EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ashok Ghosh	**v**	**Judicial Appointments Commission** **Martin Chamberlain**

Heard at: London Central

On: 6th November 2023 (Housekeeping in person and reading in Chambers)
7th to 10th and 13th to 14th November 2023 (in person)
8th to 10th January 2024 (in Chambers)

Before: Employment Judge Gidney,
Mr Rob Baber
Ms Zophie Darmas

Appearances
For the Claimant: Mr Ghosh
For the Respondents: Mr Ben Cooper KC and Robert Moretto, Counsel

RESERVED JUDGMENT

The Judgment

The Judgment of the Tribunal is that:

1. The claim of direct race discrimination, contrary to s13 **Equality Act 2010**, is dismissed;

2. The claim of indirect race discrimination, contrary to s19 of the **Equality Act 2010**, is dismissed.

REASONS

Introduction

1. On 25th April 2022 the Claimant notified ACAS of a dispute with the Judicial Appointments Commission, the 1st Respondent. He received his Early Conciliation Certificate on 20th May 2022 **[OB15]**[1]. On 23rd May 2022 the Claimant notified ACAS of a dispute with Martin Chamberlain[2], the 4th Respondent. He received his second Early Conciliation Certificate on 24th May 2022 **[OB16]**. By a Claim Form dated 6th June 2022 **[OB17-61]** the Claimant presented claims of direct race **[OB45]** and indirect race discrimination **[OB35]** ('the Claims') against both Respondents.

2. The Claimant also named the following individuals as Respondents to his Claim:

    2.1. Lord Ajak Kakkar, 2nd Respondent, who was at all material times the 1st Respondent's Chairman;
    2.2. Dame Susan Carr, 3rd Respondent, who was at all material times the 1st Respondent's Vice Chair, Commissioner and Lady Justice of Appeal. She was the Assigned Commissioner to the Claimant's

[1] **[OB]** Refers to page numbers within the Open Hearing Bundle.
[2] Martin Chamberlain is a sitting High Court Judge. His title is Mr Justice Sir Michael Chamberlain KC. In both his witness statement and when, at the very outset of the case, I asked everyone in Tribunal to introduce themselves, Mr Chamberlain referred to himself as 'Martin Chamberlain'. We have followed that lead, both during the hearing and in this Judgment. In these proceedings he appeared before us as a witness.

selection exercise to oversee the process. She did not participate in the assessment of the candidates and did not play any part of the decision not to shortlist the Claimant;

2.3. Yvette Long, 5th Respondent, a Human Resources Consultant who was the non-legal sift panel member;

2.4. Ian Thompson, 6th Respondent, who was at all material times the 1st Respondent's Head of Corporate Services and employee of the 1st Respondent.

3. On 23rd November 2022 the case was case managed by Employment Judge Brown **[OB165]**. She listed a preliminary hearing to determine:

3.1. What documents relating to the applications of other candidates would be disclosable under standard principles of disclosure?

3.2. Whether the Employment Tribunal is a court such that it can authorise disclosure of such documentation under section 139 of the **Constitutional Reform Act 2005**?

3.3. Whether disclosure can be affected lawfully in accordance with the **2005 Act** through redaction of any potentially identifying material, even if the Employment Tribunal is not a court?

3.4. If disclosure is directed, what measures need to be put in place to maintain the confidentiality of other candidates, independent assessors and any others, including whether all or part of the hearing, should be heard in private under section 10A of the **Employment Tribunals Act 1996** and Rule 50 of the **Employment Tribunal Rules**?

3.5. Whether the claims against the individual respondents should be struck out?

4. The Judge also recorded the List of Issues in the case **[OB169]** to which shall refer later.

The Preliminary Point on Construction

5. The Preliminary Hearing was heard by Employment Judge Burns on 3rd and 4th May 2023 **[OB403]**. She ruled that Employment Tribunal is a court for the purposes of s139 of the **Constitutional Reform Act 2005** and that it could make the order for disclosure that it had made in this case. She dismissed all complaints against the 2nd, 3rd, 5th and 6th Respondents, upon withdrawal by the Claimant. She dismissed complaints under s111-112 **Equality Act 2010** ('**EqA**') against the 4th Respondent upon withdrawal by the Claimant. The judge dismissed the Respondent's application to strike out the s13 and s19 **EqA** complaints against the 4th Respondent. Accordingly, he remained a named Respondent for the determination of those claims. Given the dismissal of all claims against the other named Respondents, we shall hereafter refer to Mr Martin Chamberlain as a 2nd Respondent.

6. In her Case Management Order, of the same date **[OB437]** the Judge gave directions on the steps to be taken by the parties to protect the confidential Candidate Material and to ensure that a determination of it was conducted in private.

7. Her Order, at paragraphs 6 and 9, stated:

> *(6) Subject to the orders below, by 1st July 2023, the first Respondent is ordered by consent to disclose the following to the Claimant (i) the application forms the forms completed by the candidates independent assessors, (ii) the forms completed by the relevant SIFT panel members, namely Ms Long and Chamberlain J. and any notes that they may have made in respect of the 20 candidates who were assessed by the shift panel made up of Ms Long and Mr Justice Chamberlain ('the Candidate Material') and who were invited to the selection days.*
>
> *(9) Subject always to any orders made by the Judge or Tribunal Panel with conduct of the relevant hearing, the following orders are made in accordance with s.10A of the **Employment Tribunals Act 1996** and Rule 50 of the **Employment Tribunal Rules** in respect of the Candidate Material:*
>
> *(i) Any part of a hearing during which the Candidate Material is considered and/or evidence is given about it, be heard in private.*

(ii) The Candidate Material and the evidence given about it should be contained in a 'closed' bundle, which should be prepared in hard copy only and which should not be made available to the public.

(iii) No person may publish or cause to be published the identity of any candidate or independent assessor or other person referred to in any of the Candidate Material (other than as contained in a public part of the ET judgment or reasons).

(iv) To the extent possible, the Candidate Material should not be referred to in any ET judgment or reasons. Alternatively, it should only be referred to in a way which does not make those who are referred to identifiable, or to the extent that it is not possible, that any such matters should be included in a confidential annex that is not made public.

8. Paragraph 7 required the Respondent to provide information on 66 candidates assessed by Ms Long and Mr Chamberlain, to be anonymised save for the ethnic background of the candidates and any information pertaining to the PCPs relied on in the s19 **EqA** claim, namely whether a barrister or solicitor, whether a King's Counsel ('KC')[3], whether a partner in a Magic Circle law firm, whether there was previous Judicial experience, or advocacy experience. Paragraph 8 dealt with the practical steps to be taken by the parties and the Tribunal to ensure that the confidential material remained confidential.

9. The Claimant did not appeal that Order, nor did he ask Employment Judge Burns to reconsider it. At the outset of the hearing, however, it was clear that the Claimant and the Respondent had a difference of opinion on how paragraph 9 of the Order (set out above) should be interpreted by the parties and by this Tribunal. The Claimant asked the Tribunal to interpret the expression 'Candidate Material' so as to exclude material that had already been redacted. The Claimant agreed that candidate material had to be heard in private. However, he asserted that where witness statements referred to redacted material, that should be available. He sought to draw a distinction between redacted and unredacted material. The Claimant invited the Tribunal to look at the redacted material and decide if its release would infringe the Article 8 rights of the individual. The Claimant agreed with the public policy point that the redaction of candidate material was appropriate and that redacting more than just a candidate's name was necessary.

[3] Queen Elizabeth II died on 8th September 2022, during the relevant time period covered by this case. To avoid unnecessary swapping between descriptors dependent upon when they were referred to, all references in this Judgment to 'Queens Counsel' or 'QC' have been updated to 'Kings Counsel' or 'KC'.

10. We were invited to construe the expression ‘candidate material’ in a way that distinguished between redacted and unredacted. This submission was undermined by the definition of ‘candidate material’ as set out by Judge Burns in paragraph 6 of her Order. This definition allowed for no such distinction to be made. We gave an oral Judgment dismissing the Claimant’s application for the expression ‘candidate material’ to be construed in other way than was clearly defined in paragraph 6 of her Order.

The Issues

11. This hearing was case managed by Employment Judge Brown on 23rd November 2022 **[OB165-172]**. She identified the Issues in the case as follows:

Direct Discrimination (s13 EqA)

11.1. In not being invited to a selection day, was the Claimant treated less favourably than a candidate who did not share his protected characteristic, being a person of colour of Indian national origin, whose circumstances were otherwise materially the same as his, would have been treated?

11.2. If the Claimant has shown facts from which the ET could conclude that the less favourable treatment was because of race, have the Respondents shown that race was no part of the reason they acted as they did?

11.3. The Claimant compares himself with hypothetical white, or white including mixed-race, comparator.

Indirect Discrimination Claim (s19 EqA)

11.4. For the purpose of his indirect discrimination claim, the Claimant contends that the selection process disadvantages black and brown

candidates, including persons of colour of Indian national origin, and advantages white, including mixed-race, candidates.

11.5. Did the Respondents apply the following Provision, Criterion or Practice ('PCP') in the relevant selection process: namely giving preference to candidates who:

11.5.1. Were a barrister;
11.5.2. Were a KC;
11.5.3. Had substantial experience of advocacy and/or litigation in the higher courts; and/or,
11.5.4. Had significant judicial experience.

11.6. If so, did those PCPs put people who shared the Claimant's characteristics at a substantial disadvantage, compared to people who did not?
11.7. Did they put the Claimant at that disadvantage?
11.8. If so, can the Respondents show that the PCP was a proportionate means of achieving a legitimate aim?

12. At the close of day 3, during cross examination, the Claimant withdrew the PCP that candidates '*were a partner in a Magic Circle law firm*'. Early on day 4, during cross-examination, the Claimant applied to amend the definition of the comparator from 'hypothetical white, or white including mixed-race' to a 'white comparator only'. The amendment application was unopposed and we allowed it.

13. This followed some debate in which the Claimant asserted that an individual who identifies as mixed race (ie White Asian) should properly be treated as 'white' and not 'mixed race'. The Claimant asserted that such a person should be considered white. The 1st Respondent, in collating its statistical data defines 'ethnic minority' as including '*Black, Asian, Mixed and other ethnic groups, but excludes white ethnic minorities*' **[OB1901 Note 8]**. We shall return to this point later.

14. We were provided with a Cast List, Chronology, Trial Timetable and Pre-Reading List. Both Mr Cooper KC and the Claimant contributed to those documents and we were grateful to them for their work. The Claimant provided a Schedule of Loss **[OB215]** in which he valued his claim at £1,378,791.96 before grossing up and interest.

