FAIR EMPLOYMENT TRIBUNAL

CASE REF: 71/15 FET

CLAIMANT: **Gary McClean**

RESPONDENT: **Waterside Neighbourhood Partnership Ltd**

DECISION

The unanimous decision of the Tribunal is that the claimant had been unlawfully discriminated against by the respondent contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998. Compensation for loss of earnings, expenses, and injury to feelings, together with interest is awarded, as calculated in this decision.

Constitution of Tribunal:

Vice President: **Mr N Kelly**

Members: **Ms F Cummins**
Mr I O'Hea

Appearances:

The claimant was represented by Mr G Grainger, Barrister-at-Law, instructed by Equality Commission for Northern Ireland.

The respondent was represented by Mr N Philips, Barrister-at-Law, instructed by Worthingtons, Solicitors.

Background

1. The claimant is a community worker. At the relevant times, he worked in the Curryneirin and Tullyally areas in the eastern part of Londonderry. He describes himself as a socialist, who is critical of Sinn Fein and who is critical of what he alleges is an agenda between Sinn Fein and the Democratic Unionist Party to carve up influence (and funding) between themselves in segregated areas.

2. The respondent is a limited company involved in community development in the North West. It was created to deal with contractual, funding and employment issues on behalf of the Waterside Neighbourhood Partnership. That Partnership is an unincorporated body which comprises representatives from various community organisations, from DSD and from the four main political parties.

3. The claimant applied for the post of Community Development Officer ('CDO') in Curryneirin. This was a post which had previously been provided directly by the Curryneirin Community Association and was now provided by the respondent to whom DSD had provided funding.

4. The claimant was shortlisted for interview together with two other candidates. Criteria were set. Questions and model answers were set. A threshold mark was set of 59 marks out of 90 total potential marks. The claimant exceeded the threshold of 59 marks. The other two candidates did not reach that threshold. The three person interview panel signed a document recording those marks and the marks of the two other candidates. The document also recorded that the claimant was the person to be appointed.

5. Nevertheless, the claimant was not appointed to the post of CDO. He was advised that the competition would be re-run. The competition was re-run. The claimant did not take part in that second competition and the post was awarded to another individual.

6. The claimant alleges that the decision of the respondent organisation not to appoint him had been an act of direct discrimination on the ground of political opinion contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998.

Relevant law

Unlawful discrimination

7. The proper approach for a Tribunal to take when assessing whether discrimination has occurred and in applying the provisions relating to the shifting of the burden of proof in relation to discrimination has been discussed several times in case law. The Court of Appeal re-visited the issue in the case of ***Nelson v Newry & Mourne District Council [2009] NICA -3 April 2009***. The court held:-

> *"22 This provision and its English analogue have been considered in a number of authorities. The difficulties which Tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear as it might have been. The Court of Appeal in **Igen v Wong [2005] 3 ALL ER 812** considered the equivalent English provision and pointed to the need for a Tribunal to go through a two-stage decision-making process. The first stage requires the complainant to prove facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the Tribunal has so concluded, the respondent has to prove that he did not commit the unlawful act of discrimination. In an annex to its judgment, the Court of Appeal modified the guidance in **Barton v Investec Henderson***

Crosthwaite Securities Ltd [2003] IRLR 333. *It stated that in considering what inferences and conclusions can be drawn from the primary facts the Tribunal must assume that there is no adequate explanation for those facts. Where the claimant proves facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent. To discharge that onus, the respondent must prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to be adduced to discharge the burden of proof. In* ***McDonagh v Royal Hotel Dungannon [2007] NICA 3*** *the Court of Appeal in Northern Ireland commended adherence to the* ***Igen*** *guidance.*

23 *In the post-****Igen*** *decision in* ***Madarassy v Nomura International PLC [2007] IRLR 247*** *the Court of Appeal provided further clarification of the Tribunal's task in deciding whether the Tribunal could properly conclude from the evidence that in the absence of an adequate explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the* ***Igen*** *approach, the* ***Madarassy*** *decision is in fact an important gloss on* ***Igen***. *The court stated:-*

> *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient matter from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination; 'could conclude' in Section 63A(2) must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage, the Tribunal needs to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the complainant were of like with like as required by Section 5(3) and available evidence of all the reasons for the differential treatment.'*

That decision makes clear that the words 'could conclude' is not be read as equivalent to 'might possibly conclude'. The facts must lead to an inference of discrimination. This approach bears out the

wording of the Directive which refers to facts from which discrimination can be 'presumed'.

24 This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. In ***Curley v Chief Constable of the Police Service of Northern Ireland [2009] NICA 8****, Coghlin LJ emphasised the need for a Tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the Tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The Tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."*

8. In ***S Deman v Commission for Equality and Human Rights & Others [2010] EWCA Civ 1279***, the Court of Appeal considered the shifting burden of proof in a discrimination case. It referred to ***Madarassy*** and the statement in that decision that a difference in status and a difference in treatment 'without more' was not sufficient to shift the burden of proof. At Paragraph 19, Lord Justice Sedley stated:-

"We agree with both counsel that the 'more' which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be forwarded by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."

9. In ***Laing v Manchester City Council [2006] IRLR 748***, the EAT stated at Paragraphs 71 - 76:-

"(71) There still seems to be much confusion created by the decision in ***Igen v Wong****. What must be borne in mind by a Tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the Tribunal on the balance of probabilities that certain treatment had been by reason of race.*

...

(73) No doubt in most cases it would be sensible for a Tribunal to formally analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in ***Network Road Infrastructure v Griffiths-Henry****, it may be legitimate to infer he may have been discriminated against on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily*

legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single answer and Tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.

...

(75) The focus of the Tribunal's analysis must at all times be the question whether they can properly and fairly infer race discrimination. If they are satisfied that the reason given by an employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is an end of the matter. It is not improper for a Tribunal to say, in effect, 'there is a real question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he believed or he did and it has nothing to do with race'.

(76) Whilst, as we have emphasised, it will usually be desirable for a Tribunal to go through the two stages suggested in ***Igen****, it is not necessarily an error of law to fail to do so. There is no purpose in compelling Tribunals in every case to go through each stage."*

10. In a disability discrimination case which involved a shifting burden of proof under analogous legislative provisions, ***Maria McKeith v Ardoyne Association (employmenttribunalsni.gov.uk – Case Reference No: 1188/15***) the Tribunal stated:-

"136. Turning to the claim of unlawful direct discrimination in relation to the dismissal of the claimant, the shifting burden of proof is going to be crucial.

137. There needs to be something more, on the evidence, than the mere possibility of unlawful discrimination (see ***Madarassy****). There needs to be something on which a reasonable Tribunal can properly conclude or infer that there had been unlawful discrimination. The Directive refers to facts from which discrimination can be 'presumed'. The Tribunal must consider the purpose of the Directive and of the implementing domestic legislation. There is rarely a 'smoking gun' or an admission of unlawful discrimination in these cases. The purpose of the Directive was to shift the normal onus of proof on to the respondent once a prima facie case has been established. The purpose of the Directive was not to simply replicate the pre-existing status quo where the onus of proof fell on the claimant. In determining whether facts have been established from which an inference of unlawful discrimination could be drawn, the Tribunal must at that preliminary stage disregard explanation from the respondent. The onus of proof then moves to the respondent.*

138. *The Court of Appeal (GB) in **Deman** (above) concluded that the 'more', in addition to a simple difference in status and a difference in treatment, need not 'be a great deal'.*

139. *When analysing whether a prima facie case of unlawful discrimination has been established, the Tribunal must focus on its task of determining whether or not there has been unlawful discrimination – (see **Curley v Chief Constable [2009] NICA 8**). In **Laing v Manchester City [2006] IRLA 748**, the EAT stated:-*

> *"There seems to be much confusion created by the decision in **Igen**. What must be borne in mind by a Tribunal faced with a risk claim is that ultimately the issue is whether or not the employer has committed an act of [race] discrimination. The shifting of the burden of proof simply recognises that there are problems of proof facing an employee which would be very difficult to overcome if the employee had at all stages to satisfy the Tribunal on the balance of probabilities that certain treatment had been because of [race]."*

140. *The facts of the current case are not such that the Tribunal could properly sidestep the issue of a shifting burden of proof. In **Hewage v Grampian Health Board [2012] ICR 1054**, Lord Hope approved the obiter comments of Underhill J in **Martin v Devonshire Solicitors [2011] ICR 352**, Paragraph 39, that it is important not to make too much of the burden of proof provisions. Lord Hope said [Paragraph 32]:-*

> *"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or another."*

The present case is not one where positive findings on the issue of unlawful discrimination readily present themselves. There is no avoiding it. The issue of a potential shifting of the burden of proof requires 'careful attention'.

141. *Council Directive 2000/78 stated in its preamble:-*

> *"(31) The rules on the burden of proof must be adapted where there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought."*

142. *In Article 10 of the Directive:-*

> *"1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal*

treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there had been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

143. Section 17A (1c) of the 1995 Act implemented that part of the Directive.

144. So in a case of this type, where the evidence does not conclusively determine the matter one way or another the claimant is entitled to the benefit of the Directive and of S.17A (1c). She must establish a prima facie case, or facts on which discrimination could reasonably be presumed. She does not have to fully discharge the normal burden of proof on the balance of probabilities before the burden of proof shifts to the respondent."

11. The Tribunal further stated:-

"If this is not a case where the burden of proof should shift, no such case exists and the provisions of Article 10 of the Directive and Section 17A (1c) of the Act are of no effect at all and are a massive waste of everyone's time. The Tribunal therefore concludes that the burden of proof has shifted. The claimant has established a prima facie case that she had been directly discriminated against within the terms of the 1995 Act because she had been the primary carer of her disabled daughter. It is now for the respondent to prove that there had been no direct (associative) disability discrimination in the decision to dismiss the claimant."

12. The findings of the Tribunal in ***McKeith v Ardoyne Association*** were challenged in the Court of Appeal. The Court of Appeal in its decision (29 November 2016) determined that the appeal did not succeed on any count. They stated:-

"The Shifting Burden of Proof.

[35] While Ms McKeith did not advance a claim for disability related discrimination in relation to the period before the dismissal decision, her background treatment in the preceding months did inform the approach of the Tribunal in relation to the dismissal decision. The background included the requirement that Ms McKeith remain absent from work for periods to look after her disabled daughter. Had it arisen for decision, the Tribunal would have concluded that the previous treatment of Ms McKeith amounted to disability related discrimination (paragraph 132).

[36] On taking into account that background and the evidence in relation to the dismissal of Ms McKeith, the Tribunal stated that "the shifting burden of proof is going to be crucial" (paragraph 136).

[37] The Burden of Proof Directive (EEC) 97/80 was extended to the United Kingdom in 1998 and Article 4(1) provided –

"Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them established, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

[38] Section 17A(1B) of the 1995 Act provides –

> *`Where, on the hearing of a complaint under sub-section (1), the complainant proves facts from which the Tribunal could, apart from this sub-section, conclude in the absence of inadequate explanation that the respondent has acted in a way which is unlawful under this Part, the Tribunal shall uphold the complaint unless the respondent proves that he did not so act.'"*

[39] The approach to the shifting burden of proof was considered by the Court of Appeal in England and Wales in Wong v Igen Ltd (2005) EWCA Civ 142. It was stated that the statutory amendments required a two-stage process. The first stage required the complainant to prove facts from which the Tribunal could, apart from the section, conclude, in the absence of an adequate explanation, that the employer had committed, or was to be treated as having committed, the unlawful act of discrimination against the employee. The second stage, which only came into effect on proof of those facts, required the employer to prove that he did not commit or was not to be treated as having committed the unlawful act, if the complaint is not to be upheld.

[40] The issue was revisited by the Court of Appeal in England and Wales In Madarassy v Nomura International plc [2007] EWCA Civ 33 which set out the position as follows (italics added) –

> *"56. The Court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent `could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal `could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *57. `Could conclude' [in the Act] must mean that `a reasonable Tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in*

status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the Tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the complaint to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by [the Act]; and available evidence of the reasons for the differential treatment.

58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the Tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."

[41] The Tribunal was satisfied that Ms McKeith had established a prima facie case that she had been directly discriminated against because she had been the primary carer of her disabled daughter (paragraph 147). The Tribunal then found that the Ardoyne Association had not put forward any convincing or coherent explanation for its decision to make Ms McKeith redundant (paragraph 148). It was accepted on the hearing of the appeal that, if this was a case where the burden of proof shifted to the employer, there had not been a sufficient explanation. Accordingly, the challenge was concerned with whether the evidence before the Tribunal was such that a prima facie case of associative direct discrimination had been made out.

[42] In this regard the Tribunal set out a number of facts which concerned Ms McKeith having been sent home on previous occasions because of her disabled daughter, Ms Burns' belief that she should be at home with her disabled daughter, the reluctant piecemeal and incomplete nature of discovery, the other two persons who were made redundant at the same time were first re-engaged as volunteers and then rehired, the evasive and unconvincing evidence of the Manager and the non-compliance with statutory dismissal procedures. The Tribunal stated ". if this is not a case where the burden of proof should shift, no such case exists" (paragraph 147).

[43] We are satisfied that, as outlined by the Tribunal, there was such evidence of a difference in status, a difference in treatment and a reason for differential treatment that, in the absence of an adequate explanation, a Tribunal could conclude that the employer committed an unlawful act of associative disability discrimination. The burden on the Ardoyne Association was not discharged. It followed that the Tribunal would find disability discrimination.

[44] We are not satisfied on any of the appellant's grounds of appeal. The appeal is dismissed."

13. Article 19 of the 1998 Order provides:-

> *"19(1) It is unlawful for an employer to discriminate against a person, in relation to employment in Northern Ireland —*
>
> *(b) where that person is seeking employment —*
>
> *...*
>
> *(iii) by refusing or deliberately omitting to offer that person employment for which he applies."*

Article 3(1) of the 1998 Order provides:-

> ***"**3(1) In this Order 'discrimination' means —*
>
> *(a) discrimination on the ground of ... political opinion; ... and 'discriminate' shall be construed accordingly."*

14. The Burden of Proof Directive 92/80/EC (now the Equal Treatment Directive 2006/54 EC) was extended to the United Kingdom in 1998. The preamble to that Directive provided:-

> *"(17) whereas plaintiffs could be deprived of any effective means of enforcing the principle of equal treatment if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory;*
>
> *(18) whereas the Court of Justice of the European Communities has therefore held that the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought."*

15. Article 4(1) of the Directive provided:-

> *"Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has*

not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of equal treatment."

16. Article 38A of the 1998 Order provides in relation to the shifting burden of proof:-

> *"Where on the hearing of a complaint under Article 38 the complainant proves facts from which the Tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent –*
>
> *(a) has committed an act of unlawful discrimination or unlawful harassment against the complainant –*
>
> *The Tribunal shall uphold the complaint unless the respondent proves that he did not commit that act."*

That amendment was introduced in the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003 under, inter alia, the European Communities Act 1972.

17. Surprisingly, the term 'political opinion' is not defined in the 1998 Order, or indeed in the original 1976 Act. In contrast, the term 'religious belief', for the purposes of, inter alia, direct discrimination in the field of employment, is defined in the 1998 Order, as amended in 2003, as including '*any religion or similar philosophical belief*'. That definition does not seem to add a great deal to the commonly understood meaning of '*religious belief*'. That term was not causing any difficulty. It is odd that a definition of that term was inserted in the legislation for the first time in 2003, when the term, ie '*political opinion*', which was causing difficulty, remains without legislative definition.

