Neutral Citation Number: [2020] EWCA Civ 733

Case No: A2/2019/0871

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
SOOLE J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2020

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE McCOMBE
and
MR JUSTICE MORGAN

- -

Between :

KHALID TABIDI	**Appellant**
- and -	
BRITISH BROADCASTING CORPORATION	**Respondent**

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- -

Mr Charles Ciumei QC and **Ms Naomi Hart** (instructed through **Advocate**) for the **Appellant**
Mr Nathaniel Caiden (instructed by **Charlotte Mortlock, BBC Employment Law Department**) for the **Respondent**

Hearing date: **Tuesday 28th April 2020**

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Approved Judgment

Lord Justice Underhill :

INTRODUCTION

1. Between October 2014 and February 2017 the Appellant, Mr Khalid Tabidi, worked for the BBC's Arabic Service on a freelance basis as a broadcast journalist/producer. In December 2016 he applied for employment in one of two roles as a Broadcast Journalist ("BJ") in the Arabic Service as part of a new project called "World 2020". He was one of eight short-listed candidates and underwent a structured interview of the usual kind, in which each candidate was asked the same questions and the panel-members noted their answers, and made comments and assigned scores, on an "interview grid". On 7 February 2017 he was told that he had been unsuccessful. The successful candidates were both women. He resigned and commenced proceedings against the BBC (to which I will refer as "the Respondent") in the Employment Tribunal. His original ET1 complained of unfair (constructive) dismissal and breach of contract.

2. At a case management hearing on 23 August 2017 Employment Judge Lewis gave the Appellant permission to amend in order to make a claim of sex discrimination. I shall have to come back in due course to how that claim is put, but the essence of his case was that the two successful candidates for the World 2020 BJ role were preferred because they were women. At a subsequent hearing on 13 November 2017 it was held that the Appellant was not an employee, and his unfair dismissal claim was accordingly dismissed. We are only concerned with the sex discrimination claim.

3. That claim was heard over three days at the beginning of January 2018 by a Tribunal at London Central consisting of Employment Judge Grewal, Mrs H Craik and Mr J Noblemunn. The Appellant was represented by Mr Emmanuel Sheppard of counsel acting as a FRU representative (Mr Sheppard had also appeared for him at the two previous hearings) and the Respondent by Mr Nathaniel Caiden of counsel. At the conclusion of the hearing the Tribunal dismissed the claim. The Respondent made an application for costs, and the Tribunal ordered the Appellant to pay the sum of £4,550 (representing, as it subsequently confirmed, Mr Caiden's fees for the hearing – a brief fee of £2,750 and two refreshers of £900). The Appellant requested written reasons which were sent to the parties on 13 April.

4. The Appellant appealed to the Employment Appeal Tribunal. The appeal was initially rejected by Choudhury J under rule 3 (7) of the Employment Appeal Tribunal Rules 1993 (as amended). But at a hearing under rule 3 (10) on 14 November 2018, at which the Appellant was represented by Mr Thomas Kibling of counsel acting pro bono, HH Judge Eady QC allowed the appeal to proceed on two grounds which she set out in her order: one related to the liability decision and the other, comprising three sub-grounds, to the costs decision.

5. In its Answer following that decision the Respondent complained that the basis on which Judge Eady allowed the liability appeal to proceed did not reflect the way in which the case had been advanced in the ET. In order to validate that complaint, and also in order to obtain a break-down of the sum awarded by way of costs, it asked the EAT to address three questions to the ET under the so-called *Burns/Barke* procedure. On 13 February 2019 Judge Eady made such an order. EJ Grewal supplied answers two days later.

6. The Appellant's appeal to the EAT was heard by Soole J sitting alone on 13 March 2019. The Appellant appeared in person, and the Respondent was again represented by Mr Caiden. At the conclusion of the hearing Soole J dismissed the appeal.

7. The Appellant was given permission by Bean LJ to appeal against the decision of the EAT as regards both liability and costs, though only on limited grounds. Before us he has been represented by Mr Charles Ciumei QC, leading Ms Naomi Hart, both acting pro bono. We are most grateful for their assistance, as I am sure the Appellant is. Mr Caiden again represented the BBC.

8. In this judgment I will deal with the liability appeal. The costs appeal is principally dealt with in the judgment of Morgan J.

THE LIABILITY APPEAL

9. At the conclusion of Mr Ciumei's submissions before us we informed Mr Caiden that we did not need to hear from him on the liability appeal. My reasons for dismissing that appeal are as follows.

THE BACKGROUND LAW

10. What constitutes direct discrimination appears from section 13 (1) of the Equality Act 2010, which reads:

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

Section 23 (1) provides:

> "On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case."

11. The definition in section 13 (1) on its face incorporates two elements – (a) whether A has treated B "less favourably than" he or she treats or would treat others, and (b) whether she or she has done so "because of the protected characteristic". Those two elements are generally referred to in the case-law as "the less favourable treatment question" and "the reason why question". The former element is inherently comparative in character, requiring a comparison between the treatment of the claimant and the treatment of "others", who may be actual ("treats") or hypothetical ("would treat"). Two points about that definition which are particularly relevant for our purposes emerge from the leading case of *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337:

    (1) At paras. 7-12 of his speech Lord Nicholls makes the valuable point – regularly repeated since, but still sometimes insufficiently heeded – that in fact the two questions are intertwined and that it will often be simpler for a tribunal to approach the reason why question first: if it is able to decide the protected characteristic was not the reason (even in part) for the treatment complained of it will necessarily follow that a person whose circumstances are not materially

different would have been treated the same, and there will be no need to embark on the task, which is not always easy, of constructing a hypothetical comparator.

(2) Lord Scott and Lord Rodger in their speeches both make the point that even where there is no actual comparator, because there is no-one who was more favourably treated whose material circumstances are the same, the treatment of other people whose circumstances were sufficiently similar might still be relevant in establishing how a hypothetical comparator would have been treated. I need not give the references since the point is succinctly summarised by Lord Hoffmann at paras. 36-37 of his speech in *Carter v Ahsan* [2007] UKHL 51, [2008] AC 696, where he describes such persons as "evidential comparators".

12. Section 136 of the Act regulates the burden of proof in discrimination cases. I need not set it out here. I need only note that it requires a two-stage process, authoritatively elucidated in the judgment of Mummery LJ in *Madarassy v Nomura International Plc* [2007] EWCA Civ 33, [2007] ICR 867: a claimant must first prove facts from which the tribunal "could" conclude that unlawful discrimination had occurred (characterised by Mummery LJ as "a *prima facie* case") and if he does so the burden shifts to the respondent to satisfy the tribunal that it did not.

THE SEX DISCRIMINATION CLAIM

13. The Appellant gave details of his sex discrimination claim in a document supplied to the ET on 18 July 2017 ("the discrimination particulars"). In summary, what he said was that an important element in the new BJ role was what he referred to (taking the phrase from the Respondent – see below) as the "Women agenda", and that the interview panel – Mr Adel Soliman, Ms Safaa Faisal and Mr Khalid Abdalla – "assumed that I had no knowledge of women affair [*sic*] or issues because I am male" and had determined to choose women for the role for that reason. The job designation for the new role did not in fact say anything about a "women agenda"; nor, the Appellant said, was anything said about it at the interview. However, he relied on an e-mail from Ms Faisal to an HR executive, Ms Twigg, dated 6 March 2017 giving her information in connection with a request by the Appellant for feedback on why he had not been appointed. It reads:

> "Just a quick note to explain that BJ 20/20 is a special project to cater for Gulf and North Africa rather than the usual day to day radio.
>
> This project is aimed to younger audience with emphasis on Women agenda.
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> Digital formatting and social media integration were essential parameters that we have been assessing candidates according to.
>
> And of course being a casual BJ in Radio not a grantee [*sic*] to be selected even if this is for 2 years."

14. As regards the allegation that the panel assumed that as a man he would have no knowledge of "women affair or issues", the Appellant relied essentially on the fact

that he was evidently better qualified for the role than the successful (female) candidates, specifically because "both had been working at other departments than radio at the time of their selection" whereas he had two years' experience as a broadcast journalist in the Arabic Service.

15. It was on the basis of that document that EJ Lewis gave the Appellant permission to amend to include the sex discrimination claim. She noted that the claim was one of direct discrimination within the terms of section 13 of the Equality Act 2010. She did not require the case to be formally re-pleaded.

16. In his subsequent witness statement the Appellant set out at paras. 49-58 the basis on which he claimed to have been the victim of sex discrimination. Although he advanced one or two further points by way of supporting argument the essence of his claim was (as indeed it had to be) the same as advanced in the discrimination particulars.

THE ET's REASONS

17. The ET briefly summarises the relevant law at paras. 2-3. No point arises before us as to the terms of that summary, and I need not set it out.

18. At paras. 5-23 the Tribunal sets out its findings of primary fact. Those which were central to its dispositive reasoning are reflected in the passages from its Conclusions that I set out below, and I need not summarise them here. However, its essential finding (at para. 16) was that the Appellant did very poorly at interview. It found that he had failed to do any research into the new role and had assumed that all that would be necessary was to rely on the quality of his previous work as a freelancer. That meant that he

> "… completely failed to take into account that this was a new role targeting a particular audience with a focus on using digital formatting and social media to get stories and reach that audience."

Although that was the basic failing, the ET found that his answers were unsatisfactory in other respects as well, itemised at para. 18 of the Reasons.

19. The Tribunal gives its reasons for rejecting the claim at paras. 24-31, headed "Conclusions". These follow the two-stage process referred to at para. 12 above.

20. The Tribunal's consideration of the first stage is at paras. 24-29 of the Reasons. Paras. 24-25 identify the required approach on the facts of this case (including an acknowledgment at para. 25 that discrimination can be unlawful even if it is unconscious). As appears from Morgan J's judgment on the costs appeal, Mr Ciumei submitted that the language of para. 24 betrayed a serious misdirection about what had to be established in order to shift the burden of proof, but that submission related only to the costs appeal and not to liability (no doubt because of the Tribunal's fallback conclusion about the second stage).

21. At para. 26 the Tribunal recites the matters on which the Appellant relied to establish his *prima facie* case, as follows:

> "The Claimant says that we could conclude that there was sex discrimination from the following facts:
>
> (1) He scored 13 and the two successful candidates scored 18.5 and 17.5, i.e. more than him.
>
> (2) He is a man and they are women.
>
> (3) Six months before the interview the HR Business Partner for the Arabic Service had reminded managers in the service that women were under-represented and that needed to be addressed.
>
> (4) The selection criteria for the role had changed and that the Respondent had added a criterion about targeting women audience [*sic*] but it had not formulated a question in the interview to assess this. It had done so by having regard to the gender of the candidates, i.e. it had made an assumption that women would be better able to target female audiences. The Claimant's case was that was Ms Faisal's email of 6 March clearly demonstrated this point."

22. At para. 27 the Tribunal addresses element (4) and finds as a fact that the selection criteria for the role had not changed. It then proceeds to consider the remaining elements. Paras. 28-29 read:

> "28. The facts that we are left with then is [*sic*] that the two women applicants scored higher than the Claimant and some six months before the interview the HR Business Partner in the Arabic Service had reminded managers of the need for diversity and the need to address the under-representation of women. We asked ourselves if there were no other facts, could we on the basis of those facts conclude that the Claimant have been unfairly marked down and the women unfairly marked up because of gender. Our conclusion was that those facts in themselves are not sufficient to establish a prima facie case of sex discrimination. We could not on the basis of those facts have concluded that the respondent had directly discriminated against the Claimant because of gender.
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> 29. But those, of course, were not the only facts before us. Leaving aside for a moment the Respondent's explanation for the difference in scores, there were other facts that we could take into account in determining whether the Claimant had established a prima facie case of sex discrimination. Mr Soliman and Ms Hamilton both encouraged the Claimant to apply for the role. The person who received the fourth highest score and was deemed to be suitable to be appointed was a man and, more significantly, the same panel appointed a man to the SBJ role. Those facts reinforce our conclusions that the Claimant has not established a prima facie case."

(The "SBJ role" referred to in para. 29 was a post of Senior Broadcast Journalist for World 2020 which was being recruited for as part of the same exercise.)

23. The Tribunal's primary finding was thus that the Appellant had not established a *prima facie* case, with the result that the claim failed at the first stage. However, it proceeded at paras. 30-31 to hold by way of alternative that in any event the Respondent had proved that there was no discrimination. Those paragraphs read:

> "30. However, in case we are wrong in our conclusion, and the burden of proof has shifted the Respondent has satisfied us that no sex discrimination occurred. We are satisfied that Mr Soliman and Ms Faisal gave the candidates the scores for the reasons which they said they did and that gender played no part whatsoever in their scores. They gave clear and detailed explanations for the scores on each question. Their evidence was credible and consistent with their contemporaneous notes and interview grades. In some cases there was no dispute between them and the Claimant about the answer that the Claimant gave. The dispute between them was as to whether the answers were good answers and merited the highest score or not.
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> 31. We are satisfied that the Claimant did not perform well at the interview for a number of reasons. He did not understand what a competency-based interview required. He had not done enough research about what the role involved and, in particular, the implication of it being a role funded by the 2020 project. He did not seem to appreciate that it was a different role from the Broadcast Journalist role that he had done as a freelancer for a couple of years."

24. Paras. 32-33 deal with the issue of costs. They are set out in Morgan J's judgment.

THE APPEAL TO THE EAT

25. The only ground of appeal which Judge Eady allowed to proceed, as regards liability, is set out at para. 1 (1) of her order as follows:

> "The ET erred in law in failing to consider whether [the Appellant] had been treated less favourably than his comparators; either the actual comparators in terms of the other candidates or a hypothetical comparator constructed using the cases of the other comparators."

In the explanation for her decision which accompanied the reasons she said:

> "Although the answer to this objection might simply lie in the ET's acceptance of the Respondent's evidence as to the selection process (and, in particular, the reason for the Appellant's non-selection), I was persuaded that a reasonably arguable question had been raised by the ET's apparent focus on the Appellant's case, without scrutiny of the cases of the (actual/hypothetical) comparators. That seemed to give rise to two potential points, (1) whether the ET properly had regard to the specific cases of the higher scoring female candidates – it being the Appellant's case that they did not have the relevant experience to meet the requirements of the job specification and that there were aspects of their performance at interview that were no different from that of the Appellant, which had been criticised in his case but not

> theirs (e.g. the news story used by the Appellant, referenced by the ET at para. 18); alternatively, (2) whether the ET considered how a hypothetical comparator in the Appellant's position would have been treated, constructing that candidate from the other (female) candidates, whether or not they were ultimately successful. The Appellant's point is that if the ET only focused on his case, and his failings and weaknesses, it would not have taken into account any comparable failings and weaknesses of the higher scoring female candidates, which – if ignored by the selection panel – might well provide grounds for an inference of unlawful discrimination."

(Judge Eady's reference to para. 18 of the Reasons is elucidated at para. 31 below.)

26. Since we are concerned on this appeal with the reasoning of the ET I do not believe that it is useful at this stage to set out the reasoning of Soole J on the liability issue.

THE APPEAL TO THIS COURT

27. Although the Appellant sought to raise other grounds in his Appellant's Notice, the only ground as regards liability on which Bean LJ granted permission – with, as he said, some hesitation – was ground 2, which corresponded to the ground which Judge Eady had allowed to proceed in the EAT.

28. That ground is elaborated in Judge Eady's reasons summarised at para. 25 above. She identifies two "points" about how the Tribunal addressed what I will call the comparator analysis. As I understand it, the distinction between the two points depends on whether the successful candidates are regarded as direct comparators or "evidential comparators" (see para. 11 (2) above); but the underlying complaint is the same – namely that the Tribunal failed to take into account the circumstances of the two successful candidates, in whichever capacity they are viewed. If that criticism is good, it would be capable of undermining the Tribunal's conclusions at both stages of the analysis required by section 136.

29. The principal focus of Mr Ciumei's oral submissions was on the panel's treatment of the performance of the Appellant and his comparators in interview. He relied generally on the fact that in its dispositive reasoning, which I have quoted in full above, the Tribunal said nothing about the comparators' performance. He also relied on the terms of EJ Grewal's response to the *Burns/Barke* questions and to two particular respects in which the comparators' performance at interview could be said to have been no better than the Appellant's. The former point was developed at para. 31 of his skeleton argument, and the latter at para. 32.2.

30. As to the criticism in para. 31 of the skeleton argument, the first of the *Burns/Barke* questions reads:

> "In relation to Ground 1, having regard to paragraph 26 of the ET Judgment, did the Claimant rely upon actual and/or hypothetical comparators? How was the case put, if at all, in relation to the use of comparators in closing?"

EJ Grewal's answer was:

> "The Claimant's case (as set out in his witness statement) was that he should have been appointed because he had considerable experience in radio journalism (which the successful candidates did not) and that he had performed well at the interview. He believed that the failure to appoint him had been an act of sex discrimination because Ms Faisal's email of 6 March 2017 showed that 'women's agenda' had been used a criterion and it had been assumed that he could not meet it because he was a man.
>
> In his closing submissions, the Claimant's representative said that there were three facts from which the Tribunal could infer sex discrimination. These were -
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> a) Vanessa Twigg's email of August 2016 (paragraph 6 of the Tribunal's decision);
>
> b) Ms Faisal's email of 6 March 2017 which showed that women's agenda had been used as a criterion although it had never been identified as a criterion and no question had been asked to assess it. It had been assessed purely on the basis of the gender of the candidates; and
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> c) The answers that the Claimant gave at his interview. The interview grids were not entirely comprehensible and there was little to be gained by going through them.
>
> *It was not the Claimant's case that he had been treated less favourably than any particular female candidate at the interview because she [had] given similar answers to him but had been given higher scores or that there was evidence from which we could infer that had a female candidate given the answers that he did she would have been given higher scores* [emphasis supplied]. Had that been the Claimant's case, the Tribunal would have addressed it in its decision. The Tribunal address it the way that it did at paragraph 26 because that was the case advanced by the Claimant."

Mr Ciumei submitted that the italicised passage showed that the Tribunal had failed to undertake the comparative analysis which, as he emphasised, is fundamental to any direct discrimination claim.

31. As to para. 32.2, the first example related to a question asked in the interview about what stories from that day's news should be included in a programme aimed at the Maghreb ("the Maghreb question"). The Tribunal found at para. 18 of the Reasons that the Appellant did not mention any story from that day but instead referred to a story, already reported, which was two days' old, and that this was one of the answers on which he was marked down at interview. The Appellant's point is that it was clear from the panel's notes that one of the successful candidates gave the same answer but was not equivalently marked down, and that another candidate gave an even more irrelevant answer but received the same score as the Appellant: this is the particular example referred to by Judge Eady in her reasons for allowing the appeal to proceed.

We were taken in some detail to the passages in question in the notes. The second example was that although the Appellant was criticised for not addressing how he would appeal to female audiences in relation to one criterion the interview grids for other candidates who received higher scores on this criterion showed a similar omission. Mr Ciumei confirmed that these were the only particular instances on which he relied in support of this aspect of the Appellant's case.

32. In so far as Mr Ciumei was contending that the Tribunal failed to compare the treatment of the Appellant and the successful candidates at all, that is in my view plainly wrong. Its conclusion that the reason why they were appointed, and he was not, was that they were genuinely regarded as having performed better than him in interview is, obviously, an exercise in comparative analysis. The Tribunal fully appreciated that in principle it was concerned not only with the panel's assessment of the Appellant but also with its assessment of the comparators – see in particular para. 30 of the Reasons, which finds that the reasons why the panel gave the scores that it did to all candidates had nothing to do with gender. The answer to the first *Burns/Barke* question does not say anything different: it is concerned specifically and only with what particular points the Appellant had relied on in connection with the necessary comparison.

33. The real question, and that which Judge Eady regarded as arguable, is thus more limited and specific: did the Tribunal, in the course of conducting the necessary comparison. fail to consider whether there were disparities in the panel's approach to the Appellant's weaknesses and those of female candidates, and specifically the successful candidates? In my view the answer to the first *Burns/Barke* question, so far from assisting the Appellant, affords a complete answer to his case. The Tribunal was only obliged to consider whether there were disparities in the panel's approach to the Appellant's answers and those of the comparators if and to the extent that he relied on such disparities. It is clear from EJ Grewal's answer, and particularly from the italicised passage, that Mr Sheppard in his closing submissions did not do so. It appears from what we were told that he had indeed asked some questions in cross-examination about the Appellant's and other candidates' answers to the Maghreb question; but it follows from EJ Grewal's answer (consistently with para. 26 of the Reasons) that he did not in the end rely on this aspect. In fact it seems that he expressly disavowed any point about it, since we were told that the comment recorded by EJ Grewal – see point (c) – that "the interview grids were not entirely comprehensible" and that "there was little to be gained by going through them" represented what Mr Sheppard himself said to the Tribunal. In those circumstances no criticism can be made of it for not addressing in its Reasons either of the particular points advanced by Mr Ciumei in his skeleton argument (or indeed any other disparities).

34. I would not want the previous paragraph to be taken as implying any criticism of Mr Sheppard. In the absence of the Employment Judge's notes we do not have an authoritative record of his cross-examination of the two panel-members who gave evidence, but when Mr Ciumei took us through the contemporaneous notes in relation to the Maghreb question I was very far from convinced that there was a clear-cut disparity of the kind which the Appellant alleges, and I am not at all surprised that Mr Sheppard took the forensic decision that the exercise did not advance his case.

35. Mr Ciumei in both his skeleton argument and his oral submissions ranged quite widely over the history of the proceedings and the way the Tribunal set out its reasons (partly because that has a bearing on the costs appeal); but we are concerned only (so far as liability is concerned) with the ground on which the Appellant has permission to proceed relating to the Tribunal's approach to the comparator analysis. As to that, his principal focus was, as I have said, on its treatment of the panel's assessments in the interview. That makes sense because it was clearly on the basis of those assessments that the decision not to appoint the Appellant was made: the Tribunal noted at para. 14, and apparently accepted, evidence that "once the candidates got to the interview stage the interview score was the only thing that counted". Nevertheless, I should address three other points made at para. 32 of his skeleton argument.

36. First, he submitted (at para. 32.1) that the Tribunal failed to consider whether female candidates were treated more favourably than the Appellant by being "allowed to progress through the selection process" despite not having the experience which, he says, was identified in the published job designation as essential for the BJ role. As I understand it, the reference to "progressing though the selection process" is to allege that the successful candidates should not have been shortlisted at all: if that were established (and the reason why they were shortlisted was discriminatory) then it would not matter even if they had performed better than the Appellant at interview, because they should not have got to the interview stage in the first place. The short answer, again, is that this point was not relied on in the ET: it does not appear in the summary at para. 26 of the Reasons, quoted at para. 21 above. I should say, however, that it was not in any event demonstrated to us that the successful candidates did not have the necessary experience. They were apparently not working in radio at the time of their applications (and Mr Ciumei says in his skeleton argument that some of the unsuccessful female candidates did not have radio experience at all). But the "skills, knowledge and experience required" heading in the published job designation referred only (as one of a large number of bullets") to "significant recent experience as a journalist, with a good knowledge of production techniques". It is plainly not the case that that requirement could only be satisfied by their working in radio at the time of application, still less by recent experience as a BJ such as the Appellant had had. We were not referred to any evidence that the successful candidates (or indeed the other successful female candidates) did not satisfy the criterion as formulated; and in fact the Tribunal made a finding (at para. 12 of the Reasons) that the shortlisted candidates were chosen "by reference to the skills, knowledge and experience required in the job description".

37. Secondly, he submitted (at para. 32.3) that the Tribunal failed to consider whether, even if the successful candidates did not, because of some material difference in their circumstances, qualify as actual comparators, they might not nevertheless be evidential comparators. I am not sure that this point is covered by the permitted ground of appeal, but even if it is there is nothing in it. The real issue, which I have already considered, is whether the Tribunal failed to address whether differences in the way the panel assessed the cases of the Appellant and of the successful candidates, or their experience, were indicative of discrimination. In that context it does not matter whether the successful candidates are treated as actual or evidential comparators: the important thing is simply whether there were differences in their treatment that should have been considered but were not.

38. Thirdly, he submitted (at para. 13.3) that the Tribunal "did not consider the characteristics of a suitable hypothetical compactor – namely, a female candidate with the same recent relevant experience as the Appellant and who gave the same answers at interview". But it was not necessary for it to do so: see para. 11 (1) above. This is a clear case where the Tribunal considered directly whether the Appellant's gender had played any part in the Respondent's decision – that is, "the reason why question" – and decided that it did not. That being so, it followed that a person whose material circumstances were identical would have been treated in the same way, and there was no need to construct a hypothetical comparator. The skeleton argument anticipates that answer and complains that the Tribunal's alternative decision was made without considering the cases of the comparators; but that brings us back to the Appellant's primary criticism, which I have rejected.

39. Mr Ciumei also picked up on EJ Grewal's reference at the start of the relevant *Burns/Barke* answer to "the Claimant's case (as set out in his witness statement)" and submitted that it was wrong of the Tribunal to treat the witness statement as authoritative rather than what the Appellant had said in the discrimination particulars. This point goes nowhere because there is no substantial difference between the two. In any event, when it comes to the particular issues in the case it was fully entitled to focus its reasoning on the particular points that Mr Sheppard identified in his closing submissions as justifying the drawing of an inference of discrimination: see para. 26 of the Reasons and the first *Burns/Barke* answer.

40. I have not found it necessary to refer to Soole J's judgment in the EAT, but I see nothing in his reasoning on the liability appeal which is inconsistent with mine.

41. Standing back from the particular issues considered above, this is a case where an experienced tribunal heard evidence from two of the individuals responsible for the decision of which the Appellant complained, who were professionally cross-examined by reference to the contemporaneous records, and reached the clear conclusion that the decision was reached without any account being taken (consciously or unconsciously) of the gender of any of the candidates. That is the kind of factual assessment which it is the responsibility of the tribunal to make, and its conclusion cannot be interfered with on appeal unless it is shown to be vitiated by an error of law. I can see no such error in the Tribunal's reasoning; indeed its decision is entirely understandable on the basis of the evidence to which it refers. I would add, finally, that this is the precisely the kind of case in which permission to appeal would have been refused if a second appeals test of the kind which applies in most other fields were in place.

THE COSTS APPEAL

42. I agree that the costs appeal should be allowed, and the ET's order for costs set aside, for the reasons given by Morgan J. I agree that the apparent misdirection in paras. 24 of the Reasons did not reflect the Tribunal's dispositive reasoning on the liability issue and accordingly did not contribute to its conclusion that the claim had no reasonable prospect of success. That means that, so far as the permitted grounds of appeal are concerned, its decision that it had jurisdiction to make an award of costs cannot be impugned. But I also agree that the reasons that it gave for the way in which it exercised its discretion were vitiated in the way complained of by the Appellant, and it is accordingly open to us (the parties having agreed) to exercise the

discretion ourselves. In my view the reasons given by Morgan J lead to the conclusion that this is not a case in which an order for costs was justified.

43. I am in fact doubtful whether I would have reached the same conclusion as the ET on the threshold question of whether this was a case in which the Appellant had no reasonable prospect of success. That finding does not necessarily follow, as the Tribunal appears to have thought, from the fact that he did not in the event prove a *prima facie* case for the purpose of section 136. But the limited nature of the grounds of appeal does not appear to permit us to decide the costs appeal on that basis, and we are able to reach the same substantive result by the route which Morgan J has followed.

Lord Justice McCombe:

44. I am grateful to my Lords, Underhill LJ and Morgan J, for their comprehensive judgments on the questions arising on this appeal. I agree with them that the appeal on liability should be dismissed and that the appeal on costs should be allowed.

45. On liability, I agree with the reasons given by Underhill LJ. In particular, I would express my agreement with my Lord's para. 41 above. Quite apart from the technical reasons for dismissing the appeal stated in the earlier paragraphs, it seems to me that this was a clear case of an appeal from a factual assessment made by an experienced tribunal which is well accustomed to deciding cases of this type with the benefit of their collective expertise. I too am unable to see any error of law in the reasoning that the ET expressed or in their conclusions and accordingly there is no reason to interfere with them. I agree that if the customary "second appeals" criteria had applied to this jurisdiction, as they do to virtually all others, permission to appeal would have been refused. In my judgment, it is high time that that the legislation was amended to enable that test to be adopted for appeals from cases which have already had the attention, not only of the expert ET, but also of the expert EAT. I can see no rational reason for the continued exception from the "second appeals" test for cases of this character.

46. As for costs, I agree that the appeal should be allowed for the reasons given by Morgan J on the second ground in paras. 90 and following of his judgment. I need express no view on the conclusions on the first ground and I do not do so.

47. For my own part, I would also have allowed the appeal for the reason that Underhill LJ gives (in para. 43 above) for doubting whether he would have made the same decision on costs as did the ET. I do not find that the limited nature of the appeal grounds prevents this.

48. I think that it is clear from para. 32 of the decision that the ET made an error in thinking that the Appellant's failure, in the end, to establish a sufficient prima facie case, for the purpose of shifting the burden of proof under section 136, meant that the Appellant's claim did not have reasonable prospect of success. The ET had given permission for the sex discrimination claim to be added by amendment and would not have done so if the points made had not seemed sensibly arguable. That remained the position up to and including the assessment of the case overall. Whatever the contents of the witness statements that were exchanged at a very late stage, it could not have been clear that the Respondent's case would be immune to cross-examination.

49. The threat of a costs application was made in the costs warning letter, which in part relied upon the barely particularised contention that the claim had no reasonable prospect of success. The only reasons given were that gender had not been a factor in the selection and that a female candidate had performed less well than the Appellant whereas a male candidate had done better: see para. 64 (4) of the judgment of Morgan J. That was merely a simplified statement of the issue in the case, without demonstrating that the Appellant's case was without foundation. Reliance on the costs warning letter by the ET was ground 4F of the grounds of appeal and, for my part, I would not be inclined to say that that ground was insufficient to permit argument on this point. Certainly, I see no prejudice in permitting the Appellant to take the point, simply on a narrow view of grounds drafted by him when acting in person.

50. In my judgment, the costs arguments became over-technical on this appeal. The reality was that this was a case permitted to go forward by the ET itself on the basis that it presented a reasonably arguable claim. Disclosure was very late and in part resisted by the Respondent. Statements were exchanged on 15 December 2017, with a hearing to follow immediately after the Christmas and New Year holidays. The threat of the costs application was made by the Respondent before these steps were complete. On any basis, the finding that there was no real prospect of success was a very harsh one in such circumstances.

51. For these additional reasons also, I would allow the appeal against the costs order.

Mr Justice Morgan:

52. I agree that the appeal, insofar as it relates to the dismissal by the ET of the Appellant's complaint of sex discrimination, should be dismissed for the reasons given by Underhill LJ.

53. That leaves for consideration the appeal against the order made by the ET requiring the Appellant to pay £4,550 in respect of the costs incurred by the Respondent.

54. When the ET gave its oral decision dismissing the complaint of sex discrimination, the Respondent applied orally for an order that the Appellant should pay the costs incurred by the Respondent in instructing counsel for the hearing. The ET acceded to that application.

55. Underhill LJ has set out the procedural history in relation to the costs order up to the decision of the EAT. On 31 October 2019, Bean LJ granted the Appellant permission to appeal to the Court of Appeal in relation to the costs order made by the ET, on two grounds, referred to as Grounds 4B and 4F. The matters relied upon in ground 4B were some of the matters which were relied upon in the first (sub-)ground of appeal, in relation to costs, for which Judge Eady QC gave permission to appeal to the EAT. Ground 4F was the same as the second (sub-) ground of appeal permitted by Judge Eady QC.

56. Before referring further to the permitted grounds of appeal, it is relevant to refer to some parts of the procedural history leading up to the hearing before the ET and then to the reasoning of the ET in support of its order for costs.

57. As Underhill LJ has explained, the Appellant was on 23 August 2017 given permission to amend in order to make the sex discrimination claim in the terms of the discrimination particulars, which raised essentially the same case as he put forward at the subsequent hearing in January 2018. In its decision the ET held that there were "sufficient facts to raise questions for the respondents to answer" and that the Appellant had "what appears to be an arguable claim".

58. Also on 23 August 2017, the ET gave case management directions. It directed that there would be a preliminary hearing on 9 and 10 November 2017, in respect of the original complaint, as to whether the Appellant had been an employee of the Respondent. It gave directions as to an Amended Response by the Respondent (to deal with the new sex discrimination claim) and as to the disclosure of documents (relating to all issues) and the exchange of witness statements for the preliminary hearing. Finally, it directed a full merits hearing on 3 to 5 January 2018.

59. The preliminary hearing took place on 9 and 10 November 2017. At the end of the hearing, the ET said that it concluded that the Appellant was not an employee. The ET provided written reasons for this decision on 12 December 2017.

60. On 10 November 2017, the ET gave further case management directions to lead up to the hearing due to begin on 3 January 2018. It defined the issue as to sex discrimination to be tried at that hearing and it directed the service of witness statements by 15 December 2017.

61. On 28 November 2017, at 15.55, the Respondent sent an email to Mr Sheppard, who was, as recorded by Underhill LJ, acting for the Appellant under the FRU scheme. The email was headed "without prejudice save as to costs". The email contained a number of statements, as follows:

    (1) it put the Appellant formally on notice that in the event he pursued his claim and was unsuccessful, the Respondent intended to apply for its costs, insofar as they were incurred after 1 December 2017, that is, three days after the date of the email;

    (2) it stated that if by the end of 1 December 2017, the Appellant withdrew his claim and did not seek to appeal the dismissal of his original claim for unfair dismissal, then the Respondent would not seek to recover its costs; at the date of the email, the Appellant was still within the time allowed to appeal that dismissal;

    (3) the Respondent gave a non-binding indication of the costs it would incur after 1 December 2017 in the sum of £13,000;

    (4) the Respondent considered that the claim for sex discrimination had no reasonable prospects of success; the explanation given was that gender was not a factor in the selection for the role and that a female candidate performed less well than the Appellant and a male candidate better;

    (5) the Respondent considered that, at most, the Appellant's claim was for the loss of a chance and it was unlikely that he would recover any sum of money above a low-level award for injury to feelings.

62. On 6 and 14 December 2017, the Respondent provided disclosure of various documents and provided the documents themselves on 8 and 14 December 2017.

63. The parties exchanged witness statements on 15 December 2017. The Appellant provided his own witness statement and the Respondent provided witness statements from the three members of the interview panel. These were detailed witness statements containing, respectively, 28, 15 and 3 pages.

64. On 21 December 2017, the Respondent provided to the Appellant redacted interview grids for the other seven applicants for the role for which he had applied. We were told that these redacted grids were provided despite previous opposition from the Respondent to doing so. These grids represent 72 pages in the bundles before us. The detailed comments of the three panel members in relation to each candidate's performance in response to the interview questions were hand-written and were extremely difficult to read. It would require hours of work to analyse this material to identify any differences in the treatment of the Appellant and the seven other candidates and to analyse the reasons for those differences.

65. I infer that in December 2017, when the Appellant received documents and witness statements from the Respondent to be relied upon at the forthcoming hearing, the Appellant was expecting to be advised by and then represented by Mr Sheppard at the hearing, as he indeed was.

66. The hearing took place on 3 to 5 January 2018. There were no opening submissions. The members of the ET read the papers on the first day. Then, the Appellant gave evidence and was cross-examined. Two members of the selection panel gave evidence and were cross-examined; the third member of the panel was abroad and his witness statement of 3 pages was admitted into evidence. There were closing submissions from both sides. The ET dismissed the complaint of sex discrimination and gave its reasons orally. The Respondent then applied for an order for the costs of counsel for the hearing and that application succeeded.

67. The jurisdiction of the ET to award costs in this case is conferred by Rule 76 in schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which relevantly provides that an ET may make a costs order and shall consider whether to do so where it considers that a claim "had no reasonable prospect of success".

68. In the written reasons which the ET provided on 13 April 2018, the ET explained its approach in relation to costs, at paras. 32-33, in the following terms:

> "32. We considered the Respondent's application for costs and we are satisfied that the threshold is established and crossed in this case, in that the claim had no reasonable prospect of success. That is evident from our conclusion that the Claimant failed to establish a prima facie case and the factors upon which he relied were incapable of establishing sex discrimination. Having decided that we nevertheless still have a discretion as to whether we make an award for costs, and if so, for how much? In deciding how to exercise that discretion, we took into account the fact that a costs warning letter was sent to the

> Claimant highlighting the weaknesses and the difficulties in his case. We accept that at the time that letter was sent witness statements had not been exchanged and some of the evidence which was relied upon in this Tribunal had not been disclosed to the Claimant. However, the witness statements were exchanged and all the evidence was disclosed before this hearing started. At that stage it ought to have been abundantly clear to anybody that the claim had no reasonable prospect of success. Although the deadline for withdrawing had expired, it was still open to the Claimant and/or his representatives to engage with the Respondent and to enquire from them as to whether they would still be willing not to pursue costs if the Claimant withdrew his case. In our experience it is very likely that if such an approach had been made at that stage the Respondent would have extended the deadline and agreed not to pursue costs. Had they failed to do so then the Claimant obviously would have been in a much stronger position today in front of us defending the application for costs but that was not what happened. We, therefore, think that it is appropriate to make an order for costs.
>
> 33. We think that it is right to [award] the costs of the hearing because they could have been avoided had the Claimant engaged with the Respondent after the disclosure of the witness statements and the evidence. We would have taken into account the means of the Claimant but we are not able to do so because he chose not to give us any evidence about his means although we invited him to do so."

69. The ET reached the conclusion that the claim had no reasonable prospect of success because it considered that to be evident from its earlier conclusion that the Appellant had failed to establish a prima facie case and that factors upon which he relied were incapable of establishing sex discrimination. Accordingly, to understand why the ET concluded that the claim had no reasonable prospect of success, it is necessary to look again, at least to some extent, at the reasons why the ET concluded that the Appellant had failed to establish a prima facie case and the factors he relied upon were incapable of establishing sex discrimination.

70. In its written Reasons at 24-25, the ET said:

> "24. In order to establish a prima facie case of sex discrimination the Claimant has to prove facts from which we could conclude that the three members of the interview panel had given him lower scores than what they believed his answers at the interview merited and had given the two successful candidates higher scores than they thought their answers merited and that they had done so because he was a man and that they were women and that gender had played some part in the scores they gave.

> 25. We put it that way because if the panel gave all the candidates scores that genuinely believed they deserved on the basis of their answers at interview and gender played no part in the scores given (consciously or unconsciously), then the Claimant's case must fail."

71. Underhill LJ has already quoted the terms of para. 26. At para. 27, the ET held that the Appellant had not proved the facts he asserted as described in para. 26(4). At para. 28, the ET held that the facts in para. 26(1)-(3) were not sufficient to establish a prima facie case of sex discrimination. It held that, on the basis of those facts, it could not conclude that: "the Claimant had been unfairly marked down and the women unfairly marked up because of gender".

72. At para. 29, the ET left to one side the Respondents' explanation for the differences in scores but the ET held that there were other relevant facts and taking them into account, the ET was reinforced in its conclusions that the Appellant had not established a prima facie case.

73. At paras. 30-31, the ET assumed in favour of the Appellant that he had established a prima facie case so that the burden of proof shifted to the Respondent under section 136 of the Equality Act 2010. On that assumption, the ET held that the Respondent had established that no sex discrimination had occurred.

74. As explained earlier, the Appellant has been given permission to appeal against the order for costs on two grounds. The first ground (4B) refers to para. 24 of the ET's decision and asserts that the ET was wrong in law in holding that the Appellant had to prove both that the selection panel had given him a lower score than they believed he deserved **and** had given the successful candidates a higher score then they believed he deserved. The ground of appeal asserts that the ET considered that the Appellant's complaint would fail even where he proved one of those possibilities. This ground of appeal relates to the ET's decision on what it described as the threshold question as to whether the claim had no reasonable prospect of success.

75. The second ground of appeal in relation to costs (4F) relates to the way in which the ET exercised its discretion under Rule 76 and specifically complained of the ET relying on what it said was its experience, in the absence of any evidence, and holding that if the Appellant had approached the Respondent and asked it to agree not to seek an order for costs, it was "very likely" that the Respondent would have agreed.

76. In support of the first ground of appeal, Mr Ciumei submitted:

(1) in para. 24 of its Reasons, the ET misdirected itself as to the burden of proof;

(2) this misdirection was carried forward into para. 32 when the ET wrongly held that the claim had no reasonable prospect of success;

(3) in any event, the question whether a claim has a reasonable prospect of success is not the same question as whether a claimant has established a prima facie case;

(4) the words "could decide" in section 136(2) of the Equality Act 2020 are satisfied where a reasonable tribunal could properly decide that there had been sex

discrimination and reasonable tribunals might take different views on that question;

(5) a reasonable prospect of success is one that is more than merely arguable and it is not necessary to show that the claim is likely to succeed;

(6) the factors relied upon by the Appellant and summarised in para. 26 of the Reasons were capable of establishing sex discrimination particularly if an appropriate comparator had been identified and the ET had addressed itself to the question of unconscious bias.

77. I will consider below whether it was open to Mr Ciumei to advance all of those submissions in view of the way in which the first ground of appeal is expressed.

78. In response to the first ground of appeal, Mr Caiden submitted:

(1) This ground of appeal challenges the reasoning in para. 24 of the Reasons; that reasoning was in connection with the question of liability not the question of costs; if the substantive appeal in relation to liability is dismissed (I interpose, as it now will be) then a challenge to para. 24 cannot be used as the basis for challenging the order for costs;

(2) When considering the appeal on costs, the court must act consistently with its earlier conclusion that the substantive appeal is to be dismissed;

(3) Para. 24 of the Reasons did not involve a misdirection; if the Appellant was scored lower than he deserved it followed that the female candidates were scored higher; the two possibilities in para. 24 joined by the word "and" are two sides of the same coin;

(4) In the alternative to (3) above, the word "and" in para. 24 should be understood as "or";

(5) These submissions were accepted by the EAT on appeal from the ET in this case.

79. I consider that the first ground of appeal is open to the Appellant and does not automatically fail because the court will dismiss the substantive appeal. In relation to liability, the ultimate conclusion of the ET was that the claim failed. This court is dismissing an appeal against that conclusion. However, for the purposes of considering the costs appeal the question is not whether the claim should ultimately fail but whether it had a reasonable prospect of success or, to use the language of the ET, whether the Appellant had shown a prima facie case. A case can have a reasonable prospect of success but yet fail. A claimant can show a prima facie case and still fail.

80. I consider that if para. 24 of the Reasons is taken literally then it plainly involves a misdirection. It was not the case that the Appellant had to prove both of the matters referred to in para. 24. He should have succeeded if he had proved either alternative. Nor do I regard para. 24, taken literally, as referring to two sides of the same coin; to use that metaphor, that paragraph refers to two different coins. It might be possible to read a similar formulation in para. 28 of the Reasons as referring to two sides of the same coin but that is more difficult in relation to para. 24.

81. However, if para. 24 were to be taken literally, it is so obviously wrong that I am driven to wonder whether the ET really intended "and" to mean "or". The EAT thought that that was a possible reading.

82. In any event, I consider that para. 24 must be read together with para. 25 and indeed the whole of the reasoning in paras. 24 to 29. It was the entirety of that reasoning which led the ET to conclude that the Appellant had failed to make out a prima facie case.

83. Para. 25 is an important paragraph in this context. There the ET explained that if the panel gave all the candidates scores which the panel believed candidates deserved and gender played no part in the scoring (consciously or unconsciously) then the Appellant's case must fail. There is no misdirection in para. 25. Applying para. 25, if the Appellant had proved that he had been marked down because of his gender he did not also need to show that the female candidates had been marked up because of their gender and his claim would not fail.

84. Further, the reasoning in para. 27 is not dependent on any misdirection in para. 24. It is open to argument whether the reasoning in para. 28 is affected by the same misdirection as in para. 24. The reasoning in para. 29 is not dependent on any misdirection in para. 24.

85. Reading these paragraphs of the reasoning as a whole, I consider that the ET held that the Appellant had no prima facie case for saying that he had been given a lower score then he deserved by reason of his gender and it also held that he had no prima facie case for saying that the female candidates had been given higher scores than they deserved by reason of their gender. Because he had no prima facie case for either of these, he failed. The reasoning of the ET nowhere conveys the sense that the reason why the Appellant failed was because he had shown a prima facie case for only one, but not both, of these possibilities.

86. Accordingly, with a little hesitation by reason of the inappropriate wording of para. 24 of the Reasons, I reach the conclusion that the Appellant cannot challenge the ET's conclusion that the claim had no reasonable prospect of success in para. 32 on the basis of para. 24 of the Reasons.

87. As described earlier, Mr Ciumei put forward further challenges to the finding in para. 32 that the claim had no reasonable prospect of success because in the event, at the hearing, the Appellant had failed to persuade the ET that he had a prima facie case. I can see that in some cases it might be that a case could be considered to have a reasonable prospect of success in advance of a hearing even where, at the hearing, when the case is examined, it is held that the claimant is not able to make out a prima facie case.

88. Mr Caiden submitted that these further challenges were not within the ground of appeal for which permission to appeal has been granted. I agree with this submission. These further challenges to the finding that the claim had no reasonable prospect of success cannot fairly be brought within the permitted ground of appeal. There was no application to us for permission to appeal on these further grounds. Although I share the doubts expressed by Underhill LJ at para. 43 of his judgment, in the absence of a relevant ground of appeal, it is not appropriate for this court to ask whether, on these

grounds, the present is a case which had a reasonable prospect of success even though in the event it was held that the Appellant failed to show a prima facie case of discrimination.

89. Accordingly, I reject the first ground of appeal in relation to costs. It follows that the ET's decision that it had jurisdiction to award costs in this case will stand.

90. The second ground of appeal in relation to costs challenges the way in which the ET exercised its discretion in relation to costs. Mr Ciumei recognised the clearly established obstacles to a successful challenge to the exercise of a discretion as to costs. The second ground of appeal made a single point which challenged the finding of the ET that the Respondent would have agreed not to seek its costs if it had been asked at some undefined point after exchange of witness statements and before the hearing.

91. Mr Ciumei made detailed submissions as to the contents of the email, the time when it was sent, the procedural history following the email and why, after all, the claim should be assessed as having a reasonable prospect of success. As with the first ground of appeal in relation to costs, it is simply not possible to bring the full breadth of these submissions within the permitted ground of appeal. I will therefore focus on the submissions made in support of, and in response to, that ground.

92. Mr Ciumei submitted:

    i) the warning email as to costs contained an offer which expired on 1 December 2017;

    ii) after 1 December 2017, the Respondent had incurred substantial further costs;

    iii) after 1 December 2017, the Respondent had not made a further offer involving no order as to costs;

    iv) the Respondent had not given any evidence as to what it would have done if at some point between exchange of witness statements and the hearing, the Appellant had offered to withdraw the claim and invited the Respondent to agree not to pursue its costs;

    v) the ET simply could not know what attitude the Respondent would take to such an invitation.

93. Mr Caiden made submissions as to why the costs warning email was relevant to the exercise of the discretion as to costs. However, the arguable relevance of the email does not directly address the narrow challenge in the permitted ground of appeal that the ET was influenced by its impermissible finding as to what the Respondent would have done if the Appellant had offered to withdraw the claim in return for the Respondent's agreement not to seek its costs. On that point, Mr Caiden submitted that the relevant finding was not essential to the ET's reasoning and its decision really flowed from the other considerations it referred to.

94. I consider that the ET's finding that if the Appellant had offered to withdraw the claim then it was very likely that the Respondent would not have pursued its costs was not a finding it was entitled to make. There was no evidence to support the

finding which can therefore only be based on inference. I do not think that such an inference could be drawn. If anything, the fact of the costs warning letter, the non-acceptance by the Appellant of its terms prior to 1 December 2017 and the fact that the Respondent had incurred further costs up to the exchange of witness statements on 15 December 2017 provide more support for the rival inference that the Respondent would not have agreed to no order as to costs if the Appellant had offered to withdraw after 15 December 2017.

95. I have considered whether I should reach the view that the observations of the ET about what the Respondent would have done were made by way of comment and were not in the end taken into account when exercising its discretion as to costs. I cannot take that view. The ET clearly held that the costs of the hearing had been wasted because the Appellant should have approached the Respondent before the hearing and offered to withdraw the claim, at which time it was very likely that the Respondent would have agreed to drop its claim to costs.

96. It follows that when exercising its discretion as to costs the ET took into account an impermissible consideration. Accordingly, this court ought to set aside the decision as to costs.

97. At the hearing of the appeal, counsel for both parties, after taking instructions, agreed that if we set aside the decision as to costs we should not remit the issue as to costs to an ET but should make the decision ourselves based on the submissions made to us as to what was the appropriate order.

98. My view is that there should be no order as to the costs in the ET. The considerations which weigh with me are:

i) when the Appellant was given permission to amend his claim to add the sex discrimination claim, the ET held that the Respondent had a case to answer and the claim appeared to be arguable;

ii) I agree with the ET that there was no case for ordering the Appellant to pay costs before the point when witness statements were exchanged;

iii) I would go further than the ET and hold that there was no case for ordering the Appellant to pay costs before he received the interview grids for the other candidates on 21 December 2017;

iv) the costs warning email does not lead me to make a different finding; that email was sent before much of the disclosure and before the witness statements; the email did not contain any analysis of the merits of the claim and did not do much more than assert that the claim would fail;

v) the Appellant was not unreasonable in not accepting the offer in the email; the period of time for acceptance was very short and the offer included a term that he give up his appeal against the decision that he was not an employee; when the email was sent, the Respondent had not given its full disclosure nor had it provided its witness statements;

vi) between 21 December 2017 and the start of the hearing on 3 January 2018, time was very short particularly bearing in mind the Christmas and New Year holidays;

vii) the Appellant was entitled to take advice from Mr Sheppard as to the effect of the documents disclosed on 6, 8 and 14 December 2017, the effect of the Respondent's witness statements and the significance of the interview grids for the other candidates;

viii) it would take many hours of work after 21 December 2017 before the Appellant could be given reliable legal advice as to the strength of his claim in the light of the new material; this would have to be in a period when there was not much time available;

ix) in the light of the above, I would not criticise the Appellant for not withdrawing the claim before the hearing; there was simply not enough time before the hearing to reach the conclusion that he should now give up a case which had been described earlier as an arguable claim;

x) the earliest point at which it could be said that the Appellant ought to have considered making an offer to the Respondent to withdraw the claim was on the first day of the hearing;

xi) if the Appellant had offered to withdraw on the first day of the hearing, it is not possible to know what the response of the Respondent would have been; I would not hold that the Appellant had any right to expect that the Respondent would agree to no order for costs in that event; if anything, the terms of the warning letter and the fact that the Respondent had incurred costs after 1 December 2017 might lead one to think that they would ask for their costs after 1 December 2017 or at least ask for their costs of coming to the hearing;

xii) even if the Appellant ought to have considered, at the beginning of the hearing, that his previously arguable case was now likely to fail, I would not criticise him for continuing to present it at the hearing which had been arranged and for which both sides were prepared and ready to go;

xiii) I would not distinguish between the fee charged by the Respondent's counsel for the first day of the hearing and the two refreshers;

xiv) there are no other features such as unreasonable behaviour which are relied upon in support of the Respondent's application for costs.

99. As my Lords agree with this conclusion, the order for costs made by the ET will be set aside and replaced with no order as to costs.