THE INDUSTRIAL TRIBUNALS

CASE REF: 1615/05

CLAIMANT: **James Robert Peifer**

RESPONDENTS: **1. Drumglass High School**
2. Southern Education and Library Board

DECISION

The claimant's victimisation claim is well-founded. It is ordered that the respondents shall pay to the claimant the sum of £1,063 (a principal sum of £500 plus interest amounting to £563), as compensation in respect of that unlawful discrimination.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Buggy**

Members: **Mrs C Stewart**
Mrs F Cummins

APPEARANCES:

The claimant was self-represented.

The respondents were represented by Ms A Finegan, Barrister-at-Law.

REASONS

1. During the summer and autumn of 2005, the claimant was an applicant for a classroom assistant post in Drumglass High School ("the School"), in Dungannon. That application was unsuccessful.

2. The foregoing is the immediate context of these proceedings.

The Acts

3. For present purposes, we have defined "Act" ("act" with a capital "a") in a special manner. For the purpose of this Decision, any "Act":

   (1) includes both acts and omissions,

   (2) refers to all acts and omissions in respect of which compensation is claimed,

(3) but does not refer to any acts or omissions which are of merely evidential or contextual importance.

4. Having carefully considered the claimant's claim form in these proceedings, it is clear to us that the only Acts which are within the scope of this case are as follows:

(1) Alleged unfairnesses, within the context of the conduct and outcomes of the recruitment process in respect of the relevant Drumglass High School classroom assistant vacancy (the vacancy for which the claimant applied), throughout the period from the date of the commencement of that recruitment process until the date in October when that process was abandoned.

(2) The omission, at the end of those two phases of the process, to appoint the claimant to the post

The causes of action

5. In relation to each of the relevant Acts, there were two separate causes of action.

6. Those causes of action were as follows:

(1) Unlawful sex discrimination, contrary to paragraph (1) of Article 8 of the Sex Discrimination (Northern Ireland) Order 1976 ("the SDO") and

(2) unlawful victimisation discrimination, also contrary to paragraph (1) of Article 8 of the SDO.

7. Paragraph (1) of Article 8 of the SDO makes it unlawful for a person, in relation to employment by it at an establishment in Northern Ireland, to sex-discriminate against a man –

(1) in the arrangements it makes for the purpose of determining who should be offered that employment

(2) or by refusing or deliberately omitting to offer him that employment.

8. Paragraph (1) of Article 8 also makes it unlawful for a person, in relation to employment by it at an establishment in Northern Ireland, to discriminate by way of "victimisation" against a man:

(1) in the arrangements which it makes for the purpose of determining who should be offered that employment or

(2) by refusing or deliberately omitting to offer him that employment.

9. Article 3 and 4 of the SDO define the circumstances in which a potential employer, within the context of recruitment, may be guilty of direct sex discrimination. According to paragraph (2) of Article 3 (which must be read in conjunction with Article 4), sex discrimination occurs, in any circumstances relevant for the purposes of paragraph (1) of Article 8 of the SDO, if, on the ground of gender, a potential employer treats a man less favourably than that potential employer treats or would treat a woman.

10. For the purposes of paragraph (1) of Article 8, Article 6 of the SDO defines "discrimination by way of victimisation discrimination" (which is usually referred to as "victimisation discrimination"). In the circumstances of this case, the effects of paragraph (1) of Article 6 can be summarised as follows.

11. For the purposes of paragraph (1) of Article 8, a person victimisation-discriminates another person if it treats the person victimised less favourably than, in those circumstances, it treats, or would treat, other persons, and it does so by reason that:

    (1) the person victimised has carried out a "protected act",

    (2) the discriminator knows that that person intends to carry out a protected act,

    (3) the discriminator suspects that that person has done a protected act, or

    (4) the discriminator suspects that the person victimised intends to do a protected act.

12. In the present context, a claimant has carried out a "protected act" if he or she:

    (1) has brought proceedings against that potential employer, or against any other person, under sex discrimination legislation or

    (2) has given evidence or information in connection with SDO proceedings brought by any person against that potential employer or against any other person, or

    (3) has otherwise done anything under or by reference to the SDO, in relation to that potential employer or in relation to any other person, or

    (4) has alleged that the relevant potential employer, or any other person, has committed an act which would amount to a contravention of the sex discrimination legislation.

The unfairnesses

13. The relevant unfairnesses clearly emerge from the following summary of relevant events, which we consider to be an accurate summary:

    (1) The school needed to employ somebody for the purpose of carrying out the duties of a particular classroom assistant post.

    (2) The claimant applied for that vacancy.

    (3) During the first phase of the relevant recruitment process, interviews were held, in relation to the post.

    (4) The claimant, and another candidate, "Ms X", alongside other applicants for the post, were interviewed for that post.

(5) Prior to the end of that first phase of the recruitment process, Ms X was already carrying out the duties of that post and was being paid for carrying out those duties.

(6) At the end of the first phase of the relevant recruitment process, Ms X was chosen as the successful candidate.

(7) However, as a result of an audit which was carried out by the Southern Education and Library Board ("the Board"), it was decided that that first phase of the recruitment process was defective, both because the panel who selected the successful candidate, at that stage of the process, was not quorate (because that panel consisted of only two people), and because the criteria upon which that panel made its decisions were not criteria which were discernible from the relevant advertisement.

(8) The Board advised the School to re-commence the recruitment process, by carrying out a fresh shortlisting process in respect of all the current candidates for the post, and by interviewing whichever of those candidates it then decided to shortlist.

(9) The School purported to follow those directions.

(10) During that second phase of the recruitment process, the claimant was not shortlisted.

(11) During that second phase of the recruitment process, Ms X and "Ms Y" were shortlisted.

(12) Pursuant to that second phase of the selection process, Ms X and Ms Y were chosen, as the successful candidate and as the reserve candidate, respectively. (Ms X was chosen as the successful candidate and Ms Y was chosen as the reserve candidate).

(13) Neither of those choices should have been made. An audit which was subsequently carried out by the Board confirmed that neither Ms X nor Ms Y met the new shortlisting criteria.

(14) As a result of those determinations by the Board, the School purported to terminate the entire recruitment process.

(15) However, purporting to act pursuant to certain powers which she had to appoint people on a temporary basis, Mrs Eileen Donnelly ("Mrs Donnelly"), who was the Principal of the School at that time, subsequently appointed Ms X to the relevant post.

14. The first round of interviews in respect of this recruitment process were conducted at the beginning of September 2005; and, during the second phase of the recruitment process, the shortlisting took place during October 2005.

15. In a claim form which was presented to the Office of the Industrial Tribunals on 25 August 2005, this claimant had brought claims of gender discrimination in

respect of many different classroom assistant recruitment processes.

16. Those proceedings had been brought against ten different schools and against three of the five Education and Library Boards which were in existence in Northern Ireland at that time.

