound by it, as her proposed findings in fact are not sufficiently detailed and, in any event, were, in certain respects, disputed by the claimant in his oral reply to her written skeleton. In these circumstances, and as is our primary, fact finding role, we have made
10 the following findings in fact, on the basis of the evidence heard from the various witnesses led before us over the course of this Final Hearing, and the various documents in the Joint Bundle of Documents provided to us, so far as spoken to in evidence.

15 40. The Tribunal has found the following essential facts established:-

- 20 1. The claimant is a black, male Nigerian. His comparator, **LM**, the successful candidate appointed to the advertised vacant post with the respondents, is white, female, and Scottish.
- 25 3. In terms of **Section 7 of the Local Government and Housing Act 1989**, the respondents, as a local authority, are obliged to make every appointment of a person to a paid office or employment on merit.
- 30 4. Within the Environment and Infrastructure Directorate, sits the respondents' Operations and Infrastructure Service, within which sits the Waste Operations Service.

5. Around March 2019, the respondents required to recruit a Waste Operations Team Leader within the Waste Operations Service, and their Operations Manager, Mr Lyall Rennie, sought the required internal approvals within the respondents in order to recruit and advertise for the post of Waste Operations Team Leader.
6. The Tribunal was advised, in the respondents' Further and Better Particulars, and in the evidence from its officers led as witnesses at this Final Hearing, that the post of Waste Operations Team Leader was advertised online via "**myjobscotland**", which is the national shared recruitment portal for Scottish local authorities and some other public sector bodies.
7. Further, the Tribunal was advised that the advertisement for the post went live on the "**myjobscotland**" website on 25 March 2019, and the closing date for applications was 7 April 2019. The Tribunal was provided with a copy of the job advertisement as document 22, at page 122 of the Joint Bundle.
8. What was provided there, as a production lodged by parties for use at this Final Hearing, was the text of the advertisement, rather than a true copy of what was published on the "**myjobscotland**" website.
9. Nonetheless, it was a matter of agreement between the parties at this Final Hearing that the job advertisement included the following text:-

"As a member of the Operations and Infrastructure Management Team this role provides an exciting and challenging opportunity to lead, manage and influence the operational delivery of the Council's waste collection and disposal service."

5 *You will be highly motivated and an effective leader with experience of delivering frontline operational services within a large and complex organisation, you will work collaboratively with key partners to develop and deliver services, leading and supporting operational change, service delivery and service improvements.*

10 *You will have knowledge of the statutory and legislative requirements of the service and relevant national and local programmes and frameworks, knowledge and understanding of route optimisation systems and resource management and have effective communication, presentation, written, influencing and negotiation skills at all levels.*

15 *You will possess a relevant degree or professional qualification or have evidence of professional competence and continuing professional development.*

20 *A driving licence is also essential.*

For an informal discussion about this post please contact Lyall Rennie, Operations Manager”.

25 10. While the job advertisement outlined some of the requirements for the post, the Tribunal was advised, as per the respondents’ Further and Better Particulars, and in the evidence from its officers led as witnesses at this Final Hearing, that the advertisement also attached a copy of the Job Outline and Person Specification for the post, and these documents outlined what the roles and responsibilities of the post were and the objective essential and desirable criteria for the post, which was advertised as grade K on the respondents’ pay and grading structure.

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- 5 11. A copy of the Waste Operations Team Leader Job Outline and Person Specification was produced to the Tribunal as document 23, in the Joint Bundle, at pages 123 to 125 for the Job Outline, and pages 126 to 129 for the Person Specification.
- 10 12. The Job Outline described the post's principal role as having responsibility *"for the operational leadership, development and management of Renfrewshire Council's Waste Services Operation, including Refuse Collection, Refuse Disposal and Household Waste and Recycling Centres, to ensure optimal operational performance and delivery of a high quality, cost effective Service for the Council"*.
- 15 13. Further, the Job Outline detailed 18 key responsibilities, indicative of the nature and level of responsibilities associated with this job, which was graded K, and was to report to the respondents' Waste Operations Manager.
- 20 14. As regards the Person Specification for the job, it highlighted a number of factors, being education; relevant experience; special knowledge and skills; personal features/qualities; management competencies; and other (driving licence).
- 25 15. For the relevant experience, special knowledge and skills, personal features/qualities, and management competencies, the Person Specification stated that the method of assessment would be application form, and interview.
- 30 16. As at the time of the selection interviews, the respondents had in place policies relating to Equality and Diversity at Work, and Recruitment. A copy of the respondents' equality and diversity at work policy, dated November 2010, was produced to the Tribunal as document 20, at pages 109 to 115 of the Joint Bundle.

17. In terms of that Equality and Diversity at Work policy, and so far as material for present purposes, it is provided as follows:-

5 “1.2 *The Council strives to embrace a positive attitude towards the promotion of equality and diversity and to create a working environment which is inclusive of everyone regardless of ethnic origin, religion or belief, disability, age, sex, gender reassignment, sexual orientation, marriage and civil partnership, pregnancy and maternity, carer responsibility, race, nationality, social or economic status, trade union membership or activity.*

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15 1.3 *This policy is consistent and in accordance with the current legislative requirements and the Equality Act 2010 and it is the responsibility of all employees to comply with this policy and be familiar with its content and principles.*

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2.1 *The purpose of this policy is to set out the Council’s vision and commitment to equality and diversity in the workplace. It aims to promote equality and diversity in all aspects of the Council’s work and encourages a working environment which is free from all forms of discrimination and harassment, where all employees can fulfil their full potential.*

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2.2 *The Council is committed to ensuring that equality and diversity is embedded in all aspects of service delivery, and strives to ensure that all employees, customers and partners are treated fairly and with respect at all times.*

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6.1 *This policy should be read in conjunction with other relevant Council policies, procedures and training materials as appropriate, including:*

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- *Recruitment and Selection Procedures*
- ...
- *Code of Conduct for Employees*
- ...

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18. At sections 8.1.3, 8.1.4 and 8.1.5 of that Equality and Diversity at Work policy, various responsibilities are set forth for line managers, employees, and the respondents' HR and Organisational Development Service. As regards disciplinary action, it is provided that:

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"10.2 Concerns or complaints from employees, partners/external agencies, contractors and agency workers will be investigated and any breach of this policy may result in disciplinary action."

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19. Further, as regards monitoring and review, it is stated that:

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"13.1 This policy will be monitored and reviewed regularly as it is applied, and in line with any legislative changes relating to equality and diversity in the workplace. "

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20. Notwithstanding the reference to monitoring and review, the Tribunal was advised by the respondents' witnesses that the Equality and Diversity at Work policy has not been reviewed since its introduction in November 2010.

21. There was also produced to the Tribunal, as document 21, at pages 116 to 121 of the Joint Bundle, a copy of the respondent's Recruitment Policy issued in June 2018, for review in June 2019, by the HR and Organisational Development Service.

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22. The Recruitment Policy contains the following provisions, which so far as material for the present purposes, state as follows:-

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“1.3 The Council will strive to reach out to all community groups through its recruitment campaigns and targeted activities to attract from the widest and most diverse pool of candidates. Appointments will be made on merit and best-fit with the Council's organisational competencies, goals and values whilst meeting best practice and legislative requirements.

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1.4 As required by the Equality Act 2010, the Council will ensure that all potential applicants are treated fairly and given equal opportunity, regardless of ethnic origin, religion or belief, disability, age, sex, gender reassignment, sexual orientation, marriage or civil partnership status, pregnancy or maternity, carer responsibility, race, nationality, social or economic status, or trade union membership or activity.

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2.1 The purpose of this policy is to support the Council to manage all recruitment effectively through the provision of a clear, fair, transparent, legal and lean process.

2.2 The policy aims to:-

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- Build and appoint our workforce of the future based on merit;*

- *Meet all legislative employment requirements;*
- *Implement fair, inclusive and consistent recruitment ensuring recruiting managers are appropriately developed in the process;*
- *Support the achievement of the Council's equality, diversity and gender pay outcomes.*

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3.1 The principles of this policy apply to all potential and existing employees of the Council.”

