



EMPLOYMENT TRIBUNALS

Claimant: Dr Mohamed Saad

Respondent: University of Nottingham

Record of an attended Hearing at the Employment Tribunal Audio Recorded by CVP

Heard at: Nottingham

Heard on: Monday 20 January, Tuesday 21 January and Wednesday 22 January 2025, 5 March 2025, 6 March 2025 and listed to reconvene on 9 May 2025 however due to the claimant's ill health a request for a postponement was granted and it was reconvened on 11 November 2025.

Deliberations: 11 November 2025 and 6 February 2026

Before: Employment Judge Broughton

Members: D Newton
H Andrews

Appearances:

Claimant: In person

Respondents: Miss Motraghi, KC Counsel

JUDGMENT

1. The claim of direct discrimination on the grounds of race and/or religion for not shortlisting the claimant for an interview for the vacancy of Assistant Professor in Physics and Astronomy (Post) is **well founded and succeeds**.
2. The claim of direct discrimination on the grounds of race and/or religion for not

moving the claimant from the reserve list onto the shortlist **is well founded and succeeds**.

3. The claim of direct discrimination on the grounds of race and/or religion for not selecting the claimant for the Post is **not** well founded and is dismissed.
4. There will be a remedy hearing to determine an award of compensation in respect of claims referred to in paragraph 1 and 2.

REASONS

Background

1. The claimant presented his claim on 18 January 2022 following Acas early conciliation from 2 December 2021 to 21 December 2021 in which he set out a complaint of discrimination on the grounds of race and/or religion and belief.

Summary of the claim

2. In summary, the claimant had applied for a post on 16 July 2021 with the respondent as Assistant Professor in Physics and Astronomy (Teaching Level 5) (**Post**). The claimant was not shortlisted for interview and complains that he was treated less favourably because of his race and or religion.

Preliminary Hearing for Case Management

3. At a case management hearing on 24 June 2022 before Employment Judge Broughton the claimant mentioned that after receiving further disclosure the day before from the respondent, he would like to include a further allegation regarding the selection of candidates from the reserve list. He had become aware that after the initial shortlisting exercise, two candidates had withdrawn from the process and a decision was made to select candidates from a reserve list. The claimant complains that he was also discriminated against during that further part of the selection exercise. Further he complained about delayed and inadequate feedback. The claimant made an application to amend his claim to include this complaint on 1 July 2022. This application was not opposed by the respondent and he was granted leave on 19 August 2022.
4. The claimant also indicated that he may apply to add a new claim of age discrimination but in the event did not do so.
5. The claimant confirmed that his religion is Islam, he is a Muslim and that he defines his race as colour (Black), Ethnicity (Black African), national origins (Egyptian).

Public Preliminary Hearing 28 March 2023

6. On 16 November 2022, the respondent applied for an order to strike out the claims pursuant to Rule 37 (now Rule 38) of the Employment Tribunal Rules of Procedure 2013 ('Rules') (since amended), on the ground that the claims had no reasonable prospect of success. In the alternative, the respondent sought an order pursuant to rule 39 of the Rules that the claimant pay a deposit as a condition of continuing his claim.

7. An application by the respondent was considered by Employment Judge Varnam on 28 March 2023.
8. A witness statement had been prepared by Professor Fromhold but no evidence was submitted by Professor Benedict.
9. At this hearing the claimant explained that he was not pursuing a claim that the respondent delayed in providing feedback to the claimant (from 6 September 2021) and then on 19 October 2021 provided feedback` which was unjustified, incomplete, and generic. That claim was dismissed on withdrawal.
10. The respondent's applications, for the reasons set out in detail in that judgment, were dismissed.

Claims and Issues

11. The issues to be determined as agreed between the parties are:

Time limits

1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 1.1.2 If not, was there conduct extending over a period?

1.1.3 1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period.

1.1.4 1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Direct discrimination on the grounds of race and/or religion and/or belief (Equality Act 2010 section 13)

2.1 Did the respondent do the following things:

2.1.1 Not shortlisting the claimant for an interview for the vacancy of Assistant Professor in Physics and Astronomy (Post)

2.1.2 Not moving the claimant from the reserve list onto the shortlist when two shortlisted candidates had dropped out of the process (as the respondent did with the French candidate 226705).

2.1.3 Not selecting the claimant for the Post.

2.2 Was that less favourable treatment?

The claimant identified the comparators as:

2.2.1 successful candidate (226653) [cover letter pp324 – 329 and CV pp330-347]

2.2.2 reserve candidate (226705) (French Candidate) [cv pp 381- 385 pp386 – 389, scores p477]

2.2.3 candidate 226313 [CV pp228- 231, application pp 232 – 235, scores at p 446]

2.2.4 candidate 226560 [cover letter pp288-291, pp 292 – 293, application pp294 – 297 scores at p446]

2.2.5 candidate 226669 [cover letter pp 351 – 353. CV p.354 – 360, application pp 361 – 364, scores at p 477]

2.2.6 candidate 226711 [cover letter pp 380 -393, CV, pp393 – 398 application pp 399 – 402 scores at p 477]

2.3 If so, was it because of race and/or religion/ belief.

2.4 Did the respondent's treatment amount to a detriment?

The Final Hearing

12. The parties had produced an agreed bundle of documents which with additional disclosure produced during the hearing numbered 898 pages.
13. The claimant did not call any supporting witnesses. He produced a lengthy 71-page statement and was cross examined at length.
14. The respondent called Professor Mark Fromhold, Professor of Physics and Head of the School of Physics and Astronomy (**School**), Dr Keith Benedict, Director of Teaching and Learning for the School and at the time of the claimant's application the Deputy Head of the School and Mr Jamie Tennant who worked within the HR Department, his substantive role at the relevant time was Head of Shared Services. All three witnesses gave evidence under an affirmation and were cross examined by the claimant at length.
15. References to page numbers herein are to pages in the agreed bundle. All findings are made on a balance of probabilities. All the evidence has been considered however only the evidence relevant to the determination of the issues is set out in this judgment.
16. The Tribunal went through the agreed list of issues with the parties at the outset (pages 614-615). Counsel for clarified that the respondent was not taking any issue on time limits because the respondent accepts that that the claimant could say that the acts amounted to conduct extending over a period pursuant to section 123 (3)(a) Equality Act 2010.
17. It became clear during the course of the hearing on the first day that we were going to have difficulty concluding the evidence on liability within the allocated time and both parties were in agreement that the evidence on the issue of remedy would be better dealt with at a separate hearing, should that be required.

Reasonable Adjustments

18. The claimant required breaks during the course of the day and he agreed to let the Tribunal know as and when he required them. He also explained that he may have difficulty hearing

particularly when feeling overwhelmed and it was stressed to him that he could ask for questions to be repeated.

19. No further adjustments were requested for the parties or witnesses.

Preliminary Matters/Applications

20. The claimant stated that there were some outstanding documents he sought disclosure of and produced a document headed 'Order Application' setting out documents he complained the respondent had failed to disclose. The claimant had made a previous application for specific disclosure in respect of the same documents to the Employment Tribunal on 17 November 2023 and that application had been dealt with by Employment Judge Heap (page 724). Employment Judge Heap had refused the request. The respondent had confirmed that it had complied with its obligations in respect of disclosure. Judge Heap had commented that if it transpired through evidence at the final hearing that the respondent had not complied, the claimant could invite inferences to be drawn.

21. The claimant confirmed that he was seeking to revisit the same application. He was not seeking any additional documentation that he had not sought as part of his 17 November 2023 application.

22. Counsel for the respondent confirmed that the respondent had complied and disclosed any disclosable documents.

23. The claimant did not assert any material change in circumstances since the decision to refuse the application (**Serco Ltd v Wells [2026] UK/EAT/0330**) and the application was refused.

24. The respondent had made an application on 3 November 2023 (page 691) to request leave to submit a supplemental statement from Dr Benedict on the grounds that the claimant had within his witness statement produced a lot of additional information and evidence about the comparison between his application and the comparators'. Permission had been granted by the Tribunal to file that additional witness statement (page 692).

25. The respondent requested leave to submit another supplemental statement for Professor Fromhold to address that detail. The claimant did not object. The claimant stated that he was '100% sure' that he could respond to what was in the supplemental statement however he sought leave to give some supplemental evidence himself orally in response, to which the respondent had no objection.

Rule 50 (now Rule 49) and skeleton argument.

26. The respondent then made a request under what was then Rule 50 on the basis that there would be reference in oral evidence and documents to candidates who are not witnesses or parties to the claim and reference may be made to their protected characteristics. The respondent set out in some detail the grounds of their application.

27. The claimant raised no objection.

28. The Tribunal considered the application under the then Rule 50 during an adjournment and gave oral reasons on reconvening for their decision to grant it.

29. In summary, the Tribunal considered and the parties agreed that after taking into account the importance of the principle of open justice, that it was appropriate to protect the Convention rights of the candidates pursuant to the Convention on Human Rights and the

Human Rights Act 1998 (HRA), by restricting the public disclosure of their names during the public tribunal hearing and in any documents entered on the Register or otherwise forming part of the public record. The candidates were not a party or witnesses to the proceedings, would not be aware of the proceedings, reference would be made to their protected characteristics and information disclosed about their personal details (e.g. employment history, qualifications etc) and the parties agreed that it was not necessary to disclose their identify in order to deal fairly and justly with the claims.

30. The candidates are referred in this judgment by their candidate number rather than by name.

Opening Notes

31. The respondent handed in a document setting out opening submissions.

32. The claimant mentioned that he was preparing a skeleton argument which he had not finished and he wanted to hand that in. The claimant completed and submitted the document.

The Evidence

33. The Tribunal then heard oral evidence from the parties. The claimant swore on the Quran. The Tribunal had read his witness statement but gave him an opportunity to give supplemental evidence which he did.

34. The claimant when giving his supplemental evidence made reference to his opening submissions. The claimant referred to page 9 of the document and confirmed that this was additional evidence which he wanted to rely upon. The respondent had no objection to that being included as evidence supplemental to his witness statement.

35. Although the Judge reminded the claimant of the purpose of supplemental evidence he nonetheless proceeded to continue to revisit what was in the witness statement and at times his skeleton argument. He asked if could set out this supplemental evidence in writing overnight. The respondent raised no objection.

36. The case had been listed for 3 days. The cross examination of the claimant was not completed until the 3rd day and the case therefore went part heard.

37. The case was then reconvened in March and was listed with the agreement of the parties for a further 2 days on 5th and 6th March 2025.

38. The claimant completed the evidence of Mr Tennant and Professor Fromhold and had commenced the cross-examination of Dr Benedict and had appeared to be almost complete in his cross-examination of Dr Benedict by the close of 6 March 2025 however unfortunately the matter had to go part heard.

39. At the conclusion of the hearing on 6th March it was agreed with the parties that we would reconvene on 9 May 2025 for the claimant to complete the cross-examination of Dr Benedict and for oral submissions.

40. Unfortunately, the claimant had some health issues and the hearing could not reconvene in May 2025. The claimant notified the Tribunal when he was well enough to recommence with the hearing from 15 August 2025 and the matter was relisted with the agreement of the parties on 11 November 2025.

41. At the start of the hearing on 11 November 2025, the claimant indicated that he intended to apply for his name to be anonymised. This was despite the claimant having not made an

application previously and there having already been 3 public hearings, albeit that would not have been determinative of the question as to whether or not anonymity should be granted. In the event the claimant decided not to make an application.

Findings of Fact

42. The claimant presented an application to the respondent for the Post in July 2021. The closing date for the application was 16 July 2022. The claimant submitted his application on 16 July 2021 attaching a number of documents and a covering letter (page 412-413). The attached documents included a curriculum vitae (page 423), teaching strategies and research statement (424-427), teaching statement and strategy (page 428-431) and the application itself (page 432).
43. The respondent received 64 applications for the Post.
44. The first stage of the selection process was a shortlisting exercise which was carried out by Professor Mark Fromhold, who had worked at the respondent since 1995 and Dr Keith Benedict, who at the time of the claimant's application and had been employed by the respondent for over 30 years.
45. The claimant confirmed in cross examination that he understood that his CV and application form would be the basis to determine the next stage of the process and of the need to be concise in those documents.
46. In terms of the recruitment policies in place at the respondent, Mr Tennant gave evidence that he worked within the HR Department at the respondent and had done since August 2015. In cross-examination Mr Tennant confirmed that the role of HR is to ensure that the role profile for a job and the criteria for selection do not use discriminatory language that would breach the Equality Act 2010, ensure the process in the respondent's Employers Policy is followed and the decisions of the panel are in line with the requirements, the decision is recorded on the Vacancy Management System and the correct process is followed. He referred to a recruitment system and toolkit which includes guidance to managers but is not a policy. He gave undisputed evidence that there is an Equality, Diversity and Inclusion (**EDI**) Policy but that it is not specific to recruitment and that there is no code of practice specifically for recruitment.
47. The Vacancy Management System is a software system and a recruitment platform to administer recruitment which is overseen by HR.

Statistics

48. Mr Tennant confirmed that on an annual basis the respondent undertakes a review of recruitment in terms of disability, race and gender of the candidates but the statistics do not relate to individual recruitment exercises.
49. The respondent had produced (page 513) the statistics on staff in the School as of 27 May 2022. It includes data for new posts and new appointments. New posts are all current staff with a contract in the School who have had a new post in the School between 1 August 2019 and 27 May 2022 (including staff who had a contract in the School on 31 July 2019 and who then received a new contract on or after 1 August 2019). It also includes new appointments which covers all current staff with a contract in the School who were newly appointed to the School between the 1 August 2019 and 27 May 2022 but excludes staff who had a contract in the School on 31 July 2019.
50. What the statistics show is a breakdown by ethnicity of a category which is headed BME

(Black and Ethnic Minority). The information is unhelpfully not broken down further to be able to identify candidates by their specific ethnic background, colour etc. There is a category for White and a category for Unknown. It breaks down the numbers into nationality EU, none EU and UK.

51. In terms of new posts, it shows the number of BME staff as 3, the number of White as 17 and Unknown as 1.
52. For new appointments it shows BME as 1, White as 4 and 0 for Unknown.
53. What this information shows is that in respect of new posts, 88% of staff are White and 11% BME. This information does not show the number from each category who applied for those positions to identify the % success rate for the categories who have applied.
54. Mr Tennant gave evidence that the respondent looks at trends over a number of years and identifies the trends and compares previous years. Further documents disclosed by the respondent (page 512) show that that within the School as of 27 May 2022, the breakdown of employees with an academic permanent contract include BME staff numbering 7, White numbering 64 and Unknown 3.
55. Mr Tennant informed the Tribunal that he was not in a position to comment on whether the School is diverse in its recruitment policy without being able to look at and analyse data, an exercise which the respondent had not done in preparation for this hearing.
56. Mr Tennant went on to give evidence that the respondent has signed up to Race Equality Charter (a framework to help improve representation, progression and success of minority ethnic staff and students within higher education) and obtained a bronze award and is working toward a silver award and to become “a more diverse organisation”. He gave evidence that the respondent has a 5-year plan to obtain a silver award but he is not part of that process and could provide no further information in terms of what steps the respondent had taken/was taking to try and secure the award. The undisputed evidence of the claimant is that other universities have the silver award and the advertisement for the job which refers to welcoming global candidates is the same sort of wording used across universities i.e. it is standard wording and does not disclose any unique approach to promoting diversity by the respondent.
57. In terms of diversity, Mr Tennant gave evidence only that he considered there was “some” diversity in the School based on the figures that the respondent had produced and gave evidence that the HR Department had not identified a percentage which it considered would be a measure of an acceptable level of diversity.
58. Mr Tennant had joined the respondent in 2015 and gave evidence that although appearing on behalf of the respondent he was not in charge of HR Equality and Diversity initiatives.
59. The respondent also produced at (page 765 to 871) a document headed Diversity in Recruitment Executive Summary and University Response. It is dated October 2018.
60. The introduction to this document states:

*“The University of Nottingham (UoN) aspires to create an environment for its staff, which is not only free from discrimination, it celebrates and values diversity. To support this, the Vice Chancellor Professor Sheera West **initiated a review of staff recruitment process to evaluate and improve practices in support of our institutional Equality, Diversity and Inclusion (EDI) objectives and aspirations: specifically investigating institutional recruitment data and exploring practices and behaviours around recruitment of staff of the EDI***

perspective.” Tribunal stress

61. It sets out (page 767) data trends over the previous 4 years.

*“The group examined this data in depth and found a number of visible positive trends, alongside trends that **could indicate areas for attention.**” Tribunal stress*

62. The report is not specific to the School but to the respondent more widely. It includes the following findings:

Race (BME)

“While overall attraction is good, there appears to be issues for BME applicants at the conversion stages (with exception of clinical academics and operations and facilities positions). BME male applicant conversion numbers are a particular concern at both shortlisting and at interview stage BME success rates were particularly low for apprenticeships and technical roles...

Of all academic sub families BME applicants have the lowest likelihood of obtaining an offer in the Research and Teaching sub family. The analysis found that while White candidates generally convert to offer better at all levels the difference increases at levels 6 and 7.”

Religion and Belief

“Applications from candidates who have declared no religion, are converting better than applications with candidates who have declared their religion. This is despite applicants declaring their religion being the largest group at application stage (48% of applications come from candidates declaring a religion where it is only 39% of offers come from this group)”

63. The report sets out best practice. The best practice themes it identifies in terms of recruitment are:

- Provide mandatory unconscious bias training for all those involved in recruitment.
- Development of recruitment tool to support managers throughout the recruitment process.

64. The respondent has devised recruitment tools and training to support best practice to assist in promoting diversity in the recruitment process. Those policies the Tribunal observe, are only effective if they are followed and enforced.

65. The respondent has a number of guidance documents which includes a document setting out guidance on deciding shortlisting and selection criteria (page 733). It states:

“Your chosen criteria must be clear, objective and measurable so you will be able to:

- *Evaluate candidates fairly and **consistently.***
- ***Provide clear justification** for shortlisting on selection decisions.*
- ***Give useful feedback** to candidates.” Tribunal stress*

66. It goes on to give guidance which states that:

*“Some criteria may be harder to assess from the application form. For example, **criteria***

involving verbal communication such as “the ability to communicate clearly and accurately”, will only give you some information through an application, whereas interviewing and testing the candidate will reveal whether they actually fully meet the criteria.

Therefore, you may choose to explore and select shortlisting criteria at the interview stage to validate the information from the application... Tribunal stress.

67. The document goes on to make a recommendation in terms of the number of criteria that should be used for shortlisting and states as follows:

“How many criteria should I use?”

- *For shortlisting, we recommend using **no more than 5 criteria** (although vacancy manager will allow to add up to 10).*
- *For selection (i.e. interview and assessment) we recommend assessing **between 6 and 10 criteria.**”* Tribunal stress

68. It also provides the following guidance:

*“If your role has a large number of criteria, you may not have enough room to assess them all. You will need to **prioritise** the most important essential criteria and decide how they will be weighted in the selection process. **The criteria weighting should be agreed in advance and must not be changed reactively during the process.**”* Tribunal stress.

69. In a further guidance document (page 747) it refers to record keeping and provides:

*“**You will need** to keep a record of how you **arrived at your shortlist**, including justifications for the reasons for selection or rejection in each case.*

*This may be required by the Employment Tribunal in the case of a complaint and unlawful discrimination and your record will be essentially demonstrating that any decisions were **evidenced based and solely related to the role criteria**. Remember applicants can request a copy of shortlist ratings and justification notes under Data Protection Regulations (GDPR) as part of a subject access request.”* Tribunal stress

70. The two individuals who carried out the recruitment process involving the claimant, Professor Fromhold and Dr Benedict are highly intelligent professionals who are used to dealing with complex documents and processing substantial amounts of information. Professor Fromhold in response to questions from the Tribunal gave evidence that he did not look at the policies during the specific exercise involving the claimant because; *“I was confident that I knew how the process worked. I have carried out a number of recruitment exercise”*. The Tribunal do not consider that understanding and applying the the guidance documents without direct HR support would cause any challenge for the Professor Fromhold and Dr Bendict.

Shortlisting

71. It is the undisputed evidence in chief of the Professor Fromhold that the respondent decided who would sit on the interview panel and it was agreed that there would be four people: Professor Fromhold, Dr Benedict, Clare Burrage (Professor of Physics) and Alfonso Paragon Salamanca, Professor of Astronomy (at the time Director of Teaching and Learning). Clare Burrage was later replaced on the panel by Professor Megan Gray (Professor of Astronomy and Undergraduate Admissions Tutor).

72. Professor Fromhold gave evidence that given the availability of staff over the summer period

the decision was taken that just himself and Dr Benedict would undertake the shortlisting exercise. Both men are White and, therefore, this was not a diverse panel. While the guidance documents do not explicitly recommend a diverse panel for shortlisting it recommends that it is undertaken by at least two members of the panel (which should be itself diverse).

73. On 12 August 2021 Professor Fromhold had begun the reviewing of the applications and it was agreed between him and Dr Benedict that they would meet together to conduct the shortlisting exercise on 13 August 2021.
74. They both therefore carried an initial exercise separately, each looking at the 64 applications. They then met the following day at 9.00am on 13 August (page 434-435).
75. The Tribunal is content, after hearing the evidence of Mr Tennant and being taken to the documents that there were two ways the respondent could deal with shortlisting under its own policies, one was for members of the panel to carry out an initial exercise and put their scores into the Vacancy Management System (**VMS**) software system and after their scores are added only then for the Chair to add his/her scores or, alternatively for the shortlisting panel to meet as a panel and put in the agreed scores onto **VMS**. Professor Fromhold as chair chose the latter.
76. Professor Fromhold completed an Excel spreadsheet after his initial desk top review of the candidates on 12 August. There were 64 candidates at this stage (page 439- 441).
77. The names of the candidates were disclosed to the panel but no other equal opportunities monitoring information.
78. The Excel spreadsheet identifies the candidates by name. The criteria are listed alongside and there is also a section for “total notes” where a provisional score was given and a section for “more notes” where very brief additional comments were recorded. The Excel spreadsheet is not something recommended in the guidance document, it was Professor Fromhold’s decision to record his initial scores this way.
79. In terms of the selection criteria, the job profile for the role (page 621) sets out in the person specification section (page 622), the essential criteria and the desirable criteria. It does not set out what weighting is attached to each.
80. Under essential criteria the job profile includes the following:
 - Excellent written/verbal communication and presentation skills.
 - Ability to work to deadlines and prioritise tasks.
 - Ability to collaborate effectively.
 - Demonstrate teaching supervisory skills.
 - First degree in physics or equivalent field strongly aligned with physics.
 - PhD or equivalent in the field strongly aligned with physics.

The desirable criteria are listed as:

- Evidence of innovation in teaching and learning.

- Membership of a professional body where appropriate.
- Higher education teaching qualification or equivalent.
- Evidence of activities leading to promotion and creation of collaborative links with industry/business/community.

81. There were, therefore, 4 desirable criteria in the person specification and 10 criteria in total. However, by the time of the shortlisting process there were 9 criteria. One of the desirable criteria, namely, *membership of a professional body* was removed. There were therefore 3 desirable criteria remaining (criteria 7, 8 and 9).

Excel Spreadsheet

82. In terms of the Excel spreadsheet which Professor Fromhold had prepared, each criterion can score a maximum of 3 points and, therefore, there are a total of 27 points to be awarded. He inserted a score against each 9 criteria and then a total score for each candidate. His evidence is that he did this over 2 days.

83. In terms of the claimant, he was awarded a **score of 23**.

84. There are only 5 candidates with a score higher than the claimant's at this stage. He therefore scored very highly.

85. There is one other candidate with a score of 23.

86. The candidate who would be successful following interview was candidate (226653) who was given a score of 25. This is a candidate whose name the Tribunal find and the claimant does not aver otherwise, is commonly an Arabic name and would suggest that the person may be Muslim however he has recorded no religion. He was however already known to the panel because he was already working at the respondent.

87. Candidate 226313 was given a score of 21. This is a candidate who the Tribunal find has a name which would be common in England and suggests English nationality or national background.

88. Candidate 226560 was given a score of 23. This is a candidate whose name would suggest that the person's national origins or nationality is Chinese.

89. Candidate 226669 was given a score of 24. This is a candidate the Tribunal find whose name is common in Slavic countries. He is recorded in the respondent's monitoring information has other White background and no religion.

90. Candidate 226711 was given a score of 24. This is a candidate with a name which the Tribunal find would be common in England and suggests English nationality or national background.

91. At this stage the claimant scored more highly than the French candidate (whose name the Tribunal consider would suggest that he is French but would not indicate his religion and the claimant does not aver otherwise) (226705) who scored 20. The notes for this candidate state "*Working in quantum hub. Has 4 years TA experience **but not in UK though***". Tribunal stress. This comment the Tribunal considers about not working in the UK may be an indication that Professor Fromhold had a preference/bias for candidates who had taught in UK universities.

92. A preference for someone who has experience working in UK universities, may give rise to a claim of indirect discrimination and is not the only such comment. A similar comment is made about another candidate: "*Has some teaching experience not in UK though*". (see also below the comment made by Dr Benedict).
93. There are a number of candidates who score very low by comparison with the claimant and the notes against many of their names say very little and include comments such as "*no covering letter or teaching description*".
94. There were a significant number of the candidates who were not considered to be appointable by Professor Fromhold at this first stage.
95. What this Excel spreadsheet does not do is provide any explanation as to why each score has been attributed to each criterion and what the thought process behind the scoring against each criterion was, other than the very brief notes in one column. The essential and discretionary criteria are not weighted.
96. Professor Fromhold then went back through the Excel spreadsheet and attributed a further number against each name giving them either 1, 2 or 3. 1 denoting a strong candidate, 2 applicants he considered to be possible reserve candidates and 3 less suitable for shortlisting or reserve. There were a lot of candidates he was then ranking as 1 therefore he 'tweaked' his rankings further. He added a score of 1* for exceptional candidates and 1- for those who had not explained clearly how they met the advertised criteria but were still within the realms of being potentially shortlisted.
97. 9 applicants were ranked 1*, 8 applicants were ranked 1 and a further 3 candidates received a slightly lower score of 1- which included the claimant. There were now 17 candidates with a higher ranking than the claimant.
98. Dr Benedict separately carried out his own scoring in a notebook. His method was essentially to set out the name of the candidate and mark a no, yes or yes+ at the side. There was no explanation for the scores recorded although in some cases he has written a word or two at the side such as "published Pedagogy" or "no PhD" but that is the extent of the notes. There is certainly no note to show that he had considered each of the criteria in relation to each applicant but has just given a general overall yes or no.
99. Dr Benedict and Professor Fromhold then met on 13 August 2021 to carry out the shortlisting exercise together.
100. The respondent is a prestigious Russell Group University. It has in place guidance to ensure the recruitment processes for what is an important position and a well sort after post is carried out fairly and therefore the guidance very clearly sets out the need to ensure that decisions are recorded. Further it recommends no more than 5 criteria for shortlisting and further refers to not retrospectively changing the criteria. Professor Fromhold and Dr Benedict would fail to adhere to these safeguards. The Tribunal consider however that even without guidance documents, any reasonably intelligent person would appreciate that decisions should be recorded and the approach to the weighting of criteria should not be changed part way through an exercise and further Professor Fromhold was experienced in conducting recruitment exercises.
101. There are absolutely no notes whatsoever of the exercise that was carried out between Dr Benedict and Professor Fromhold at that meeting on 13 August 2021. That was a serious failure to follow the respondent's own best practice and for intelligent individuals, an omission difficult to explain or understand.

102. The upshot of that meeting on 13 August 2023 was that as set out in a document (page 445) each of the candidates were given a total score against each criteria and then it confirms whether they are rejected, have got through the shortlisting stage to interview or they have been put on a reserve list.
103. That document gives no more information whatsoever and assistance in helping to understand how a decision was made against each of the criteria. The Tribunal find this lack of record keeping quite frankly astonishing not least given that Professor Fromhold refers in his evidence in chief to his involvement in promoting diversity in the School (para 26- 27), that the respondent is in the process of trying to secure a Race Equality Charter silver award and given that the School's own statistics around BME recruitment (whatever the explanation for that).
104. Dr Benedict had identified the claimant in his provisional assessment as a "yes ++". He had only identified 3 of the 64 candidates as a "yes ++" and that included the claimant. The claimant was in the top 3 highest scoring candidates. Following this joint shortlisting exercise, the claimant had fallen to a position where he was put onto a reserve list and had not made it through the shortlisting process.

Further Shortlisting

105. Dr Benedict and Professor Fromhold did not limit the criteria or it seems consider whether they should only use essential criteria at this stage but considered all 9 criteria at this meeting in respect of all 64 candidates. That would have required them to assess 576 scores. This was a meeting which lasted no more than about an hour or an hour and a half.
106. Their evidence is that for some of the candidates there was very little discussion to be had because they clearly not suitable. Regardless of that, even if they gave full consideration to the top 10 candidates, the Tribunal find that that still required them to consider fairly and objectively 90 scores within 60 to 90 minutes. The applications were not brief. Some applications were longer than others but all of them contained a substantial amount of information. The claimant's application alone comprised 20 pages of very detailed information.
107. The Tribunal consider that it would have been incredibly difficult to thoroughly assess those applications within the time that they gave themselves but nonetheless Professor Fromhold and Dr Benedict maintain they did so.
108. At this point the claimant had now scored a total of 19 (from the 23 given by Professor Fromhold in his initial scores). Those with a score of 22 or above (8 candidates) went through to interview (page 538). Those 8 were:
1. candidate 226653: Lebanese - other mixed background - no religion; **successful candidate**
 2. candidate 226391 British-other Asian background-Hindu
 3. candidate 226637 Irish-other white background-Muslim
 4. candidate 226669 Yugoslavian-other white background-no religion
 5. candidate 226711 British-White British-no religion
 6. candidate 226560 Chinese-Chinese or Chinese British-no religion withdrawn.

7. candidate 226124 British-prefer not to say on religion and ethnic origin.
8. candidate 226313 British-White British-no religion withdrawn.
9. candidate 226705 French -other white background -prefer not to say on religion.

109. The claimant was, therefore, put on a reserve list.

110. There were others put on a reserve list who had a higher score than the claimant and they were:

Candidate 226749 had a total score of 21 and was on the reserve list.

Candidate 225870 had a score of 20 was on the reserve list.

Candidate 226037 had a score of 20 and was on the reserve list.

Candidate 226390 had a score of 20 and was on the reserve list.

Candidate 226435 had a score of 21 and was on the reserve list.

Candidate 223887 had a score of 20 and was on the reserve list.

Candidate 224154 had a score of 21 and was on the reserve list.

And candidate 224462 had a score of 21 and was on the reserve list.

111. The only other person with the claimant's score on the reserve list was the French candidate (226705) who had a score of 19.

112. The French candidate and the claimant were therefore at the bottom of the reserve list.

113. In terms of the other comparators, they scored as followed showing the score and former score given by Professor Fromhold:

114. The successful candidate (226653) was given a score of 24 down from 25.

115. The candidate (226313) was given a score off 22, down from 21.

116. The candidate (226560) was given a score of 23, that score did not change.

117. The candidate 226669 as given a score of 24, that score did not change.

118. The candidate 226711 was given a score of 24, that score did not change.

119. The claimant having a drop of 4 points, had a more significant scoring adjustment in this second phase than his comparators.

120. On 20 August 2021 Professor Fromhold emailed Dr Benedict to tell him that two of the shortlisted candidates had pulled out of the interviews

121. The evidence of Professor Fromhold is that they had committed to interviewing more applicants than they normally would have done in selecting 8 for interview and, therefore he asked Dr Benedict for his view on whether he felt that they should proceed with the 6

remaining candidates only or whether they should invite one or more of the reserve candidates to interview.

122. Dr Benedict responded on 20 August and suggested that they invite one further candidate and suggested either the claimant or the French candidate number 226705 (page 433): *“might be worth adding one of the reserves. Saad or [French candidate]”*.

Move from Reserve to Shortlist

123. The supplemental witness statement, which was signed by Dr Benedict and dated 2 November 2023, included the following evidence:

*“We had already committed to interviewing more candidates than we would usually so I suggested that perhaps we invite one further candidate to interview from the reserve list. I had seen Professor Fromhold’s email which was sent at 09:18am and I responded **hastily at 09:40am based on my recollection of who the next two candidates were in line**. My recollection was that was Dr Saad and candidate 226705 which is why I proposed those to options to Professor Fromhold to consider. **I did not consult the shortlisting scores before doing so as I was extremely busy at the time preparing for the return of students**. It was August 2021, and we were expecting students to return in person study with strong limitations on contact hours and social distancing arrangements but facing the possibility of large numbers of students having to self-isolate and potentially another lockdown (which indeed could pass into December). **I realise now the benefit of having checked the full list of final and agreed shortlisting scores the two candidates I had in mind (Dr Saad and 226705) were the bottom of the reserve list rather than the top.**” Tribunal stress*

124. Dr Benedict’s evidence is clear, that in error he had chosen the two at the bottom of the reserve list. That was not, however, his oral evidence before the Tribunal.

125. While the Tribunal acknowledge the fact that Dr Benedict was prepared to change his evidence under oath, he had sworn to the truth of his evidence in chief and was given the chance to make any corrections before he did so. He did not provide any suitable explanation for why his account before the Tribunal was so fundamentally inconsistent with the explanation in his witness statement.

126. In re-examination counsel for the respondent took the time to take Dr Benedict back to his witness statement on this point and asked him: *“to clarify which was reliable”*.

Counsel: *“You were asked why you would have selected the French candidate and the Claimant and you had said “you had spent a lot of time talking about them and so they were uppermost in your mind”, I appreciate the events of 4 years ago in your witness statement was written closer in time, therefore, can you confirm which is more reliable?”*

127. Dr Benedict however was clear in his both original evidence under cross-examination and further when he was re-examined on the point, that he had no regard for where they came in the scoring process when he proposed them to Professor Fromhold.

128. Dr Benedict confirmed that where they came in the scoring process only came out later when he was preparing his witness statement.

129. The witness statement is materially misleading on this fundamentally important point and whilst the witness statement may have been prepared with the assistance of a solicitor, it was his evidence, he had signed it and he had sworn to the truth of it. His oral evidence was as follows:

“Judge: can you verify how the French candidate was chosen?”

Dr Benedict: I cannot answer the question.

He went on to say that:

“They were the two names that I thought should be worth discussing”.

130. The Judge asked him whether he thought that the two were the top of the reserve list or whether that did not matter to him. He suggested the two were the ones he was most interested in and he confirmed the two names he put forward were the ones he thought they should consider promoting *“regardless of their score or from where they were in the list.”*
131. The Judge wanted to be absolutely clear about his evidence and asked him to clarify whether he was saying that where they were in the reserve list in terms of scores, was not relevant to him and he confirmed that this was *“correct”*.
132. Dr Benedict was equivocal that this evidence now before the Tribunal was correct. He did not consider whether others had scored more highly when he suggested the claimant and the French candidate.
133. Professor Fromhold in his evidence in cross examination confirmed when asked by the Judge that he knew the two proposed were at the bottom of the reserve list but there were aspects of their application *“we thought could be explored further.”* He gave evidence that:
- “Looking back, taking them out of order was an error.”*
134. It was the Tribunal consider an obviously grossly unfair thing to do and for someone as experienced as Professor Fromhold and who asserts such concern and involvement in promoting diversity, it is inexplicable. If those candidates were of more interest to them than other candidates, why was this not reflected in the scoring? Neither Professor Fromhold or Dr Benedict provided a satisfactory explanation for that.
135. Although originally they decided to interview 8 people, Professor Fromhold’s evidence is that decided to put only one more person through to interview:
- “...8 candidates [to interview] felt too many but they were outstanding candidates... 6 was more manageable – question was whether to focus our energy on 6, one of whom was likely to be offered or look at others... ideally we would interview 5 or 6 – already we were interviewing more than we would normally.”*
136. There was no documentary evidence put forward to confirm that in previous recruitment exercise the number interviewed was limited to 5 or 6.
137. Dr Benedict was clear that he simply put forward the names of the people he was most interested in which quite frankly the Tribunal considers drove a ‘coach and horses’ through the safeguards the respondent’s policies and training put in place and created in doing so the risk of a decision influenced by bias and subconscious discrimination.
138. As it happens, in terms of this part of the process, the claimant was treated more favourably than those who had been scored higher than he had been.
139. The Tribunal did consider that Dr Benedict was being honest when giving his oral evidence on this issue, he maintained his position that he had selected those he was most interested in. The Tribunal accept his evidence which is supported by the email exchange

with Professor Fromhold. He had no further part in the decision about which of those two candidates would go forward, he left that decision to Professor Fromhold.

140. Dr Benedict was then on annual leave and he would only know who would be selected when he returned from annual leave the week after 20 October.

141. The decision was then left with Professor Fromhold. This exercise took place only 9 days after Professor Fromhold and Dr Benedict had gone through what they maintain was a thorough selection exercise. The Tribunal find that more likely than not that it was still fresh in Professor Fromhold's mind what those scores were. In any event he could (and should) have checked them and in fact the Tribunal find that if his evidence is to be believed, namely that he would make a decision on which one had scored the highest in essential criteria, he must have checked their scores and decided to proceed nonetheless with these two candidates and indeed that is his evidence.

142. On 20 August 2021 Professor Fromhold contacted Eva Shykles in HR and states simply, "Thanks for letting me know – we would like to add [French candidate] to the shortlist please."

143. Professor Fromhold gave no explanation whatsoever to Ms Shykles as to why he had decided on the French candidate and again, kept no notes or records of his decision-making process.

144. There was it would seem no checks carried out by Ms Shykles or HR more generally.

145. The reason Professor Fromhold gives in his witness statement dated 23 February 2023 (despite the absolute absence of any notes or records during this period in August 2021) is that the French candidate scored more highly on the essential criteria. The French candidate had scored 16 on the essential criteria and the claimant 14, although they had the same total score. However, the recruitment selection process they had followed at the first stage gave equal weighting to the essential and desirable criteria. They were now doing the Tribunal find, the very thing which the guidance documents stated should not be done, namely changing the selection process midway through.

146. Professor Fromhold's evidence is that because it was a tie-break situation, each with a total score of 19 each, he decided to base his decision on the essential criteria score only and considered the French candidate's background in Quantum Technologies which is an area where the School had a lot of activity and (witness statement paragraph 15):

*"The university had also recently lost one of the lecturers in this specific area so I considered perhaps that if he were successful, he may be able to fill the teaching role of the previous lecturer so this was **part of the reason why** I decided to invite him for interview." Tribunal stress*

147. In cross examination professor Fromhold gave evidence that:

*"I did **not shortlist because of expertise in Quantum Technology**, it was also because he scored the highest of the essential criteria, the essential score was first and then Quantum Technology was a factor... **the essential criteria was the main one.**" Tribunal stress*

148. This oral evidence is not quite how his evidence in chief is presented. In his witness statement he talks first about the Quantum technology giving the Tribunal consider an impression that this was the first consideration and then comments on the essential criteria.

149. However, as the claimant rightly points out, a background in Quantum Technologies formed no part of the job profile. It was not part of the essential or desirable criteria. Professor

Fromhold was now introducing his preference it seems, for another area of experience outside the criteria against which all other candidates had been measured. This was again obviously unfair.

150. There were two people who identify as Muslims (including the claimant) on the reserve list and there is only one who we understand from the information presented by the respondent, identifies as Muslim who was shortlisted (candidate 226637).
151. The Tribunal note that on the list of those who are shortlisted the Muslim candidate is given a very high score of 24. The successful candidate is also given a score of 24 (226653). Another candidate has a score of 24 (223691) who identifies as British and Hindu.
152. The Tribunal accept the evidence of Professor Fromhold which the claimant does not dispute, that the successful candidate is Lebanese and Professor Fromhold describes him as non-White, he is however known to Professor Fromhold. The successful candidate was already working at the university.
153. The candidate, whose name would indicate that he is Muslim (226637), was not known to Professor Fromhold and was given the same total score as the successful candidate. Professor Fromhold gave evidence under cross examination that on reviewing the evidence again he believes that perhaps he had underscored this Muslim candidate (226637) on criteria 8 because this candidate had an MA in Teaching and Learning (page 315-314), giving him the highest teaching qualification of all the applicants. Further, he had reflected in his application on the benefits of his teaching qualification in the same way as the successful candidate had: *“so it is possible that we should have also awarded him a higher mark of 3 rather than 2”* (paragraph 17d of his witness statement). That does beg the question, why, when criteria 8, out of all the criteria, is the most straightforward of the criteria to measure objectively, did Professor Fromhold manage to underscore this Muslim candidate?
154. Had this Muslim candidate received a score of 3 for criteria 8, which Professor Fromhold now on reflection believes he probably should have received, this candidate would have been the highest scoring candidate.
155. The Tribunal take into account that it is possible that Professor Fromhold had a bias toward the candidate who was already working at the respondent. However, Professor Fromhold is an intelligent person, experienced in carrying out recruitment exercises and he have known that it would undermine the fairness of the process to show bias in favour of the internal candidate. Whether he nonetheless did so consciously or otherwise would call into question his judgment and ability to carry out an unbiased selection process. The claimant has not brought an indirect discrimination claim however, preferential treatment of an internal candidate based on the respondent's own data about the School's existing ratio of BME staff to White staff, may give rise to such a claim. It is this sort of risk that applying the respondent's policies and guidance conscientiously guards against.

Communication with the Claimant

156. What then happens in terms of communication with the claimant is of further concern to the Tribunal.
157. On 6 September 2021 the claimant makes an enquiry about his application as he had not received any notification from the respondent.
158. On 6 September 2021, Eva Shykles, Recruitment Services Assistant (page 449) contacts the claimant and explains that he is on a reserve list and that is why he has not heard anything further.

159. The claimant's evidence is that he thought perhaps there was some mistake which he would want to try and have corrected before the interview and on 7 September 2021 emails to ask whether the successful shortlisted candidates have already attended the interview (page 450).

160. Eva Shykles replies on 7 September to tell him that the interviews are the following week (page 451).

161. The claimant replies on 13 September (page 454) to say he is disappointed that he is not shortlisted and:

"Could you please let me know why I am not shortlisted for the interview? Could you also send me my score that the shortlisting panel has given me. I would appreciate your prompt response".

162. Eva Shykles then sends a response on 13 September (page 455). It is to be remembered that Eva Shykles has had direct email communication with Professor Fromhold and knows that the French candidate had been promoted into the reserve list and the Tribunal find that she would have been able to access the scores from VMS however she replied:

*"Please find attached your scores, you scored 19, however, **all those interviewed scored 22 or above so there wasn't much in it.***

The panel can't give you feedback as this is only provided to those interviewed there is a policy due to the high number of applications we receive". Tribunal stress

163. That statement is incorrect.

164. The French candidate did not score 22. He had the same total score as the claimant.

165. The claimant writes again on 13 September and explains that based on his extensive higher education experience he has a reservation about the low scores and he asks for the shortlisting panel to provide detailed feedback for the reasons for not being shortlisted (page 456).

166. The claimant received an automated message from Ms Shykles email that she would be out of the office on 21 September and therefore he then forwards this email to the Respondents HR Department on 13 September (page 457).

167. The claimant follows this up again on 16 September 2021 not having had a reply (page 458).

168. Eva Shykles replies on 25 September 2021 and apologies for the late reply as she had been on leave and states,

"As previously mentioned, the panel cannot provide feedback for candidates that are not shortlisted as this wouldn't be possible.

*All I can give you is your scores and any feedback on the system, however, **there seems to be no feedback on this file"** (page 459). Tribunal stress*

169. There was no feedback because Professor Fromhold had put no information on the VMS to explain the scores.

170. The claimant writes again on 7 October and asks about the ethnic background of the

successful candidate and how to raise an official complaint and expressed his disappointment at that lack of any feedback on the system. The evidence of Professor Fromhold (which the claimant did not challenge in cross examination) was that he does not believe he was shown the complaint letter, he was only told there was a complaint. On balance the Tribunal accept that he was not shown it, the documents do not suggest that he was.

171. Eva Shykles then replies on 8 October (page 461):

“As mentioned previously due to high levels of application feedback cannot be provided to those candidates unsuccessful at shortlisting stage. In terms of notes, panels always don’t add these to the system so it is just unfortunate in this case that they haven’t been added, apologies for this. I am unsure if I am allowed to release this information so will have to check with my manager and get back to you as soon as possible....”

172. There is an email then on 14 October from Eva Shykles to Professor Fromhold (page 466):

“Hi Mark, please can you provide feedback on why 226743 – Mohamed Saad in the above position was not interviewed.

Normally I wouldn’t ask for this for candidates who are not interviewed, however, this applicant has made a complaint about the process”.

173. Approximately an hour later on 14 October 2021 Professor Fromhold replies and at this point has been asked generally for feedback, he has not been asked about any specific criteria. This would be his opportunity to provide some information about why he scored the claimant as he did, even if it is a brief reason in relation to each criterion but what he states is as follows (page 465):

“Hi Eva,

I am not sure what I can say about this other than the field was exceptionally strong and other candidates supplied more convincing information on why they met the criteria for the role.

May I ask the nature of the complaint?”

174. At this point, therefore, Professor Fromhold is not saying he is in a position to provide more feedback. His evidence in cross examination is that on that day he had been on a review panel for a multimillion point review grant and spent the evening prepare for the REF process and he did not have time to look over the scores. However, he does not offer to provide more information the following day when he has more time and given there is a complaint this would the Tribunal find have given him good reason to do so, unless he feels that he cannot provide helpful feedback.

175. Eva Shykles was liaising at this point with Megan Garner, HR Resourcing Services Manager.

176. Eva Shykles then asks again for feedback this time on 15 October 2021 (page 464) and her request is more specific and focussed on the very low score for the last criteria:

“Looking at his scores, he scored 2/3’s across the board except for the last criteria. Please can you further expand on why he did not meet this criterion specifically. The criteria is “evidence of activities leading to promotion and creation of collaborative links with

industry/business/community”.

“Yeh he is confused about scoring high enough to be reserve, however, not being interviewed”.

177. There is nothing at this point to prevent Professor Fromhold from giving more information but he focusses on that specific criteria and states as follows:

“The candidate has worked at IBM but there was not much evidence of how he has developed subsequent collaborations with industry and what they had led to with dates and details. There was a statement about having placed students within companies but little detail about when and for how long; more information would have helped.”

*The applicant was reserved but across the whole scoring criteria, **other applicants scored better** and were, therefore, interviewed – **subject to the practical limit** on how many people could have been interviewed”. Tribunal stress*

178. That is, therefore, the extent of the information that he seems able to provide at this point, which was in October 2021.

179. The ‘practical limit’ is the Tribunal consider, somewhat misleading because Professor Fromhold and Dr Benedict had considered that the practical limit had been to interview 8. Nothing had changed to make this arrangement ‘impractical’ even if they changed their minds and decided to interview 7 candidates.

180. Professor Fromhold is however then in 2023 when preparing his statement, able to provide quite detailed reasons in support of the application at the preliminary hearing to strike out the claim and again at this hearing. Evidence which Dr Benedict concurs with.

181. The claimant is then given the following information from Megan Garner on 19 October (page 472).

“I have looked into your feedback regarding your recent application for the above post.

The panel have provided the following feedback regarding your application.

The candidate has worked for IBM but there was not much evidence of how they had developed subsequent collaboration with industry and what they had led to with dates and details. There was a statement about having placed students with companies but little detail about when and for how long, more information would have be needed.

*The decision not to take your application forward for interview was based on the above feedback, **I have looked into this and it is commensurate with the scoring and with other applicants scores.** Tribunal stress*

182. This information given to the claimant was again misleading. The French candidate had the same total scores as the claimant.

183. The claimant replies on 20 October (page 473) and asks the respondent to confirm the maximum scores for each of the 9 essential and desirable subsections on his score sheet.

184. The claimant was provided with a list of the 9 criteria. It is explained that the highest score for each criterion is 3 with a maximum possible score of 27 and his scores are now provided (page 474).

185. On 11 November 2021 the claimant submits a formal grievance (page 475).
186. He now alleges that he believes he has been treated unlawfully by being discriminated against on the grounds of his race, colour, nationality, religion, ethnic and national origins *“(as I am Black/Arab Muslim and African person and my national origin is Egyptian)”*.
187. At this point the claimant does not know the ethnic origin of the person who has been successful and indeed more broadly of those who have gone through the process but he complains about receiving unjustified, incomplete and generic feedback after struggling to get feedback for more than 36 days since 13 September 2021.
188. Megan Garner then contacted Jamie Tennant on 15 September 2021 (page 479). Jamie Tennant, Head of HR Shared Services (page 480) replies to Megan Garner stating that they need to treat this as a *“serious complaint”* and that they will look into the matter as a service complaint and will respond to the claimant once their investigation has taken place. He goes on to say:
- “Our next step will be for you to look into it, discuss it with hiring manager, other short listers to ascertain what process they followed, how the scores were determined, is there evidence of bias etc.”*
189. Megan Garner then wrote to Jamie Tennant on 17 November (page 481) and sets out the process. She states:
- “They did not, as far as they remember, distinguish between essentials and desirable attributes in the scoring, the former being taken as a threshold (yes or no) having that characteristic, then taking the highest score through to interview. If they had taken through those purely essential, the candidate who has raised the complaint would still not have been taken through to interview. The scoring seems consistent across the board with the candidate placing 30th on essential only and 20th with the total of essential/desirable with specific candidate feedback below [the reference to the candidate working at IBM]”*
190. This information is not consistent with the evidence now presented at this Tribunal that the French candidate was chosen because he scored higher on the essential criteria i.e. it was weighted at that stage and this is their response in November 2021, not when they prepared their statements in 2023 in defence of a discrimination claim.
191. There is no reference here to Professor Fromhold and Dr Benedict having given any more information about why they had scored the claimant in the way that they had or indeed about the decision to promote up from the reserve list the French candidate and not the claimant.
192. Jamie Tennant then emailed Megan Garner to ask if she had looked at the EDI data for the vacancy to see if BME applications were treated less favourably (page 485-488). It is clear she had not done so but is told by Mr Tennant how to run a report (page 487).
193. Megan Garner reports to Jamie Tennant on 30 November 2021 (page 488) that:
- “So, looking at the data, there is a larger drop off percentage at the SL stage of BME applications by quite a large amount, going from 42 applicants to 3 shortlisted. The drop off rate for White is much lower. The successful candidate was under the BME category.” Tribunal stress*
194. Mr Tennant when taken to these statistics in cross examination and commented that:

“Figures we have seen in trends over time, obviously selection panels do not know ethnicity of candidates, they see only written evidence from candidates. We do see in recruitment across the world – we do see more of a drop than we would like – there may be a number of factors, could be experience and backgrounds not at level for Russell Group university – part of the work we are doing is to remove barriers ...”

195. However, the respondent included the names of the candidates in the applications and despite the submissions of counsel (addressed further below) the Tribunal find that assumptions can be drawn from those names as to the candidate’s likely ethnicity etc.

196. When this report was put to Professor Fromhold in cross examination, he did not dispute that report’s findings, commenting that;

“I agree it is a shocking statistic – it is not good – BME is 8% - same across the country – higher than other science schools – it is a pipeline problem ...”

197. Mr Tennant gave evidence that he reviewed the numbers and scores but he did not review the actual evidence because he is *“not a physicist”*. He reviewed the scores and noted the successful candidate was of BME ethnicity and looked for evidence of bias in the selection process. The Tribunal consider that given the unfair way in which the process was carried out, he could not have looked very hard.

198. The Tribunal observe that Mr Tennant while not a physicist and thus not able to assess most of the criteria against the evidence easily, he did not ask a physicist to look over the shortlisted applications and the claimant’s application. He does not appear to have been concerned that the claimant and the French candidate were selected from the bottom of the reserve list. He does not question why the Muslim candidate who was the most qualified out of all the shortlisted candidates scored only a 2 for criterion 8 which was the most objective and measurable of all the criterion. He must have also known that there was no recorded feedback from the shortlisting exercise, a serious failure to apply the respondent’s internal guidance. The Tribunal consider that Mr Tennant failed to carry out a meaningful investigation but applied more effort it would seem on providing misleading information to the claimant.

199. What the statistics from this exercise shows is that there are, in terms of applications (disregarding the small number recorded as unknown), 42 BME candidates, 4 unknown and 18 White. Therefore, 65.60% of the applicants are BME and White candidates 28.12%.

200. Out of the 65.60% of BME applications only 7.14% make it through to the shortlist. That is 3 out of 42.

201. Out of the White candidates of 28.12%, 22% make it through to shortlist, which is 4 candidates out of 18.

202. As claimant sets out in his witness statement, after the second stage (when the French candidate is promoted from the reserve list to interview) the shortlisted statistics are then that out of 18 White candidates five were ultimately shortlisted and therefore the final figures are.

BME: 7.14%

White: 27.77% (four times higher than BME applicants)

203. In terms of religion, 1 Muslim candidate was selected for the shortlist, and 8 non-Muslims. candidates on the reserve list included 2 Muslims including the claimant (9 non-Muslim), 7

Non White candidates (4 whites) and one candidate who unknown to Professor Fromhold and Dr Benedict self-describes as Egyptian. The Tribunal note that those on the reserve and shortlist equate to 10 non-White and 10 White, i.e. 50% are non-White. At shortlist that reduces down to 6 White and 3 non-White, 33% are now non White.

204. The % of Muslims candidates reduce by 50% however, those figures being so small in terms of number, the Tribunal considers are of no real probative value compared to the BME and White candidate numbers.

205. The statistics in respect of BME and White, are however not insignificant and appear to reflect the pattern or 'trend' identified by the respondent in its 2018 report and cross UK universities more widely. While Professor Fromhold comments that this disparity is due to 'pipeline', i.e. the quality of candidates coming through, the respondent did not produce any evidence that this has been established to be the sole or even main reason within the School or more generally across UK universities.

206. The EDI and ethnicities statistical data of the School of Physics and Astronomy as of 27 May 2022 confirms that out of 74 academic staff there are:

- White 64
- unknown 3
- BME 7

207. There are therefore just over nine times as many white academic staff in the School as at May 2022, as BME.

208. The claimant sets out in his evidence reference to various sources, not disputed by the respondent, which shows underrepresentation of Black STEM academics across UK universities generally.

209. The claimant included a link in his witness statement to data from the Higher Education Statistics Agency in 2018 -2019 which shows that Black scientists are least likely to hold an academic Professorial post (page 57). He also included various articles (page 58 – 71) commenting on the underrepresentation of Black Higher Education staff. The Equality in Higher Education Statistical report 2021 records:

"...the comparison shows that the current UK HE staffs ethnic representation (84.6% White and 15.4% Black, Asian and minority ethnic) closely matches that of the English and Welsh population (86% white residents and 14% Black, Asian and minority ethnic residents). However, this is not true for all the minority ethnic backgrounds. For example, Black HE staffs members are underrepresented compared with the proportion of the Black population recorded in the census (2.8% of the total staff of UK HER black compared with 3.3% of the total population)."

In general, inequalities persist among White and Black, Asian and minority ethnic staff members in UK HE, with lower proportions of Black, Asian and minority ethnic staff than white staff on open ended/permanents contracts... In terms of professorial roles, in 2019/20, the share of white academics was nearly double that of Black Asian and minority ethnic academics (11.2% compares with 6.2%) ..." Tribunal stress.

210. The reason for the statistics is the Tribunal consider, likely to be due to a number of different factors. A BBC report which the claimant disclosed, quotes a Dr Mark Richards, an atmospheric researcher at Imperial College London (page 69), in which he states that the

data demonstrates that Black and early career students are not getting the backing they need from professors:

“They seem to show that there is an element of racism or structural bias... The racism, he says is very rarely overt or intentionally offensive. Rather it manifests itself subtly, he says, Academic careers depend on senior professors liking certain individuals; taking them under their wing by giving them support, advice and opening doors for them. People look for younger versiona of themselves... if you are from an under- represented group, the likelihood of you being favoured is going to be reduced. While being liked is certainly a good quality, I don't think it should be the determining factor. It show really be about the quality of your work and the merit of your efforts.”

211. The claimant did not produce any similar information, articles or statistics in relation specifically to religion or specifically Black African staff.
212. The successful person appointed in this exercise by Professor Fromhold and Dr Benedict does fall within the category of BME being Lebanese. On the evidence presented by Professor Fromhold, he is non-White. However, the fact that the successful candidate is BME candidate does not mean that there has not been discrimination, including subconscious discrimination, in the way the process at the various stages has been conducted.
213. The Tribunal take into account that the successful candidate was someone known to the shortlisting panel.
214. The Tribunal is mindful that there may subconsciously at least be a difference in terms of treatment toward someone who is already known and who is of a different race or religion etc than the treatment toward someone with whom a relationship or working relationship has not already been established. Discrimination is not a binary concept in that sense.
215. The fact, therefore, that the candidate is BME is not determinative of the question as to whether there has been otherwise discrimination in the way the selection process has taken place with respect to others. The successful candidate is also not African, he is not Egyptian and his religion was not disclosed.
216. The Tribunal consider that the evidence set out in the witness statements of Professor Fromhold and Dr Benedict is predominantly a result of the witnesses looking now at the application and considering what they believe that would have decided now if they were carrying out that exercise rather than actually a recollection of what they had considered at the time. There may be an element of recollection however the Tribunal have regard to the fact that Professor Fromhold was not in a position even shortly after the exercise in 2021, to give any sort of meaningful feedback other than the point about collaboration with industry. The Tribunal have had regard to this when weighing their evidence.
217. Mr Tennant on 8 December 2021 then put together suggested wording for a response to the claimant's grievance. That response is set out at page 490-491 and the actual version which is sent to the Claimant is at 494-495 and is sent on 17 December 2021. The Tribunal accept on balance the evidence of Professor Fromhold that he was not shown this letter at the time it was sent and possibly not until the preliminary hearing in these proceedings and that the matter was largely dealt with by HR. He gave evidence that he had given HR information about the elevation process from the shortlist involving the claimant and the French candidate, however that does not chime with the email from Ms Shykles where she reports that there was no weighting of the criteria.
218. There are some notable changes from the draft letter Jamie Tennant provided, to the

letter which was sent out. What is missing from the final letter is the following (page 490 – 494).

“I have reviewed the process for this vacancy”.

219. At the end of the letter that went to the Claimant it states.

“The length of time taken to notify you the outcome of your application and to send you the feedback you requested were longer than the service we seek to provide. Please accept my apologies for these delays.”

220. The first version states.

“The length of time taken to notify you of the outcome of the application to provide you with the feedback requested was not acceptable. Please accept my apologies for these unnecessary delays. This did not provide a service we seek to deliver and those processes will be reviewed to eliminate unnecessary delays and ensure the candidate experience is improved.”

221. There is the Tribunal consider, a ‘watering down’ of the letter and a step back from taking responsibility for what had happened or to committing to any sort of review.

222. What Mr Tennant also states, however, which is of more concern is as follows:

“Looking at your application, you have received a total shortlist score of 19 out of 27. Considering the information provided in the application form and CV, the reviewers assessed you as providing [it sets out whether the scores reflect weak evidence provided or strong against the criteria].

*...the strength of the applicant pool for this vacancy resulted in the threshold for progression being set at a higher level than you received. **All shortlisted candidates met the threshold set.** In line with the university’s recruitment process, you were subsequently placed in a reserved pool to be considered for interview should no appointment be made. Following the interview and selection process an appointment was made and **all reserved candidates were then notified that their application was unsuccessful.**” Tribunal stress*

223. There are material omissions and misrepresentations in this letter which the Tribunal conclude are deliberate.

224. It fails completely to explain that another candidate with the same score as the claimant was put forward into the shortlist and had an interview.

225. Under cross-examination Mr Tennant gave evidence that with regards to Eva Shykles, who is still working at the respondent but did not appear as a witness, in terms of her correspondence to the claimant in which she said all those who were shortlisted scored 22 or above, he did not know why she had said that, it was conjecture on his part that this was an error. It is reasonable the Tribunal consider to conclude that it was at best a lack of care which does not reflect well on the seriousness with which the HR team monitor the application of its recruitment processes and policies to safeguard against discrimination or, a deliberate attempt to mislead the claimant to prevent an employment tribunal claim. Given the conduct of the HR department overall, the Tribunal conclude that it is more likely the latter.

226. Mr Tennant also confirmed in cross examination that the expectation is that those who were carrying out the recruitment process follow a document (page 630-631) which is

headed "Chair and Panel Guidance Shortlisting, Interviewing and Offer" which states.

"There is also a note section to record your objective justification for the allocated ratings".

And;

*"If you decide to meet as a panel to discuss shortlisting, panel members are encouraged to make their evaluation of each application independently, prior to the meeting. During the meeting, the Chair will facilitate a discussion to reach a consensus on shortlist decisions and can update the vacancy manager system on behalf of everyone. The system will present a pop-up message highlighting that not all panel members have entered scores, **and a note will need to be added** to explain how decisions have been reached." (Tribunal stress).*

227. It goes on to reinforce the importance of notetaking as follows (page 631):

*"A record should be kept of the shortlisting process, including an indication of the reasons for selection or rejection in each case. Remember that applicants can request a copy of shortlist rating and justification notes under the Data Protection Act. Such records as may also be required by an Employment Tribunal in the case of complaint of unlawful discrimination. A Tribunal will want to establish that decisions are evidence based and **solely in relation to the role criteria.**" (Tribunal stress).*

228. Mr Tennant when asked why in his response to the grievance he made no mention of the promotion from the shortlist of the French candidate his evidence was:

"I focussed on the complaint itself; it was on the shortlist process and the time taken and that no feedback was given and it was sought to reassure him it was done correctly".

229. The Tribunal find that Mr Tennant was less than candid in his reply to this question as he had been when dealing with the claimant. Whilst Mr Tennant was saying that his letter was in response to the complaints the claimant had made, he knew full well that the claimant had not been aware that there had been a further decision made about the shortlist.

230. In terms of any investigation, he gave evidence that: *"it was discussed internally, the Recruitment Assistant did not check whether those who were invited were at the top of the reserve list."*

231. The Tribunal find that the alleged 'investigation' was superficial. There are no notes, no interviews undertaken, no record of what investigation was carried out or what the outcome was.

232. Mr Tennant accepted, when asked by the Judge to clarify when he knew about the promotion of the French candidate from the reserve list, that he knew before he had sent the response to the complaint at page 494. He was then asked by the Judge to explain why he had therefore not explained this in his complaint letter. The Tribunal's clear impression was that he was particularly careful in his responses to these questions, he appeared uncomfortable, he suddenly took significant pauses and he appeared to be struggling to find his answer:

"It was not part of the original complaint and given neither candidate should have been considered and the candidate was not appointable. I considered it would only ...[pause] it would ... [pause] I was only trying to satisfy the claimant about the process and apologise for the process".

233. Mr Tennant gave evidence that he felt neither the claimant nor the French candidate

should have been promoted to interview, however, we heard from Dr Benedict that he had no regard to the scores when deciding which of the two candidates to put forward for the promotion from the shortlist. Mr Tennant did not during the 'investigation' (of which there are no records) discuss with Dr Benedict his reasons for putting those two names forward.

234. The Judge asked Mr Tennant whether he was concerned that providing information to the claimant who had raised a 'serious complaint, about the way the French candidate had been promoted to the interview/shortlist when the candidate had scored the same total score, may have set "hairs running", hence his failure to disclose it. His response was again pitted with pauses and he again appeared uncomfortable and struggling to find an answer but stated:

"I was not concerned about another complaint...[pause] ... I was concerned it would not allow us [pause]... it would not satisfy Dr Saad and I was seeking to reassure him that he had not been discriminated against and of the process, information was not available to anyone, the scoring was consistent and to apologise and that was what I was focussing on in my response."

235. However, the respondent was in receipt of legal advice when it submitted its grounds of resistance in February 2022 at page 43 to 53 and within its grounds of resistance it provides at paragraph 5 as follows:

*"The claimant received a shortlisting score of 19 out of 27... **the candidates shortlisted for the role scored 22 or above.**" Tribunal stress*

236. It also alleges at paragraph 2:

"All received applications, including the claimant's, were considered in accordance with the Respondents recruitment procedure."

237. It is not the case that the applications were considered in accordance with the respondent's recruitment procedure in that no records were kept, there were no records put on the VMS and no meaningful records kept otherwise of the decision about shortlisting.

238. The shortlisting criteria was effectively changed when dealing with the promotion of a candidate from the reserve to the shortlist.

239. This was not a lengthy grounds of resistance; it comprised of just over 12 fairly short paragraphs.

240. Mr Tennant who had been put forward as the representative of HR on behalf of the respondent said that he did not know why the grounds of resistance stated that those who had been put forward for interview had scored 22 or above, he could give no explanation. In response to the Judge, he stated that he could not recall when he first became aware of what was in the grounds of resistance but thought it would have been in 2022. He did not assert however that he took any steps to rectify the errors and ensure the response was amended promptly.

241. When we reconvened on 3 March 2025 the cross-examination of Mr Tennant continued and he continued to maintain that he could not explain why the events surrounding the French candidate had not been set out in the response and claimed that he was not responsible for that. He confirmed, however, that a colleague in HR would have been involved and that they should have checked the response. It took a number of questions before Mr Tennant identified who the likely person was in HR who would have had responsibility for checking the response, ultimately, he named the Head of the team at time,

Ms Lord who he does not believe is still working at the respondent. He confirmed that HR would have provided the documents to the lawyers, he would have been asked to provide the relevant documents he had and when the Judge asked him whether he had informed the HR team about the events around the French candidate he stated: *"I cannot recall if it was a discussion or not, I cannot recall if it was part of a discussion at the time"*.

242. Mr Tennant confirmed that the information that he would have sent to their lawyers would have been put on a file and created a folder on a secure share point which would have been sent to him as a link in an email. He gave evidence that he would have to find the email and check on the link to see if the folder still exists however, he had not checked prior to giving evidence at this hearing whether he still had access to that folder. What had been sent to the lawyers was never presented during the hearing.

243. In terms of the investigation that was carried out at the time, Mr Tennant gave evidence that no notes exist of any 'investigation' and that it was *"not a particularly difficult process"*. He confirmed that he had no discussion with Professor Fromhold and Dr Benedict during his 'investigation' but that he; *"believes his recruitment manager, Megan Garner had discussed it with them"* and he discussed it with her and that he had *"asked her to gather as much information as possible"*. However, Professor Fromhold and Dr Benedict confirmed there had been no discussion with them and there are no documents to suggest there had been. The Tribunal find that no such discussion had taken place.

244. The Tribunal observe that the claimant's complaint, albeit referred to as serious, was not in practice taken very seriously. There appears to have been no genuine interest from the respondent's HR team in carrying out a meaningful investigation from which the Tribunal consider it may be reasonably inferred that there was a lack of importance attached to compliance with its own guidance, intended in part to address EDI in recruitment.

245. Mr Tennant also went on to state that if the claimant had raised a complaint before the interviews took place in September, then: *"If we felt it was out of scoring order, I could have withdrawn the candidate or reviewed their decision .It did not become a complaint until many weeks later. The two at the bottom of the reserve list should probably not been selected at all. ...I felt it did not invalidate the entire process as the successful candidate was very strong but it should have been picked up, they had taken from the reserve list as one of those at the bottom of the list."* The Tribunal observe that the claimant can hardly be criticised for taking time to raise a complaint when this information about promotion from the short list was withheld from him.

246. When asking Mr Tennant whether his evidence was that Dr Benedict had deliberately chosen the two from the bottom of the reserve list, he gave evidence that: *"It was not clear from the evidence that they knew that they were bottom of the reserve list but they should have checked and we should have checked."*

247. Mr Tennant also went on to confirm what is in the guidance about recommending the use of 5 criteria for shortlisting and he confirmed that this guidance applies across the board with any university, however, this is not always complied with and 7, 8 or 9 criteria may be used *"despite the dangers"*.

248. He also confirmed that they would expect to shortlist in half a day perhaps 15 to 20 candidates.

249. Mr Tennant in cross examination stated that he had not checked with Professor Fromhold or Dr Benedict whether they had followed the guidance but gave evidence that they could use both the essential and desirable criteria to shortlist if they wanted: *"as long as it was consistent, if it was done for some but not others, they would investigate further"*. The

Tribunal observe that there was inconsistent application of the criteria when deciding who to move to shortlist after the 2 candidates withdrew.

250. In re-examination counsel for the respondent put it to Mr Tennant that if the respondent had a situation where there is tie break between the scores of candidates whether those carrying the selection could apply some other criteria, his evidence was that they could "*but we would not recommend it*".

Names

251. The claimant's name was on his application form and background information including lecturing in Egypt. The Tribunal accept the claimant's submission that it would be reasonable to draw an assumption that he was likely to be Muslim and of Egyptian ethnicity and non-White from the information in his application.

252. The respondent submits that to infer race, religion or skin colour from a name would be a 'retrograde step for Tribunal' because a name is given by parents and does not reflect the child's choice and may be selected without the origin of the name being known or for reasons which are not due to religion or religious background and names Barack Obama as an example. The Tribunal did not find the submissions on this point persuasive. To assert that such assumptions are not made and there is no reasonable basis for making such an assumption or drawing such inferences from names and background information of the type set out in the information in the applications of candidates' information, is unsound.

253. The Tribunal find that it is more likely than not that Professor Fromhold and Dr Benedict, even if this were subconscious, more likely than not assumed from the information in the claimant's application documents and his name, that the claimant was likely to be Muslim, Black African and Egyptian.

254. Counsel emphasises in her submissions that the successful candidate was Lebanese (non-White) and also has what counsel herself described as a 'stereotypical Islamic name'. Counsel also pointed out that the candidate ranked joint top in the shortlisting exercise, is a Muslim candidate. However, Professor Fromhold accepted he may have underscored the Muslim candidate on criteria 8 (226637) and the Tribunal observe that if he had received another point, he would in the shortlisting process, have scored the highest of all the candidate, above the candidate who was ultimately successful (subject to professor Fromholds's evidence about possibly underscoring the successful candidate on the more subjective criteria 3: see below.)

255. Counsel submits that it is rejected by Professor Fromhold and Dr Benedict that they made any association between names and protected characteristics of race and/or religion. The Tribunal have regard to the fact that even if that is their genuine belief, this does not take into account their subconscious mind. These are two intelligent individuals with information which clearly, the Tribunal consider, suggests the colour, religion and ethnic and national background of the claimant.

256. Counsel submits that the claimant's case must be that on one day his race and religion did not adversely affect their treatment of him at the initial separate assessment Professor Fromhold and Dr Benedict carried out, but the very next day on 13 August, when they get together, they do discriminate due to those same protected characteristics. However, the Tribunal consider that while that may appear an attractive argument it is overly simplicity. The Tribunal do not consider that this negates the possibility that on looking more carefully at the appointable candidates (being able to now swiftly discount certain candidates) it is possible for subconscious bias to play a part in the exercise of deciding who they actually would prefer to see at the interview.

257. In the joint exercise the claimant scored 3 in the first two criteria (the highest possible score).
258. His scores and those of his comparators are in terms of criteria 3 to 9 are as follows.
- Claimant: 2 2 2 2 2 2 1 [19]
 - *successful candidate* :226653: 2 2 **3 3 3 3**
 - *reserve candidate (French)* 226705: **3 2 2 3 2 0 1**
 - *candidate* 226313: **3 2 3 3 3 1 1**
 - *candidate* 226560 : 3 2 2 3 3 1 3
 - *candidate* 226669 : 3 2 2 3 3 2 3
 - *candidate* 226711 : 3 2 2 3 3 2 3
259. The claimant has produced evidence that candidate 226124 (pages 215 – 224) while not describing himself as Egyptian as part of this process, does identify himself in on his website (a page from which was produced in the bundle) as Egyptian and he was shortlisted with a score of 22. His name suggests Arabic descent however his application does not suggest he is Egyptian and the evidence of the respondent is that research was not carried out on the candidates outside of their applications and therefore how he self describes in social media would not be information the respondent would have as part of the selection process, on its own case.
260. In terms of those on the reserve list; there were 2 Muslim candidates including the claimant.
261. For non-White candidates with top scores (shortlist and reserve) there are 10 but only 3 after shortlisting (30%).
262. There are 10 White candidates and 6 after shortlisting (60%).
263. There are 2 Muslim candidates that falls to 1 after shortlisting (50% but on a much smaller number of candidates). Not all candidates have declared their religion.
264. There is, therefore, a significant drop off from those on the reserve and shortlist after shortlisting for non-White candidates compared to White candidates.
265. In terms of any comparison of the claimant's application and that of the others and whether the scores the claimant received can be objectively justified is an incredibly difficult exercise for the Tribunal to carry out not least because of the decision to consider all the criteria, including criteria which are particularly difficult to assess in an interview process e.g. (e.g. excellent verbal communication and presentation skills) and the absence of any record of the decision making at the time. The Tribunal were not assisted by any independent expert evidence and this is a specialist academic field.
266. The candidates were measured against broad criterion with no further explanatory notes or guidance about the sort of evidence the panel were looking for from the applications. The absence of any guidance about how these criteria are to be assessed, in itself means that the decisions are much harder to monitor and verify which itself creates a greater risk of discrimination and bias in the assessment process.

267. What the Tribunal have attempted to do, is to assess as far as it is able the reasons put forward by Professor Fromhold and Dr Benedict and the points that have been raised by the claimant in respect of the specific criteria which he focusses on in his evidence and cross examination and make an assessment based on a balance of probabilities.

268. The claimant does not complain about his score for Criteria 1 and 2.

Criteria 3

269. Criteria 3 is excellent written/verbal communication and presentation skills. Whilst written communication can to some extent be tested from an application form the Tribunal consider that it is difficult to test the other two criteria and other ways of testing should have been considered e.g. interview. The respondent's own guidance makes this point which does not appear to have been considered. Assessing communication on an application form opens up the risk of indirect discrimination. That is not a claim however which the claimant has brought.

270. Out of the shortlisted candidates at the first stage, there is only one who scored the same as the claimant (i.e. 2) and that is the successful candidate (226653), all others scored the maximum score of 3.

271. In hindsight Professor Fromhold gave evidence that looking back the successful candidate's application it was well written and he appears to have been underscored against this criterion, while the claimant's score of 2 may, on reflection, looking again at the application, have been generous. Unlike criteria 8, this criteria however is far less easy to measure and this observation about criteria 3 is based on the absence of any record of why Professor Fromhold gave the successful candidate a score of 2 at the time.

272. The claimant scored 2 against this criterion. Professor Fromhold makes a number of points in his evidence in support of this score, including that in summary:

- It lacked detail frequently and did not communicate the context and significance in things that he had done. His application tended to lack clarity, in particular, he would have expected to see examples of what resulted from activity, dates, what feedback he had received e.g. student feedback etc.
- There was little or no detail about what had emerged from his collaboration with industry.
- His application tended to present a list of activities rather than reflect on the value of those activities and drawing out innovative aspects.
- He failed to explain why he had left his senior lectureship at NTU.
- There was no explanation for the claimant moving into publishing or why he was seeking to move back into teaching.

273. The main points Professor Fromhold raises seem to be a mixture of the presentation of the application itself and what he has done in practice without any guidance as to what the metrics were for measuring it.

274. In comparing the claimant's application to the successful candidate (226653) (who Professor Fromhold says in retrospect should have been given a 3 rather than a 2), the Tribunal consider that they are very different in style. The successful candidate's application is much easier the Tribunal consider to read, the covering letter has an easy conversational

style, it is much more focussed and more obviously tailored to the respondent's criterion than the claimant's.

275. The claimant's application by contrast to other candidates who scored more highly, is not as easy to navigate. It uses a lot of lists and is less conversational and less contextualising around the things that he has done and there is a failure in places to identify dates. For example, (page 413) he speaks about industrial/academic research and development expertise and training activities and refers to having a significant record in planning, managing, co-ordinating, leading and developing, and execution of delivering of a wide range of research and development projects in collaboration with academia and industry. He talks about his research expertise focussed on a wide range of topics and he lists what those topics are. He refers to extensive hands-on experience including training programmes design and delivery to students and again he lists examples of that. However, he provides no dates for when he delivered those training programmes, he does not explain how they were received or provides any other context but sets out a list of the programmes that he has delivered.
2. The successful candidate being more conversational in his approach provides more context, for example: *"My main achievement in teaching and learning was the significant difference I made in a workshop environment. Since my arrival to the school, I turned the workshops sessions from problems solving sessions to vibrant and engaging developments"*.
276. There is a very different style and the Tribunal consider the successful candidate's application is much easier to read and more contextualised than the claimant's.
277. The successful candidate, in terms of social responsibilities and illustration of management (page 336) refers to the role that he has carried out and then sets out the impact that it had.
278. The successful candidate does not provide feedback from students but he sets out evidence on teaching and learning (page 335) and set out the provisors set scores in 2019/2022 for second year workshops and the symmetry in action principles module.
279. The Tribunal have compared the claimant's application to candidate 226613 who is a White candidate who is shortlisted and scored a 3. In the Tribunal's opinion this covering letter is again much more tailored to the assessment criterion. The covering letter is very clear, easy to read and again more conversational and contextualised in style.
280. This candidate does provide student scores (page 229). It refers to excellent overall satisfaction rating and provides the EVASYS scores 4.5/5 in 2019. The candidate also provides scores for 2018.
281. Professor Fromhold in his evidence in chief refers to candidate 226560 referencing two awards the candidate received for outstanding lecturing performance and the absence of such evidence in the claimant's application. The claimant in his supplemental statement in response to Professor Fromhold's evidence in chief, disputes this on the basis that he says he provided evidence of teaching excellence including teaching awards (page 413) which includes Musgrave Teaching Prize but he does not state in which year this was awarded.
282. The Yugoslavian candidate's 226669 (page 352) covering letter and application is also much more conversational, it speaks about the things that the candidate has done and the impact of those in a way which is much easier to read and certainly for the Tribunal to understand. The candidate sets out at paragraphs 3 and 4 of his application what has grown out of this work e.g. page 352) *"Growing out of this work, I developed a range new visualisation tools, including web -based literature graph exploration tools, and recently a*

new presentation software that offers interactive capabilities and flexibility beyond current market leaders.”

283. It is a well-presented application.

284. Professor Fromhold also gives evidence that the claimant failed to explain his unusual career trajectory in that he fails to explain his move into publishing and why he was seeking to return to university teaching at a lower level 12 months later (page 415/634). Professor Fromhold compares this to for example candidate 226313 who explains very briefly his reason for leaving previous employment (page 232).

285. The Tribunal note that Professor Fromhold had made a brief note in his Excel spreadsheet during his first initial assessment, that the claimant was working in academic publishing which the Tribunal accepts was therefore on balance something he had in his mind at that initial stage of consideration. He had also noted in his Excel spreadsheet that in terms of another unsuccessful candidate; *“Has been senior lecturer at [X University] – what happened? 50sih”*. Tribunal stress

286. In his supplemental evidence the claimant remarks that providing information about career transition was not identified as key in the job advertisement and he could have explained this at interview. However, the Tribunal accept that those with an apparent unusual career trajectory was something Professor Fromhold had in mind early in his assessment and is not of itself suggestive of direct discrimination based on race or religion. The Tribunal note however that considerations of age or unusual career trajectory could give rise to claims of age discrimination (direct or indirect), however that is not a claim the claimant has brought.

287. The claimant in cross examination suggested to Professor Fromhold that he may have considered him to be overqualified and should not have applied, however Professor Fromhold denied this, giving evidence that he did not consider he was overqualified for the role.

288. The Tribunal consider that there are obvious differences in presentation styles and that there appears to be reasonable grounds for scoring down the claimant for the presentation of his application as compared to the other shortlisted candidates. He does not clearly identify the criterion and therefore it is necessary to look quite hard in his documents to find the relevant information.

289. The claimant accepted in cross examination that he used the same application form for all the applications that he makes. He does not tailor the application to each application he makes but gave evidence that it has been a successful application. In submissions he submitted that he makes “tiny changes” to the application for the different jobs he applies for. The Tribunal have regard to the fact that he submitted his application on the closing date which may mean that he had less time to changes to it.

Criteria 4

290. Criteria 4 is ability to work to deadlines and prioritise tasks.

291. Professor Fromhold’s evidence at (paragraph 10 w/s) is that all of the shortlisted candidates and the claimant scored 2 out of 3 and the scores were not changed as a result of the shortlisting discussion with Dr Benedict.

292. Professor Fromhold refers to this as a hard criterion to assess and all of the shortlisted applications contain some evidence but not strong evidence.

293. The claimant was given the same score as everyone else and on balance the Tribunal are not persuaded that there is evidence presented by the claimant to justify a higher score than other candidates.

Criteria 5

294. Criteria 5 is ability to collaborate effectively.

295. The claimant was given a score of 2.

296. All candidates apart from candidate 226313 who make it to the shortlist were scored 2 out of 3 for this criterion.

297. Candidate 226313 is White/British and does not report a religion although whether he reported a religion or not would not have been information the Tribunal accept Professor Fromhold and Dr Benedict would not have had access to. The evidence of Professor Fromhold and Dr Benedict is that he was scored 3 because his application described the context and outcomes of collaborations and he refers to an example at page 228 where he includes examples of collaborative Engineering and Physical Sciences Research Council funded projects.

298. Professor Fromhold gave evidence that the claimant did not describe his collaborations well because there is often very little context set out in his application, reflection or discussion of what had emerged from the examples of collaboration and dates were missing. It was unclear whether they were present or historic. The Tribunal on balance looking at the application consider that this criticism is sound.

299. In terms of others who scored a 3 for criteria 5 that included candidate 225870 who was on the reserve list (not shortlisted), candidate 226259 who was rejected, candidate 226627 who was rejected, candidate 226313 who was shortlisted (White British), candidate 226390 who was on the reserve list, candidate 226606 who was rejected, candidate 226625 rejected, candidate 226626 rejected, candidate 226684 rejected and candidate 226724 rejected.

300. The claimant, however, in his response compares his application to the White candidate 226313.

301. The Tribunal note that candidate 226313 sets out post doctoral research position working on a variety of research projects and collaboration with various external partners. He sets out key responsibilities and clearly dates when this collaboration took place. It specifically refers to further collaborations in 2013 to 2017 and his research results supporting a supporting the award of an EPSRC grant for £660,000.

302. The claimant in his covering email talks about international partnership, consultancy service and research grants and stated: *"I have a strong and effective network of expertise and stakeholders from academia and industry around the globe including MIT (USA), IBM (USA), Institute of Energy (Norway), National Institute for Standards (Egypt) etc"* The Tribunal notes that he lists them and goes on to say how much funding he has obtained but there is no detail of what those collaborations were that he was involved with or indeed what the output rather than the research funding was from those collaborations.

303. The claimant includes a page (page 415) where he sets out academic research industrial positions, he lists them with dates and he does provide some detail here, for example, he refers to Suez University Faculty of Science in Egypt where he led and managed R&D projects and collaboration with industry.

- Design, plan, manage and deliver training programmes, seminars and workshops and advise customers/company.
- Provide key technical consultancy to customers and partners from industry and academia.
- UG/PG projects and placement supervision.
- Design lab experiments for UG and PG students etc.

304. In terms of leading and managing R&D projects and collaboration with industry, however, this is no further detail about what those collaborations involve and what the R&D projects were. The same approach is taken when he refers to Egypt IBM nano technology, he refers to R&D project co-ordinator and leading and managing R&D projects in collaboration with industry but it is not clear what those R&D projects were.

305. Candidate 226560 (page 386 – 297) while not as well qualified as the claimant, this candidate's application is the Tribunal accept is very well set out. The candidate in the covering letter gives each criteria a heading and sets out evidence in support of each of them. Criteria 5 is clearly addressed with examples of collaboration with colleagues and the results of that e.g.

"I initiated a collaboration with a group of chemists and learnt from their specific expertise. We brought together the physics and chemistry behind two dimensional matters in order to engineer them for better performance nano electronics."

306. In cross examination the claimant accepted that this was a different structure to his application but asserted that this information from the candidate was in the covering letter and the advertisement says the assessment is based on the CV and application form. While the claimant made the point that the job advert does not explicitly say the covering letter with the application and CV will be taken into account in the initial assessment, the claimant had submitted a lengthy covering letter himself and he did not put it to the respondent in cross examination that they had treated him any differently in considering the content of the covering letters.

307. The Tribunal consider that whilst there is a lot of information in the claimant's CV and application and it appears that he has considerable experience, there is almost so much information that it is difficult to present it well or in any depth. It does indeed appear to be an application which it is a 'mile wide but an inch in depth', which may well be because of his considerable experience there is so much information he can provide however it is not tailored to the application and the specific job profile. The other shortlisted applications appear not as broad or as extensive in terms of experience but provide more depth in terms of what actually the candidates have been doing in terms of, for example, collaboration in particular and cross refer more explicitly to the job profile criteria.

308. The Tribunal can see grounds for why the different approach candidate 226313 has taken in his application which may reasonably have justified a higher score.

Criteria 6

309. Criteria 6 is demonstrating teaching and supervisory skills.

310. In respect of this the claimant was scored a 2. He is understandable upset by this score because he had the most extensive teaching experience in terms of years of teaching.

311. The candidates shortlisted at the first stage all scored 3 against criteria 6.
312. The French candidate 226705 received a score of 3 against criteria 6.
313. In relation to criteria 6 Professor Fromhold's evidence is that all the shortlisted candidates scored 3 because they had clearly presented their teaching skills and provided independent evidence of their ability within their respective applications for example, student feedback was provided for candidate 226313 and for the successful candidate 226653 (at page 347) and candidate 226560 (page 292).
314. The successful candidate 226653 sets out in quite some detail evidence of teaching and supervisory skills and also sets out in some detail the student feedback received from a module in 2020/21 and refers to student evaluation (page 331) and receiving scores of 90.55 and 85.4% from students in teaching (page 346).
315. Dr Benedict in cross examination accepted that the claimant had the most significant experience in terms of number of years of experience in teaching but that Dr Benedict made the objectively valid point that the respondent were looking for excellence in teaching and not just years spent.
316. Candidate 226313 (page 229) refers out to his consistently high teaching rating and student satisfaction EvaSys survey scores and in the CV sets out the scores against each module. The claimant in cross examination of Professor Fromhold referred to this candidate's limited experience in lecturing namely that he had a maximum it appears of 6 months in lectureship between 2017 and 2021 and that he had lectured 'only partially as part of a PDRF post' (Postdoctoral Research Fellow) in response to which Professor Fromhold gave evidence that:
- "He says a lecturer – part of PDRF and lists modules, he received excellent teaching rating, the students liked his teaching. It is not about counting years of experience; it is evidence of the ability to teach to a high level."*
317. Dr Benedict gave evidence in cross examination, when asked whether he differentiated between the UK and Egyptian University the claimant attended, that;
- "Some knowledge of British students and their background is relevant and so is experience of other universities."*
318. He is then asked by the claimant whether he thinks the standard between UK universities and Egyptian universities is different. He does not say there is no difference in his opinion but his evidence was:
- "I am not qualified to say. I do not know enough about teaching in Egypt. I know very little about relative standards"*.
319. This the Tribunal finds may indicate a possible bias toward those who have more teaching experience in UK universities, giving rise to the possible risk of indirect discrimination. This chimes with Professor's comments (as above) in his Excel spreadsheet where he remarks on work which has not been carried out in the UK.
320. The claimant refers to this candidate being a second degree undergraduate in 2011 and that his reference to be a Teaching Assistant is misleading, in that he does not have a PhD or bachelor's degree at this point. Professor Fromhold gave evidence that: *"He was teaching to 6th formers so it was outreach – well done to hm for taking part in outreach, considered it in my assessment ... it was an excellent cover letter."*

321. The Tribunal note that it is a well-presented cover letter which does set out what he has done, what he is passionate about and the results of his work e.g:

“I spearheaded the successful push for a department wide pool of standard BSc projects, covering the areas of general physics, nuclear and astronomy, This resulted in a pool of 21 standard projects supervised by any member of the team...”

322. Its presentation style is materially different from the claimant’s, it is conversational, clear, and expands on his projects etc.

323. The claimant took Professor Fromhold to his own application and put it to him that it gives details of his responsibility and positions in academia and industry to which Professor Fromhold gave evidence that:

“It lists what you did, but there is no evidence of the quality or what students got from it – good example would be excellent feedback from students or project has been successful – page 416, you list collaboration but there are no dates or what the lasting benefits was – it is a list and - you refer to MRS – I don’t now what it is – there are 3 acronyms under collaboration that I don’t what they are.”

324. The claimant did not challenge that Professor Fromhold should have known the acronyms he had used.

325. The claimant also referred to securing a research grant however Professor Fromhold gave evidence that there is no indication of the claimant’s role in that, what he personally did, what it lead to, whether he shared authorship of the paper.

326. Candidate 226560 records that they have received a student feedback rating of 4.7/5.0 and sets out positive feedback about his teaching (page 289).

327. In cross examination the claimant put it to Professor Fromhold that although the French candidate had given no information about feedback from students in terms of criteria 6 he had been given a score of 3 (as compared to the claimant’s 2). Professor Fromhold gave evidence that:

“At page 388 he talks of supervising Master’s Students. Page 388 (para 2) he refers to teaching in France to deprived kids, refers to ‘outreach’ experience of community to school, kids and university students. Masters Students now PhD. The candidate gave other evidence why he was strong in communication and an effective supervisor, so much so that publications came out of it. As compared to your [claimant] page 427, you list projects you have supervised but there is no indication of the outcome or evidence that the students have done well or comments from external examiners – it is a list – one of the other shortlisted candidates taught at the same university as the claimant [NTU] and his application at page 225 [candidate 226313] and he gave detailed student scores – I had in mind, why is there no evidence from the claimant about his student feedback or as a teacher”

328. The claimant also pointed to the French candidate’s teaching academic experience was only 3 hours per week, teaching not lecturing, that his teaching was limited because he was a research Fellow full time. Professor Fromhold gave evidence that while not disputing this, the French candidate was a tutor which is a key job of an academic, his teaching load was significant and that the claimant had; *“skipped over that he had supported 3 Masters students, who did so well they published.”*

329. Professor Fromholds evidence (w/s para 12 and 13) was that as compared to those shortlisted, the claimant’s teaching skills were standard pre-Covid practice not evidenced by

student feedback or peers. That he had missed out on the transformation skills acquired during the pandemic because he had left his Senior Lectureship in June 2020. The Tribunal accept that those comments are reasonably supported by the information set out in the applications and given the focus on teaching moving away from traditional formats (as evidenced by the wording in the job advert) on balance it accepts on the evidence that more likely than not this resulted in a lower score for the claimant.

330. The claimant in his supplemental evidence in response to Professor Fromhold's statement, takes issue with the prioritisation of one aspect of teaching experience (i.e. pandemic specific teaching) without considering broader evidence of adaptability and innovation in teaching methods. However, the Tribunal find that whether or not the claimant considered this should have been given such priority, that on balance it was and this approach was taken to all the applications and reflects the focus (as set out in the job profile) of the requirement for innovative teaching and learning ideas that fit with the "*School's vision for the future.*"

331. In cross examination when it was put to the claimant that an objective measure of teaching skills is the feedback from students, his evidence was that the "*key matrix is presentation in the interview*" and he referred to NTU requiring as part of their interview process a presentation to students which he considered was the best way to select on this criteria. While the Tribunal accept that may well be a much better way to assess teaching skills, he does not dispute that evidence of student feedback is a metric which can be applied at the application stage. He had not included it he said because it had not been specifically asked for. The claimant then maintained that the scores are confidential and he would have had to ask the university where he had worked if he could disclose them. The Tribunal is not persuaded that the feedback scores he received from unnamed students would need consent to be disclosed, however he does not assert he considered including them, asked if he could disclose them and it clear other candidates have included them.

Criteria 7

332. Criteria 7 is evidence of innovation in teaching and learning.

333. The candidates shortlisted at the first stage all scored 3 against criteria 7.

334. The Tribunal find that this was a teaching focussed not research focussed role albeit the Tribunal note the point made by the claimant that nonetheless students in their final year and those undertaking a Masters need to be supervised by a lecturer and therefore there will be a need for some research experience. However, this was a teaching focussed role. There was a significant amount of information in the claimant's application about his research experience.

335. It was put to the claimant in cross examination that what is important is not counting the number of publications someone has produced or simply years of experience but what is also important is the promise for what can be delivered for the future. The claimant responded by giving evidence about the importance of the individual applicant's H index score when applying for any role in academia. The H index in simple terms, measures the productivity and citation of a researchers work, how many papers they have published and how many times they have been cited.

336. The French candidate 226705 receives the same score as the claimant, a score of 2 against criteria 7 and his evidence which the Tribunal find on balance is supported by the documents, is that the claimant's methodology seemed more traditional in comparison with the shortlisted candidates.

337. Professor Fromhold gave evidence that the French candidate had failed to give particular examples of innovation in his teaching and thus he was also scored a 2 against this criterion because the teaching experience seemed traditional and outdated.
338. In terms of criteria 7 Professor Fromhold's evidence is (paragraph 14 w/s) that it was not clear from the claimant's application what his real innovations were and on reflection a score of 2 is perhaps generous.
339. The respondent was the Tribunal accept, preparing for the new academic year and looking to respond to a changing learning environment and for those who would contribute to that.
340. Professor Fromhold gave evidence that the claimant's teaching skills were in his opinion standard pre-Covid practice and he did not evidence otherwise by providing evidence from students or peers and the claimant's application was missing out evidence about a transformation of teaching skills that the shortlisted applicants had shown they had acquired during the pandemic. That he had left a senior lectureship post in June 2020 (a few months after lockdown) and that this therefore made his application weaker.
341. The claimant submits that his application shows substantial evidence of teaching and that he had been teaching as a senior lecturer during Covid-19 until 13 June 2020 bearing in mind that the first lockdown was in February/March 2020. The claimant also refers in his evidence to the reference in his application to extensive laboratory and research projects and supervisory experience including mentoring postgraduate and undergraduate students which aligns with the stated criteria and that during Covid-19 he was supervising Year 2 labs.
342. The evidence of Dr Benedict was that whilst the claimant had continued to teach until June 2020 the first lockdown was in March 2020 but during that short period of 3 to 4 months teaching staff were very 'reactive' in their approach and that it was only during the summer that they were able to then plan and really start to implement a different way of teaching and points to the lack of time the claimant had in teaching following the introduction of Covid.
343. In terms of the claimant's application and his teaching experience it is clear that he has got a considerable number of years of teaching experience. He refers to Senior Lecturer at NUT from 2018-2020, Associate Professor 2016-2018, Senior Research Scientist/Senior Lecturer 2012-2016.
344. In terms of the need for innovative learning the Tribunal accept on the balance of probabilities, that this was considered to be important to the respondent and take note of the job advert itself at page 85 of the bundle. The job advert states,
- "Do you have innovative teaching and learning ideas that fit with our school vision for the future and will help drive change? Can you teach students in the school of physics and astronomy in a way that inspires them and equips them for the future? Do you have a commitment to create a vibrant, collegiate and dynamic learning environment?"*
345. That is the second paragraph from the job advert and the Tribunal accept that the ability to provide this sort of dynamic way of teaching was important to the respondent however the claimant does not in his application really address this. Whilst it is clear that the claimant has teaching experience, having innovative teaching ideas does not stand out from his application and the Tribunal had to look hard to find references to for example, online learning.
346. There is a statement at page 412 to: *"I teach a range of UG/PG Physics and Engineering Modules in lectures, tutorials, labs and online including [there is then a list of subjects]".* Other

than this the only reference really to alternative ways of learning is at page 415 when the claimant refers to his latest role which looks to be 2020-Present, as Editorial Manager of Concept Tech Publishing Corporation UK, a business that the Claimant had set up. This is not an academic role, it is a business the claimant had started after he left NTU in 2020. It includes as a last bullet point: *“Organising international conferences and virtual labs to academia and industry.”* There is no further detail however about what the virtual labs are and how they have changed learning in academia.

347. The Tribunal are of the view that a reader has to work quite hard to find in the claimant's the application documents reference to anything that may be relevant to dynamic learning and there is, the Tribunal consider, an absence of any meaningful focus on addressing that specific requirement of the respondent for dynamic teaching experience.

348. There is the Tribunal find a material difference in the way candidate 226669 (the Yugoslavian candidate who scored a 3) deals with this requirement, for example this candidate focusses in more detail in his covering application with innovative ideas and developments:

“With tools I have developed, lecture tutorials can become more interactive, while labs can benefit from additional activities using 3D models and augmented reality. The tools are generally applicable for science education and I can help with faculty members in adopting and customising them to their needs. My wide experience with open-source software, open data and web applications can be used in designing and guiding student projects. I have had to actively continue developing related tools (e.g. for literature analysis) that hold potential augmenting our capabilities of knowledge handling....” (page 353).

349. There is a stark difference the Tribunal consider, between this application and the claimant's application and this may be the consequence of the claimant not tailoring his application to the specific job advert. Dr Benedict also gave evidence in cross examination about this candidate that:

“He showed organisational skills- in area where we had a shortage of teaching that material. There were 2 main things:

We lost teaching expertise in the area set out in his application and that area of physics is considered core. We have lost 3 of the best teachers in that area and this candidate showed skills across jurisdictional area, relevance to undergraduate teaching – the consensus was that it outweighed other considerations’.”

350. Dr Benedict went to not clarify that this candidate had experience of bringing together PhD students and Masters students which the respondent knew worked well.

351. The successful candidate 226653 in the application addresses this criterion clearly. This candidate describes a new workshop format for analytical and computational sessions (page 331)

“In 2020/21, I took over as convenor of this module. I redesigned the teaching for this module to reflect the blended learning required due to the Covid 19 restrictions, by reformatting the Moodle page, preparing online activities and surveys for the engagement sessions, and recording videos for the lectures.”

352. The claimant put questions to Dr Benedict in cross examination about candidate 226669 who had been unemployed since 2020 and not involved in the transformation during Covid but scored 3 for evidence of innovation in teach and learning. Dr Benedict gave evidence that this candidate is contracted to do something with the department of physics, albeit not

employed by them, however he demonstrated skills relevant to teaching after Covid, in that he had developed web application and software tools directly exportable to undergraduate teaching therefore he was doing work relevant to teaching.

353. The claimant was also taken to the successful candidate's application (226653) (page 332- 342) and the evidence he gives to support this criterion. The claimant did not dispute that this candidate set out a clear and convincing account of how he innovated in teaching but suggested that this may have been a result of 'coaching' from Professor Fromhold:

"Internal candidate, possible he would know nature of the job. Professor Fromhold in his witness statement said it was advertised internally- successful candidate possibly had discussion about what to put in his application - job advertised for 1 week before and he had an opportunity – it is normal, in Nottingham for internal advert , I spoke to my line manager and talked about it – he could have spoken to someone"

354. The claimant in cross examination confirmed that he was not alleging that if the successful candidate had asked someone internally about the role and what to put in his application that would amount to race discrimination.

355. Candidate 226637 refers in his application (page 302) to presenting a conference on *"use of demonstration and blended learning in the remote format in Physics"* at Imperial college in London in 2021. Further (page 305) under a heading which identifies the criterion he is engaging with, he provides quite a lot of information directed specifically at enabling learning in a blended learning environment including:

"As a key member of the Stream B project, I am working with several colleagues in order to create and evaluate a range of online activities prior to schedule contact hours in order to enhance students' conceptual understanding ...in this project, we want to create, improve and evaluate a range of different online re- class and in class activities ..." The application sets out the specific online activities.

356. Candidate 226711 addresses this criterion directly in the application (page 391 - 393). The candidate refers to how he adopted remote and blended learning techniques during the Covid 19 pandemic and how his ability to teach, support and inspire physics students during the pandemic resulted in the candidate being awarded the Vice Chancellors recognition award. The candidate also refers to a specific research interest in the *"effectiveness of blended learning in the physics classroom."* (393)

357. French candidate 226705 was scored a 3. There is less evidence the Tribunal find in his application relevant to this criterion than the comparators who made it to the shortlist at the first stage however, he does state that he has supervised three Masters students in 2020/2021 and was a first year tutor from 2021 and thus has more recent teaching experience than the claimant during the 'Covid 19 period' . He also refers in his application (page 388) to demonstrating in his teaching *"outstanding commitment to students needs as exemplified by the sessions at the Physics Experimentation in Brussels...that I organised within the general physics course."*

358. Candidate 226313 deals in some detail with his approach to learning (page 226 -227 and 234) and his experience which is current. In his covering letter he speaks to his *"continuous improvement to the student experience"* and what he has done in connection with that backed up by EVASYS scores. In the further information section (page 234), he deals again with how he delivers teaching e.g. *"I am currently I delivering teaching in a synchronous and asynchronous capacity via – pre-recorded content and live online sessions across a range of modules"* and talks at some length about how he seeks student feedback and what he had done in response to the feedback to improve student satisfaction.

359. Candidate 226560 sets out a specific section addressing this criterion of evidence of innovation in teaching and learning (page 290). The candidate talks of being well versed in online teaching having taught fully online over the year 2020-2021 as well as before the pandemic and the various tools the candidate uses to teach, for example electronic whiteboard software. The candidate also sets out experience of designing, delivering and revising coursework. There are 3 clearly set out specific paragraphs in the covering letter devoted to addressing this criterion.
360. The Tribunal accept counsel's submission that the claimant only mentioned that he teaches "*a range of modules in lectures, tutorials and labs online*" (page 412/414) and left teaching in summer 2020 and if he used blended learning methods he made no reference to them or gave any indication of how he learnt from them or how they enhanced the student experience.
361. The claimant pointed out references to teaching 'online' in his application (page 414) and gave evidence under cross examination that he had opened his publishing company in 2020 where he remained working (page 415) and referred to organising virtual labs. He had also mentioned Open Access which he accepted had been around for the past 20 years but explained that was referring in his CV to virtual labs and having created the full range of Open Access platforms. However while in his application he refers to Open Access he does not link this with Virtual labs, which he accepted he had not done but gave evidence that he had not been asked to (page 414). He accepted other candidates (225870 page 193 and 226560 page 290) evidenced teaching during Covid but that online teaching was not specifically a criterion. While the Tribunal accept it was not, innovative teaching clearly was.
362. The claimant in cross examination gave more detail about the evidence he asserts he would have provided but that:
- "I would expect to present it in interview."*
363. The claimant gave evidence that while he did not include student feedback scores because it was not explicitly asked for, he had put in other information also not asked for but for which he considered was important, such as the details of his patents to support his H index score. In cross examination he confirmed that he has last been involved in a recruitment process for a lecturing post 3 years before. It was put to him in cross examination that the H Index cannot be used for academics at this level because it is inconsistent with The Declaration on Research Assessment (DORA) framework connected with improving diversity in outcomes because of its biases i.e. it could impact people of certain backgrounds who do not have a lot of publications or against women because of its career length bias. The claimant was not aware of this but did not seek to refute the existence of this guidance or the premise that use of H index may lead to biases. The claimant referred to having a different system at the Suez University. Professor Fromhold gave evidence that the H index was not a relevant consideration when assessing the candidates.
364. On balance the Tribunal accept that there is a material difference between the claimant's application and that of others who engage in more detail with this criterion, such that there appears to be a sound basis for a score of 2 on the balance of probabilities.

Criteria 8

365. This criterion is higher education teaching qualification or equivalent. The claimant scored a 2. The only candidate to score a 3 was candidate 226653, the successful candidate.
366. Professor Fromhold's evidence is that the successful candidate was given a score of 3 because he was a Fellow of the Higher Education Academy and holds a PCGHE and

because he provided significant reflection in his application regarding his actual experience and do not simply rely on the fact that he has this qualification as justification for meeting the criteria.

367. Professor Fromhold however gave undisputed evidence that Fellowship of the Higher Education Academy is not a formal teaching qualification rather it is a professional accreditation based on demonstrating several years of teaching experience and that there are four levels of fellowship: Associate Fellow, Fellow, Senior Fellow and Principal Fellow. Professor Fromhold states,

“In our school and many others at the university, higher education academy affiliation is not considered particularly prestigious or worth a fee required for the fellowship. Most of my colleagues, me included, are Associate Members of the Higher Education Academy (i.e. level below the Claimant and the successful candidate). Many of us secure this fellowship level by attending a one-day course.”

368. He goes on to say,

“We prioritise and improve on our collective teaching capability by sharing good practice and innovation, organising and attending faculty wide workshops, focussing on recent advances and by reflecting on the large amount of feedback we obtain from students e.g. teach and module questionnaires, personal comments, learning community forum, peer review, teaching buddy system. This is why we consider feedback to be of great importance in an application.”

369. However, this criterion is not about demonstrating teaching skill (that is covered by criterion 6) it is about qualifications (or equivalent).

370. What is said about the claimant's application is that it included no feedback results from students or peers but that the successful applicant presented extensive feedback he had received and analysed it and evidences his teaching skills (page 346).

371. Professor Fromhold goes on to refer to a number of candidates in his evidence in chief, four candidates in particular who scored 2 and what he says was the rationale for that score. In terms of candidate 226637, a Muslim candidate, on reflection he considered that it is possible that he may have underscored that candidate and should have scored him a 3 because he had the Highest Teaching qualification of all the candidates and had reflected on the benefits of his teaching qualification.

372. The claimant is also a Fellow and his qualifications include a PGCHET from Queen's University in Belfast. Professor Fromhold refers to a key omission in the claimant's application not including feedback from students (w/s para 18) and the claimant accepted in cross examination that he had not provided feedback from his students as others had. The Tribunal note that some others who had provided feedback were also scored a 2 and that the issue of lack of feedback was a consideration as part of the scoring in criteria 6. It therefore appears unreasonable to the Tribunal to consider feedback from students (and the absence of it) it again under this criterion.

373. Criteria 8 is the only criteria which is manifestly objective and measurable by hard evidence. Feedback has nothing to do with qualifications. Feedback cannot be reasonably interpreted as the equivalent of qualifications and Professor Fromhold and Dr Benedict did not give evidence that feedback was treated by them as equivalent to qualifications.

374. The relevant comparator is the one person who was awarded a 3 which was the internal candidate who was offered the Post. Both are Fellows and have PGCHE however, given the

claimant's relative experience in teaching, the Tribunal consider that the successful candidate is not a suitable comparator but even if the fact that the claimant had greater teaching experience was not material, the Tribunal consider that only if experience of reflecting on the benefit of their qualifications was genuinely considered material would he not be suitable. In any event he is a useful evidential comparator.

375. The issue about reflective learning the Tribunal considers, is applicable to criteria 6 (demonstrable teaching skills), while this specific criterion is the only manifestly 'hard' criterion.
376. The Tribunal are not persuaded on the evidence that it was reasonable for the successful candidate to have been awarded a 3 and that candidate 22663, given his qualifications, was awarded a 2.
377. On balance the Tribunal is not persuaded that the claimant was scored fairly under this criterion or the other Muslim candidate who made it to the shortlist. The Tribunal on balance are not persuaded by Professor Fromhold's explanation for the scores. The Tribunal consider that the claimant's score, on the evidence, was unfair and that a fair score would have been a 3 to reflect his qualifications.
378. The Tribunal note that even with this adjusted score, the claimant would not have been shortlisted at the first stage, he would however have scored 20, above the French candidate (who had a score of 19).

Criteria 9

379. Criteria 9 is evidence of activities leading to promotion and creation of collaborative links with industry/business/ communities.
380. Professor Fromhold criticised the claimant's application on the basis that there is a list of activities with no dates, few details of collaboration and what emerged from them and little or no context regarding how and why they were formed. The claimant only scored a 1.
381. The French candidate also scored a 1.
382. The successful candidate was given a score of 3. The Muslim candidate 226637 was given a score 3 and the Yugoslavian candidate a 3.
383. The Muslim candidate 226637 who was shortlisted, Professor Fromhold states, detailed community outreach for astronomy (page 310-311). He gives other examples of information that has been provided in the application of others to support their scores (w/s paras 19 to 21).
384. Shortlisted candidate 226391 who received 3 out of 3 disclosed his dual British and Mauritian nationality within his covering letter (page 259) which he and Dr Benedict would have seen. Counsel refers to this candidate being a citizen of an African country which is not consistent with the claimant's claim that they discriminated against the claimant because they may have perceived him as from an African country. (The Tribunal understand that while located off the coast of Africa, it is not actually considered part of the African continent).
385. Candidate 22637 (Irish/Muslim candidate) detailed that his BSE and MSC degree was undertaken in Iran (page 304-305 and 313), he describes extensive teaching experience in Iran and was awarded a mark of 3, therefore, which counsel submits avers to a lack of evidence that their marking was biased.

386. Professor Fromhold in cross examination pointed to the claimant giving an example of outreach as series of TV programmes but again it is in list format with no explanation of the claimant's role, what the programme was about, what the audience figures were on Egyptian television. (Page 418). The Tribunal accept it is essentially a list of dates and the TV channel e.g.

"30 April 2019 – Egyptian National TV Broadcast for 1 hour Cairo Channel"

387. The claimant suggests to Professor Fromhold that he could have looked at the programmes on YouTube or Google to which Professor Fromhold gave evidence that they do not do that and that the evidence he presented was not strong evidence of outreach. The Tribunal observe that the claimant may have been better giving a few more detailed examples rather than a list.

388. It was put to the claimant in cross examination that the application for the Egyptian candidate's (226124) application also set out clear evidence of collaboration with the community albeit not industry (page 215 and 216). The Tribunal consider there is a marked difference in the detail provided by other candidates about the projects they have been involved in, what was involved and the outcomes/ benefits as compared to the information in the claimant's application.

389. The Tribunal find that there are material and significant differences between the claimant's application and the successful candidate's application. Rather than set out a list of collaborative links the successful candidate (page 338) sets out a clear section marked "Academic and professional activities outside of the university" and provides details of a project with an organisation developing an AI platform. He discusses what the project was, the result of the project and feedback from students. However, the claimant disputed that this was strong evidence because he did not involve collaboration with industry and he pointed to his contact with industry to get placements for his students. Professor Fromhold gave evidence in cross examination that strong evidence for this criterion could be met by evidence about collaboration with either industry or community, which the Tribunal note appears to be borne out by the scoring of the various applications.

390. The Tribunal do find that there is substance to the criticisms of the claimant's application and that there is evidence to support the score which was given.

Successful candidate

391. In response to questions from the Tribunal Panel, Professor Fromhold gave evidence that there were certain "buzz words" he was looking for in the applications which included 'blended learning' which would be "good to see". This was a new post they were recruiting for with emphasis on teaching and there was no expectation he said to do research or papers or obtain funding. The successful candidate may supervise PhD students but there was no expectation of this.

392. The Tribunal observe that there were no criteria listed in the essential or desirable criteria mentioning the requirement for research experience.

393. In terms of the successful candidate's application overall, the claimant refers to him being less experienced, having a 'low track' record of publications and H index, limited experience in academia, being a grade 4 and not having done a similar role to Associate Professor and only having a PhD. The evidence of Professor Fromhold was that the successful candidate was in a level 4 role when he applied and this would have been a promotion for him to level 5, he gave evidence however that he had done a very similar role to this vacant level 5 role the week before he applied and he gave evidence that:

“I encouraged him to go for promotion to level 5”. Tribunal stress

394. Professor Fromhold also gave evidence that the level 5 role is more leadership rather than teaching, it is concerned with showing leadership, shaping the curriculum, being responsible for modules for the materials and the reason why he encouraged him to go for this promotion was:

“He had shown successful leadership particularly in Covid, he really took leadership in the Covid period and how to move to blended teaching.” And

“We would prefer for this role an excellent teacher above someone with higher education, we preferred to have demonstrable teaching skills.”

395. Demonstrating teaching ‘skills’ was criterion 6.

Questions and answers

396. On 18 March 2022 the claimant sent to the respondent (page 499) a list of questions. There were 36 in total. The response on behalf the respondent on 11 May 2022 (page 505) was to state that the statutory questionnaire procedure was abolished in 2014 and that because the list of relevant documents were due to be exchanged in the tribunal proceedings by 13 May 2022 it was the respondent’s view that a large proportion of the questions will be answered by the documents and therefore the respondent did not propose to respond to the questionnaire.

397. The claimant then wrote on 11 May 2022 stating that he had still not received the respondent’s answers to his questions from the documents and the Tribunal find that the failure to do so is supported by the documents, including confirmation of the total number of successful shortlisted candidates who were invited for the interview (page 507).

398. The response from the respondent on 11 May 2022 (page 509) was to state that there were: *“8 applicants shortlisted out of the 64 applications received”*.

399. Tribunal note that in the response to the Tribunal claim dated 24th of February 2022 (page 52) the respondent does not disclose here that there was a second stage in the process.

400. Following disclosure from the respondent during the course of these tribunal proceedings on 23 June 2022, the claimant became aware that after the initial shortlisting exercise two candidates withdrew from the shortlist and a decision was made to select from the reserve (page 535).

401. The claimant complains that it had taken the respondent 9 months, despite all the questions he had asked, for them to disclose that a candidate had been taken from the reserve list. The respondent’s lack of candour and transparency therefore continued in its response to the claim and thereafter in the information provided to the claimant that he had requested. It was only on 23 June 2022 the day before the first case management hearing at the employment tribunal, information about promoting the French candidate from the reserve list was disclosed to the claimant.

Legal Principles

402. The claimant alleges that because of one or other of the pleaded protected characteristics he was treated less favourably than another person was or would have been treated, in respect of the matters identified in the list of issues (LOI).

403. The claimant has identified actual comparators who he says were more favourably treated, in that they were selected for interview, offered the role or in the case of the French candidate elevated from the reserve list.

404. The question before the Tribunal is whether the non-shortlisting of the claimant, either in the initial shortlisting exercise or following the withdrawal of two shortlisted candidates, and his subsequent non-appointment to the Post, was influenced by one or more of his relevant protected characteristics.

405. The Tribunal must apply the two-stage test set out in section 136 of the Equality Act 2010. The claimant must prove facts from which, in the absence of any other explanation, a Tribunal could make a finding that there had been unlawful discrimination. If the claimant succeeds in this the burden of proof reverses and the respondent must prove that it did not unlawfully discriminate.

406. The relevant statutory provisions are set out in section 13, 39 and section 136 Equality Act 2010:

407. Section 13 Equality Act 2010:

(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.

408. Section 39 (1) provides that:

*(1) An employer (A) must not discriminate against a person (B)—
(a) in the arrangements A makes for deciding to whom to offer employment.
(b) as to the terms on which A offers B employment.
(c) by not offering B employment.*

409. Section 136 sets out the burden of proof:

*(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, **in the absence of any other explanation**, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*(3) But **subsection** (2) does not apply if A shows that A did not contravene the provision.*

*(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or **rule**. Tribunal Stress*

410. Direct discrimination is rarely blatant. As Lord Browne-Wilkinson observed in **Glasgow City Council v Zafar 1998 ICR 120, HL**, claims brought under the discrimination legislation present special problems of proof, since those who discriminate 'do not in general advertise their prejudices: indeed they may not even be aware of them'.

411. Given the likelihood that direct discrimination will take a disguised or covert form rather than being overt, the Court of Appeal has said in the context of a direct race discrimination claim, it is legitimate for a tribunal to look at all the material before it when determining whether there has been less favourable treatment, and that this may include evidence about the conduct of the alleged discriminator before or after the act about which the particular complaint is made : **London Borough of Ealing v Rihal 2004 IRLR 642, CA**.

412. It is also true in cases where the discrimination is based on multiple allegations. In the latter, the tribunal will be expected to take a holistic view to glean the wider picture that may not otherwise be apparent from adopting an overly fragmented approach: **Fraser v Leicester University and ors EAT 0155/13**.
413. Where the employer behaves unreasonably, that does not mean that there has been discrimination, but it may be evidence supporting that inference if there is nothing else to explain the behaviour : **Anya v University of Oxford and anor 2001 ICR 847, CA**.
414. An employer might escape a finding of direct discrimination by arguing, before the tribunal, 'I'm a bastard to everyone', but this is likely to be harder to demonstrate, though not impossible, in a case where the evidence shows that only one employee was subjected to the employer's unreasonable behaviour : obiter comments of Mr Justice Langstaff in **Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust EAT 0269/15**. However, tribunals must be careful not to leap from a finding of unfair or unreasonable conduct , which may well amount to less favourable treatment than that which was (or would have been) meted out to a comparator (whether real or hypothetical) , to the conclusion that such conduct was motivated by the protected characteristic relied on and was thus directly discriminatory. There must be some evidential basis for drawing such a conclusion or adverse inference.
415. **Messeri v Royal Hospital for Neuro-Disability ET Case No.2301983/20**, during the period when the claimant was suspended from work, a number of procedural failings occurred as regards his disciplinary investigation, including providing him with unclear and confusing information as to the allegations against him, failing to provide adequate information about the progress of the investigation, and not explaining the basis for asking him further questions after he had been told that the investigation had been concluded. Despite being highly critical of these failings and, indeed, of the conclusions reached following the investigation, the employment tribunal held that the employer's conduct had not been motivated consciously or subconsciously by considerations of race based on the fact that the claimant was Italian, and his first language was not English. Nor could an inference of discrimination reasonably be drawn. On the evidence presented, the tribunal accepted that the sole reason for the employer's unfair and unreasonable treatment of the claimant was a lack of care, attention to detail and focus on the investigating managers' parts, rather than a discriminatory motivation.
416. In **Nelson v Newry and Mourne District Council 2009 IRLR 548, NICA**, the Northern Ireland Court of Appeal opined that the fact that the employer's decision-making was not irrational or perverse must be very relevant in deciding whether there was evidence from which it could be inferred that the decision-making was motivated by an improper discriminatory intent.
417. The Tribunal have reminded itself of the guidance in **Field v Steve Pye and Co. (KL) Limited and Others [2022] EAT 68**.

41. It is important that employment tribunals do not only focus on the proposition that the burden of proof provisions have nothing to offer if the employment tribunal is in a position to make positive findings on the evidence one way or the other. If there is evidence that could realistically suggest that there was discrimination it is not appropriate to just add that evidence into the balance and then conduct an overall assessment, on the balance of probabilities, and make a positive finding that there was a non-discriminatory reason for the treatment. To do so ignores the prior sentence in Hewage that the burden of proof requires careful consideration if there is room for doubt.

42. Where there is significant evidence that could establish that there has been

discrimination it cannot be ignored. In such a case, if the employment tribunal moves directly to the reason why question, it should generally explain why it has done so and why the evidence that was suggestive of discrimination was not considered at the first stage in an Igen analysis. **Where there is evidence that suggests there could have been discrimination, should an employment tribunal move straight to the reason why question it could only do so on the basis that it assumed that the claimant had passed the stage one Igen threshold so that in answering the reason why question the respondent would have to prove that the treatment was in no sense whatsoever discriminatory, which would generally require cogent evidence.** In such a case the employment tribunal would, in effect, be moving directly to paragraphs 10-13 of the Igen guidelines.

43. Although it is legitimate to move straight to the second stage, there is something to be said for an employment tribunal considering why it is choosing that option. **If at the end of the hearing, having considered all of the evidence, the tribunal concludes that there is nothing that could suggest that discrimination has occurred and the employer has established a non-discriminatory reason for the impugned treatment, there would be no error of law in just answering the “reason why” question, but it is hard to see what would be gained by doing so, when the tribunal has already concluded that there is no evidence that could establish discrimination, which would result in the claim failing at the first stage . There is much to be said for making that finding and then going on to say that, in addition, the respondent’s non-discriminatory reason for the treatment was accepted.**

44. **If having heard all of the evidence, the tribunal concludes that there is some evidence that could indicate discrimination but, nonetheless, is fully convinced that the impugned treatment was in no sense whatsoever because of the protected characteristic, it is permissible for the employment tribunal to reach its conclusion at the second stage only. But again, it is hard to see what the advantage is. Where there is evidence that could indicate discrimination there is much to be said for properly grappling with the evidence and deciding whether it is, or is not, sufficient to switch the burden of proof. That will avoid a claimant feeling that the evidence has been swept under the carpet. It is hard to see the disadvantage of stating that there was evidence that was sufficient to shift the burden of proof but that, despite the burden having been shifted, a nondiscriminatory reason for the treatment has been made out.**

45. Particular care should be taken if the reason for moving to the second stage is to avoid the effort of analysing evidence that could be relevant to whether the burden of proof should have shifted at the first stage. This could involve treating the two stages as if hermetically sealed from each other, whereas evidence is not generally like that. It also runs the risk that a claimant will feel that their claim that they have been subject to unlawful discrimination has not received the attention that it merits. 46. Where a claimant contends that there is evidence that should result in a shift in the burden of proof, they should state concisely what that evidence is in closing submissions, particularly when represent. Tribunal stress.

418. The test of unfavourable treatment posed is an objective one. The fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment: **In Burrett v West Birmingham Health Authority 1994 IRLR 7, EAT.**

Appropriate Comparator

419. Section 23 Equality Act 2010 deals with the issue of a comparator:

(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be

no material difference between the circumstances relating to each case.

420. Lord Nicholls commented in *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL* (a sex discrimination case), in some cases the ‘less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.’ In that case S, a chief inspector, claimed that she was treated less favourably than two male chief inspectors when she was relieved of her counselling responsibilities. However, she had been the subject of complaints and representations, whereas the male chief inspectors had not. **According to Lord Nicholls: ‘Whether this factual difference between their positions was in truth a material difference is an issue which cannot be resolved without determining why she was treated as she was. It might be that the reason why she was relieved of her counselling responsibilities had nothing to do with the complaints and representations.** If that were so, then a comparison between her and the two male Chief Inspectors may well be comparing like with like, because in that event the difference between her and her two male colleagues would be an **immaterial difference.**’
421. It follows from the wording of S.13(1) EqA that the statutory comparator must not share the claimant’s protected characteristic.
422. *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL* (a sex discrimination case), Lord Scott explained that this means that ‘the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all *material respects* as the victim save only that he, or she, is not a member of the protected class’.
423. The EHRC Employment Code expressly states that the circumstances of the claimant and the comparator **need not be identical in every way.**
- ‘What matters is that the circumstances which are relevant to the [claimant’s treatment] are the same or nearly the same for the [claimant] and the comparator’— para 3.23.*
424. *Shamoon v Chief Constable of the Royal Ulster Constabulary* : In his Lordship’s judgment, a circumstance may be relevant if the employer in fact attached some weight to it, whether or not the tribunal thinks a reasonable employer ought to have done so.
425. The fact that a different decision maker was involved in the comparator’s case does not necessarily amount to a material difference for the purpose of identifying that person as a comparator: obiter view of the EAT in *Olalekan v Serco Ltd 2019 IRLR 314, EAT*. In *Reynolds v CLFIS (UK) Ltd 2015 ICR 1010, CA*, Lord Justice Underhill stated: ‘the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else’s motivation’. However, the EAT in *Serco* considered that there was no suggestion in *Reynolds* that a person who is otherwise a suitable comparator is rendered unsuitable merely because a different decision maker was involved. If the only difference is the identity of the decision maker, that, of itself, would be unlikely to amount to a material difference because the employer would be liable for the actions and decisions of both under S.109(4) EqA .That approach would not be inconsistent with that in *Reynolds* as the focus would still be on the mental processes of the decision maker who dealt with the claimant.
426. In *London Borough of Islington v Ladele (Liberty intervening) 2009 ICR 387, EAT*, Mr Justice Elias, then President of the EAT, commented that where the characteristics of the statutory comparator are in dispute, a tribunal is, in practice, unlikely to be able to identify the comparator without first answering the question of why the claimant was treated as he

or she was. To illustrate this point, he cited as an example a claimant who alleges that he did not get a job because of his race. The employer defends the race discrimination complaint by saying that he was not appointed because he was not academically clever enough, and there is evidence to show that the person appointed to the job had better academic qualifications. The claimant alleges that this was irrelevant to the appointment; it was not therefore a material difference.

427. If Elias P continued, the tribunal is satisfied that the real reason is race, then the academic qualifications are irrelevant. The relevant circumstances are not therefore materially different. However, **if the tribunal is satisfied that the real reason is the difference in academic qualifications, then that provides a material difference between the position of the applicant and that of the comparator.** Thus, a finding of discrimination can be made without the tribunal needing specifically to identify the precise characteristics of the comparator at all.

428. In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in **Nagarajan v London Regional Transport [1999] ICR 877**, 884E – “this is the crucial question”. He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

429. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: the observations of **Lord Nicholls in Nagarajan (p.886F)** as explained by Peter Gibson LJ in *Igen v Wong* [2005] ICR 931, para 37.

430. ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337***

“(2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant... (3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated: see Lord Scott of Foscote in Shamoon at paragraph 109 and Lord Rodger of Earlsferry at paragraph 143. This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the “evidential comparator”) to those of the complainant and all the other evidence in the case.

431. In the **Network Rail** case Elias P considered that there would be a prima facie case of discrimination if a black employee was at least as well qualified as a white employee and only the white employee was promoted if they were the only two candidates for promotion. However, he pointed out that the case becomes weaker where there are a number of candidates and the unsuccessful black candidate is rejected along with a number of equally well-qualified white candidates, since there is then no distinction between all the unsuccessful candidates.

432. In **Dresdner Kleinwort Wasserstein Ltd. v Adeboyo [2005] IRLR** : The court observed that a black candidate who is better qualified than the only other white candidate and does not get the job imposes a greater burden at the second stage than would a black candidate rejected along with some others who were equally qualified (assuming that the Tribunal properly finds a prima facie case in such a case).

Submissions

Respondents Submissions

433. The respondent gave written and oral submissions and they have been considered in full and will not be rehearsed here. In summary however it is submitted that the claimant had a wholly unrealistic approach including to his own assessment that he should have received full marks in every criterion. That his application was a good application but not 'stellar'. That long gone is 'chalk and talk' and student feedback on quality is extremely important and while his last position was at NTU another candidate who had worked at NTU was able to provide student feedback scores but the claimant had not done so, an important metric for the respondent. The claimant argues that missing information from his application could have been sought at interview but this application was his opportunity to 'sell himself'.
434. The claimant's race and religion and that of the other candidates was removed from the applications before it was shared with the short listers. The respondent refers to cases (most of which are set out above) but also:
435. **R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors [2010] IRLR 136 SC**; where it was held that where an action is not inherently discriminatory the Tribunal will need to consider the mental processes, conscious or subconscious for the treatment.
436. **Ayodele v Citylink Ltd [2018] ICE 749**: a decision which outlines the 2-stage approach to discrimination cases.

Claimant's submissions

437. The claimant's submissions have been considered in full. In brief he invites inferences to be drawn from the responses he received when asking for feedback and failure to follow the respondent policies including lack of note taking. He dealt with these failings at length in his submissions.
438. The claimant went over in brief the evidence about the relative scores and that while Dr Benedict had given evidence that the applications were not assessed on research output, he had included information on teaching and research and patents he had secured, to show he could help with funding. He also mentioned that he could provide 2 letters of recommendations from NTU for him to apply to Oxford University, however he had not attached these to his application and did not want to admit them into evidence now. He referred to using the same application when he applies for jobs and makes 'tiny changes' to the criteria and it has been successful in a number of applications for which he has been called to interview.

Conclusions

Not shortlisting the Claimant for an interview for the vacancy of Assistant Professor in Physics and Astronomy.

439. The Tribunal have reminded itself that a difference in race/religion and a difference in treatment are not, on their own, sufficient to raise a prima facie case of discrimination and at this first stage the burden falls on the claimant.
440. The Tribunal have taken into account the submissions of counsel for the respondent that because the claimant had been given a very high score initially when Professor Fromhold and Dr Benedict had carried out their separate scoring exercises it does not make sense that they would go on to discriminate against him during the joint shortlisting exercise.

441. The Tribunal are not persuaded that this is a particularly strong argument, while superficially perhaps an attractive one.
442. Professor Fromhold and Dr Benedict at the joint meeting were honing their decision about who they wanted to put forward and focussing on the top candidates. The Tribunal consider that it is possible for discrimination, particularly subconscious discrimination, to raise itself at different stages in a selection process and particularly at a stage where a final decision is being made about who they would want to see at an interview.
443. Further, the inverse argument could be made, that the claimant's application had been considered good enough initially to come within the top 5 or 3 candidates but then his score had been adjusted, more than most other reserve candidates, such that he was now at the bottom of the reserve list. Why was his score adjusted down so much relative to others?
444. Counsel for the respondent also submits that the successful candidate falls within the classification of BME. While this is a factor to weigh into the balance, the Tribunal do not consider that this carries much weight. As set out in the findings of fact, this candidate was known to Professor Fromhold and Dr Benedict. Professor Fromhold encouraged him to apply for promotion and discrimination, including subconscious discrimination, is not a binary concept. It is possible for someone to hold a bias based on protected characteristics more strongly against those who are unfamiliar to them.
445. The successful candidate was also not identified as Muslim or of the same ethnic background or national origins as the claimant.
446. Other candidates who were invited to interview include a Muslim candidate (226637) and counsel for the respondent also submits that the fact that a Muslim candidate (226637) (who had also undertaken his education and work in a Middle eastern country, and whose name is Arabic), was shortlisted and that another candidate (226124) who has an Arabic name (the candidate from Mauritius) was also shortlisted, weighs against discrimination based on the claimant's religion or ethnic origins. While this is a factor again to weigh in the balance, the Tribunal are mindful that discrimination, particularly subconscious is by its very nature difficult to identify and may not follow a clear pattern. A candidate who appears outstanding may be selected while another with the same protected characteristic may not be where the distinction between the strength of their application and other candidates is less obvious.
447. The Tribunal on balance, for the reasons set out in its findings of fact, do not find that the claimant has established, although eminently well qualified, that the evidence supports a finding that he should have been given a higher score against the other subjective criteria (this excludes criterion 8). The criterion which are subjective make it difficult for the Tribunal to assess in terms of making a finding that the claimant deserved higher scores. The exercise is made more difficult due to the absence of any guidance sitting alongside the criterion identifying what it had been agreed the assessors would be looking for from the applications to evidence each criteria. The Tribunal were of the view however, that his application was not as well presented as those who were shortlisted, it did not engage as directly with the job profile and the stated criterion, he contextualised less, and the Tribunal considered that it was necessary to search for the information to support the criteria. It was an application a 'mile wide but an inch thick'.
448. In terms of the actual comparators, the Tribunal find that there were material differences between the claimant's application and the applications of other candidates as set out in the findings of fact however the approach to criteria 8 is difficult objectively to understand.
449. The reasonableness of the scoring against criteria 8 is easier for a third party to assess.

450. Professor Fromhold in his witness statement (para 18) under criteria 8 states; “A key omission from Dr Saad’s application was that it included no feedback from students or peers.”
451. The Tribunal consider that to add in other measures against criteria 8, namely student feedback and other evidence of ‘quality’ of teaching, was unreasonable and unfair. Those factors were considered under criteria 6. The claimant was in effect being marked down for the same thing (i.e. no student feedback or empirical evidence as to the quality of his teaching) against both those criteria. In his statement Professor Fromhold gave evidence (para 12) that:
- “All shortlisted candidates scored 3 out of 3 for this criterion (criterion 6) because they had clearly presented their teaching skills and presented independent evidence of their ability within their respective applications, for example from student feedback... and student rating scores...”*
452. The Tribunal have reminded itself that conduct which is unreasonable is not however of itself discrimination however, it must also consider whether (given there are no records of what was considered) it is persuaded on the evidence that Professor Fromhold did apply a requirement for candidates to evidence they had reflected on the benefits of their qualifications or whether so long after the event, this is evidence seeking to now justify unfair scoring. The job profile does not, as it does with other criteria, identify that the criterion will include assessment of such reflection. It is a ‘hard’ criterion of qualifications or equivalence hence why it is a desirable only criterion.
453. In relation to criterion 8, the successful candidate also has a PGHCE and is a Fellow of the Higher Education Academy, the same as the claimant however, despite having less teaching experience than the claimant, never having held an academic Assistant Professorship, Senior Lectureship or Lectureship position in academia, he was awarded a 3. Candidate 226124, a British candidate has inferior teaching qualifications to the claimant but is also awarded a 2.
454. In light of the approach to this scoring, when considering why the claimant was given a score of 2 against this criterion, it is necessary to consider what inferences it may be reasonable to draw from the primary findings of fact because evidence of discrimination is rarely overt.
455. The Tribunal when considering what adverse inferences may be drawn from the primary findings of fact have taken into account the egregious failure to comply with the respondent’s own guidance documents, including the failure by either Professor Fromhold or Dr Benedict to keep any record whatsoever of their joint decision making and how they agreed the scores for each candidate. There was also a woeful disregard for the guidance documents and good practice more generally, as set out in the findings of fact.
456. While now Professor Fromhold and Dr Benedict give detailed evidence about why the claimant would have been scored as he was, none of this was ever recorded at the time. Their evidence now, while relevant and has been considered carefully, is more likely than not largely an assessment now of what they believe they are likely to have thought at the time, rather than actual recollection. Further, their recollection is likely to be influenced by the circumstances, namely that they are defending an allegation of discrimination. They have had a significant amount of time to come up with an explanation behind the scores for criterion 8 (with no record to confirm or remind them of what they considered at the time) and include now matters considered elsewhere under another criterion. What is the reason for the duplication and additional considered of reflection which appears inconsistent with the description of this criteria?

457. The Tribunal have also had regard to the conduct of the HR department which is deeply concerning. The lack of transparency, the deliberate withholding of information with the intention to mislead the claimant and with the aim the Tribunal find of avoiding what they ultimately faced, namely a discrimination claim. There was a lack of any meaningful investigation into what had taken place. There were no steps taken to address the failure to follow the respondent's recruitment guidance directly with Professor Fromhold and Dr Benedict. HR was also responsible for allowing inaccurate information to be inserted into the response filed with the Employment Tribunal.
458. There is no suggestion that Professor Fromhold and Dr Benedict were complicit in the actions of HR. However, while it is the decision making around the selection process which the Tribunal must focus on, the Tribunal consider that it is relevant to weigh into the balance that this organisation, in which Professor Fromhold and Dr Benedict hold important positions, appears by its actions to condone decisions to disregard practices and guidance put in place to promote diversity and equal opportunities. A culture in which poor decisions which offend those policies have been deliberately concealed. The Tribunal consider that this is a factor for consideration in terms of what inferences it is reasonable to draw in the Madarassy sense from the way the organisation operates.
459. The Tribunal also consider that when considering inferences, the statistics indicate a trend of underrepresentation of Black candidates for professorial positions. The Tribunal also take into account the respondent's own statistics specific to this recruitment exercise. The Tribunal is wary of drawing inferences from minor statistical variations when considering their probative value however there is persuasive statistical evidence to indicate a trend of lower conversion from application to interview of BME candidates (relevant to the claimant's characteristics of colour and ethnic background).
460. The Tribunal cannot and do not reach a conclusion on the evidence that there is institutional racism within the respondent or in the School, however the statistics in the respondent's own 2018 review combined with the statistics from this particular exercise involving the claimant (as reported by Ms Garner to Mr Tennant on 30 November 2021 (page 488)) indicate a trend of BME applicants being less successful at the shortlisting stage. This trend appears to be reflected more broadly across UK universities and that the Tribunal take particular account of is that this issue itself should have lead Professor Fromhold and Dr Benedict, both very intelligent people, to be even more careful about ensuring they followed a transparent and fair process which is compliant with the guidance documents the respondent have in place. Why did they not apply that guidance?
461. The Tribunal have regard to the decision making of Professor Fromhold and Dr Benedict arising from certain comments and observations they made during the process which do not appear to be observations of individuals sufficiently mindful of the need to avoid biases which may give rise to discrimination. This includes the comments which suggest a preference for candidates with more experience working within UK universities while Dr Benedict admitted he had no knowledge on which to justify any negative comparison. Professor Fromhold admitting to himself 'encouraging' the internal applicant to apply for promotion while agreeing to sit on a panel of 2 at the shortlisting stage rather than limit his participation at least to the interview panel of 4. The Tribunal also consider it relevant to take into account the explicit reference and noting by Professor Fromhold of a candidate's age and while this he explained was about this person's career trajectory, age did not need to be highlighted.
462. The Tribunal have taken on board that there were other candidates who made it to the shortlist, whose names suggest that they may be Black, from an Arabic ethnic identity and/or suggestive of being Muslim however that does not prevent subconscious discrimination influencing a decision with perhaps more marginal candidates.

463. The Tribunal are not persuaded by the respondent's explanation as to why the claimant was given a score of 2 for criteria 8. The Tribunal make the point that this is not a case where it is obvious that there has been fair scoring in relation to the other scores. The Tribunal has done its best to make an assessment on a balance of probabilities, taking into account the evidence of the respondent witnesses about what they now say they would have considered, in the absence of any record of their decision making at the time and in a very specialist field and the claimant's evidence around what are largely subjective areas of assessment without clear guidance on how those criterion were to be measured.
464. However, criterion 8 is capable of objective measurement and the respondent has failed to provide cogent or convincing evidence the Tribunal find to explain the scoring. It scored the successful candidate a 3 who while BME, was not identified as Muslim, Black African or Egyptian and who already had an established working relationship with the respondent. Further, the Tribunal take into account that they scored another Muslim candidate a 2 who was better qualified than the successful candidate and now admit that they may have underscored him on what is a manifestly an easier criterion to measure and thus score fairly.
465. The claimant was also given the same score of other candidates, including the White French candidate who, as an evidential comparator with the same score as the claimant has a PhD and Master of Science degree but is considerably less qualified than the claimant who holds a PhD, MSc (Research) in Material Science, MSc (taught) in Optics and Laser Technology, BSc in Physics and a PGCHET and over 14 years of academic teaching at the level of Assistant professorship and Senior Lectureship.
466. The Tribunal consider that on the evidence the claimant has established sufficient facts from which the Tribunal could and should infer less favourable treatment based on his race and/or religion, and in particular (given the statistical evidence) his ethnic background and/or colour.
467. The Tribunal consider that there is 'something more' in the Madarassy sense, drawing inferences from the primary findings of fact, to reverse the burden of proof.
468. Applying the burden of proof provisions, it falls to the respondent to explain why the claimant was only scored a 2, the same score as the successful candidate and the Tribunal is not satisfied with the explanation.
469. There is evidence that could indicate discrimination. The respondent has failed to provide a satisfactory explanation.
470. The Tribunal do not on balance find that the impugned treatment (i.e. the scores which the claimant received which meant he was not put through to the shortlist) was in no sense whatsoever because of the claimant's race and or religion. Discrimination more likely subconsciously, played a more than trivial part the Tribunal find in the selection process applying the burden of proof provisions
471. That said, the Tribunal conclude that but for the discrimination the claimant in any event would still **not have** achieved a sufficient score (another 3 points) to place him in the shortlist in the first round, however it cannot be said that the treatment of not having a score high enough to be put on the shortlist was *in no way whatsoever* due to the claimant's protected characteristics, it played a part.

Time Limits

472. The respondent does not take a point about time limits and made no submissions on it however time limits are a jurisdictional issue.

473. The Acas early conciliation began on 2 December 2021 and the claimant filed his claim on 18 January 2022. The decision about scoring took place on 13 August 2021.
474. This claim is part of a continuing course of conduct (not disputed by the respondent) which continued with the decision about not shortlisting the claimant, along with the French candidate, at the second shortlisting stage on 20 August 2021.
475. The claim was amended to include the complaint about not being promoted to the short list without reserving the position on time limits) and this specific complaint about conduct on 13 August, is part of that same conduct pursuant to section 123 ((3)(a) Equality Act 2010 and *Hendricks v Commissioner of police of the Metropolis* [2003] IRLR 96. The Tribunal find that the claim was therefore brought within time.
476. In any event in the circumstances, given the lack of information provided to the claimant and the concealing of information, the Tribunal would consider it just and equitable in any event to allow the claim. The respondent pleads no prejudice. The prejudice to the claimant would be to deny him justice with respect to a serious claim of discrimination in the recruitment process.
477. **This claim is well founded and succeeds.**

Not moving the Claimant from the reserve list onto the shortlist when two shortlisted candidates dropped out of the process.

478. The assessment of the two candidates is reliant on the credibility and reliability of Professor Fromhold's account of what played a part in his decision making.
479. The Tribunal consider that the way this part of the process was carried out was egregious. The Tribunal are conscious of also taking a holistic view of the overall facts of this case.
480. While the two candidates had the same total score, the French candidate was not the Tribunal find as well qualified as the claimant and but for the discrimination in the scoring of criterion 8, the claimant would have been awarded a score of 20 i.e. he would have scored higher than the French candidate.
481. Professor Fromhold gave evidence that the fact that the French candidate had the higher score on essential criteria was the main reason he chose him and therefore by extension if the claimant had scored higher on the essential criteria, on the respondent's own case, he would have been selected regardless of not having experience in Quantum Technology.
482. Professor Fromhold was presented with a French candidate and the claimant who it would reasonably be assumed from his application was Black African, Egyptian and Muslim.
483. Professor Fromhold maintains that after going through a process of an initial assessment (which he says took him 2 days, and then another session to shortlist the candidates and select those for the shortlist and reserve list), he decided to disregard entirely the way in which they had selected the candidates and use a different method, something the respondent's guidance documents warns the assessors not to do. He decided to weight the criteria even though it must be the case that he did not consider the essential criteria to be more important than the desirable criteria because they were not weighted before. So why do it? The reason why question is necessary to determine because it is relevant to what was material and whether the French candidate is a suitable comparator or to what extent a useful

evidential comparator.

484. Professor Fromhold and Dr Benedict gave evidence that they had carried out a thorough process, applying each criterion to each candidate. Professor Fromhold is an intelligent man with experience of carrying out recruitment exercises, who gave evidence about involvement in initiatives to broaden diversity. He had access to guidance documents which stressed the importance of not changing the weighting of criteria during the process and yet he did so. The question is why did he do this when the result was that the BME candidate did not make it to the interview stage?
485. Professor Fromhold commented on the statistics from this selection exercise, which had been provided by Megan Garner, and commented that they were 'shocking' and that it is the same trend across the country. He was aware of this issue of the low rate of BME applicants reaching the shortlist and yet with that knowledge, he decided on a course of action which should have set alarm bells ringing but he did it anyway.
486. It was the Tribunal find, for such an educated and intelligent person, recruiting within this profession with a well-known problem of relatively low conversion rate of BME applicants compared to White applicants to interview, an unfathomable decision and a 'dangerous' one to quote Mr Tennant (as above).
487. The Tribunal were not impressed with the evidence of Professor Fromhold on this issue, who while considering that it was a mistake to consider the claimant at all (because he was at the bottom for the reserve list) did not show any reflection or insight into his decision to change the weighting of the selection criteria. His evidence was not convincing around the decision to interview 7 rather than 8 people. He asserted that 7 was more manageable but failed to provide a convincing explanation of what practical difficulty interviewing one more candidate would have had.
488. The Tribunal were not persuaded by his explanation that he had decided to select between the French candidate and the claimant based on essential criteria only.
489. Professor Fromhold is too intelligent a person to not appreciate that this was unfair and given the Tribunal find there was no real need to do it, it was illogical. There was a simple solution, to put them both forward for the interview or neither of them.
490. This was not a junior role. It was a professorial post within a prestigious university, a university with carefully produced guidance documents and in the process of trying to secure a silver award as part of the Race Charter. Professor Fromhold is a senior person within the respondent university entrusted with carrying out fair and non-discriminatory recruitment exercises. He does not allege that this is his normal practice, to change weighting part way through an exercise.
491. If the respondent for genuine reasons could not interview another person, they could have decided on the most objectively measurable criteria. This was after all a teaching role at Level 5. Professor Fromhold could have distinguished between them using the only criteria which is capable of objective evaluation, independent of personal opinions or biases, allowing for a fair assessment, namely relative teaching qualifications.
492. The Tribunal are not persuaded that Professor Fromhold simply applied the highest essential criteria. If that had been his 'tie break' solution the fairer and more logical thing to do would have been to go back to the scores and put forward the person highest on the reserve list. Why not just do that if there was nothing else to distinguish the candidates? His explanation is also not on all fours with his witness statement where he mentions first the French candidate's Quantum Technology experience which he then downplays in cross

examination and it is not consistent with what he wrote in his email to Ms Shykles that: *“The applicant was reserved but across the whole scoring criteria, other applicants scored better and were, therefore, interviewed...”* He does not here explain that he weighted the criteria between the French Candidate and the claimant at the second stage. He also accepts that it was an error to not select from the highest scores on the reserve list however, he was experienced in recruitment and this was such a manifestly unfair thing to do, and so risky for the respondent not least because this was a decision between a White candidate and a BME candidate.

493. The Tribunal are not persuaded that Professor Fromhold simply applied the highest score to decide and thus this is not a material factor to distinguish the French candidate from the claimant however, even if that were the application used (and thus the French candidate is not a suitable comparator), it is so manifestly unfair that in the circumstances the Tribunal consider that it is appropriate to draw adverse inferences from that decision.

494. The Tribunal consider that taking into account all the facts from which inferences may be drawn in this case (including those as set out above in respect of the first complaint), there is evidence that suggests there could have been discrimination and the burden of proof has shifted to the respondent.

495. The Tribunal conclude that the respondent has failed to prove that the treatment was in no sense whatsoever discriminatory. It has not provided an explanation which the Tribunal considers satisfactory and convincing. It does not accept that Professor Fromhold decided between the two candidates based on essential criteria or decided that it was not practical to put them both through to an interview. The Tribunal consider that on the evidence something else was at play. Even if Professor Fromhold had decided to use essential criteria, that was so manifestly counter to the respondent’s guidance and what he must have known was appropriate, that it itself begs the question why he would use that criteria to decide between what he would have reasonably assumed to be likely to be a White and BME candidate? There were other options, go back to the reserve list or put forward both or neither candidates.

496. The respondent has not persuaded the Tribunal that its conduct on balance, was not motivated, consciously or subconsciously, by considerations of the claimant’s race and/or religion.

497. As explained in ***Nagarajan v London Regional Transport 1999 ICR 877, HL*** ‘*many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant’s race. After careful and thorough investigation of a claim members of an Employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.*’

498. If having heard all of the evidence, the Tribunal concludes that there is some evidence that could indicate discrimination and is not fully convinced that the impugned treatment was in no sense whatsoever because of the protected characteristic.

Time limits

499. The Acas early conciliation began on 2 December 2021 and the claimant filed on 18 January 2022. The claimant only found out about the facts giving rise to this claim in June 2022 because this had not been disclosed in the response and the fact of it was concealed from him. The claimant applied to include this complaint at the hearing on 24 June 2022 and the respondent understandably in the circumstances, did not oppose it. That amendment

was granted and the issue of time limits was not reserved. This claim was brought within time but even if it had not, the Tribunal consider that for the same reasons as set in relation to the first complaint, it would be just and equitable to extend time

500. The Tribunal find that the complaint is well founded and succeeds.

Not being selected for the role

501. The claimant complains that it was less favourable treatment not to have selected him for the role.

502. The successful candidate was the Tribunal find, non- White. His religion is unknown.

503. The claimant argues that had he been put forward for interview “100%” he would have been selected.

504. The panel was composed of another two additional assessors, a total panel of 4.

Comparators

505. The claimant himself suggested that the successful candidate had been given information by Professor Fromhold to help him prepare, that is not only treating the claimant less favourably (because he does not have that advantage) it is treating every candidate regardless of race, or religion less favourably (which may give rise an indirect discrimination claim but that is not how the claimant has presented his claim).

506. The Tribunal are persuaded that there were material differences between the successful candidate’s application and other candidates which the respondent reasonably considered made the successful candidate more suitable for this post.

507. In terms of any other findings of primary facts which may indicate that the claimant would have been successful at the interview itself, the claimant did not cross-examine Professor Fromhold or Dr Benedict on the interview process itself. He did not elicit any evidence about the format of the interview, on what was discussed, on what the panel focused on, the questions asked, the answers given, how it was conducted or how the successful candidate performed and why he was selected at interview above the other candidates. He did not ask questions about how the full panel arrived at the decision about who to appoint.

508. There are no findings of fact from which the Tribunal can conclude that the claimant was treated less favourably by not actually being appointed. He never made it to the interview stage but the Tribunal are not persuaded on the case presented by the claimant, that he would on a balance of probabilities have been selected had he reached that stage.

509. The Tribunal accept the respondent’s submissions that the claimant had scored significantly less than the highest scoring candidates at the shortlisting stage (even putting aside the scoring of criteria 8) and that the successful candidate was able to provide something the claimant could not, most notably strong evidence of their teaching experience throughout the Covid era and innovative teaching and not only in the initial months of Covid but in terms of how the candidate appreciated and responded to the long term changes to the practice of physics in higher education.

510. The French candidate who scored the same overall score as the claimant was not successful. Even accounting for the underscoring of criteria 8 there were 4 points between

the claimant and the successful candidate (or 3 if the successful candidate had been overscored on criteria 8).

511. The claimant asked the Tribunal not to give weight to how he presented his case at this tribunal hearing and given the claimant had been unwell and was clearly at times upset and anxious, it has not done so.
512. On balance the Tribunal find that the evidence presented does not support a finding that the claimant would have been appointed at interview. The shortlisted candidates did present in their documents, a much better, clearly focussed response to the criteria and it may be reasonably inferred that this is evidence of how they are likely to have performed at the interview stage.
513. However, the claimant did not question the witnesses about the interview process. There is no evidence about how the interviews were carried out. The claimant does not allege any reason why he would believe that the other 2 panel members would have discriminated.
514. The claimant's own case is that it is likely that the internal candidate been given some assistance by Professor Fromhold, albeit he did not put that directly to Professor Fromhold. Professor Fromhold himself however gave evidence that he had encouraged him to apply. That would not amount to less favourable treatment of the claimant because of his race/religion albeit bias toward an internal candidate may lead to the potential for indirect discrimination (and more generally factor into the trend across UK universities of the underrepresentation of Black academics).
515. This decision should not be seen as any endorsement of the way in which this matter was dealt with by the respondent in terms of its application of its policies and the decision to withhold information from a candidate. However, the Tribunal consider that on the evidence presented it cannot find on a balance of probabilities that the claimant was discriminated against by not being selected for the Post.
516. **This complaint is not well founded and is dismissed.**

Approved by:

Employment Judge Broughton

Dated: 13 February 2026

Sent to the parties on

...16 February 2026.....

For the Employment Tribunal

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