The history of these proceedings

17. The present proceedings ("these proceedings") have already been the subject of decisions of an industrial tribunal.

18. A tribunal ("the First Tribunal") issued a liability decision in this case in September 2013 and issued a remedies decision in this case in September 2014.

19. Those two decisions can be summarised in the following terms:

    (1) On the basis of an admission of liability which had been made on behalf of both of these respondents, the First Tribunal decided that this claimant's sex discrimination complaint in respect of some of the relevant Acts was well-founded.

    (2) The First Tribunal decided that the claimant was entitled to compensation amounting to £3,429 in respect of that gender discrimination.

20. The claimant appealed to the Court of Appeal in respect of those decisions.

21. In September 2017, the Court of Appeal delivered its decision, in respect of that appeal.

22. At the same time, that court also delivered its judgment in respect of a number of other appeals, which this claimant had also made, in respect of various decisions, of various tribunals, in relation to various other IT discrimination proceedings ("other proceedings") which this claimant had taken, against various schools, and against various Boards, in relation to various unsuccessful job applications which he had made in respect of various classroom assistant posts.

23. The Court of Appeal's judgment in respect of all of those appeals (including the appeal in this case) is to be found in *Peifer v Belfast Model School for Girls and Others* [2017] NICA 55. At paragraphs 44-49 of that judgment, Morgan LCJ (delivering the judgment of the Court) dealt with the issues and outcomes of the appeal in this particular case, in the following terms:

> "[44] The appellant applied for a classroom assistant post at the school with a closing date for applications of 19 July 2005. He was invited to attend for interview on 1 September 2005. A female applicant was selected for the post. The appointment was audited by the Southern Education and Library Board as a result of which a letter was sent to the school on 16 September 2005 indicating that the recruitment exercise contravened good practice. First, the selection panels were not quorate which meant that the processes for shortlisting in interview were not valid and secondly the criteria on the shortlisting document were not discernible from those stated in the

advertisements for the post. The school was advised to recommence the recruitment and selection processes from the receipt of applications stage.

[45] When the competition was recommenced the appellant was considered not to have met the shortlisting criteria which included evidence that the candidate had received training in autism, ADHD or dyslexia. That process was again audited on 21 November 2005. The SELB concluded that only two applicants met all the criteria which the panel used for the shortlisting. One of those withdrew from the process and the other was not recommended for appointment. The recommended appointee and the reserve candidates did not meet the criteria applied in shortlisting and were not regarded as suitable candidates. In those circumstances it was considered that no appointment should be made.

[46] That case was listed for hearing before the tribunal on 2 September 2013. On the morning of the hearing counsel for the respondent admitted liability for unlawful discrimination on the ground of sex. There was no written basis submitted to the tribunal for that finding. The tribunal then decided to adjourn the hearing of the appropriate remedy.

[47] The appellant was not satisfied with this outcome. He considered that he had been deprived of the opportunity to demonstrate the extent to which the respondent had discriminated against him. In particular in his IT1 he had raised the issue of victimisation. A case management discussion was held on 10 December 2012 to identify legal and factual issues. The papers show that the issue of victimisation because he had made previous complaints of sex discrimination was identified as a factual issue but was not set out as a specific legal issue.

[48] The appellant accordingly complains that he has been deprived of the opportunity to present his victimisation claim and thereby deprived of the opportunity to pursue thereafter his remedy in respect of it. At the remedy hearing he was apparently cross-examined about the issue of victimisation but he was the only witness to give evidence at that hearing. The written decision of the remedy hearing indicates that the articulated admission of liability made at the hearing on 2 September 2013 was:

> "The Respondents admitted liability on the basis for the post of classroom assistant at Drumglass High School that two female candidates in the second recruitment exercise were shortlisted on 6 October 2005 when neither candidate had received training in autism, ADHD or dyslexia whereas the claimant was not shortlisted against that criterion. After a period of eight years the Respondents are not in a position to offer any explanation as to why this happened and therefore the Respondents admit liability on the grounds of sex discrimination"

[49] In our view the appellant had asserted the claim in victimisation before the tribunal. The hearing on 2 September 2013 did not deal with the claim. The remedies hearing listed on 18 August 2014 did not purport to deal with that claim albeit that the appellant was cross-examined in respect of it. The circumstances of the admission by the respondent on 2 September 2013 without any written basis of the reasons for the admission were

unsatisfactory. In our view the appellant was deprived of the opportunity of pursuing his victimisation claim and we direct, therefore, that his victimisation claim should be heard by a fresh tribunal."

The terms of the remittal

24. This tribunal has become seised of this case pursuant to the direction of the Court of Appeal which is quoted above. (See paragraph 49 of the Court of Appeal judgment).

25. Upon reflection, we have concluded that, pursuant to that remittal, the scope of our tasks is relatively limited. All that we are entitled to do, and all that we are required to do, is the following:

    (1) We have to consider the claimant's Article 8 victimisation claim (which is a claim in respect of the same Acts as the Acts which were also the subject-matter of the sex discrimination claim which has already been adjudicated upon).

    (2) If we decide that that victimisation claim is well-founded, we must decide on the amount of any compensation, in respect of that particular type of discrimination ("the relevant discrimination") to which the claimant is entitled.

The facts

26. In the following paragraphs, we have set out various findings of fact which are relevant to the issues which we have determined in this case. (For ease of reference, and in order to minimise avoidable repetition, some other findings of fact, also relevant to the issues which we have had to decide, are contained elsewhere in this Decision).

27. The main basis for the victimisation discrimination claim, in these proceedings, can be summarised as follows. The claimant correctly asserts that unfair preference was shown to Ms X, during both phases of the relevant recruitment process, and that, during the second phase of the recruitment process, unfair preference was also shown in relation to Ms Y (the candidate who was appointed as the reserve candidate during the second phase of the relevant recruitment process). The claimant says that the relevant unfairnesses of the relevant recruitment process constituted unlawful victimisation discrimination within the meaning of paragraph (1) of Article 8 of the SDO.

28. At the time of the relevant recruitment process (and for many years afterwards), Mrs Eileen Donnelly was the Principal of the School. In that capacity, she was present during all the shortlisting, interviewing, re-shortlisting and re-interviewing which took place during the course of the relevant recruitment process.

29. All the decision-making which is the subject of the victimisation discrimination claim in these proceedings was decision-making which was carried out by various members of the Board of Governors of the School. In this decision, we refer to some of those alleged decision-makers, respectively, as:

    "A"

"B"

"C"

"D"

and "E"

30. During the first phase of the recruitment process, both the shortlisting and the interviewing was carried out by A and B.

31. A did not give evidence in this case. We are sure that there was good reason for the respondents' omission to call A as a witness in this case. Accordingly, we draw no adverse inferences from the omission to call A as a witness.

32. During the second phase of the recruitment process, the shortlisting panel consisted of:

A,

C,

D,

E,

and Mr Malcolm McQueen.

33. Only C and E provided sworn oral testimony, in these proceedings, in relation to the shortlisting during the second phase of the recruitment process. In deciding liability and compensation issues in this case, we drew no adverse inferences from the fact that only C and E provided oral testimony (on behalf of the respondents) in relation to that shortlisting.

34. During the second phase of the recruitment process, the interview panel consisted of A, C and D. For the avoidance of any doubt, we have not drawn any adverse inferences on account of the fact that C was the only member of that second-phase interview panel who provided sworn oral testimony in this case.

35. In 2005, there were five Education and Library Boards in Northern Ireland.

36. In proceedings which were presented on 19 August 2005 (Case Reference Number 1200/05), the claimant made claims against three of the five Education and Library Boards (the Western Education and Library Board, the Belfast Education and Library Board and the South Eastern Education and Library Board). In the same proceedings, he made claims against ten different post-primary schools, which were as follows:

(1) Castlederg High School
(2) Limavady High School
(3) St Patrick's and St Brigid's College, in Claudy, (in Co. Derry/Londonderry)

(4) Oakgrove Integrated College, in the city of Derry/Londonderry
(5) Four Belfast schools, some of which were Controlled Schools, and some of which were Catholic Maintained Schools
(6) St Colmcille's High School in Crossgar
(7) Sullivan Upper School in Holywood.

37. In the relevant claim form (CRN 1200/05), the claimant stated his complaint in the following terms:

> "Complaint is about discrimination in recruitment. With regard to one particular type of job – Special Needs Classroom Assistant. Respondents will be Equal Opportunities Units at three Education and Library Boards and various secondary schools within their respective domains.
>
> On some occasions I was shortlisted while on others I was not. In any event, I feel sure I was the best qualified applicant in probably each attempt. More later in this form".

38. At paragraph 8.1 of that claim form, the claimant ticked the box for sex discrimination.

39. At paragraph 8.4 of the claim form, the claimant set out more details about the timing of the various applications which had culminated in his tribunal 1200/05, proceedings. According to the details provided there:

(1) He got a non-selection letter from Rathmore Grammar School in Finaghy on 20 May 2005.

(2) He got a "non-shortlist" letter from Sullivan Upper School in Holywood on 20 June 2005.

(3) He got a "non-shortlist" letter from St Patrick's and St Brigid's College on 30 June 2005.

(4) He got a non-shortlist letter from Castlederg High School on 30 June 2005.

(5) He got a non-shortlist from Belfast Model School on 4 July 2005.

(6) On the same day, he got a non-selection letter from Limavady High School.

(7) On 8 July 2005, he got a non-selection letter from St Gabriel's High School.

(8) On 8 August 2005, he got a non-selection letter from La Salle Boys School in Belfast.

(9) On 9 August 2005, he got a non-selection letter from St Colmcille's High School in Crossgar.

(10) On 7 August 2005, he got a non-selection letter from Oakgrove Integrated College.

40. As the claimant explained in the 1200/05 claim form, by the time of the presentation of the claim form, he had written to five of the schools, and three of those schools had responded to those communications from this claimant. At paragraph 12.1 of the 1200/05 claim form, this claimant commented on those responses, in the following terms:

> "Two of the five have chosen to call me by phone to give "off the cuff" terse explanations. One of the five responded finally today (17 August) with one sentence over telephone. One Education and Library Board have put me as "first" on a reserve list, should a "suitable" vacancy of the school arise".

41. In 2005, all of the Northern Ireland Education and Library Boards, and many of Northern Ireland's post-primary schools, were represented by "the Education and Library Boards Solicitors". Both in respect of the 1200/05 proceedings and also in respect of these particular proceedings, Responses were presented, by the person who was then in charge of the ELB Solicitors. (Below, we refer to him as "the Head Solicitor)".

42. On 23 November 2005, this claimant presented a fresh set of proceedings to an industrial tribunal, which included the claims which were/are the subject of the present proceedings. The case reference number of the claims, in those proceedings, against Drumglass High School and against the Southern Education and Library Board, is 1615/05.

43. In that claim form, the claimant complained in respect of three separate classroom assistant recruitment exercises, in relation to three separate posts, which had been carried out in each of the following schools:

(1) Drumglass High School
(2) St Louise's Comprehensive College on the Falls Road in Belfast
(3) Grosvenor Grammar School, also in Belfast.

44. In the claims in relation to the Drumglass High School vacancy, the claims were made against the School and against the Southern Education and Library Board.

45. In the claims which were made against St Louise's Comprehensive College, the school was the respondent and so was the Belfast Education and Library Board.

46. In the claims which were made in respect of the Grosvenor Grammar School recruitment exercise, the school was a respondent, and so was the Belfast Education and Library Board.

47. At paragraph 11.1 of the relevant industrial tribunal claim form, the claimant stated the following:

> "For reasons stated in Section 12, I believed there has been not only sex discrimination, but also victimisation".

48. At paragraph 12.1 of the claim form, in respect of the Drumglass Recruitment exercise, the claimant stated the following:

"I applied to Classroom Assistant vacancy in first part of July (19 July) deadline), They left a message 26 Aug on my phone. (Monday – Bank Holiday). On 29 August I reached them by phone. They asked if I was coming to 1 Sep interview, Yes! Later in day I received their letter of invite. On 28 September I had to write to them to see how the 1 September interview had gone. On 14 October I received their letter (dated 10 October). It read: … "the selection procedure undertaken by the Board of Governors was deemed to be unfair due to incorrect application of the selection criteria and the committee not being quorate. You have not been selected for interview … Best wishes to you".

49. On 29 December 2005, a Response was presented, on behalf of the Southern Education and Library Board, and also on behalf of Drumglass High School. The Head Solicitor (see paragraph 41 above) signed that Response.

50. At paragraph 6.2 of that Response, the respondents specified the following defences:

"(1) The claimant together with fifteen other applicants applied for the post of Classroom Assistant at Drumglass High School, Dungannon. He was not shortlisted for the post as the short-listing panel considered that he did not demonstrate on his application form that he met the enhanced criterion, namely, "Please demonstrate that you have specific training in managing autism, dyslexia or behavioural issues, such as Attention Deficit Hyperactivity Disorder".

(2) Following an audit check on the recruitment process the Human Resources Branch advised the Principal that the selection panel was not quorate and that the decisions of the selection panel could not be sustained. However, this did not conflict with the reason for not shortlisting the Claimant. The advice given to the Principal was to recommence the recruitment exercise at the shortlisting stage. The re-run of the recruitment exercise was also audited and when other procedural issues emerged, the advice given was to re-advertise the post. To date no appointment has been made to his post and it has not been readvertised.

(3) The respondents deny that they discriminated against the Claimant on the grounds of his sex or at all.

(4) The claim regarding victimisation must be rejected since the respondents had no knowledge of the claimant's complaints against the other Boards until the Claimant made such complaints known in his "Claim to an Industrial Tribunal" form dated 22 November 2005, case reference 1616/05 refers".

The burden of proof legislation

51. By 2005, the SDO had been amended by inserting a new Article, Article 63A, which was entitled "Burden of proof: industrial tribunals".

52. In 2005, the text of that new Article was as follows:

"(1) This Article applies to any complaint presented under Article 63 to an industrial tribunal.

(2) Where, on the hearing of the complaint, 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 –

(a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part III, or

(b) is by virtue of Article 42 or 43 to be treated as having committed such an act of discrimination against the complainant,

the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed that act".

53. In this case, the respondents realistically accept that, if any relevant act of unlawful victimisation discrimination was carried out, by any relevant individual, each of these two respondents (the Board and the School) is to be treated, pursuant to Article 42 and/or Article 43 of the SDO, as having itself committed the relevant act of unlawful discrimination against this claimant.

54. In the SDO itself, and in other employment discrimination legislation, the provisions of the 2005 version of Article 63A of the SDO have subsequently been modified or replaced.

55. However, it seems to be generally accepted that the modified or replaced versions of Article 63A, are not, in the present context, practically different, from the provisions of the 2005 version of Article 63A of the SDO, either:

(1) in scope or

(2) in meaning.

56. We think that it is clear that subsections (2) and (3) of Section 136 of the Equality Act 2010 (which applies in Great Britain) has a scope and a meaning which are practically identical to the scope and meaning of the material parts of the 2005 version of Article 63A of the SDO and of the current version of Article 63A of the SDO.

57. Subsections (2) and (3) of Section 136 of the Equality Act, so far as material, provide as follows:

"(2) If there are facts from which the [employment tribunal] could decide, in the absence of any other explanation, that a person (A) contravened [the employment discrimination provision] concerned, the [employment tribunal] must hold that the contravention occurred.

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

58. In *Ayodele v Citylink Ltd & Anor* [2017] EWCA Civ 1913, Singh LJ, on behalf of a unanimous England and Wales Court of Appeal, gave detailed consideration to the implications of subsections (2) and (3) of Section 136 of the 2010 Act. At paragraph 34 of his judgment, Singh LJ dealt with the implications of those subsections in the following terms:

> "As I have mentioned, the origins of the material legislation lie in EU law. The Opinion of Advocate General Mengozzi in Case C-415/10 *Galina Meister v Speech Design Carrier Systems GmbH*, delivered on 12 January 2012, ECLI:EU:C:2012:8, at para. 22, supports the view that in EU law the initial burden lies on a claimant and that this maintains a fair balance between the rights of claimants and those of defendants or respondents:
>
> > "It is also apparent from the overall scheme of those provisions that the choice made by the legislature was clearly that of maintaining a balance between the victim of discrimination and the employer, when the latter is the source of the discrimination. Indeed, with regard to the burden of proof, those three directives opted for a mechanism making it possible to lighten, though not remove, that burden on the victim. In other words, as the Court has already held in its judgment in *Kelly* … the mechanism consists of two stages. First of all, the victim must sufficiently establish the facts from which it may be presumed that there has been discrimination. In other words, the victim must establish a *prima facie* case of discrimination. Next, if that presumption is established, the burden of proof thereafter lies on the defendant. Central to the provisions referred to in the first question referred for a preliminary ruling is therefore the burden of proof that, although somewhat reduced, nevertheless falls on the victim. A measure of balance is therefore maintained, enabling the victim to claim his right to equal treatment but preventing proceedings from being brought against the defendant solely on the basis of the victim's assertions.""

59. At paragraphs 92-94 of the same judgment, Singh LJ explained the extent of the task which must be carried out by a claimant, if he/she is to be able to take advantage of the proof-reversal provisions which are contained at the end of Section 136 of the Equality Act (the current GB equivalent of Article 63A of the SDO).

60. It will be recalled that the relevant part of Article 63A(2) reads as follows:

> "The tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act".

Paragraphs 92-94 of the *Ayodele* judgment were in the following terms:

> "92. … Before a tribunal can start making an assessment, the claimant has got to start the case, otherwise there is nothing for the respondent to address and nothing for the tribunal to assess.

93. In my view, this point is reinforced by considerations of fairness. The language of section 136 makes it clear that, if the inference of discrimination *could* be drawn at the first stage of the enquiry, then it *must* be drawn by the court or tribunal. The consequence will be that the claim will necessarily succeed unless the respondent discharges the burden of proof, which Mr Dennis accepts does lie on it at the second stage. I can see no reason in fairness why a respondent should have to discharge that burden of proof unless and until the claimant has shown that there is a *prima facie* case of discrimination which needs to be answered. It seems to me that there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a *prima facie* case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage.

94. I am reinforced in that view by the Opinion of Advocate General Mengozzi in *Galina Meister*, cited above. As the Advocate General said there, this interpretation maintains a fair balance between the rights of a claimant and those of a defendant or respondent".

61. The version of Article 63A of the SDO which applied in 2005, and the current version of that provision, are both practically identical to the version of section 63A of the Sex Discrimination Act 1975 which applied in Great Britain in 2005.

62. In *Igen v Wong* [2005] EWCA Civ 142, the English Court of Appeal considered the implications of section 63A of the Sex Discrimination Act, and of the Race Relations Act 1976 and Disability Discrimination Act equivalents of the SDA section 63A. In that connection, at paragraph 76 of the unnamious judgment of the Court, it endorsed a revised version of what is commonly referred to as "the Barton Guidance".

63. That revised version of the Barton Guidance was set out, in the following terms, as an Annex to the Court of Appeal decision in *Wong*. That revised version was as follows:

"(1) Pursuant to section 63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(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 some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(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.

(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to section 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved 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.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

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

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) 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 discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

64. We think that, for the purposes of this particular case, it will be helpful to set out a customised modification of the Barton Guidance, which will:

(1) refer to the relevant Northern Ireland legislation (instead of referring to GB legislation),

(2) tweak the guidance as though it was applying solely in the context of an SDO victimisation claim (which is the context of this particular case) and

(3) reproduce only those parts of the guidance which are of central relevant within the context of this case.

65. Our customised version of the revised Barton Guidance is as follows:

> "(1) Pursuant to [Article 63A of the SDO], it is for the complainant who complains of [SDO victimisation discrimination] to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that [the respondents are by virtue of Article 42 and/or Article 43 of the SDO to be treated as having committed an act of SDO victimisation discrimination] against the claimant.
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (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 [victimisation discrimination] …
>
> (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.
>
> (5) It is important to note the word "could" in [Article 63A(2)]. At this stage the tribunal does not have to reach a definitive determination that such facts would lead [this tribunal] to the conclusion that there was an act of unlawful [victimisation discrimination]. Instead, at this stage, a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts."

66. We refer to sub-paragraph (5) of the customised guidance. In deciding whether the burden of proof has passed, this tribunal does not have to decide whether we would conclude, in the absence of an adequate explanation, that the relevant acts of victimisation discrimination did occur. Instead, all we have to do is to decide whether a reasonable tribunal could so conclude.

67. In *Deman v Commission for Equality and Human Rights and others* [2010] EWCA Civ 1729, Sedley LJ, delivering the unanimous judgment of the Court of Appeal in

that case, discussed what needed to be established, within the context of the then operative GB equivalent, in the Race Relations Act, of Article 63A of the SDO (for the purpose of taking advantage of that section's burden of proof reversal provisions). In that connection, at paragraphs 18 and 19 of his judgment, Sedley LJ made the following comments:

> "[18] In *Madarassy v Nomura International Ltd* [2007] IRLR 246, this court, per Mummery LJ held:
>
> > "The bare facts of a difference in status … and a difference in treatment only indicates 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 [a relevant] unlawful act of discrimination".
>
> [19] We agree with both counsels 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 furnished by 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 as allegedly occurred …" .

68. During the course of the 24 June segment of the main hearing, Ms Finegan conceded that, if the Article 63A burden of proof passes to the respondents, the claimant is entitled to win on liability.

69. She made that concession because only some of the relevant decision-makers were available to provide sworn oral testimony (on behalf of the respondents) in this case. Although we draw no adverse inferences from that situation, the fact remains that, unfortunately, the respondents were unable to provide sworn oral testimony, from each decision-maker, which would have made it possible for the respondents to provide direct evidence that all the relevant decisions, of all the relevant decision-makers, were not significantly affected by victimisation discrimination.

70. In our respectful view, she was correct to make that concession. In this context, we refer, in particular, by way of example, to the decision of the Northern Ireland Court of Appeal in *Fair Employment Agency v Craigavon Borough Council* [1980] IRLR 316.

71. In that case, at paragraph 24 of his judgment on behalf of a unanimous court, Lowry LCJ, made the following comments:

> "… A more refined point is whether the panel can be said to have discriminated against [the complainant in that case] if the majority who voted against his appointment did so in good faith. … If, by reason of prejudice on the part of [two particular, identified, Councillors], the panel as a whole treated [that particular complainant] unfairly (as the judge found) then the panel (whatever the motives of the majority) discriminated against him. … A decision whether a body has discriminated within the meaning [of the discrimination provisions of the Fair Employment Act 1976] is not reached by counting heads but by considering the action taken and how it was achieved".

Our liability conclusions

72. So that brings us back to the following question: Has the claimant in this case proven, on the balance of probabilities, facts from which a reasonable tribunal could properly conclude, in the assumed absence of an adequate explanation, that the alleged acts of victimisation discrimination, (by persons for whom the respondents have responsibility under Articles 42 and/or Article 43 of the SDO) have occurred?

73. We are satisfied, on the balance of probabilities, that the ultimate outcome of the relevant recruitment process was that it was terminated and that no appointment was made pursuant to that process. Accordingly, the claimant's victimisation claim, in these proceedings, in relation to Act (2), as defined at paragraph 4 above, is clearly not well-founded.

74. There are three important elements to any allegation of SDO victimisation discrimination. They are as follows:

    (1) An appropriate actual or hypothetical statutory comparator must be identified.

    (2) In a relevant context, the claimant must have been treated less favourably than that relevant statutory comparator was treated, or would have been treated.

    (3) A relevant prohibited ground (in this case, the fact that the claimant had done the protected act), must have been a significant reason, although not necessarily the main reason, for the relevant mistreatment.

75. In this case:

    (1) Ms X (see paragraph 13 above) is clearly an appropriate statutory comparator. (The claimant and Ms X were competitors in the relevant recruitment competition. He carried out a protected act and she did not carry out such an act).

    (2) Ms Y is clearly also an appropriate statutory comparator (for the same reasons as Ms X is an appropriate comparator).

76. Accordingly, in relation to Act (1), the first element of the requirements which are specified at paragraph 73 above have been met.

77. The second element of the relevant requirements is that the claimant must have been less favourably treated, than Ms X and/or Ms Y, within the context of the relevant recruitment process.

78. In relation to Act (1), that second requirement, in relation to Ms X, is clearly met, because of the fact that "unfair preference" occurred on two occasions:

    (1) On the first occasion, Ms X was chosen as the successful candidate, and the claimant was not chosen as a successful candidate, in the following situation:

        (a) The panel which chose Ms X had no power to do so (because it consisted of only two people) and

(b) the choice was an illegitimate choice, because it was not based on appropriate criteria.

(2) On the second occasion, unfair preference was shown towards Ms X because Ms X was chosen as the successful candidate, and the claimant was not, in circumstances where Ms X did not meet the shortlisting criteria which the second selection panel was purporting to apply.

79. In relation to Act (1), as defined at paragraph 4 above, the "second requirement", in relation to Ms Y, is also clearly met because of the fact that, during the second phase of the recruitment process, unfair preference was shown to Ms Y because she was chosen as a reserve candidate, and the claimant was not, in circumstances in which Ms Y did not meet the shortlisting criteria which the second panel was purporting to apply.

80. In relation to Act (1), the third element of the relevant requirements (the requirements which are specified at paragraph 74 above) is that, to a significant extent, on each relevant occasion (on the occasion on which the first selection panel decided that Ms X should be the successful candidate, on the occasion when the second interview panel decided to shortlist X and Y, but not to shortlist the claimant, and on the occasion when the second selection panel decided that Ms X should be the successful candidate and Ms Y should be the reserve candidate) those decisions were affected, to a significant extent, by the fact that the claimant had done the relevant protected act.

81. As Ms Finegan appropriately accepted, the lodging of the first set of industrial tribunal proceedings in August 2005, was indeed a protected act.

82 In our view, within the content of the third element of the relevant requirements (see paragraph 73 above), the something "more", which was referred to in *Deman* has been provided. (See paragraph 67 above).

83. That something "more" is provided by any one of the following four factors, and by combinations of two, or three, or all, of those four factors.

84. First, in the Response to these proceedings (see paragraph 50 above) the Head Solicitor, who was then acting as the legal representative of both the respondent Board and the respondent School, unequivocally stated that "… the respondents had no knowledge of the claimant's complaints against the other Boards until the claimant …" made such complaints known in his "Claim to an Industrial Tribunal" form dated 22 November 2005, case reference 1616/05 refers".

85. It seems to us that if that comment was properly made, the Head Solicitor must, either directly or through a third party, have made appropriate enquiries, separately, with each of the relevant decision-makers and with the School's Principal (Mrs Donnelly), as to whether each of them did know, or did not know, about the earlier complaints at the time when decisions were being taken in relation to the recruitment exercise which is the subject of this case. If all such enquiries were not made, that part of the Response is an unsatisfactory comment, analogous to the types of unsatisfactory answers which are referred to at paragraph (7) of the Barton Guidance.

86. And if such enquiries were made with any particular relevant decision-maker, it would have been very difficult to make those enquiries without, at that time, informing that individual of the fact that the claimant had indeed brought the deluge of earlier industrial tribunal applications.

87. However, three witnesses in this case, who were members of the relevant Board of Governors selection committees (the various committees which made the relevant allegedly discriminatory decisions) all told us that they did not know, until many months after the launch of the current proceedings, that those earlier (August 2005) IT claims had been made by this claimant.

88. We think that the combination of circumstances described at paragraphs 84-87 above could result in a reasonable tribunal concluding that Mrs Donnelly and/or some or all of the selection committee witnesses in this case did know about the August proceedings, on a date much earlier than the times when each told us that he/she was first informed about the existence of the August proceedings. (We are not saying that we ourselves have arrived at that conclusion; we are merely stating that we believe that a tribunal could reasonably arrive at that conclusion.

89. Secondly, this claimant's August 2005 proceedings were an event which must have had the potential to be the subject of considerable gossip throughout the post-primary education sector in Northern Ireland, because of the following unusual features:

    (1) A middle aged man was applying for a classroom assistant post.

    (2) That man was an American.

    (3) He had brought claims against 10 different schools.

    (4) He had brought claims against three out of the five Northern Ireland Education and Library Boards which were in existence at that time.

90. We think that some reasonable tribunals would regard it as likely that, by September or mid-October 2005, word of that situation would have reached Mrs Donnelly, or at least one of the members of the relevant selection committees, by the time that decisions were being made at each of the two phases of the relevant recruitment process.

91. Thirdly, during the course of her sworn testimony Mrs Donnelly told us that, until many years after 2005, she personally did not know of the fact that the claimant had brought the August claims.

92. We think that many reasonable tribunals would regard that particular aspect of Mrs Donnelly's evidence as being hard to believe, especially in view of the fact that she continued to be the principal of Drumglass High School for many years after 2005.

93. Fourthly, we have noted the exchange of email correspondence, in October and in November 2017, between Mr Keith Farrell (of the Education Authority) and

Mr Malcolm McQueen, who was a member of the second shortlisting committee (which conducted the shortlisting during the second phase of the relevant recruitment process).

94. We note that Mr Farrell's email of 31 October 2017 had been preceded by a telephone conversation, during the course of which Mr Farrell and Mr McQueen had discussed these proceedings: The introductory paragraph to the Farrell email of 31 October was as follows:

> "I refer to our telephone conversation regarding Mr J Peifer's Tribunal claim in respect of the recruitment and selection processes for a Classroom Assistant post at Drumglass High School …".

95. We note that, during the course of that email, Mr Farrell went on to ask a couple of questions, and that one of those questions was as follows:

> "At the time of either of the recruitment exercises did you know or had you heard that the Claimant (Mr J Peifer) had made previous complaints of sex discrimination."

We note that Mr McQueen's response to that question, on 3 November 2018, was far from being unequivocal. Instead, he responded in the following terms:

> "In reply to your question Keith I am sorry but my memory of the situation is now very vague. Apologies but I thought it all been sorted long ago."

We note that, Mr McQueen has subsequently refined that initial response. However, we note that that initial response was equivocal on the question of whether or not, by the time of the relevant Drumglass recruitment exercise, Mr McQueen knew of, or had heard of, the existence of the August 2005 claims.

96. Ms Finegan, on behalf of the respondents, provided us with helpful written submissions ("the respondents' Submission").

97. The Submission was supplemented by oral argument. The Submission is a written record of many of the arguments which have been made on behalf of the respondents. Accordingly, in this Decision, we do not need to include a note of all of those arguments.

98. Any omission on our part to refer to any particular argument within the respondents' Submission is not an indication that we agree with that argument.

99. Any omission on our part, in the course of this Decision, to refer to any factual assertion in the respondents' Submission is not an indication that we agree with the accuracy of that assertion.

100. We do however wish to make one particular comment in relation to the respondent's Submission. That comment is as follows.

101. The respondents' Submission, and some of Ms Finegan's oral arguments, appear to be based on the proposition that, in order to meet the threshold for the passing of the relevant burden of proof, the claimant must satisfy this tribunal, on the balance

of probabilities, that one or more of the relevant decision-makers (the people who took the decisions at each stage of the relevant two-phase recruitment process) knew of the existence of the August 2005 proceedings.

102. We do not accept that proposition.

103. Instead, we are sure that, in order for the burden of proof to pass (pursuant to Article 65A), all the claimant has to do is to establish a prima facie case that all of the following elements have been met:

(1) Ms X (or Ms Y) was an appropriate comparator.

(2) Unfair preference was shown towards Ms X (or Ms Y).

(3) In each instance, the carrying out of the relevant protected act, by the claimant, was a significant reason for that unfair preference.

104. We consider that such a prima facie case clearly exists in respect of elements (1) and (2) above.

105. It clearly exists in relation to element (1) because neither Ms X nor Ms Y carried out a protected act and both Ms X and Ms Y were competing against this claimant in the relevant recruitment exercise.

106. Element (2) was met because unfair preference, accorded to a comparator within the context of a recruitment exercise, does constitute less favourable treatment.

107. So that leaves element (3). In our view, a prima facie case in respect of element (3) would obviously be made out if a reasonable tribunal, on the basis of the facts known to us at the conclusion of the evidence in this case, could properly conclude (in the absence of a relevant non-discriminatory explanation being proven by the respondents) that the fact that the claimant had begun the August proceedings was a significant reason for the unfair preferences.

108. In our view, the requirement upon the claimant, as described in the last preceding paragraph, would easily be achieved by the claimant, if there was prima facie evidence (to the extent which is indicated at paragraph (1) of the revised Barton Guidance), that, prior to the making of the relevant decisions, during the course of the relevant recruitment exercise, one or more of the alleged perpetrators of the discrimination knew of the fact that the claimant had begun the August 2005 proceedings.

109. In our view, for the reasons which we have set out at paragraphs 75-95 above, such prima facie evidence does exist.

The course of these proceedings

110. During the course of these proceedings, the claimant made many applications, and wrote to the Office of the Industrial Tribunals on many occasions.

111. In particular, the claimant provided a lengthy written submission (the claimant's Submission), as a response to the respondents' Submission. The claimant's

Submission provides a written record of the arguments which he made within that Submission. Accordingly, there is no need for us to refer to all of those arguments during the course of this Decision.

112. In the absence of comment in relation to any aspect of the claimant's Submission, it should not be assumed that we accept the correctness of that particular aspect of his Submission, or that we accept the correctness of any related factual assertion.

113. During the course of lengthy correspondence during these proceedings, the claimant has made many factual assertions, most of them in relation to what the respondents or their agents have allegedly done, but some of them in relation to what occurred during the main hearing of this case. In the absence of comment, in this Decision, or elsewhere, in relation to any such factual assertion, it should not be assumed that the factual accuracy of that assertion is being accepted, either by this tribunal as a whole, or by myself personally.

114. During the course of these proceedings, the claimant made many interlocutory applications. In an email dated 21 August 2019, from the Office of the Industrial Tribunals to the claimant, written rulings in respect of twenty of those applications were set out or referred to.

115. This main hearing lasted for eight days. That overall duration is much longer than one would normally expect for a recruitment type of case. However, the claimant made many detailed points, some of which were worthy of lengthy exploration during the course of oral testimony.

116. On 15 October 2018, the claimant told me that his hearing aid was not working on that day and, accordingly, this tribunal decided that it was not appropriate for any oral testimony to be received on that date.

117. There have also been lengthy gaps between the various dates of the main hearing. However, in my view, there were good reasons for all of those gaps. I can provide written reasons, in respect of those gaps, to the Court of Appeal if (in the very likely event of there being an appeal to the Court of Appeal), that court asks me to do so.

Remedies

118. The compensation issues can be summarised as follows:

(1) What financial loss, if any, has the claimant sustained because of the victimisation discrimination ("the relevant discrimination")?

(2) If the claimant has sustained any financial loss as a result of the relevant discrimination, did he fail to mitigate that loss?

(3) In the circumstances of this case, is the claimant entitled to exemplary damages in respect of the relevant discrimination?

(4) Is the claimant entitled to aggravated damages in respect of the relevant discrimination?

(5) How much, if any, compensation should be awarded to the claimant in respect of the injury to feelings (if any) which he has sustained as a result of the relevant discrimination?

119. It is convenient to address the second remedies issue at the outset of this consideration of remedies (as distinct from dealing with the first remedies issue first).

120. The second remedies issue is the question of whether or not the claimant failed to mitigate any financial loss which he sustained as a result of the relevant discrimination.

121. We are sure that, if the claimant had made reasonable efforts to obtain alternative employment, he would have obtained suitable alternative employment (not necessarily in the field of education) within three months of the date on which the notification of the second panel's decision was made to him.

122. In arriving at that conclusion, we have taken account of the fact that the claimant is an intelligent man, with considerable skills, and that the salary which he would have obtained if he had been successful in obtaining the relevant post was very close to the statutory minimum wage level at the time of the relevant non-appointment.

123. The effect of our conclusion in relation to the second remedies issue is that, in any event, the claimant is not entitled to any compensation in respect of any financial loss sustained in respect of any period which began more than three months after the date of the announcement of his non-selection for the relevant appointment.

124. It is now convenient to address the first remedies issue, which is whether or not the claimant sustained any relevant financial loss as a result of the relevant discrimination. In other words (in light of our conclusion in respect of the second remedies issue), is the claimant entitled to any sum for financial loss in respect of the first three months after the date on which he was told that he was not being selected for the relevant post?

125. We are sure that the claimant is not entitled to any compensation for financial loss, because we are sure that the claimant did not sustain any financial loss as a result of the relevant discrimination.

126. According to the claimant, if the relevant selection process had been conducted fairly, the inevitable outcome is that he would have been selected as the successful candidate. We are not so sure about that. However, we are sure that, even if the claimant had been selected for the relevant post, he would not have accepted that post.

127. In arriving at the latter conclusion, we have taken account of the following.

(1) We took account of the claimant's manner and demeanour, in providing oral testimony in respect of the question of whether or not he would have accepted the post if it had been offered.

(2) We have noted that the post's salary was close to statutory minimum wage level, and that the distance between the claimant's home in

Derry/Londonderry and the address of the school is approximately 50 miles and we are therefore sure that travelling to and from the school (from his home in Derry/Londonderry) would have cost the claimant a lot of money.

(3) The claimant told us that, if he had got the job, he would have moved to Dungannon. We do not believe that aspect of his testimony. We note that, since the autumn of 2005, he has devoted his life to pursuing his industrial tribunal claims, in respect of the unsuccessful classroom assistant post applications which he made in 2005. We note that, in respect of all of those efforts, the main fora were the Office of the Industrial Tribunals, here in Belfast, and the Court of Appeal, which is also based in Belfast. We note that, despite that, throughout the last 14 years, the claimant has never moved to live in Belfast.

128. As a result of the matters which are described in the last paragraph above, we have come to the conclusion that, if the claimant had been offered the relevant post, he would not have been willing to move from his Derry/Londonderry home (for the purpose of carrying out his duties in the relevant post) and we are also sure that he would not have wanted to pay the extensive costs of commuting, to and from his chosen home city, to Dungannon.

129. The third remedies issues is whether the claimant is entitled to exemplary damages in this case.

130. We have assumed that exemplary damages are available in Northern Ireland in respect of sex discrimination cases.

131. However in the circumstances of this case, the criteria for the award of exemplary damages in such cases have not been met.

132. As "Harvey on Industrial Relations and Employment Law", at Division L, Chapter 6, paragraph 908, explains:

> "Exemplary damages may in some circumstances be awarded … But this will only be so if compensation is insufficient to punish the wrongdoer and if the conduct is either (a) oppressive, arbitrary or unconstitutional action by the agents of government or (b) where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the claimant".

133. In the circumstances of this case, ground (b) is clearly inapplicable.

134. That leaves ground (a) for consideration. In relation to ground (a), "Harvey", at paragraph 909, adds the following:

> "Although it is now clear that such awards can be made, exemplary damages remain reserved for the most serious cases of abuse of governmental power".

135. There is no doubt that this case is a particularly serious example of unfair recruitment practices. However:

(1) It is obvious that the perpetrator, or perpetrators, of the relevant discrimination were within the School (as distinct from being based in the offices of the Board itself).

(2) In any event, even though the unfairnesses which occurred within the context of the relevant recruitment exercise were serious, those unfairnesses did not constitute oppressive, "arbitrary" or unconstitutional action (in the senses in which those terms are used, within the current context).

136. The fourth remedies issue is whether any award of compensation in respect of the relevant discrimination should include an award of aggravated damages.

137. The effect of *McConnell v Police Authority for Northern Ireland* [1997] NI 244, is that, in discrimination cases in Northern Ireland, an award of aggravated damages should not be an extra sum over and above the sum (if any) which a tribunal considers to be appropriate compensation for any injury to the claimant's feelings. Instead, in such cases, any element of aggravation ought to be taken into account in reckoning the extent to the injury to the claimant's feelings; and it should not be treated as an extra award which reflects a degree of punishment of the respondents for their behaviour.

138. Against that background, we have decided that there will be no separate calculation of aggravated damages. Instead, in deciding on the award which the claimant should receive in respect of any relevant injury to his feelings, we have taken into account of any element of aggravation.

139. The fifth, and last, remedies issue relates to the amount of any compensation which is due to the claimant, in respect of any injury to feelings which he has sustained as a result of this particular type of discrimination (the relevant discrimination).

140. Having listened carefully to the claimant during the course of this lengthy hearing, and having considered the extensive documentation which the claimant has made available to us during the course of this litigation, we have arrived at the following conclusions in respect of injury to feelings in this case.

141. Earlier in this Decision (at paragraph 3 above), we have:

(1) specially defined the word "Acts" for the purposes of this Decision;

(2) we have drawn a distinction between an Act and some other act or omission (which, according to our special definition, does not constitute an Act); and

(3) we have drawn attention to the fact that a particular Act may well be the subject of more than one complaint, each complaint being based on a separate cause of action.

142. In these proceedings, the unfairnesses in the conduct and outcome of the relevant recruitment process is the only Act, within the scope of the claim form, in respect of which the claimant's claims have been successful. (See paragraphs 4 and 74 above).

143. In these proceedings, those Acts have been the subject of two claims:

(1) a claim of sex discrimination, made under Article 8 of the SDO and

(2) a claim of victimisation discrimination, which has also been made pursuant to Article 8 of the SDO.

144. That sex discrimination complaint has already been the subject of a decision by an industrial tribunal ("the First Tribunal"), which awarded the sum of £3,429 to the claimant as a remedy in respect of the relevant sex discrimination.

145. Upon reflection, we have concluded that, because of the terms on which this case was remitted (by the Court of Appeal) to this tribunal, we do not have any power to re-open, or reconsider, remedies issues in relation to the sex discrimination aspect of this case. Instead, our remedies tasks are limited to considering the amount of compensation which should be paid to the claimant in respect of the victimisation-discriminatory unfair conduct of the relevant recruitment process.

146. In other words, all that we now can do, and all that we now have to do, is to decide on the amount of award (if any) which ought to be made to the claimant in respect of any injury to feelings which he has sustained as a result of the victimisation-discriminatory aspects of the unfair conduct of relevant recruitment process (as distinct from resulting from the gender-discriminatory aspects of the unfair conduct of that process).

147. As already indicated above, this claim of victimisation discrimination is a claim in respect of the same Act as the Act which was the subject-matter of the sex discrimination claim. In such a situation, it would normally be best if a singular award for injuries to feelings were to be made, in respect of that singular Act, which award would incorporate compensation both for:

(1) injury to feelings (if any) which the relevant claimant has sustained as a result of the gender discrimination and also

(2) injury to feelings (if any) which that claimant has sustained a result of the victimisation discrimination.

148. However, in the particular circumstances of this particular case, such a course of action is not open to us.

149. Therefore, what we must now do is to identify the extent of any injury to feelings which the claimant has sustained, as a result of the victimisation-discriminatory, recruitment process unfairnesses. (The injury to feelings which the claimant has sustained as a result of the gender-discriminatory aspects of the relevant unfairnesses have already been the subject of a compensation award, and we have no power to reconsider or revise the remedies order which the First Tribunal made in respect of the gender-discriminatory unfairnesses of the recruitment process).

150. The factual situation in this case can be summarised as follows:

(1) The school had a vacancy for a particular classroom assistant post.

(2) Soon after the commencement of the relevant recruitment process, Ms X was already carrying out the duties of the advertised post, on a temporary basis.

(3) At the end of the first phase of the relevant recruitment process, Ms X was wrongly selected as the successful candidate.

(4) It was subsequently accepted by the School that that first phase of the recruitment process had been defective.

(5) Accordingly, the School purported to re-commence the recruitment process.

(6) The outcome of the ensuing second phase of the recruitment process was that Ms X was again wrongly selected as the successful candidate.

(7) Again, it was subsequently accepted by the School that that second recruitment process was defective.

(8) The School then purported to terminate the selection process.

(9) However, pursuant to purported powers which should not have been used for that purpose, the Principal of the School appointed Ms X to the relevant post.

(10) Pursuant to that purported appointment, the outcome was that, for all practical purposes:

(a) Ms X was in the same position as she would have been in if Ms X had been properly and fairly appointed, pursuant to a properly and fairly conducted recruitment process and

(b) the claimant was in the same position as he would have been in if Ms X had been properly and fairly appointed, pursuant to a properly and fairly conducted process.

151. It is hardly surprising that this claimant is angry about the wrongdoings which are referred to in the last preceding paragraph above.

152. However, he is not entitled, pursuant to the SDO, to damages for anger which he feels. Instead, any relevant entitlement is an entitlement in respect of injury to feelings.

153. Furthermore, in light of the fact that we only have power to award remedies in respect of injury to feelings which the claimant has sustained as a result of the relevant unlawful victimisation-discrimination, we have to identify the extent of the injury to feelings, if any, which the claimant has sustained as a result of the victimisation-discriminatory recruitment unfairnesses (as distinct from any injury to feelings which he has sustained as the result of the gender-discriminatory aspects of the relevant recruitment unfairnesses).

154. We are sure that, throughout the relevant period (the period which began when the claimant was informed that he was not being selected for the relevant post at Drumglass, and which ended with the last day of the main hearing which this

tribunal conducted), the claimant's upset was not based, to any substantial extent, on the fact that he had been subjected to victimisation-discriminatory discrimination ("retaliatory discrimination"). Instead, the relevant injury to feelings was mainly caused by this claimant's perception that the relevant recruitment unfairnesses were the result of gender discrimination.

155. It is difficult to identify any substantial additional injury to feelings which the claimant sustained as a result of the fact that the relevant unfairnesses were also victimisation-discriminatory (as distinct from only being gender-discriminatory).

156. We think that the amount of compensation in respect of injury to feelings must be assessed on the basis of what would have been a proper quantification of compensation to injury to feelings if the award had been made in 2005. (In this general context, we notice that when the Employment Tribunal Presidents in Great Britain recently issued updates to the Vento categories, they expressly stated that those updates should apply only in respect of litigation which had begun after a certain, specified, date). The fall in the value of money since 2005 will be compensated for by the award of interest on any principal sum which is awarded. (See paragraph 161 below).

157. The three bands for injury to feelings compensation set out in *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102 were as follows:

    (1) Lower band – up to £5,000.

    (2) Middle band – £5,000 - £15,000.

    (3) Higher band – £15,000 - £25,000.

158. We have decided to award the claimant the principal sum of £500 in respect of injury to feelings sustained by him as a result of the relevant discrimination.

159. We refer to the Industrial Tribunals (Interest on Awards in Sex Discrimination and Disability Discrimination Cases) Regulations (Northern Ireland) 1996 ("the 1996 Regulations").

160. We are not aware of any circumstances which have the effect that serious injustice will be caused by our awarding the interest which is referred in the last paragraph above. (See paragraph (3) of regulation 7 of the 1996 Regulations).

161. Pursuant to Regulation 3 of the 1996 Regulations, we award interest on the principal amount (see paragraph 158 above). That interest is awarded, at the rate of 8% per annum, in respect of the entire period beginning on 1 October 2005 and ending on 1 November 2019. That interest amounts to the sum of £563.

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

Signed:

Date and place of hearing: **15-19 October 2018, 14 January 2019, 1 April 2019 and 24 June 2019, Belfast.**

Date decision recorded in register and issued to parties: