



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4103220/2020**

**Final Hearing Held by Cloud Video Platform on 9 – 11 February 2022**

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**Employment Judge A Kemp  
Tribunal Member E Hossack  
Tribunal Member S Larkin**

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**Mr D Johnson**

**Claimant  
Represented by:  
Mr O Isaacs,  
Counsel**

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**Grampian Health Board**

**Respondent  
Represented by:  
Mr K McGuire,  
Counsel  
Instructed by:  
Mr A Watson,  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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**The unanimous decision of the Tribunal is that the claim of direct discrimination of the claimant by the respondent under section 13 of the Equality Act 2010 does not succeed and the claim is dismissed.**

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## REASONS

### Introduction

1. This was a Final Hearing of the claims made by the claimant. Mr Isaacs appeared for the claimant. The respondent was represented by Mr McGuire.  
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2. The claim is for direct discrimination under section 13 of the Equality Act 2010 on the protected characteristics of age and race. The claim is made in relation to an application that the claimant made for a post at Dr Gray's Hospital, Elgin for which he was not successful. He provided a Schedule of Loss seeking a sum in excess of £1.2 million, which was re-submitted with revisions during the hearing. The respondent denied the claims.  
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3. There have been a number of Preliminary Hearings in this claim. The first was on 30 September 2020 for case management. The second was on 11 March 2021 when it was held that the claim was within the jurisdiction of the Tribunal, an amendment by the claimant was allowed, and applications for strike out and a deposit order by the respondent were refused. The third was on 6 May 2021 after which Orders were issued for a Final Hearing. The Final Hearing was to have taken place in 2021 but was postponed on 29 July 2021 at the final Preliminary Hearing. Also at that Preliminary Hearing an application by the claimant to strike out the defence was refused. During the course of the process the claimant sought a large number of document orders, and a series of such orders was made. After the final Preliminary Hearing the claimant made a further amendment to his case, which the respondent later confirmed was not opposed.  
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4. The present hearing was fixed by Notice dated 19 October 2021.
5. The hearing took place by Cloud Video Platform remotely in accordance with the orders made at the Preliminary Hearing on 6 May 2021. It was conducted successfully.

## Issues

6. The Tribunal discussed the issues for determination at the commencement of the hearing. The list of issues agreed with the parties' counsel is:

- 5 (i) Did the respondent directly discriminate against the claimant under section 13 of the Equality Act 2010 in (i) not appointing him to the role for which he had applied, (ii) asking him different questions to those asked of the candidates who were appointed, those candidates being his comparators, (iii) taking a selective view of the requirements for the role, or (iv) downplaying his experience and qualities to justify his non-selection whereas others' lack of experience was identified but then ignored, because the protected characteristics of his age or his race, or both, and in that regard
- 10 (a) Has the claimant established a prima facie case in respect of either or both of the protected characteristics from which discrimination might be inferred, and if so
- 15 (b) Has the respondent proved that the decision it made was in no way whatsoever affected by either of the protected characteristics relied on?
- 20 (ii) If the claim is successful to any extent, to what remedy is the claimant entitled?

## Preliminary Issues

7. The claimant had applied for a wasted costs order. It was agreed that that application be deferred until the determination of the merits of the Claim,

25 and it is commented on at the end of this Judgment. There were otherwise no preliminary issues.

## Evidence

8. Evidence was given by the claimant first, and then by the respondent's two witnesses Professor Duff Bruce and Mr Andrew Johnston. Evidence

30 in chief was given by written witness statement which had been provided to the other party prior to the hearing in accordance with Orders made at the Preliminary Hearing on 6 May 2021.

9. The parties had prepared a Bundle of Documents. There were also a supplementary bundle of documents that the claimant produced without objection from the respondent. The claimant as referred to above produced a revised schedule of loss and attachment on the second day of the hearing, which was received without objection from the respondent although the contents were addressed in submission.

10. The Tribunal wishes to record its appreciation for the assistance of both counsel during the hearing, and for the helpful submissions that were made by each of them which were of a high quality.

10 **Facts**

11. The Tribunal found the following facts, material to the case before it, to have been established:

12. The claimant is Mr David Johnson.

13. His date of birth is 7 June 1958.

15 14. The respondent is Grampian Health Board. It is responsible for hospitals in the Grampian region.

15. One such hospital is Dr Gray's Hospital, Elgin ("the Hospital"). It is a District General Hospital. It sees patients as Out-patients and as In-patients. It has a Trauma and Orthopaedic department, which deals with trauma such as injuries including fractures from accidents, and elective work such as hip replacements. It does not carry out more complex trauma or orthopaedic work, which is generally referred to a Major Trauma Centre (MTC) at Aberdeen. It does not undertake elective spinal or pelvic surgery. Patients attending the Hospital requiring more complex surgery, or spinal or pelvic surgery, may be stabilised before being transferred to Aberdeen. The Hospital is at the third level of a trauma network in Scotland. The first level is of the MTC. The second level is a Major Trauma Unit, such as Raigmore Hospital, Inverness. There is also a fourth level comprising community facilities and similar.

30 16. The Trauma and Orthopaedic department of the Hospital sees something of the order of 8,000 patients per annum, of which something of the order

of 750 patients per annum are in the category of trauma. Of those about 150 per annum involve hip replacements.

17. The work of a Consultant is divided into four-hour sessions known as Programmed Activities (PAs). Normally 10 PAs are worked per week, but there is a possibility of working 12 PAs per week. As at December 2019 one week in five for each consultant in the department was spent on call for trauma work, for 24 hours per day for seven days. The balance of the weeks was generally spent in elective work, and outpatient clinics.

18. The respondent has a Recruitment and Selection Policy applicable to the selection of those to be its employees. It includes the following:

“the Interview Panel must record evidence obtained at interview to assist in making an objective appointment in accordance with the Person Specification. A rating/scoring system should be used to assist objectivity.”

19. The respondent also has Guidance on the Appointment of Medical/Dental Consultants agreed with the British Medical Association (“the Guidance”). It provides for the constitution of the Panel, to include a Manager from the relevant sector, and others. It also states that

“Decisions to appoint must be made on the application and performance at the interview panel. Whilst there is often local knowledge of a candidate, this knowledge cannot be used to favour/influence the decision making process, as this leave the Board open to criticism of an unfair process. Firstly the Chair should seek the view of the External Adviser on the appointability of the candidates i.e. in their opinion do all the candidates meet the criteria for appointment to the Consultant grade. The Chair should then seek the views of the other members of the Panel and ensure a full and open discussion on suitability of each candidate. At the conclusion of the discussion each member of the Panel should be invited to vote for their preferred candidate. In the event of a tied vote the Chair has the casting vote. No panel member has a power of veto.....”

20. The claimant is of mixed Afro-Caribbean BME racial origins. His father was the son of a church minister in Nigeria. His mother is white Caucasian English.
- 5 21. The claimant qualified MB ChB in 1980. He became a Fellow of the Royal College of Surgeons in 1984 and a Fellow of the Royal College of Surgeons in Edinburgh in the speciality of Orthopaedics and Trauma in 1989. He was awarded an MD in 1990. He has been awarded numerous competitive surgical prizes, scholarships and fellowships. He has published widely both in the UK and internationally. He co-edited a book  
10 on knee surgery. He has been appointed a reviewer of many national and international journals.
- 15 22. During the claimant's career he specialised in knee surgery. He has undertaken during the overall course of his career a high amount of trauma work in orthopaedics. That includes for example fractures of the hip, shoulder, leg, arm, wrist, ankle and foot, dislocations of the shoulder or wrist, and cuts or infections. He has also undertaken elective work in orthopaedics including for example hip replacements.
- 20 23. He has worked in a variety of hospitals in the UK, and in Australia. From 1992 he worked at hospitals in Bristol.
- 25 24. The claimant established a limited company, David Johnson Orthopaedics Limited, through which he conducted private orthopaedic work. From about January 2018 the claimant carried out increasingly limited amounts of orthopaedic work which was either related to trauma or elective surgery at that Clinic. The work he carried out through his limited company from  
30 January 2018 was mainly giving expert medico-legal opinions.
25. In 2018 the General Medical Council commenced an investigation into a complaint that the claimant had sent a letter on the headed notepaper of an hospital at a time when he was not connected to that hospital. No interim measures were taken in relation to the allegation.
- 30 26. In the period from 3 June 2018 to about 3 September 2018 the claimant carried out Locum work as a Consultant Orthopaedic Surgeon at University Hospital, Leicester. He carried out similar such Locum work in

the period 3 October 2018 to 15 December 2018 at Hairmeyers Hospital, Glasgow. Such Locum work in each case principally involved carrying out trauma work. In January 2019 the claimant carried out one to two weeks of Locum work on the Shetland Islands which involved seeing patients in an out-patient setting.

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27. On or around 1 October 2019 the respondent advertised three vacancies for Consultant Surgeons in the Trauma and Orthopaedic Department at Dr Gray's Hospital. Specialist interest was encouraged. Those interested were invited to visit the hospital and speak to the clinicians.

10 28. The vacancies arose as three Consultants had resigned from their posts. Two of those consultants were of Indian sub-continent, and one of Asian, ethnic origin, and their ages were in about their 40s.

29. The respondent prepared a Job Description for the roles. It included that:

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“Our consultants currently work a 1:5 rota with a view to moving to a 1:6 rota sometime in the future. While on call and elective lists and clinics are suspended. There is a trauma session in theatre each Wednesday afternoon and Friday morning. Access to emergency theatre is available at other times. Each consultant has a weekly fracture clinic. ....The department receive approximately 750 emergency admissions each year, 20% of which are hip fractures. ....”

