EMPLOYMENT TRIBUNALS

Claimant: Mr O. Wynn-Cowell

Respondent: Valuation Office Agency

HELD AT: Mold **ON:** 6th – 9th, 13th & 15th December 2021, 5th January 2022.
19th January 2022 in chambers

BEFORE: Employment Judge T. Vincent Ryan
Ms L. Owen
Mr P. Charles

REPRESENTATION:

Claimant: Mr Wynn-Cowell represented himself (a "litigant in person")
Respondent: Mr. J. Allsop, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. Time Limits: The claimant's claims, save for those in relation to vacancy application 1621669, were presented out of time in circumstances where it would not be just and equitable to extend time to the date of presentation. The Tribunal has no jurisdiction in respect of those claims, which are dismissed. If the Tribunal is wrong about that then it would substitute the findings below which are also its findings in respect of all claims relating to Vacancy 1621669.

2. Protected disclosure:

    2.1. Disclosures:

        2.1.1. 5th November 2018 email to R's CEO: The claimant made a protected disclosure of breach of legal obligations in relation to the Civil Service Code and the Civil Service Recruitment Principles.

        2.1.2. 3rd January 2019 grievance: The claimant made a protected disclosure of breach of legal obligations in relation to the Civil Service Code, and Civil Service Recruitment Principles, and race discrimination.

2.2. Detriment: The Respondent did not subject the Claimant to detriments as claimed. The claimant's public interest detriment claim fails and is dismissed.

3. Direct Race Discrimination: The claimant's claims of direct race discrimination fail and are dismissed.

4. Victimisation:

4.1. Protected act: the claimant performed a protected act on 3rd January 2019 when he referred in his grievance to acts of race discrimination that occurred in and around 2007.

4.2. Detriment: The Respondent did not subject the Claimant to detriments as claimed. The claimant's victimisation claim fails and is dismissed.

REASONS

The Issues: in a situation where the claimant is employed by the respondent to date but over the years has been unsuccessful in relation to several internal job applications for promotion, the following issues between the parties have been agreed in respect of his claims of direct race discrimination, victimisation and public interest disclosure detriment:

1. Time limits

1.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 14 March 2019 may not have been brought in time.

1.2. The respondent accepts that complaints relating to vacancy 1621669 are brought in time. However, it says that the direct race discrimination complaints in relation to vacancies 1499028, 15825234, and 1595880 are out of time. The tribunal will decide whether those discrimination complaints were made within the time limit in section 123 of the Equality Act 2010. Specifically, the tribunal will decide:

1.2.1. was the claim made to the tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2. If not, was their conduct extending over a period?

1.2.3. If so, was the claim made to the tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4. If not, were the claims made within a further period that the tribunal thinks is just and equitable? The tribunal will decide why were the complaints not made to the tribunal in time and in any event whether it is just and equitable in all the circumstances to extend time.

2. Protected disclosure

2.1. Did the claimant make one or more qualifying disclosures as defined in section 43B Employment Rights Act 1996 (ERA)? The tribunal will decide:

2.1.1. what did the claimant say or write? When? To whom? The claimant says that he made disclosures on these occasions (now excluding 23 October 2018, an email to the respondent's Chief Executive Officer as this has been withdrawn and dismissed):

2.1.1.1. 5th November 2018 – in an email to the respondent's Chief Executive Officer;

2.1.1.2. 3rd January 2019 in his formal grievance.

2.1.2. Did he disclose information? The claimant says that he disclosed information tending to show that there had been a breach of the Civil Service Recruitment Principles ("the Principles") and the Civil Service Code ("the Code") which have a statutory basis. Specifically, he disclosed that in relation to vacancy 149 9028 Mr Richie Roberts redrafted one example given by the claimant in his application for that vacancy and then sat on the panel which assessed the applications for that vacancy.

2.1.3. Did he believe the disclosure of information was made in the public interest?

2.1.4. Was that belief reasonable?

2.1.5. Did he believe it tended to show that a person had failed, was failing or is likely to fail to comply with any legal obligation?

2.1.6. Was that belief reasonable?

2.2. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

3. Detriment

3.1. Did the respondent do the following things?

3.1.1. Under-marking the claimant's application for vacancy 162 1669 and/or
3.1.2. excluding the claimant from interview for vacancy 162 1669.

3.2. by doing so, did it subject the claimant to detriment?

3.3. If so, was it done on the ground that he made a protected disclosure?

4. Remedy for protected disclosure

4.1. what financial losses has the detrimental treatment caused the claimant?

4.2. Has the claimant taken reasonable steps to replace any lost earnings, for example by looking for another vacancy?

4.3. If not, for what period of loss should the claimant be compensated?

4.4. What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

4.5. Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

4.6. Is it just and equitable to award the claimant other compensation?

4.7. Did the claimant cause or contribute to the detrimental treatment by his own actions and if so, would it be just and equitable to reduce the claimant's compensation? By what proportion?

4.8. Was the protected disclosure made in good faith?

4.9. If not, is it just and equitable to reduce the claimant's compensation? By what proportion up to 25%?

5. Direct Race Discrimination

5.1. The claimant is Welsh

5.2. Did the respondent do the following things:

5.2.1. Under-marking the claimant's application for vacancy 1499028 in July 2016;

5.2.2. excluding the claimant from interview for vacancy 1499028 July 2016;

5.2.3. under-marking the claimant at the interview for vacancy 15825234 in June 2018;

5.2.4. not appointing the claimant to vacancy 15825234 in June 2018;

5.2.5. under-marking the claimant's application for vacancy 159 5880 in September 2018;

5.2.6. excluding the claimant from interview for vacancy 159 5880 in September 2018;

5.2.7. under-marking the claimant's application for vacancy 162 1669 in March 2019;

5.2.8. excluding the claimant from interview for vacancy 162 1669 in March 2019.

5.3. Was that less favourable treatment? The tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimants. If there was nobody in the same circumstances as the claimant, the tribunal will decide whether he was treated worse than someone else would have been treated. The claimant says that he was treated worse than employee H and employee M.

5.4. If so, was it because of race?

6. Victimisation

6.1. The respondent accepts that the claimant did a protected act as follows: raising a grievance on 3 January 2019 which included allegations that he had been discriminated against because he is Welsh.

6.2. Did the respondent do the following things:

6.2.1. Under-marking the claimant's application for vacancy 1621669 in March 2019

6.2.2. excluding the claimant from interview for vacancy 1621669 in March 2019.

6.3. by doing so, did it subject the claimant to detriment?

6.4. If so, was it because the claimant did a protected act?

6.5. Was it because the respondent believed that the claimant had done or might do a protected act?

7. Remedy for discrimination or victimisation

7.1. Should the tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

7.2. What financial losses has the discrimination caused the claimant?

7.3. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another vacancy?

7.4. If not, for what period of loss should the claimant be compensated?

7.5. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

7.6. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

7.7. Should interest be awarded? How much?

The Facts:

8. The respondent prepared, and the claimant agreed, a cast list and chronology which is appended to this judgment. As the details contained in the appendix are agreed the Tribunal confirms them as facts. The chronology is accepted without the Tribunal reciting all those dates and matters again. In addition to the cast list the Tribunal has made findings specific to the witnesses who appeared at the final hearing, and they are set out below, in all other respects the job titles and significance of the others named are as shown in the appendix, which the Tribunal has not altered even by adding dates and details found in the Facts below.

9. The respondent (R):

   9.1. R is an agency of HMRC that values property for tax purposes taking and defending cases in the Tribunals when settlements are not reached with property owners and other stakeholders; it is staffed by Civil Servants. It operates in various geographical regions of England, and in Wales, each of which is called a Regional Valuation Unit (RVU); the claimant was employed at all material times in the Bangor, Gwynedd office until it closed, and he transferred to R's Wrexham office; he has worked in Wales throughout the chronology of this case.

   9.2. Recruitment process and Principles:

      9.2.1. the Civil Service Code: The Statutory basis for the management of the Civil Service is set out in the Constitutional Reform and Governance Act 2010 (CRGA). S.5 CRGA requires the publication of a code of conduct for the civil service which is to be laid before Parliament and which then forms part of the terms and conditions of employment of any civil servant covered by the code, such as all the witnesses before this Tribunal, (the Code). The code must require civil servants to carry out their duties with integrity and honesty and with objectivity and impartiality (s.7 CRGA). There is provision for making complaints of breaches of the Code and investigation into complaints at s.9 CRGA. The March 2015 Civil Service Code commences in the hearing bundle at p.453. The Civil Service Values recites that civil servants are appointed on merit on the basis of fair and open competition and are expected to carry out their roles with dedication and commitment to the values of integrity, honesty, objectivity and impartiality (the core values). The Code lists do's and don'ts in respect of each of the core values, including a commitment to equality and diversity and to not acting in a way that unjustifiably favours or discriminates against particular individuals (page 456). CRGA and the code are the basis of a number of legal obligations placed upon civil servants.