The Evidence

15. We were provided with an agreed 'open' trial bundle which ran to 1989 pages, in both hard copy and electronic format. To that an additional number of pages, taking the total to 2012 pages, were added. The 'open bundle' was contained in a number of white lever arch files. We were also provided with a 'closed' bundle in a black folder, containing the confidential Candidate materials, running to 391 pages.

16. We were provided with the following witness statements:

    16.1. The Claimant's 'open' witness statement (in which his oral evidence on the Candidate material had been redacted) running to 126 pages, which was publicly available.
    16.2. The Claimant's 'closed' witness statement (with no redactions and was to be considered in private only);
    16.3. A supplemental witness statement from the Claimant, running to 5 pages;
    16.4. Mr Chamberlain's 'open' witness statement (in which his oral evidence on the Candidate material had been redacted) running to 28 pages, which was publicly available;
    16.5. Mr Chamberlain's 'closed' witness statement (with no redactions and was to be considered in private only);
    16.6. A witness statement for Yvette Long, running to 10 pages;
    16.7. A witness statement for Alex McMurtrie, the 1st Respondent's Chief Executive and Accounting Officer, running to 41 pages.

17. Each of the witnesses gave evidence from a witness statement and was subject to cross examination.

Findings of Fact

18. We have not recited every fact in this case, or sought to resolve every dispute between the parties. We have limited our analysis to the facts that were relevant to the Issues that we were tasked to resolve. We made the following findings of fact on the basis of the material before us, taking into account contemporaneous documents, where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities, taking into account its assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts.

19. The Claimant is a solicitor in private practice, based at the firm Excello Law Ltd. His application to the Respondent described his job title as Consultant **[OB649]**. The Claimant identifies himself as being '*a person of colour (non-white) of Indian national origin and a British Citizen*' **[AG9]** and **[OB30]**[4].

20. The 1st Respondent is a body corporate under s61 **Constitutional Reform Act 2005** whose function is to recommend candidates for appointment in England and Wales to Courts and Tribunals (excluding the Supreme Court).

21. The 2nd Respondent, Martin Chamberlain, is a sitting High Court Judge, who, with Yvette Long, formed the Sift Panel that determined whether the Claimant's application for the position of Deputy High Court Judge should proceed to the next stage in the application process. He was the Judicial Member of the sift panel.

[4] Paragraph 9 of the Claimant's Particulars of Claim **[OB30]** and of his witness statement **[AG9]**.

22. On 12th January 2022 the 1st Respondent launched a selection exercise to recruit 28 candidates for the office of Deputy Judge of the High Court. From here on we shall refer to the role as 'Deputy High Court Judge' or 'DHCJ'. The advert for the position contained the following extract **[OB904]**:

> *'No previous judicial experience is required. All solicitors and barristers with at least seven years post qualification legal experience are eligible to apply. The Commission encourages diversity and welcomes applications from groups currently underrepresented in the judiciary. The principles of fair and open competition will apply and recommendation for appointment will be made solely on merit'.*

23. In December 2021 the 1st Respondent published information for the role, which included a job description stating, '*Candidates applying for this post must be of high calibre, an exceptional ability with the potential to progress to the High Court.*' **[OB919]**. 238 candidates applied. The vacancy details required candidates of exceptional ability and identified the skills and attributes required for the role, upon which the candidates would be assessed **[OB918]**. They were:

    23.1. **Legal and Judicial Skills**: (i) exceptional intellect, (ii) analysis of complex issues, reaching clear reasoned decisions, (iii) expertise in one or more areas of law, and if unfamiliar judging it fast, and (iv) grasp of what underpins a fair hearing.
    23.2. **Personal Qualities**: (i) integrity and independence of mind, (ii) resilience and calm under pressure, (iii) attentive listener, clear communicator, (iv) courteously authoritative in Court even in complex and demanding situations, and (v) understanding and treating fairly, different individuals, communities and groups.
    23.3. **Working effectively**: (i) a team player, seeking and offering candid advice when needed, (ii) efficiently dispatching business, including supporting staff; (iii) supporting change throughout the judiciary, and (iv) aware of the role of the Judge in twenty-first century society.

24. The following guidance was provided to candidates on completing their application forms **[OB936]**:

> *'The strongest self assessments provide between 1 and 3 examples within each competency area and demonstrate breath, showing clearly how you approached each situation and achieved a successful outcome. Your strongest examples might not come from a legal or judicial context. For instance, if you have not sat as a judge before, you may have chaired a committee or board meeting. You could draw upon any voluntary or pro bono work you may have done, such as working with charities for schools to provide examples of the competencies.'*

25. The Claimant applied for appointment to the Office of Deputy High Court Judge, pursuant to s9(4) **Supreme Courts Act 1981** on 9th February 2022, the closing date for applications **[OB648]**. Within the application form the candidate is provided with a list of every JAC Commissioner and every JAC panel member. They are required to state whether they know a Commissioner and Sift Panel member and if so, to provide details in order to determine whether that knowledge presents or risks presenting a conflict of interest. Knowing someone is, of itself, not a reason to declare a conflict. More detail is then requested to determine whether the relationship gives rise to a conflict or not. At this point in the process the Commissioners to oversee of the process have not been appointed and the Sift Panel members have not been allocated candidates. In respect of the Commissioners the Claimant stated that he knew Dame Susan Carr **[OB1995]** and he provided the following detail '*I was a member of a shift panel in December 2021 in the selection of Solicitors Disciplinary Tribunal members and Dame Susan Carr oversaw that process*'. In respect of the Sift Panel members the Claimant identified that he knew one, Stephanie McIntosh, stating that they had sat on the same sift panel for the Solicitors Disciplinary Tribunal in December 2021. He did not know Mr Chamberlain. The Claimant provided this information on 9th February 2022.

26. Both the Commissioners and the Panel Members, prior to any allocation of candidates into panels, also had to state whether they knew any candidate, and if so to provide details, for the purpose of identifying a possible conflict. To this extent every panel member, at the outset of the process saw the names of every candidate. By the time the candidates had been allocated to a Sift Panel, their names had been redacted and replaced with a number. On

Dame Susan Carr's declaration dated 9th March 2023, she confirmed that she knew the Claimant. However, she stated that she considered herself conflicted and she gave the following reason **[CB579]** '*I have interviewed him for panel membership of the SDT (Solicitors Disciplinary Tribunal). He has an ongoing complaint to the JCIO (Judicial Conduct Investigations Office) against me*'. We note that the Claimant failed to reveal that critical detail of his dealings with the Judge in his own conflict form. We shall return to this later.

27. Mr Chamberlain completed his own conflict form, having had access to the full list of 235 candidates **[MC21]**. He identified 6 candidates that he knew, but did not consider there to be a conflict, explaining the nature of the relationship. One candidate he recused himself from on the grounds that the candidate was a personal friend. He saw the Claimant's name on list, but Mr Chamberlain did not know it, so he did not declare a relationship **[MC21]**. He did not know the Claimant **[CB573-574]**. Ms Long's declaration form stated that she knew the Claimant, having sat with him on a selection panel. She did not consider that that raised a conflict **[CB575]**.

28. The knowledge / conflict declarations of every candidate and every panel member influenced which Sift Panel each candidate was allocated to.

29. The application form required candidates to demonstrate with between 1 and 3 examples the three competencies referred to above (and their 13 sub-competences) in just 1,500 words. This task in itself required exercising judgment. Too long spent on one sub-competency risked leaving others undemonstrated or inadequately demonstrated. If a candidate spread his/her word limit over 3 examples for all 13 sub-competencies, he/she would have about 38 words to use per example. The greater the number of examples used per sub-competency (within the range of 1 to 3 examples) increased the chances of a particular sub-competency being demonstrated. The Claimant used his word allocation (excluding headers) as follows:

    29.1. **Legal and Judicial Skills**: 724 words in total
        (i) exceptional intellect: 124 words

(ii) analysis of complex issues: 405

(iii) expertise in one or more areas of law: 0 words

(iv) grasp of what underpins a fair hearing: 195 words

29.2. **Personal Qualities**: 458 words in total

(i) integrity and independence of mind: 136 words

(ii) resilience and calm under pressure: 206 words

(iii) attentive listener, clear communicator: 0 words

(iv) courteously authoritative in Court: 0 words

(v) understanding and treating fairly: 116 words

29.3. **Working effectively**: 280 words

(i) a team player: 88 words

(ii) efficiently dispatching business: 28 words

(iii) supporting change throughout the judiciary: 127 words

(iv) aware of the role of the Judge: 37 words

30. The Claimant elected to use approximately half of his total word allocation on the first competency. There were three sub-competencies that the Claimant elected not to demonstrate any with examples, at all. All candidate's independent assessments were due in by 2nd March 2022.

31. The 1st Respondent held a Sift Panel briefing on 21st March 2022 **[OB604]** which included training on fair selection **[OB625]** and unconscious bias **[OB622]**. Sift Panel 1 had from 21st until 28th March to sift its candidates and a further 8 'write up' days to 8th April 2022. The panels had a target of selecting 84 candidates for the next round, which would consist of a role play exercise and interview, to be conducted on 22nd-24th June and 4th-11th July 2022.

32. 238 applications were made. 3 did not meet the minimum statutory requirements for applying (7 years' experience, an ability to sit for 8 years and a citizenship requirement **[AM19]**[5]). The remaining 235 applications were sifted by four sift panels who were tasked with identifying the best 84 candidates who would progress to the selection day. The candidates were

[5] Paragraph 19 of Alex McMurtrie's witness statement

assigned to a sift panel that contained a Judicial member from the division of the High Court that they had expressed an interest in. There are three divisions, namely the Queen's Bench, Chancery and Family divisions. The 2nd Respondent, a High Court Judge from the Queen's Bench division, was assigned to a sift panel (Sift Panel 1) for candidates who had expressed an interest in joining that division, as the Claimant had **[OB648]**. Sift Panel 1 consisted of Mr Chamberlain and Ms Long. They were given 67 applications to 'sift' over a period of six days. The Claimant's application was considered on the 5th day.