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30. The respondent prepared a Person Specification for the role. It contained Essential and Desirable criteria. Under Experience the following was essential “Six years' experience at Registrar level or equivalent post recommended by SAC.” Under Ability the following was essential

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- “Evidence of ability to take full responsibility for independent management of patients.
- Experience of teaching and supervising the performance of critical skills by trainees.”

30 31. Approximately 40% of the role involved trauma work, and the balance elective work. A key aspect of the work of the Consultant was performing

surgery on patients whether that was within the category of trauma or elective.

32. In November 2019 the claimant visited the Hospital and spoke to Mr Colin Smart, a Consultant Trauma and Orthopaedic surgeon at the Hospital, in his early 60s, who showed him around the hospital and discussed the role with him. In the course of doing so they met Mr Andrew Johnston, and the claimant had a discussion with Mr Johnston for about half an hour.
33. The claimant applied for the post using an online application form in November 2019. In his application form he did not state a date for the end of his work at University Hospital Leicester, which had commenced on 3 June 2018, he referred to work as a Locum Consultant at Hairmeyers Hospital, Glasgow as being from 3 October 2018 to 15 December 2018, and did not refer to his Locum work on Shetland. He stated his current employer as "Bristol Orthopaedic Clinic". He stated that there were no unspent convictions to be disclosed. He stated that there were no fitness to practice proceedings to disclose. He stated as a summary of his current duties and responsibilities "Consultant in Trauma and Orthopaedics".
34. He sent with his application his CV. His CV stated that he had carried out work at Hairmeyers Hospital in "October/November 2017." His CV was not passed on to the Panel members determining the applications. The claimant was not informed of that.
35. Bristol Orthopaedic Clinic is the trading name for the claimant's limited company. He is not an employee of that company, but a Director and its principal shareholder. That company did not make profits in the financial years to 31 August 2020 or 31 August 2021.
36. Eight candidates were short-listed by a Panel established by the respondent and called for interview for the posts by the respondent. They included, in addition to the claimant, Candidate 1, Candidate 2 and Candidate 3. Candidate 1 is of British nationality and his ethnic group is identified as Asian, Asian-Scottish, Asian-British – Pakistani. His date of birth is 12 December 1970. Candidate 2 is of Italian nationality. His ethnic group is identified as Any other White background. His date of birth is 12



March 1986. Candidate 3 is of Greek nationality. He did not identify an ethnic group but is of white background. His date of birth is 2 April 1980.

37. Candidate 1 was employed at University Hospitals, Birmingham as a Consultant in the speciality of Trauma and Orthopaedics. He had been in that post since 5 March 2018. His duties and responsibilities were summarised as “Full capacity Upper limb consultant post including acute trauma on call”.
38. Candidate 2 was employed at Royal Bournemouth Hospital as a Post CCT Senior Knee Fellow in the speciality of trauma and orthopaedics. He had held the post since 1 October 2019. Prior to that he had held a similar post at Royal Derby Hospital from 3 September 2018. His duties and responsibilities for his current role were summarised as “During this fellowship I will have a great exposure to knee arthroplasty surgery including revision and soft tissue knee including revision ACL surgery. I will continue to polish my trauma skills with regular sessions at Poole Hospital which has one of the highest incidence for NOF in UK.” His duties and responsibilities for his former role were summarised as “During my post CCT fellowship, I have been exposed to lower limb primary and revision arthroplasty. I am having the opportunity to perform hip and knee arthroplasty and get a good exposure to revision cases as well. I had a good exposure to soft tissue knee surgery in particular ACL reconstruction, MPFL reconstruction, meniscus repair, extra-articular tenodesis, AMIC procedure, meniscus transplant, knee osteotomies and knee arthroplasty (primary total knee replacement, unicompartmental knee replacement and revision.....[with further details]”.
39. Candidate 3 was employed by Greater Glasgow Health Board as a Senior Clinical Fellow. In the speciality of Trauma and Orthopaedics. He had been in post since 15 August 2019 and his duties and responsibilities were stated to be “Lower Limb reconstruction, lower limb arthroplasty”. His previous employment was at Forth Valley Royal Hospital as a Speciality Doctor in Trauma and Orthopaedics, with his duties and responsibilities stated to be “trauma and elective orthopaedic duties, wards rounds and participation in the middle grade rota oncall”.

40. Interviews were held on 6 December 2019 (“the interviews”). They were conducted by a Panel of six, being Professor Duff Bruce as Chairperson, who had not been originally appointed to the panel but was appointed to that role after the original Chair was not able to act a few days prior to the interviews, (Dr Jamie Hogg had also originally been on the panel but similarly withdrew from it: he was not replaced), Mr Colin Smart, Mr David Boddie and Mr Andrew Johnston each of whom were Consultants in Orthopaedics, Dr William McLeod as External Adviser and Professor John Duncan as the University representative (“the Panel”). The Panel was supported by Mr Scott Thomson an HR representative of the respondent who was not a part of the Panel. It did not include a Manager.
41. All of the Panel were white British by ethnic origin. Their ages ranged from 40s to early 60s. Professor Bruce and Mr Johnston had both had discrimination training in 2016 but not specifically in relation to unconscious bias.
42. The Panel had a brief meeting before the interviews commenced. There was a discussion of what issues would be raised with the candidates and by which Panel member. Each candidate had a time allocation of about 45 minutes.
43. The claimant was the first person to be interviewed. Basic notes of the interviews were prepared at the time by Mr Thomson on a computer or laptop. He did so similarly for all of the candidates interviewed. Those notes of the questions asked and answers given are a reasonably accurate summary of them. Each interview lasted about 40 minutes.
44. The questions asked of the claimant were to the following effect –
- “1. What is your training and experience?
  2. Have you been Locuming until recently?
  3. The role involves general hospital work, what skillset do you bring to orthopaedics?
  4. Are you undertaking elective surgery in Bristol at the moment?  
Is the elective work through the NHS?
  5. A staff shortage with nurses means theatre time is precious, how can we improve theatre efficiency?

- 5
6. There is general hospital work, what skillset do you bring to orthopaedics?
7. Dr Gray's is integral in the A96 corridor, your CV is based around things such as knee work, how would you feel about more general trauma work?
8. Does the locum work you have done recently include trauma?
9. What is your understanding of the infant stages in trauma services in Scotland?
- 10
10. Is there a particular episode in training that you remember that you dealt with well?
11. Is your teaching experience most in the postgraduate section?
12. What is your understanding of the undergraduate shape of the curriculum?
13. Our curriculum would be considered conventional but changing.
- 15
14. Have you come across the GMC change about medical licensing assessment for undergraduates?
15. What attracts you to Elgin?
16. Do you have any concerns about Elgin?
17. Are you interested in part-time work?
- 20
18. We are looking to have a few new starts together. What are your thoughts on activities we might be able to do in developing a common way of working?
19. Your validation date is due in April 2020, have you had an annual appraisal this year?
- 25
20. Do you have any questions for us?
21. Are you in a position to accept a post if offered it?
22. When is a possible start date?
23. 1 February [2020] for example?"

45. The questions asked of Candidate 2 were approximately the following:
- 30
- "1. What is your training and experience?
2. What can you bring to elective care?
3. How would you help to maximise theatre efficiency?
4. What is the scope of trauma services at a District General Hospital?

5. What is a challenging thing in training you dealt with?
6. What was the trainees learning in that case?
7. What is your teaching experience and how does it relate to undergraduates?
- 5 8. Have you had formal education in training?
9. What do you know about the reorganisation of the trauma service in Aberdeen?
10. What do you know about the Aberdeen University curriculum?
11. Have you come across the GMC change about medical licensing assessment for undergraduates?
- 10 12. What attracted you to the post?
13. Do you have any doubts about the kind of working environment?
14. Would you consider a part-time contract?
- 15 15. What are your thoughts on team-building skills?
16. Were you on a specialist register through training in Italy?
17. Have you had any UK training on the specialism?
18. When is your re-validation?
19. Have you had an appraisal?
- 20 20. Would you accept the post if offered it?
21. What are the timescales?"

46. The questions asked of Candidate 3 were approximately the following:

- 25 "1. What is your training and experience?
2. Did your Greek qualification allow you on the specialist register?
3. There are unique challenges working in a smaller hospital, what elective experience can you bring to Dr Gray's hospital?
4. There are a number of nursing and anaesthetist vacancies which leaves theatre time short, what would you do to improve the efficiency of theatre times?
- 30 5. Can you suggest anything else to improve efficiency?
6. When was your last appraisal?
7. What is the scope of trauma at Dr Gray's?
8. It state in your CV that you completed a CHO, where was that?
9. Was the training in Greece light on trauma?

10. What is your understanding of the rearrangement of trauma services in Scotland?
11. Where would Dr Gray's work within a trauma network?
12. Have you had a challenging situation in training?
- 5 13. Were you signed off as a trainer during your training?
14. Was it mainly about postgraduate work?
15. What was the undergraduate experience?
16. What is your understanding of the Aberdeen University curriculum?
- 10 17. Do you know about GMC changes to exams?
18. What attracts you to the job?
19. Are there downsides to Elgin?
20. Would you consider a part-time appointment?
21. What is your experience in team-building?
- 15 22. Do you have any questions for us?
23. Would you accept the job if offered it?"

47. The questions asked of Candidate 1 were approximately the following:

- "1. What is your training and experience?
2. There is a generality of elective experience is required, what  
20 elective experience can you bring?
3. Are you looking at purely limb elective work or more general?
4. There is a lack of anaesthetists and theatre nurses which means theatre time is precious, what would you do to help?
5. You have a broad experience in trauma management, what is  
25 the scope of trauma at a place like Dr Gray's?
6. What cases would you anticipate having to transfer?
7. What is your understanding of the setup of trauma centres in Scotland?
8. Is there any other role NHS Scotland has in major trauma  
30 centres?
9. Where would Dr Gray's work within a trauma network?
10. Was there a challenging situation you have had to deal with and how did you deal with it?
11. You have a strong teaching portfolio, expand on it.

12. Do you know about the Aberdeen University curriculum?
13. What is your understanding of GMC changes to the award of medical qualifications in the UK?
14. Why Elgin?
- 5 15. On the other hand, do you have any concerns about Elgin?
16. When are you due to revalidate?
17. Would you work part-time?
18. What is your experience around team-building?
19. Do you have any questions?
- 10 20. Would you accept the post if offered it?
21. When would be the start date?"

48. The answers given by the claimant to the said questions included, approximately, the following answers:

- 15 "2. Locuming and other things, I was up in Shetland the other week doing trauma and orthopaedics work. I saw 51 new patients in one week. It was interesting and challenging.
3. I had general training across all specialities, unlike some more recent graduates. I never trained in plastics. I did a fellowship in shoulder surgery, I did surgeries in Bristol and I have done surgery
- 20 in the ankle.
4. No, it is outpatient work there
5. Yes
6. I would be happy with that, I have spent a lot of my post graduate time in that environment so I am used to it. Principles of things like
- 25 closed nailing doesn't change. You have to have a broad knowledge of the capabilities at a hospital and personally knowing what can be fixed and what has to be referred on. I am perfectly happy to do more general work.
7. Yes
- 30 8. In Oxford we were all trained on shift and that regularly meant doing surgery in the late hours. I spent time in Bristol doing a lot of trauma work. It went from minor wrist fractures to more serious cases.

9. I understand that they have been designated level 1-2. I am assuming that there is a system for helicopter services for transferring people due to oil work etc.”

5 49. The answers given by Candidate 2 to the said questions included, approximately, the following answers

10 “2. Knee replacements, I have good experience of this in Derby. I learned from the consultants there. I learned to do fixed bearing. I have done a good number of hip surgeries as well, I did some independent hip work in my last fellowship. If I get this job I will try and do more hip work.

15 4. To deliver good quality surgery and try to match the needs of the population. From the last 2018 report Elgin was top ranking for delivering certain procedures within 36 hours. There are sometimes delays in ED so there is room for improvement. I would try to manage trauma by using my expertise but if I wasn't confident in doing some type of trauma care I would ask my colleagues for help, including in Aberdeen.

5. I know about the Aberdeen and Inverness trauma centres.”

20 50. The answers given by Candidate 3 to the said questions included, approximately, the following answers

25 “7. I visited the department two months ago and spoke with Dr Smart. In the last year and a half before I re-joined Glasgow I was in Forth Valley. I was asked to do paediatric cases, elective procedures slightly outside my scope, with assistance. I am quite flexible that way. I appreciate that in a hospital like Dr Grays, I saw in the job description that I might have to do work in Aberdeen Royal Infirmary which I would do.

9. No, but doing trauma gave me a good reason to come to the UK.

30 10. Things are a little bit stuck in Glasgow. The changes since 2012 in England have led to good results with things like the flow of patients. I am familiar with the way the system operates

11. They would keep all the cases they can do within the hospital, stuff like paediatrics and hip fractures. They only refer outwith if necessary. That helps with the flow of patients.”

51. Following the interviews the Panel members held a discussion with regard  
5 to the candidates. One of the candidates was considered not to be appointable. The other seven candidates were all considered by the external advisor Dr McLeod to be appointable, including the claimant.

52. No scoring of each candidate against specific selection criteria, or other  
10 system of rating each candidate by allocating marks against criteria similarly, was used by any of the Panel.

53. The Panel members were invited by Professor Duff to vote for the three  
candidates they considered should be appointed. All six on the Panel considered that the same three candidates should be appointed, being Candidate 1, Candidate 2 and Candidate 3, although they had each of  
15 those candidates in different orders of ranking as first, second and third. Professor Bruce and Mr Johnston both considered that those three candidates had each demonstrated an ability to take full responsibility for independent management of patients.

54. Three Panel members being Professor Bruce, Dr McLeod and Mr Smart,  
20 ranked each candidate from first to eighth, and each ranked the claimant seventh. The other three Panel members only ranked their first three candidates.

55. Mr Thomson prepared a Minute of the meeting which is reasonably  
25 accurate but not comprehensive as a record of the discussions. In a section headed “Summary of the Panel’s comments following interview” the following was stated in relation to the claimant:

30 “The external advisor confirmed that [the claimant] was appointable based on his CV, training and qualifications. He also noted that he was not totally convinced of the candidate’s current trauma experience. Mr Smart agreed that [the claimant’s] current trauma experience is a downside despite his good historic experience. The Chair and Andrew Johnston also took issue with [the claimant’s]



lack of recent trauma experience. The panel agreed that [the claimant] interviewed quite well but they had reservations around his recent trauma experience.”

56. The following was stated in relation to Candidate 1

5 “The external advisor confirmed that Candidate 1 was appointable based on his CV, training and qualifications. He also stated that he interviewed well and gave the best answer about how trauma works in Elgin. The University rep stated that the only question mark would be whether Candidate 1 would be prepared to do total knee  
10 replacements. Mr Johnston noted that the candidate was honest when it came to his limitations around knee surgery. Mr Boddie commented that the candidate was good across the board and had good experience. Mr Smart said he thinks that Candidate 1’s experience in upper limb trauma would be of good benefit to the  
15 department. The panel agreed that Candidate 1 performed very well and would be a good colleague.

57. The following was stated in relation to Candidate 3

20 “The external advisor confirmed that Candidate 3 was appointable based on his CV, training and qualifications. The external advisor also stated that he was not totally convinced if the candidate could cover the generality of trauma that well and that he was surprised that he did not know about MTCs. The University rep believed that Candidate 3 was pretty reasonable and presented himself well. He also asked sensible questions. Mr Johnston noted that the  
25 candidate was competent although the last time he had an appraisal was in January 2018 and that he should have known about MTCs since he was working in Glasgow. Mr Boddie stated that [his] answers did not match his stated interest in trauma. Mr Smart explained that the candidate came to visit the hospital  
30 beforehand and on the elective side he should be a safe pair of hands. The chair stated that he liked him and that he was still quite junior. He was honest about his limitations. He had personal

reasons why he wanted to come to Elgin and came across as very genuine.”

58. The following was stated in relation to Candidate 2

5 “The external advisor confirmed that Candidate 2 was appointable based on his CV, training and qualifications. He also said that the candidate came across well, had good experience with knees and suspected that he can do hips. However the candidate did not know too much about how trauma network works though or local teaching needs and practices. The external advisor confirmed that he still  
10 suspects that he would do the job well though. The University rep noted that the candidate’s publications were very strong. Mr Johnston stated that the candidate had a strong academic background but had little knowledge of Scottish MTC. Mr Johnston also said that the candidate had strong fellowships and had CCT  
15 and was a strong candidate. He may push research and academia at Elgin. Mr Boddie noted that the interview started off well but his answers on the trauma questions were weak. The candidate would be a competent appointment though. Mr Smart believed that Candidate 2 spoke well and is very much a knee surgeon who would likely be interested in specialising in knees. The panel agreed  
20 that Candidate 2 performed well and would be a good colleague.”

59. The Minute stated under the heading “Post Interview”

25 “The panel unanimously agreed that the three candidates who should be appointed are Candidate 1, Candidate 3 and Candidate 2. ....The panel ranked the three candidates slightly differently but agreed that they were the three best candidates for the vacancies”.

60. The minute did not record the reasons why the panel had decided not to appoint the claimant, and why it had decided to appoint Candidate 1, Candidate 2 and Candidate 3. It did not record a discussion held as to  
30 whether to appoint to the possible fourth role. One of the candidates, not being the claimant, was considered for a role as a Locum. Mr Johnston did not consider that that person was appropriate to be appointed to it. No formal offer of such a possible fourth role was made to any candidate.

61. Mr Thomson maintained separate notes of the post-interview discussion which are reasonably accurate but not comprehensive. In relation to the claimant those notes stated, using numbers for each Panel member (such that Dr McLeod was 1):

5 “Dr McLeod – good CV and experience but not totally convinced of current trauma experience.

Mr Smart- current experience in trauma would be his downside, he might be difficult for this department to great deal of experience historically, not as much recently.

10 Professor Bruce – issues with lower level of more recent experience. Mr Johnston – gaps with trauma and orthopaedic experience.”

62. Those notes stated the following in relation to Candidate 3

15 “Dr McLeod – not totally convinced if he can cover generality of trauma that well. Surprised he didn’t know about MTCs

Mr Johnston – should have known about MTCs if he is working in Glasgow, last appraisal was in January 2018. Competent though Mr Boddie – Answers to the questions did not match his stated interest in trauma

20 Mr Smart – He came to visit and on the elective side I think he would be a safe pair of hands

Professor Duff – I liked him and he is still quite junior. He was honest about his limitations. He had personal reasons why he wanted to come to Elgin. Very genuine.”

- 25 63. Those notes stated the following in relation to Candidate 2

“Dr McLeod – came across well, good experience with knees and I suspect he can do hips. Did not know too much about how trauma network works though or local teaching needs and practices. Suspect he would do the job well though.

30 Mr Smart – thought he spoke well and is very much a knee surgeon and would be interested in specialising in knees.

Mr Johnston – strong academic background, little knowledge of Scottish MTC however. Strong fellowships and has CCT, strong candidate. May push research/ academia at Elgin.

Professor Duncan – publications are very strong.

5 Mr Boddie – started off well but trauma answers were weak. Would be a competent appointment though.”

64. The “scoring” was recorded in the notes as votes for orders of preference of the candidates as follows:

1. Dr McLeod (i) Candidate 1 (ii) Candidate 2 (iii) Candidate 3
- 10 2. Mr Johnston (i) Candidate 1 (ii) Candidate 2 (iii) Candidate 3
3. Mr Boddie (i) Candidate 1 (ii) Candidate 3 (iii) Candidate 2
4. Professor Duncan (i) Candidate 1 (ii) Candidate 3 (iii) Candidate 2
5. Mr Smart (i) Candidate 1 (ii) Candidate 2 (iii) Candidate 3
- 15 6. Professor Duff (i) Candidate 3 (ii) Candidate 2 (iii) Candidate 1

65. The note recorded that the three candidates appointed were Candidate 1, Candidate 2 and Candidate 3.

66. The Panel understood from the claimant’s application form and interview that he had not undertaken any work in surgery, or in trauma, since  
20 December 2018. The surgery he had undertaken in 2018 was, they understood from his application form, for a period of about 10 weeks at Hairmeyers Hospital, Glasgow up to 15 December 2018, and prior to that for an unspecified period of time starting on 3 June 2018 at University Hospital, Leicester, both of which were when he was a Locum, and both  
25 of which included trauma work. He had also carried out work at an out-patient clinic on the island of Shetland for up to two weeks on dates he did not give to the Panel during the interview save that it had been “the other week”. The Panel considered that the claimant had not demonstrated as good an ability to take full responsibility for independent management of  
30 patients as other candidates they appointed because of what they considered to be his lack of recent experience of trauma work.

67. After deciding to appoint those three candidates, and not the claimant, to the roles, Mr Johnston referred the other members of the Panel to his

5 understanding that the claimant had a criminal conviction which he believed was not spent, and that in not referring to that unspent conviction he had not followed probity in relation to his application. Mr Johnston had been aware of that matter from his receipt on 6 September 2019 of the claimant's CV submitted to him from an agency, in relation to a post as Locum. He carried out an online search for the claimant and another candidate as a matter of due diligence in light of concerns over a previous Locum appointment. He found newspaper articles of a conviction of the claimant he understood to have been in 2016. Professor Duff instructed that that matter not be minuted. Mr Thomson followed that instruction. Professor Duff himself raised with the Panel an issue as to the claimant stating on the application form his current employer as Bristol Orthopaedic Clinic, which he was concerned may also not be accurate. That was also not minuted.

15 68. Professor Duff called the claimant later that day, at around 4pm, to inform him that he had not been successful at the interview. He said that the claimant could ask for feedback.

69. The respondent later referred the matter of the undeclared conviction, as it saw it, to the General Medical Council (GMC). After an investigation the GMC concluded that there was no case to answer on that issue as it was not established that the conviction had not been spent at the time of the application. The GMC has not yet concluded the process in respect of the 2018 complaint, on which no interim sanctions were applied. It also considered that the claimant had not disclosed the 2018 investigation in his application to the respondent and that doing so may be an issue of honesty. The claimant's representatives argued that he had not been dishonest as there was an investigation and that did not amount to proceedings. That argument was not accepted, at that stage. A Tribunal hearing into these issues is arranged for April 2022.

30 70. The claimant made a subject access request, in relation to documents concerning the interview, on 10 February 2020. The respondent did not initially respond. The claimant sent a reminder on 14 April 2020. On 14 August 2020 the respondent disclosed a two-page redacted note of interviews from which the only words legible were "little knowledge of

Scottish MTC. Mr Johnston also said that the candidate had strong fellowships.”

- 5 71. When the claimant presented his Claim to the Tribunal on 28 July 2020 (an earlier Claim Form had been rejected as not within the jurisdiction of the Tribunal) he did not specifically state any claim of direct discrimination on grounds of age or race, although there was a reference to discrimination. The focus of his application was that reliance had been placed on what he had argued was a spent conviction under the Rehabilitation of Offenders Act 1974.
- 10 72. The respondent’s Response Form was received by the Employment Tribunal on 27 August 2020. It included the following averments “The interview notes do not mention the claimant’s conviction…….The claimant subsequently submitted a Data Subject Access Request and this has been dealt with by the Respondent.”
- 15 73. On 13 April 2021 the respondent provided a Response to Further Particulars of Claim from the claimant which included that “[A question related to how trauma services were managed in Scotland] was a matter that other candidates who had not trained in Scotland were able to answer satisfactorily…….The Respondent accepted that the Claimant was an  
20 experienced Consultant. He did not, however, perform well at interview, as compared to the successful candidates, and the Respondent had misgivings in relation to his recent experience.”
- 25 74. The respondent later disclosed to the claimant, following an Order for Documents, all of the notes in relation to the interviews both handwritten and typed. It accepted that the words in the document it had disclosed on 14 August 2020 which were not redacted were not those in relation to the claimant, but were in relation to Candidate 2.
- 30 75. If the claimant had been successful in his application he would have been appointed to a full-time role with a salary of £109,462 per annum gross. He would have had employer pension contributions of 20.7% of that sum. He would have relocated to the Elgin area. (Evidence was not given as to the net income the claimant would have received after statutory deductions.)

76. Since his non-appointment to the role the claimant has worked as a Locum in Manchester in the period 2 March to 7 August 2020. During that period he earned a gross salary of £81,200.63. The claimant has received State Benefits. In December 2019 he received £317.82. In February 2020 he received £276.74. Between 3 November 2020 and 1 April 2021 he received £409.89 every four weeks.
77. The claimant was upset by his non-appointment to the role. He believed that he was the best candidate for it.
78. The GMC commissioned research into why some groups of doctors were referred to it for fitness to practice concerns more than others, and a report into that was issued on 25 June 2019. The groups referred more often included those which were Black, Asian and Minority Ethnic doctors, and older male doctors.
79. Articles in the British Medical Journal, including ones on 12 and 3 February 2020, referred to ethnic minority doctors being twice as likely as white colleagues to be referred to the GMC, and injustices faced by ethnic minority doctors in the National Health Service.

### **Submissions for claimant**

80. Mr Isaacs helpfully prepared a written submission which was supplemented orally, and the following is a basic summary of the submission given. He said that the “smell test” should be applied, in that looking at the big picture the circumstances did not smell right. The burden of proof had shifted to the respondent. He argued that Professor Bruce’s evidence should not be accepted, and that the respondent was clutching at straws for the reason not to appoint the claimant. There had not been an objective assessment of candidates, but appointment of who they liked. The evidence of the respondent as to the level of trauma work was not correct and should not be accepted. The claimant’s evidence should be accepted. He had significant experience in trauma and elective surgery. He was appointable to the role as the external advisor found. Candidate 2 suggested that he would ask colleagues if not confident to manage trauma, which suggested gaps in his abilities. Mr Boddie noted a poor understanding of trauma, and Professor Duncan that trauma was not so

well represented. His answer on MTC was “thin”. He had no experience of working as a consultant, and not able to evidence an ability to take full responsibility for independent management of patients. Candidate 3 had limitations over his experience in trauma. His answer about the MTC was wrong. He was not able to evidence an ability to take full responsibility for independent management of patients. The claimant was not appointed, he was asked different questions to the other candidates, a selective view of the requirements of the role was taken, his experience was downplayed whereas others’ lack of experience was ignored. The respondent failed to follow its own policies. The explanation for non-selection is not consistent with the person specification, which does not mention recent trauma experience. There were concerns over the experience of Candidate 2 and Candidate 3 but the claimant’s extensive experience was seen as a negative. The claimant’s answer on MTC was compared to that for those candidates, and how each had been treated. There had been a misleading and incomplete response to the data subject access request, with the document disclosed initially containing Candidate 2’s detail. The respondent’s pleadings had been inaccurate about the notes mentioning the conviction, that candidates answers on MTC had been satisfactory, and that the claimant had not performed well at interview. A different standard had been applied to the claimant. The EHRC Code of Practice had not been followed. There had been inconsistent accounts given, allowing the drawing of inferences, on which reference was made to ***Veolia Environmental Services UK v Gumbs UKEAT/0487/12***, and ***Kelly v National University of Ireland [2012] ICR 322***. Reference was made to the statutory provisions and case law much of which is set out below. The factors that led to a prima facie case of age and race discrimination were each set out, and it was argued that the respondent had not discharged the onus of proof which had shifted to it. The Claim was well founded. There were further submissions as to remedy.

### **Submissions for respondent**

81. Mr McGuire had also helpfully prepared a written submission which was supplemented orally, and the following again is a basic summary of the



submission given. He did not accept that there was a smell test to apply and referred to the statutory provisions. He invited the Tribunal to dismiss the Claim. He noted that the claim was of direct discrimination on the grounds of race and/or age and that there were three actual comparators the claimant relied on being Candidate 2, Candidate 1 and Candidate 3. The claimant had not established a prima facie case of either direct age or race discrimination. If, contrary to that, the burden had shifted, the respondent had explained why the claimant had not been appointed, and the three candidates who were successful had been appointed. The Panel had not appointed who they liked. The totality of the evidence should be considered. The respondent's evidence should be accepted as credible and reliable. The claimant's lack of recent experience in non-elective surgery was a drawback for him, and 40-50% of the role was that. That was obviously a factor that the panel were entitled to take into account. Race, or that the claimant was over 50, was not a significant influence in the decision. The claimant had regarded completing the application form as a tedious exercise. What was presented to the Panel at interview in 40 minutes was different to a 30 page witness statement.

## **Law**

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

### *(i) Statute*

83. Section 4 of the Equality Act 2010 ("the 2010 Act") provides that age and race are each a protected characteristic.

84. Section 13 of the Act provides as follows:

#### **"13 Direct discrimination**

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

85. Section 23 of the Act provides

#### **"Comparison by reference to circumstances**

(1) On a comparison of cases for the purposes of sections 13,14 and 19 there must be no material difference between the circumstances relating to each case....”

86. Section 39 of the Act provides:

5                   **“39 Employees and applicants**

(1) An employer (A) must not discriminate against a person (B) –  
    (a) in the arrangements A makes for deciding to whom to offer employment...  
    (c) by not offering B employment.”

10 87. Section 136 of the Act provides:

**“136 Burden of proof**

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

88. Section 212 of the Act defines “substantial” as “more than minor or trivial.”

89. The provisions of the 2010 Act are construed against the terms of the **Equal Treatment Framework Directive 2000/78/EC**, as well as the **Burden of Proof Directive 97/80/EC**. The dismissal was prior to the United Kingdom withdrawing from the European Union, and those provisions remain part of the retained law under the European Union (Withdrawal) Act 2018.

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*(ii) Case law*

25 90. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In **Amnesty International v Ahmed [2009] IRLR 884** the EAT recognised two different approaches from two House of Lords authorities - (i) in **James v Eastleigh Borough Council [1990] IRLR 288** and (ii) in **Nagaragan v London Regional Transport [1999] IRLR 572**. In some cases, such as **James**, the grounds or reason for the treatment complained of is inherent in the act itself. In

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

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

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

93. What is less favourable treatment is a matter of fact and degree, excluding what may be minor or trivial differences of treatment, as was addressed in **Ministry of Defence v Jeremiah [1979] IRLR 436**, subject to what was said in **Gill v El Vino Co Ltd [1983] IRLR 206**.

94. In **Shamoon v Chief Constable of the RUC [2003] IRLR 285**, a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another. In **Cordell v Foreign and Commonwealth Office [2012] ICR 280** the EAT suggested that particularly in a case where there was no actual comparator relied on that may be appropriate.

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

96. The EHRC Code of Practice on Employment addresses the issue of the comparators and provides, at paragraph 3.28:

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

97. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a “substantial reason” for the decision. In ***O’Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258*** the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context: it referred to the following quotation from ***Nagarajan***

“Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.”

98. The Court considered arguments as to whether an alternative wording of no discrimination whatsoever was more appropriate, and the wording of EU Directives. It concluded as follows:

“In any event we doubt if Lord Nicholls' wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial.”

### **Burden of proof**

5 99. There is a normally two-stage process in applying the burden of proof provisions in discrimination cases, whether for direct discrimination or harassment, as explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or  
10 prima facie case by reference to the facts made out. If he does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is held to be inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that  
15 conclusion is not reached. It may not always be necessary to follow that two stage process as explained in ***Laing v Manchester City Council [2006] IRLR 748***.

100. That discrimination may require to be inferred was commented on in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673*** Lord Justice Elias  
20 said the following (in a case which concerned the protected characteristic of disability):

“In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found.”

25 101. Discrimination may be inferred if there is no explanation given for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799***). Whether to do so is dependent on the facts of each case. In ***Gallop v Newport City Council (No 2) [2016] IRLR 395***, the EAT stated, after reviewing  
30 authority, that:

"ultimately all such cases are exemplary; if there is a principle it is that explanations exposed as lies are likely to shift the burden of

proof. But cases depend upon their own facts. That there has been a dishonest explanation will not necessarily shift the burden of proof in any particular case. The instant case is an example of that. Lies may be told to cover up a perfectly innocent explanation.”

5 102. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage.

10 103. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn, at the first stage, was then confirmed in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352*** at the Court of Appeal, and upheld at the Supreme Court, reported at ***[2021] IRLR 811***. The Supreme Court said the following in relation to the terms of section 136(2):

15 “ s 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not 'there are facts etc'. I agree that this is what s 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was  
20 already what the old provisions required as they had been interpreted by the courts. As discussed at paras [20]–[23] above, it had been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not  
25 limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or  
30 undermine the claimant's case.”

104. The Court said the following in relation to the first stage, at which there is an assessment of whether there are facts established in the evidence from which a finding of discrimination might be made:

“At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account.”

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105. The court said this in relation to drawing inferences from the failure of a party to call a witness:

“Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules.”

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106. In *Igen* the Court of Appeal said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established, the second stage of the process if the burden of proof passes from the claimant to the respondent:

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“ To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since ‘no discrimination whatsoever’ is compatible with the Burden of Proof Directive.”

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107. The Tribunal is required to consider the conscious or unconscious processes that led to a decision – *IPC Media Ltd v Millar [2013] IRLR 707*. That the Tribunal must consider the possibility of unconscious bias was addressed in *Geller v Yeshurun Hebrew Congregation [2016] ICR 1028*. It was also an issue addressed in *Nagarajan*.

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108. The EHRC Code of Practice gives guidance about the start of the employment process. This includes paragraphs 16.43 and 16.44 which state the following:

“Arrangements for deciding to whom to offer employment include short-listing, selection tests, use of assessment centres and interviews. An employer must not discriminate in any of these arrangements and must make reasonable adjustments so that disabled people are not placed at a substantial disadvantage compared to non-disabled people (see Chapter 10). Basing selection decisions on stereotypical assumptions or prejudice is likely to amount to direct discrimination.

An employer should ensure that these processes are fair and objective and that decisions are consistent. Employers should also keep records that will allow them to justify each decision and the process by which it was reached and to respond to any complaints of discrimination. If the employer does not keep records of their decisions, in some circumstances, it could result in an Employment Tribunal drawing an adverse inference of discrimination”.

109. The Code addresses the interview process at paragraph 16.57 which includes that:

“By conducting interviews strictly on the basis of the application form, the job description, the person specification the agreed weight to be given to each criterion and the results of any selection tests, an employer will ensure that all applicants are assessed objectively, and solely on their ability to do the job satisfactorily.”

110. Further guidance is given at paragraph 16.61 as follows:

“An employer can reduce the possibility of unlawful discrimination by ensuring that staff involved in selection panels have had equality training and training about interviews, to help them:

- Recognise when they are making stereotypical assumptions about people
- Apply a scoring method objectively
- Prepare questions based on the person specification and job description and the information in the application form, and
- Avoid questions that are not relevant to the requirements of the job.”



**Observations on the evidence**

111. The Tribunal's assessment of each of the witnesses who gave oral evidence is as follows:

*The claimant*

5 112. The claimant is clearly a highly qualified consultant orthopaedic surgeon with substantial experience in particular of knee surgery, who has had a very impressive career at a high level, has been very widely published and has engaged in both practice and academic work nationally and internationally. He spoke eloquently with regard to why he considered that  
10 he was the best candidate for the roles, and he clearly could not understand why he had not been appointed to it but that others with far less experience, and lesser qualifications as he saw it, had been, such that he believed that his age or race or both must have been the true reasons for the decision. His concerns were heightened when the  
15 respondent disclosed records almost entirely redacted, and the small part that was not redacted was, they later admitted, not related to him at all. The respondent had then sought not to disclose the full notes and records related to the interviews and only did so when document orders were issued. The lack of candour, accuracy and transparency with which the  
20 respondent dealt with his queries was a concern to us, referred to below, and we had much sympathy for the claimant in light of that position.

113. We did however have some concerns over the reliability of some aspects of his evidence. He had not given fully accurate details of his experience in his application, and some dates did not tie up between the application  
25 and CV, for example in the former he gave as the dates for work at Hairmeyers Hospital October to December 2018, in the latter it was stated to be October/November 2017. It was not clear which was accurate, and in his evidence he said that he had regarded the completion of the application form as tedious. He similarly did not put any end date for his  
30 Locum work at University Hospital, Leicester in the application form, but said in evidence it was September 2018. He did not mention at all in the application form two weeks of Locum work in Shetland, even though that was more recent than those he did mention. He did refer to that in the

interview, but said that it had been in “the other week”. It was however somewhat over 10 months earlier, and the other week was not an accurate term to use. He gave the impression in his evidence that that week was spent carrying out work in trauma including surgical work, but we accepted Mr Johnston’s evidence that in Shetland there is no facility for operative work and it is an outpatient clinic. The claimant referred in his application form to Bristol Orthopaedic Clinic as his current employer, and he stated as his position Consultant Orthopaedic Surgeon, but he has never been an employee of that Clinic, which is not a separate entity per se but the trading name of his own limited company, which was not given on the form. He has not had dividends from the company for over two years as no profits from it have been generated. That indicates a low level of turnover and of work generally, and we considered that he sought to give an impression of a greater level of work in elective work and trauma than was accurate in the period from 2018 onwards at least. He did not in his witness statement challenge the accuracy of notes of the interviews taken by HR, but in his oral evidence suggested that they were inaccurate, and in one respect that the answer he had given was effectively the opposite of what had been recorded. That he did not refer to such alleged inaccuracy in his long witness statement was most surprising.

114. Where there was a dispute with the respondent’s witnesses on matters of fact we preferred their evidence to that of the claimant, for reasons we expand upon below.

*Professor Duff Bruce*

115. We considered Professor Bruce to be a credible and reliable witness. He did not always answer the question asked as directly as we would have wished, but we concluded that he was being careful in the answers that he gave rather than seeking in any sense to mislead or to avoid the question. He was cross examined in detail on the issues in dispute, he being the Chair of the Panel, and gave we considered entirely credible answers to them. We did not accept the submission for the claimant that his evidence should be rejected. He explained the processes of the interviews and then the discussions about the candidates in a manner that we considered likely to be accurate. We were satisfied that the genuine

and effective reason for his not considering that the claimant should be appointed to one of the roles was the lack, as he understood it, of recent trauma experience. We accepted his evidence that such trauma work made up about 40 – 50% of the workload of the consultant, not the 20% of less contended for by the claimant, and we accepted that he had a concern, from the application form and answers given in interview, that the claimant did not have sufficient recent experience of it, in that there was very little if any in the year prior to the interview, and not a large amount of it in the year prior to that. He was asked how that related to the Person Specification and stated that it applied to the first bullet point under the heading of Ability. We accepted his evidence on that. He explained why he considered that those who were appointed were appropriate to be so appointed, and he rejected suggestions that age or race had played any part whether consciously or unconsciously in a manner we found entirely convincing. The minutes and notes of the discussions of the Panel after the interviews which led to the decision to appoint others to the role than the claimant were not complete, and for the claimant did not clearly set out why that decision had been taken. We accepted as credible and reliable Professor Bruce's evidence as to the reasons for that decision, which we considered to be based on the Panel's unanimous understanding that the claimant did not have recent experience in trauma work in particular, and that that placed him far lower in the ranking of the candidates than those who were appointed, with Professor Bruce placing him seventh. Whilst other issues were referred to, such as in relation to how trauma work was organised in more general terms, only Candidate 1 gave an adequate answer and that point was not a differentiator on the question of who to appoint. That, and other issues raised in the discussions, were not significant factors in the decision by the Panel on who to appoint, we concluded.

30 *Mr Andrew Johnston*

116. We considered Mr Johnston to be an entirely credible and reliable witness. He gave candid answers to questions. He was clear in what he said as to the decision that was made, and why he had done so. He gave what we considered to be a convincing explanation as to why he had not placed

the claimant in the group of three candidates he considered should be appointed, which was the lack of evidence of the practice of surgery more recently. He explained that surgical skills require to be practiced continually, and that even after a two week holiday he found a need to

5 “think a bit harder”. He explained that there was a gap in the claimant’s practice as he understood it from the interview process and application form, with no surgical work for about a year, and limited experience of it in the year prior to that. His evidence was that that issue was the reason for his view that the claimant should not be appointed. We accepted that

10 evidence. He explained about the Locum role in Shetland and that that did not involve surgical work. For Mr Johnston the distinction between trauma and elective work was less significant than that there was a concern over de-skilling with such a gap in the practice of surgery generally. He sought someone to carry out trauma or elective surgical work who could “hit the

15 ground running” as he put it, with such general level of work (not including the most complex which was referred to Aberdeen) being the key aspect of the roles being interviewed for. He explained that it related to the first bullet point under the heading of Ability in the Person Specification. That body of evidence we considered to be significant, and consistent with that

20 of Professor Bruce. Mr Johnston also explained why he considered that the three candidates who were the comparators should be appointed, and rejected the suggestion that the claimant’s age or race played any part. He answered clearly the cross examination questions which sought in effect to challenge the decisions and suggest a different standard applied

25 to the claimant as to the comparators. The one aspect of his evidence that we did question was in his witness statement where he stated that he knew nothing of the claimant’s race. That was not felicitously put. He was aware that the claimant was not white, and indeed of mixed race, both from the meeting with Mr Smart in which he had become involved, and

30 during the interview. Whilst he may not have been aware of precisely what the claimant’s race or ethnic origin was that phrase in the witness statement was not well chosen. We concluded however that that did not indicate any mindset against those who were not white, or were specifically of mixed race or of African descent, and that Mr Johnston was

35 not someone for whom age or race was of any relevance in the decision of who to appoint.

*Other comments*

117. We took account of the fact that the respondent had not tendered four of the six Panel members to give evidence, nor Mr Thomson of HR who had taken the notes and Minutes, nor anyone who had dealt with the data subject access request or related matters. We considered whether we should draw inferences adverse to the respondent in light of that. Having considered all of the evidence however we concluded that we should not. We were satisfied that the evidence of the witnesses from the respondent who did appear was sufficiently credible, reliable and consistent. We noted that the Panel was unanimous in its conclusions, but not unanimous in its ranking of candidates. That indicated to us independent consideration of the position by each Panel member. We also considered the position in relation to the wrong disclosure of redacted notes relating to Candidate 2 not the claimant, the initially almost complete redacting of the notes sought, the general reluctance to disclose notes either timeously or adequately, and the details in the pleadings for the respondent that were not accurate in all respects. They are matters that we address further below. We did not however consider that documents had been falsified, or altered, or not disclosed so as to be complete, as was argued. Whilst there is a difference in formatting of the notes in their various forms, both redacted and not, we were satisfied that the difference was from the way it was presented, not as to its content. The page breaks were at the same point, and the documents appeared to us to be genuine and complete. The notes of the interviews with both questions asked and answers given were we considered reasonably accurate. The questions asked are set out in the Facts section based on those notes and inferring from them what questions were asked. A similar process was undertaken for the answers which were set out in the Facts only for those matters focussed on during submissions, although we considered all of the answers given in our deliberations.

## Discussion

### *(i) Less Favourable Treatment*

118. The first issue is: was there less favourable treatment of the claimant by the respondent? The claimant was not appointed to the role for which he applied, and that is less favourable treatment. The claimant also argued that he was not asked the same questions as other candidates, and it is true that precisely the same question was not always asked of each candidate, but we did not consider that the questions that were asked of the claimant and his comparators met the standard for less favourable treatment. The structure of the questioning was the same. The questions were in respect of the same topics or themes (they are set out in the facts found above), asked in the same order. Some were identical. Some were so close to what was asked of others as to be nearly identical. Some were asked in relation to that candidate's particular circumstances, or to clarify a matter. Those that were different otherwise were sufficiently similar as not to make a material difference, in our view. When considering the questions asked in the round, we considered that it was clear that each candidate (including the claimant) had effectively the same opportunity to present themselves for the role.

119. The claimant further argued that a selective view of the requirements for the role was taken, and his own experience downplayed when inexperience of others was ignored. We did not consider that that had been what happened, and we rejected those allegations as not established on the facts. We considered however that these are all issues to be considered within the overall context of the claimant not being appointed, and address them in that context below.

120. Less favourable treatment was established by the fact of non-appointment to the role.

### *(ii) Prima Facie Case*

121. The second issue was: whether or not the claimant has established a prima facie case that either or both of age or race were a significant factor in the decision taken not to appoint him to the role. This was not

straightforward. There were certainly some issues that required detailed consideration in this respect, which took the claimant close to establishing a prima facie case. Whilst we knew what the “smell test” was intended to refer to during the claimant’s submission, it is too vague a notion even as  
5 a short-hand for the statutory provisions. What we consider was needed was a careful assessment of all of the evidence led before us as to whether or not the claimant had established a prima facie case of direct discrimination on either of the protected characteristics he relied upon.

(i) *General*

10 122. The first issue was that the selection procedure followed was not what we would describe as best practice, and it did not appear to us to be fully consistent with the terms of the EHRC Code of Practice in relation to interviews to which we have referred above. There were two documents to consider. One was the Guidance agreed with the BMA in relation to  
15 consultant appointments. It referred to votes for a candidate after a discussion as to suitability. The second was the Recruitment and Selection Policy. It referred to “rating/scoring” candidates, against the Person Specification.

20 123. It is not obvious how those two documents relate to each other. Voting for a candidate is not the same as rating a candidate or scoring that candidate against selection criteria, in our opinion. Voting is rather more of a subjective exercise on the test of suitability, as is ranking the candidates either entirely (here one to eight) or for the first three only. Half of the Panel appear to have carried out each of those ranking exercises, and voting on  
25 each of the candidates by all Panel members did not take place. Rating or scoring candidates against criteria is a more objective exercise than voting, and is the kind of process referred to in the EHRC Code of Practice. It includes an assessment of performance at interview and from the application form on some form of numerical scale, against set criteria  
30 derived from the Person Specification. That form of process was not carried out. We considered that the Policy was not followed in light of that, and that doing so was one factor that could mean that there had been a prima facie case established.

124. The second issue was whether or not the same questions were asked of candidates. The notes disclose that precisely the same questions were not asked of them. There was a degree of tailoring of questions to the candidate, but they all covered the same overall themes. The claimant was asked about trauma work both generally, and more specifically whether his Locum work included trauma. The note recorded a question about “infant trauma”, which we inferred was for the infant stages in trauma services, which was more specific than for other candidates, but they were also asked specific questions related to trauma such as the reorganisation of trauma services in Aberdeen and where Dr Gray’s works within a trauma network. That there were not the same questions asked precisely was a matter to take into account, but we considered that the questions were such as to be broadly equivalent to each other, and not amount to less favourable treatment.
125. The third issue was the recording of the interviews, and particularly the discussions afterwards. There was a Minute, and some notes both of the interviews and the discussions thereafter, but precisely what process of reasoning was followed, why the claimant was not selected, and why three other candidates were, was not recorded fully in writing. That is also not consistent with the EHRC Code of Practice.
126. The fourth issue was that the Panel did not have all of the required members from the Guidance, in that there should also have been a Manager. We also noted that it was an all-white panel.
127. The fifth issue was the provision to the claimant of inaccurate records of the interview after he had made a data subject access request, after failing to respond to it timeously. What was provided to the claimant were notes, which were very heavily redacted, not of his interview but those of Candidate 2. The extent of the redactions initially was so extensive as to leave an almost meaningless part of the note in any event. No witness spoke to that matter, either what was said to be an error when the redacted notes were produced or the reason for such extensive and on the face of it unnecessary redactions from notes of the claimant’s own interview. There were a number of parts of the interview notes which related to the claimant and which ought to have been provided to him in answer to the



request. Why the claimant was not provided with the full notes of his own interview when he made that request, as he was entitled to, was at best unclear. That there was also a delay and a more general reluctance to provide all of the notes of the interviews, and that it had required a formal Document Order after the issue was addressed at Preliminary Hearings, is also a matter to take into account. The respondent refers to the Claim originally being in respect of the conviction said to be spent, and the Tribunal does not have direct jurisdiction over whether the subject access request was adequately responded to, but the claimant is entitled to raise such matters within this claim, and although neither age nor race discrimination were highlighted in his claim form, with no tick in the boxes for discrimination at all, there was a reference, however vague, to discrimination within the form.

128. The sixth issue was some lack of accuracy in the respondent's pleadings. It was averred, to paraphrase, that successful candidates gave satisfactory answers on the MTC issue. But only Candidate 1 did, as was accepted in cross examination. The respondent averred that it had "dealt with" the data subject access request, but it had sent an almost entirely redacted document, with the part not redacted not related to the claimant. It had not provided accurately the notes in relation to the claimant's interview, to which he was entitled, and the request was only adequately addressed after the Tribunal issued a Document Order. It had not been dealt with adequately at all at the time of that averment. There was an averment that the notes did not refer to the conviction issue, which was not entirely accurate as one of the handwritten set of notes, by Dr McLeod, stated "probity issue" which we consider was likely to be a reference to the conviction (although he of course did not give evidence), albeit that the note did not state in terms "conviction". There was also an allegation by the claimant that it was inaccurately stated that the claimant had not interviewed well, but the full averment was that the claimant had not performed well, "compared to the successful candidates", and that is not inaccurate.

129. The seventh issue was how the answers given were evaluated. This is in many ways a central issue in the claim. It was alleged that the claimant's

experience was downplayed, and the other candidates' lack of experience ignored. We did not consider that either allegation was established. The claimant's experience overall was not we consider downplayed, it was acknowledged, for example Dr McLeod is noted to have referred to his "good CV". That was not a reference to the CV itself, but a shorthand for the application form in which the claimant had set out his qualifications and experience. Another example is Mr Johnston in his handwritten notes which stated for the claimant "Extensive experience, less so recently?" The issue in relation to the claimant for the Panel was the lack of recent trauma and surgical experience he had. As stated above, that lack of recent experience was a fact derived from the application form and interview, it had lasted for very nearly a year, and the detail on the application for the year prior to that was not complete or clear. The claimant had given brief details on his application form, and did not supplement those details fully at the interview, although he sought to do so before us both in the written statement and when giving evidence orally. For Candidate 2 the note of interview refers to his having little knowledge of the MTC, and that his trauma answers were weak, which is a critical comment, but that he was a strong candidate more generally. We did not find evidence of the weaknesses being ignored. They were taken into account, as addressed in the evidence of Professor Duff and Mr Johnston. For Candidate 3 there were also critical comments as to trauma knowledge and experience, but he had been "honest about his limitations." That there were weaknesses was also taken into account for him, as similarly explained in evidence. There were no real criticisms of the appointment of Candidate 1.

130. The differences in how the claimant and his comparators were assessed was an issue explored in cross examination extensively but we did not consider that that had demonstrated any downplaying of the claimant's experience, skills or otherwise, or any downplaying of the comparators' lack of any experience, skills or otherwise. We considered that the Panel was comparing the relative merits of all candidates before it. Those candidates were different, and required to be assessed individually. It was inevitable that different terms and expressions would be used in light of that, the levels of their experience and skills were not the same, and their

circumstances were not the same, but there was no evidence we found that different standards were applied to the claimant on the one hand or the comparators on the other. In this regard it is we consider relevant to note the context of the appointment. It was for a post in what might be described as up to a medium level of complexity of surgery, as the most complex cases were sent to other hospitals, primarily Aberdeen as an MTC.

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131. Whilst the claimant had his own view that he was the best candidate for the role given the breadth and depth of his experience, he did not of course attend the interviews of other candidates, and his own view that lack of recent trauma and surgical experience was not an issue was not by any means determinative. What is of primary importance in a case of direct discrimination is the reason or reasons for the decision challenged, such that the focus is largely on the evidence of the decision-making by those who were involved in doing so.

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132. These matters we weighed in the balance with all of the evidence in the case, and they do take the case close to the threshold of a prima facie one, but we did not consider that they were sufficient of themselves to raise a prima facie case of discrimination on the grounds of age or race. We did not consider that it was sufficient to consider the issue of a prima facie case of discrimination in general terms, but that the prima facie case required to be established specifically on at least one of the protected characteristics relied on. We then considered what was submitted to be the basis for each of those characteristics to ascertain whether or not considering the evidence as a whole such that a prima facie case on each ground had been proved by the claimant.

*(ii) Age*

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133. On the matter of age the comparators were said to be much younger. Two were to a material extent, being Candidate 2 who was aged 33 at the time of the interviews, and Candidate 3 who was aged 39. Candidate 1 was a few days short of his 49<sup>th</sup> birthday. The case was put on the basis of the claimant being over 50. The claimant was 61 at the time of the interview. As it transpired nothing was submitted in relation to Candidate 1, and the

focus of argument was on Candidate 2 and Candidate 3. That they were materially younger is not, we consider, sufficient. There was secondly said to be a well known societal issue as to older claimants being discriminated against, but with no evidence produced in relation to it, and it was something of a sweeping generalisation. Again we did not consider that to be sufficient. There was thirdly said to be a reluctance to acknowledge the claimant's experience and achievements but a willingness to downplay weaknesses of others. We did not consider that that was the case. The lack of recent trauma, and more widely surgical, experience of the claimant was a matter of fact, with the issue of recency being of the order of a year. The comparators were in roles in which surgical practice was an everyday part of what they did. As we address below that was a material difference between the claimant and his proposed comparators. Weaknesses of others was not ignored or downplayed, in our view, but commented on in the notes and assessed. The three successful candidates did not have the length or breadth of experience as a Consultant that the claimant had. Those not yet appointed consultants (Candidate 2 and Candidate 3) obviously would not have the experience of being a consultant by definition, but the Panel conducting the interviews considered that they had evidenced their ability in each case to undertake such a role. We considered that there was a sound basis in the evidence for such a view, and that view was not affected by the ages of each candidate to any extent.

134. Each candidate bar one evidenced the ability required of the role, as the Panel found, and was specifically stated as such by the external adviser as a first stage of the assessment process. The relative assessment of each candidate included comments critical of the comparators. Professor Duff, for example, referred in the notes of the discussion to Candidate 3 as "quite junior" and it appeared to us that that was not stated fully as a positive, but with a degree of what might be described as caution about that. Comments critical of both candidates especially on the subject of knowledge or experience of trauma were made. Reference was further made in oral submission on the specific characteristic of age to paragraph 21 of the written submission. That includes the argument that there is no requirement for recent trauma experience in the Person Specification, and

the suggestion was that that had been a new criterion in effect created to justify not employing the claimant. Both of the respondent's witnesses explained that they considered that lack of such experience, and in Mr Johnston's evidence it was put more widely as lack of recent surgical experience, was part of the assessment of the extent of the ability to take full responsibility for independent management of patients. Whilst that may not have been immediately obvious to a lay person that is not the point. This was a concern on the part of the Panel held objectively for sound reasons. There was nothing in the issue of recency that appeared to us to be dependent on age. The claimant said in evidence that he had "relatively recent trauma experience" and referred to that as a Locum in particular, which was in 2018 according to the application form before the Panel. That was his perception, genuinely held, but the issue is what the Panel considered the position to be, why, and whether age was a significant factor in that or not.

135. Other arguments included concerns over whether each of Candidate 2 and Candidate 3 could undertake the full spectrum of work, and a general inexperience and lack of ability in some areas which were argued to have been either ignored or downplayed. We did not agree for the reasons given above. What took place was a comparative assessment of the relative merits of seven candidates all of whom met the essential criteria from the Person Specification (one of the total of eight had not). The issue for the Panel was not, as appeared to be suggested in cross examination at one point, that as the claimant was appointable he should have been appointed, but a judgment as to whether or not he should be appointed in preference to other candidates for one of three roles (the issue of the fourth role is addressed separately below). There were six members of the Panel. Four of them were consultant orthopaedic surgeons, and two were academics. We did not find any evidence of unconscious bias, which would have required to have involved all six of the Panel. That is so notwithstanding that only two of the Panel gave evidence. We were satisfied with the evidence before us that the decision of the Panel was unanimous, and was for the reasons we have stated.

136. We considered all of these matters collectively, and with the other evidence that we heard. The evidence included that the department had a variety of ages, with Mr Smart one of the Panel and at that time within the department being in his early 60s. The issue of the recency of experience in trauma, or surgery more widely, was not one related to age. It was not we considered an argument which was manufactured and put forward to disguise any different and true reason. In simple terms the role being interviewed for was a role focussing on surgery, with almost half of that in trauma. Having up to date skills is, we consider, a factor that the Panel was entitled to take into account as one of importance. If we had had a concern over whether or not that expressed concern over trauma experience spoken to in evidence and set out in the notes and minute was genuine matters would have been different, but we did not. The notes and minutes focussed on the issue of lack of trauma experience not overall, as the claimant had had a long career in that aspect, but recently. That term as to recency was not defined specifically in the notes but the lack of experience was almost complete in the last year before the interview. That was a material period of time, and fell within what may ordinarily be thought of as recent.

137. Whilst the comparators founded on by the claimant were much younger than him there were material differences in recency of experience. All of the comparators were currently engaging in work in the surgical context. They set that out in their application forms in some detail, which contrasts with the claimant's application form which did not. He did not materially add to that in his interview. The proposed comparators did not have the gap in that practical experience that the claimant had. That difference in recent trauma and surgical experience was significant, both for the Panel and in the context of the role being applied for, which we accepted had trauma as about 40% of its content. In our judgment this meant that the proposed comparators were not, in that material respect, the same as the claimant but without the protected characteristic of age. We did not consider that they were valid comparators in light of that material difference. That was a highly significant factor in our consideration as to whether a prima facie case on this ground had been established, as the case had been put on the basis of the three actual comparators, and not

to any extent on the basis of an hypothetical comparator, both as regards pleading and cross-examination.

5 138. We came to the conclusion that a prima facie case that there might have been discrimination on the ground of age, having regard to all of the evidence we heard, had not been established by the claimant. Our conclusion was therefore that the claim of direct discrimination on the ground of age had not succeeded.

*(iii) Race*

10 139. The second characteristic founded on was race, with the claimant being of mixed race and of partly African ethnic origin. We again considered the facts relied on for that protected characteristic. The facts relied on in that regard, in addition to the more general issues as to process, transparency and pleading to which we have referred above, were firstly that there was an all white Panel, which was true, and secondly that none of those appointed were of the same ethnic origin as the claimant, which was also true. We did not consider those matters to be sufficient, however. Thirdly it was argued that there was a general issue raised of the way BAME individuals are treated in the NHS, but not particularly those of Asian origin, and reference to articles on race in the NHS generally. These are all what might be described as matters of background, and again we did not consider that sufficient. Fourthly reference was made to Mr Johnston commenting in his witness statement that he did not know the claimant's race, which was wrong by the time of the meeting with Mr Smart and then the interview itself. We commented on that above. It was a factor to weight in the balance. Reliance was also placed on the factors set out in paragraph 21 of the written submission.

25 140. We considered all of these points. We concluded that there was insufficient proved by the claimant to find that a prima facie case that there might have been discrimination on the ground of race having regard to all of the evidence we heard. Those who had been in post and were leaving creating the vacancies were not white. The candidate who was voted for as the first choice by most of the Panel was Candidate 1, whose ethnic origin was not white. Whilst these consultants were not of African descent

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or mixed race we did not consider that that factor was proved to be significant of itself. The only material facts to support that argument was the claimant's race, and the BMA paper. That the claimant is himself of African descent and of mixed race and the terms of that paper are not, we considered, sufficient to establish a prima facie case. This was not a hearing about a reference to the GMC being discriminatory, for example, but concerning the appointment to a post as Consultant, and none of that background evidence provided to us directly addressed such a situation. We also considered as above that the evidence of the reason for the decision being related to lack of recent trauma experience was objective, clear, consistent and convincing. We reached the same conclusion in relation to the comparators proposed by the claimant for the protected characteristic of race as in relation to the protected characteristic of age. The comparators relied on did not share his ethnic origin but there were the same material differences in recency of experience we address above including as to recent trauma. They were not appropriate comparators in light of that, in our view, for the protected characteristic of race and as stated above there was no argument as to a hypothetical comparator. We did not consider that a prima facie case of direct discrimination on the ground of race had been proved. The claim under section 13 for that protected characteristic had accordingly not succeeded.

*(iv) Proof of reason*

141. We then considered the position lest those conclusions on prima facie case are wrong and the burden of proof had shifted to the respondent. Had the respondent proved that age or race was in no way whatsoever part of the reason for not appointing the claimant, or in relation to the specific aspects of less favourable treatment founded on? We were satisfied that they had. We considered the evidence of Professor Bruce and Mr Johnston to be compelling. The reason for the decision was the issue of recency of experience as explained above. Particularly the evidence of Mr Johnston set out why recency of experience was important, in his opinion. It enabled a consultant in such a hospital to hit the ground running, doing the kind of work such a consultant does. His explanation that even two weeks' holiday causes him to think harder when first



operating was entirely convincing, and his concern of a gap of a year, with unclear experience in the period before that as the claimant had not taken the trouble to be clear (and accurate) about it in his application, was a view he was fully entitled to hold. The evidence from Professor Duff and Mr Johnston was that the Panel had a shared view on that, or it was a congruent one as Professor Duff put it. It is consistent with both with the evidence we heard, and the notes taken by Mr Thomson. The evidence from both Professor Duff and Mr Johnston made the position in this respect clearer in the course of their oral evidence, supplementing the slightly brief written witness statements and the notes and Minute which did not fully address the reasoning for the decisions taken. Each of those witnesses was cross examined in detail, and we accepted the answers that they gave.

142. We did take into account our concerns over process, the note-taking, the transparency and how matters were handled, all of which was far from perfect, and not consistent with the EHRC Code of Practice in the respects we have set out. We took account of the criticisms of the interviews, that there were not identical questions, and the arguments over the answers both by the claimant on the one hand and Candidate 2 and Candidate 3 on the other (there was as stated no real challenge in respect of the appointment of the other comparator Candidate 1). We considered both whether there might have been conscious bias, whether there might have been unconscious bias, and whether the reason given might not be the genuine reason but rather was one masking age or race as being part of the decision-making process, but concluded that the respondent had proved that there had not.

143. We considered that if the claimant had held a full-time or Locum position as a Consultant in a material part of 2019 such that he did have recent experience in surgery and trauma work he would have been appointed to the post. He had wide and impressive experience throughout a large part of his career, but it was the lack of that recent practice of surgery, particularly trauma surgery, for a period of approximately a year at the least, that the Panel considered, unanimously, meant that his application failed when compared with the three candidates who were appointed.

144. Other issues were referred to in the assessment of the claimant but were, we concluded, of no real weight in the decision that he not be appointed, such as his answers in relation to trauma issues or teaching. These other matters were points of detail, and not effective parts of the decision-making that led to him not being appointed. Other candidates had not answered fully on all issues, and particularly in relation to trauma matters Candidate 2 and Candidate 3 had not answered adequately, the Panel thought. There were points of detail for all candidates. This is to be seen in the context of there having been seven candidates the external advisor considered appointable. There were three vacancies, with the potential for a fourth one. No fourth appointment was in the event made. So far as the three vacancies to which appointments were made what took place was a comparative exercise. Just because the claimant was appointable, as others were, did not entitle him to be appointed. Some of the questioning in cross examination went close to suggesting that he did have such an entitlement. Arguments were also made that there were four vacancies, if not five. The claimant was not considered for the potential fourth role at all because of the issue of recent experience. Another candidate was considered for it, but not in fact offered it. The decision not to consider the claimant for the possible fourth role was in no way whatsoever due to age or race, and in any event the issue of the fourth role was not part of the claimant's pleaded case. There was no fifth vacancy, although there had been discussion about whether there might have been that on a part-time basis if Mr Smart was to go to part-time working. The issue of any fifth role was not part of the claimant's pleaded case, but in any event there was no fifth vacancy.

145. We also mention the evidence in relation to the claimant's conviction. We have not addressed it in full detail in the findings in fact as we did not consider it directly relevant to the matters before us, and there was little evidence about it given orally before us in answer to questions in cross-examination. Mr Johnston was aware of there having been a conviction from an earlier stage when the claimant's CV was passed to him by an agency. It was accepted by both parties that he had mentioned that issue only after a decision on the claimant's application had been taken. The respondent has a policy about recruiting those with convictions, but that is

not a protected characteristic under the 2010 Act, and no claim in relation to it directly is within the jurisdiction of the Tribunal. It did not appear to us that it had any influence on the issues that we required to decide. The respondent did not argue that that conviction or concern that it had not been disclosed in the application form, referred to as the probity issue, was part of its decision-making process in respect of the appointments following the interviews in any way. Whilst it was raised in cross examination that Mr Johnston should have removed himself from the Panel if he had such information we accepted his evidence that it was only at the interview that he realised that it was the claimant who had been the subject of that CV and conviction issue, and then raised it only after the decision not to appoint him was reached. Whether the respondent was wise not to record that issue is a different matter, but as we consider it to be irrelevant to the issues before us we say no more about it.

## 15 **Conclusion**

146. In light of the findings made above, the Tribunal dismisses the Claim by unanimous decision.

147. In doing so, we do not wish to give the impression that we consider that the respondent handled the process well. There were issues of concern as we have noted above. It is not clear how the Guidance and Policy referred to relate to each other, and whether they are consistent, or are in practice applied in a consistent manner. It is not easy to see how the Guidance is fully consistent with the EHRC Code of Practice, and although consistency with it is not essential in all cases a departure from it is a matter that can be taken into account if a claim of discrimination is made. Voting appears to be undertaken but not in respect of all candidates in all cases. The questions asked were not identical for each candidate, for each of the subject matters involved at least for the initial stages. Having a matrix of scores against identified criteria, where those criteria are derived from a document such as a Person Specification or Job Description or both, has the advantage of making the process materially less subjective. It was also not clear whether the Person Specification had been drafted as clearly and effectively as it might have been.

148. The claimant provided a CV but the Panel did not have it for the interview, and the claimant had not been told that the CV he sent had not been seen by the Panel. Not unreasonably he assumed that they had seen it. There was no evidence of another candidate having sent a CV to the respondent and that being before the Panel, however and in this case the issue of short-listing was not material to the issues. The notes and Minute of the meeting were not comprehensive, or fully accurate. We accepted that they were reasonably accurate, but it emerged that a “1986 corridor” was in fact the A96 corridor between Aberdeen and Inverness with Elgin between them. We have commented above that the Minute did not comprehensively record the reasons for the decisions to appoint the three successful candidates, and not the claimant. Having full records of the decision-making is beneficial for obvious reasons, as the Code refers to.
149. The provision of almost entirely redacted notes was not an adequate response to the data subject access request made by the claimant as he was entitled to (although that is not an issue directly within our jurisdiction). The limited part that was provided was for another candidate. That was at best inaccurate. Some of the pleading for the respondent was not entirely accurate, or as candid as might have been expected. Providing fully accurate documents and pleadings is important.
150. The respondent may wish to review its practices and processes in light of the points we have mentioned.
151. The claimant has, as we indicated above, made an application for a wasted costs order. If he wishes to pursue that application he should inform the Tribunal of that by email, with a copy to the respondent’s solicitor, and a hearing to address that shall be arranged. In light of that issue being potentially outstanding no comment on the matters raised by the application shall be made beyond those above.

30 **Employment Judge A Kemp**

**Date of Judgement: 24th February 2022**

**Date sent to Parties: 15<sup>th</sup> March 2022**