23. In terms of the respondents' recruitment policy, there are 5 stages to the recruitment process, as follows:-

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Stage 1 – Vacancy Management;

Stage 2 – Preparing to Recruit;

Stage 3 – The Selection Process;

Stage 4 – Pre-Employment Checks; and

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Stage 5 – Offer of Appointment and Induction

24. Stage 3 – the Selection Process – provides as follows:-

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“A variety of selection methods may be utilised such as assessment centres, competency based interviews including the use of digital resources where appropriate and/or recruitment open days. It is good practice that the selection panel should have a gender equality balance where possible through the selection process.”

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25. At Stage 5 – Offer of Appointment and Induction, it is provided as follows:-

5 *“Following interview and assessment outcomes, an offer of appointment subject to satisfactory pre-employment checks can be made to the preferred candidate. An offer of feedback to unsuccessful candidates should also be provided as best practice.”*

10 26. At section 9.1 of the Recruitment Policy, provision is made for **“recruitment complaints”**. It is there provided as follows:-

15 *“If an applicant considers they have been unfairly treated in the application of this policy, a complaint can be made to the Head of Transformation & OD who will thoroughly investigate the matter and take any appropriate actions.”*

20 27. On the evidence provided to the Tribunal, while the claimant entered into correspondence with the respondents, in particular his email of 23 May 2019 to Mrs Hepburn, as detailed later in these findings, and he later brought his Tribunal complaint against the respondents, there was no formal investigation by the respondents, and the matter progressed as their defence of the Tribunal proceedings brought against them by the claimant.

25 28. Notwithstanding section 12.1 of the Recruitment Policy (monitoring and review), and that the policy will be *“reviewed regularly and in line with any legislative changes and best practice relating to recruitment activities”*, the Tribunal was advised by the respondents’ witnesses that the Recruitment Policy has not been updated since it was introduced in June 2018.

30 29. The claimant submitted his application for the post on 7 April 2019, and a copy of his candidate pack was produced to the Tribunal as document 24, at pages 130 to 137 of the Joint Bundle. According

to the respondents' Further and Better Particulars, a total of 26 applications for the post were received by the respondents.

5 30. After the closing date, the respondents carried out a short-listing process to assess which applicants for the post were to be shortlisted for interview, based on the essential and desirable criteria for the post, as set forth in the Job Outline and Person Specification.

10 31. Seven candidates were shortlisted for interview, one of whom was the claimant, and another was **LM** who was the preferred and successful candidate, appointed by the respondents on merit after the interview process.

15 32. These 7 applicants were those who appeared to the short-listing panel of Mrs Lindsey Hepburn (Waste Operations Manager) and Mr Ken Gray (Street Scene Manager) to meet both the essential and some of the desirable criteria for the vacant post, and so merited proceeding to competitive interview.

20 33. A copy of the respondents' short-listing matrix form, completed by Mrs Hepburn and Mr Gray, was produced to the Tribunal as document 25, at page 138 of the Joint Bundle. In terms of that short-listing form, candidates were scored **0** if they did not meet the
25 criteria; **1** if they met some of the criteria; and **2** if they met all the criteria.

30 34. At that short-listing stage, the claimant scored a total of 9 for essential criteria, and 3 for desirable criteria, giving him an overall total of **12**. The successful candidate, **LM**, scored an essential total of 8, and a desirable total of 3, giving her an overall total of **11**. Both were shortlisted for competitive interview, along with the other 5 short-listed applicants.

35. By email from Mrs Lindsey Hepburn, the respondents' Waste Operations Manager, sent to the claimant on 11 April 2019, he was invited to interview on Thursday, 18 April 2019.

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36. In her invite email to the claimant, a copy of which was produced to the Tribunal as document 26, at page 139 of the Joint Bundle, Mrs Hepburn stated that:

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"As the interviews are next Thursday, I was keen to contact you to give you as much notice as possible as you will be required to do a presentation as part of the interview process.

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The presentation should last no longer than 10 minutes and on the following topic:-

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"Describe your role in implementing a new recycling initiative, highlighting the key components of the project and any problems you overcame".

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I would be grateful if you could email your presentation to me by Wednesday 17th April at 12 noon."

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37. Further, by email on 15 April 2019, from **myjobscotland** to the claimant, copy produced at page 140 of the Joint Bundle, the claimant was called for interview at 15:00 hours on 18 April 2019 and advised that he should email his presentation to Lindsey Hepburn.

38. The claimant anticipated that his presentation would form part of the formal interview process, and so be taken into account by the interview panel.

5 39. All interviews were held before a panel comprising of Mrs Lindsey Hepburn (Waste Operations Manager) and Mr Ken Gray (Street Scene Manager), and a Mrs Kathleen Clark (Principal HR Advisor) also attended each of the interviews held on 18 April 2019 within the respondents' headquarters at Renfrewshire House, Paisley.

10 40. Mrs Clark was there in order to provide HR support to the interview panel to ensure a fair and consistent recruitment process was followed. She was not an interviewer, despite being so described on the respondents' pro-forma interview assessment sheets.

15 41. Mrs Hepburn chaired the interview panel, comprising herself and Mr Gray, with Mrs Clark as HR adviser, and the interview process was structured as follows:-

- 15
- (a) introduction;
 - (b) a prepared presentation given by each candidate, which was not scored, and regarded by the panel as an icebreaker for the candidates to ease themselves into the interview;
 - 20 (c) set questions were asked of each candidate; and
 - 25 (d) questions, if required, from each candidate.

30 42. All interviews held were similar in terms of length, being around three quarters of an hour, with the respondents allocating one-hour slots for each interview. The claimant's interview was the second last interview of the day, on 18 April 2019.

43. Each candidate presented their presentation, and they were thereafter asked the same set of questions and the same

structured process was followed for each and every candidate interviewed by the panel.

5 44. Mr Gray and Mrs Hepburn each completed interview assessment sheets in respect of each candidate that was interviewed on 18 April 2019, including the claimant, and the successful candidate, **LM**.

10 45. A copy of the claimant's interview presentation was produced to the Tribunal as document 30, at pages 146 to 153 of the Joint Bundle. He made his presentation to the interview panel.

15 46. A copy of the successful candidate, **LM**'s presentation was not produced to the Tribunal, as the respondents stated that presentations were not scored, but designed to be an icebreaker for the candidates to put themselves at ease at the start of the interview process.

20 47. While no copy presentation for **LM** was produced to the Tribunal, the respondents' witnesses confirmed that **LM**, as with all other candidates, made a presentation to the interview panel.

25 48. Mrs Hepburn, as chair of the interview panel, as well as Mr Gray, as the other member of the interview panel, completed separate interview assessment forms for all of the candidates, including the claimant, and **LM**.

30 49. The interview assessment sheets were based on a template document drafted by the respondents' recruitment team in August 2016, with a document header "**per/rec 24**".

50. The completed interview assessment sheets for the claimant were produced to the Tribunal as document 34, at pages 168 to 170 of

the Joint Bundle for the form completed by Mr Gray, and at pages 171 to 173 for the form completed by Mrs Hepburn.

5 51. For the successful candidate, **LM**, Mr Gray's completed interview assessment sheet was produced to the Tribunal at document 35, pages 177 to 179, while Mrs Hepburn's completed interview assessment sheet for **LM** was produced at pages 174 to 176.

10 52. In completing her interview assessment sheets, Mrs Hepburn wrote a brief description of the candidate's response to each of the set questions asked at the interview, whereas Mr Gray took separate handwritten notes, a copy of which were produced to the Tribunal at document 31 (pages 151 to 157) for the claimant, and document 32, at pages 158 to 161, for **LM**.

15 53. For the Tribunal's ease of reference only, a typed-up version of Mr Gray's interview notes for the claimant and **LM** were produced to the Tribunal as document 33, at pages 162 to 167.

20 54. On his interview assessment sheet for the claimant, Mr Gray scored the claimant, in regard to the questions asked at interview, as 5, 4, 3, 4, 3, 4, 4, and 3. He did not indicate any candidate response to the questions, nor indicate that they were on his attached notes.

25 55. In answer to the quality of presentation, and quality of responses to questions, his completed interview assessment sheet contained no entry. For the interviewer's comments, Mr Gray stated "**Answers to some questions require greater detail to own role & qualities.**" He gave the claimant an overall assessment of **4**, and recommended "**Do not appoint**", giving as his reason: "**Other stronger candidate**" (unidentified). His form was signed, and dated 25 April 2019.