33. Given that candidates were appointed to a Sift Panel that had a High Court Judge from the division of the High Court that they were applying for, it was possible that, whilst every application was name blind, the appointed Judge would nonetheless recognise an individual from their competency examples if the candidate had appeared in front of that Judge or had given a competency example which referred to a well-known Queen's Bench Division case, or contained some other professional achievement that the Judge was aware of. Recognition, in those circumstances, was not a ground for recusal or conflict nor could it be, as the process had started with every panel member being given a list of every candidate. On this point Mr Chamberlain told us that he had professionally recognised 9 of the successful candidates 4 of which were non-white **[MC29] (**3 were Asian candidates and 1 was mixed race). Of the Claimant's application he said **[MC31]** '*There was nothing on his form or in either of the independent assessments which enabled me to identify him. I knew he was a man because one of his assessors referred to him as 'he'. The information I had about him came entirely from his name blind form and his two independent assessors*'. We accept this evidence and find as a fact that Mr Chamberlain had not established, worked out or guessed at the Claimant's ethnicity or colour at the time he conducted the Sift.

34. The sift panels scored each candidate against each criteria as 'A' an outstanding candidate, 'B' a strong candidate, 'C' a selectable candidate and 'D' not presently selectable. An overall grade (A to D) was then applied to each candidate. There were 13 criteria across the 3 main competencies. Each

competency was awarded a grade. Each grade attracted points, as follows: 4 for an A, 3 for a B, 2 for a C and 1 for a D. Added together these points provide a final numerical score and an overall grade.

35. This meant that any candidate with an overall grade of A to C was deemed selectable as a deputy High Court Judge. Whether a candidate who was deemed as selectable progressed depended on factors outside of the control of the sift panels, namely the number of other candidates who scored the same or better grading, and the number of available vacancies for the selection day, which in this case was the best 84 candidates. All selectable candidates were ranked in order of merit. The 1st Respondent applied an equal merit provision where two of more candidates were assessed as being of equal merit and there was a clear under-representation within the judiciary on the basis of race of sex **[OB619]**. The equal merit provision would apply where two or more candidates had the same numerical score but they fell over the cut off line for selection. Calibration and moderation exercises followed. The final decision as to who progressed to the next stage was made by the 1st Respondent's Commissioners at an EMP sub-committee of the Selection and Character Committee ('SCC'). It is important to note that the candidates were not scored against each other; they were scored against the criteria for the competition.

36. Once the 4 sift panels had awarded a grade to each candidate, the role of the sift panels was over. The determination of the best 84 candidates, who would progress to the next interview stage, was then a process of identifying the highest scoring candidates from each panel. None of the sift panels would have known the cut-off point until all of the applications had been marked **[AM59]**. From those 84 candidates, the best 28 would be appointed to the position of DHCJ. In the Claimant's competition, and across all sift panels the scoring was as follows:

    36.1. There were 6 candidates assessed as 'A' or 'outstanding' overall;
    36.2. 76 assessed as 'B' or 'strong'. These candidates totaled 82 of the successful candidates selected for the next round);

36.3. One candidate was awarded a C overall, but progressed to the selection day on account of receiving an 'A' for Legal and Judicial Skills. In total 83 candidates progressed to the selection day.

36.4. A further 67 candidates, like the Claimant, were awarded a 'C' or 'selectable grade';

36.5. 85 candidates were awarded a 'D' or 'not presently selectable' grade.

37. The sift process was 'blind'. This meant that the panel members did not know the name or the race of any candidates. This was confirmed in the Exercise Information provided about the competition **[OB849]** and in the training provided to the sift panel members **[OB894, 898]** and in the advert to candidates **[OB905]**. This was in accordance with the Judicial Diversity Forum 2020/2021 Action Plan **[OB1635]**. It was explained to us by the 1st Respondent's Chief Executive, Alex McMurtrie **[AM47]**. The process was described in the 1st Respondent's Selection Policy Guide **[OB2011]** as follows:

> *'The JAC uses name blind sifting for all exercises using a paper sift as a shortlisting method to further promote fair selection and diversity. The JAC Digital platform will automatically redact the candidates name and allocate a unique identifier which will then be used for the panel packs. This is a simple process whereby the selection exercise team will select the candidate on the platform and press the download button on the redacted application in the panel pack view. The downloaded documents will currently be in a PDF format but may change as the platform develops. Panel members do not have access to the platform, so would not be able to access any other candidate and information other than what is provided to them by the team. Over time this may also change, but panel members were still only see relevant candidate information.*
>
> *The unique identifier will be used in place of an applicant's name whenever we generate reports from the platform.*
>
> *Selection exercise teams should ensure that the names of candidates are manually redacted from all sift materials to be used by the panel. For example, independent assessments will need to have the candidates names removed and replaced with the unique identifier and any other character declarations or related documents may also need redacting. No other potential identifiers of an individual or their diversity characteristics, such as gendered pronouns, need to be redacted.'*

38. The ethnic breakdown of the candidates was as follows:

Ethnicity	**235 Candidates sifted by all sift panels**	**67 Candidates sifted by Mr Chamberlain & Ms Long's Panel**
White	Number: 178 Selected: 64 Percentage: 36%	Number: 50 Selected: 14 Percentage: 28%
Non-white or mixed background.	Number: 56 Selected: 19 Percentage: 34%	Number: 17 Selected: 6 Percentage: 35%

39. Sift Panel 1 shortlisted a greater percentage of successful non-white or mixed candidates than white candidates. Mr Chamberlain's scoring of the Claimant's competency examples was C for each competency and C overall **[OB664]**. Under **Legal and Judicial Skills** for 'analysis' Mr Chamberlain noted that the International Law example was complex, but that it did not demonstrate a breath of work that required analytic skills. He also noted that the Claimant's Solicitor's Disciplinary Hearing example illustrated an understanding of fair hearing principles. Under **Personal Qualities** he noted that the 'resilience' example was good and demonstrated an ability to hold ground in the face of serious opposition. He also noted that the Claimant's 'treating fairly' examples showed an awareness of discriminatory practices and taking concrete action to address them. There was no indication that Mr Chamberlain had deduced or even considered deducing the Claimant's ethnicity from his examples. Mr Chamberlain had done no more than record that the Claimant had demonstrated the personal quality of 'understanding and treating fairly different individuals, communities and groups'. Under Working Efficiently Mr Chamberlain noted that whilst the Claimant's 'team player' examples lacked detail, he noted that the equal merit provision example demonstrated thought about fair recruitment procedures and taking concrete action with a positive result. It is clear that Mr Chamberlain was marking the Claimant up for his

tackling racism examples. Overall, however, given the paucity given to some competencies and the complete failure to address others, Mr Chamberlain marked the Claimant as a C for each competency and a C overall. Whilst Mr Chamberlain was not required to grade the independent assessors, he noted that whilst they were not lawyers, and they had focused on the Claimant's project finance work, they had provided support for all of the criteria headings.

40. In his evidence, Mr Chamberlain told us **[MC66]** '*The Claimant believes that his application was outstanding. I did not think so. My provisional grades for the Claimant were C for Legal and Judicial Skills, C for Personal Qualities, and C for Working Efficiently with an overall grade of C. I thought he had provided sufficient evidence for each of the required skills and was so selectable for progression to the next stage of the competition. I did not know whether, if this was the agreed grade, the Claimant would end up progressing*'.

41. Yvette Long also graded the Claimant as a C for each category and a C overall **[OB666]**. Her form had been completed in manuscript, not type. She gave the Claimant a provision score for Legal & Judicial Skills as C/B and then on discussion with Mr Chamberlain revised it to a C. For Personal Qualities she gave a provisional score of B/A and then on discussion with Mr Chamberlain revised it to a C. For working efficiently her provisional grade was C/D which she reviewed to a C. Her initial overall grade was B/C which she revised down to a C. She ticked 'grasps what underpins a fair hearing', 'integrity and independence of mind' and 'resilience and calm under pressure' as demonstrated. She confirmed in her witness statement **[YL16]** that she did not prefer barristers to solicitors, or KCs to non-KCs, or Magic Circle partners to partners from other firms. She did not consider that advocates would make better candidates. Ms Long confirmed that the application was 'name blind' and that she had not deduced anything about the Claimant's ethnicity from his application form **[YL19]**.

42. The Sift Panel's final report on the Claimant awarded a C for each category and a C overall **[OB669]**. It set out the observations of both panel members, as follows:

> *The candidate demonstrated sufficient evidence of Legal and Judicial Skills. When addressing their analytical skills the candidate explains in great detail the conclusion reached on a particular and admittedly complex legal issue encountered in 2019 requiring knowledge of German and EU law. They do not however show a breadth of work requiring such analytic skills, particularly in areas outside their specialism. The disciplinary hearing adjournment example shows an understanding of fair hearing principles. The range and scope of the evidence given was no more than sufficient.*
>
> *The candidate demonstrated sufficient evidence of Personal Qualities. The example showing resilience and independence of mind in a highly politically sensitive circumstance where the candidate had come under significant pressure to change their advice showed their ability to hold ground in face of serious opposition. The example of the dissenting judgement in the disciplinary sexual harassment example showed a sensitivity and insight into the issues but it was not clear how this was relevant to this skill area. The candidate did give two examples related to the fair treatment of different groups showing an awareness of discriminatory practices and taking concrete action to address them. The mixed relevance and breadth of the examples given made the evidence no more than sufficient.*
>
> *The candidate demonstrated sufficient evidence of Working Effectively. While the candidate gives examples of team working they give no details about how they work collaboratively with others except in the example of working on the disciplinary panel, where they describe guiding members and managing the clerk. The example of suggesting introducing the equal merit provision into the recruitment of members to the disciplinary panel showed a proactive approach to enabling change. They also showed a clear understanding of the role of a judge in the twenty-first century. Overall the lack of detail in some areas made the evidence no more than sufficient.*

43. As Ms Long stated in her statement **[YL29]** '*overall the panel considered the evidence of all three areas was sufficient, they noted the supportive independent assessments reaffirmed the assessment of the candidates own evidence. This meant that the claimant met the required standard to be recommended for interview, but whether the claimant was in fact invited to interview would depend on how the other candidates scored.*'

44. We accept, and find as a fact, that Mr Chamberlain and Ms Long applied scores for the Claimant based on their assessment of his application to the 1st Respondent's published criteria as is evidenced in their respective score sheets **[OB666 and OB664]**, overall report **[OB669]** and witness statements **[MC65-88]** and **[YL18-30]** and did so in good faith. The Claimant cannot gainsay that evidence and has not done so. The Claimant's assertion that Mr Chamberlain and Ms Long used their own criteria for sifting candidates **[AG164]** is rejected in light of our findings of fact. We reject the Claimant's assertion in his witness statement that any other conclusion on this point would be sheer lunacy **[AG165]**.

45. It is not our role to 'remark' the Claimant competency examples. We do conclude however that there is no evidence that the scores given were anything other than a fair assessment of the Claimant's application, untainted by race, in any way, whatsoever. In particular we refer to the following assessments made by Sift Panel 1 which were demonstrably fair assessments of the competency example given:

    45.1. The Claimant provided a good example of 'analysis of complex issues' however it was only one example and too much of the Claimant's application was taken up by it. This did not demonstrate regularly analysing complex issues and was within the Claimant's specialism.
    45.2. The Claimant provided a good example of 'fair hearing' regarding an adjournment. His second example did not illustrate that competency however.
    45.3. The London Transport example was a good example of 'resilience and calmness'. The 'integrity and independence' example (regarding collaborative evidence of a sexual assault) was considered weak because it did not indicate whether the Claimant's opinion was in the minority or not.
    45.4. The treating fairly examples were considered good examples, subject to observing that the examples given did not include the level of detail that the Claimant has now provided in his witness statement.

45.5. The Claimant elected not to provide any examples under ‘attentive listener’ and ‘courteously authoritative’. This decision we think did make a high overall score unlikely.

45.6. The Claimant’s ‘supporting change’ example (relating to the equal merit provision) was good, however his ‘team player’ example did not demonstrate that competency.

45.7. The Claimant did not make sufficient use of his experience acting in a quasi-judicial role as Chair of the Solicitor’s Disciplinary Tribunal. It is likely that such skills would have been transferable to the DHCJ role but were under utilised in comparison to the Claimant’s project finance experience which demonstrated a less transferable skill set.

46. We remind ourselves that the Claimant was not deemed unselectable as a DHCJ. Sift Panel 1 considered the Claimant to have demonstrated sufficient competency to be selectable. Whether a selectable candidate progressed to interview involved an assessment of the number of other selectable candidates against the number of vacancies for the role. That exercise was not carried out by Sift Panel 1. It therefore follows that we reject the Claimant’s submission that Mr Chamberlain decided to reject the 1st Respondent’s criteria (or PCP) of Legal and Judicial Skills, Personal Qualities and Working Efficiently and replace it with his own personal criteria of (i) being a barrister, (ii) a KC, (iii) had substantial advocacy or High Court litigation experience and/or (iv) significant judicial experience. This is important because the Claimant accepted in cross examination that the published criteria **[OB918]** did not put him at any disadvantage. If they had been followed, he asserted, he would have had no claim. His claim is based on the assertion that Martin Chamberlain swapped out the 1st Respondent’s published criteria (*Legal and Judicial Skills, Personal Qualities and Working Efficiently*) for his own racist criteria and was then able to persuade Ms Long to do the same. It is that criteria (*being a barrister, a KC, had substantial advocacy or High Court litigation experience and/or significant judicial experience*) that, the Claimant asserts, put both him and other non-white candidates at a disadvantage. We do not accept that criteria was applied.

47. We also accept that the 1st Respondent had the aim, in its selection process, of selecting candidates for the role of DHCJ of the highest calibre. This, we find was a legitimate aim for the 1st Respondent to have. In the absence of any evidence that an alternative process would have been more favourable to Indian or ethnic minority candidates, the 1st Respondent's process was a proportionate means of achieving that legitimate aim.

48. Although Mr Chamberlain and Ms Long had rated the Claimant as selectable for the role of DHCJ, on 21st April 2022 the Claimant was informed that he had not been shortlisted for the selection day, which was the next stage in the application process **[OB693]**. He had been awarded a C, or selectable grade overall, and his numerical score was a 6. Accordingly the Claimant was scored as a C6. The cut off for this exercise was a numerical score of C8. 83 candidates scored a C8 or above and progressed to the next stage. As there was not a group of candidates with the same score straddling the cut-off point the equal merit provision was not applied.

49. The statistical data for the JAC00086 DHCJ competition that the Claimant applied for revealed the following **[OB1901]**:

Characteristic	**Eligible Pool**	**%**	**Applicants**	**%**	**Short listed**	**%**	**Appointed**	**%**
Ethnic Minority[6]	20,561	17%	56	24%	19	23%	7	24%
White	98,477	83%	179	76%	64	77%	22	76%

50. For this competition, the following can be deduced:

    50.1. Ethnic minority and mixed candidates made up 17% of the eligible pool (ie those that met the basic statutory criteria for appointment).

[6] The published statistical data at Footnote 8 defined ethnic minority as including Black, Asian, Mixed and Other Ethnic Groups but excludes White Ethnic Minorities **[OB1901]**.

50.2. Those candidates applied in a higher proportion than their representation in the eligible pool, as 24% of the applicants that applied were ethnic minority or mixed race. This is some anecdotal evidence that the 1st Respondent's outreach programs (which were set out in the JAC's July 2023 Diversity Update at **[OB1809 and 1810]**) were working.

50.3. Once in the competition, there was hardly any drop off in representation between those that applied and those that were selected for interview, with the percentage of ethnic minority or mixed race remaining steady at 23%.

50.4. Once selected for interview there was no drop off between that stage and those recommended for appointment, with the percentage of ethnic minority or mixed race remaining steady at 24%.

The Applicable Law

Direct race discrimination

51. Direct discrimination is defined in **EqA**, s13 (so far as relevant) as follows:

> *'**13 Direct discrimination***
> *(1) 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.'*

52. This requires a comparative analysis to be undertaken by the Tribunal between the treatment of the Claimant and the treatment of another person that does not share his protected characteristic. That person may be an actual or hypothetical comparator. There must be no material difference between the circumstances relating to each case: **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 HL at para 108 (Lord Scott) and s23(1) **EqA**10.

53. The circumstances which are material are those which are relevant to the decision or treatment in question. Whether a comparator in materially the

same circumstances was treated more favourably is interlinked with the reason for the treatment in question. Whether there was less favourable treatment and whether it was because of race are aspects of a single question, not separate questions. Tribunals can focus primarily on the reasons for the treatment, from which the appropriate inference as to less favourable treatment will then naturally flow. **Shamoon** at paras 8-12, 53-54, 125 and 134-136.

54. If the Tribunal is satisfied, having heard all the evidence, including the explanations provided by the decision-makers, that race played no part whatsoever in the decision, then it is not necessary to have recourse to the burden of proof provisions: **Hewage v Grampian Health Board** [2012] ICR 1054, SC, para 32 Lord Hope. Otherwise, the Claimant bears an initial burden of proving facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondents directly discriminated against the Claimant because of race (**EqA**, s136). If the Claimant proves such facts the burden shifts to the Respondents to prove that they did not directly discriminate against him because of race.

55. In applying the shifting burden of proof, a two-stage approach is required. At the first stage, the burden is on the Claimant to establish facts from which, in the absence of another explanation, a finding of direct discrimination could be made. It is not sufficient for the Claimant to lead evidence from which it might be possible to find direct discrimination, he must prove the primary facts from which the Tribunal could (in the absence of another explanation) find that discrimination has occurred: **Igen v Wong** [2005] ICR 931, CA, at paras 17, 25- 33 Peter Gibson LJ.

56. The tribunal needs to consider all the evidence relevant to the discrimination complaint, ie (i) whether the act complained of occurred at all, (ii) evidence as to the actual comparators relied on by the Claimant to prove less favourable treatment, (iii) evidence as to whether the comparisons being made by the Claimant were of like with like, and (vi) available evidence of the reasons for the differential treatment: **Madarassy v Nomura International plc** [2007]

ICR 867, CA para 65-72. This will include evidence as to the Respondent's knowledge or perception of the Claimant's race. It will be for Claimant to prove on the balance of probabilities that the discriminators did know or form a perception as to his race: **Efobi v Royal Mail Group Ltd** [2021] ICR 1263, SC para 45.

57. Having made relevant primary findings, the Tribunal should step back and consider all the relevant facts in the round in order to determine what inferences it could in the absence of another explanation: **Qureshi v Victoria University of Manchester & another** [2001] ICR 863, EAT, at paras 875F-876B. It is not sufficient to shift the burden of proof for the Claimant merely to prove a difference in race and a difference in treatment; he must also prove additional primary facts which could in the absence of another explanation support an inference that mental processes of the individual alleged discriminators were materially influenced by race: **Kohli v Department for International Trade** [2023] EAT 82, at para 71(d).

58. In the context of a selection exercise, it is not sufficient to shift the burden to point to other candidates of a different race who were selected: the Claimant must show that that their circumstances were materially the same and that there is some basis for inferring that race materially influenced the selection: **Virgin Active Ltd v Hughes** [2023] EAT 130, at para 68-69.

59. Unreasonable conduct in relation to the Respondent's sift exercise would not be sufficient to support an inference of direct discrimination: **Glasgow City Council v Zafar** [1998] ICR 120, HL, at para 124A-E. Unreasonable behaviour is not necessarily discriminatory. A charge of discrimination is a very serious matter to find established against anyone: any such finding must have a proper evidential basis: **Bahl v The Law Society** [2003] IRLR 640, EAT at para 134. The Respondents' non-discriminatory explanation for its treatment does not have to be a good one in the sense of one that satisfies some objective standard of reasonableness. If the burden shifts, then to discharge that burden the Respondents must show that the treatment in question was *'in no sense whatsoever'* because of the protected

characteristic: **Nagarajan v London Regional Transport** [1999] ICR 877, HL at para 510H-511H.

60. Cogent grounds are required to support a finding of subconscious bias. Such a conclusion cannot be reached on the basis of speculation, but only where there is clear evidence to support such an inference: **Bahl** at para 127. If the Tribunal accepts the decision-maker's assessment as honest and credible, that is an end of the matter unless there is a proper basis for a finding of subconscious discrimination: **Kohli** at paras 59-65.

Indirect discrimination.

61. Indirect discrimination is defined in EqA10, s19 (so far as relevant) as follows:

> ***19 Indirect discrimination***
> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
> *(c) it puts, or would put, B at that disadvantage, and,*
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

62. The Claimant has the burden of proving that the Respondents (a) did apply the alleged provision, criterion or practice ('PCP') to people of all races, (b) that the PCP put people of his race in general at a particular disadvantage and (c) the PCP put the Claimant at that disadvantage. If established, the burden then shifts to the Respondents to prove that the PCP was nevertheless a proportionate means of achieving a legitimate aim.

63. The function of a PCP is to identify what it is at the Respondent which is said to give rise to a particular disadvantage to people who share the Claimant's race. It is for the Claimant to identify the PCP which he seeks to impugn. The Claimant must identify a PCP which was actually applied by the Respondents. The term *'particular disadvantage'* refers to the need for the Claimant to show that particularly persons sharing the Claimant's race were disadvantaged by the PCP in question: **McNeil & others v HMRC** [2020] ICR 515, CA at para 16. This may be done either by statistical evidence or by other evidence which shows that the protected characteristic in question is obviously or inherently more likely to be associated with disadvantage as a result of the PCP: **Chief Constable of West Yorkshire Police v Homer** [2012] ICR 704, SC, at para 14. What is required is to demonstrate a causal link between the PCP and a group disadvantage; the reasons for any such link are immaterial.

64. Where statistics are relied on, the proper form of analysis is to calculate the proportion of all individuals with the relevant protected characteristic in the relevant overall pool who are advantaged by the PCP, and to compare that with the equivalent proportion of those who do not share the characteristic in question: **R v Secretary of State for Employment, ex parte Seymour-Smith** [1999] ICR 447, ECJ at para 59. The point in time that a particular disadvantage must be assessed is the point when the PCP was applied to the Claimant. The assessment must be made by reference to data applicable at the point of the sift in March 2022 and earlier data should not be brought into account **Clarke v Eley (IMI) Kynoch Ltd** [1983] ICR 165 at para 172D-G.

65. The difference must be considerable, or, to put it another way, "far" more people in the protected group must suffer the disadvantage': **McNeil** at para 20 *per* Underhill LJ). It is for the Tribunal to assess whether the statistics are significant, which, in this context, is a wider concept than statistical significance. It refers to whether, on the Tribunal's assessment, the statistics are probative of a race-related disparity: **McNeil** at para 19.

66. It is for the Claimant must show that he was put at *the same* disadvantage as the group: **Ryan v South Western Ambulance Service NHS Foundation Trust** [2021] ICR 555, EAT at para 55(ii). The disadvantage is the failure to achieve the benefit in question as a result of the PCP. A particular Claimant would not put at a disadvantage by the relevant PCP if he is an 'undeserving Claimant' for example because in **Essop** *'he failed because he did not prepare, or did not show up at the right time or in the right place to take the test, or did not finish the task'.*

67. The question of whether the PCP was a proportionate means of achieving a legitimate aim is an objective test which requires the Tribunal to carry out a 'critical evaluation' and determine for itself whether the means used are proportionate to any legitimate aim, balancing the detriment to the Claimant against the importance of the aim and considering whether that aim could have been achieved by means which would have had less of a disparate impact: **Hardy & Hansons plc v Lax** [2005] ICR 1565, CA, at paras 32-34.

68. We shall now turn to our conclusions:

Our Conclusions

Credibility

69. Before turning to our conclusions on the Issues we consider it necessary to set out our view on the credibility and character of the Claimant and the 1st Respondent's witnesses. In so doing we recognise that claims of race discrimination are among the utmost serious of the claims that a Tribunal is tasked to determine. For a victim of race discrimination a fair assessment and resolution of their concerns is essential. We understand just how important that is to victims of discrimination and the burden to get that right weighs heavily upon us. Discrimination claims can involve high levels of emotion and, sometimes, a Claimant's desire to win has the potential to lead to an overstating or exaggeration of matters which, due to their perspective, is not

necessarily an indicator of dishonesty. The alleged perpetrators of discrimination can become demonised in the eyes of a Claimant to such an extent that they may start to insult an individual perceived to be a perpetrator beyond which is reasonable or necessary for the fair determination of their claim. These can be common features of discrimination claims, particularly when a Claimant is a representing himself / herself against a large organisation.

70. That said, allegations of discrimination, particularly of being racist, are of the utmost serious to managers of an organisation accused of that conduct. Their job may well be threatened by such a finding, which may also have the potential to be career limiting or even career ending. It will be of the utmost importance to a manager or other individual accused of racism to clear their name, particularly if their accuser has succeeded in generating press interest in the allegations, prior to their determination by an Employment Tribunal, as was the case here. Press attended throughout the hearing. In his letter before action dated 24th April 2022 the Claimant stated, '*Considerable press attention will no doubt be attracted by these proceedings, which will of course be in open court, and I will do my best to ensure that widespread press attention is drawn to them.*' **[OB727]**.

71. We consider that determining and making findings on credibility is important in this case. We do so as follows:

71.1. We were concerned about the way in which the Claimant has put his case. In the Claimant's witness statement he focused on the 1st Respondent's statement, in its advert for the DHCJ position that *'the Commission encourages diversity and welcomes applications from groups currently underrepresented in the judiciary'* **[AG44]**. The Claimant could have described that as an aspiration only, that the 1st Respondent had failed to achieve. Instead he described it as a lie **[AG44]**. He asserted the 1st Respondent only welcomed applications from those with substantial experience of advocacy in the higher Courts who knew High Court Judges well. The Claimant asserts, by calling it a

lie, that the 1st Respondent knew that the statement in its advert was untrue. The Claimant was seeking to put credibility at the heart of his case. During his oral evidence in cross examination he admitted that the statement was misleading. He explained that had meant to say 'the 1st Respondent *pre-dominantly* only welcomed applications from those with substantial experience of advocacy in the higher Courts who knew High Court Judges well' and that not adding 'pre-dominantly' had been a slip. We reject that explanation because its inclusion would have undermined the assertion that the 1st Respondent had lied in its advert. We think the original statement was an overstatement that the Claimant intended to make, albeit one that he withdrew from under cross examination.

71.2. The Claimant elected to present his evidence, both in his witness statement, and during his cross examination, in an unnecessarily rude and on occasions unacceptably offensive way. We started hearing evidence on the morning of day 2. Mr Cooper's second question invited the Claimant to acknowledge that a DHCJ role was a senior judicial position. The Claimant replied '*Yes, only a moron would not understand that*'. I intervened to tell the Claimant that I expected everybody in the case, himself included, to behave in an appropriate way, displaying the decorum that the determination of such serious issues required. The Claimant apologised and reminded me that as a litigant in person his emotions ran high. We accept that the Claimant is emotionally invested in his case and that it is of the utmost importance to him. The Claimant is of course a litigant in person, but he is not typical of the litigants in person that regularly appear before Tribunals. He is a Solicitor, who qualified on 1st April 1985, with 38 years post qualification experience who had been assessed by the 1st Respondent as selectable for the role of Deputy High Court Judge. His decision to pursue his claim in such an unnecessarily aggressive way contradicted his status as a senior solicitor and demonstrated poor judgment.

71.3. Whilst cross words might be spoken in the heat of the moment during cross examination, a witness statement is different. A witness generally has months to prepare it, and once prepared, can read and reread and edit and amend as much and for as long as they wish. Words used in a witness statement are not said in heat of the moment. They are considered and chosen by the witness to be the way in which they wish to present their evidence. In his witness statement, intended to be a factual account of what had occurred, the Claimant chose to put his case in the following way:

71.4. Describing Yvette Long as '*a ditherer, out of her depth and probably overawed by the fact that Sir Martin was a High Court Judge*' **[AG19]**. No evidential basis was provided for this characterisation;

71.5. The Claimant's application was name blind. By the time his application had been received by the sift panel his name had been removed and replaced with the number 'JAC00086-hdy0204' **[OB648]**. To progress a direct race discrimination it was going to be necessary for the Claimant to establish that the sift panel members had worked out that he was a '*person of colour, Indian national*'. He sought to do that in Tribunal by advancing a proposition that his competencies demonstrated such strong examples of tackling racism that only a person of colour would undertake them, and that accordingly the sift panel worked out his race from the examples he had given. This proposition troubled us. If anything it revealed the Claimant's own racial bias that a white candidate would not seek to tackle racism or tackle it as strongly as he did. There was no reference to his name or any other matter which indicated his ethnicity. Yet the Claimant chose to describe anyone who had read his competency examples and had no idea that he was not white that they '*may as well believe that the moon is made of green cheese*' **[AG53]**;

71.6. He continued to make the point again in an unnecessarily insulting way, stating '*I set out 2 of the 3 examples I gave of how I had opposed*

unlawful discrimination and it was from those examples that anyone with even a modicum of intelligence would have concluded that I was very likely to be a person of colour' **[AG55]**;

71.7. As we have just stated, a cornerstone of the Claimant direct discrimination claim was the assertion that the panel would have determined that he was not white because he had given examples of fighting racism. We considered this argument exposed the Claimant's own racial bias that white people do not fight racism, or do not do so as vigorously as people of colour. This was not the only occasion when the Claimant's own racial bias undermined his claims. He repeatedly referred to Mr Chamberlain's world as being a '*white little cloistered world*' **[AG124]** and **[CB848]** and to a lesser extent **[OB696, 697, 703]** and **[AG76, 99]**. This was not based on any evidence or fact, but rather the Claimant's own racial assumptions about Mr Chamberlain and what he assumed his background and life in and out of work was like.

71.8. Asserting that '*the Respondents did not want an Asian or Black person on the High Court bench who would not be their Negro. … That was not something Sir Martin could stomach, and he knew full well that I was most unlikely to be white*' **[AG53]**. There was no evidence put before us to support that offensive attribution to the 2nd Respondent and we reject it. Such an assertion, unsupported by anything other than the 'C' 'selectable' grade awarded to the Claimant by the 2nd Respondent undermines the Claimant's credibility.

71.9. Asserting that, '*in the the challenging words of Malcolm X he* [Martin Chamberlain] *did not want a field nigger or, to paraphrase James Baldwin, a person of colour who was not his n******' (our redaction) **[AG157]**. This extremely offensive thinking, that the Claimant was attributing to the 2nd Respondent, in an openly available witness statement was, in our opinion, intended to be highly damaging to the 2nd Respondent. The assertion that the 2nd Respondent had that thought process was unsupported by any evidence, and was wholly

unfounded. It was not even put to Mr Chamberlain in cross examination. There was no evidential basis for it all and we reject it. It was contradicted by the available evidence. 4 of the 9 candidates that Mr Chamberlain recognised from their applications were non-white **[MC31]**. The success rate for Asian candidates was higher for Sift Panel 1 that it was for white candidates and the Claimant's examples of fighting racism were marked up by Mr Chamberlain as good competency examples **[OB631 & 636]**. The inclusion in the Claimant's witness statement of such an offensive thought process as a description of Mr Chamberlain's thinking, was unfounded, intended to shock and, it was, in our opinion, unreasonable for the Claimant to have included it.

71.10. The Claimant described Mr Chamberlain's reaction to his fighting racism competency examples in the following terms: '*They were far too extreme for his liking. He knew full well that a white person was unlikely to have given such examples and to have risked their livelihood to fight racial discrimination*' **[AG64]**. He had no evidential basis for that observation at all.

71.11. One of his competency examples related to reporting Southwark Council to the Commission for Racial Equality. The example given stated '*when a solicitor at Southwark Council I reported the Council's housing allocation practises to the Commission for Racial Equality as it discriminated against BAME people. The CRE formally investigated and served a non-discrimination notice on the Council, which altered its practises*.' In his witness statement (which was not before the sift panel when it determined the Claimant's application) he provided more detail, stating '*That example showed that I put my livelihood, my job and career on the line. Indeed, it ruined my career for many years in order to stop my employer unlawfully discriminating against tens of thousands of people on the grounds of their race …. I risked the destruction my professional career and the loss of my livelihood in order to achieve that for them*' **[AG58]**. In cross examination the

Claimant went further and said that he had lost his job because of the CRE referral. The Claimant invited us to conclude that Martin Chamberlain should have inferred that the negative consequences identified in the witness statement would have been obvious to him at the time of the sift, stating that anyone who did not reach that conclusion '*must be a complete dolt*'. There is no basis for making the inference that '*a white person was unlikely to have given such examples and to have risked their livelihood to fight racial discrimination'* and we reject it. The Claimant has expanded the detail of his 'fighting racism' competency examples in his witness evidence and then invited us to use to attribute that expanded knowledge to Mr Chamberlain during the sifting exercise. There is no basis upon which we could do that.

71.12. In another competency example the Claimant explained how he had given a dissenting judgment on a Solicitors' Disciplinary Tribunal in a sexual harassment hearing **[OB654]**. He asserted that it demonstrated that he understood the nature of sexism and the importance of treating women fairly, before concluding that '*if Sir Martin really could not see that he must have been sexist himself, or an ass (or both) but since he is a High Court judge, it is unlikely that he is asinine*' **[AG68]**.

71.13. In another competency example the Claimant sought to demonstrate his legal and judicial skills by referring to an occasion when he quickly mastered private international law **[OB653]**. He said, '*It is indicative of some Martin's own ignorance, lack of breath of knowledge and experience that he seems not to have understood this … .*' **[AG99]**.

71.14. The Claimant's observations regarding the assessment Mr Chamberlain made of his Independent Assessors was expressed as '*his dismissal of my independent assessors, even though it is doubtless the result of his own ignorance and lack of experience of legal practise outside his little cloistered world of the bar, is offensive*' **[AG99]**.

71.15. The Claimant continued by stating, '*a competent lawyer would have paid attention to detail as a matter of habit, but not, apparently, Sir Martin*' **[AG100]**.

72. We understand it is not easy to set out a factual basis for asserting discrimination without offending the accused individual. That said we found the Claimant's attack on Mr Chamberlain to be unnecessarily personal and inappropriate. We were concerned that this showed the extent that the Claimant was prepared to go in how he put his case, with attacks on Mr Chamberlain's competence, ignorance and lack of experience, which we conclude were all unfounded. This was another indicator to us that the Claimant's judgment had been undermined by the way he had chosen to put his case. The Respondent invited us to reach other conclusions on the Claimant's credibility. Some examples were said to impinge on the Claimant's integrity or honesty as a witness, whilst others simply reduced his credibility in so far as they evidenced an initial position that had not been thought through. Those points are as follows:

72.1. The Claimant categorised the 1st Respondent's efforts to outreach to ethnic minorities as the Master of the Rolls '*visiting infants in primary schools*'. However, when this was tested he accepted that he could not dispute the 1st Respondent's written statement as to its outreach efforts **[OB1809-1811]**. We also note that the Government's 2023 Official Statistics for diversity of the Judiciary for the DHCJ competition that the Claimant applied in **[OB1819]** had higher percentage of ethnic minority applicants (at 24% of all applications) than were represented in the eligible pool for selection, namely solicitors or barristers with 7 years PQE (with ethnic minorities representing only 17% of that eligible pool) **[OB1901]**. This is some indication that the 1st Respondent's outreach to ethnic minorities had achieved some measure of success. We didn't think this point undermined the Claimant's integrity, but we did conclude that it illustrated a willingness to make bold assertions without checking the evidential basis for them, and to that extent, it undermined his credibility.

72.2. The Claimant, in his supplementary statement at paragraph 14 stated **[AG SuppWS 14]**: '*Mr Justice Chamberlain's lack of integrity, in marked contrast to the conduct of the Lady Chief Justice Susan Carr, then Vice Chair of the Judicial Appointments Commission, who recused herself from any involvement with my application because she had had dealings with me briefly'*.

72.3. The Claimant made this point to contrast Mr Chamberlain's decision to continue to assess 9 name blind applications where he had recognised the individuals from the competency examples that they had given, with the conduct of Lady Justice Susan Carr[7], who, the Claimant asserted, had recused herself from considering the Claimant's application '*because she had had some dealings with him previously*'. The same point was put to Mr Chamberlain in cross examination, that he should have recused himself from sifting the applicants he recognised, because Lady Justice Carr had recused herself because she had recognised the Claimant. The factual basis for this statement (as contained in the Claimant's statement and in his question to Mr Chamberlain) was false. It emerged that Lady Justice Carr had not recused herself because she knew the Claimant and had had some dealings with him, but because, as she stated in her declaration of conflicts form, '*I have interviewed him for panel membership of the Solicitors Disciplinary Tribunal. He has an ongoing complaint to the JCIO against me*' **[CB579]**[8]. We conclude that the assertions in the supplementary statement and in the question to Mr Chamberlain that the reason for the recusal was because Lady Justice Carr knew the Claimant was so misleading that they amounted to dishonest statements. He knew the actual reason for her recusal but had put his case on the basis of an entirely different, false, reason.

[7] As she then was, now Lady Chief Justice Carr.
[8] **[CB]** is a reference to the Closed Bundle

72.4. The position was compounded when the Claimant was taken to his own declaration of interest statement in his application form for the DHCJ position **[OB1995]**. He was required to state whether he knew any Commissioner and if 'yes' to provide details. He declared '*Known to Dame Susan Car - I was a member of the shift panel in December 2021, in the selection of Solicitors Disciplinary Tribunal members and Dame Susan Carr oversaw the process*'. He failed to declare that he had made a formal complaint about the Judge to the JCIO. During cross examination he explained that failure by stating that the complaint had been resolved by the time he submitted his application for the DHCJ post on 9th February 2022. We reject that answer. Lady Justice Carr's declaration of interests and conflicts form is dated 9th March 2022 **[CB579]**. One month after the Claimant's declaration the Judge describes the complaint as '*ongoing*'. We are driven to conclude that the Claimant misrepresented his case in his supplementary statement and in the way he cross examined Mr Chamberlain. Then it was revealed, on this application form, that he had failed to declare the full picture of his prior dealings with Lady Justice Carr. Both of these matters negatively impact on the Claimant's credibility and integrity.

72.5. We are concerned about a further statement on the Claimant's application form, which, we conclude, was so misleading that it further illustrated the Claimant's willingness to mislead in order to achieve his goals. In order to demonstrate intellect within the 'legal and judicial skills' competency the Claimant stated **[OB653]**: *'I have the same academic background as Lords Sumption and Bingham with first degrees in history and jurisprudence from Oxford University'*.

72.6. The application form contained no other reference to the Claimant's academics. We conclude that this sentence was intended to convey to the reader of the Claimant's application for DHCJ role that he, like Lord Sumption and Lord Bingham, had first class degrees in history and jurisprudence from Oxford University. In fact it emerged that the Claimant's degree classification was 2:1. In attempting to justify this

under cross examination the Claimant stated '*I did not get a first because I don't have a white face. I don't think the class of degree matters*'. We judged this to be a deeply unimpressive response. We conclude that the Claimant intended the statement on his academic background in his DHJC application to mislead the Respondents.

72.7. As we have already mentioned, the Claimant defined any mixed race comparator as white and asserted they should be treated as white when their situation was contrast to his own. This would have had the effect of allowing the Claimant to rely on any successful mixed race candidate as joining the ranks of successful white candidates and thus skew the statistics in the Claimant's favour, potentially in a misleading way. In the diversity monitoring forms, if 'mixed race' was ticked, a drop down menu of mixed race options including 'White Asian' was provided to Applicants to choose from (for example at **[OB1404]**). Candidate 238 elected to describe their ethnicity in that way, as 'White Asian' **[CB388]**. The Claimant persisted in asserting that such a candidate was white and should be treated as such and he asserted that at the Case Management Hearing both the Respondents and the Judge had accepted that position **[OB404]**. It is clear to us however that the Judge was recording the Claimant's position and was not recording that it such a definition had been agreed. The statistics collated from the Claimant's DHCJ competition defined (at note 8) ethnic minority as including Black, Asian, Mixed and other ethnic groups but excluding white ethnic minorities **[OB1901]**.

72.8. Ultimately, and on day 4 of the case, the Claimant applied to amend his comparator for the purposes of his direct discrimination claim from how he described it to Judge Brown '*the selection process disadvantages black and brown candidates, including persons of colour of Indian national origin, and advantages white, including mixed race candidates*' **[OB169]** and how he described it to Judge Burns '*the Claimant compares himself with hypothetical white, or white including mixed race comparator*' **[OB404]** to simply white candidates. The amendment was

granted unopposed. Notwithstanding the potential for categorising successful mixed race candidates as white to mislead or skew the statistics, we do not conclude that this issue impacts on the Claimant's integrity, but we do find that his confusion on his issue was self-serving and that, once again, it impacted on his judgment and credibility.

72.9. The Claimant showed a tendency to rely on any statistics that he believed assisted his claim, whilst dismissing the statistics for the actual competition into which he entered as '*meaningless, rubbish, should be shredded, are propaganda*'[9]. This impacted on the Claimant's judgment and credibility.

72.10. The Claimant made assertions that at best, he had 'spun' in his own interest, or at worse, repeated assertions that he knew to be incorrect and knew could mislead a reader. The Claimant, in his reply to Mr Thompson (the 1st Respondent's Head of Corporate Services) on 20th May 2022, sought to recite what Mr Thompson had told him as follows: 'I note your response that you "*cannot find any evidence of maladministration on behalf of the Judicial Appointments Commission in relation to your application" because "candidates applying for this exercise were expected to be" white*' **[OB774]**. This would be a remarkable response for Mr Thompson to have made, but it was not his response. He said in his email of the same date '*I cannot find any evidence of maladministration on behalf of the Judicial Appointments Commission in relation to your application. This was a challenging competition and candidates applying for this exercise were expected to be of the highest calibre*' **[OB768]**. We are at a loss to understand how the Claimant could replace 'highest calibre' with 'white' when reciting his account of what Mr Thompson had said. It is an egregious example of misstatement. When taken to this misstatement in cross examination he said Mr Thompson had lied when he said 'of the highest calibre' as he meant 'white'. The response was deeply unimpressive. The

[9] Before lunch on Thursday 8th November 2023

Claimant quoted back to Mr Thompson what he had said, but edited it to give a completely false and damaging record of Mr Thompson's response.

72.11. In his application the Claimant maintained that '*no other lawyer in England, is likely to have had a greater breadth of experience than I had - The breadth of Sir Martin's experience is limited compared to mine*' **[AG15 & 97]**. The Claimant asserted that he should have been assessed as '*strong*' or '*outstanding*' under the competency of '*mastering new areas of law quickly*'. We find that this was in direct contradiction of his invitation to the panel (on Monday 13th November 2023) take his lack of expertise in employment law into account. We did find a juxtaposition between an assertion that he was outstanding at mastering new areas of law quickly, and for his lack of expertise in employment law to be taken into account at the final hearing, 1 year and 5 months after he had presented his claim. The Respondent invited us to conclude that the Claimant chose to present himself as both outstanding in mastering new areas of law, and inexperienced in employment law, when it suited him to do so. Whilst we see the force in this, we concluded that this did not impinge on the Claimant's integrity, although it was a factor in assessing his credibility more generally, as the two submissions cannot be easily reconciled.

72.12. Whilst recognising that conducting Tribunal litigation can be stressful, we were struck by just how confrontational the Claimant was, both towards the Respondent's Counsel and the Tribunal. During cross examination the Claimant would argue with Counsel rather than give his evidence. On one occasion the Claimant steadfastly refused to answer a question put to him on the grounds that he deemed it irrelevant. I intervened to say that the Tribunal would assess the relevance of a question and if an irrelevant question was asked we would either stop it or require Counsel to explain its relevance. In the event that we did not intervene to stop a question the Claimant should do his best to answer it and that his closing submissions was a better

place to challenge the relevance of any question. The Claimant took a pen and paper and started to write on it, stating loudly to the room '*Judge refuses to allow Claimant to challenge a question*'. I told the Claimant that he could challenge the relevance of any question in his final submissions, but that it would assist the Tribunal if he did his best to answer questions put to him rather than attempt to engage in an argument as to whether he had to answer them at all. We found the Claimant difficult and his approach counter-productive.

72.13. Finally, we were struck by the Claimant's admission towards the end of his cross examination that he had decided, at the point at which he applied for the DHCJ role, that he would present a claim of race discrimination against the Respondents in the event that he did not succeed to be a DHCJ. He decided to present a claim of race discrimination irrespective of the reasons for the assessment, and the evidence regarding it, and the success or failures of others. He told us '*before I knew who else had applied, I intended that I would sue*'. He had decided to present a race discrimination claim before he had established any basis for concluding that his race had played a part in his failure to be appointed. In light of the Claimant's evidence of his intention to present a race claim if he failed in a competition that he had not yet begun, we find as a fact that the Claimant entered into the competition with an element of bad faith.

73. In short, we have been driven to the conclusion that the Claimant is not a witness upon whom we could rely. He had, on occasion, misstated matters so egregiously to amount to lies. On many other occasions, we think his desire to win lead to his honesty and fairness being (in his mind) acceptable casualties of war. He advanced propositions which were simply not true. We heard no sustainable basis for doubting the honesty and integrity of any of the 1st Respondent's witnesses.

74. We shall turn now to the List of Issues **[OB169]** that require our determination.

Direct Race Discrimination.

75. The first issue for the Tribunal is: 'In not being invited to a selection day, was the Claimant treated less favourably than a candidate who did not share his protected characteristic, being a person of colour of Indian national origin, whose circumstances were otherwise materially the same as his, would have been treated?' This is a narrow point. We are not considering the application process generally. The detriment relied on is not being invited to the selection day.

76. The Claimant was not invited to the selection day **[OB693]**. We find as a fact that the treatment relied on by the Claimant occurred. We also find that the rejection was an act of detriment.

77. We have considered the next issue. Has the Claimant has shown facts from which the ET could conclude that the less favourable treatment was because of race? The Claimant compares himself with hypothetical white comparator. We conclude that this would have to be a white applicant who completed the Claimant's application in exactly the same way, with the same answers and focus that he did. It will also be necessary to conclude that Sift Panel 1, consisting of Mr Chamberlain and Ms Long, were able to discern that the Claimant was a person of colour of Indian national origin, from his name blind application **[OB648]**, and having made that determination, then treated him less favourably by only grading him a C6 'selectable' overall grade.

78. The Claimant relies on 'not being selected for interview' as his less favourable treatment, rather than his score of C6. We note that there is a causative step between being awarded a C6 grade overall and not being selected for interview. The score itself was not the reason for the Claimant's rejection at the sift stage. The reason for the rejection was that when compared to the scores of the other candidates and the number of DHCJ vacancies, the Claimant's C6 score fell short. On this point Mr McMurtrie told us **[AM59]**:

> '*I should say that none of the sift panel would have known what the cut off point for being invited to a selection day was in terms of the score required. Indeed, no one can be sure of the cut-off point until all of the applications have been marked, For example applicants at the 83 'mark' may have had A, B, C or D grades - We simply cannot know until they are all assessed, and that will depend on the strength of the candidates in any particular year. As it was in this exercise, those who scored 8 or more went through to the selection day and therefore the Claimant with the score of C6 did not do so'.*

79. This final part was outside of the control of Mr Chamberlain and Ms Long. The result had the potential to be different had either the quality of the other candidates been lower or the number of vacancies higher. That said, Mr Chamberlain's evidence (which we accept) was that, whilst he did not know for sure, he recognised that a C6 score may not be good enough to progress.

80. It is an essential feature of a direct discrimination claim that the alleged discriminator knows that the Claimant is (as he describes himself) '*a person of colour (non-white) of Indian national origin and a British Citizen*' **[AG9]** and **[OB30]**[10]. There can be no direct discrimination where the alleged discriminator was not aware of the Claimant's protected characteristic. The Claimant has failed to prove that Mr Chamberlain and Ms Long identified that the Claimant was a person of colour of Indian national origin. At its highest, the Claimant put his case in the following way:

80.1. '*anyone who believes this denial by the Respondent that they had no idea I was not white, in spite of the strong examples of countering racism that I gave, may as well believe that the moon is made of green cheese*' **[AG53]**; and,

80.2. '*I set out 2 of the 3 examples I gave of how I had opposed unlawful discrimination and it was from those examples that anyone with even a modicum of intelligence would have concluded that I was very likely to be a person of colour*' **[AG55]**.

[10] Paragraph 9 of the Claimant's Particulars of Claim **[OB30]** and of his witness statement **[AG9]**.

81. Over the course of the hearing the Claimant diluted this proposition, as follows:

81.1. In cross examination the Claimant accepted '*that those reading his form should have believed on the balance of probabilities that I was not white*';

81.2. This was further diluted when the Claimant put point the point to Mr Chamberlain in cross examination on the basis that it was '*possible*' that he was Black or Asian;

81.3. Finally, in his final written submissions the Claimant had moved to a position which, we felt, was tantamount to abandoning the assertion that the sift panel had worked out his ethnicity. He said '*my claim is that Mr Justice Chamberlain had an inkling that I was not white*' and '*even if he thought there was a slim possibility I was not white …. that would be sufficient as a factual basis for my claim*'[11].

82. We disagree with this last submission. Over the course of the case the Claimant moved from asserting that anyone that denied that the Claimant was a 'person of colour' from his competency examples may as well believe '*that the moon is made of green cheese*' to the examples creating no more than a '*slim possibility*' that he was a person of colour. There is a possibility, never mind a slim one, that any applicant could be of any ethnicity. The Claimant is required to adduce facts from which we could conclude that Mr Chamberlain and Yvette Long had worked out that he was of Indian nationality and/or a person of colour and subjected him to less favourable treatment as a result. The Claimant's application was name blind and we reject the proposition that the panel determined the Claimant's ethnicity based on his competency examples of fighting racism. We do so because we considered the position to be flawed and of itself indicative of the Claimant's own racial prejudice that a white candidate would not fight racism as vigorously as he had. The Claimant

[11] Claimant's corrected Final Submissions, paragraph 31.

himself effectively abandoned it during the course of the hearing. We consider the reframing of this argument by the Claimant (as set out above) effectively removed an essential requirement in a direct race discrimination claim, namely that the alleged discriminators either knew or had deduced that he was '*of Indian nationality and/or a person of colour*'.

83. Even if we were wrong about that, we have found as a fact (at paragraphs 39 to 44 above) that the Sift Panel 1, consisting of Mr Chamberlain and Ms Long scored the Claimant as a C6 in good faith, on his application, against the 1st Respondent's published criteria. We found as a fact that the overall score of a C was a fair assessment of the competency examples that the Claimant provided. They were good enough for the Claimant to be deemed selectable as a DHCJ but fell short when set against the quality of other candidates and the number of rolls available. That assessment had nothing whatsoever to do with the Claimant's race. With regard to the shifting burden of proof, we accept the Respondent's submission that we can make positive findings of fact that there was no direct discrimination.

84. If we are wrong on that however, we conclude that the Claimant has failed to shift the burden of proof, in accordance with s136 **EqA**. It is for the Claimant to prove facts from which we could conclude, in the absence of any other explanation, that his non-selection for interview was because of his race. He has not done that. Even if he had, the Respondents have shown that race was no part of the reason that the Respondents acted as they did.

85. In the circumstances the Claimant's claim of direct race discrimination fails and is dismissed. We turn now to the Claimant's claim of indirect race discrimination.

Indirect Discrimination Claim (s19 EqA)

86. For the purpose of his indirect discrimination claim, the Claimant contends that the selection process disadvantages black and brown candidates,

including persons of colour of Indian national origin, and advantages white, including mixed-race, candidates. We have concluded that this claim runs into difficulty at the very outset. Statistical information has been provided about this competition **[OB1901 and para 48 above]**, however these statistics relate to the success of all candidates against the PCPs used by the Respondents, namely its published criteria for selection of legal and judicial skills, personal qualities and working efficiently.

87. The Claimant's indirect discrimination claim is not based on those criteria, indeed he accepted on many occasions in his evidence that the published criteria did not put him at any disadvantage at all. He invites us to conclude that Sift Panel 1, consisting of Mr Chamberlain and Ms Long took the decision to reject the 1st Respondent's selection criteria and apply their own, potentially racist, criteria instead. Indeed the first indirect discrimination issue for us to determine is: Did the Respondents apply the following Provision, Criterion or Practice ('PCP') in the relevant selection process: namely giving preference to candidates who:

    87.1.1. Were a barrister;
    87.1.2. Were a KC;
    87.1.3. Had substantial experience of advocacy and/or litigation in the higher courts;
    87.1.4. Had significant judicial experience.

88. We have no hesitation in concluding that the Respondents did not apply the PCP of being a barrister, KC, or having substantial higher court advocacy or judicial experience. We accept the evidence of both Mr Chamberlain and Ms Long that they scored the Claimant against the 1st Respondent's published criteria, and not against the criteria relied on by the Claimant. Given the Claimant's acceptance that the published criteria did not place him at a disadvantage, this finding is fatal to the Claimant's pleaded indirect race discrimination claim.

89. Mr Chamberlain's score matrix, against the published criteria **[OB664]** record a C overall. Within each category of Legal and Judicial Skills, Personal Qualities and Working Efficiently each sub-criteria are set out, along with Mr Chamberlain's comments for each section. His comments reveal a positive to reaction to the examples given by the Claimant to fighting discrimination, for example '*Solicitors Disciplinary Tribunal adjournment example shows understanding of fair hearing principles*', '*Resilience example is good. Shows ability to hold ground in face of strong opposition*', '*Treating fairly examples show awareness of discriminatory practices and taking concrete action to address them'* and '*Example re considering the equal merit provision shows thought about fair recruitment procedures. And again concrete action taken with a positive result*.' We have recorded within our findings of fact (at paragraph 44) those occasions when Mr Chamberlain observed that other criteria had not been demonstrated as well, or on some occasions not demonstrated at all. We conclude that Mr Chamberlain's analysis of the published criteria and the Claimant's examples of competency to be unimpeachable and a fair analysis of where the Claimant did well, and where he fell short.

90. Ms Long's score matrix **[OB666]** also awards the Claimant a C grade overall. Her score matrix shows her initial scoring, and then the agreed scoring after discussion with Mr Chamberlain. For Legal and Judicial Skills and Working Efficiently she graded the Claimant C/D and then moderates that up to a C in discussion with Mr Chamberlain. For Personal Qualities she graded the Claimant B/A and then moderated that down to a C. We accept her evidence of that moderation process **[YL9-10]**. Both herself and Mr Chamberlain were equals in the process and that on occasion she agreed to change her score and on others Mr Chamberlain agreed to change his. This worked in both directions. On the issue of whether Ms Long applied the criteria that the Claimant relies on to advance is indirect discrimination claim, she said:

> '*I did not approach the assessment with a view or on the basis that barristers, QC's, those from Magic circle firms or advocates would make better candidates. I did not harbour any assumptions about one type of lawyer being*

better or more capable than another or simply took each example given in the application form at face value and assess the quality and relevance of the example against the framework.'

91. We accept that evidence.

92. We also accept the Respondent's submission that the Claimant, in advancing his indirect discrimination claim, has confused cause and effect. The Sift Panel did not give preference to KCs or those with substantial Higher Court or Judicial experience. This would have required a marking up of a candidate simply because they were a KC, etc, and regardless of the actual examples that they had used to demonstrate competency. This did not happen. We considered the applications of the other candidates, which was contained within a Closed Bundle. We have been directed not to include evidence from that Closed Bundle in our judgment if possible, or if not to set it out in a confidential and separate annex if necessary. We do not believe a separate annex is necessary, as we can conclude here that we were not able to identify any candidate who met the Claimant's criteria (of being a KC etc) but whose competency examples taken on their own pointed to a lower score than that which they received.

93. Returning to the cause and effect point, such individuals are likely to have already demonstrated their competency or to be in a good position to do so. Their selection for interview was not caused by being a KC or having substantial Higher Court or Judicial experience, but the effect of already having demonstrated those skills assisted them in their applications. Mr Chamberlain in his oral evidence on this point gave the example a skilled rugby player may well succeed in a contest for skilled football players because of their transferable skills. That is not to say that being a rugby player was a criteria for the football player role, or that rugby players were preferred, just that skills such as eye/ball co-ordination, speed, agility and fitness that a rugby player would have, are also likely to greatly assist in the football player competition. Turning back to the circumstances of this case, the competencies required of KCs **[OB1980]** are transferrable and similar. However, for the Claimant to succeed the Tribunal would need be satisfied that the

Respondents treated the mere fact of being a KC (for example) as meriting additional credit. We do not accept that proposition.

94. The Claimant invited us to uphold his indirect discrimination claim on the basis of the 'intersectionality' between race and other non-protected characteristics such as being a Solicitor, or not being a High Court Advocate. In terms, he asserts, it is hard for an Asian KC with judicial experience to progress, but it is even harder for a non-contentious Asian Solicitor to progress because, he argues, they also have the characteristic of being a solicitor and having a non-contentious practice. However, we are only concerned with the characteristic of the Claimant's that the law protects, namely, his race.

95. For the reasons already given, our findings so far on this part of the Claimant's claim are sufficient to conclude that his indirect race discrimination claim must fail. For completeness, however, we have considered the rest of the indirect discrimination issues.

96. The next issue is, if the Respondents had applied the PCP of (i) being a barrister; (ii) a KC; (iii) someone with substantial experience of advocacy and/or litigation in the higher courts; and (iv) someone with significant judicial experience, did that put people who shared the Claimant's characteristics at a substantial disadvantage, compared to people who did not?

97. The Claimant has not provided the Tribunal with any evidence of Asian or non-white candidates being placed at substantial disadvantage by the PCPs that he contends were being applied. With have approached this exercise by looking at whether the Respondent's actual PCPs, its published selection criteria, placed Asian or non-white candidates at substantial disadvantage. As we have already found as a fact, the available evidence does not support that proposition. On contrary it demonstrates that Asian and non-white candidates progressed to the interview stage in the same proportion that they represented of the eligible pool. The PCP did not place them at any disadvantage, let alone a substantial one.

98. The Government's 2023 statistics for the diversity of the Judiciary **[OB1819]** illustrate at **[OB1822, 1840]** that in all exercises during that period ethnic minority candidates made up 16% of the eligible pool and 16% of the recommended appointments. The report concludes 'the two exercises where there was no drop off from application to recommendation were for High Court judge and the s9(4) Deputy High Court judge **[1843]**. As the evidence at **[OB1901]** demonstrates, in the current competition ethnic minority and mixed candidates made up 17% of the eligible pool (ie those that met the basic statutory criteria for appointment). Those candidates applied in a higher proportion than their representation in the eligible pool, as 24% of the applicants that applied were ethnic minority or mixed race. Once in the competition, there was hardly any drop off in representation between those that applied and those that were selected for interview, with the percentage of ethnic minority or mixed race remaining steady at 23%. Once selected for interview there was no drop off between that stage and those recommended for appointment, with the percentage of ethnic minority or mixed race remaining steady at 24%. In the circumstances we conclude that candidates who share the Claimant's characteristic of being a person of colour, of Indian national origin, were not placed at a substantial disadvantage by either the Claimant's contended PCPs or the PCPs that were actually applied, namely the 1st Respondent's published criteria.

99. We turn next to the November 2022 University of Manchester report 'Racial Bias and the Bench' **[OB1553]**. The Claimant places great reliance on this report. It's Executive Summary section on judicial appointments said:

> *'Appointments of Judges seems to depend very much on ethnicity. The Government's 2022 statistics state that the conversion rate from application to judicial appointment for Asian and Black candidates was estimated to be 37% and 75% lower, respectively than for successful white candidates. When intersectionality is taken into account the discrepancy is even more stark ethnic minority females.'*

100. There are three difficulties which combine to undermine the probative relevance of this report in support of the Claimant's case. The first is that it

has considered the period between 2019 and 2022. It does not include the competition that the Claimant entered. It cannot be fairly used as a statistical analysis of the Claimant's competition. The second, is that it covers the entire judiciary, with appointments at all levels and all jurisdictions and as such is of limited value in assessing one stage, by one Sift Panel, in one competition. The third is that Manchester Report, if it has any evidential value at all, would have been based on the 1st Respondent's published criteria, which the Claimant accepts did not place him at a disadvantage. It would not have (and could not) have been based on the PCPs relied on by the Claimant. We concluded that the report did not assist us in our analysis of this competition.

101. We turn to the next question: Did the 1st Respondent's PCPs place the Claimant at that disadvantage? The first point to make, already stated, is that the Claimant accepts that the Respondent's published criteria did not place him at a disadvantage. In his evidence **[AG47]** the Claimant argued that the published criteria gave huge scope for subjectivity that enabled Mr Chamberlain to shortlist only those candidates that satisfied his own personal PCPs. We disagree with this assertion. The published criteria, contained a number of specific sub-criteria under each heading which required specific examples of competency. As we have already found as a fact (paragraphs 39 to 44 above) the Claimant was disadvantaged by his failure to provide adequate examples (or in some cases, any examples) of competency for every criteria set out in the published criteria. The Claimant failed to present evidence that he could have drawn upon on his application form in a sufficiently effective and persuasive way. He failed to show that he was, as an individual, put at the same disadvantage as the group.

102. The final question is this: If the 1st Respondent applied the PCPs contended for by the Claimant, and if those PCPs put candidates sharing the Claimant's characteristic and the Claimant at a substantial disadvantage, can the Respondents show that the PCP was a proportionate means of achieving a legitimate aim? We have already found as a fact (at paragraph 47 above) that the 1st Respondent's published criteria had a legitimate aim and the application of that criteria was a proportionate means of achieving that aim.

There was no PCP of the type relied on by the Claimant and as such we are not required to establish whether a PCP that was not applied could nonetheless be justified.

103. In all of the circumstances, it is the Judgment of the Tribunal that:

103.1. The claim of direct race discrimination, contrary to s13 Equality Act 2010, is dismissed;

103.2. The claim of indirect race discrimination, contrary to s19 of the Equality Act 2010, is dismissed.

11th February 2024

Employment Judge Gidney

Sent to the parties on:
16 February 2024