Political opinion

18. In ***McKay v Northern Ireland Public Service Alliance [1994] NI 103*** the Court of Appeal stated that references to '*political opinion*' in the then 1976 Act were not restricted to opinions held in connection with religious belief or community background. "Political opinion" was not confined therefore to Unionist/Nationalist politics. It had to be given its ordinary meaning and would therefore include differences of opinion on the left/right political spectrum and indeed would cover any opinion on the governance of a state or in relation to public policy.

19. In ***Gill v NICEM [2002] IRLR 74***, the Court of Appeal further considered the meaning of '*political opinion*' in this context. The claimant argued that his preferred approach to anti-racism was a '*political opinion*'. The Court held that such an approach did not constitute a political opinion. It stated:-

> *"The type of political opinion envisaged by the fair employment legislation is that which relates to the conduct of the Government of the State, which may be that of Northern Ireland but which is not confined to that political entity, or which relates to matters of public policy. The object of the legislation is to prevent discrimination against a person which may stem from the association*

of that person with a political party, philosophy or ideology which may predispose the discriminator against him.

In the present case, the difference between the 'anti-racist' and 'culturally sensitive' approaches was one of methods, the one being more aggressive and confrontational than the other, but both being means of advancing the interests of people from ethnic minorities. This was not the type of political opinion intended by Parliament in enacting the fair employment legislation."

In ***Ryder v Northern Ireland Policing Board [2007] NICA 43***, the Court of Appeal stated:-

> *"(15) Mr McGleenan agreed that the essential ratio of this part of the judgment was encapsulated in the sentence – the type of political opinion in question must be one relating to the conduct of the government of the state or matters of public policy. I agree. I do not consider that the Court of Appeal in **Gill** sought to lay down a universally applicable rule that a view as to the methods by which a particular course should be advanced could never qualify as a political opinion for the purposes of the legislation."*

20. As indicated above, the Fair Employment Act(Northern Ireland) 1976 did not provide a definition of '*political opinion*'. It might seem improbable that Parliament, when passing the 1976 Act and when considering a legislative response to the *Van Straubenzee Report* on religious discrimination, ever intended to include left/right political discrimination, much less policy differences relating to the organisation of community development, within its ambit. No other part of the United Kingdom required such legislative protection and still does not do so. One interpretation is that in the particular context of Northern Ireland and in the particular context of a response to the *Van Straubenzee Report*, the intention had been to restrict the definition of political opinion to those circumstances where it was shorthand for community affiliation in the sectarian makeup of Northern Ireland. However, the use of the unqualified words '*political opinion*', in the absence of any definition such as '*any political opinion relating to the constitutional position of Northern Ireland within the United Kingdom*', and conflicting references in Parliament materials, led to the decision of the Court of Appeal in ***McKay***.

21. The 1976 Act was not amended following the decision in ***McKay*** to clarify the definition of '*political opinion*'. Furthermore, the 1998 Order which replaced the 1976 Act did not attempt to clarify the definition, although '*religious belief*' was in fact defined at a later stage in 2003. Whether that can properly be regarded as a positive affirmation by the Assembly of the ***McKay*** decision, or whether the Assembly had simply failed to appreciate the difficulties raised by ***McKay***, is a moot point. The Tribunal heard no evidence on this issue.

22. The Tribunal, of course, accepts that it is bound by the words of the statute and by the decisions of the Court of Appeal. However, the term '*political opinion*' in the 1998 Order is not as clear, unambiguous or trouble free as it might have at first appeared – see, eg ***Fleck and Mackel v NIPSA-employmenttribunalsni.gov.uk***. The position at present, absent any legislative or judicial clarification, is that '*political opinion*' means any political opinion which relates to the conduct of the government

of the state or to public policy but excluding some, but not all, opinions in relation to methods. The distinction to be drawn between political opinions and opinions in relation to methods, and also the distinction to be drawn between those opinions in relation to methods which are also political opinions and those opinions in relation to methods which are not political opinions is problematic.

Procedure

23. This claim had been case-managed. Detailed directions had been given for the completion of the interlocutory process and for the use of the witness statement procedure. That procedure provided that each witness would exchange witness statements in advance accorded to a stated timetable. At the hearing each witness was to be called to swear or affirm to tell the truth, then asked to adopt their previously exchanged witness statement as their evidence-in-chief and then moved immediately to cross-examination and then to brief re-examination.

24. The hearing was fixed for 12 – 16 December 2016. The earlier Case Management Discussion had determined that the panel hearing the case was to read the exchanged witness statements and, to the extent necessary, parts of the agreed bundle between 10.00 am and 12.00 pm. The hearing proper was to commence at 12.00 pm on the first day and at 10.00 am on subsequent days.

25. Having seen the statement of one respondent witness, the claimant wished to submit a supplemental witness statement. The directions in relation to the witness statement procedure had set out a sequential timetable for the exchange of witness statements. The claimant and his witnesses provided their witness statements first and the respondent's witnesses subsequently provided their witness statements to the claimant's solicitor a few weeks later.

26. A further Case Management Discussion was held at 11.00 am on the first day of the hearing, ie Monday 12 December 2016. The claimant had applied for permission to lodge a brief supplemental witness statement. The respondent had objected to that application. After hearing the parties, the Tribunal ruled that the supplemental witness statement would be admitted into evidence. The Tribunal ruled that in cases where a sequential or indeed a simultaneous exchange of witness statements had been directed, there was always the possibility that a witness for either side would be caught unprepared or by surprise by something in a witness statement submitted by the other side. Pedantically holding everyone to the terms of the original witness statements would not necessarily be in accordance with the overriding objective. Furthermore, a debate about the relevance of supplementary evidence in such circumstances would be extremely time-consuming and would be difficult to determine in a discrimination case, without hearing all the evidence, and all the submissions, in relation to both the claim and the defence. On balance, and in accordance with the overriding objective, the supplemental witness statement was therefore permitted.

27. Permission was also granted for any additional and focused oral evidence-in-chief which might be required from any witness as a result of either the supplementary witness statement or indeed for any other cause.

28. The hearing proper therefore started at 11.45 am on 12 December 2016 after the determination of that preliminary issue.

29. On behalf of the claimant, the Tribunal heard evidence from:-

(i) the claimant himself;

(ii) Mr William Lamrock, the chair of the interview panel and director and co-chair of the respondent organisation;

(iii) Mr Stephen Gallagher, former chairperson of Curryneirin Community Association;

(iv) Mr Patrick Maguire, youth worker; and

(v) Mr Gareth Lamrock, youth worker.

30. On behalf of the respondent, the Tribunal heard evidence from:-

(i) Ms Alison Wallace, strategy manager and director of the respondent and interview panel member;

(ii) Ms Geraldine Doherty, director and co-chair of the respondent and interview panel member;

(iii) Ms Geraldine Boggs of a Department for Social Development who was an observer during the short listing and interview processes;

(iv) Ms Linda Watson, director of the respondent organisation; and

(v) Ms Karen Mullan, director of the respondent organisation.

31. The Tribunal sat for four days from 12 – 15 December 2016. Submissions were heard on 20 January 2017. The panel met later on 20 January 2017 and again on 30 January 2017 to consider the evidence, the submissions and to reach a decision. This document is that decision.

Relevant findings of fact

32. The claimant was a community worker. He worked at the relevant times in the Curryneirin area of Londonderry. This was an interface area where there were ongoing community tensions between Curryneirin and the neighbouring area of Tullyally.

33. The claimant had been active in youth work in the Curryneirin and Tullyally interface through a body called the Tullyneirin Youth Forum.

34. The claimant stated, in his witness statement that he had been discriminated against by the respondent because of three political opinions. Firstly, that he was a socialist. Secondly, that he had a '*socialist world view*'. He stated that he was critical of Sinn Fein and was known to be critical of Sinn Fein. Thirdly, that he was critical and was known to be critical of what he regarded as a '*carve up*' of segregated and disadvantaged communities between Sinn Fein and the Democratic Unionist Party. In answers to cross-examination, he concentrated on the second

and third reasons, ie his criticism of Sinn Fein and his opposition to the alleged '*carve up*' of communities (and funding) between Sinn Fein and the Democratic Unionist Party.

35. He argued that he was to the left of Sinn Fein and that socialists in Northern Ireland would recognise that the two main political parties were engaged in a carve up. Politics had changed in Northern Ireland over the last 15 – 16 years '*but not necessarily in a good direction*'.

    Ms Wallace, in cross-examination, accepted that others, and not just the claimant, held the view that there had been a '*carve up*' between Sinn Fein and the Democratic Unionist Party.

36. In this decision, the Tribunal is not deciding whether there is, or has been, a '*carve up*' of disadvantaged communities. The legislation, as currently worded, is not restricted to mainstream political opinions. It is not even restricted to political opinions which are valid or correct. It relates to any opinion in relation to the governance of the state, or any opinion in relation to matters of public policy, with the exception of some opinions in relation to method. Such opinions can be commonly held opinions, or opinions held only by fringe groups or even opinions held only by one individual.

37. The claimant did not appear to accept that Sinn Fein members were socialists. They '*professed to be socialists*'. He stated that his views would have contradicted those of Sinn Fein. The precise nature of the ideological conflict is not clear except in relation to the organisation of community work. The claimant's view was that people, specifically the residents of Curryneirin and Tullyally should '*think for themselves*' and not be part of the alleged territorial or political control of Sinn Fein and the DUP. The Tribunal is not required to assess whether that view was correct or incorrect; widely held or held only by a few people.

38. The claimant had worked for approximately three years between 2002 and 2005 as an unpaid co-ordinator for the North West Social Forum, which dealt with peace building initiatives in relation to interface areas in Londonderry. The claimant, during this period, had taken part in a body described as the Interface Monitoring Forum. The unchallenged evidence of the claimant was that Sinn Fein had not participated in this Forum at that time because it had included the PSNI.

39. The North West Social Forum was set up to '*provide an alternative to party politics*'. Its stated aim was '*to set up a process which would allow them (the people) to participate outside of political party involvement*'. It was expressly a non-party political forum. It is apparent from press coverage produced by the claimant to the Tribunal which was dated between 2004 and 2005 that the claimant had been actively involved in this forum, particularly in relation to youth work in Londonderry.

40. After 2005, the claimant had been employed in a series of community posts in Belfast, Coleraine and Londonderry. From 2012 to 2014 he had been the Sports Community Officer in the Respect programme in Londonderry. From 2014 to 31 March 2015, he had been an outreach worker in the Peace Walls programmes in Londonderry which had been funded by the IFI, until that programme closed. He had worked in the Curryneirin and Tullyally areas.

41. After 31 March 2015, the claimant had worked in a voluntary capacity in the Curryneirin area with local youth. He had worked alongside the part-time youth worker who had been employed by Hillcrest House, a charitable organisation. That employed youth worker had been line managed by Ms Geraldine Doherty and he had worked through the Curryneirin Community Association ('CCA').

42. It is not in dispute that there had been tensions between the CCA and the respondent organisation. Both Ms Doherty and Ms Wallace accepted, in cross-examination, that they had been aware of such tensions. Ms Wallace, in particular, stated that the CCA had not met regularly in the two years up to June 2014 and that the then chairperson, Mr Stephen Gallagher, had been the chairperson of '*nothing*'. Both Ms Doherty and Ms Wallace stated that the respondent organisation and DSD had been unhappy with the standard of the work produced by the CCA.

43. To access funding in relation to community work and, in particular, in relation to funding of the Community Development Officer post, the CCA had to work with the respondent organisation through which funds had been channelled by the Department for Social Development.

44. There had been particular tensions in the period up to March 2014. DSD funding had been withdrawn at that point. The respondent organisation made it plain that neighbourhood renewal funding could only be accessed through it. Ms Wallace, who was responsible for neighbourhood funding channelled through the respondent became involved in the CCA in June 2014.

45. Mr Stephen Gallagher, the former chairperson of the CCA, who had been criticised by Ms Wallace, stated that the community had remained independent of '*any political organisations*' for 15 years. He stated that he had been harassed by Ms Wallace of the respondent organisation in an effort to force the CCA to invite Sinn Fein to their meetings. Ms Wallace, in cross-examination denied that she had attempted to force the CCA to invite Sinn Fein to meetings but accepted that her interaction with the CCA on behalf of the respondent organisation had been resented by the CCA's workers. It is no part of this Tribunal's function to determine whether or not the workers or indeed Ms Wallace had valid complaints in respect of this dispute. It is, however, clear that there had been a significant dispute between the CCA and the respondent organisation.

46. It also seems clear that Ms Wallace had some detailed knowledge of the claimant's voluntary activities in relation to youth work in the Curryneirin area. She had taken part, for example, in a discussion about whether or not those activities had sufficient insurance cover. Again, the Tribunal is not concerned about whether or not insurance cover had been correctly provided or indeed whether the queries about insurance cover had been generated by any particular individual. The Tribunal concludes that Ms Wallace had been aware of the claimant's activities as a voluntary youth worker in the Curryneirin area after the Peace Wall programme had finished.

47. Ms Doherty also had detailed knowledge of the claimant's activities in the Curryneirin area. She accepted, in cross-examination, that she had been aware of his duties as a paid outreach worker and then of his duties as a voluntary youth

worker. She line-managed the part-time youth worker who had been directly employed by Hillcrest House and who worked through the CCA.

48. Ms Doherty also stated, in cross-examination, that meetings of the WNP had always started with a discussion of Curryneirin. She had been '*fully aware of the problem in Curryneirin*'. She had met with the CCA Youth Sub-committee every six weeks following the withdrawal of DSD funding in March 2014 up to the date of the interview.

49. Mr Maguire and Mr Gareth Lamrock both gave evidence to the effect that cross-community youth work in the interface area had benefited from the claimant's presence and had suffered once the claimant left following the incidents raised in this Tribunal claim. That was disputed by the respondent's witnesses. Again, this is not an issue which the Tribunal is required to resolve. The Tribunal is required to resolve an allegation that the claimant suffered a detriment because of a political opinion, ie an opinion in relation to public policy. It is not required to make findings in relation to the details of the claimant's working history or to make findings on the merits of any dispute in relation to youth work.

50. Ms Helen Henderson, director of St Columb's Park House, another community organisation, prepared a report at the end of 2015, after the interview process, which was entitled '*Observations on Current Issues between Curryneirin and Waterside Neighbourhood Partnership*'. That report stated in clear terms:-

> *"The relations between DSD, WNP, Curryneirin Committee are increasingly polarised. We need to reduce that tension. All of us need to step back and take a deep breath."*

The report further stated:-

> *"Communications between WNP and the Committee had been problematic. It was agreed at the February Committee meeting that to simplify things that all communication should come through the chairperson of the Curryneirin Committee. This has not happened. The relationship between both these groups has completely broken down with no trust."*

The report further stated:-

> *"The Curryneirin Committee have felt powerless and that no one listens to them. They are a group of residents who volunteer in the community centre and have limited access to resources and many have caring responsibilities for family. The strategy manager (Ms Wallace) is in a position of power with access to public money and plays a pivotal role in the community development agenda across the neighbourhood renewal areas. This case raises the question about the centralisation of power with one person. Whoever this person is and however fair and consistent they are, it is questionable whether this amount of power should not be held with one position and one person."*

51. Ms Wallace and Ms Doherty accepted that they had a high regard for Ms Henderson. However they criticised the report and stated that they had not been asked for comments on a draft report before it had issued in final form. That

said, it is clear from the contents of the report, and it has not been challenged in cross-examination, that the organisation employing Ms Henderson had been asked by Ms Wallace and by development workers from both Tullyally and Curryneirin to look into this matter and to prepare this report. The fact that such a request was made indicates that there had been significant difficulties in the relationship between the respondent and the CCA in 2015.