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56. In completing her interview assessment sheet for the claimant, Mrs Hepburn briefly noted the candidate responses to the questions asked at interview, and scored him as 5, 4, 3, 4, 3, 4, 4, and 3. In scoring the claimant's answer to the supplementary question on "forward thinking", Mrs Hepburn appears to have initially marked that as a 5, the same as the mark allocated for the principal question on that factor, but then scored that out, and ticked a score of 4.

57. She made no entry on quality of presentation, or quality of responses to questions and, as regards her recorded interviewer's comments, she stated "***lacked leadership (his role) within responses***". She gave the claimant an overall assessment of **4**, and her recommendation was "***Do not appoint***", the reason given being "***Failed to provide enough detail in relation to his role. Other stronger candidate.***" The other candidate is not identified. She signed her interview assessment sheet for the claimant on 24 April 2019.

58. When it came to completing his interview assessment sheet for the successful candidate LM, Mr Gray made no entry under candidate responses (nor did he refer to his handwritten notes), and he scored her answers to the questions as 4, 4, 5, 4, 4, 3, 4, and 5. He made no entry for quality of presentation, or quality of responses to questions.

59. In his interviewer's comments, he stated "***strong interview with positive & detailed examples to demonstrate competence.***" He gave **LM** an overall assessment of **4**, and recommended that she be appointed, the reason given being stated as "***strongest candidate & met essential criteria.***" He signed the interview assessment sheet on 25 April 2019.

5 60. For the successful candidate **LM**, Mrs Hepburn's completed interview assessment sheet briefly recorded the candidate response to the questions asked at interview, and she scored her as 4, 4, 5, 4, 4, 3, 4, and 5. She made no entry under quality of presentation, or quality of responses to questions.

10 61. As regards her interviewer comments, she stated "***interviewed well, gave good examples, described her role within examples.***" She gave **LM** an overall assessment of **4**, and recommended that she be appointed, giving as her reason: "***strongest candidate and met essential criteria***". She signed the interview assessment sheet on 25 April 2019.

15 62. Albeit Mrs Kathleen Clark had been the HR advisor at the interview, and not a decision maker on the interview panel, Mrs Clark signed **LM's** interview assessment sheet (prepared by Mrs Hepburn) on 2 May 2019, to confirm that **LM** was the preferred candidate to be offered the post, which **LM** did, being appointed thereafter.

20 63. Following all 7 interviews that took place on 18 April 2019, Mr Gray and Mrs Hepburn weighed up the skills, qualifications, experience, and responses to interview questions of all candidates that were interviewed. A scoring process was carried out in relation to each of the interviewed candidates, based on their responses to the questions at interview.

25 64. As a result of the scoring process, the claimant received a total score of **30**, whereas **LM**, the successful candidate, received a score of **33**. The claimant performed well at interview, and the interview panel scored **LM** and the claimant very closely, being just 30 3 points apart.

65. **LM** received a better score than the claimant in two key areas of the interview questions on "Leads and Engages", and

“Transformational Change”. Mr Gray and Mrs Hepburn were of the view that **LM** provided more detailed answers to some of the questions asked compared to the claimant, and that **LM** was able to demonstrate better their skills, experience in these key areas of the role.

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66. As **LM** received the highest score, and therefore she was objectively the best candidate, she was identified by the interview panel as the preferred candidate, and recommended to be appointed to the role. Her appointment is in accordance with the legal provision which provides that every appointment of a person to a paid office or employment under a local authority in Scotland shall be on merit. The claimant was not appointed because he was not identified as the best candidate performing at the competitive interview process. He was the runner up, and, had **LM** not accepted the post, then it would have been offered to the claimant, as next highest scoring candidate, subject always to pre-employment checks, as per the respondents’ recruitment process.

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67. On 2 May 2019, the claimant received an email from myjobscotland advising him that he had not been successful in his application for the post. Also, on that day, Mr Gray called the claimant by telephone and informed him that he had not been successful, and that another candidate had been appointed to the post.

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68. During that telephone call, Mr Gray advised the claimant that Mrs Hepburn was on annual leave and that she could provide feedback to the claimant on her return from annual leave, if he wished.

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69. The respondents’ Recruitment Policy provides that an offer of feedback to unsuccessful candidates should be provided as best practice and, in accordance with the respondents’ policy, Mr Gray

offered the claimant the opportunity to receive feedback from Mrs Hepburn.

5 70. On 3 May 2019, the claimant emailed Mrs Hepburn to ask her to arrange a call to provide feedback to him. A copy of his email was produced to the Tribunal at document 37, at page 181 of the Joint Bundle, where he stated:

10 *“Ken called me yesterday regarding the outcome of my interview, he asked if I needed feedback in which I replied yes. He stated that you are on holiday, that when you came back, we are going to have a conference call in order to give me the feedback. I will be looking forward to the call, in order to get the feedback so as to know my areas of weakness.”*

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20 71. Mrs Hepburn was on annual leave from 29 April to 6 May 2019. On her return from annual leave, she scheduled a telephone call with the claimant in order to give him feedback on his interview. She arranged to call the claimant on 10 May 2019, however, this call had to be rescheduled to 13 May 2019, because the claimant was unable to take the call on 10 May 2019.

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72. On 13 May 2019, Mrs Hepburn called the claimant, but his telephone was not working and therefore the call was rescheduled again to 14 May 2019. Mrs Hepburn spoke with the claimant on the telephone on 14 May 2019.

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73. During this telephone call, Mrs Hepburn provided detailed feedback to the claimant about his interview and explained why he had been unsuccessful. The claimant was advised, after he pressed Mrs Hepburn about whether **LM** was internal or external, that **LM** was an internal candidate, i.e. an existing employee of the respondents.

5 74. At no point during this call was any personal information about **LM** discussed. The claimant was not informed, nor did he ask about **LM's** race. No details about **LM** were provided to the claimant, other than that they were an internal candidate. Mrs Hepburn did not disclose the sex, race, ethnicity, or any personal information about **LM** to the claimant.

10 75. Unknown to Mrs Hepburn, the claimant covertly recorded that feedback call that took place between himself and herself on 14 May 2019. She had not given her permission for this call to be recorded, and the claimant did not make her aware that he was recording the call.

15 76. There was produced to the Tribunal, and accepted as document 49 at the continued Final Hearing, on 1 March 2021, at pages 259 to 264 of the Joint Bundle, a jointly agreed transcript of the interview feedback call between Lindsey Hepburn and the claimant on 14 May 2019.

20 77. It is clear, from the terms of the agreed transcript, that detailed feedback was given to the claimant by Mrs Hepburn, that she did not tell him he had received "5 top marks", that the claimant never asked what race **LM** was on this call; and that the claimant was
25 advised that the presentation was an icebreaker and not scored.

30 78. On 23 May 2019, Mrs Hepburn received an email from the claimant regarding his disappointment at not being appointed to the post. A copy of this email was produced to the Tribunal as document 43, at page 190 of the Joint Bundle, and it was in the following terms:-

"I would like to thank you for the feedback you gave me regarding my interview with you, having fully regurgitated over

5 *and over about it, I believe I was racially discriminated against. The only issue you had with my interview was that internal staff were specific in highlighting issues facing waste management operation in Renfrewshire Council. You have every opportunity to have advertised this job internally but you never did. Advertising it to the public, you should have put everybody on a level playing field. I have worked in at least 3 Councils and I would like to point it out to you that every Council has a similar issue related to waste management.*

10 *You also said you did not score the presentation because it's not part of the interview. I totally disagree with you, the presentation is the hardest part of the interview and it should have been scored. You are trying to cut every leverage I have for the interview in order to deny me the post.*

15 *I have decided to take legal action against Renfrewshire Council for racial discrimination.”*

20 79. On 29 May 2019, Mrs Hepburn acknowledged receipt of the claimant's email dated 23 May 2019, and advised that she would respond the following week. The respondents sought legal advice from their in-house solicitors in relation to this email. Thereafter, on 7 June 2019, Mrs Hepburn responded to the claimant's email, a copy of which was provided to the Tribunal as document 43, at
25 page 189 of the Joint Bundle.