      9.2.2. The Civil Service Recruitment Principles: s.9 CRGA provides for the publication of a set of principles to be applied for the purposes of recruitment of civil servants, with which management authorities must comply. S.10 CRGA applies to the selection of persons who are not civil servants for appointments to the civil service (external candidates) and provides that selection must be on merit based on fair and open

competition. The April 2015 Civil Service Recruitment Principles are at page 459 of the hearing bundle and the 2018 version at page 489 (the Principles). The introduction to the Principles states the statutory basis which is expressly "for appointment as civil servants" and does not refer specifically to the promotion of civil servants. The legal requirement set out in the Principles is that selection for appointment to the civil service shall be on **merit** on the basis of **fair** and **open** competition, described as three elements that must be met for the appointment to be lawful. The three elements are explained in the document and require that there is no bias in the assessment of candidates with selection processes being objective, impartial and consistently applied. Departments are responsible for designing and delivering selection processes that meet the legal requirement and the document makes clear that there is no single "right" process for all appointments such that there can be some proportionate variation to the processes of selection. That said, the essential elements include a selection panel of two or more people with a qualifying chairperson, and the panel must ensure an impartial assessment against published essential criteria (competences, skills and experience), making the final decision on merit. Panel members must declare conflicts of interest including prior knowledge of an applicant and a record of any conflicts must be kept. Records must be kept of the process. CRGA and the Principles are the basis of several legal obligations placed upon civil servants.

9.2.3. R's witnesses involved in the claimant's applications for internal promotion believed and understood that the Code always applied to them but save for Ms Zammit-Willson, were uncertain as to whether the Principles were applicable. Ms Zammit-Willson believes that the Principles applied to external candidates only but was uncertain as to the basis of that understanding which was implicit. C believed not only that the Code applied to him, and all managers involved in this case but also, by implication, that the Principles applied to applications for internal promotion made by current civil servants (internal candidates).

9.2.4. In practice R would set up a three-member sift panel to mark applicants for promotion; this was a "blind" or anonymised sift. Subject to the number of applications, the members would each mark the candidates' applications and sift for those going ahead to interview. Candidates who then succeeded at interview would be offered the post. Promotion to Grade 7 is very competitive. If there were many applications for any particular post the panel might split them up such that every application was marked by two panel members but not by all three of them. The members would then meet to moderate the markings and the results were input into the selection database.

9.3. Training: civil servants are required to be familiar with the Code; likewise, those involved in the recruitment of external candidates to the civil service are expected to be familiar with the Principles. It is understood by the tribunal that training was provided to managers in relation to unconscious bias. Ms Moore and Mr Virk expressly stated that they received this training, and the tribunal finds that they did. Ms Zammit-Willson always sought to avoid bias and the tribunal considers that her evidence of her awareness and efforts to

avoid such bias were indicative of the likelihood that she had received appropriate training or had acquainted herself with the necessary tools to avoid unconscious bias. All of R's witnesses denied conscious bias towards C in respect of the internal promotion applications made by C. All R's witnesses involved in the promotion selection processes conceded that at some stage in one or more of the competitions in which they were involved they had identified C as a candidate despite the applications being anonymised at the sift stage. Because of the nature of the work and the skills being assessed within existing teams it often happens that internal applicants are recognised even though anonymised.

9.4. We heard from the following witnesses for R:

9.4.1. Ms Helen Zammit-Willson:

9.4.1.1. Mrs Zammit-Willson is Director of the National Valuation Unit, promoted to Senior Civil Servant in 2019 and the most senior of R's witnesses before the tribunal. Ms Zammit-Willson was C's line manager in the period 2005-2008. At the material time in respect of C's claims, July 2016 (the first contested vacancy) – September 2018 (the last contested vacancy in which she was involved) Ms Zammit-Willson held several Grade 6 roles. She considers that it is important to R to be able to provide services within Wales through the medium of both Welsh and English, that appointing fluent Welsh speakers is important, and to the extent that in recruitment rounds in 2020 R specifically advertised roles to attract Welsh speakers as more people with such language fluency were required. Ms Zammit-Willson was involved in two of the contested promotion vacancies, 1499028 and 1595800. The Tribunal found her evidence credible and plausible; she was clear and consistent and where there is any issue between her evidence and that given by C the tribunal favoured her evidence.

9.4.1.2. Mrs Zammit-Willson formed a view about C from his applications and interviews for promotion over the years. She found that he could be disparaging of colleagues. In fact, C frequently, that is to R and in his evidence to us, said that his professional opinion had on occasion been preferred over that of Ms Zammit-Willson in an Upper Tribunal case; he seemed to suggest that this motivated a prejudice against him, but the Tribunal was unable to find evidence of that. She did however believe that his disparaging words and manner came across badly in selection exercises. She found he was obtuse as a communicator and she encouraged him to use simpler and clearer language, which he did not. Whilst Ms Zammit-Willson acknowledged C's technical ability she felt that C was held back by these characteristics, and his manner as described.

9.4.2. Mr Richard Roberts:

9.4.2.1. Mr Roberts is currently Unit Head for the RVU North but previously Unit Head North Wales and then NDR Unit Head Wales & Chief Valuer Wales when he was responsible for the VOA's offices

at Wrexham and Bangor (until the latter closed in early 2021). Mr Roberts was C's line manager from April 2010 to December 2016. Mr Roberts is Welsh. He is not a fluent Welsh speaker, whereas C is fluent. Mr Roberts considered C's ability to converse in Welsh was useful to R especially in supporting R's caseworkers when Tribunals were conducted through the medium of Welsh; he understood that R valued the ability of staff to speak Welsh and to be able to use the Welsh language at work. Mr Roberts was involved in three of the contested promotion vacancies, 1499028, 1585234, and 1621669. The Tribunal found his evidence credible and plausible; he was clear and consistent and where there is any issue between his evidence and that given by C the tribunal favoured his evidence.

9.4.2.2. Mr Roberts considers C to be both competent as a surveyor and confident, better suited to a specialised national role than a regional one; he does not rate him highly as a good communicator because of his tendency to use long and complicated words where shorter and clearer ones (known and used by his audience) would do better. He found C to be boastful and self-congratulatory in that in his applications for promotion he would lead with acknowledgments received, or plaudits, rather than explaining his input, in say a difficult case. He formed the view that in interview C came across as being arrogant and giving the impression of being a know-all who did not take comments about him on-board. Mr Roberts also found over time that C would re-use examples of his work to illustrate skills, but this was repetitive and the examples not only self-identified C but became no longer contemporaneous and as relevant.

9.4.3. Ms Jo Moore:

9.4.3.1. Ms Moore is R's RVU East Unit Head based in Leeds; she has never worked with C and has, throughout, worked on different properties at a different site. Ms Moore considers that there are roles within R when the ability to speak Welsh is beneficial to R and that such language skills could be a factor assisting candidates for vacancies. Ms Moore was involved in two of the contested promotion vacancies, 1585234 and 1621669. The Tribunal found her evidence credible and plausible; she was clear, consistent and emphatically forthright; where there is any issue between her evidence and that given by C the tribunal favoured her evidence.

9.4.3.2. Ms Moore has never worked with C but has come across him in various promotion application exercises, in addition to the two mentioned above that form part of C's claim. She describes him as "memorable" and this was not wholly complimentary, C unusually bringing detailed documentation about his work to interviews and using what she considered inappropriate language and citing inappropriate analogies in his presentations. That said, she acknowledged his technical skills and experience but believed him unsuited for management roles based on the applications she dealt with and C's performance in his applications and interviews.

9.4.4. Dal Virk

9.4.4.1. Mr Virk is currently R's Unit Head for Wales & West RVU. He line-manages C's line manager. Mr Dirk was involved in two of the contested promotion vacancies namely 1585234 and 1621229, and in both cases his panel members were the said Mr Roberts and Ms Moore.

9.4.4.2. The Tribunal found his evidence credible and plausible; he was relatively clear and consistent, that is relative to C, and where there is any issue between his evidence and that given by C the tribunal favoured his evidence subject to a reservation.

9.4.4.3. There are issues as to whether Mr Virk knew that C had presented a grievance in January 2019, whether and when he knew the details of that grievance, and whether it influenced his involvement in the last contentious application for promotion that forms part of this claim. The tribunal makes findings of fact below on all those issues and in respect of Mr Virk's credibility we found that he was very busy at the material times and tended to limit his knowledge and involvement to the headlines he needed to know only and committed either to informal handling of concerns by another person or formal processes including appeals rather than involving himself in matters he could so delegate. Our conclusion was that this made him understandably vague as to some details and not that he was evasive, obtuse, or in any way misleading. When C raised his grievance Mr Virk knew from Mr Endersby that someone in his larger team had raised a grievance about recruitment processes and Mr Endersby suggested that the matter be dealt with informally by Jo Banks (as someone experienced in such matters, although he may have thought it helpful that Ms Banks was the appropriate line manager); Mr Virk asked Miss Banks to speak to Mr Endersby with a view to resolving a grievance but he did not know the details of the grievance and we accept has no recollection of knowing that it came from C, although he may have known that at the time he delegated to Ms Banks, and forgotten; either way he did not involve himself in the matter any further until the grievance investigation after his involvement with the final promotion application 1621669 about which the claimant claims. It is evident from the documents to which we were taken in and around the grievance that R and its HR officers (from whom we heard no evidence but contemporaneous emails are in the hearing bundle) considered the grievance to be about C being unsuccessful and what he thought about the application of the Code and Principles to the exercises in question but not specifically allegations of race discrimination, and they were attempting to obtain details from C; the details were given by C at a grievance meeting on 29 April 2019 whereas Mr Virk's involvement in vacancy numbered 1621669 ended on 15 March 2019; on that date his scoring of C's application was not influenced by C's grievance but was on the merits of the application.

9.4.5. Mr Christopher Endersby: Mr Endersby is employed by R as a HR consultant in People Advisory Services; he has approximately 30 years HR experience. Mr Endersby managed C's grievance of 3rd January 2019. He was not directly involved in any of the contested vacancy/promotion recruitment exercises. His significance as a witness relates to C's victimisation and "whistle-blowing" detriment claims which he says impacted vacancy 1621669. It appeared to the Tribunal that there was a sincere recognition by Mr Endersby, and others within R's management, that C's grievance could have been handled better; there was no convincing evidence of anything untoward in terms of these claims in what Mr Endersby did, or any need for the tribunal to draw adverse inferences. It is noted that there is no claim directly related to R's handling of the grievance. The Tribunal found Mr Endersby's evidence credible and plausible; he was clear and consistent and where there is any issue between his evidence and that given by C the tribunal favoured his evidence.

9.4.6. John Plant: Mr Plant worked in R's HR function from 2009 (having joined R in 1987) until his retirement in December 2021; at the material time he was R's Head of Workforce Strategy and Reward. Mr Plant became involved in C's grievance of 3rd January 2019 in March of that year; he was appointed Grievance Officer. C says that he made a protected disclosure within, amongst certain emails, his said grievance and that he was subjected to detriment on that ground and victimised in respect of vacancy 1621669. The Tribunal found Mr Plant's evidence credible and plausible; he was clear and consistent and where there is any issue between his evidence and that given by C the tribunal favoured his evidence. C accused Mr Plant of deliberately and suspiciously destroying records and manipulating the enquiry, however the tribunal accepted Mr Plant's innocent explanations in the absence of any evidence or reason for us to draw adverse inference to the contrary. There is no claim directly relating to the handling of the grievance.

9.5. C's witness: Jo Banks was the claimant's line manager after Mr Roberts, understood by the tribunal to be from January 2017, until at least the presentation of his grievance in January 2019 and the time of its management by R. The Tribunal found her evidence credible and plausible; she was clear and consistent; significantly, as she was a witness for C, the tribunal found her evidence to be considered and measured avoiding corroboration of some of C's hyperbolic theorising and speculation.

10. The claimant (C): C commenced his employment with R on 2nd September 1991 and he remains so employed. The claimant was always an internal candidate, a serving Civil Servant seeking promotion, when he made the applications in respect of which he makes these claims; he believed, erroneously, that the Principles applied to him in law (whereas at best they had moral weight). He identifies as being of Welsh nationality and ethnic origin; he is a first language Welsh speaker. It appears from the documentation at pages 71 – 76 that R had a need for a Welsh-speaker to be recruited to its Bangor, Gwynedd office and on that basis C was recruited and appointed despite not being the best candidate in terms of marking on the competition part of the application and in relation to his experience as a valuer (p73); whether or not that is correct (as we did not hear

evidence from the writer of that letter) it was the understanding of R's witnesses. The fact that C interprets that letter as confirming that he was being paid a lower wage than comparators because he was a Welsh speaker (not a claim in this case) is indicative of his lack of awareness or insight, and his propensity to exaggerate, conflate, confuse and believe in unsubstantiated conspiracy. That said, the tribunal considers the claimant to be conscientious and sincere. The Tribunal finds that he had a reasonable and genuine belief, whether rightly or wrongly, that R breached the Code and Principles as he thought they applied to his various applications for promotion; he did not, however, convince the tribunal that he believed his nationality or ethnic origin was really relevant. His evidence was very often unfocused and obtuse, as were most of his questions in cross examination; the tribunal allowed him considerable latitude considering that he was a litigant in person and that he was at most times courteous and considerate. The Tribunal will not reiterate Mr Allsop's submissions on the reliability of C's evidence set out at paragraph 34 of his outline closing submissions, but it endorses the points made which, subject to this paragraph, reflect its view of C and his evidence.

11. Vacancy 1499028 (National Valuation Unit Specialist Case Worker) July 2016 (in respect of which C claims Direct Race Discrimination only) (the claimant alleges what he referred to as "insider trading" for reasons evident below; we may refer to this application as "the insider trading application"):

    11.1. R's panel in respect of this matter comprised Ms Zammit-Willson, Mr Richard Roberts and Mr David Grace. We heard evidence from Ms Zammit-Willson and Mr Roberts; we did not hear evidence from Mr Grace.

    11.2. Mr Roberts provided C with assistance in respect of this and some earlier applications for promotion; that was a usual feature of management support, C was content dealing with Mr Roberts and had expressed his satisfaction with Mr Roberts' appointment as his manager initially because of their shared Welsh identity; C felt and effectively said that they could relate to each other, telling Mr Roberts that he, Mr Roberts would better understand him. On this occasion C submitted a draft application to Mr Roberts who worked on it on a weekend, suggesting some improvements. C adopted some of the suggestions and submitted his application believing that it had benefitted from Mr Roberts' involvement.

    11.3. At the time of his assistance to C, Mr Roberts was unaware that he was to be on the recruitment panel. He gave advice and assistance unaware that a situation would arise of potential conflict. He gave his advice and assistance to C in good faith and conscientiously. Subsequently he was asked to join the panel. It is for this reason that C categorises this as "insider trading", Mr Roberts having given assistance and being on the panel.

    11.4. There were 63 applications. Because of the high number the panel split them for the blind sift marking. Every application was marked by two panel members. C's application was marked by Mr Grace and Mrs Zammit-Willson. Mr Roberts played no part in the marking. All three members were involved in the moderation meeting and Mr Roberts input the data on the system.

11.5. Mrs Zammit-Willson was unable to recall in detail how she marked C as she did but was emphatic that it was on merit and reflected her view of C as a candidate described above (disparaging, not coming across well, using obtuse language etc). The Tribunal found her convincing. As stated, we did not hear from Mr Grace.

11.6. 14 of the 63 applicants passed through to the interview stage. C did not, on the basis of the marking by Mr Grace and Mrs Zammit-Willson. Of the 14 candidates who went on to interview three identified as being Welsh. Five of the interviewed candidates were appointed, two of whom identified as being Welsh.

11.7. The Tribunal finds that the actions and involvement of both Mr Roberts, such as it was, and Mrs Zammit-Willson were not related in any way to C's nationality or ethnic origin. Mrs Zammit-Willson marked C on the merits and demerits of his application. C makes no claim that Mr Roberts' prior assistance was aimed at jeopardising the application; he did not have to accept it; he adopted Mr Roberts' guidance voluntarily, believing that it improved his prospects. In the event the assistance was in vain. The claim is that the application was marked down as an act of unlawful discrimination. There is no evidence to support this allegation. The outcome, as set out above, belies any general inference of less favourable treatment being given to Welsh applicants. C's named comparators, H and M, did not apply in this competition.

11.8. C sought feedback from Mrs Zammit-Willson. He alleges that she said he was not "corporate" enough; she says she does not recall saying so and it is not something she believes she would have said as it is vague and unhelpful. The Tribunal's concern is C's propensity to rephrase and/or re-interpret things said to him in an exaggerated and slanted way; it can have no confidence in C quoting that expression which may just reflect how he understood or misunderstood what was said. If Mrs Zammit-Willson fed-back on the lines of our findings about her view of C, then he may well have thought she was saying, in effect, that he was not corporate in terms of not being collegial and supportive of colleagues. We find on balance that this is more likely than that anything she said to C, or thought, was related to his being Welsh. Similarly, even if she marked him down being in the least influenced by C having had an opinion of his preferred by the Upper Tribunal over hers, that is unrelated to his nationality or ethnic origin. We find that Mrs Zammit-Wilson marked him conscientiously on merit.

12. Vacancy 1585234 (RVU West & Wales Team Leader) June 2018 (in respect of which C claims Direct Race Discrimination only) (this application was referred to as "the whack-a-mole" application for reasons evident below; we may refer to this application as "the whack-a-mole application"):

12.1. R's panel in respect of this matter comprised Mr Dal Virk, Mr Richard Roberts, and Ms Jo Moore. We heard evidence from each of the panel members.

12.2. Following one withdrawal there were 14 applicants and all of them were marked and then interviewed, that is there was no pre-interview sift. C's

named comparator M did not apply; his comparator H applied, was marked higher than C but he failed at the interview (as did C). Seven applicants were considered successful at interview and of them one identified as being Welsh; four of them were appointed including the one successful Welsh interviewee.

12.3. This was a Team Leader role application. R was looking for applicants to demonstrate management rather than technical skills; C failed to do this to the satisfaction of the panel. During the interview C cited whack-a-mole figuratively to illustrate how he would deal with problems as they arose; he quoted Darwin and Bill Gates; C used militaristic language and referenced the Pacman video game. C considered he was illustrating his points well and in a humorous way. The panel viewed his use of analogies and language to be inappropriate and glib.

12.4. Ms Moore marked C down because she found he had not illustrated that he had the required management skills and she was concerned at his use of language which she felt showed his unsuitability for the promotion; for example, she would not want a Leader adopting an approach akin to whacking a mole with a mallet as it was not an appropriate leadership style, and she was looking for leadership and empowerment not video game or military campaign analogies. Mr Virk did not mind the use of quotations and analogies but marked the claimant down for failing to communicate what he meant clearly and to contextualise his presentation. Mr Roberts described C as a “memorable interviewee because of his mannerisms”; he marked C as he did because he did not think C had shown the required skills and that his presentation was poor. In cross-examination of Ms Moore C asked her: “Was it very bad?” to which she simply and directly replied: “Yes”.

12.5. The panel marked the application and conducted the interview conscientiously on merit and rejected C’s application on that basis. C’s nationality and ethnic origin were not relevant to the decision.

13. Vacancy 1595880 (National Valuation Unit Specialist Grade 7) September 2018 (in respect of which C claims Direct Race Discrimination only) (for reasons set out below this may be referred to as “the Jo Banks assisted application”):

13.1. R’s panel in respect of this matter comprised Ms Zammit-Willson, Mr David Grace and Mr Ian Johnson. We did not hear evidence from Mr Grace or Mr Johnson.

13.2. C received assistance from Ms Banks with this application. She suggested that he should mention that he was a Welsh speaker which she considered was a “plus factor”; C “pushed back” on the suggestion as he felt it would be an identifier. Ms Banks understood that C did not want to draw attention to him being the otherwise anonymous applicant. She thought it would have been to his advantage in this application to show his proficiency in the language. Some of her suggestions were adopted by C but not that one. Ms Banks was unaware that C may have considered that he was subjected to race discrimination until some time later, after his grievance (January 2019) but at least 12 months before this hearing that commenced on December 2021 (she was unable to be any clearer); she did not

understand from C that his reluctance to mention proficiency in Welsh was related to any suspicion on C's part that he was marked down because he is Welsh.

13.3. There were 56 applicants and 40 of them failed at the sift stage. There was one interview panel. C failed at the sift. Ms Zammit-Wilson said little about this exercise in her statement save to deny unlawful discrimination. C asked few specific questions on this exercise in cross-examination. The Tribunal accepted Ms Zammit-Wilson's evidence that as she and Mr Grace recognised C's application (blind at that stage) they let Mr Johnson give his view first and that the scoring was conscientious and genuine, unaffected by C's nationality and ethnic origin. There was no evidence to the contrary and for all the reasons stated above, no reason or basis to draw any adverse inference. Unfortunately for C he was one of many who failed at the sift on the basis of the standard of his submission and the application of a competitive marking system.

14. C's correspondence with Ms Tatton, R's CEO:

14.1. On 23rd October 2018 C sent an email to Ms Tatton (p153) offering his commentary on Application 159880 by way of feedback, complaining that the system appears "incoherent". He suggested meeting her to give his perspective having criticised the exercise, where he was unsuccessful notwithstanding his mastery of Upper Tribunal work and exceptional high-profile experience. Ms Tatton's response of 29th October 2018 is on the same page; she did not engage in the specifics of C's failed application but explained best practice and encouraged him to obtain constructive feedback each time he applied for posts.

14.2. Pleaded Public Interest Disclosure: On 5th November 2018 C wrote an email to Ms Tatton which appears at page 152. C quotes "Owain, you are not corporate enough" which he speculates may have been based on "matters extrinsic to my application". C then briefly, with no names attributed, described what he referred to at the hearing as Mr Roberts' "insider trading", a senior leader giving assistance with an application, "materially redraft[ing]", scoring and failing the application. The Tribunal notes at this stage its finding that Mr Roberts offered assistance that was voluntarily accepted and that he did not score or fail C's application. C believed, on his reading and understanding of the Code and Principles, that Mr Roberts had breached legal obligations; he gave information to Ms Tatton tending to show that, albeit without naming Mr Roberts. C expressly stated that he did not want Ms Tatton to speak to the senior leaders involved as this might affect future applications. He concluded obtusely "Should my correspondence ignite any curiosity, I will co-operate in any way I can". In his own way that was the equivalent of a request for a meeting.

14.3. When Ms Tatton merely noted what C had said and assured him she would do as he asked, C asked whether that meant the matter was closed. He explained he only asked that she did not speak to those involved. C asked whether further information was required. He wanted the matter to be investigated, although he did not clearly communicate that.

14.4. Ms Tatton's private secretary, Ms Crick, confirmed that the CEO could not get involved in individual cases and C expressed his genuine surprise, referring to his "disclosure" (of 5th November 2018) that a senior leader assisted in and then failed an application for promotion. Ms Crick referred C to the recruitment complaints procedure providing him with a hyperlink. C acknowledged that information, asked further questions and indicated he would grieve. Ms Crick informed C that she had spoken to the Head VOA Recruitment, Ms Hawksworth, about C's concerns and offered to arrange a meeting, subsequently passing on the email trail and brokering a meeting between them.

14.5. On 28th November 2018 Ms Hawksworth told C in an email (p146) that she was unclear about his complaint, as opposed to him flagging up concerns, and saying that he would have to lodge a formal grievance if he hoped for a different outcome for his application. She asked for clarity. C had wanted to resolve matters informally and did not know what outcomes a grievance could achieve (p146).

14.6. The Tribunal finds, from the correspondence, that R understood that C was aggrieved at being unsuccessful and he was critical of the procedure adopted, specifically the role of Mr Roberts (yet unnamed in correspondence). R did not understand C to be giving information tending to show breaches of the Code and Principles notwithstanding his reference to bias. We note C did not then allege that Mr Roberts' assistance was biased against him and intended to jeopardise his application; he did not explain the role any bias may have played in marking the application. R dealt with the matter as a complaint via its internal procedure and a meeting with the Head of VOA Recruitment. It appears that this was consistent with R's initial handling of C's grievance (see below) when there is email correspondence trying to better understand what C was complaining about, R not understanding that C complained not only of what he believed to be breaches of the Code and Principles but race discrimination, not evident on the face of the emails cited in this paragraph. The Tribunal did not hear evidence from Ms Tatton, Ms Crick or Ms Hawksworth.

15. Pleaded Public Interest Disclosure: C's grievance and R's management of it:

15.1. On 3rd January 2019 C submitted his formal grievance to HR Grievance & Litigation; it starts at p175. He indicated the nature of the complaint by inserting an X in three of five available boxes where the two he omitted were a reference to Trade Union Membership/activity and "none of the above", in other words indicating that his grievance fell into a very broad range of serious categories, including potentially whistleblowing and discrimination. In the narrative C grieves about:

15.1.1. application exercise 1595880 (the Jo Banks assisted application) where he complains about his marks;

15.1.2. application 1499028 (the insider trading application), and he requested data;

15.1.3. the “not corporate” allegation which he suggests is evidence of “unconscious tendencies”;

15.1.4. some panels scoring him lower than others “not explicable by chance” – “that is not to say that this correlation is significant or causal or untoward”, but the panels included individuals with contrasting opinions to him including those expressed at the Upper Tribunal (which we believe to be a reference to Ms Zammit-Willson’s opinion being over-ruled in favour of C’s some years previously);

15.1.5. Being put on a reserve list in an application (not subject of this claim) only to fail on another shortly after where “it is difficult to reconcile this incoherence”;

15.1.6. He cites differences of professional opinion again with Mrs Zammit-Willson where he was praised; the Tribunal finds this was to corroborate his sense of his skill and experience levels;

15.1.7. He cites an example of his making a correct adjustment for a “shell rent” overlooked by a colleague; the Tribunal finds this was to corroborate his sense of his skill and experience levels;

15.1.8. C says the person he has gone out of his way not to criticise is “amongst his harshest scorers”, a reference to Ms Zammit-Willson;

15.1.9. C refers in his narrative paragraphs 8 – 12 to bullying and coercive behaviour with threats of disciplinary action in 2007, not a claim in this Tribunal;

15.1.10. Again, citing the example from approximately 2007, not a claim to this Tribunal, C quotes a colleague referring to “an ignorant Welshman” and he says, incorrectly, that he has a letter where R is content to pay him less than his peers “because of my proficiency in the Welsh language”;

15.1.11. C says that he lacked the “bandwidth” to act after his failure at application 1499028 (the insider trading application) but says that reluctantly he has decided to grieve at this stage, that is following his failure with application 1595880 (the Jo Banks assisted application).

15.2. The Tribunal finds that C believed from the comments and behaviour of his former colleague in 2007, that this former colleague’s alleged bullying, coercive behaviour and his remark about “ignorant Welshman” amounted to unlawful discrimination in relation to his protected characteristic of race. He disclosed information tending to show such. This episode is not the basis of a claim of race discrimination to this Tribunal.

15.3. There is no other explicit reference to such race related conduct but only subconscious inconsistencies where he places emphasis on antipathy from Ms Zammit-Willson, whose professional opinion he says was over-ruled in favour of C’s opinions by the Upper Tribunal where C was praised. C seems to be suggesting the potential for professional jealousy and otherwise

says he cannot understand inconsistency in markings and why he was unsuccessful. The Tribunal finds that this complaint is a complaint based on a suspicion and self-belief, and not the disclosure of information tending to show a breach of legal obligation. C disclosed that he failed in various applications, was assisted with them, was an approved reservist with one application and that he suspects the markers took against him.

15.4. The grievance was managed by Mr Endersby. We repeat our findings at paragraph 9.4.4 above concerning the handling of the grievance namely: Mr Endersby suggested to Mr Virk that the matter be dealt with informally by Jo Banks (as someone experienced in such matters, although he may have thought it helpful that Ms Banks was the appropriate line manager); Mr Virk asked Miss Banks to speak to Mr Endersby with a view to resolving a grievance but he did not know the details of the grievance and we accept has no recollection of knowing that it came from C, although he may have known that at the time he delegated to Ms Banks, and forgotten; either way he did not involve himself in the matter any further until the grievance investigation after his involvement with the final promotion application 1621669 about which the claimant claims. It is evident from the documents to which we were taken in and around the grievance that R and its HR officers (from whom we heard no evidence but contemporaneous emails are in the hearing bundle) considered the grievance to be about C being unsuccessful and what he thought about the application of the Code and Principles to the exercises in question but not specifically allegations of race discrimination, and they were attempting to obtain details from C; the details were given by C at a grievance meeting on 29 April 2019 whereas Mr Virk's involvement in vacancy numbered 1621669 ended on 15 March 2019; on that date his scoring of C's application was not influenced by C's grievance but was on the merits of the application.

16. Vacancy 1621669 (RVU Wales & West Technical Lead) March 2019 (in respect of which C claims Direct Race Discrimination, Victimisation and detriment on the ground that C made a protected disclosure or disclosures):

16.1. R's panel in respect of this matter comprised Mr Dal Virk, Mr Richard Roberts and Ms Jo Moore.

16.2. There were 20 applicants. 9 applicants including C did not pass the sift. C's comparator M was passed through to interview and was then placed on a reserve list. One of the 11 candidates who passed the interview and was appointed identified as being Welsh.

16.3. None of the panel members knew the details of C's grievance when they considered this application; Ms Moore did not even know of it. None of the panel members was aware of C's correspondence with Ms Tatton of 5th November 2018 (which he had specifically asked Ms Tatton not to raise with them and she had written she would not). None of the panel members referred to C's grievance in reaching their decision on the application by C.

16.4. Mr Virk chaired the panel. The panel members dealt with the sift by marking applications on their own and then "meeting" in a conference call on 15th March 2019, as they were located apart. No candidates were discussed

by name, but applications were discussed by reference to their respective serial numbers. It was a “brisk” business-like meeting with no “chit-chat”.

16.5. Mr Virk recognised C’s application and those of others who applied. C’s application was recognisable because he re-used examples of his work and experience that Mr Virk considered stale, not least because of he had advised C some time previously (in a meeting he recalls occurred in Stoke) that he ought to include current examples not repeating 2015 examples such as were repeated in this application. He marked C’s application on merit.

16.6. Mr Roberts marked the applications alone based on the “Behaviours” section, ignoring job history. Where undecided he noted two potential scores for further discussion with the panel members. He recognised C’s application and some other applicants; for this reason, he invited the others to comment on those applicants before him. He only referred to applicants by serial number, not name, and made no personal comment about C. Mr Roberts marked C’s application on merit. He does not recall any disagreement between the panel members about the scoring. His recollection of this sift is clear and he gave evidence of being at home in his kitchen using his work mobile for the panel conference call. His evidence was credible and plausible.

16.7. Ms Moore recognised C’s applications as he had re-used prior examples of his work and experience she had seen in other exercises. She recalls no conversation about C. Ms Moore marked C’s application on merit.

16.8. C failed at the sift meaning he was not interviewed.

The Law:

17. Mr Allsop presented detailed written submissions dated 4th January 2022 and C was given the opportunity to consider them in advance of making his own submissions. Whilst C is not experienced or trained in employment law, we are satisfied that the understood the said submissions; he did not take exception to the submissions under the heading “Applicable Principles” and confirmed that he had no objection to the statement of principles, concentrating his submissions on factual matters and his analysis of applicable Civil Service policies and procedures.

18. Section 39 Equality Act 2010 (EqA) provides that an employer must not discriminate against a person in the arrangements for deciding to whom to offer employment, as to the terms on which the offer of employment is made or by not offering employment. An employer must not discriminate against an employee as to the terms of employment the way access is afforded to opportunities for promotion, transfer or training of receiving any other benefit, facility or service or by not affording them, by dismissal or subjecting an employee to any other detriment.

19. Section 4 EqA lists protected characteristics including race. Race includes colour, nationality, ethnic or national origins 9s.9 EqA); it does not include language usage or skills.

20. Section 13 EqA 2010 - direct discrimination.

    20.1. A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others (a named or hypothetical comparator, one whose relevant circumstances are the same as B apart from the protected characteristic relied upon by B in the claim).

    20.2. The key here is causation and the Tribunal answering the question as to the cause of the treatment, the "why?" A did as it did or said as it said. Mr Allsop's submissions on the leading authorities of Igen Ltd v Wong [2005] IRLR 258 and Efobi v Royal Mail Group Ltd [2021] IRLR 811 (the latter of which was an appeal against a first instance judgment of Employment judge Ryan) are approved and applied by the Tribunal, subject to the observation cited in Hewage v Grampian Health Board [2012] IRLR 870 that where a Tribunal can make positive findings it may do so without overburdening itself with concerns over the burden of proof. I set out some more detail on the burden of proof below in paragraph 22 - 24.

    20.3. It is established that it is not sufficient to succeed with a claim of discrimination merely to establish a protected characteristic and a difference of treatment with an assertion of discrimination.

21. Section 27 Equality Act 2010 - victimisation.

    21.1. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act. In this context a protected act includes bringing proceedings under EqA, giving evidence or information in connection with proceedings under EqA, doing any other thing for the purposes of or in connection with EqA, making an allegation (whether or not express) that A or another person has contravened EqA. Giving false evidence or information, making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith. Section 27 EqA applies only where the person subjected to a detriment is an individual.

    21.2. A protected act, such as a grievance letter, need not state explicitly that an act of discrimination has occurred or refer to the Equality Act 2010; it must be made in good faith, whether or not the allegation proves to be true or amounts to unlawful discrimination.

    21.3. Mr Allsop cited Chief Constable of Greater Manchester Police v Paul Bailey [2017] EWCA Civ 425 in his submissions. The fact of a protected act, causation and detriment must be established but causation will only be established if the protected act had a significant influence on A (see 18.1) in respect of the alleged detriment.

22. The burden of proof provisions of EqA are set out in s.136. If there are facts from which the Tribunal could decide, in the absence of any other explanation, that A contravened the provision concerned, the tribunal must hold that the contravention occurred, save where A shows that A did not contravene the provision. This is referred to as a two-stage test, facts being established at the

first stage showing a potential for discrimination and then at the second stage a respondent (A) showing, proving facts, to establish an innocent explanation for acts, omissions or words (or otherwise, such as where A establishes in fact that the alleged acts etc did not occur) and therefore that there was no contravention as alleged.

23. At the so-called first stage the tribunal must find sufficient facts, which may be proved by either the claimant or the respondent, to pass any burden of showing there was no contravention of the provision to A, although any mere explanation from the respondent (A) is to be ignored at that first stage. One would expect the claimant to advance evidence to prove facts beyond merely making assertions of discrimination.

24. In discrimination cases there is often the obvious difficulty of positively proving that discrimination took place from available oral and documentary evidence. A tribunal may, but is not obliged to, draw adverse inferences from established facts, and by that route find that there was contravention of a relevant provision. In this judgment if adverse inferences have been drawn from established facts this will be made clear; if it is not clear that adverse inferences have been drawn then, on consideration and for good reason, it was not deemed necessary to draw any.

25. Time limits – s.123 EqA:

    25.1. Proceedings on a complaint such as C's may not be brought after the end of a period of 3 months starting with the act complained of, or such other time as the Tribunal thinks just and equitable (a wide discretion to extend time as deemed just and equitable).

    25.2. Conduct extending over a period is to be treated as done at the end of the period (a continuous act) where that situation is anchored by discrete acts of discrimination as opposed to reliance on an overarching or nebulous discriminatory state of affairs.

    25.3. Mr Allsop cited Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 (where he appeared for the Appellant) paragraphs 18-19. Whilst the discretion is referred to as "the widest possible" and no factors are listed in s.123 EqA for consideration, all significant factors must be considered, and that will always include the length of, and reason for, any delay and whether that delay has prejudiced the respondent.

26. Public Interest Disclosure detriment – s47B Employment Rights Act 1996 (ERA):

    26.1. s.43a ERA defines a protected disclosure as a qualifying disclosure as defined by s.43B ERA, which is made by a worker in accordance with any of sections 43C – H ERA.

    26.2. S.43B says that there must be a disclosure of information which, in the reasonable belief of the worker, tends to show that one or more listed matter, such as here that R has failed, is failing, or is likely to fail to comply with a legal obligation to which it is subject (s.43B (1) (b)) (here breaches of the Civil

service Recruitment Principles and the Civil Service Code, which have a statutory basis).

26.3. The worker must establish that information, which he reasonably believed to be true, was disclosed, that the information tended to show, for example, the failure mentioned above, and if so, that the worker had a reasonable belief that the disclosure was made in the public interest. The disclosure must be more than a mere assertion; some information must be imparted even if that involves an allegation. There must be sufficient factual content and specificity to be able to show, in this case, the alleged failings. This test requires an evaluative judgment in the light of all the facts of a case, similar to the question as to the reasonableness of the worker's belief (Kilraine v London Borough of Wandsworth [21018] IRLR 846). There is a subjective and objective element, where, if the worker subjectively believes that the disclosed information tends to show what is contended (e.g., breach of legal obligation) and the disclosure has sufficient content to be capable of tending to show it, then it is likely that the worker's belief will be a reasonable one.

26.4. The Tribunal is required to identify in cases such as this one, the source of a verifiable legal obligation (as opposed to any mere working standard or moral obligation) said to have been breached (or that is being breached or is likely to be breached). Only when this is done can the reasonableness of the worker's belief be assessed.

26.5. Mr Allsop submits that in terms of the reasonableness of C's beliefs that any disclosure(s) was/were in the public interest and tended to show breaches of legal obligation as alleged, the factors listed in his submissions at paragraph 19 (a) – (h) must be considered. C's belief must be measured against what a person in his position would reasonably believe to be wrongdoing.

26.6. As to public interest, the worker must believe that the disclosure in question was in the public interest and that belief itself must be reasonable.

26.7. A detriment is what a reasonable worker would or might view as a disadvantage in their work circumstances. It does not have to be a substantial disadvantage but must be a material one. Once detriment has been established the causation question arises again, what was the reason why the worker was subjected to it? For a claimant to succeed, the disclosure must have influenced or materially influenced (that is more than trivially) a respondent accused of subjecting the worker to that detriment. It is not a "but for" test. If a respondent can show that the reason for the detriment had nothing to do with the disclosure the respondent will not be liable under s. 47B ERA.

Application of law to facts:

27. <u>Time limits</u>

27.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 14 March 2019 may not have been brought in time.

27.2. The respondent accepts that complaints relating to vacancy 1621669 are brought in time. However, it says that the direct race discrimination complaints in relation to vacancies 1499028, 15825234, and 1595880 are out of time. The tribunal will decide whether those discrimination complaints were made within the time limit in section 123 of the Equality Act 2010. Specifically, the tribunal will decide:

27.2.1. *was the claim made to the tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?* C presented his claim to the Tribunal on 12th August 2019. The claims in issue here are in relation to applications made in July 2016, June 2018 and September 2018 respectfully. The claims are significantly out of time in circumstances where C has not explained his delay. This delay has, in some instances prejudiced R because of the passage of time and the effect that has had on memories and the retention of documentation such as personal notes of scoring and panel meetings.

27.2.2. *If not, was their conduct extending over a period?* The Tribunal finds that there was no unlawful discrimination based on the protected characteristic of nationality or ethnic origin. There is nothing to "anchor" these events to application 1621669 in respect of which claims are in time. Obviously, C continues to identify as Welsh; he continued to fail with these applications but for reasons unrelated to the protected characteristic in question. There is corelation, but no culpable causation; he failed on merits/demerits.

27.2.3. *If so, was the claim made to the tribunal within three months (plus early conciliation extension) of the end of that period?* This is no longer an issue in view of the above findings.

27.2.4. *If not, were the claims made within a further period that the tribunal thinks is just and equitable? The tribunal will decide why were the complaints not made to the tribunal in time and in any event whether it is just and equitable in all the circumstances to extend time.* As the claimant's claims lack merit and C has not put forward any evidence or convincing submissions for such an extension it would not be just and equitable to extend time; there is no point. We have made positive findings on C's claims in any event, and none succeeds on their merits regardless of time issues. There is no case for an extension.

27.2.5. The direct race discrimination complaints in relation to vacancies 1499028, 15825234, and 1595880 are out of time and are dismissed. In the interest of justice, we have considered them anyway and made an alternative finding in each case.

28. <u>Protected disclosure</u>

28.1. Did the claimant make one or more qualifying disclosures as defined in section 43B Employment Rights Act 1996 (ERA)? The tribunal will decide:

28.1.1. what did the claimant say or write? When? To whom? The claimant says that he made disclosures on these occasions (now excluding 23 October 2018, an email to the respondent's Chief Executive Officer as this has been withdrawn and dismissed):

28.1.1.1. 5th November 2018 – in an email to the respondent's Chief Executive Officer;

28.1.1.2. 3rd January 2019 in his formal grievance.

28.1.2. Did he disclose information? The claimant says that he disclosed information tending to show that there had been a breach of the Civil Service Recruitment Principles ("the Principles") and the Civil Service Code ("the Code") which have a statutory basis. Specifically, he disclosed that in relation to vacancy 149 9028 Mr Richie Roberts redrafted one example given by the claimant in his application for that vacancy and then sat on the panel which assessed the applications for that vacancy. On 5th November 2018 and 3rd January 2019 C disclosed that a senior manager (identifiable on a paper search in respect of the application in question) assisted with an application and then was involved in the process that failed it, therefore being involved in the process on behalf of an applicant and then being involved in what was intended to be an impartial selection exercise ("insider trading"). Mr Roberts was potentially compromised. This could have led to bias or a reasonable perception of bias. Bias would breach the Code and, in some circumstances, (for external candidates) breach the Principles.

28.1.3. On 3rd January 2019 C also disclosed discriminatory conduct related to his nationality that had occurred in 2007. The allegation was against a former colleague. It amounted to a breach of legal obligation in terms of unlawful discrimination and breach of the Code.

28.1.4. *Did he believe the disclosure of information was made in the public interest?* Regarding "insider trading", C's main priority was to advance his career. He did not want Ms Tatton to speak to those involved in the exercise in question as he did not want to harm future applications. That said, it is clear that he expected her to act on his disclosure otherwise. C is a conscientious Civil Servant, steeped in the Code. It mattered to him that the Code and Principles should be applied to all job applicants and in the employment situation generally. The Tribunal accepts that there was a belief in the public interest and that, in part, motivated C.

28.1.5. It is less easy to see the public interest in respect of the 2007 allegations given that he did nothing at a time when it could have made a difference. The alleged perpetrator was no longer employed by R. This conduct does not form part of C's claim. It seems to be background as C wanted to get it off his chest. It would have been raised sooner if C

thought doing so was in the public interest. This was a matter of personal grievance.

28.1.6. *Was that belief reasonable*? Yes, in respect only of the "insider trading" disclosure. There must be thousands of external and internal applications every year; we heard no evidence on this but take judicial cognisance. The whole point of the Code and the Principles are to protect the institution of the Civil Service by ensuring ethical standards are followed. The integrity of the institution is central to our democratic principles and has constitutional significance. C reasonably believed in the near sanctity of the Code and Principles and that any breach would be of interest to the public especially in career preferment.

28.1.7. *Did he believe it tended to show that a person had failed, was failing or is likely to fail to comply with any legal obligation*? Yes, the "insider trading" disclosure did. He was wrong. His perception was however a reasonable one. We have found exculpatory facts, but C was not to know that at the time. There was no breach of either the Code or the Principles. The Code applied. The Principles did not apply as it was an internal application for promotion.

28.1.8. *Was that belief reasonable*? Again, in respect of "insider trading", yes. A reasonable observer would have been surprised at and suspicious of Mr Roberts' involvement assisting and marking, especially if the assisted candidate had been appointed. He ought not to have played a dual role in that exercise; doing so would give rise to a belief that he was acting contrary to applicable standards.

28.2. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

29. <u>Detriment</u>

29.1. Did the respondent do the following things?

29.1.1. *Under-marking the claimant's application for vacancy 162 1669* No. As the facts show, C was marked on merit and was unsuccessful as his application was not good enough compared to others also marked on merit. He was not "undermarked" but marked conscientiously. Two of the markers (Ms Moore and Mr Roberts) were ignorant of C's disclosures by grievance, or emails to Ms Tatton. Mr Virk knew nothing of the Ms Tatton correspondence; he knew of a grievance from one of his colleagues, may previously have known C had grieved, but he did not know of the details and was not mindful of the fact of a grievance when marking C's said application.

and/or

29.1.2. *excluding the claimant from interview for vacancy 162 1669.* No. As the facts show, C was marked on merit and was unsuccessful as his application was not good enough compared to others also marked on merit. He was not "undermarked" but marked conscientiously. Two of the markers (Ms Moore and Mr Roberts) were ignorant of C's disclosures by grievance, or emails to Ms Tatton. Mr Virk knew nothing of the Ms Tatton

correspondence; he knew of a grievance from one of his colleagues, may previously have known C had grieved, but he did not know of the details and was not mindful of the fact of a grievance when marking C's said application.

29.2. *by doing so, did it subject the claimant to detriment*? Not advancing in a promotion exercise is detrimental; it is what a reasonable employee in all the circumstances would consider a detriment. Being marked fairly may not be a detriment in itself.

29.3. *If so, was it done on the ground that he made a protected disclosure*? No. C was marked and not passed through to interview on the basis of merit in a competitive exercise. His application did not make the cut when conscientiously considered.

30. Direct Race Discrimination

30.1. The claimant is Welsh

30.2. Did the respondent do the following things:

30.2.1. *Under-marking the claimant's application for vacancy 1499028 in July 2016*. R did not under-mark C but marked him conscientiously on merit in a competitive process.

30.2.2. excluding the claimant from interview for vacancy 1499028 July 2016. C did not proceed to interview. He was "excluded" because his marks were insufficient to put him through to that stage.

30.2.3. *under-marking the claimant at the interview for vacancy 15825234 in June 2018* R did not under-mark C but marked him conscientiously on merit in a competitive process.

30.2.4. *not appointing the claimant to vacancy 15825234 in June 2018*: R did not promote C to the post in question. R did not appoint C because of his marks at interview, where he was conscientiously deemed to have under-performed in comparison to other candidates. He was not appointed.

30.2.5. *under-marking the claimant's application for vacancy 159 5880 in September 2018*: R did not under-mark C but marked him conscientiously on merit in a competitive process.

30.2.6. excluding the claimant from interview for vacancy 159 5880 in September 2018: C did not proceed to interview. He was "excluded" because his marks were insufficient to put him through to that stage.

30.2.7. *under-marking the claimant's application for vacancy 162 1669 in March 2019*: R did not under-mark C but marked him conscientiously on merit in a competitive process.

30.2.8. *excluding the claimant from interview for vacancy 162 1669 in March 2019*. C did not proceed to interview. He was "excluded" because his marks were insufficient to put him through to that stage.

30.3. *Was that less favourable treatment? The tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimants. If there was nobody in the same circumstances as the claimant, the tribunal will decide whether he was treated worse than someone else would have been treated. The claimant says that he was treated worse than employee H and employee M*. The Tribunal has been unable to find evidence, by direct findings of fact or by drawing inferences, to establish that C was treated less favourably than either M, H, or any likely hypothetical comparator however framed (though none was by C). The selection exercises were fair and conscientious, applying the Code. The Tribunal is critical of Mr Roberts' involvement in what C calls "insider trading"; this gave rise to a perception (only) that everything was not right.

30.4. *If so, was it because of race*? Race was irrelevant to the above procedures. The Tribunal is not even convinced that C believes in its relevance. He clearly believes that he was a suitable candidate and one of the better, if not on occasion best, candidates. We understand his disquiet at "insider trading". He would not accept however that his applications lacked the required merit, and he was looking for a reason for his lack of success. He became suspicious, almost blaming professional jealousy by his repeated references to his opinion having been preferred to that of Mrs Zammit-Willson; that is not a reason related to race. The insider trading was by a Welshmen with no apparent reason to treat a compatriot less favourably than others.

31. <u>Victimisation</u>

31.1. The respondent accepts that the claimant did a protected act as follows: raising a grievance on 3 January 2019 which included allegations that he had been discriminated against because he is Welsh.

31.2. Did the respondent do the following things:

31.2.1. Under-marking the claimant's application for vacancy 1621669 in March 2019. We repeat our findings above.

31.2.2. *excluding the claimant from interview for vacancy 1621669 in March 2019*. We repeat our findings above.

31.3. by doing so, did it subject the claimant to detriment? As above, not proceeding to appointment/promotion is a detriment although being marked fairly is hardly that. He was marked fairly and did not make the cut. It may be said that being saved from having to undergo an interview for which the candidate had failed to qualify is not a detriment as he would have been unsuitable for it; it is however repeated that not getting the chance at interview to prove suitability for promotion is detrimental.

31.4. *If so, was it because the claimant did a protected act*? No. For all the reasons stated the reason was merit, or lack of in comparison with a competitive field.

31.5. *Was it because the respondent believed that the claimant had done or might do a protected act*? No. For all the reasons stated the reason was merit, or lack of in comparison with a competitive field.

Employment Judge T.V. Ryan

Date: 17.02.22

JUDGMENT SENT TO THE PARTIES ON 21 February 2022

FOR THE TRIBUNAL OFFICE Mr N Roche

APPENDIX

Wynn Cowell v VOA

Cast List – Respondent's version

Person	Role
Matthew Baker	Head of HR. Grievance appeal manager
Jo Banks	Team Leader. Claimant's line manager from cXXX until c December 2020 when the Claimant took up promotion to his current Grade 7 position.
Tony Beadle	Conducted mock interview of Claimant on 3 November 2015
Tessa Branscombe	Employee Relations Manager
Employee C	Senior employee who left VOA in 2008
Alan Colston	Chief Valuer (formerly Director of National Specialist Unit in 2016)
Christopher Endersby	HR Consultant who was involved in handling of C's formal grievance
David Grace	Head of Industrial, Commercial and Crown. (Former Unit Head Wales). Sift panel member for vacancy 1499028 (July 2016) and 1595880 (Sept 2018).
Employee H	Actual comparator relied on for direct race discrimination. Applied for vacancies 1585234 (June2018), 1595880 (September 2018) and 1621669 (March 2019).
Employee LH	Employee referred to at para 150 of C's witness statement, who it is indicated by Employee M had applied unsuccessfully for multiple G7 vacancies. Employee LH has declared a nationality on R's HR systems and it is confirmed that she does not identify as Welsh.
Pauline Hawksworth	VOA Head of Recruitment and Resourcing
Employee M	Actual comparator relied on for direct race discrimination. Applied for vacancies 1595880 (September 2018) and 1621669 (March 2019)
Jo Moore	RVU East Unit Head. Sift Panel member for vacancies 1585234 (June 2018) and 1621669 (March 2019)
John Plant	Head of Workforce Strategy and Reward (retiring Dec 2021). (Also referred to as Head of Pay and Reward.) Grievance manager.
Richie Roberts	Unit Head for RVU North. Sift Panel member for vacancy 1499028* (July 2016), 1585234 (June 2018) and 1621669 (March 2019). Assisted Claimant (and other employees) with applications

	for various roles including application for 1499028. *[*It is the Respondent's case that the Claimant's application was not scored by RR – see para 17 of his witness statement.]*
Teresa Roberts	Wife of Richie Roberts. Conducted mock interview of Claimant on 3 November 2015.
Jonathan Russell	Joined VOA as Chief People Officer in 2018. Appointed as Interim Chief Executive of VOA c Sept 2020. Permanently appointed to that role c Sept 2021.
Melissa Tatton	Chief Executive Officer at the time that the Claimant sent two emails to her (23 October 2018 and 5 November 2018) which he relies upon as protected disclosures for his whistleblowing detriment claim.
Dal Virk	Unit head for Regional Valuation Unit (RVU) Wales and West. Sift panel member for 1585234 cJune 2018. Chair of the Sift Panel for vacancy 1621669 (March 2019). Immediate line manager of Jo Banks.
Employee W	Employee referred to at para 150 of C's witness statement, who it is indicated by Employee M had applied unsuccessfully for multiple G7 vacancies. Employee W retired in 2012. Respondent does not hold HR data on his nationality. The ability to identify as Welsh did not come in until c2015.
Owain Wynn-Cowell	Claimant. Applicant for vacancies which included: 1499028 (July 2016); 1585234 (June 2018); 1595880 (September 2018) and 1621669 (March 2019). Successfully appointed to a G7 role 1st December 2020.
Helen Zammit-Willson	Director of the National Valuation Unit. Directly line managed Claimant for period 2005-2008. Chair of sift panel for vacancies 1499028 (July 2016) and 1595800 (September 2018). Line managed for a period by Employee C.

Chronology – Respondent's version

Date	Event	Page references
02.09.91	Claimant starts his employment with the Respondent. Fluency in Welsh secures employment. (This is disputed by claimant).	73
30.11.93	Claimant qualifies as a chartered surveyor	-
c2007	Period Claimant alleges he was bullied by Employee C	-
2008	Employee C leaves VOA	-
Summer 2014	Claimant is unsuccessful in his application for vacancy 1420470. Respondent's position is Panel was chaired by Helen Zammit-Willson and David Grace. Claimant indicates (on 23.11.21) that he does not accept that David Grace was present. Feedback indicated work needed on his interview skills and mock interview might help. Claimant successful at interview for 1417414. Reserve list place after high score.	707 78-80
15.09.14	Claimant met with Richie Roberts.	770
03.11.15	Claimant attends a mock interview organised by Richie Roberts in the Respondent's Shrewsbury Office. (Interview with Mrs Roberts and Mr Beadle.)	712
Mid Dec 2015	Trawl for vacancy 1475367 (specialist caseworker with NSU Industrial and Crown team). Claimant passes the sift.	
Mid Jan 2016	Claimant unsuccessful at interview for 1475367. Panel Richie Roberts, David Grace and Helen Zammit-Willson.	853
July 2016	**Vacancy 1499028** • Richie Roberts assists Claimant with his application. Neither named actual comparator applies. • Sift panel: Helen Zammit-Willson/David Grace/Richie Roberts. • Richie Roberts does not score the Claimant's application (p434) but loads agreed scores onto Respondent's systems (p94). • Claimant is unsuccessful with his application.	82 94 98-102 94 434-435
16.08.16	Helen Zammit-Willson met with Claimant to provide feedback re 1499028. Claimant alleges she made the comment: "*Owain, you are not corporate enough was made*".	716-718
June 2018	**Vacancy 1585234** • Claimant and Employee H apply.	116 (H's app)

	• Sift panel: Dal Virk; Joanne Moore; Richie Roberts • Both Claimant and Employee H fail at interview stage.	120 (C's app) 124 (score descriptor) 126- rating for selection exercise 1. 124-126 and 852
Sept 2018	**Vacancy 1595800** • Claimant, Employee H and Employee M all apply. • Sift panel: Helen Zammit-Willson/ David Grace/ Ian Johnson • Claimant, Employee H and Employee M all fail at sift stage.	127 (H's app) 133 (C's app) 139 (M's app)
23.10.18	Claimant emails CEO, Melissa Tatton – an email relied on as protected disclosure for whistleblowing detriment claim	153-154
05.11.18	Claimant emails CEO, Melissa Tatton – an email relied on as protected disclosure for whistleblowing detriment claim	152
28.11.18	Claimant speaks to Pauline Hawksworth	145 764-769
18.12.18	Claimant asserts he spoke with Pauline Hawksworth (neither confirmed nor denied by Respondent)	Claimant's WS at para 61 769
03.01.19	Claimant lodges formal grievance The Claimant relies on this as being a protected act relied upon for victimisation claim	175-181
14.01.19	Internal announcement that Helen Zammit-Willson will be appointed and SCS role taking effect on 18 February 2019	
12.02.19	Chris Endersby and Dal Virk discuss Claimant's grievance	197 198
15.02.19	Chris Endersby speaks to Jo Banks about the Claimant's grievance.	199 200
18.02.19	Claimant received e mail from Chris Endersby advising that the formal grievance procedure is not the appropriate avenue to pursue the matters which the Claimant has raised. Claimant telephones Chris Endersby. Chris Endersby terminates the call. Helen Zammit-Willson take up her first SCS role as per the internal announcement made on 14 January 2019.	741 203 757
28.02.19	Jo Banks speaks to Claimant about his formal grievance.	745-748
March 2019	**Vacancy 1621669** Claimant, Employee M and Employee H apply.	188-191 204 (M's

		app) 209 (H's app) 214 (C's app)
15.03.19	Sift Panel have a conference call to go through the applications for vacancy 1621669. Claimant fails at the sift which Employee M and Employee H both progress to interview.	-
18.03.19	Claimant receives Rejection letter in respect of 1621229. [Employees M and H both progressed to interview. Employee H was amongst 4 successful applicants and Employee M was placed on a reserve list.]	234
28.03.19	Tessa Branscombe emails Claimant to suggests hearing his grievance about 1621669 together with the content of his formal grievance.	229
29.04.19	Grievance meeting between John Plant and Claimant	238 240 273 278 (mtg notes)
29.04.19	John Plant speaks to Richie Roberts	287
01.05.19	John Plant speaks to Helen Zammit-Willson	287
03.05.19	John Plant speaks to Dal Virk	288
10.05.19	Claimant receives outcome of grievance	291
10.05.19	Claimant appeals grievance outcome	298
03.06.19	Claimant circulates grievance appeal skeleton document	308
04.06.19	Mathew Baker (Appeal Manager) meets with the Claimant	330 (mtg notes)
07.06.19	Mathew Barker telephones Claimant regarding his grievance	333 752-754
14.06.19	Claimant applies for ACAS Early conciliation	
21.06.19	Claimant receives outcome of grievance appeal	351
August 2019	Jonathan Russell reviews case history	379
12.08.19	Claimant files his ET1	1
04.09.19	Jonathan Russell emails Claimant with the findings of his review.	395-397
06.11.20	Claimant hears that he has been successful at interview for	-

	a grade 7 post and is on a reserve list	
01.12.20	Claimant commences his grade 7 post	-