52. As indicated above, it is not this Tribunal's role to determine who, if anyone, was at fault in the deteriorating relationships between the CCA and the respondent. It is, however, clear that there had been significant difficulties in that relationship and that those difficulties had, to a significant degree, concerned a resentment on the part of some individuals about the role of WNP in administering neighbourhood renewal funding on behalf of DSD.

53. The respondent and the CCA agreed that a Community Development Officer ('CDO') should be appointed in the Curryneirin area. That post was to be funded by the Department for Social Development. It had decided that the necessary funding would be channelled through the respondent who would be the legal employer of the person appointed. That person would work with the CCA. Curryneirin is a deprived area. It shares a sectarian interface with Tullyally. In terms of the sectarian division within Northern Ireland, and to the extent that it matters in this case, the former is Roman Catholic; the latter is Protestant.

54. The job specification and job description for the CDO post had been agreed by the respondent organisation and the DSD. They had been based on those used in an earlier competition for a CDO, who had been previously employed by the CCA. Both the job specification and description had been discussed between the respondent and with the DSD. At this stage either Ms Doherty or Ms Wallace or indeed anyone else in the respondent organisation could have brought forward amendments or suggested changes in either the job specification or job description; in particular, to change the nature of the relevant experience required. No one did so. The only suggested amendments came from Ms Geraldine Boggs of DSD who had been the DSD observer in both the short listing process and in the interview process. Those amendments were adopted by the respondent organisation.

55. There is no evidence that the job specification and job description had not been entirely satisfactory when it had previously been used in the same circumstances. The respondent organisation had been content to adopt it again without any amendment. As indicated above, some amendments had in fact been proposed by Ms Boggs but it was not argued before this Tribunal that those amendments were either significant or relevant to this case.

56. The amendments were set out in an e-mail from Ms Boggs to Ms Wallace on 3 June 2015 [*E4*]. That e-mail stated:-

> *"Realistically we are looking for someone who will:*
>
> *work with the community (identify the needs and engagement);*
>
> *agree programme of activity (maximise the use of the centre);*
>
> *agree funding strategy and source funding for it; and*

develop a community action plan to be reviewed and evaluated (ongoing)."

Those amendments, summarised above, did not require any particular form of community development experience and did not exclude or downgrade community development experience which had been gained in youth work.

57. Four essential requirements were agreed on by the respondent organisation and by DSD. Only one was set out in a Jobcentre advertisement. That advertisement stated:-

> *"Essential requirements : a third level qualification in a relevant field and at least three years' experience in a community development role OR a recognised qualification in Community Development/Leadership and Supervision Management skills plus five years' experience within the Community/Voluntary sector."*

No mention was made of any particular type of community development experience. There was no indication that youth related community development experience would not be regarded as sufficient.

58. The claimant completed an application form on 29 May 2015. He set out in some detail his educational qualifications. Those educational qualifications included a third level qualification, ie a BA Hons in Peace and Conflict Studies. That seems to have been a suitable qualification for community development work within Northern Ireland. It was clearly regarded as such by the short listing panel.

59. The claimant set out, again in some detail, his employment history from 1986 to the date of the application. That history included 15 months working for the Peace Walls Programme. The unrebutted evidence of the claimant was that this programme had not been exclusively related to youth work but that it had been related to community development work in general. The employment history also included 30 months in the Respect Programme. Again, the unrebutted evidence of the claimant was that this programme had not been exclusively a youth programme. The employment history also included 24 months as a Community Relations Officer dealing with an IFI Community Relations Programme in Coleraine. There was again no evidence that this work in Coleraine had been exclusively or primarily youth related.

60. The application form also stated clearly that the claimant had, since 31 March 2015, been working voluntarily.

61. It is clear from the evidence of Ms Wallace and Ms Doherty that they had both been aware before the interview that the claimant had been working voluntarily in the Curryneirin area in the months before the interview. In any event, the application form went on to state in some detail:-

> *"By way of evidence of a recent intervention pertaining to the job description, I have worked for the past 18 months spread between the Tullyally and Curryneirin estates; 16 months in a paid capacity; and the past two months in a voluntary capacity. The initial period was through the Peace Walls*

Programme and although this may not have been the success it could have been, I am firmly of the belief that my contribution to this programme was as successful as it could have been, given some of the issues that existed in the general programme management. For the past two months I have been working on a voluntary basis to try to maintain the momentum of this programme, working primarily with the youth of these areas. This work continues to prove to be very effective in creating new parameters for engagement towards creating strong, confident, cohesive and resilient communities."

(**NB:** Parts of the photocopied form have been cut off and parts of words are missing. However the excerpt above appears to be accurate.)

62. The short listing exercise was carried out on 1 June 2015 by the same three people who also formed the interview panel, ie Mr Lamrock, Ms Doherty and Ms Wallace. The four essential criteria were set out on the proforma used in that short listing exercise. As indicated above, only the first of those criteria had been included in the Jobcentre advertisement. That had been the criterion indicated above.

63. In any event, the short listing panel did not record any marking on the other three criteria in the proforma and appears to have ignored them. However, that may be because the first criterion was the only criterion which had been identified in the Job Centre advertisement as an essential criterion.

64. Four applicants were considered for short listing. Three applicants, including the claimant, were regarded as having satisfied the first essential criterion. It is therefore clear that the short listing panel had concluded that the claimant had:-

> *"A third level qualification in a relevant field and at least three years' experience in a community development role."*

Nobody at this stage noted in the short listing papers or argued that the claimant's experience in various community development roles had been the wrong kind of experience, or that it had been focused exclusively on youth work. No one argued either that the post had not been sufficiently advertised.

65. The interview panel consisted of Mr Lamrock, Ms Doherty and Ms Wallace. Mr Lamrock acted as chairman. At the time, he was the co-chair of the respondent organisation, as was Ms Doherty. Ms Boggs, a DSD official, acted as an observer on behalf of the DSD.

66. The interview of the three shortlisted candidates, including the claimant, took place on 5 June 2015.

67. No complaint of any sort, or any form of grievance, was lodged either during the interview, immediately after the interview, or at any other time since this interview process, raising concerns about the alleged conduct of Mr Lamrock as chair of the interview panel. No such complaint was made by Ms Boggs in her capacity as observer acting on behalf of DSD, either during the interview, immediately after the interview, or at any other time since that interview.

68. Nevertheless serious allegations have been made by Ms Doherty and Ms Wallace in their evidence to this Tribunal; both in their witness statements, which had been exchanged in advance of the hearing, and in their cross-examination before the Tribunal. Mr Lamrock first learned of these serious allegations when he saw the witness statements which had been exchanged in accordance with the case-management directions. It is noted that Mr Lamrock, Ms Doherty and Ms Wallace had been in frequent contact after the interview, both in person and by e-mail, and that no such allegations were raised in the course of that contact by Ms Doherty or Ms Wallace. This is particularly odd since the exchanges between Mr Lamrock, Ms Doherty and Ms Wallace had directly concerned the non-appointment of the claimant. If Ms Doherty and Ms Wallace had really felt that they had been bullied into marking the claimant higher than they otherwise would have done, it is extraordinary that these serious allegations were not made in the course of these exchanges. Furthermore, these allegations were not made in the feedback received by the claimant, in the response filed on behalf of the respondent, or in the interlocutory process. In fact, the response, completed with legal advice, asserted '*recruitment for the programming team was completed in a professional and effective manner*'. That statement is not consistent with an allegation of bullying by the chair of the interview panel.

The respondent sought an Order for a Deposit on the basis that the claim had little reasonable prospect of success. That was refused after a hearing on 2 February. The written decision contains no reference to any allegation of bullying or inappropriate behaviour and refers only to a '*dispute between the parties as to the extent or appropriateness of examples given by him at interview*'.

69. Mr William Lamrock stated in cross-examination that the three person panel (including him, Ms Doherty and Ms Wallace) had '*sat together many times*'. This was not rebutted. There had been no previous complaints. Ms Doherty in cross-examination had been quite clear that there had been no previous difficulties. She stated:-

> *"It had been the first time it had arisen. I felt very uncomfortable. I never had a problem with Mr Lamrock before."*

70. In contrast, Ms Wallace stated in cross-examination that:-

> *"William Lamrock can be unpleasant at times."*
>
> *"William Lamrock is very overbearing."*
>
> *"He can be a difficult person and can cause difficulties for you."*

She went on, unasked and unprompted, to refer to '*other incidents*'. No such incidents had been referred to in her witness statement, or indeed in anyone else's witness statement. No such '*incidents*' had been put to Mr Lamrock in cross-examination. He had left the hearing after that cross-examination and was therefore apparently not to be given any opportunity to respond to those further allegations. No such alleged incidents had resulted in any formal complaint or had been brought to Mr Lamrock's attention in any way. No other witness referred in cross-examination, to any such alleged incident. In fact, Ms Wallace accepted that she had wanted to sit on the interview panel and that she had known in advance

that Mr Lamrock would be the chair of the panel. It is difficult to reconcile the evidence of Ms Wallace with that given by Ms Doherty in relation to Mr Lamrock. It is also difficult to understand why Ms Wallace would have been as eager to sit on an interview panel with Mr Lamrock if he had been as difficult as she now claims.

71. Ms Wallace and Ms Doherty made a further serious allegation in their witness statements. They suggested that Mr Lamrock had been basing his scores for the claimant on a previous working relationship – that Mr Lamrock had been filling in gaps in the claimant's answers. This serious charge had not been made during or after the interview. It was not mentioned in any of the e-mails following the interview. Ms Wallace and Ms Doherty had put this allegation in their witness statements. However, that was apparently the first time that such an allegation was made. It was not made in the feedback received by the claimant, in the response to these proceedings in the interlocutory process, or, apparently, in the hearing to determine the application for a deposit order. That suggests that this allegation, like the allegation of bullying, is something that has only occurred to Ms Wallace and Ms Doherty relatively recently.

72. Ms Boggs, the DSD observer, attended the interviews of all three candidates. She stated twice before the actual interviews that the panel did not need to appoint anyone. She did not qualify that broad statement by saying that the panel did not need to appoint anyone if no one had met or exceeded the threshold mark of 59. She stated in evidence that it had been her standard practice to say this to '*settle*' the panel. She could not explain how such a remark could have '*settled*' a panel; particularly an experienced panel. It is difficult to see why this remark needed to be said at all, much less repeated, unless it had followed an earlier discussion about the suitability of one or more of the shortlisted candidates.

73. Ms Boggs in her witness statement stated:-

> *"After the conclusions of the interviews, the panel discussed the scoring and it was obvious that Willie awarded high marks to Gary (the claimant) while both Geraldine (Ms Doherty) and Alison (Ms Wallace) scored lower. Willie [Mr Lamrock] seemed reluctant to accept their arguments and when the panel broke up no appointment had been made."*

Ms Boggs, in her witness statement, did not allege that the chairman of the interview panel, Mr Lamrock, had bullied or had applied pressure to the other panel members, had exercised favouritism towards a candidate or had in any way acted improperly during the interview process. The most she said is that <u>after</u> the interview process there had been a discussion and that the chairman '*seemed reluctant to accept*' the arguments put forward by Ms Doherty and Ms Wallace.

74. In her cross-examination, Ms Boggs accepted that she had been present in the interview process as an observer. She accepted that her role had been to make a note if she had seen anything inappropriate in the course of the interview process. She stated that she had made notes at the interview but had destroyed them immediately afterwards. She stated that the destruction of the notes had been agreed by the respondent. She was unable to explain the purpose of destroying the notes. She did not state, in any event, that she had noted anything improper in the notes which she had destroyed. She had not raised any complaints to the respondent alleging bullying by Mr Lamrock . She did not raise any concerns with

the respondent that he had favoured one candidate or that he had, in any way, acted improperly. She accepted, in cross-examination, that she had made no complaint of any sort or any report of any sort to the Department raising concerns about Mr Lamrock's conduct of the interview as chairman. Given that she had been there to ensure propriety and to safeguard public funds, the absence of any complaint strongly suggests that no impropriety had taken place.

75. Ms Boggs confirmed in cross-examination that she had been familiar with community groups and with many of the personalities in the North West. She had been aware of the difficulties in Curryneirin and had taken part in discussions around it.

She denied knowing or having heard of the claimant. She said she had been working only with directly funded groups in her role as a Departmental official.

76. Ms Boggs said that the DSD had been funding Curryneirin Community Association directly in the period up to March 2014 but she stated that there had been no evidence of work being carried out. Funding had been withdrawn. The respondent had been selected as a vehicle '*to take on Curryneirin*'.

She had been aware of friction between the workers of the CCA and the respondent before the interview. She was vague about the timing of the friction.

77. She said in cross-examination that it had been her understanding that '*no appointment had been made*'. She did not see the collation sheet or the individual scoring sheets. The collation sheet was put to her in cross-examination – "*I was not aware Mr McClean was appointed when I left the room that day*". "*I can see that it is written there"*. Her evidence is simply not credible. She had been sitting at the same table as the interview panel and yet claims not to have seen the completion and signing of the collation sheet. Completion and signing of that sheet must have taken some minutes. She also claims not to know the claimant but she had been familiar with Curryneirin where he had been working and with the problems surrounding the Curryneirin Community Association. The claimant had been working with youth in the area and with the previous chairperson of the CCA.

78. She said, in cross-examination, that Mr Lamrock had been quite forthright. He had said "*OK come on*". The "*two girls were quieter*". He had been '*vocal*' and '*wanted a higher score*'. When asked why she did not write any of this down and keep a note, she stated "*I did not comment*". "*I was there to see they were asked the same questions and given the same time*". *"I suppose I expected to be called and interviewed by WNP*". *"I did not think it was my role"*. Again this evidence is not credible. Given the expenditure of public funds, her role had been to act as an observer on behalf of DSD. That had not simply been a matter of timekeeping and counting questions. If bullying or favouritism had taken place, it had been her role to report it. She did not. She did not even make any adverse comment in her notes which she had then destroyed anyway.

79. When asked if there was any other interpretation of the collation sheet other than the obvious she said '*probably not*'. That response was evasive. No other interpretation of the collation sheet was possible. Her answer should have been a straightforward '*No*'.

80. The interview process consisted of seven questions and a presentation by each candidate.

81. In relation to the presentation which was a presentation on '*how would you build community capacity in the Curryneirin area?*', Mr Lamrock awarded 18 out of 20 marks. Ms Wallace awarded 17 out of 20 marks. Ms Doherty also awarded 17 out of 20 marks. Each of the three interviewers accepted that they had been free to record their own marks. Their individual marks for the presentation were remarkably similar. Mr Lamrock awarded only one point more than Ms Wallace and Ms Doherty. Seventeen or eighteen marks out of twenty marks was, by any measure, an excellent result and Ms Doherty and Ms Wallace, in cross-examination, both accepted that this had been the case.

It is notable that when the post was re-advertised the presentation, where the claimant had excelled, was removed from the process.