80. In that email, the claimant was advised as follows by Mrs Hepburn:

30 *“In response to your email received on 23rd May 2019, I would like to provide you with further feedback on your interview for the post of Waste Operations Team Leader.*

5 *The first part of the process included a presentation. The presentation was intended to be an ice-breaker to allow candidates the opportunity to open up and engage with the recruitment panel. The presentation was not formally assessed*
however as a panel we thought your topic of presentation was very interesting and we enjoyed hearing about the new recycling initiative at North Lanarkshire Council. In terms of the delivery of the presentation, I would highlight the importance of making good eye contact as this allows you to connect and build
10 *a rapport with the panel however during the presentation and throughout your interview you tended to focus on one member of the panel only when providing your responses.*

15 *With reference to your interview, we were impressed with your knowledge and experience within the waste industry and this was reflected within your responses. However there were areas in which your answers lacked depth, particularly in relation to your role as a leader and we felt that you did not make your role within the examples clear as you tended to be more descriptive and we would have liked to have heard more*
20 *about what you personally achieved and how you went about it, you often refer to “we” instead of “I”.*

25 *In addition, we felt your responses in relation to transformational change were also descriptive and tended to focus on operational processes. The role of Operations Team Leader requires a high level of strategic thinking and we were looking for examples which highlighted the importance of leadership when implementing new service changes, how to*
30 *manage barriers to change and your specific role in delivering this. We felt that your response to transformational change was slightly negative towards your existing employer and we would*

emphasise the importance of trying to highlight the positives as well as the negatives in your responses.

5 *The post was advertised externally to ensure we were able to select from a wider pool of candidates and I can confirm that 3 external candidates and 4 internal candidates were interviewed.*

10 *Overall you performed well in the interview and scored 30 out of a possible 40. As the successful candidate scored higher than you, this candidate was appointed. The assertion that you make below that the reason why you were not appointed was on the basis of race discrimination is completely unfounded. Renfrewshire Council is committed to ensuring that all employees, customers and partners and other parties are treated fairly and with respect at all times. The Council promotes and encourages a culture whereby equality of opportunity exists for everyone regardless of race, sex, gender identity, disability, age, religion or belief, sexual orientation, pregnancy and maternal status or marriage or civil partnership status.*

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I do hope the above information is helpful to you and I wish you all the best with any future job applications.”

25 81. In connection with these Tribunal proceedings, the claimant provided a Schedule of Loss on 27 August 2020, a copy of which was produced to the Tribunal as document 4, at pages 30 and 31 of the Joint Bundle. He sought compensation in the total sum of **£106,752.19**.

30 82. This comprised loss of salary for 90 weeks, at £785.88 per week (£70,729.20), plus loss of pension for 90 weeks @ 8.5% (£6,011.99), and compensation for injury to feelings @ £44,000,

totalling £120,741.18, less income from benefits from 22 May 2019 to December 2020 (@ £12,488.99), money earned (through mitigation) @ £1,500, totalling deductions of £13,899.99, producing the total claimed at £106, 752.19.

5

83. It was a matter of agreement between the parties at this Final Hearing that, as per the respondents' Counter Schedule of Loss, as at 10 September 2020, copy produced to the Tribunal as document 5, at pages 32 and 33 of the Joint Bundle, if the claimant had been appointed to the post, gross weekly pay would have been £743.40 per week, producing £571.28 per week. Had he joined the Local Government Pension Scheme, employee contributions would have been 6.3%, with employer contribution 19.3%.

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84. Thereafter, on 15 November 2020, the claimant produced an updated Schedule of Loss, a copy of which was produced to the Tribunal as document 12, at pages 52 and 53 of the Joint Bundle. On the basis of losses from 18 April 2019 to 31 December 2020, the claimant's total financial loss was assessed at **£91,061.04**. That included a sum of £45,000 for injury to feelings using the upper "Vento" band. He disclosed his mitigation earnings of £1,200 from Tapzino Consulting, and his total benefits through Universal Credit.

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85. Finally, at the continued Final Hearing, on 3 March 2021, the claimant provided a final, revised Schedule of Loss, which the Tribunal received as document 50, at pages 265 to 268 of the Joint Bundle. The claimant recalculated his losses from 18 April 2019 to 30 November 2020, showing a total financial loss now at **£89,026.53**, inclusive of injury to feelings at £45,000.

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86. In cross-examination, the claimant accepted, in principle, that his calculations required further revisal, and that any losses accrued

from 2 May 2019, when he was informed that he was unsuccessful in getting the post.

5 87. The respondents included in the Joint Bundle, at documents 44 and 45, at pages 191 to 203, various copy Employment Tribunal judgments in claims brought by the claimant against other respondents, namely Argyll Community Housing Association (4112456/2019, issued 20 March 2020), and Argyll & Bute Council (4107178/2019, issued 20 April 2020).

10 88. While the claimant accepted, in cross-examination before this Final Hearing, that these were judgments on the public record, on the Gov.UK website, where his race discrimination complaints against those respondents had been dismissed by another Tribunal, this Tribunal has noted them, but given them no weight as they are not
15 binding on this Tribunal, and, in any event, related to the particular facts and circumstances of those other cases.

20 89. At the continued Final Hearing before this Tribunal, late on in the afternoon of Tuesday, 2 March 2021, the claimant gave oral evidence that he had secured new employment, as an Environmental Health Officer with Carlisle City Council, starting on 4 January 2021, and he gave further evidence in chief, on 3 March 2021, but he declined to produce, as requested by the respondents, any supporting documentation, stating that it was
25 private and confidential, and not relevant. He declined to produce any documentation to the respondents, for personal reasons, and he restricted his claim for financial compensation against the respondents to 30 November 2020.

30 90. While the claimant had never mentioned, in the first diet of Final Hearing, in December 2020, that he had been offered a new job with another employer, at the Continued Final Hearing on 3 March 2021, he admitted, in oral evidence, that he had been offered this

5 job with Carlisle City Council on 12 November 2020, that he accepted that offer on 12 December 2020, as a 12 months contract, he started induction around 19 December 2020, and that employment was now to terminate on 26 March 2021, as he stated funds are no longer available as planned, and funding for his post will be ending.

Tribunal's assessment of the evidence heard at the Final Hearing

10 41. In considering the evidence led before the Tribunal, we have had to carefully assess the whole evidence heard from the various witnesses led before us, and to consider the many documents produced to the Tribunal in the agreed Joint Bundle lodged and used at this Final Hearing, so far as spoken to in evidence, which evidence and our assessment we now set out in the following
15 sub-paragraphs:-

(1) Mr David Odigie: claimant

20 (a) The claimant was the first witness to be heard by the Tribunal on Tuesday, 1 December 2020, and continued to the following day. We heard from him again, on the first day of the continued Final Hearing, on Monday, 1 March 2021, as regards the agreed transcript of the telephone feedback call on 14 May 2019.

25 (b) Further, on the last day of the continued Final Hearing, on Wednesday 3 March 2021, we heard further evidence in chief, from the claimant, again elicited by the Employment Judge, followed by cross-examination by Ms Lilburn for the
30 respondents, on the claimant's Schedule of Loss, its updating in the new document accepted as document 50, and his attempts to mitigate his losses, and in particular his new employment with Carlisle City Council, which he had

disclosed to the Tribunal, and the respondents, for the first time, at the close of proceedings the previous afternoon, Tuesday 2 March 2021.

- 5 (c) In giving his evidence in chief to the Tribunal, the claimant did so, answering a series of structured and focused questions asked by the presiding Employment Judge, a process as agreed by both parties. In answering, the claimant did so under reference to various documents lodged with the Tribunal, and
- 10 in the Joint Bundle, identifying points of concern to him, arising from the respondents' recruitment and selection process, and his unsuccessful application for the vacant post.
- (d) In doing so, he spoke to the terms of the updated Schedule of
- 15 Loss, intimated on 15 November 2020, and confirmed that he was still unemployed, but looking for employment, and he was seeking financial compensation from the respondents, including an award for injury to feelings, as per his Schedule of Loss intimated to the Tribunal, and copied to the respondents.
- 20 (e) When the claimant came to be cross-examined by Ms Lilburn, acting for the respondents, his answers to her questions in cross-examination were more difficult to comprehend, and it appeared to the Tribunal that the claimant was being both
- 25 evasive and ambiguous, and seeking to add new areas of concern to his claim, that were not part of the original, pled ET1 claim form.
- (f) Indeed, even after his amendment was allowed, on Monday 30
- 30 November 2020, the claimant continued, in the course of giving his answers, and particularly in the course of cross-examining the respondent's witnesses, to raise new matters, which had

not been pled in the original ET1 claim form, nor foreshadowed in the amended ET1 claim form allowed by the Tribunal.

- 5 (g) Further, despite the Judge's clear, and often repeated, guidance to the claimant, as an unrepresented party litigant, that he needed to cross-examine the respondent's witnesses on the terms of their evidence in chief, and raise with them matters that he disputed, and put to them points in his pled case, the claimant frequently disregarded the judicial guidance offered to him, as an aid to putting him on an equal footing with the respondents' solicitor.
- 10
- (h) Further, it is noted and recorded here that the claimant ignored the oft repeated guidance from the Judge for him to ask bite size questions, not give evidence, or make statements, and to refer the witness to the relevant document, and the relevant page number, in the Joint Bundle, if he was asking them a specific question.
- 15
- 20 (i) Overall, we found the claimant to be a confused, and confusing witness, who despite having a deep passion for his cause, and belief that he has been the victim of unlawful racial discrimination by the respondents, lacked both credibility, and reliability. The Tribunal was not convinced that the claimant had a genuine belief that he had been discriminated against by the respondents on grounds of his protected characteristic, as it is clear from the evidence before us that at the time he first complained of "**racial discrimination**" on 23 May 2019, and presented his ET1 thereafter, he did not know the race of the successful candidate **LM**, and the focus of his complaint was about an internal candidate being appointed.
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- 30

(2) Mrs Lindsey Hepburn: respondent's Waste Operations Manager

5 (a) Mrs Hepburn was the first witness for the respondents to be heard by the Tribunal on day 1 of the continued Final Hearing, on Monday, 1 March 2021. In giving her evidence to the Tribunal, she did so under reference to various documents lodged with the Tribunal, and in the Joint Bundle, explaining her role in the short-listing process, and thereafter the interview panel, and her involvement in the selection decision to appoint **LM** as the preferred candidate, with the claimant as the next highest scorer after the interview process.

15 (b) She gave her evidence clearly and confidently, under reference to the relevant productions contained within the Joint Bundle used at the Final Hearing, and she was fairly clear and articulate in answering questions put to her in examination in chief by Ms Lilburn, solicitor for the respondents.

20 (c) Further, Mrs Hepburn was subject to cross-examination by the claimant, but her evidence in chief was not undermined, as it was generally in accord with the contemporary records taken at the time of the interview process. Overall, Mrs Hepburn's evidence relating to her role as chair of the interview panel satisfied us that she was giving the Tribunal a full recollection of events, as best she could remember them, and she came across to the Tribunal as a credible and reliable witness.

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(3) Mr Ken Gray:- respondent's Street Scene Manager

(a) Mr Gray was the second witness led on behalf of the respondents and, on account of him being in self-isolation, due to COVID 19 positive testing for a member of his family, he gave

his evidence remotely, on Tuesday, 2 March 2021, joining the in person Final Hearing through use of the CVP. He had available to him, at his home, a full set of the Joint Bundle, as he would have had had he been in attendance personally and giving his evidence from the witness box in the Glasgow Tribunal Centre.

5

(b) In giving his evidence to the Tribunal, Mr Gray did so under reference to the various documents contained within the Joint Bundle, identifying those which he had access to at the time of his involvement in the short listing process, and the interview process, and he generally explained his role, and his reasons for preferring **LM**'s interview performance to the claimant's, and for **LM** being the preferred candidate from the interview selection process. Again, his evidence was generally in accord with the contemporary records taken at the time.

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(c) Overall, Mr Gray was a witness who satisfied us that he was recounting events as best he could recall, and he too came across to the Tribunal as a credible and reliable witness speaking clearly, and confidently, to his role as a decision maker on the interview selection panel.

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(4) Mrs Kathleen Clark: respondents' Principal HR Advisor

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(a) The final witness heard by the Tribunal was Mrs Clark, and her evidence was taken on Wednesday, 3 March 2021, when she was examined in chief by the respondents' solicitor, Ms Lilburn, and thereafter cross-examined by the claimant.

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(b) While described on the interview assessment sheets as a member of the interview panel, Mrs Clark made it clear, as had

Mrs Hepburn and Mr Gray before her, that Mrs Clark was an HR advisor, and not a decision maker on the selection panel.

5 (c) Giving her evidence to the Tribunal, she did so under reference to various documents contained within the Joint Bundle, speaking to the respondents' practices and policies, and her participation in the interviews, on 18 April 2019, she having had no involvement in the shortlisting process carried out previously by Mrs Hepburn and Mr Gray.

10 (d) In giving her evidence to the Tribunal, Mrs Clark gave an overview of the respondents as a corporate public sector organisation, and the role that she, and her team, play in providing a full HR function to the Council. She also spoke to the Equality and Diversity, and Recruitment Policies, included within the Joint Bundle provided to the Tribunal for use at this
15 Final Hearing.

20 (e) She was clear that the Equality and Diversity Policy, issued in November 2010, was that still currently in use within the respondents, and available on their intranet site, and that she had not seen any other document, only this November 2010 version. She further stated that it had not been reviewed in
25 10 years, and that she would raise that matter within the organisation.

30 (f) Similarly, Mrs Clark confirmed that the Recruitment Policy, introduced in June 2018, and due for revision in June 2019, was still the current document used within the respondents, and that they were still working to it. She also spoke to the recruitment process, and the use of *myjobscotland*.

- 5 (g) Unfortunately, while she referred the Tribunal to the Job Outline, and Person Specification, the witness could not say if the Person Specification was posted on the *myjobscotland* website, and she went further, and stated that she would not put a Person Specification on that job site, but she did not know whether that had happened in this case, or not.
- 10 (h) The impression gleaned by the Tribunal, from the evidence of Mrs Hepburn and Mr Gray, was that both the Job Outline and Person Specification were posted on the *myjobscotland* website, but, in the event, the matter could have been clarified beyond any doubt if the respondents had lodged, in the Joint Bundle, the actual advert placed on *myjobscotland*, rather than simply the text for that advert.
- 15 (i) Mrs Clark was also asked questions, in evidence in chief by Ms Lilburn, about the short-listing process, and the use of presentations at interviews. As an HR professional, she stated that if you asked an applicant for a presentation, then you should include it as part of the process, and it should be scored.
- 20 (j) While she was not part of the interview panel, merely an advisor, Mrs Clark in giving her evidence to us was crystal clear in her recollection that none of the presentations made were scored, and that was applied consistently throughout all of the interviews carried out on 18 April 2019.
- 25 (k) She had seen the interview assessment sheets completed by Mrs Hepburn and Mr Gray for both **LM**, and the claimant, and she stated that it was Mrs Hepburn and Mr Gray, as panel members, who marked the candidates and gave scores for the questions answered. She explained that she had signed the interview assessment sheet for **LM**, at Mrs Hepburn's request,
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as she had requested that she take all the sheets to tally up the scores given, for the final score, as Mrs Hepburn had not done that before, being a recent joiner with the Council, and that she signed that sheet to endorse **LM** as having the highest score.

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(l) While Mrs Clark spoke to the overall assessment, on page 3 of the interview assessment form template, she explained that you look at the interview assessment sheets, and count up the individual scores of 5, 4, 3, 2 and 1, and whatever has the majority is the overall assessment. As both **LM** and the claimant each had 4 scores of 4, that was their overall assessment, but the interview panel then count up the total scores, and that gives the final score.

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(m) Mrs Clark accepted it would be very useful if the template document used by the respondents for interviews had been updated, to provide space for an overall score box, and she stated that she would draw that to the attention of the Recruitment Team when she got back to the office after having given her evidence to this Tribunal.

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(n) Mrs Clark was clear that, in her professional HR view, both **LM** and the claimant got consistent treatment, and everything at the interview was fair and consistent, and that nobody was treated less favourably than any other candidate.

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(o) Having read the agreed transcript of the feedback interview with Mrs Hepburn, Mrs Clark stated that she thought it was more than satisfactory feedback to the claimant, and, in her opinion, it was feedback at a high level to the claimant.

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(p) When it came to Mrs Clark being asked questions about the ET1 claim form served on the Council, her evidence was

5 confused, and she initially thought she had seen it in August 2020, rather than after it was served in November 2019, but she then stated she was sure she would have seen it before December 2019, when the Council's ET3 response was put in by Mr Nairn Young, solicitor with the Council, although she could not recall specifically.

10 (q) She strongly refuted that the claimant's treatment, in not being selected for the post, was racially motivated and she stated that the claimant's race had no bearing at all on the process followed by the respondents. She emphasised how Council officers have a legal duty to appoint the person with the highest score, and who therefore merits the offer of the post.

15 (r) Overall, while Mrs Clark was a generally credible witness, speaking to the Council's policies and practices, and her involvement in the interview panels for this selection exercise, the reliability of parts of her evidence did not impact on the fact that, generally speaking, her evidence about the interview process, and the methodology adopted, was consistent with
20 that of Mrs Hepburn and Mr Gray as the decision makers on the panel.

Parties' Closing Submissions

25 42. While, in assigning the 3 days for the continued Final Hearing, it was timetabled that the Tribunal would hear closing submissions from both parties, on the afternoon of Wednesday, 3 March 2021, in the event, that did not happen, as the Tribunal was hearing evidence from the respondents' final witness, Mrs
30 Clark, and so a further day required to be identified for the purpose of closing submissions from both parties.

43. Case Management Orders for that purpose were given orally by the Judge at the close of proceedings on 3 March 2021, and followed up, in writing, by letter from the Tribunal on 4 March 2021. Ms Lilburn was ordered to intimate her written skeleton argument by no later than 12 noon on Thursday 11 March 2021, with the claimant to intimate an annotated version of his list of 9 case law authorities, identifying clearly the relevant legal principle being relied upon, with full citation of page/paragraph number of the Judgment relied upon, as per his list intimated to the Tribunal by email on 25 February 2021, so as to give the Tribunal, and the respondents' representative, clear specification and fair notice of the legal arguments being presented to the Tribunal by the claimant.
44. The respondents had previously, on 29 January 2021, provided their list of authorities, to the Tribunal, copied to the claimant, as follows:

15

Legislation

20

- S.9 Equality Act 2010
- s.13 Equality Act 2010
- s.23 Equality Act 2010
- s.39 Equality Act 2010
- s.136 Equality Act 2010

25

Case Law

30

1. **Barton v Investec Henderson Crosthwaite Securities Ltd** [2003] I.C.R. 1205
2. **Shamoon v. Chief Constable of The Royal Ulster Constabulary** [2003] ICR. 33
3. **Madarassy v Nomura International** [2007] ICR 86
4. **Bahl v The Law Society** [2004] EWCA Civ 1070
5. **Igen v Wong** [2005] ICR 931
6. **Hewage v Grampian Health Board** [2012] I.C.R. 1054

7. **Ayodele v Citylink Ltd** [2018] I.C.R. 748
8. **Laing v Manchester City Council** [2006] I.C.R. 1519
9. **Chairman and Governors of Amwell School v Dougherty** [2007] I.C.R. 135
- 5 10. **Fleming v East of England Ambulance Service NHS Trust** 2017 WL 08148372 or UKEAT/0054/17/BA
11. **Phoenix House Ltd v Stockman** [2019] WL 02914014 or UKEAT/0058/18/OO
12. **Vento v Chief Constable of West Yorkshire**, [2003] I.C.R. 318
- 10 13. **Cadogan Hotel Partners Ltd v Ozog** [2014] WL 3925328 or UK
14. **Komeng v Creative Support** 2019 WL 05102724 or UKEAT/0275/18/JOJ

45. Further, the claimant, in his email of 25 February 2021, at that time intimated
 15 his list of 9 case law authorities, as follows:-

1. **Macdonald v Advocate General for Scotland** (2003) UKHL 34
2. **R. v Birmingham City Council**, ex parte EOC, (1989) A.C. 1155 (CA and HL)
- 20 3. **Owen and Briggs v James** (1982) I.C.R. 618 (CA)
4. **Chief Constable of West Yorkshire v Khan** (2002) I. W. L. R. 1947
5. **Simon v Brimham Associates** (1987) I. C. R. 596. CA
6. Case C-54/07 **Feryn** (2008) ECR 1-05187 (ECJ)
7. **King v Great Britain-China Centre** (1992) I. C. R. 516 (CA)
- 25 8. **Re Equal Opportunities Commission for Northern Ireland's Application (1989) I.R.I.R 64** (NI High Court) A case brought on the sex Discrimination (Northern Ireland) Order 1976
9. **R V Birmingham City Council**, ex parte Equal Opportunities Commission (1989) I.A.C. 1156 (HL), 1194, citing **R.v Commission**

for Racial Equality ex parte Westminster City Council (1985) I.C.R. 827 (CA).

- 5 46. The claimant did not provide an annotated list of his authorities as per the Judge's Order dated 4 March 2021. It appears that he was confused as to what was required by the Tribunal. Following an email exchange with Ms Lilburn, on the afternoon of 11 March 2021, after she had provided the respondents' skeletal written submission to the claimant and Tribunal by email at 12:06 pm, the claimant emailed Ms Lilburn at 22:51 pm that evening, stating
10 he had provided the cases and legal principles he would be relying on, and attached a document entitled "**Court cases**", identifying the 5 cases he was now relying upon.
- 15 47. The claimant did so with some highlighted passages from some of those cited judgments marked up for emphasis. He did that for 4 of the 5 cases he cited, being (1) **Ms L. Barton v Investec Henderson Crosthwaite Securities Limited**; (2) **Madarassy v Nomura International Plc**; (3) **Kamlesh Bahl v The Law Society, Robert Sayer, Jane Betts**, and (4) **Hewage v Grampian Health Board**. While he cited a further case (being **Ayodele v Citylink Limited and another**), no highlighted paragraphs from that judgment were
20 provided in his document intimated to Ms Lilburn, and forwarded by her to the Tribunal on the morning of Friday, 12 March 2021.
- 25 48. Thereafter, while the Tribunal had received Ms Lilburn's written skeleton closing submissions for the respondents, the claimant intimated, before replying to her oral submissions, that he had his own written submission, which he was asked to, and did, then email in to the Tribunal, at 11:26 am, on the morning of Friday, 12 March 2021, with an attached document entitled
30 "**Skeletal Statement**", comprising 6 typewritten, but unnumbered, and unparagraphed, pages of text, some of which was highlighted text from relevant sections of productions contained within the Joint Bundle.

49. It was not, however, a comprehensive response to Ms Lilburn's detailed, written skeleton for the respondents and, in that regard, and to give the claimant a fair opportunity to respond to her detailed written submissions, the Judge asked the claimant certain questions of clarification, when he had
5 concluded his own oral submissions to the Tribunal.

50. Ms Lilburn's written skeleton submissions on behalf of the respondent ran to 18 typewritten pages of text, extending to some 74 paragraphs in total. She invited the Tribunal to make certain, specified findings in fact, and she
10 described the relevant law in relation to direct discrimination, comparator, alleged less favourable treatment, and the burden of proof in discrimination cases, at paragraphs 3 to 34 inclusive, before then addressing the issue of the claimant's covert recording, at paragraphs 35 to 44, followed by her views on witness credibility and reliability at paragraphs 45 to 48.

15 51. She concluded with her submissions on the issue of remedy, at paragraphs 49 to 71, stating that the claimant was not entitled to any compensation or other remedy from the Tribunal but, in the event the Tribunal was minded to make an award of compensation in this claim, requesting that we consider her
20 detailed submissions. In that regard, Ms Lilburn addressed the claimant's position on financial loss, providing proposed amendments to his updated Schedule of Loss, as well as outlining the respondents' position on the claimant's asserted financial loss, before addressing injury to feelings, and the claimant's failure to mitigate his losses.

25 52. Ms Lilburn's written skeleton submissions on behalf of the respondents are held on the Tribunal's case file, so it is not necessary to repeat their full terms verbatim here but, for present purposes, it will suffice to note her conclusion, at paragraphs 72 to 74, as follows:-

30

“72. The Respondent submits that the reality of the situation in this case was that the Claimant was not the best candidate for the

job. Unfortunately, this can be a common issue for any jobseeker.

5 ***73. The Respondent submits that in this case, the Claimant has not proven any facts from which a Tribunal could conclude that the Respondent had committed an act of discrimination. In the absence of the Claimant proving such facts, the claim should fail.***

10 ***74. The Respondent submits that none of the assertions made by the Claimant in his claim amount to discrimination and therefore it is submitted that the Tribunal should dismiss the Claimant's claim in full."***

15 53. The claimant's own skeletal written statement is again held on the Tribunal's case file, so it is not necessary to repeat its full terms verbatim here but, for present purposes, it is sufficient to note that, after a brief chronology of events, and cross reference to relevant documents in the Joint Bundle, at page 1 of 6 of his written submission, the claimant stated that having received the detailed feedback from Mrs Hepburn, on 14 May 2019, which date he erroneously misstated as 14 April 2019, the nature of the feedback confirmed his suspicion that if he were a white person, he would have been scored 5 for those questions where he was scored either 3 or 4.

20 54. Further, on page 4 of 6 of his written submission, the claimant stated as follows:-

"The Feedback did not actually represent what happened during the interview and it didn't reflect my score.

30 ***On the 23rd of May, I sent an email accusing Renfrewshire of racial discrimination (page 190).***

I strongly believe that I was not offered the job because of my race, if I were a white person, I would have gotten the job.

5 ***I strongly believe that the offering of the job was not based on the interview.***

I strongly believe that I was not given a level playing field to compete for the job.

10 ***Before the interview I received 5 emails and 2 phone calls, two weeks after the interview I was still chasing after the outcome of the interview.***

15 ***I was informed after the interview that they would get back to me before the end of the next day and they never got back to me as promised.***

20 ***Despite that my presentation was the best and I had impressive score, I was not given the job.***

The delay in given (sic) me feedback was discriminating.”

Reserved Judgment

25 55. When proceedings concluded, on the afternoon of Friday, 12 March 2021, the claimant and Ms Lilburn were advised that Judgment was being reserved, and it would be issued in writing, with reasons, in due course, after private deliberation by the Tribunal. With limited opportunity that afternoon, further private deliberation has only taken place recently, by further, remote discussion
30 with the lay members of the Tribunal. This unanimous Judgment represents the final product from our private deliberations, and reflects our unanimous views as the specialist judicial panel brought together as an industrial jury from our disparate experiences.

Issues for the Tribunal

56. This case called before the full Tribunal for full disposal, including remedy, if
5 appropriate. The principal issue before the Tribunal was to consider the
respondents' liability, if any, for the claimant's complaint of alleged unlawful
direct discrimination on grounds of race and, if the Tribunal found the claimant
to have been unlawfully directed discriminated against by the respondents, on
10 grounds of race, then it would be for the Tribunal to go on and consider the
further issue arising of determining the appropriate remedy for any established
discrimination.

Relevant Law

15 57. While the Tribunal has received submissions from Ms Lilburn, and some case
law references from the claimant, it has required to give itself a self-direction
on the relevant law.

58. The **Equality Act 2010** covers unlawful discrimination both in employment,
20 and other fields, and the key concepts are to be found in Part 2 of the Act, while
for present purposes, Part 5 of the Act is relevant, as it deals with work and
employment, with Part 9 dealing with enforcement, including complaints to
Employment Tribunals.

25 59. Race is one of the protected characteristics identified in **Section 4 of the
Equality Act 2010**. Race is further defined at **Section 9(1)** as including
(a) colour; (b) nationality, and (c) ethnic or national origins.

60. In terms of **Section 39(1) of the Equality Act 2010**, an employer (A) must not
30 discriminate against a person (B) – (a) if the arrangements A makes for
deciding to whom to offer employment; (b) as to the terms on which A offers B
employment; and (c) by not offering B employment.

61. Further, direct discrimination is defined at **Section 13(1) of the Equality Act 2010** as follows:-

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

62. In terms of **Section 23(1) of the Equality Act 2010**, on a comparison of cases for the purposes of, amongst others, direct discrimination, contrary to **Section 13**, there must be no material difference between the circumstances relating to each case. The claimant relies upon the successful candidate, **LM**, as his comparator.

63. **Section 120 of the Equality Act 2010** provides that an Employment Tribunal has jurisdiction to determine a complaint relating to a contravention of Part 5 (work) of that Act and, subject to the time limit provisions of **Section 123** (which, in the present case, are inapplicable, the Tribunal having previously decided, at an earlier stage, that the complaint, although late, it is just and equitable to allow it to proceed to be heard on its merits), are subject to the remedies set forth in **Section 124**, if an Employment Tribunal finds that there has been a contravention of the **Equality Act 2010**.

64. In that event, the Tribunal may, as per **Section 124(2)**, (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; (b) order the respondent to pay compensation to the claimant; and (c) make an appropriate recommendation, as defined in **Section 124(3)**.

65. In the present case, the claimant seeks a declaration, and an award of compensation, but not any recommendation from the Tribunal. Finally, in terms of **Section 124(6) of the Equality Act 2010**, the amount of compensation which may be awarded under section 124(2)(b) corresponds to the amount that could be awarded by the Sheriff under **Section 119** and, as

per **Section 119(4)**, an award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

- 5 66. The burden of proof provisions in relation to discrimination claims are found in **Section 136 of the Equality Act 2010**. **Section 136(2)** provides that 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. However, **Section 136(3)** goes on to provide that: “But sub section (2) does not apply if A shows that A did not contravene the provision. Finally, in terms of **Section 136(6)**, a reference to “the court” includes a reference to an Employment Tribunal. The burden of proving facts lies with the claimant. Only if that is satisfied, does the burden then shift to the respondents to show that they did not discriminate against him.
- 10
- 15 67. The Court of Appeal, in **Igen Limited v Wong** [2005] ICR 931 (CA), set out the position with regard to the drawing of inferences in discrimination cases. In the later Court of Appeal Judgment, in **Madarassy v Nomura International Plc** [2007] ICR 867 (CA), the Court of Appeal found that the words “could conclude” must mean “a reasonable Tribunal could properly conclude” from all the evidence before it, meaning that the claimant had to “set up a prima facie case”. That done, the burden of proof shifted to the respondent (employer) who had to show that they did not commit (or is not to be treated as having committed) the unlawful act.
- 20
- 25 68. The Supreme Court, in **Hewage v Grampian Health Board** [2012] ICR 1054 (SC), held that Tribunals should be careful not to approach the **Igen** guidelines in too mechanistic a fashion, and the Court of Appeal has confirmed that approach under the **Equality Act 2010** in its Judgment in **Ayodele v Citylink** [2018] IRLR 114 (CA).
- 30
69. In addition to the statutory provisions, the Tribunal has had regard to the **Equality and Human Rights Commission: Code of Practice on Employment 2011**, which sets out helpful guidance.

70. At paragraph 3.2 it states:- *“Direct discrimination occurs when a person treats another less favourably than they treat or would treat others because of a protected characteristic.”*

5

71. In answering the question **“What is “less favourable” treatment?”**, the Code of Practice states, at paragraph 3.4, that: *“To decide whether an employer has treated a worker “less favourably”, a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. If the employer’s treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable: for example, where a job applicant is refused a job. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity.”*

10

15

72. At paragraph 3.11 of the Code, it is provided that: “because of” a protected characteristic has the same meaning as the phrase “on grounds of” (a protected characteristic) in previous equality legislation. The new wording does not change the legal meaning of what amounts to direct discrimination. The characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause.

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73. Continuing, paragraph 3.13 of the Code then states: *“In other cases, the link between the protected characteristic and the treatment will be less clear and it will be necessary to look at why the employer treated the worker less favourably to determine whether this was because of a protected characteristic.”*

25

Discussion and Deliberation

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74. In coming to our final decision in this case, the Tribunal has carefully reviewed and analysed the whole evidence led before it, both orally in sworn evidence, and within the various documents spoken to in evidence at the Final Hearing.

75. Having done so, and reflected on the whole evidence, and both parties' closing submissions, during our private deliberations, we have come to the clear view that the claimant has not proven any facts from which the Tribunal could conclude that the respondents had committed an act of direct race discrimination against him, arising from his non-appointment to the post of Waste Operations Team Leader, following upon his interview for that post by the respondents on 18 April 2019.

76. In these circumstances, we have decided that his complaint of unlawful discrimination by the respondents fails, and accordingly we have dismissed it for that reason.

77. In coming to our decision, and as referred to earlier in these Reasons (at paragraph 3 above), we reminded ourselves of the amended basis of his ET1 claim, detailing the points previously made by him in his Preliminary Hearing Agenda, which set forth matters as follows:

S.4 If you complain about direct discrimination:

(i) What is the less favourable treatment which you say you suffered. (including the date or dates of the treatments and the person or person responsible.)

- *I was not offered the job*
- *The offering of the job was not based on the interview*
- *I was not given a plain level field to compete for the Job*
- *Before the interview I received five emails and two phone calls, two weeks after the interview I was still chasing after the outcome of the interview*
- *I was informed after the interview that they would get back to me before the end of the next day and they never got back to me as promised*

- *Despite the fact that my presentation was the best and I had five top mark (the highest) and 4 high mark, I was still not given the job*
- *Delay in given feedback*

5 ***(ii) Why do you consider this treatment to have been because a protective characteristic?***

- *I had experience and qualification in the job I applied for, my presentation was the best, my interview was very good, If I was to be of same race with the interviewers, they would have offered me the job.*

10
15 78. So too have we referred back to the claimant's further specification of claim, on 13 September 2020, as detailed at paragraph 25 of these Reasons above, where he stated that:

1. ***I was discriminated against by the interviewers by not offering me the job because of I am black.***
- 20 2. ***The offering of the job to the successful candidate (LM) was not based on the interview conducted by the respondent for the purpose of selection.***
- 25 3. ***The claimant was not given a plain level field to compete for the job based on the colour of his skin.***
- 30 4. ***Before the interview, before the interviewer knew that the claimant was black, the claimant received five emails and two phone calls, two weeks after the interview the claimant was still chasing after the outcome of the interview by emails. If not, that claimant chased after the outcome of the interview he would not have been contacted.***

5. The claimant was informed after the interview that the interviewer would get back to the claimant before the end of the next day, but the respondent interviewers never got back to the claimant as promised.

5

6. Even though the claimant presentation was the best among the applicants and the claimant had five top marks (the highest mark) and 4 high mark (second highest mark), the claimant was not given the job because he is Black.

10

79. On the evidence before us, we are satisfied that the claimant was on a level playing field with the other short-listed candidates, and that he was not appointed because he was not considered to be the best candidate. We had no information before us about the race, or other personal characteristics, of the others interviewed, except for **LM**. There was no evidence before us that his presentation was the best, and, indeed, he was the second last applicant to be interviewed, so how he could know he was the best is unclear to us. In any event, the respondents did not score the presentations from any applicant called for interview. His feedback, from Mrs Hepburn, as per the agreed transcript, is clear in its terms.

15

20

80. Put simply, we are satisfied that the claimant was not appointed because he was not identified as the best candidate performing at the competitive interview process. He was the runner up, and, had **LM** not accepted the post, then we are satisfied, based on the evidence given by the respondents' witnesses, that it would have been offered to the claimant, as next highest scoring candidate, subject always to pre-employment checks, as per the respondents' recruitment process.

25

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81. We do not accept, on the evidence we heard, that the claimant, or any applicant was advised they would hear the outcome the next day, and we are equally clear that the claimant and others were contacted on 2 May 2019. Any delay

was thus common to all who were interviewed, and not discriminatory as regards the claimant only.

- 5 82. It is unfortunate that the claimant anticipated the presentation forming part of the interview process, whereas the respondents did not score it, but used it as an ice-breaker, and the Tribunal trusts that, in future interviews, the respondents will make it clear to candidates called for interview what is the process, and whether any presentation is to be taken into account.
- 10 83. From her evidence to us, it was clear that Mrs Hepburn had reflected, since issuing her letter of invitation to applicants, and we trust that, in reviewing their recruitment practices, processes and procedures, including the interview assessment sheets, and how they are drafted, the respondents may take the organisational learning from this case into account in reviewing, and updating
15 their internal procedures.
84. Further, and in any event, we are satisfied, on the evidence led before us, that the claimant was fairly and competitively interviewed for that vacant post, but he was not offered the post, as he was not the best candidate based on
20 interview performance on 18 April 2019. We are satisfied that **LM** was identified by the interview panel as the best candidate, and that it was she who was appointed based on merit. There is nothing at all in the evidence before us to show that the claimant was treated less favourably, and discriminated against, on racial grounds.
- 25 85. Indeed, it is of note that while the less favourable treatment complained of by the claimant was that he was not appointed to the post because he is black, in his evidence to this Tribunal, the claimant accepted that he did not ask Mrs Hepburn, on the phone call feedback of 14 May 2019, what race the successful
30 candidate was, and he made no reference to the successful candidate's race or any other personal information during that feedback, nor within the email correspondence with Mrs Hepburn between 23 May and 7 June 2019.

86. Further, prior to the first diet of Final Hearing before this Tribunal, between 30 November and 2 December 2020, the claimant did not know what race **LM** was. Notwithstanding Mrs Hepburn's denial, on 7 June 2019, that the respondents had in any way discriminated against the claimant, he continued to insist upon his claim against them, and to accuse them of racial discrimination against him.
87. At this Final Hearing, the claimant sought to raise points not part of his pled case, including a complaint that **LM** should not have been short-listed. He stated that he understood **LM** had since left the respondents' employment, and he sought to make a point from that, but her circumstances, and whether or not still employed in the role, were not confirmed or denied by the respondents' solicitor, or their witnesses. The Judge made it clear the Tribunal was considering the claimant's case, and not looking at **LM**, other than as a comparator.
88. We declined to allow the claimant to further expand his pled case, into new matters not previously foreshadowed by him, the Judge reminding him to stick to his pled case, unless he was seeking to further amend it, which he did not seek to do. He was often reminded by the Judge of the guidance from the Employment Appeal Tribunal in **Chandhok v Tirkey [2015] IRLR 195**, about the importance of the ET1 claim form and ET3 response, where each party requires to know in essence what the other party is saying, so they can properly meet that case, and that the giving of fair, advance notice is at the heart of the Tribunal system.
89. While "pleadings" are relatively informal in this Tribunal, as compared to the civil courts, the ET1 should set the parameters of the dispute before the Tribunal. It is not appropriate to allow a claimant, even an unrepresented, party litigant, to build a case on shifting sands, and raise the case which best seems to suit the moment from their perspective. In conducting the Hearing, we were conscious of that, and that there is always a balance to be struck between

avoiding unnecessary formalism and ensuring the fairness of the Tribunal process to both parties.

Closing Remarks

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90. As we have dismissed the claim, we need not address the disputed submissions that we received on the matter of remedy. Given the dismissal, the Tribunal does not make any award of compensation to the claimant.

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91. Had we found in his favour, it is right and proper that we say here that in awarding him any sum by way of injury to feelings, we would not have been minded to do so, on the basis of the evidence led before us, at the high level of £45,000 suggested by the claimant. Such an amount, in the **Vento** highest band, would have been excessive, and we would have, as invited by the respondents, looked at an award at the low end of the lowest **Vento** band, having regard to the factors set out in **Komeng**.

15

92. Finally, we close by stating that we recognise that our Judgment will not be well received by the claimant, because, even during the course of the Final Hearing, it was clear to us that he still bears a deep sense of grievance and injustice at the way he perceives he was treated by the respondents.

20

93. We appreciate that that is his perception, and so his reality, but, as the independent and objective fact finding Tribunal, applying the relevant law to the facts of this case as we have found them to be, based on the evidence led before us from both parties, we hope that in reading our Judgment, and these Reasons, the claimant will come to understand our reasons for dismissing his complaint.

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94. Further, we also hope that the claimant will note and act upon our suggestion that, having secured employment with Carlisle City Council, his first employment in many years, he will now turn his efforts towards seeking further new employment, with another employer, and try to rebuild his employment

experience for the benefit of a prospective new employer, and his own self-confidence and personal esteem, as well as the security of himself and his family.

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Employment Judge: Ian McPherson
Date of Judgment: 19 May 2021
Entered in register: 19 May 2021
and copied to parties

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