82. The first interview question was:-

> *"What do you know about Curryneirin? Can you tell us how your experience and skills to date relates [sic] to this post?"*

The model answer said:-

> *"This should include a general overview – citing examples of line management, IT skills, familiarity with meeting and working with people at all levels; leading on initiatives/projects, finance, managing budgets, staff, etc.*
>
> *Curryneirin – interface, low community capacity, low educational attainment, child poverty, unemployment."*

Mr Lamrock awarded seven marks out of ten. He made notes in relation to the claimant's experience in Curryneirin, and in relation to his working experience in relation to Peace II and in Ballysally, as a mediator. He referred to the claimant working in Curryneirin for 18 months, education (for) multi-ability issues, isolation/apathy, Respect Programme Management, and Peace III Steering Group Agreements. Ms Wallace awarded six marks out of ten and again made notes in relation to his working history experience. Ms Wallace's notes were difficult to read. However she referred to the claimant's own educational background, the multiple needs of the community, isolation/apathy, unemployment and poverty, interface issues, the Peace Walls programme and a steering group. Ms Doherty awarded six marks out of ten and again made notes in relation to the claimant's working history and experience. She underlined *"low educational attainment*" in the model answer indicating that he had raised this point. She noted:-

> *"Peace Walls – experience conflict mediation, disadvantaged/apathy, Respect Programme, management/financial steering group, mediator, app(lication), delivery, Respect Project"*

There was no significant difference between the marks awarded by Mr Lamrock and those awarded by Ms Doherty and Ms Wallace in relation to Question 1.

Crucially, neither Ms Doherty or Ms Wallace noted any problem about the claimant's experience to date being the wrong type of experience for this post. This was precisely the interview question that would have highlighted any such concerns if, indeed, such concerns had ever existed.

83. The second question was:-

> *"Tell me about a time when you had to develop and deliver a community project or initiative? How would you apply this going forward? What went well? What would you change?"*

The model answer read:-

> *"Identify need – community survey stats*
>
> *Consult with target group*
>
> *Set up project working group*
>
> *Develop project idea*
>
> *Develop evaluation model*
>
> *Identify resources needed – staff, funding, venue, etc*
>
> *Identify funding if needed*
>
> *Deliver and evaluate programme*
>
> *Example –*
>
> *S – describe the situation*
>
> *T – describe tasks to be completed*
>
> *A – what action was taken*
>
> *R – what was the result/outcome"*

Mr Lamrock awarded nine out of ten marks on this question. He recorded notes of the claimant's answers referring to the claimant's experience in the Respect Project. He recorded '*Respect – need – sport – staff require/facility'*. He referred to a '*partnership approach, a steering group, monetary evaluation and recruitment co-ordinate venues, share space, convincing benefits and a baseline study*'. Ms Wallace awarded eight marks out of ten for this question and again recorded notes in relation to the claimant's involvement in the Respect Project. Her notes are again difficult to read. However she recorded references to staff management, the need for resources, a partnership approach, resources needed, evaluation and '*wont change anything*'. Ms Wallace alleged, in cross-examination, that she had changed this mark from seven to eight. Ms Wallace was evasive in relation to this mark when cross-examined. She was asked whether seven was still a high mark. She actually first said '*No*'. That was a surprising response. Then she said '*It was*

an OK score'. Then she said '*It was a good mark*'. She did not want to accept the obvious; ie that seven out of ten was a good mark and that was the mark that she had allegedly wished to give originally. She accepted that she had been free to record her individual mark. Ms Doherty awarded eight out of ten for that question and again recorded notes which also appear to refer to the Respect Project. She recorded references to a partnership approach, a steering group, recruitment, co-ordination, attitudinal changes and line management of two staff. She ticked those parts of the model answers relating to '*identify need'*, '*developing an evaluation model*' and '*identifying resources'*. That indicated that these areas had also been covered in the answers. There was no suggestion that she had changed her mark at any point.

There was no evidence before the Tribunal that the Respect Project had been exclusively a youth related project. There was no record in the contemporaneous interview notes or indeed in the short listing notes of any such concern on the part of Ms Doherty or Ms Wallace.

84. The third question was:-

> *"Give me an example of when you had to communicate a message? How did you know the message was understood? What other means of communication have you used?"*

The model answer read:-

> *"The Waterside Neighbourhood Partnership – Neighbourhood Renewal Activities/Projects. E-mail, presentation skills – PowerPoint*
>
> *Community engagement – e-mail – local flyers – parish bulletins – meeting and getting to know local residents and their issues (at the door), co-ordinating local people for specific initiatives/questionnaires, survey of needs in the area (to complement Neighbourhood Action Plans)*
>
> *Who were the audience?*
>
> *How did you do it?"*

Mr Lamrock awarded six marks out ten for that question. He again recorded notes in relation to the claimant's answer. He referred to '*different levels [of communication], statutory, PowerPoint, community, facebook, public meetings, face-to-face surveys, feedback, positive action plans*'. Ms Wallace awarded four marks out of ten for that question and again recorded notes in relation to the answer. Again, her notes were difficult to read. However, she included references to '*group discussions, telephone, community, facebook, mediation, focus groups, face-to-face (meetings) feedback from communities, action plans and further evaluation'*. Ms Doherty awarded five marks out of ten for that question and again recorded notes in relation to the answer. She ticked *'e-mail'* and '*PowerPoint*' in the model answer. She recorded '*F to F'* (face-to-face) and '*D to D'* (door-to-door). She recorded – '*community residents, networking/inter-agency, public meetings, focus groups, action plans, further evaluation*'. *As* with the previous questions, there was no startling difference between the interview panels' marking in relation to this question. Mr Lamrock had marked the highest with six, Ms Doherty was next

with five and Ms Wallace was lowest with four. This is not an unusual spread of marking in an interview situation.

In any event, Ms Wallace had felt sufficiently confident in relation to this question to award a mark of four; two marks less than Mr Lamrock who had awarded six marks. This is inconsistent with her argument that she had been bullied by Mr Lamrock and that she had been unable to record the mark she wanted. When cross-examined on this issue, she initially argued that Mr Lamrock had bullied her into giving a higher mark and then stated '*I cannot say how unpleasant it was*'. She argued that Mr Lamrock had wanted to give a higher mark than the six marks he eventually awarded. It was put to her that her own answer showed that Mr Lamrock had been prepared to listen to discussion and to then lower his mark to six. That was inconsistent with her repeated allegation that he bullied the other panel members and that he refused to listen. She then stated that '*he listened to us in relation to this question but not in relation to other questions*'. That answer was not credible. Nothing of that sort had been said before by Ms Wallace. There was nothing about this question or about this answer which would have made Mr Lamrock listen to the other panel members in relation, uniquely, to this question but not in relation to the other questions.

85. The fourth question was:-

> *"Can you tell me about a time when you have had to resolve conflict at a neighbourhood level? What was the outcome? Would you change?"*

The model answer read:-

> *"Listen, stay neutral, mediate, take advice, promote compromise, win-win, get outside support if needed."*

Mr Lamrock awarded eight marks out of ten on that question. He recorded notes referring to a '*conflict at the interface, 3 steps/2 back, seek advice – training outside, achieved (illegible) fund voluntarily'*. He referred to the '*makings of The Youth Forum'* ('TYF'?) responsibility of the area. Ms Wallace awarded the same mark, ie eight marks out of ten, and again recorded similar notes in relation to the claimant's answer. She referred to '*conflict between young people at interface – use previous skills – seek advice from outside agencies/training*'. She included the same phrase '*makings of Youth Forum*'. Ms Doherty awarded seven marks out of ten and again recorded notes in relation to a '*conflict between young people*'. She also referred in her notes to '*YF (the Youth Forum), conflict resolution, mediation, training, outside intervention – believes that change has been positive – funding??. Has been there two months voluntary'*. As previously, there is very little difference between the marking of the three members of the interview panel. Mr Lamrock marked the highest, followed in this case by Ms Wallace with Ms Doherty awarding a slightly lower mark. It has to be noted that the lower mark awarded by Ms Doherty was still over the threshold at 7 marks out of 10.

86. The fifth question was:-

> *"What do you know about neighbourhood renewal? How would you ensure the needs of Curryneirin are best met? What would you do?"*

The model answer read:-

> *"NR targeted action to address the inequalities that exist in the worst 10% of areas in Northern Ireland. In levels of deprivation, NRA's, social, community, physical and economic renewal. Neighbourhood action plans should identify services which need to be improved and facilities to be created/improved in Curryneirin.*
>
> *Needs analysis*
>
> *Strategic thinking"*

Mr Lamrock awarded eight marks out of ten. He recorded notes of the claimant's answer. He referred to a '*target of 10% of the most deprived, one plan of four pillars; community renewal, economic sustainability and training*'. He referred to '*physical development of empty (properties), the WNP renewal constitution and the need for WNP action interconnected resources needed*'. Ms Wallace awarded again eight marks out of ten with brief notes in relation to the claimant's answer. Those notes were illegible. Ms Doherty awarded exactly the same mark, ie eight marks out of ten, with brief notes of the claimant's answer. Ms Doherty ticked or underlined parts of the model answer covered by the claimant; ie *'worst 10% of areas'*, '*community*', and '*physical and economic renewal*'. She recorded '*one plan, action plans no duplication, building capacity and sustainability, training and employment*'. Again, as with the previous questions, there is really very little difference between the individual markings of the members of the interview panel. Eight marks out of ten is by any measure an excellent mark.

Again, given the wording of the question, and given their evidence to the Tribunal, it is odd that neither Ms Doherty or Ms Wallace had marked the claimant down in relation to the question on the basis that his experience was not related to neighbourhood renewal. There was no suggestion of any such concern even though the first part of the question had specifically asked:-

> *"What do you know about neighbourhood renewal?"*

87. The sixth question was:-

> *"Can you give us an example of a funding application process you have undertaken? What went well? What would you change? What was the outcome?"*

The model answer read:-

> *"Must describe the process of making an application, ie identify project – identify potential funders, write application – on successful allocation – scrutinise contract for funding – keeping invoices/receipts – give timely returns, keep to the budget – carry out regular monitoring and evaluation (questionnaires for users/stakeholders) – reporting to treasurer/management committee"*

Mr Lamrock awarded eight marks out of ten for that question and recorded notes of the claimant's answer. He referred to '*targets, potential funders, criteria,*

pre-conditions, receipts, evaluation, the Respect programme, new staff and improved delivery'. Ms Wallace awarded seven marks out of ten for that answer, again a mark which was above the threshold and she recorded notes in relation to the claimant's detailed answer. Those notes were again difficult to read. However she referred to, '*identifying needs, target group, indentifying potential funders, pre-conditions, finance procedure, people procedure, the Respect programme, Peace III and a working group*'. Ms Doherty awarded eight marks out of ten for that answer. She again recorded notes in relation to the answer given by the claimant. Again she ticked parts of the model answer – '*identify potential funders*' – '*invite application*' – '*keep receipts*' – '*evaluation*'. She noted '*working group, criteria Fin (finance?), reporting, Respect programme – accessed Peace III – resources for two new staff*'. Again, there is very little difference between the marks for this question given by the three individual panel members. Mr Lamrock and Ms Doherty marked the highest with eight marks out of ten and Ms Wallace awarded seven marks out of ten.

88. The seventh question was:-

> *"Tell me of a time when you had to monitor and evaluate a programme/ project? What would you do different? What went well?"*

The model answer read:-

> *"Based on needs of funder and organisation. Adapt to suit user group, questionnaires, focus groups, one-to-one, sign-in sheets, use of multi-media, survey monkeys etc. Qualitative and Quantative"*

Mr Lamrock awarded seven marks out of ten for that question and recorded notes in relation to the answer. He referred to the Peace III Project and to evaluations set by the funder. He referred to '*pre and post attitudes, evaluations, funder sets, targets, surveys, markings and funder requirement*'. Ms Wallace awarded six marks out of ten for that question and again recorded notes in relation to '*the Peace III exercise, pre and post surveys, measuring outcomes, changes in attitude, funder requirements, requesting advice, questionnaires, survey notes and multi-media*'. Ms Doherty awarded six marks out of ten for that question and again recorded notes in relation to '*Peace III Project and funding requirements*'. She ticked parts of the model answer – '*use of multi-media'* – '*survey monkey*' (apparently a technical term). She noted '*Peace III – pre and post, attitudinal survey, funder requirements, informal discussions, he has been successful in the past*'.

89. On the final page of her notes, in a space which had been left to record any questions put by the candidate, Ms Doherty recorded:-

> *"Who have you been volunteering with??"*

That is likely to have been completed at the end of the interview process when Ms Doherty had reached that page. She had already noted in relation to Question 4 that:-

> *"Have [sic] been there 2 months voluntary."*

In cross-examination she stated that the question noted on the final page had been '*curiosity*' on her part. It is odd that if she had been simply curious to the extent of writing this question down with two question marks, that she had not asked for further clarification during the interview.

90. At the conclusion of this individual scoring, a proforma document was completed in handwriting by Ms Wallace and signed by Ms Wallace, Ms Doherty and Mr Lamrock as chairman. That document was described throughout cross-examination and in the witness statements as a collation sheet. It was in fact identified as a '*score sheet*'. It recorded the total individual marks of each interview panel member for each of the three candidates. Given that these total marks covered seven questions and a presentation, there was relatively little difference in the marks awarded by each interview panel member. In relation to the first candidate, Mr Lamrock had awarded 38, Ms Doherty 42 and Ms Wallace 43. In relation to the claimant, Mr Lamrock had awarded 69, Ms Doherty 65 and Ms Wallace 64. There seems to have been an arithmetical error. Mr Lamrock scores amounted to 71. In relation to the third candidate, Mr Lamrock had awarded 56, Ms Doherty 57 and Ms Wallace 62. The threshold had been agreed beforehand as 59 marks out of 90. There was no discussion in relation to the first and third candidates and in fact there had been a consensus that the first and third candidates had been eliminated. It is also clear that on each of the three individual marks, the claimant had been significantly above the threshold which had been agreed in advance of the interview process.

91. There was a particular line in the collation sheet which commenced '*person appointed*'. Ms Wallace wrote in the claimant's name as the '*person appointed*'. That was followed by the three signatures of the interview panel members.

92. The panel accepts, and it was not in contention before the Tribunal, that the decision of the interview panel was technically a recommendation to the Board of the respondent organisation which would, in the ordinary course of events, have been followed.

93. The respondent asserts that the process had not been finished at that point. Ms Doherty, in particular, asserted clearly that her view was that the marks were not determinative of the issue and that even where an individual scored the highest marks and was significantly above the previously agreed threshold mark, that person need not be appointed. When it was put to her that this was contrary to the principle of equal opportunity and that it could be contrary to the recruitment and selection code produced by the Equality Commission, she did not accept that point.

94. After the collation sheet had been completed and the three interview panel members had added their signatures to that document, discussion continued. That lasted for one hour approximately. Mr Lamrock then had to leave to go to another meeting. A further discussion continued for approximately five minutes in Mr Lamrock's absence. It appears that despite the clear markings recorded by Ms Doherty and Ms Wallace and despite the clear terms of the collation sheet, those two interview panel members, for some reason, had decided that the claimant was not to be appointed.

95. On the day of the interview, or on the day after the interview, ie on 5 or 6 June 2015, Ms Karen Mullan was told by Ms Doherty that she had concerns about appointing the claimant. This was an unminuted conversation. It was not mentioned at all by Ms Mullan in her witness statement. It was mentioned for the first time in cross-examination.

96. Mr Lamrock met with Ms Doherty and Ms Wallace on Tuesday 9 June. During that meeting, Ms Doherty stated that she had reservations. She stated that the reservations that, she and Ms Wallace, had related to Questions 3 and 7. She did not raise any other issue. She accepted, in cross-examination, that in relation to Question 3 she had given 50% of the total marks. She accepted that this had not been a bad mark. She stated that during the answers to that question which related to means of communication, the answers given by the claimant had been insufficient.

97. It was put to Ms Doherty in cross-examination that she had ticked both e-mail and PowerPoint. She had ticked face-to-face meetings. She had ticked door-to-door. The claimant had also mentioned networks, inter-agency discussions, public meetings and action plans. She was asked what precisely had been missing in answers which had raised her extraordinary level of concern. Her answers in cross-examination were evasive. She said at one point that he had not specifically linked the action plan with the WNP action plan. She, however, accepted that no one had provided all the possible answers. She was unable to say what part of his answers had been so deficient that it had raised the particular level of concern that she had been and was now expressing. When it was put to her that she was straining to find a reason to justify what she had said during the meeting on 9 June she stated '*yeah*'.

98. In relation to Question 7 Ms Doherty accepted, in cross-examination, that she had given the claimant six marks and that this had been '*a good answer*'. She stated in cross-examination then that his answers had been generic. He had not outlined his role. When it was put then in cross-examination that he had mentioned several different aspects of his work, the Respect Programme, work in resolving conflict at a neighbourhood level, Peace Walls Programme, etc she stated '*yes but they were in relation to youth work – this is where I felt the programme had let us down*'. It is difficult to reconcile this new proposition with the original proposition that the answers had been '*generic*'.

    This concern about the claimant's experience being in youth work, even if accurate, was not reflected in the interview notes. Ms Doherty had actually recorded in relation to Question 7:-

    "He has been successful in the past."

    Concerns about '*the programme*' or about a focus on youth work were not raised by Ms Doherty (or anyone else) in the e-mails following the interview until Ms Doherty said on 7 July that:-

    "I believed the process failed us as a Board."

99. The feedback to the claimant on 22 July did not refer to a focus on youth work. It stated that throughout the interview he had referred to only one project, ie the

Respect Project. Apart from not being correct, since the claimant had referred to the Peace Walls Project and to other employment, the feedback did not refer to a belief that the claimant's experience had been deficient because it had been restricted to youth work.

100. Ms Doherty was pressed further in cross-examination. It was suggested that it was odd that the competition had been re-run using the same job specification and description if her concern about the claimant had been that his experience had been too narrowly focused on youth work. She stressed '*we were trying to get someone who had all round community development experience and not just youth work*'.

101. Ms Doherty was asked repeatedly why, if she felt that the competition had to be re-run because of those precise difficulties, the same job documentation/ job specification/job description had been re-used. She stated '*we believed it would be unfair to change. It would be unfair of us when we were going out for a second time*'. When it was put to her that that answer was nonsense she stated '*this had been the concern raised during the discussion*'. When pressed several times about why she did not change the criteria for the second interview, she refused to address that question and stated '*our discussion was to do with all round community development work*'.

102. Ms Doherty accepted then, under cross-examination, that the Peace Walls Programme had not been restricted to youth. It had been mentioned in the claimant's answers. She was unsure about the Respect Programme : she did not know a great deal about it.

103. On 11 June 2015, some six days after the interview, Ms Wallace had e-mailed the other two panel members, Ms Doherty and Mr Lamrock, to say that:-

> *"I feel the questions the candidate didn't answer well were the relationship/ communication question and the programme planning question and on that grounds [sic] I feel the post should be re-advertised ... ."*

Much of this e-mail has been redacted on the basis that it referred to or contained legal advice. That said, the remarks which have been disclosed appear to relate to Questions 3 and 7 where Ms Wallace had awarded four out of ten and six out of ten respectively. The agreed procedure did not provide that each candidate should achieve a threshold in each and every question. It had been an overall threshold. No respondent witness has suggested that a mark below a particular level in relation to a single question ruled out a candidate. That was not asserted in any witness statement or in any cross-examination. The contents of the e-mail were not consistent with Ms Wallace's overall and contemporaneous marking. They were not consistent with the collation sheet that Ms Wallace had completed and had signed at the end of the interview.

104. On 12 June 2015, Ms Doherty replied to both Ms Wallace and Mr Lamrock stating:-

> *"As you are aware I have doubts in relation to the candidate who scored the highest being able to fulfil the intended role of community development officer for Curryneirin, as such I am more than happy for the job to re-advertised and the candidate being invited to re-apply."*

Ms Doherty did not, at this stage, raise concerns about any particular question during the interview. Her concerns were more general. She stated she had doubts in relation to the claimant's ability to fulfil the role of CDO. Again those remarks were inconsistent with Ms Doherty's contemporaneous interview marking on 5 June 2015 and inconsistent with the collation sheet signed by Ms Doherty which had clearly identified the claimant as the person to be recommended for appointment.

105. On 12 June 2015, Mr Lamrock replied to the other two panel members stating:-

> *"We need to call a meeting of the Company as there are risks and issues for us in this matter. Can we arrange a meeting for week starting 22nd."*

No meeting of the Board of Directors of the limited company ever took place in this matter. Any such meeting would have consisted of four individuals, ie Mr Lamrock, Ms Doherty, Ms Linda Watson and Ms Karen Mullan. Given the importance of this issue; the non-appointment of the highest marked candidate, it seems odd that a meeting of those four individuals proved impossible. If such a meeting had been held, there could have been a full discussion between Mr Lamrock and the other two interview panel members.

106. On 19 June 2015, Ms Wallace tried to arrange a meeting. Ms Doherty confirmed her availability. Ms Mullan was not available, neither was Ms Watson.

107. Following discussion between Mr Lamrock, Ms Wallace and Ms Doherty it had been agreed that a letter would be sent to the claimant highlighting that out of the candidates interviewed he had scored the highest but the panel felt that there had been weaknesses in a number of questions and as such he had been called for a second interview. That was set out in an e-mail from Ms Doherty to Ms Wallace on 24 June 2015.

108. Arrangements were made for a second interview. It was agreed that Mr Lamrock and Ms Doherty would not be on the panel. It was arranged that Ms Mullan would sit on the panel.

109. On 6 July 2015, Ms Wallace wrote to the other panel members stating:-

> *"I have been trying to arrange a meeting of the Company to discuss an issue regarding the recruitment of the community development officer for Curryneirin, unfortunately I have not been able to get a date that suits everyone. As the interviews took place over a month ago we need to let the applicants know the decision and also it is a matter of urgency that we get a worker placed in Curryneirin. Could you let me know your thoughts on the matter by e-mail. Details are as follows.*
>
> *Three people were interviewed, only one reached the threshold to be appointed. Two of the panel had major concerns about the ability and skill level of this person to fulfil the role – (section redacted) – two options have been suggested.*
>
> - *(five lines redacted in total)*

2. *One of the co-chairs also sought advice and suggest that we offer the highest scoring participant a second interview and then re-advertise if needed.*

I would be grateful if you could come back to me with your opinion as soon as possible. If you need any more information give me a ring."

110. Mr Lamrock wrote back to Ms Wallace, copied to Ms Doherty, Ms Mullan and Ms Watson, that:-

"It needs to be made clear that the recruitment was run and scoring completed. The questions for the interviews were based on a previous Tullyally post and amendments made by DSD and agreed. A threshold of 65% was set (this translated to 59 marks). On the completion of the interviews two candidates had scored below this and one had achieved 65 marks approx. (Roughly 70%.) The collation sheet was prepared and all three interviewers signed it agreeing this was accurate. That brought an end to the process.

In all recruitment processes you are told your personal opinion is not to be entered into it. If you know someone or not, it must not make any difference so as to not prejudice the process.

WNP Company is opening itself to risk if we overturn a process based on perception and not hard facts from the interview.

(One line redacted)."

111. Ms Watson replied to that e-mail, copied to all parties:-

"In my opinion – if we were not to offer the person who reached the threshold the post they could come back and ask questions and as we have been open and transparent we would have to give them the scoring. I think the best way forward is to offer them a second interview – using a new panel and new questions and then make our decision as to their suitability. If they do not make the threshold this time we go back out and recruit for the post but make sure we say in the advert that 'anyone who has already applied for the post should not re-apply'."

112. On 7 July 2015, Ms Doherty wrote to all parties stating:-

"I have concerns now in relation to the length of time this process is taking, to allay everyone's fears could we re-advertise the post and invite all three candidates back for interview."

113. On 7 July 2015, Karen Mullan wrote to all parties stating:-

"Sorry folks for not getting back sooner as I have been up to my eyes. If two out of three interviewers are not happy with the candidate I think we should go back out to re-advertisement and invite them all to apply.

In the private and public sector they don't appoint people just because they did the best interview, they won't appoint unless the candidate is right for the job and if the panel does not agree, the process begins again and in the community sector we should be doing the same, particularly giving the legacy that Curryneirin had been let down by the previous staff, I feel we would be doing this community an injustice in not trying to seek the best person possible. I also agree this process is going on too long not only is Curryneirin being left without a worker but we will also be losing all funding for that area.

I would be happy re-advertising and would suggest that if the Curryneirin committee have any funds available they should pay for an advert in the local papers to cast the net further."

114. On the same day, 7 July 2015, Ms Wallace replied, stating:-

"Thanks for coming back to me I know everyone is busy at the moment. I agree we should not appoint someone that two out of three interview panel members believe based on the interview is not suitable for the job. I think the best way forward is to begin the process again, re-advertise and ask the three previous applicants back for interview in that way everyone is being treated equally.

(Three lines redacted).

Therefore to move things on could we agree to start the process again, re-advertise and ask the three people back again. This is taking up so much of my time and Curryneirin really needs a worker in place as soon as possible."

115. On the same day, Mr Lamrock replied:-

"Based on the interview and the threshold line set at 65% there was one candidate on all three cards who exceeded this. The process had a collation sheet signed by all three interviewers agreeing to this marking. Based on the interview and against agreed/approved questions there was a successful candidate. Now for that decision to be overturned there must be a strong reason based on fact that will stand up to scrutiny. Otherwise the company would open itself to risk. I am not prepared to do that. This is public funds and it is there to be assessed by many who would have an interest.

Also because we do not like the result we cannot just scrap and run the process again without very good reason."

116. There was yet more correspondence on 7 July 2015 but much of it has been heavily redacted on the basis that it contained or referred to legal advice. Ms Wallace wrote to the other parties and stated:-

"Can we not just re-advertise the post and move things forward as a second interview [presumably of the claimant] as you know will serve no purpose its just delaying the process. Please re-consider so we can get someone in place for Curryneirin."

117. Again, on 7 July 2015, Mr Lamrock replied to Ms Wallace stating:-

> *"You had agreed to call the candidate back for a second interview and ask questions on the areas that you felt they were weak on. That was a fortnight ago. If you keep changing your mind then of course we delay the worker getting into Curryneirin, which we all want."*

118. Ms Watson re-entered the correspondence later that day, stating to Mr Lamrock:-

> *"This was probably down to me [presumably the delay] as the more I thought about it the more I believed the process failed us as a Board. Yes the candidate reached the threshold but was weak in a number of the answers and the experience that the candidate referred to was very much focused on one project that they were involved in and as such I do not really feel that this candidate meets the requirements that are needed for Curryneirin.*
>
> *Again I feel the best way forward and probably the fairest is to re-advertise and invite the three candidates back for interview with a new panel."*

119. On or about 9 July 2015, Ms Wallace wrote to the parties, including the claimant, stating that:-

> *"On this occasion the panel have decided not to appoint anyone at this time. The post will be re-advertised and you are welcome to re-apply."*

120. On 22 July 2015, Ms Wallace wrote to the other interview panel members indicating that the claimant had come back looking for feedback from the interview and for the interview notes. She stated that she was going to send the notes with the names of the interview panel removed as advised by the Labour Relations Agency. That particular statement does not make any sense at all. The interviewers had been identified at the interview. They were known to the claimant and the claimant was known to them. The proposed comments included the statement that the claimant had referred to only one project as an example of his work (the Respect Project). However that was not factually correct. The claimant had also mentioned his work in relation to the Peace III Project and his work in Coleraine.

121. Mr Lamrock refused to join in the response which had been drafted by Ms Wallace. He stated that in relation to Question 3 and 7 he gave six and seven marks respectively out of ten. He stated these had been good marks. He stated that the draft response reflected a majority of the panel's views.

122. Arrangements proceeded for the re-advertising and re-interview for the post. The claimant did not take part in that new competition.

123. It is clear that the interview notes which were sent by Ms Wallace to the claimant had a significant part of those notes removed without any indication that that part had been removed. In particular, that part recording the setting of the threshold marking of 59 marks and the blank space where the interviewers would have completed their names had been removed. When pressed in cross-examination as to why there had been this deletion from the forms, the only explanation that Ms Wallace put forward was that she had been advised that the

names of the interviewers should not be related directly to each scoring sheet. However, since the place for the names had been blank in the original forms there had been absolutely no reason for the deletion other than the obvious reason of avoiding telling the claimant that the threshold marking had been set at 59 marks and that therefore he had exceeded that threshold mark. The evidence given by Ms Wallace, particularly under cross-examination, in this regard was unconvincing and evasive.

124. The final version of the reply to the claimant's queries went to him on 29 July 2015. It referred to Questions 3 and 7. It stated that '*throughout the interview*' he had referred only to the Respect Project as an example of his work. That version did not make it plain that there had been a significant disagreement within the panel. It did not say that the comments and views expressed were those held by only two of the three interview panel members. It did not say that the chairman disagreed. It did not set out the chairman's views. It simply stated that they were the views of '*WNP Ltd*'. It did not allege bullying, favouritism, poor advertising, experience being restricted to youth work, poor process, an unwillingness on the part of the CCA to work with the claimant or any difficulty in managing the claimant. That response was deliberately misleading.

125. On 29 July 2015, the claimant wrote to Ms Wallace indicating that he believed that he had been the victim of discrimination on the basis of his perceived political opinion. In accordance with the Data Protection Act he sought copies of all documentation in relation to the interview process. He asked if a threshold mark had been set. He asked for a copy of the notes of the '*independent observer*' (Ms Beggs).

126. There was discussion regarding a response to be sent to the Press Office. On 18 August 2015, Ms Doherty responded to this discussion by stating:-

> *"So sorry that this hasn't gone away yet."*

This remark does not demonstrate any willingness on the part of the respondent to explain what had happened. Coupled with the deliberately misleading feedback, it is extremely worrying.

Credibility

127. This is a highly unusual case where the highest marked candidate in an interview process, who had exceeded the agreed threshold marking, and who had been identified as the person to be appointed, was not appointed. Two members of the interview panel believed he should not be appointed to the post. The chairman of the interview panel believed that he should have been appointed. Various reasons were advanced at various times by the respondent for the decision not to appoint the claimant. The credibility of the other two members of the interview panel and indeed the credibility of other witnesses for the respondent is therefore going to be crucial in this matter.

At the risk of some duplication, it would be appropriate to separately set out the concerns of the Tribunal in this respect.

Ms Linda Watson

128. Ms Watson was a Board member of the respondent limited company. That company had been set up to deal with contractual matters, including those relating to employment contracts on behalf of the unincorporated association. She therefore had a particular responsibility in this matter.

129. In her witness statement she stated that she had been aware, as a Board member, that a recruitment process had been put in place in May 2015 to appoint a Community Development Officer for the Curryneirin area. She stated she had been made aware of the arrangements for the interview. She stated that she had later been made aware about 9 or 10 June 2015 by Ms Wallace that, even though the claimant had scored the highest of three candidates, Ms Wallace and Ms Doherty had concerns about some of the answers the claimant had given at the interview. She did not state in that witness statement that she had any concerns about the job description, about the process, or about the nature of the claimant's experience in youth work. She did not believe that a meeting of the directors had been necessary to enable her full understanding of the difficulties concerning the non-appointment of the claimant even though Mr Lamrock had requested such a meeting. She stated that '*I felt I received enough information to keep me fully informed*'. She further stated:-

> *"I am happy the initial interview process was conducted in a professional and fair manner."*

130. This hearing had been fixed well in advance after an extensive case-management process. Ms Watson would have had plenty of time to consider the contents of her evidence. In cross-examination she was quite definite that she had found out about the concerns held by Ms Wallace and Ms Doherty in an e-mail on 9 or 10 June 2015. In fact, no such e-mail could be produced. This would, on any reading of events, have been an unusual and serious matter. This had been a publicly funded appointment process at which a DSD observer had been present. Ms Watson had been told that even though the claimant had received the highest marks, two interview panel members felt that he should not be appointed. It is unlikely that in the context of the evidence to be presented in this matter, Ms Watson could have failed to recall what must have been a detailed and memorable meeting with Ms Wallace.

131. It is disturbing that Ms Watson accepted in cross-examination that at no stage had she asked for sight of the collation sheet or for any of the documentation in relation to this interview process. Again, this had been a highly unusual event. She merely stated that she had taken '*what Ms Wallace told me was the truth*'. She had made no further enquiries and had examined none of the relevant documentation. She had not insisted on a meeting of the Board as requested by the chairman of the interview panel.

132. She was pressed during cross-examination on why an individual who was the highest marked candidate and who had exceeded the threshold mark had not been appointed. In response she stated that she had been on other panels where there had been no appointment, including one where the candidate who had not been appointed had been two marks over the threshold mark. She emphasised in her

response that an appointment might not have been made if the candidate had been only slightly over the threshold mark. Even if such an argument were to be accepted as correct, that had not been the factual position in the present case. The claimant had been substantially over the threshold mark. She accepted that she had been told of the threshold mark and of the individual marks by Ms Wallace in her initial conversation.

It is disturbing that Ms Watson responded to the cross-examination by putting forward what had clearly not been a relevant analogy (even if correct) which had involved an individual who had only been slightly over the threshold mark.

133. It is also somewhat disturbing that even though this was again a highly unusual situation, Ms Watson had had unminuted discussions with Ms Wallace about this matter.

134. Furthermore, Ms Watson did not put in any e-mail or in any contemporaneous correspondence and crucially did not put in her witness statement that she had been told that Ms Wallace or Ms Doherty had been pressurised or bullied by Mr Lamrock. In fact, she stated '*I am happy the initial interview process was conducted in a professional and fair manner*'. Given the evidence of Ms Wallace and Ms Doherty to this Tribunal and given Ms Watson's position as a Board member, that is highly surprising.

135. In further cross-examination, she asserted that the claimant's previous experience in youth work had been inappropriate and not what the Curryneirin Community Association had required for this post. She appeared to be anxious to introduce this answer. This was not an argument that she had put forward in her witness statement. In fact, her witness statement referred simply to the answers that the claimant had given in the course of the interview.

136. Finally, Ms Watson had agreed that, in relation to the re-advertisement and the re-interview for the Community Development Officer post, the presentation would be removed from the interview process. The presentation had been the part of the interview where the claimant had been exceptionally successful. This part of the process had been removed when Ms Watson and the respondent organisation might have anticipated that the claimant might have applied for re-interview.

137. In short, the Tribunal's conclusion is that Ms Watson's evidence does not support the thrust of Ms Doherty's and Ms Wallace's evidence, in that she did not state in her evidence-in-chief that she had been told by Ms Wallace or Ms Doherty that they had been bullied by Mr Lamrock or that he had exercised favouritism. She did not take any of the action that the Tribunal would have considered normal if she had been told of any such conduct on the part of Mr Lamrock. She had asserted that the interview process had been conducted in a professional and fair manner despite not having conducted any enquiries into the matter, even though the chairperson of the interview panel had been significantly concerned. She had introduced a new argument in the course of cross-examination which she had not included in her evidence-in-chief or in any previous documentation. In short, Ms Watson's evidence was not credible.

Ms Karen Mullan

138. Ms Mullan had also been a director of the respondent limited company. She stated in her witness statement that she had confirmed in an e-mail of 7 July 2015 that she was of the opinion that:-

> *"You do not simply appoint an individual because they did best in interview, you must consider if they are in fact right for the job. Given that the majority of the interview panel were not convinced the claimant was suitable for the post based on the answers given at interview, my concern was that we would be doing the Curryneirin a disservice if we were to appoint the wrong person to the post simply because they achieved a better mark than the other candidates."*

Ms Mullan did not state in her witness statement that she had been told at any stage that Ms Wallace or Ms Doherty had been bullied or pressurised by Mr Lamrock. She did not state in her witness statement that the claimant's experience in youth work had been inappropriate and had not been what the Community Association had required. She did not state in her witness statement that the competition had been inadequately advertised. She focused solely on what she had been told, ie that the concerns were in relation to answers given at the interview.

139. Whilst she felt that a meeting of the directors, as requested by Mr Lamrock, would have been beneficial, she felt that it would have been difficult to arrange. She had been '*happy that I understood the concerns of all panel members and believed I had enough information to agree the approach taken*'.

140. In cross-examination she stated that she had first been told of Ms Doherty's concerns orally on the same day of the interview or the day after the interview, ie on either 5 June or 6 June 2015. She did not mention that conversation in her witness statement or elsewhere. Her witness statement stated that she had received an e-mail on 19 June 2015 '*inviting me to a meeting to discuss an issue with the first recruitment process*'. It is odd that Ms Mullan did not include any reference to this alleged conversation with Ms Doherty which had taken place on the day of the interview, or on the day after the interview, in her witness statement since it had obviously been a crucial meeting.

141. She alleged in cross-examination that Ms Doherty had told her that she had been pressurised by Mr Lamrock into marking higher than she had wanted to mark. Again, this was not mentioned in her witness statement. Even though she was a director of a limited company, and even though this would have been an explosive allegation, she had taken no action. She made no complaint; she made no further enquiries. In fact, in her witness statement she stated that she had been '*happy with the make-up of the panel*'. If allegations of bullying or indeed of favouritism, had been raised with Ms Mullan, she would have mentioned those allegations at this point in her statement which comprised her evidence-in-chief.

142. In cross-examination, Ms Mullan stated that Ms Doherty, who had been a fellow director and a co-chair of the respondent organisation, could have been pressurised by Mr Lamrock into marking higher than she wanted to mark. That does not seems

credible. Ms Doherty had been appointed to sit with Mr Lamrock as a co-chair of the organisation and had also been appointed to sit in the interview panel with Mr Lamrock. Neither would have happened if, as alleged in cross-examination by Ms Mullan, Mr Lamrock could have exerted such control over Ms Doherty. Ms Mullan made a point in her witness statement of confirming that she had been happy with the make-up of the interview panel. She did not express any concern about this alleged bullying or pressurising in the exchange of e-mails following the interview. She did not ask for the interview papers or for the collation sheet. It is simply not credible that someone in her position, having received such an allegation, would have done absolutely nothing.

143. In cross-examination she stated that she does not believe that the interview process had been completed when the collation sheet had been signed by all three interview panel members. This does not seem a credible position for anyone to take. If an individual is identified as the person appointed, that can only mean that the interview process is over. She finally accepted in cross-examination that when the collation sheet is signed, the process is indeed over. She stated '*I was just waiting to see what the next stage was*'. That answer and her evidence lacked credibility.

Ms Alison Wallace

144. Ms Wallace had been the Strategy Manager for the respondent organisation and therefore a senior employee. She stated in her witness statement that she had been continually pressurised by Mr Lamrock in the course of the interview. She stated, apparently for the first time, that she believed this was because the claimant had previously worked for Mr Lamrock in the YMCA. She criticised the answers to Questions 2, 3, 4, 6 and 7. She stated:-

> *"I agree that the collation sheet was completed but at no point was there an agreement to appoint Gary McClean."*

145. At various points in her cross-examination, her evidence was particularly evasive and unconvincing. For example, she disagreed with the proposition that the claimant '*was working with the community*'. That answer was changed to '*he was working with young people in the area*' to '*no, he was working in the community*'. There was a reluctance to accept obvious pieces of evidence.

146. In relation to Question 2, she stated that her mark had been changed from seven marks to eight marks under pressure from Mr Lamrock. When she was asked to accept that her original mark of seven marks was still '*a high mark*', she initially said '*no*'. That answer was changed to '*it was an okay score*'. It was then changed to '*it was a good mark*'. Again there was a reluctance to accept what was obvious, ie that seven marks out of ten was still a high mark.

147. She was very vague in cross-examination about when the collation sheet had actually been completed and signed. She stated, first, that it had been signed when Mr Lamrock had got up to leave the meeting. Then she stated she could not really remember when she had signed it. It had been either at the start or the end of the discussion. Given that Ms Wallace had actually completed this form and then had signed it herself and had presented it to the other two panel members for signature, it is simply not credible that she did not have a clearer idea of when it had been completed.

148. Her evidence was particularly evasive at one point when she had been asked, by counsel for the claimant, whether Mr Lamrock had '*manipulated her*'. She kept replying that he had '*pressurised*' her. She did everything possible to avoid accepting the use of the word '*manipulated*'. The Tribunal concludes that she did this because Ms Doherty had said *at Paragraph 17* of her witness statement that Ms Wallace was '*a very strong-minded professional woman who would not be manipulated by anyone*'. Again the evidence was not credible.

149. In an e-mail, some six days after the interview, when she had not been under any pressure, she referred only to two interview questions. She stated that '*on that grounds*', the post should be re-advertised. She accepted, in cross-examination, that there had been no mention in that e-mail of difficulties in relation to the job specification or description. There had been no complaints about bullying or pressure by Mr Lamrock. There had been no statement that the Curryneirin Community Association would not work with the claimant. There had been no complaint about the claimant being difficult to manage. It is extremely difficult to reconcile the plain terms of that e-mail with her evidence to this Tribunal.

150. In cross-examination she accepted that she had prepared the feedback for the claimant. She accepted that in that feedback there had been no reference to the split in the panel or to the chairman's views. Ms Wallace could put forward no convincing explanation for that failure. The Tribunal concludes that her evidence was evasive and again not credible.

151. When documentation was provided by way of feedback to the claimant, the threshold mark of 59 marks had been removed from the documentation. Ms Wallace kept repeating, in cross-examination, that her '*only motivation*' had been to remove the signature panel, as '*advised by the LRA*' to preserve anonymity. This answer was repeated on several occasions and gave the impression of being a rehearsed answer. Even if it had been correct, ie even if there had been some reason to preserve the anonymity of individual interview panel members, the signature panels in the interview record forms had been blank in any event. The names of the interviewers had not been included. Her evidence therefore made absolutely no sense. There had been no reason to remove blank signature panels and equally there had been no reason to include in that deletion the reference to the threshold mark which had been higher up the page. This had separately occurred in each of the three interview records provided to the claimant. It had not been an accident. The evidence given by Ms Wallace in this matter was again entirely lacking in credibility, obviously rehearsed and incapable of belief.

152. In cross-examination she was very evasive when it had been put to her that she had not wanted to appoint the claimant. She had '*wanted to be fair*' – '*wanted to appoint someone*' – '*wanted to bring matters to a conclusion*'. Since it was obvious on any version of events, including on her own version of events, that Ms Doherty and Ms Wallace did not wish to appoint the claimant, her reluctance to accept what she had already said was very evasive.

Ms Geraldine Doherty

153. Ms Doherty had been a co-chair of the respondent organisation. In her witness statement she stated that:-

> "*William (Lamrock) totally refused to take into account the rationale for her marks and was totally dismissive of her comments and at one stage stated 'I see where this is going', as such I felt pressurised into increasing my initial marks."*

She stated:-

> *"I did not believe that by signing this sheet that it was the end of the process and believed we still had the option of discussing whether to appoint or not."*

154. In her witness statement, Ms Doherty did not allege that the job description/ job specification had been incorrectly focused. Her only reference to the process was when she stated '*Alison and I continued the conversation about how we felt that the process had let us down (due to the limited nature of advertising for the post) and were frustrated by the fact that William Lamrock had left the room without a final decision being made*'. That reference to the '*limited nature of advertising*' was not pursued by either Ms Doherty or Ms Wallace in answers to cross-examination. The scope of advertising had been mentioned by Ms Mullan in her e-mail of 7 July 2015. She suggested that '*if the Curryneirin Committee have any funds available they should pay for an advert in the local papers to cast the net further*'. It does not seem to have been mentioned again other than in Ms Doherty's statement.

    It is difficult to reconcile the contents of the statement, and the evidence given by Ms Doherty in cross-examination, with the contents of the contemporaneous e-mails following the interview and with her complete failure to pursue or even raise any complaint about Mr Lamrock.

155. Ms Doherty accepted in cross-examination that she had grown up and had worked in the same area (Mountainview) where the claimant lived. Both had worked in community work. She stated, however, that she knew very little about him. That was unconvincing. This had been a small area in a small city where both individuals had been involved in community work for lengthy periods.

156. She stated in cross-examination that she had been actively involved in her local Sinn Fein Branch in the Waterside. That branch covered Mountainview where the claimant had lived. When she was asked if she had known whether there were any Sinn Fein members in Mountainview she stated '*not to my knowledge*' and '*couldn't possibly say*'. That answer again seems evasive. It is highly unlikely that an active member of any political party who had served as a vice-chair of the particular Branch would not have known whether or not there were members of that party in a particular housing estate in their area.

157. She asserted repeatedly that she had no knowledge of the North West Social Forum of which the claimant had been a co-ordinator. She stated '*I've never heard of it before the statements*'. She stated that she was absolutely sure about that. She was then referred to the claimant's application form for this post. That application form clearly stated that the claimant had been employed from 2002 to 2005 by the North West Social Forum. When that was put to her in cross-examination she stated she had '*read most of it*' but stated that she had not read all of it – '*not in any real detail, no*'. She stated that once the short listing panel

had agreed that the claimant had reached the essential criterion she stopped at that point. She would have skimmed over the rest. However, she accepted that she also had this application form with her at the interview, as indeed had the other two panel members. She stated that it had been there to refresh her memory of the candidate. She would have read over only the name and the essential criterion. That answer again seems highly evasive. It is, in any event, unlikely that someone with lengthy experience of community work and in a relatively small area of a relatively small city would not have heard of a body which had had some prominence in the area. It is particularly implausible that she would have just glanced at parts of the application form; particularly where she now states that she had been concerned about the claimant's experience. There had been only three candidates to be interviewed. The experience of each candidate had been crucial and would have informed the questions and the answers in the course of the interview. It is not credible that Ms Doherty had not read that part of the application form which referred to relevant experience and which referred to the North West Social Forum. If she had taken the short listing and interview processes seriously, she would have read that form in full.

158. She maintained in cross-examination that she had been bullied and pressurised by Mr Lamrock into marking higher than she had wanted to mark. When it was put to her that it was unlikely that two experienced and responsible panel members would have allowed their marks to be changed in this manner, she stated '*it did happen*'. When pressed further she stated '*it would be highly unusual*'. She seemed very reluctant to accept how unlikely her allegations were in this respect.

159. She accepted in cross-examination that she had been familiar with the format of the collation sheet and had used it as a document before. She accepted that she had read it before signing it and accepted that she had been acknowledging the marks given by each interviewer. She accepted that she had signed a document which stated that the person to be appointed was the claimant. She had previously stated that she believed that discussion would still continue. However, she stated at this point that '*we were making a recommendation to the full Board*'.

    In any event, it seems simply incredible that anyone would sign such a document and believe that discussion would continue thereafter and that the collation sheet had not been an end of the matter. If that were the case, signing the document would have made no sense and would have been pointless.

160. In cross-examination an example had been put to her of her applying for a job in the shipyard, getting the highest marks in the interview, and then, following a discussion that had taken place within the interview panel, not being appointed to the post. When asked for her reaction to such circumstances she stated '*I would just get on with it*'. That seems, to the Tribunal, to be frankly highly unlikely.

Decision

161. There will be cases when the decision to be made by the Tribunal is obvious from the evidence; where the vexed question of the shifting burden of proof does not arise at all for consideration. Courts have in the past criticised a technical approach to, or an overreliance on, the statutory provisions in relation to that shifting burden of proof. In ***Hewage v Grampian Health Board [2012] ICR 1054***, Lord Hope approved the comments of Underhill P in ***Martin v Devonshire Solicitors [2011]***

ICR 352 where he stated that it is important not to make too much of the statutory provisions:-

> *"They will require careful attention where there is room for doubt as the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or another."*

162. In the present case, bearing in mind, firstly, that, in relation to discrimination claims there is rarely a smoking gun or clear evidence and, secondly, that it is important at all times for the Tribunal to remember that it is concerned with a claim of unlawful discrimination and not with a claim of poor administrative practices, the conclusion of the Tribunal is that no obvious decision presents itself on the evidence before it. The application of the shifting burden of proof will therefore have to be considered by the Tribunal in this case.

163. Article 4(1) of the Burden of Proof Directive (now Article 19 of the recast Equal Treatment Directive 2006/54/EC) (see above) makes it plain that the purpose of the provisions in Article 38A of the 1998 Order is to make it easier for claimants to prove unlawful discrimination. If a prima facie case has been made out on the evidence (disregarding any explanation that might be brought forward by the respondent, as opposed to any evidence put forward by the respondent) the burden of proof shifts to the respondent. The respondent must then prove that there has been no discriminatory motive, whether conscious or subconscious, behind that impugned decision. If it fails to do so, the Tribunal is obliged to uphold the claim of unlawful discrimination. That is mandatory. The 1998 Order says '*shall uphold*'. The Equality Act 2010 in Great Britain says '*must uphold*'. The meaning and effect are the same.

164. It is important for the Tribunal to remember the use of the word '*could*' which is used in the second line of Article 38A. It does not say '*would*'. The Tribunal therefore does not have to reach a definitive determination that it would have been driven inexorably to a firm conclusion that unlawful discrimination had occurred. The statutory test is lower than that. Firstly, any explanation that might be brought forward by the respondent must be disregarded at that first stage. All the evidence before the Tribunal must be considered, including evidence (not explanation) adduced by the respondent, to see whether primary facts have been established on which inferences of unlawful discrimination could reasonably be drawn.

165. In ***Madarassy***, Mummery LJ stated *at Paragraph 57*:-

> *"That* 'a *reasonable Tribunal could properly conclude' from all the evidence before it. This will include evidence adduced by the complainant in respect of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for that differential treatment."*

He went onto state:-

> *"It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I will discuss later), the Tribunal would need*

to consider all the evidence relevant to the discrimination complaints; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied upon by the complainant to prove less favourable treatment; evidence as to whether the comparisons made by the complainant were of like with like as required by Section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment."

166. In considering whether reasonable inferences could properly be drawn in any case, the giving of inconsistent explanations or an unacceptable account of the facts has been held to be sufficient for the burden of proof to pass to the employer. In ***Veolia Environmental Services UK v Gumbs [UKEAT/0487/12]***, HHJ Hand QC stated:-

> *"The fact of inconsistent accounts as to why something has happened have for many years, if not centuries, been regarded as a basis from which inferences can be drawn by Tribunals of first instance. The statutory provisions as to the reversal of the burden of proof and the jurisprudence, which has grown up around them, exclude actual consideration of the substance of the explanation but if the fact that there have been a number of inconsistent explanations or reasons put forward is to be excluded from consideration as to whether the burden of proving an non-discriminatory explanation should pass to the employer (and the claimant's case, therefore, fails at that stage) then the Employment Tribunal has been put into a strange position in contrast to other Courts and Tribunals that have to make factual findings. We see no basis for excluding from consideration the fact that there have been a number of different and inconsistent reasons advanced for particular behaviour."*

167. An inference of unlawful discrimination may also be drawn from an evasive or false explanation other than in a response to a questionnaire; see ***Dattani v Chief Constable of West Mercia [2005] IRLR 327***.

In that case the EAT (Judge McMullen QC) stated that:-

> *"A respondent, asked a direct question in writing by an aggrieved person, who fails to respond, or who does so evasively, ought to be treated in the same way irrespective of whether a question has been asked under the statutory procedure."*

The head note states:-

> *"Accordingly, in that present case, the Tribunal was not precluded from drawing an inference from incorrect information provided by the employers in their notice of appearance [response], further and better particulars, and a written explanation."*

168. It is important, as indicated above, for a Tribunal to remember when determining whether it could reasonably draw inferences of unlawful discrimination that its function is to determine whether unlawful discrimination has occurred and that poor administrative practices may not, on their own, be sufficient depending on the circumstances of the case. The fact that an employer's behaviour calls for an

explanation does not automatically get a claimant through to the second stage of the two-stage process. There still has to be some evidence that the behaviour had been '*attributable (at least to a significant extent)'* to the prohibited ground of unlawful discrimination – see ***B v A [2010] IRLR 400*** *at Paragraph 22*.

169. In ***Network Rail Infrastructure Ltd v Griffins-Henry [2006] IRLR 865*** Elias J stated *Paragraphs 18 and 21* that:-

> *"Ms Cunningham (counsel for the employer) says in order to establish a prima facie case there must always be some positive evidence that the difference in treatment is race or sex as the case may be. That seems to us to put the hurdle too high. As the Courts have frequently recognised, there are real difficulties in establishing discrimination because of the obvious fact that it is never admitted, and it has to be inferred from the circumstances. The law has tried to strike the balance between on the one hand making such claims impossible to sustain, and on the other not subjecting employers to unwarranted and unfair findings of discrimination. The statutory burden of proof as interpreted in* ***Igen****, by which of course we are bound, directs Tribunals how the issue should be approached. Provided Tribunals adopt a realistic and fair analysis of the employer's explanation at the second stage, we see no justification for requiring positive evidence of discrimination at the first stage."*
>
> *"Ms Cunningham says that finding a prima facie case on the evidence established here puts employers into too difficult a situation. She cites the case of somebody who may be not only female and black but perhaps an Anglican or gay, or has some other legally relevant feature which distinguishes her from the remaining members of the group from which selection is made. She says that on the analysis by the Tribunal one could in all those cases infer that the reason why she was rejected was each and everyone of these distinctive features which distinguished her from the other employees. We accept the logic would indeed be that there a Tribunal would be entitled to find that there was a case to answer in all these examples, if the circumstances were otherwise as in this case. But it will often be easy to rebut. A Tribunal will have to have regard to all the evidence in determining whether the employer has rebutted the prima facie case. For example in most cases the employer will be able to show that he has no interest or knowledge of the religious affiliation of staff or perhaps their sexual orientation. In some cases it may be shown that the manager alleged to have discriminated on, say, sex grounds has frequently in the past promoted women. That will obviously be powerful evidence rebutting any inference of sex discrimination."*

170. If the Tribunal, on all the evidence before it, could reasonably infer unlawful discrimination and therefore if the burden of proof passes to the respondent in the second stage of this legislative process, the employer must then rebut the prima facie case which has been established. The ***Igen*** decision provides that there must be an adequate explanation supported by cogent evidence.

171. In ***Osoba v Chief Constable of Hertfordshire Constabulary [UKEAT/0055/13/BA]***, the EAT considered an age discrimination case where the operation of a redundancy scoring matrix had been described as shambolic and

inconsistent. The Employment Tribunal had held that the burden of proof had shifted to the respondent to disprove discrimination in the second stage. In that second stage the respondent stated that they acted honestly and in good faith and accepted poor administrative practices. The Employment Tribunal accepted this and found that there had indeed been no discrimination. On an appeal by the claimant the EAT upheld the Employment Tribunal's decision in favour of the employer. HHJ McMullen QC stated:-

> *"27 The central problem with someone who admits to making errors is whether a further explanation is to be rung from her. Sometimes those errors are explained in mitigation, 'I was overworked', 'I had family care responsibility' but that is not the case here. The simple proposition advanced by Ms Pritchard [the alleged discriminator] is that she did what she thought was right in accordance with the policy and she was exposed in the course of the trial to the errors which she had made which she accepted.*
>
> *28 The Tribunal accepted her account that she had acted honestly. Most particularly in the face of the direct accusation of manipulation in order to do down the claimant because of his age the Tribunal accepted the good faith of her account. Is that enough? Does she have to create some further explanation? We consider it would be wrong for a respondent to have to give a yet further possibly dissembling explanation in order to meet the case. We accept Mr Ley-Morgan's analogy to explanations above such as overwork or family circumstances, but there simply may be cases where there is nothing more to say, no further explanation than 'Well, I got it wrong and I take responsibility for that'."*

172. However, the line taken by the EAT in ***Osoba*** (above) may be more difficult to take where there has not been a straightforward explanation and a straightforward acceptance of poor administrative practices. It may in fact be extremely difficult to take if several different explanations are advanced on behalf of the respondent; eg:-

(1) Questions 2 and 7 were not answered correctly even though the recorded marks were good.

(2) The two interview panel members were bullied and pressurised improperly by the chairman even though no complaint was ever made about such alleged conduct during the interview, after the interview or at any time before the furnishing of the witness statements.

(3) The chairman had exercised favoritism towards the claimant because of a previous working relationship, even though, as above, there had been no complaint about the alleged conduct.

(4) That the experience of the claimant was, like the wrong type of leaves on a railway line, the wrong type of experience and that the process had let the interview panel down, even though the same job description and same essential criteria were used in the subsequent competition and had indeed been used previously.

(5) That the CCA would find it difficult to work with him, although no evidence was produced to that effect.

(6) That he would have been difficult to manage although again no evidence was introduced to that effect.

(7) That the process had been defective, in that there had been inadequate advertising of the post, although that issue had only been raised twice and, by the time Ms Wallace and Ms Doherty were cross-examined, appears to have been forgotten.

Respondent's argument

173. The respondent argued that the claim does not get off first base because the claimant has not established, on the balance of probabilities, two essential primary facts; firstly, that he had a relevant political opinion for the purposes of the 1998 Order; and, secondly, that that opinion had been known to the respondent and, specifically, that it had been known to Ms Doherty and Ms Wallace. The respondent's argument is that the burden of proof does not shift at all to the respondent unless such primary facts have been proved.

174. The respondent argued:-

> *"Therefore if the claimant does not prove, on the balance of probabilities, that the respondent was aware of his 'difference in status', the burden does not shift, his case fails and that is an end to the matter. There is no room whatsoever for the Tribunal to decide that the burden has shifted without specifically finding on the balance of probabilities that the respondent knew of 'the difference in status'."*

That argument advanced by the respondent also applies, of course, to the first such issue; ie the existence of the difference in status, or the '*political opinion*'.

175. The statutory provisions relating to the shifting burden of proof have been over-analysed, as can be seen from the foregoing references to case law. It would be wrong to further complicate the plain wording of the statutory provision and to add yet a further gloss to the plain wording of the legislation.

176. The legislation sets out a two-stage procedure and not a three-stage procedure. The Directive, in relation to the first-stage, refers to the establishment of facts from which it may be assumed that there has been discrimination. Article 38A of the 1998 Order describes the first-stage as where:-

> *"The complainant proves facts from which the Tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent has committed an act of unlawful discrimination."*

177. Neither provision, or any analogous provision in relation to any other area of unlawful discrimination, provides for a three-stage procedure where, firstly, certain primary or basic facts must be separately proved, secondly, where an inference '*could'* (or as the respondent suggests wrongly '*would*') be drawn; and, thirdly, where the respondent has to rebut any such inference.

178. The *Barton Guidance* should be read as a whole and should not be '*cherry-picked*' to suggest that there are in fact three distinct stages in this procedure. It is also important to bear in mind the purpose of the shifting burden of proof provisions and of the originating Directive. As the *Barton Guidance* explained:-

> *"(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of [sex] discrimination. Few employers would be prepared to admit such discrimination, even to themselves."*

In the context of the present case, it is unlikely that if the claim is well-grounded, any respondent would admit knowing of a political opinion held by the claimant.

179. The *Barton Guidance* continued:-

> *"(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal."*

This part of the Guidance clearly refers to the proving of primary facts, and makes it plain that it cannot be separated from the drawing of inferences.

Political opinion

180. The claimant does not have either mainstream or even particularly well-articulated political views. He repeated in his cross-examination that he had a socialist '*world view*' which had informed his approach to other matters. The nature of that world view is unclear.

181. Perhaps more relevant to the present case is that he has stated that he was opposed to Sinn Fein and indeed to the main political parties in Northern Ireland. He further stated that he believed that communities such as Curryneirin should '*think for themselves*'. He was opposed to community services and funding being under the direction of the main political parties and, in particular, under the direction of Sinn Fein. He argued that such matters should be independent of the main political parties. The Tribunal should stress that it is no function of this Tribunal to determine whether or to what extent any political party had control or influence over funding. At this stage we are simply considering whether there had been a relevant political opinion; whether or not it was a correct opinion.

182. The North West Social Forum had clearly held distinct anti-political party views. The claimant had been a co-ordinator of that group for some three years and had issued public statements, some of which had appeared in the press.

183. The evidence of Mr William Lamrock was that the claimant had been known as an '*Eamon McCann type of person*'. The evidence of Mr Gareth Lamrock was that the claimant had been associated with socialist views.

184. The protection of the legislation is not restricted to those who hold mainstream views or to views which are, in the opinion of any Tribunal, valid or invalid. The

term '*political opinion*' has been widely interpreted by the Court of Appeal. That term covers, not just any matter relating to the governance of the state but any matter in relation to public policy, with the exception of some matters relating to method.

185. The unanimous decision of the Tribunal is that on the evidence before it, it has been established, on the balance of probabilities, that the claimant held a particular political opinion for the purposes of the 1998 Order in relation to a matter of public policy, ie in relation to the control and funding of community activities. He believed that such control and funding should be a matter for the communities themselves and not for main political parties. That was not simply a procedural or technical matter such as that considered in ***Gill***; an opinion in relation to method rather than an opinion in relation to public policy.

186. Whether such a political opinion is correct, or even practicable in any democratic system, is another matter and not one for this Tribunal. However the Tribunal accepts the claimant's evidence that he held such an opinion and that it is a relevant opinion for the purposes of the 1998 Order, as currently interpreted. It is consistent with his stated position in the NWSF and supported to an extent by the witnesses called on his behalf. It is therefore more likely than not he held such an opinion.

Whether the respondent was aware of any such political view

187. It is clear that the claimant had been working in the Curryneirin area for approximately two years, firstly, as part of the Peace Walls Project; and, secondly, on a voluntary basis in the period immediately preceding the interview.

188. It is clear that the respondent organisation had had significant involvement in the CCA following difficulties perceived in or around 2014 by the Department for Social Development in relation to the CCA. The funding had been withdrawn from the CCA and thereafter was to be channelled through the respondent organisation. Ms Doherty had attended frequent meetings with a sub-committee of the CCA in relation to youth work. She was the line manager of an employed youth worker in Curryneirin with whom the claimant had had particular contact. Ms Wallace again had frequent contact with the CCA. She had raised queries about the operation of the CCA and indeed had taken part in a consideration of the claimant's voluntary work, assessing at one point whether adequate insurance cover had been in place for this work.

189. The Tribunal has considered the evasive evidence given by Ms Doherty and Ms Wallace, as outlined above. It does not accept their repeated assertions that they knew little about the claimant and nothing of the claimant's political views.

190. In relation to Ms Doherty, she had grown up and still worked in the area where the claimant had resided. Her statement, in cross-examination, that she had never heard of the North West Social Forum when it had clearly been mentioned in detail in the claimant's application form was not credible. Her statement that she did not know whether there were any Sinn Fein members in Curryneirin even though she had been for a period vice-chair of the local Sinn Fein Branch and had stood for election in the 2011 Local Government elections as a Sinn Fein representative was not credible.

191. Her handwritten statement on the interview record forms which stated '*who is he volunteering with?*' could not have been simply an exercise in curiosity as she claimed. If it had been, she would simply have asked the question at an appropriate point in the interview. A reasonable inference would be that she was aware of and was suspicious of the nature of his volunteering.

192. In relation to Ms Wallace, given the obvious friction which had existed between the CCA and the respondent and the resentment that she acknowledged had existed between employees of that CCA and her, it is highly unlikely that she did not know more than she admits about the activities of the claimant as, firstly, a paid worker and then as a voluntary worker in precisely that area. Her evidence in cross-examination had been evasive. She had known of the claimant's existence through a previous job application and had in fact altered interview questions accordingly. It is simply not credible that she had known little about the claimant or indeed nothing about his political views when she interviewed him.

193. The Tribunal also takes into account, in assessing the extent of knowledge held by the respondent's two witnesses of the claimant's political opinion, the conduct of the interview process, the process thereafter and the successive and differing explanations advanced by Ms Doherty and Ms Wallace for that behaviour. It draws a reasonable inference from those matters that the reason was they had been aware of his political opinion.

194. In summary, when determining as an integral part of the first stage whether primary facts (such as political opinion and knowledge of that opinion) have been proven, the Tribunal must look at all the evidence (facts rather than explanation) before it and must bear in mind the purpose of the shifting burden of proof (*Paragraphs (4) and (3)* of the *Barton Guidance*). It cannot be expected that a respondent will accept, as a matter of course, knowledge of '*status*' including knowledge of a political opinion. That will often be a difficult matter to establish and will often depend on reasonable inferences drawn from the evidence before the Tribunal.

195. Knowledge of a '*status*' or of political opinion is an essential factor in a successful claim – see ***Curley v Chief Constable***. It must be considered and considered carefully by the Tribunal. However, it cannot be artificially separated out from consideration of the first stage and cannot be judged against a higher standard of proof. Proper inferences can form part of its determination of proving facts on a balance of probabilities.

196. The Tribunal must consider whether it is more likely than not that Ms Doherty and Ms Wallace knew of the claimant's political opinion.

197. As indicated, relevant evidence is that:-

    (i) Ms Doherty and Ms Wallace had had significant and frequent contact with Curryneirin and the CCA where the claimant had been working for two years.

    (ii) Ms Doherty line-managed the part-time youth worker who worked in the same area as the claimant who had also worked with local youth.

(iii) The claimant's voluntary work had been discussed specifically in relation to insurance.

(iv) The evidence of Ms Doherty and Ms Wallace before the Tribunal had been evasive and not credible.

(v) The respondent had set up an objective marking system to determine the successful candidate for the post. It cannot, as argued by the respondent, have been a system simply to weed out the '*also rans*' with the actual decision to be then made on the basis of subjective judgement and extraneous factors in contravention of the Equality Commission Code of Practice on Recruitment and Selection. There already had been a short listing procedure to weed out unsuitable candidates.

(vi) A series of different explanations had been advanced at different times by the respondent to explain the failure to implement the result of the objective process. Those were:-

(a) The answers to Question 2 and 7 were inadequate.

(b) The chairman of the interview panel had bullied or pressurised the other two members of the interview panel.

(c) The chairman had favoured the claimant because of a previous working relationship.

(d) The experience of the claimant had been the wrong type of experience.

(e) The CCA did not want to work with the claimant.

(f) The claimant would be difficult to manage.

(g) The competition had not been sufficiently advertised.

Those seven explanations were not credible for the reasons set out elsewhere in this decision. In relation to (e) and (f), those concerns were raised shortly after the interview process. Apart from the absence of any evidence to support those explanations, it is difficult to reconcile those explanations with the assertions by Ms Doherty and Ms Wallace that they knew little about the claimant.

(vii) The only reasonable decision on the basis of the foregoing, subject to any rational explanation at the second stage, is that the primary facts have been established on a balance of probabilities.

198. The unanimous decision of the Tribunal, on the balance of probabilities, is therefore that from all the evidence before it, that the respondent organisation and, in particular, Ms Doherty and Ms Wallace knew of the claimant's political opinion as

defined above at the time of the decision not to appoint him as the highest marked candidate.

Unlawful discrimination, contrary to the 1998 Order

199. At this stage the Tribunal has to consider all the evidence to determine whether it could reasonably infer unlawful discrimination in the absence of any explanation offered by the respondent or which might be offered by the respondent.

200. In this case, it is clear that the claimant had been marked highest for the three candidates and that his mark had significantly exceeded the threshold mark which had been agreed before the interview had commenced. It is therefore obvious and indeed had been agreed by the respondent that in the ordinary course of events he would have been recommended for appointment to the Board and would then have been appointed. This did not happen.

201. The allegation, which was repeated and which seemed at times somewhat rehearsed, that Mr William Lamrock had bullied and pressurised Ms Doherty and Ms Wallace into marking higher than they had wished to mark, did not appear until the witness statements were exchanged. There was no mention of any such allegation in the interview records. There was no mention of any such allegation in the e-mail correspondence which followed the interview process. There was no mention of any such allegation in the feedback provided to the claimant. There was no mention of any such allegation in the response filed with the benefit of legal advice on behalf of the respondent organisation. There is no mention of any such allegation in the interlocutory process. Reasonable inferences can be drawn from these inconsistent explanations – see ***Veolia*** and ***Dattani*** above.

202. The allegations levied by Ms Wallace and Ms Doherty were of such seriousness that if they were true, they would have resulted in a complaint within the respondent organisation. They would also have resulted in a separate complaint by Ms Geraldine Boggs who had been present throughout all the disputed events and who had been there as an observer on behalf of the Department for Social Development to ensure propriety. In the absence of any such complaint the unanimous decision of the Tribunal is that no such bullying or pressure had been applied as alleged by Ms Doherty and Ms Wallace. There had clearly been a discussion and a disagreement, but no more than that.

203. The issues raised in the e-mail correspondence following the interview reflected the positions then held by Ms Wallace and Ms Doherty. They alleged in that correspondence that two questions in particular had not been properly answered by the claimant. That position is not reflected in the contemporaneous interview notes. It was not reflected in the collation sheet, signed by both individuals, and was not reflected in the clear statement, signed by both individuals, that the claimant was to be the person appointed. Furthermore, it did not stand up to any scrutiny in cross-examination. It was clear that in relation to Question 7 (the communication question), the claimant's answer had been detailed and had covered many of the matters raised in the model answer. Ms Doherty was unable to indicate in cross-examination, how the answers given by the claimant to that question had been so deficient as to generate the level of concern which she had displayed immediately after the interview and was still displaying.

204. The unanimous decision of the Tribunal is that the concerns expressed by Ms Doherty and Ms Wallace about those two questions were not credible. Again, reasonable inferences can be drawn.

205. A further issue arose in the e-mail correspondence from Ms Watson and in Ms Doherty's witness statement relating to process, which was expressed as a concern about the level of advertising of the post. That concern appears to have been forgotten about and was not advanced further during the hearing. The unanimous decision of the Tribunal is that that concern was not credible. It was part of a process of ex post facto rationalisation to find an explanation, any explanation, for the result of the interview process.

206. The evidence of Ms Watson, Ms Doherty and Ms Wallace was that they had concerns about the nature of the claimant's experience. They had concerns that it had been related primarily to youth work. That does not appear to be reflected in the evidence. He had experience in relation to the Respect Programme, the Peace Walls Programme and in relation to mediation work in Ballysally. None of that has been shown to relate solely to youth work. In any event, no concerns had been raised by anyone on this ground in relation to the short listing of the claimant. No concerns had been raised contemporaneously by anyone in relation to the interview question which had raised the issue of experience. If the job specification and job description had been so deficient in this respect, the respondent organisation would not have used that job description and job specification again when it re-advertised the post. However, it did so.

207. Ms Wallace and Ms Doherty stated that following the interview process they had concerns that the CCA would not have been willing to work with him and that he would have been difficult to manage. That is inconsistent with the emphasis placed on Questions 2 and 7 by these two individuals in the period immediately following the interview. It is also entirely unsupported by any evidence. It is unclear how they had those concerns when their evidence was that they knew very little about him. Mr William Lamrock's suggestion that references should be taken up was not followed. If there had been any genuine concern about the claimant's ability to be managed that would have been a sensible step. If there had been any genuine concerns about the CCA's willingness to work with him, that is a matter which could easily have been established at the time of the interview by correspondence with the CCA or at the time of the Tribunal hearing by evidence from witnesses who were employed by or on the Board of that CCA. None of this was done. The Tribunal's unanimous decision is that this explanation is not credible.

208. It is clear from the case law referred to above that the Tribunal must accept that there will be occasions where a process, particularly an appointment process, has been unfairly or improperly conducted but where it would not be reasonable to infer unlawful discrimination (see ***Osoba*** above). The Tribunal has considered whether this is such a case. However, given the nature of the evidence brought by Ms Wallace and Ms Doherty and indeed by Ms Watson and the several examples of ex post facto rationalisation (seven in total), it seems highly unlikely that there can be any innocent explanation of the extraordinary result of this interview process. If there had been such an innocent explanation, it would have been put forward from the start and maintained consistently thereafter.

209. The conclusion of the Tribunal is that it could, on the evidence before it, reasonably infer that there has been unlawful discrimination on the ground of political opinion. Therefore the burden passes to the respondent to establish there had been no conscious or unconscious discrimination on this ground.

Second stage

210. As indicated previously the rebuttal of the inference requires cogent evidence from the respondent.

211. If it had been the case that the respondent had fixed on one particular reason (rather than on several different reasons on different dates) for its decision not to appoint the highest marked candidate who had exceeded the threshold marking, the Tribunal might have been prepared to accept such an explanation as an innocent explanation untainted by unlawful discrimination (see ***Osoba*** above). However, in this case the respondent has put forward, successively, such a range of different reasons that the Tribunal cannot hold that there is an innocent, ie a non-discriminatory motive behind the respondent's actions in failing to appoint the claimant to this post.

212. If it had been a straightforward decision on the part of the majority of the interview panel that the highest marked candidate was nevertheless someone with whom the CCA did not want to work, that could have been easily proved and that explanation would have been the explanation advanced from the start and the explanation maintained thereafter. That is not what happened. Similarly, if it had been the case, that the majority of the interview panel had innocently determined that the highest marked candidate was someone who would have been difficult to manage, that would have been the reason advanced at the start and the reason maintained thereafter. That is not what happened.

213. If it had been the case that the majority of the interview panel had determined, for some reason, immediately after completing the collation sheet, that the claimant had the wrong type of experience and that he should not be appointed for that reason, that is the reason it would have been advanced from the start and maintained thereafter. That is not what happened. In fact, that reason appears somewhat late in the day and it is difficult to reconcile with the decision taken by the respondent organisation to use the same job specification in the new competition.

214. If the majority of the interview panel had determined that the highest marked candidate should not be appointed because of a difficulty in process related to the advertising of the post, that would have been the reason put forward at that point and reason maintained thereafter. This is not what happened. In fact, that alleged reason now appears to have vanished into the ether.

215. If the majority of the interview panel had decided that the highest marked candidate should not be appointed because they had been bullied and pressurised by the chairman of the interview panel, that is the reason they would have put forward immediately after the interview process and it would have been the reason that they maintained thereafter. That is not what happened. In fact, they had detailed discussions with, not just Mr Lamrock himself but with other members of the respondent organisation. That allegation of bullying had not been put to Mr Lamrock. It was not raised in the feedback to the claimant. It appears nowhere

in the response to this Tribunal. It appears nowhere in the interlocutory process. It does not make an appearance until the exchange of the witness statements. That is frankly incredible and in some ways it is insulting on the part of the respondent to expect the Tribunal to believe that such a serious matter would have passed unremarked by not just Ms Doherty and Ms Wallace but also by Ms Boggs who had been there to safeguard public funds and to ensure the propriety of the process.

The same can be said about the allegation that Mr Lamrock had favoured the claimant because of a previous working relationship.

216. In the absence of any single convincing reason for the decision not to appoint the claimant, the Tribunal must conclude that the respondent has failed to discharge the burden placed upon it by the second stage in this process.

217. The Tribunal therefore concludes that the claimant has been unlawfully discriminated again on grounds of his political opinion, contrary to the 1998 Order.

Remedy

Financial Loss

218. The claimant was interviewed for a post with the Simon Community on 2 July 2015. He was offered that post one day later and started on or about 17 August 2015. The claimant actual net income during that period was £9,479.38.

219. The post of Community Development Officer had been offered for a limited period of up to 31 March 2016. If the claimant had been appointed to that post he would have received net pay of £10,699.92 in the nine months between July 2015 and March 2016.

220. There was therefore a financial loss of £1,220.54 in relation to net income.

221. The claimant cannot be properly criticised for seeking and obtaining alternative employment in these circumstances. He had a duty to mitigate his loss.

222. The Tribunal therefore awards £1,220.54 in respect of lost income.

Travelling Expenses

223. The claimant has claimed compensation of £2,494.80 in respect of additional financial loss in respect of travelling expenses. His evidence was that he had to travel an additional 66 miles per day on three days per week. He calculated the figure on Inland Revenue rates of 45p per mile.

Neither the figures or the method of calculation were challenged.

224. The Tribunal therefore awards £2,494.80 in respect of additional financial loss for travelling expenses.

Injury to feelings

225. The claimant produced no medical evidence in relation to injury to feelings.

226. While he would have been annoyed and distressed by his non-appointment in his chosen area of work, he appeared to the Tribunal to be a robust individual who did not suffer unduly in this respect. There was no evidence that he had suffered any unusual or marked distress as a result of that decision. No medical evidence was produced. To his credit, he took up alternative employment promptly and mitigated his loss.

227. Determining the correct figure for injury to feelings is always a difficult exercise. It is not meant to be punitive. It should reflect the degree of injury to feelings actually suffered by the claimant.

228. The unanimous decision of the Tribunal is that the award should be at the upper end of the lower ***Vento*** band or at the lower end of the middle ***Vento*** hand. The Tribunal therefore awards £6,000.00.

Interest

229. Under Article 7(1)(a) of the Fair Employment Tribunal (Remedies) Order (Northern Ireland) 1995 ('the 1995 Order') interest should be added at 8% per annum on the sum for injury to feelings from the date of the injury to the current date.

There was no evidence justifying a different calculation period, for the purpose of Article 7(3) of the 1995 Order.

The correct period for calculation is 9 July 2015 to 20 February 2017; ie 592 days.

230. That amount is £6,000.00 x $^{592}/_{365}$ x 8% = £778.52

231. Under Article 7(1)(b) of the 1995 Order interest is payable at 8% on other compensation from the midpoint date to the date of compensation.

232. That amount is £3,715.34 x $^{296}/_{365}$ x 8% = £ 241.01

233. The total amount due is:-

Injury to feelings	£ 6,000.00
Interest on that amount	£ 778.52
Other compensation	£ 3,715.34
Interest	£ 241.01
Total	**£10,734.87**

234. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Vice President

Date and place of hearing: **12 – 15 December 2016; and 20 January 2017 at Belfast**

Date decision recorded in register and issued to parties: