EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113588/2021

Held in Glasgow on 6, 7, 8, 9 and 20, 21, 22, 23 and 27 March 2023

Employment Judge L Wiseman
Members L Brown and A Grant

Mr James MacNaughton	**Claimant** **Represented by:** **Mr T Merck - Advocate** **[Instructed by:** **Ms S Shiels – Solicitor**
Calmac Ferries Ltd	**First Respondent** **Represented by:** **Ms S Mackie - Solicitor**
Caledonian MacBrayne Crewing (Guernsey) Ltd	**Second Respondent** **Represented by:** **Ms S Mackie - Solicitor**
David MacBrayne Ltd	**Third Respondent** **Represented by:** **Ms S Mackie - Solicitor**
David MacBrayne HR (UK) Ltd	**Fourth Respondent** **Represented by:** **Ms S Mackie - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 2 December 2021 in which he brought claims under the Employment Relations Act 1999 (Blacklists) Regulations 2010 and section 146 of the Trade Union and Labour Relations Consolidation Act 1992. The claimant successfully applied for employment with the respondent in 2014. This employment was terminated on the day it started because the claimant did not have the correct certification for the vessel. The claimant will say that he was subsequently subjected to a detriment for using the services of a trade union, and blacklisted. The claimant supported his claim by pointing to the fact he had subsequently applied for 60 plus positions with the respondent and had only been successful in one application, which was withdrawn before he started work.

2. The respondents entered a Response to the claim in which they denied the existence of a blacklist and denied the claimant had been subjected to a detriment for using the services of a trade union. The respondent asserted the claimant's employment in 2014 had been terminated because he did not have the correct certification for the vessel and the offer of employment in 2017 had been withdrawn because the claimant had failed to demonstrate behaviour consistent with the respondent's values following a conviction for Assault to Injury.

Introduction

3. The claimant, in 2014, was a member of the trade union Prospect. The claimant commenced employment with the respondent but this employment was immediately terminated because the claimant did not have the correct certification for the vessel. The claimant made use of the services of his trade union to successfully seek a compensatory payment for the loss of employment. The claimant asserts that because of making use of the services of his trade union he was branded a trouble-maker and blacklisted by the respondents.

4. The claimant continued to apply for jobs with the respondents (60 applications in total) and has been unsuccessful in all but one of those applications. The claimant was offered employment in 2017 but this was withdrawn following the respondent learning of a conviction for Assault to Injury.

5. The claimant, through a Subject Access Request in early 2021, recovered emails referring to a document entitled "James MacNaughton – BLACKLIST.doc".

6. The claimant's case is that the events of 2014, together with the blacklist document and the internal correspondence and comments surrounding his applications, demonstrate the real reason why he has not been successful in obtaining employment with the respondents.

7. The case has been subject to case management where it was agreed the list of 60 applications would be focussed on the 20 applications highlighted on pages 197 – 204 (that is, applications 1, 2, 4, 10, 21, 22, 26, 29, 30, 36, 28, 44, 49, 51, 54, 55, 56, 58, 59 and 60). In fact, applications 4, 21, 59 and 60 were withdrawn during the course of the hearing.

8. The claimant's representative also made clear at the start of the hearing that the blacklisting claim was brought in terms of Regulations 3 and 9. (The claim brought in terms of Regulation 6 had been withdrawn following the claims against two recruitment agencies being withdrawn).

9. The tribunal and parties agreed at the start of the hearing to separate liability and remedy. This hearing, accordingly, is restricted to determining liability for the claims brought by the claimant.

10. The tribunal heard evidence from:

    (i) The claimant;

    (ii) The claimant's wife, Anne MacNaughton;

    (iii) Kevin Campbell, Technical Manager (Overhauls)

    (iv) Laura Farina, HR Assistant,

(v) Leeanne Taylor, HR Business Partner (Employee Relations)

(vi) Patricia Harwood, HR Business Partner

(vii) Evan Mackay, Marine Manager

(viii) Chloe Nelllis, HR Assistant

(ix) Lee McDowell, Master

(x) Dario Spadavecchia, Marine Manager

(xi) Natasha Kerr, HR Business Partner

(xii) Pauline Tylee, HR Services Superviser

(xiii) Carol MacFarlane, HR Services Manager.

11. The tribunal was referred to separate folders of documents prepared by the claimant and the respondents' representatives. (The letter C or R before a page number denotes whether it is the claimant's or respondents' productions).

12. The tribunal, on the basis of the evidence before it, made the following material findings of fact.

Findings of fact

13. The first and second respondents are wholly owned subsidiaries of the third respondent, David MacBrayne Ltd. The fourth respondent is responsible for all recruitment for the three other respondents, who are involved in the operation of passenger and vehicle ferry services between the mainland of Scotland and its major islands on the West coast. (The different respondents are not differentiated within this Judgment: they are referred to generically as "the respondents".)

The respondent's recruitment process

14. The respondents' recruitment process in the period 2014 – 2019/2020 was that posts would be advertised internally and externally and applications/CVs

sent to an HR Inbox. The HR Assistants would collate the CVs for the various posts, cut and paste them into an email and send all of them to the hiring manager/s. HR did not, at this time, carry out any sifting.

15. The HR Assistants did, frequently, rename CVs. This was done, for example, if the CV had been sent in with a covering email but the CV did not contain the name of the person, or if it was not clear or if the person had applied for more than one position.

16. The hiring manager was responsible for sifting the applications/CVs and deciding who to invite for interview. This would be confirmed to HR who would issue the invite to interview letters. The hiring manager would carry out the interviews and decide who was successful. The hiring manager would notify HR of the decision and an offer of employment would be issued by the second respondent.

17. The HR Assistants would issue standard template emails to the unsuccessful candidates thanking them for their application and saying they had been unsuccessful on that occasion. Some of the template emails included a paragraph saying “please do not let this deter you from applying for vacancies in the future”.

18. The respondent did not provide feedback to unsuccessful external candidates regarding the reasons for being unsuccessful. Feedback would only be provided to internal candidates.

19. Ms Carol MacFarlane commenced employment with the respondent in July 2018 as HR Services Manager. Ms MacFarlane, in response to complaints from hiring managers regarding receiving all CVs, introduced a system (in 2019/2020) whereby HR started to sift CVs for the basic requirements of the job, and to check certification.

20. The HR team was a small team who sat together in the office. There was chatter about applicants/employees, including the claimant

The respondents' relationship with trade unions

21. The respondents recognise four trade unions for the purposes of collective bargaining: RMT, Nautilus, Unite and TSSA. The collective agreement between Calmac Ferries Ltd and TSSA, RMT, Unite and Nautilus, representing Port Assistants and Senior Post Assistants was produced at R212. The collective agreement between Calmac Ferries Ltd and TSSA representing clerical staff throughout the company was produced at R281. The collective agreement between Caledonian MacBrayne Crewing (Guernsey) Ltd and Unite and RMT for the crew on all Small Ferries was produced at R224. The collective agreement between Caledonian MacBrayne Crewing (Guernsey) Ltd and RMT representing the ratings of the Clyde Fleet was produced at R246. The collective agreement between Caledonian MacBrayne Crewing (Guernsey) Ltd and the RMT representing ratings within the Western Isles, employed on all vessels operated by Calmac Ferries Ltd on all agreed Western Isles routes was produced at R270. The collective agreement between the second respondent and Nautilus International representing all Masters and Officers employed on vessels operated by Calmac Ferries Ltd on the agreed Hebridean and Clyde routes was produced at R303.

22. The vast majority of the respondents seagoing employees and port assistants/senior port assistants are members of a trade union (although the respondents do not hold information regarding trade union membership).

23. The respondents have a very healthy, mutually beneficial relationship with the trade unions and it is something both sides have worked hard to develop. Ms Leeanne Taylor, HR Business Partner (Employee Relations) is responsible for dialogue with, negotiations and working with the trade unions. There are regular joint consultative meetings with each of the recognised trade unions, attended by Ms Taylor, management representatives and representatives of the respective trade union. There are times when the respondents and trade unions do not agree, but every effort will be made to try to resolve matters before they escalate.

24. The respondents employ a dedicated RMT representative who works out of the RMT office. There are also trade union learning representatives who have 50% facility time. The respondents and trade unions have participated in joint initiatives such as a beach clean.

25. The respondents would expect that in most meetings with an employee (for example, disciplinary, grievance or welfare meetings) a trade union representative would attend the meeting: this would include for members of trade unions which are not recognised by the respondents.

26. The claimant was a member of Prospect trade union from 2014 and also of RMT from 2017.

2014

Application 1 (Watchkeeping Engineer)

27. The claimant, by email of the 20 February 2014 (R 364) notified Calmac he would like to be considered for the post of Watchkeeping Engineer. The claimant enclosed his CV and certification for consideration. The claimant attended for interview and was offered the post (C 220). The letter dated 29 April 2014, confirmed the appointment as a Seasonal Watchkeeping Engineer and that the vessel to which he was appointed had still to be determined.

28. The claimant was advised by letter of the 30 April 2014 (R 360) that his start date would be the 2 May 2014 and that his designated vessel would be the Loch Nevis. The claimant knew the vessel and the routes it sailed because he lives locally and his wife worked on that vessel.

29. The claimant attended for work on the 14 May 2014 on the Loch Nevis and commenced an Induction. The claimant was subsequently informed by the Captain that his certification was not appropriate for the vessel and he was required to leave the vessel. The claimant found the incident *"highly embarrassing"*: he was *"mortified".*

30. The Captain emailed Mr Stephen Horne, Learning Partner (R 357) attaching a copy of the claimant's certificate of competence and confirming he was

seeking clarification regarding his concerns about the limitations on the certificate. The Captain was of the view the certificate was not applicable to the respondent's vessels.

31. Mr Horne responded (R357) to confirm his interpretation of the limitations was the same and that the certification produced by the claimant was not applicable to "our vessels". Mr Horne further confirmed he was waiting to speak to the Marine and Coastguard Agency (MCA) for confirmation this was the correct interpretation.

32. Mr Stephen Horne, contacted the MCA by email on the 15 May (R 355) and following their response he emailed the Captain (R 356) and confirmed that their interpretation of the limitations on the claimant's certification was correct. Mr Horne added that he suspected the claimant's background had been with fishing.

33. Ms Jane Dolan, Crew Resources Manager sent an email (R358) confirming the claimant's certificate of competence was not valid for the respondents' operation. Ms Dolan confirmed the offer of employment would need to be withdrawn. She also asked hiring managers to ensure that all certification was correct before offers of employment were made.

34. The claimant contacted the respondent (R 352) to advise that he had left a full time job to take up the position with the respondent and, as the issue with the certification had not been his mistake, he thought some kind of compensatory employment could be offered.

35. The HR Business Partner dealing with this issue at the time was Ms Anne Allen, and she advised Ms Pauline Tylee, HR Services Manager and others (R 350) that the claimant was looking for alternative employment and had suggested some posts for which his certificates would be valid. Ms Allen put out a general enquiry regarding the posts suggested and whether any vacancies for those posts were coming up. Ms Allen also noted that the claimant had given her the details of his trade union representative at Prospect trade union to contact regarding a meeting.

36. Ms Allen contacted Mr Richard Hardy at Prospect on the 26 May (R 349). Ms Allen informed him of the situation and suggested they wait until the position regarding suitable vacancies was confirmed before agreeing a date for the dismissal meeting. Mr Hardy replied to thank Ms Allen for the efforts she was making on behalf of Mr MacNaughton.

37. Ms Allen emailed again on the 28 May to confirm there were no vacancies of the posts suggested by the claimant, and seasonal posts had been filled in March. Ms Allen invited Mr Hardy to come back to her with suitable dates for the meeting and a proposed venue (given the claimant did not want to meet in Mallaig).

38. Ms Allen, by later email of the 28 May (R 347) sent Mr Hardy notification of a vacancy for a Motorman. Ms Allen noted the vacancy required the employee to live on the Colintraive side of the route because all crew on the small ferries live locally. Ms Allen noted the claimant lived in Mallaig and so the post may not be suitable.

39. The dismissal meeting was arranged and took place on the 11 June. The claimant was invited by letter of the 30 May (R 344) to attend the dismissal hearing and the letter confirmed Mr Hardy had been informed of the date and venue for the meeting.

40. Mr David McAuslan, Technical Superintendent, Ms Allen, the claimant and Mr Hardy attended the meeting on the 11 June and a note of the meeting was produced at R340. Mr Hardy noted during the meeting that it was thought there could be a case of negligent misrepresentation, but they would be prepared to look at a settlement of six months compensation. The claimant also noted he had been in contact with Glasgow College regarding courses to enable him to gain the correct certification.

41. The meeting was adjourned to allow Ms Allen to seek some advice. (There was a collective agreement in place governing the circumstances of dismissal, and which entitled the claimant to be paid three months' notice). Mr McAuslan confirmed he did not accept the respondent had been negligent because as soon as they had become aware of the limitations on the claimant's

certification they had withdrawn the offer of employment. Mr McAuslan further confirmed he believed the claimant had a responsibility to be aware of his own certification and its limitations. Mr McAuslan offered three months payment in lieu of notice.

42. Mr Hardy sought payment of 4 months but Mr McAuslan confirmed the payment would be three months.

43. Mr Hardy and Ms Allen corresponded after the meeting (R 338) and he reiterated the view negligent misrepresentation could be pursued in the Sheriff Court. Mr Hardy set out a proposed settlement involving payment of wages until 11 June (the effective date of termination) and three months' salary as compensation. Ms Allen confirmed agreement to this. Mr Hardy sought payment of the three months compensation tax free.

44. Ms Allen (R337) responded by confirming the respondent did not believe there was a claim for negligent misrepresentation, but if the claimant wished to pursue it through the Courts, the respondent would argue its case. Ms Allen noted the respondent had made an administrative error when checking the certification at interview and because of that had agreed to pay wages until 11 June and three months compensation subject to tax and national insurance. Ms Allen also noted the claimant had an accountability for the situation because he had applied for and accepted a position when he did not have the correct certification for a passenger vessel. The claimant had taken no ownership of this issue.

45. The claimant was paid £8, 412 net on the 27 June 2014.

46. The respondent accepted they had made an administrative error when checking the claimant's certification. They took a very dim view of the fact the claimant would not accept any accountability or responsibility for the fact he had boarded a vessel to take up employment in circumstances where the limitations on his certificates did not entitle him to do so.

Application 2 (Engineer in Charge – Small Vessels)

47. The claimant applied for this post on the 4 July 2014 (R367). The claimant was not successful. The post was based in Gourock and accordingly the candidates were required to live locally and have RORO (roll on roll off) experience, which the claimant did not have.

48. An HR Assistant brought in to assist with the high volume recruitment of seasonal employees noted in an email (C249) “our friend is back”.

2015

Application 4 (Seasonal Seaman Purser)

49. This application was withdrawn during the hearing.

50. The claimant applied for this post in January 2015. He was interviewed and recommended for this position by Mr Dario Spadavecchia, Marine Manager (R369). Mr Spadavecchia recommended 7 people for the positions, and the claimant was ranked 6 on the list. The claimant was ultimately not offered a position because there were less than 6 vacancies.

2017

Application 10 (Motorman Oban/Lismore – Small Ferry Division)

51. The claimant applied for this post on the 20 September 2015 (R379). Ms Jaki Robson, HR Assistant sent all applications for the position (including the claimant’s) to Mr Kevin Campbell by email of the 1 October 2015 (R377).

52. Mr Campbell sifted the applications and in an email dated 25 October 2015 (R 376, sent at 13.58) he confirmed the names of 9 people to be invited for interview. The claimant was not one of those to be invited for interview. Mr Campbell, in his email to Ms Robson, said *“The name James MacNaughton rings a bell. Have we had issues with this man in the past? ..”* Mr Campbell did not know the claimant and did not have any knowledge of the 2014 issues regarding certification or use of trade union services. Mr Campbell thought perhaps he had interviewed the claimant previously.

53. Ms Robson responded to Mr Campbell's email on the 26 October (R375) and said *"James MacNaughton was offered a role previously but there was an issue regarding certification and the offer was later withdrawn. I don't remember all of the details but it did get a bit messy. His wife works within the fleet in retail."*

54. Mr Campbell did not understand the reference to *"messy".* He had no knowledge of what had happened in 2014 either with regards to the limitations on the claimant's certification or the involvement of the trade union. Mr Campbell understood from Ms Robson's email that there had been an issue with the claimant's certification.

55. Mr Campbell did not select the claimant for interview because the advert (R372) had stated "*Ideally, you will be qualified to STCW 95 III/1 Officer of the Watch (Class 4 Motor) no power limit restrictions .. or be in possession of MEOL qualification. Possession of a Boatmasters Grade 1 would be an advantage".* The claimant did not have the STCW or MEOL certificates: other candidates did have those qualifications. Furthermore, the claimant's work background did not suggest he would be suited to the role. Mr Campbell made the decision not to select the claimant for interview before he had received the email from Ms Robson dated 26 October (R375).

56. Ms Robson sent an email to the candidates (including the claimant) who had not been offered an interview (R373). This was a standard email thanking people for their application and saying they had not been successful.

Application 21 (Seasonal 3rd Officers)

57. This application was withdrawn during the hearing when the claimant confirmed he had not applied for this job.

Application 22 (Seasonal Seaman Purser)

58. The claimant applied for this post on the 30 January 2017 (R409). An HR Assistant sent a list of all the applicants (including the claimant) for the role (R408) to Dario Spadavecchia.

59. Captain Lachlan Wotherspoon emailed Ms Robson on the 27 January 2017 asking her to invite 17 people (including the claimant) for interview. Ms Robson sent an email to the claimant on the 30 January 2017 (R403) asking him to attend for interview on the 31 January and confirming the interview would be conducted by Mr Dario Spadavecchia.

60. Mr Spadavecchia emailed HR (Ms Robson) on the 31 January (R401) to confirm another candidate had not accepted the job and so the claimant should be offered the position.

61. The HR department had, whilst the interview process had been ongoing, sent a number of emails relating to the claimant. Ms Jane Dolan, Crewing Manager, had emailed Ms Pauline Tylee, HR Services Supervisor on the 31 January 2017 (R399) asking her to *"check that this isn't the mcnaughton guy that was with us before".* Ms Tylee understood she was being asked this because there had been an issue with certification previously. Ms Tylee responded later that day (R402) to confirm *"he is the guy that was here before, his offer was withdrawn as he did not possess the relevant certs for the post of Watchkeeping Engineer".*

62. Ms Lisa Turner, Senior Crew Resources Officer emailed Ms Dolan on the 1 February (R401) asking *"hey is he ok for SP [Seaman Purser] or will I put the kybosh on it?"* Ms Turner replied *"suggest Dario discusses with hr. To get full st01y".*

63. Mr Spadavecchia received an email from Ms Robson on the 1 February (R402) saying *"Are we happy to offer James a seasonal Seaman Purser role? He was offered a role in 2014 but it was then discovered he didn't hold the correct certification so the offer was withdrawn. There was some fallout after this which I'd be happy to discuss if required."*

64. Mr Spadavecchia did not speak to HR or Ms Robson about this matter. He was satisfied any issue related to a previous post, and satisfied the claimant held the relevant certification for the position for which he was recruiting. Mr Spadavecchia confirmed this to Ms Robson, and Ms Robson emailed Guernsey Crewing (who are the employer of seagoing employees) on the 3

February (R397) to confirm the recommendation was to offer the following employees, including the claimant, employment.

65. An offer of employment was made to the claimant, which he accepted. A welcome pack was sent to him and, on the 10 March 2017 the claimant emailed to ask for confirmation of joining instructions.

66. The respondent received an anonymous complaint making them aware the claimant had been involved in an incident which would not look good for the respondent if they employed him. The incident had been in Mallaig, which was where the claimant was going to be based, and had involved a person who travelled on the ferry the claimant would have been working on.

67. Ms Tylee carried out a search based on the information received and found an article from The Oban Times dated 16 February 2017 (R538) entitled "Father and sons guilty of assault". The article concerned the claimant and his two sons and confirmed the claimant had been convicted of Assault to Injury and sentenced to 75 hours of community service. The information contained in the article caused concern for the respondent because the Seaman Purser role is part of a small crew of 3/4 people and deals with members of the public.

68. Ms Tylee passed the information to the HR Business Partners and Ms Hume contacted the Sheriff Court to seek confirmation of the conviction. A response from Fort William Sheriff and Justice of the Peace Court was received (R388) confirming the claimant had been found guilty of the charge "Assault to Injury" on the 9 February 2017 and was ordered to do 75 hours of community payback to be completed within 6 months.

69. The claimant emailed Ms Robson on the 21 March 2017 (R391) to assure her any allegations about him were completely untrue and unnecessary. He provided the name and contact number for the Mallaig Harbourmaster who would confirm his character.

70. Mr Spadavecchia considered the allegations/conviction to be a very serious matter given the role the claimant had been offered involved dealing with passengers and situations – for example the cancellation or delay of a ferry –

which can become tense. Mr Spadavecchia believed a conviction for an offence involving aggressive and violent behaviour was not suitable and presented a risk in the role. There was also the potential for damage to the respondents' reputation. Mr Spadavecchia confirmed to Ms Robson (R390) that the offer of employment should be withdrawn because the allegations were very serious.

71. The claimant was advised by letter of the 18 April 2017 (R384) that the offer of employment was withdrawn because of concerns regarding his suitability for the role. This was a standard template letter prepared by Ms Kerr who understood the reference to "suitability for the role" referred to the behaviours of aggression and violence related to the conviction. The claimant was paid £619 in respect of one week notice (per the applicable collective agreement).

72. The respondent does not have a policy requiring applicants to declare convictions. The respondent, if it becomes aware of convictions, will investigate and deal with the issue on a case by case basis depending on the nature of the conviction and the role of the person involved. Ms Harwood cited two cases (one involving an allegation of sexual assault and one involving growing illegal substances) where the respondent had investigated and dismissed the individuals involved.

73. In the case involving the claimant, the victim of the assault was a relation of the claimant's wife. He worked on the ferry out of Mallaig. The respondent has not ever had any issues with this employee.

74. A further court case (April 2018) against the claimant, involving allegations of possession of a knife and behaving in a threatening or abusive manner likely to cause fear or alarm by shouting and swearing, uttering threats and brandishing a knife, was found not proven. The allegations against the claimant were made by the same relation involved in the previous assault.

Application 26 (Motorman)

75. The claimant applied for this role on the 30 August 2017. Ms Robson had, by email of the 30 August 2017 (R412) contacted a recruitment agency stating

they were desperate for a Motorman. The agency responded to say the only candidate they had was the claimant, but they thought it had previously been mentioned that he was *"a No"* and that ships did not like him. The agency enquired whether Engineers could apply for the position. Ms Robson replied to say that *"James MacNaughton is a definite no"* and that she could not take an Engineer for a Motorman position.

76. The RMT and Nautilus trade unions have an agreement that officers cannot be employed in ratings positions. The respondents abide by that agreement. The effect of the agreement is that if a person has been employed in an officer position, they cannot be employed in a ratings position: hence, an Engineer could not be accepted by the respondents for a Motorman position.

Application 29 (Motorman)

77. The claimant applied for this role on the 6 October 2017. Ms Natasha Kerr, who was an HR Assistant at the time, forwarded all applications, including the claimant's, to the Technical Managers (R420). The vacancy was a technical vacancy and so the technical managers did the hiring. Ms Kerr also sent the same email and information to the Marine managers in error (R418). The reference to the claimant in that email stated "James Macnaughton – BLACKLIST.doc". Ms Kerr did not write this: she simply cut and paste all the CVs into the email and sent it on. She did not, at the time, notice the reference to "blacklist". Ms Kerr had no understanding, at that time, of the meaning of the term "blacklist" beyond its general meaning.

78. The claimant was not successful in his application for this position because the vacancies were filled by internal trainee candidates: all external candidates were unsuccessful. The claimant was sent a standard template letter informing him his application had not been successful (R416).

Application 30 (Dual Purpose Ratings)

79. The claimant applied for this role on or about the 6 October 2017. Ms Kerr, HR Assistant, copied all applications/CVs for the Motorman position (above)

to the Marine managers (R429) in error: this included the claimant's CV described as James MacNaughton – Blacklist.doc.

80. A spreadsheet which HR had prepared to assist the hiring managers was also sent. The spreadsheet had fields in it for completion to show all those who had applied, those selected for interview, when interviewed and the outcome. Mr Lee McDowell, Master, had responsibility for hiring for the vacancy.

81. Mr McDowell emailed Ms Jane Dolan, Crewing Manager, to enquire how many Dual Purpose Ratings were required and where they were to be assigned because the vessels were seagoing and non-seagoing and different skills and experience were required.

82. Mr McDowell noted the word Blacklist had been annotated into the file name on the claimant's CV. Mr McDowell did not think anything of it at the time: it had no bearing on the outcome of the selection. Mr McDowell opened and considered the claimant's CV. Mr McDowell did not select the claimant for interview because he did not have the right qualifications for the role. The claimant did not have a navigation watch ratings certificate.

83. Mr McDowell confirmed to HR the names of those he wished to interview. The claimant and all other unsuccessful candidates received an email (R426) informing them they had been unsuccessful.

84. Mr McDowell is a member of Nautilus trade union and was a member of the National Executive Committee from 2005/06 until 2012/13. Mr McDowell is also a lay representative for all deck officers in the respondent.

2018

85. Ms Laura Farina, HR Assistant, was asked by Ms Tracey Irving, Head of HR, to collate information regarding the job applications made by the claimant. Ms Irving asked for this information because the claimant had contacted his MSP, Kate Forbes, who had contacted the respondents to enquire why the claimant had not been offered employment.

86. Ms Tylee provided Ms Farina (R493) with background information regarding the claimant, which was contained within a document called James MacNaughtonhistory.xlsx. The information provided in the document was set out on R494 and confirmed the reason for dismissal in 2014 was *"due to not holding the relevant certification for the role offered"* and the offer of employment in 2017 was withdrawn because there were concerns about his suitability for the role which arose from the fact of the conviction for assault. The document also set out the roles applied for in 2018 and the reason why he had not been selected.

87. The respondents' witnesses were not aware of any follow up by Ms Forbes after the meeting with Ms Irving.

88. Ms Taylor was contacted by Mr Gordon Martin, Full Time Officer with the RMT, in 2018 regarding the claimant. Mr Martin informed Ms Taylor the claimant had been in contact with them regarding two job offers having been withdrawn and his many applications for vacancies which had been unsuccessful. Ms Taylor advised Mr Martin that the first job offer had been withdrawn because the claimant's certification had not been valid and the second job offer had been withdrawn because the claimant had been convicted of Assault to Injury. Mr Martin was satisfied with the explanation.

Application 36 (Seasonal Seaman Purser)

89. The claimant applied for this role on or about the 13 December 2018. Ms Kerr, HR Assistant, sent all CVs, including the claimant's, to the hiring manager Mr Spadavecchia (R436).

90. Mr Andrew Gray, Crew Resources Officer, emailed HR (Ms Kerr) on the 14 January 2019 (R434) confirming the location of the vacancies and stating *"I see James MacNaughton has a CV in the list that you sent. Can you remove him, he has not to be short listed for any positions due to an issue in the past, Jane is looking out the email to back this up."* Mr Spadavecchia, who was copied into the email assumed this referred to the previous aggressive and violent behaviour.

91. Ms Dolan forwarded to Mr Gray a copy of an email from Ms Leanne Taylor, HR Business Partner (Employee Relations) dated 19 January 2018 (R507) in which she said *"External candidate James MacNaughton has been calling the unions as he is apparently applying for every vacancy he can for 13 years and hasn't been given a job! He's persistent if nothing. Anyway, from memory, and after speaking with Jane, it would seem that in the past he has been offered 2 jobs but these have [been] withdrawn after discovering that the first time, his ticket didn't seem valid and the second time, he was involved in a fight at a wedding. Is there anywhere that we can highlight the problems to Marine that we have with this guy if he keeps applying for vacancies so that we don't end up hiring him for a 3rd time and have to withdraw it again? I believe he has also applied for the following open vacancies to be aware and to make Marine aware … On paper I think he looks more than qualified which I assume is why we continue to interview and employ him until we realise who he is and have to retract."*

92. Ms Taylor, at the time of writing the email in January 2018, was not aware of the Blacklist.doc.

93. Mr Spadavecchia, having had regard to the email, wrote to Mr Gray on the 14 January 2019 (R506) saying *"Thanks for the email, the second time happened to me, I made the recommendation. Leanne as you correctly say his CV matches our requirement and he was successful at interview. After the offer was done we received an anonymous letter of complaint from a concerned member of staff who claimed the offensive allegations. We did some digging (Fiona was the HR at that time) and the allegations were correct and we withdrew the offer. Natasha, based on the below can we please remove him from every list you send us."*

94. Mr Spadavecchia made this request because the claimant kept applying for vacancies and although his qualifications may have been appropriate, his behaviour was not in line with the values of the respondent. Mr Spadavecchia considered the claimant should not be interviewed again for this reason.

95. Ms Leanne Taylor, HR Business Partner (Employee Relations) noted the above email traffic and replied to Mr Spadavecchia on the 19 January 2019 (copied to Mr Gray) (R506). Ms Taylor said *"Let's be careful here, we need to make sure we do everything right here as we cannot "blacklist" anyone. Natasha, can you check with the HR Managers please and make sure we cover all our bases as he has previously involved his local MSP on this too. I believe Tracey met with the MSP but I'm unsure of the outcome. We need to make sure we don't do anything unlawful by disadvantaging him. For me, the issue was that we keep offering him positions then withdrawing the offers so we needed to make sure we stopped doing that. We shouldn't be offering jobs then retracting them. We need to keep ourselves right."*

96. Ms Taylor understood, following her email, that the claimant would not be put forward for vacancies, or, if he was, then the Marine Manager would be advised of the certification and behavioural issues which made the claimant unsuitable for employment.

97. The claimant and all other unsuccessful candidates were advised by email (R433) that their application had been unsuccessful.

2019

Application 38 (Freight Assistant – Mallaig)

98. The claimant applied for this post on or about 3 April 2019 (R441). All of the applications, including the claimant's, were sent to the hiring manager (R439). The hiring manager confirmed there were no suitable applicants and asked for the position to be re-advertised.

99. The claimant was advised his application had been unsuccessful by email of the 24 April (R438).

100. The claimant, by email of the 1 May 2019 (R509) made a complaint (which was copied to Ms Kate Forbes, MSP). The complaint was that it had come to the claimant's attention that Michael MacNeill had been offered a deck crew job on the Skye/Mallaig ferry. The claimant noted that he and his family had issues with the person which would make it impossible to use the ferry. The

claimant and his family travelled back and forth on the ferry to watch his son play football. The claimant commented the individual had been shown to be aggressive and abusive to the claimant's wife and family, assaulting her and calling her a calmac whore outside Mallaig church on Christmas day 2017. The claimant alleged the man had been charged and received a fiscal order against him. The claimant further alleged the man was known to make false allegations against him and his family which had been proved untrue in a courtroom. The claimant asserted he was not the type of person women and children would be comfortable about. The claimant asked for the man to be removed.

101. The email was referred to Ms MacFarlane, who commenced an investigation. Ms MacFarlane spoke to Ms Tylee who sent Ms MacFarlane copies of the newspaper articles about the claimant's conviction. Ms Tylee did this because the person assaulted by the claimant was the same person about whom the claimant was now complaining. Ms MacFarlane also contacted Ms Harwood, HR Business Partner for the vessel where Mr MacNeill was employed (R530) to ask Ms Harwood to gather some information. Ms MacFarlane sent Ms Harwood a timeline/chronology of the case and a copy of the newspaper article about the assault conviction.

102. Ms MacFarlane investigated whether there were any legal proceedings against Mr MacNeill, but found nothing.

103. Ms Harwood emailed Mr Donald MacKillop, Retail Development Manager, and Mr Finlay MacRae, Area Operations Manager, to make them aware of the complaint and to ask that Mrs MacNaughton be spoken to regarding the situation and that Mr MacNeill be informed of the complaint against him. Mr MacRae responded to Ms Harwood (R526) to advise that he was aware of the situation because Mrs MacNaughton had spoken to him to enquire what the position would be if the respondent unknowingly employed someone with "a restraining order". Mrs MacNaughton was advised it appeared to be a family matter (because Mrs MacNaughton was the sister-in-law of Mr MacNeill). Mr MacRae suggested the best outcome for all would be to avoid an unplanned meeting at a port or on a vessel, and to this end he noted

alternative vessels and routes which could be used by the claimant and his family. Mr MacRae confirmed there had been no reportable incidents at work that would warrant any intervention.

104. Ms Harwood subsequently advised Ms MacFarlane of this information and that there had been no issues with Mr MacNeill since he had been employed.

105. Ms MacFarlane emailed the claimant on the 24 May 2019 (R520) to confirm a full investigation had taken place and she could not find any evidence of the man having any legal proceedings lodged against him. Ms MacFarlane invited the claimant to bring forward any further information he may have to support his allegation, otherwise the investigation would be closed. The claimant did not send anything further.

106. The claimant emailed Ms MacFarlane again on the 31 May 2019 (R522) setting out what had happened to him in respect of his employment with Calmac, and in respect of his conviction. The claimant stated that he believed that by employing the man concerned, the company was guilty of double standards and discrimination. The claimant asked for a coherent explanation why the company was discriminating against him.

107. Ms MacFarlane responded by email of the 12 June (R514) in which she explained that the GDPR regulations meant the personal data of applicants had to be destroyed after 12 months, and accordingly she had no information regarding applications made prior to that timescale. Ms MacFarlane noted the claimant had enquired about the recruitment for the freight assistant role and confirmed it had been conducted fairly and consistently and the claimant had not been selected for the role because others more suited to it. Ms MacFarlane provided some information about the recruitment process and concluded by stating no discrimination had taken place.

108. The claimant replied by email of the 12 June (R512) in which he stated he knew applicants for the freight assistant jobs and their qualifications and wanted an explanation why they had been suitable for the role and he had not been. The claimant insisted the respondent was “blatantly disregarding any applications I make for any job with Calmac in a petty childish vendetta”. The

claimant confirmed he was going to submit the case to the Ombudsman because he believed the respondent's practices and behaviour were unacceptable.

109. Ms MacFarlane considered the claimant was questioning her personal values and professionalism and it was unacceptable.

110. Ms MacFarlane subsequently (2021) started to receive a "barrage" of daily emails from the claimant which she considered very challenging. Ms MacFarlane referred the matter to her Director, who sought advice, which was to be much more direct in responses to the claimant rather than use HR-speak.

Application 44 (Seaman Purser)

111. The claimant applied for this position in August 2019. The applications, including the claimant's application, was forwarded to the hiring manager by email of the 2 September 2019 (R449).

112. Mr Scott Maclean, Marine Manager, sent an email to HR (R448) advising that he was going to be conducting some of the interviews and he asked whether the 3/Os listed were seasonal employees and whether there was any feedback good or bad from any of the vessels about any of the candidates.

113. Ms Robson replied to that email on the 9 February (R447) and referred to the application made by the claimant and stated *"he's a definite no".*

114. Mr Evan Mackay, Marine Manager, who was going to be conducting the interviews for the Seaman Purser position, emailed Ms Robson (R445) to ask whether the "no" was on the basis of his previous performance with Calmac as an agency employee. Mr Mackay asked this question because, based on his experience, if someone leaves and wants to come back, and it's a "no", it would usually be because of previous performance.

115. Mr Mackay discussed the matter with Mr Spadavecchia and was informed that it was a "no" to the claimant because of behaviours of violent and aggressive

behaviour related to a conviction. Mr Mackay understood from this information why the claimant was not considered to be a suitable person for the role.

116. The claimant's application for the position was not successful because of the behaviours related to the conviction and he received the standard template email confirming the application had been unsuccessful (R444).

2021

Application 49 (Motorman Loch Seaforth)

117. Ms Robson emailed a recruitment agency on the 12 February 2021 asking if they could find a Motorman for the Loch Seaforth (R455). The agency responded to advise they had two candidates who would be suitable for the vacancy, but only one candidate had expressed an interest.

118. Ms Robson replied to the agency that she had the details for James MacNaughton. She asked if he was married to Anne MacNaughton who was employed by Calmac. The agency confirmed his wife's name was Anne. Ms Robson replied *"yeah that's the guy. It'll be a no then. He has previous with Calmac and we wouldn't use him anywhere on the fleet.."* (R453).

Application 51 (Seasonal Seaman Purser)

119. The claimant applied for this position in January 2021. He was advised by email of the 16 March 2021 (R464) that his application had been unsuccessful.

120. The claimant contacted the HR Assistant, Ms Chloe Nellis, to ask for feedback why his applications were constantly rejected. The claimant queried whether the reason was age related. Ms Nellis raised the claimant's email with the HR Services team because of the reference to age, and it was at this point she became aware of the fact previous offers of employment had been withdrawn because of issues with certification and the behaviours related to the conviction.

121. Ms Nellis, acting on the consensus of the HR Services team, sent a generic response to the claimant (R463) saying the vacancy had attracted a high

number of applications and many candidates had met and/or exceeded the essential and desirable criteria. Ms Nellis confirmed that on this occasion other candidates with more role-specific experience were selected for interview. Ms Nellis gave the claimant some guidance regarding the format of his CV.

The Subject Access Request

122. The claimant made a Subject Access Request (SAR) on the 24 March 2021. Mr Alan Redhead, Records Manager, was responsible for working with Ms MacFarlane to respond to the request. All of the information in the claimant's file was sent to him. Ms MacFarlane additionally looked in the Leavers file and although there was very little filed under the claimant's name, she found additional documents filed under "McNaughton", and these were also sent to the claimant.

123. Mr Redhead wrote to the claimant on the 1 June 2021 (R523) confirming that a batch of 25 documents had been uncovered under a slight misspelling of his name and that these documents would be forwarded to him. Mr Redhead included the following paragraphs in his letter:

"We can state categorically that we do not hold and indeed have never held a document that lists people who may or who may not be acceptable for employment. Every application is considered on merit and goes through a proper and transparent process as to what candidates are selected to progress in their application.

The situation with regard to the use of the word is that you have been employed by the company twice and on both occasions we have had to withdraw the offer of employment due to discrepancies with your certification and non-disclosure of a serious assault conviction. You have been a repeat applicant for a wide variety of posts and the word "blacklist" was put on your CV in good faith to flag previous issues for the recruiting manager and show that you are not considered a suitable candidate for Calmac to consider. This was simply added as an identifier to those making a shortlist for interview for that specific role.

The issues that are referred to are regarding the certification issue and the non-disclosure of a serious assault conviction. These issues were referred to in some of the emails that were originally provided to you."

124. Ms MacFarlane was not involved in drafting the letter sent by Mr Redhead. Ms MacFarlane was not aware of the existence of a document with the word "blacklist" on it until receipt of the claimant's ET1 form.

125. Mr Martin, RMT, contacted Ms Taylor by email of the 6 May 2021 (R532). Mr Martin had been passed a copy of the Blacklist.doc by Prospect trade union. Mr Martin asked Ms Taylor to investigate and get back to him as a matter of urgency.

126. This was the first time this type of issue had ever been raised by a trade union and it was the first time Ms Taylor had seen the Blacklist.doc. Ms Taylor contacted the Head of Security, who passed her to Mr Alan Redhead, Records Manager who provided her with copies of the documents which had been given to the claimant following his Subject Access Request.

127. Ms Taylor contacted Ms Tylee who confirmed the Blacklist.doc document was the claimant's CV.

128. Ms Taylor telephoned Mr Martin to explain what action she had taken and to confirm there was no blacklist. The document was a CV where the name had been changed and the term "blacklist" had been used to refer to a "do not employ". Mr Martin was satisfied with the explanation and satisfied the respondents were not operating a blacklist.

129. Ms Taylor sent an email to Mr Martin on the 14 May 2021 (R533) in which she thanked him for bringing this to her attention. Ms Taylor confirmed the respondents do not hold and have never held a document that lists people who may or who may not be acceptable for employment. Every application is considered on merit and goes through a proper and transparent process. Ms Taylor gave an assurance the respondents do not have a blacklist.

130. The trade unions have not raised any further issues or concerns with Ms Taylor, or the respondents generally, concerning either a blacklist or trade union members being subjected to detriment for using trade union services.

131. The consequences for the respondents if they did operate a blacklist would be catastrophic because they would be unable to operate their services and unable to recruit.

Application 54 (Motorman – MV Loch Seaforth)

132. The claimant applied for this vacancy and was advised the vacancy had been withdrawn. The claimant emailed Ms Carol MacFarlane, HR Services Manager on the 26 August 2021 (R468) to suggest the respondents were still operating a blacklist and this was the reason for the vacancy being withdrawn. Ms MacFarlane responded to say the claimant's CV had not been accepted because the vacancy had been backfilled with "call backs". The vacancy had been withdrawn for this reason. (A call back is when an employee, having had their rest time, and prior to commencing their next allocated shift, can volunteer for additional work, which is paid at treble time).

Application 55 (Motormen)

133. The claimant applied for this position on the 2 September 2021. The claimant emailed Ms MacFarlane on the 2 September 2021 (R472) to enquire whether the recruitment agency had been instructed to exclude him from any opportunity for work with Calmac. Ms MacFarlane responded (R472) and reiterated that Calmac welcomed applications for all vacancies providing the applicant has the correct qualifications, certificates and experience for the vacancy. Ms MacFarlane confirmed that all applications, once received, would be reviewed, sifted and scored to ensure the right person for the job was recruited. Ms MacFarlane further confirmed some of the areas which would be scored, and this included behaviours.

134. The claimant responded to explain he was just trying to ensure he would be treated fairly. Ms MacFarlane replied that he had always been treated fairly and his previous applications had been scored and he had not been invited

for interview. Ms MacFarlane confirmed there had never been any list to prohibit him or stop him from applying for roles and that his applications had always been welcomed.

Application 56 (Motormen)

135. The claimant applied for this position on the 28 October 2021. (The claimant led no evidence regarding this application at the hearing).

Application 58 (Small Ferry Motorman)

136. The claimant, in response to his application, received an email (R475) from Ms MacFarlane saying *"We would refer you to our correspondence with ACAS in relation to your recent claim, which I trust you have seen. That explains quite clearly why Calmac will not consider any application from you for any post, seasonal or otherwise."*

Application 59 (Seasonal Port Assistant – Mallaig)

137. This application was withdrawn at the hearing. Ms Robson had, by email of the 15 June 2017 (R478) sent the applications for the post to the hiring manager. The applications included one from Alexander James MacNaughton. Ms Robson, in her email, stated *"We'd recommend discounting Alexander MacNaughton".* Alexander MacNaughton is the claimant's son.

Application 60 (Deck and Engineroom Trainee)

138. This application was withdrawn at the hearing because the person who made the application was the claimant's son. The comment relied upon regarding this application ("our friend is back") is referred to above in respect of application 2.

The Blacklist.doc

139. The word "Blacklist" was annotated onto the claimant's CV. The term "blacklist" on the claimant's CV was used to indicate "do not employ". The

term “blacklist” was not put on the claimant’s CV for any reason related to trade union membership or activities or use of trade union services.

140. The respondents carried out an investigation but did not discover who had renamed the claimant’s CV in this way.

Credibility and notes on the evidence

The claimant

141. There were no real issues of credibility regarding the claimant’s evidence: his evidence was brief and on the whole straightforward. The claimant’s case was that he had been subjected to detriment and blacklisted for using the services of a trade union in 2014. The claimant, in support of that position, told the tribunal that *“things only got heated when Prospect trade union got involved.”* The claimant felt Mr Hardy’s tone regarding *“negligent misrepresentation”* was *“not friendly”* and after he made the statement about testing it in the Sheriff Court, it had *“got a bit hostile/strained”.* This was the totality of the claimant’s evidence regarding the trade union involvement in the dismissal meeting in 2014 and the reason for him being blacklisted.

142. The claimant accepted in cross examination that the Master on the Loch Nevis had told him his certification was not valid for the vessel and that he had agreed. The claimant had been *“mortified”* at having to leave the vessel. The claimant agreed the issue regarding certification arose prior to any involvement of the trade union and that the circumstances of the conviction in 2017 were *“serious and may affect employment”.*

143. The claimant did not accept any accountability or responsibility for the issues regarding certification in 2014. He considered he had been open and honest about his certification and that any fault lay with the respondent. The claimant maintained he had not applied for any particular vacancy and had not known which vessel he would be on.

144. Mr McDowell, in his evidence, observed that the claimant’s CV had been “slightly misleading” because it did not include the limitations on the certification. Mr McDowell considered it was “very uncommon” for this

information to be omitted. The effect of the limitations on the claimant's certification meant that he could not sail as an Officer on a Calmac vessel.

145. There was very clearly some uneasiness on the part of the respondent regarding the fact the claimant took no responsibility for the issue regarding his certification. Some witnesses referred to the claimant having been "dishonest". Mr McDowell, for example, considered it dishonest to apply for a role you do not hold the competency certification for and he referred to the issue leaving a question mark over what else the claimant may not have disclosed. Mr McDowell was critical of the claimant because he [the claimant] would have understood the limitations of what his certification allowed him to do.

146. The respondent accepted that responsibility for checking the claimant's certification lay with them, and that they had made an administrative error; but, their consistent position was that the claimant also bore some responsibility for what had happened.

147. The tribunal accepted the claimant had made an initial general enquiry about the availability of work, but thereafter he did apply for the Watchkeeping Engineer position. The tribunal noted that whilst the claimant was not initially aware of the vessel to which he would be assigned, he was told, two days prior to joining the vessel that he would be on the Loch Nevis. The claimant, as a local person and because his wife worked on the vessel, would know the ferry and its routes. The claimant ought to have been aware of the limitations on his certification. The tribunal concluded that in the circumstances the claimant did bear some responsibility for the issue regarding certification.

148. The tribunal did not consider the claimant had been "dishonest" about his certification, but as an experienced seaman he ought to have been aware of the limitations on his certification which had been not been gained in a passenger ferry environment. The respondents took a very dim view of the claimant not accepting any responsibility for this issue and the tribunal concluded this was reasonable in the circumstances.

Anne MacNaughton

149. The claimant's wife was very uncomfortable giving evidence because she has worked for the respondents for 10 years and was still employed by them. Mrs Mac Naughton's evidence did not add anything to the claimant's case.

The Blacklist.doc

150. There was no dispute in this case that a "James MacNaughton – Blacklist.doc" existed. The tribunal accepted the evidence of the respondents' witnesses and found as a matter of fact that someone had annotated the claimant's CV with this description. The witnesses called by the respondents did not know who had done this: all they could say was that it had not been them. The witnesses all said they had not ever seen a Blacklist.

151. The HR Assistants were naïve/uninformed about the meaning of the word "blacklist". Ms Farina told the tribunal she had not named the CV "Blacklist.doc" and she did not know who had done so. Ms Farina confirmed she now understood the meaning and implications of the word, but at the time she had not known and had read it as meaning *"we don't want to have the person come back or work for us".*

152. Ms Nellis said nothing beyond stating the respondent did not operate a blacklist.

153. Ms Harwood, HR Business Partner, told the tribunal that the word "blacklist" gave her "the fear" because she understood the connotations of it and it was a word she would not use. Ms Harwood thought perhaps someone had renamed the claimant's CV and called it "Blacklist", in the sense of "do not employ", without realising the true meaning of the word.

154. Ms Kerr, HR Business Partner, told the tribunal she had sent the email to the hiring managers which included the claimant's CV referred to as James MacNaughton – Blacklist.doc. Ms Kerr confirmed she had not named the CV this and did not know how it had appeared in this format. She had simply sent on all of the CVs and had not noticed it at the time. Ms Kerr's opinion was that the person who renamed the CV with the term "blacklist" was trying to convey

that the claimant was not a person to be employed because of the issues with his certification and the conviction/behaviours.

155. Ms Kerr described herself as having been "naïve" at the time because she had not heard of the term "blacklist" being used in a trade union context. Ms Kerr was not long out of University and only knew the term blacklist being used in its general sense.

156. Ms Leeanne Taylor, HR Business Partner (Employee Relations) told the tribunal she fully understood the meaning of the term "blacklist". She had not put that term on the claimant's CV and did not know who had. Ms Taylor believed that within the HR team there was not a general understanding of the meaning of the term "blacklist". She considered that whoever had put the term on the claimant's CV had done so to convey "do not employ" because of the issues with certification and the conviction/behaviours.

157. Ms Tylee, HR Services Supervisor, told the tribunal she did not know how the CV had come to be named "Blacklist.doc". Blacklist was not a word used within the respondent.

158. Ms MacFarlane, HR Services Manager, did not see the "Blacklist.doc" until the claim was made.

159. Mr Campbell, Technical Manager – Overhauls, did not see the Blacklist.doc document. He told the tribunal that to his knowledge the respondent did not operate a blacklist and he described the suggestion the respondent had operated a blacklist as "preposterous".

160. Mr Lee McDowell, Master, told the tribunal that he had received an email from Ms Kerr attaching all applications/CVs which included the claimant's CV with the term "Blacklist" annotated into the file name. Mr McDowell had not thought anything of it at the time. He opened the claimant's CV and disregarded it because he did not have the right qualifications for the vacancy.

161. Mr McDowell acknowledged that he had thought it "weird" the word blacklist had been used. He was aware of the term "blacklisting" in the building industry but he did not associate the word "blacklist" on the claimant's CV as being a

trade union blacklist. Mr McDowell *"did not imagine for one minute that [the word blacklist] related to [the respondent] having a blacklist".* He did not take from the word "blacklist" on the claimant's CV that it meant the claimant had to be excluded. His passing thoughts were that perhaps someone was playing a joke on him, or that the claimant had experience in the oil industry. Mr McDowell did not know who had put the term on the claimant's CV but did not discount the possibility it may have been the claimant.

162. Mr McDowell had been a member of the trade union Nautilus' National Executive Committee. We accepted his evidence that he did not "for one minute" believe the Blacklist.doc meant the respondent was operating a blacklist, but his action in not even questioning why someone had used that term appeared somewhat lacking.

163. Mr Spadavecchia was not aware of the meaning of the term "blacklist" beyond a general understanding that it meant "do not hire".

The respondents' relationship with trade unions

164. The tribunal found as a matter of fact that the respondents have a very healthy relationship with the four recognised trade unions. The respondents are heavily unionised with the vast majority of employees being a member of a trade union. All of the respondents' witnesses spoke to their knowledge of the relationship with trade unions.

165. Mr Campbell told the tribunal that the respondent was *"very engaging and forthcoming with the trade unions, which are well represented in the workplace."* He said that trade unions had a very big part to play in the day to day running of the organisation: the relationship was very open. Mr Campbell is a member of the trade union, Nautilus.

166. Mr Campbell described the suggestion that the respondent operated a blacklist to be "preposterous" given the relationship which exists. Mr Campbell acknowledged that Prospect was not a trade union recognised by the respondent, but he thought it "highly unlikely" there would be hostility by the

respondent towards a trade union it did not recognise. He would expect the dealings between the respondent and any trade union to be the same.

167. Ms Taylor described the respondent's relationship with the trade unions as generally very good. Ms Taylor had been attending the Joint Consultative Committee meetings since 2004, and confirmed a good, trusting relationship had been built up. Ms Taylor confirmed that with the exception of this case the trade unions had not ever raised issues regarding blacklisting or detrimental treatment of trade union members.

168. Mr McDowell described the relationship of the respondent and the trade unions as "symbiotic" and "mutually beneficial". Mr McDowell believed trade union membership of officers and ratings was almost 100%. He recalled strike action in 2015/2016 regarding pensions, and only one person had not gone out on strike.

169. Mr Evan Mackay described the respondent's relationship with trade unions as "second to none" and confirmed there was not much the respondent did where the trade unions were not engaged. Mr Mackay spoke of the regular meetings with the trade unions and his belief that if there had been any concern by the trade unions regarding a blacklist or detrimental treatment of trade union members, then it would have been raised with Ms Taylor.

170. The tribunal, based on the evidence of the respondents' witnesses, found as a matter of fact that the consequences for the respondent if it operated a blacklist would be catastrophic. They would not be able to operate the ferry services or recruit employees; there would be an industrial dispute and questions asked politically.

Respondents' witnesses

171. The tribunal on the whole found the respondent's witnesses to be credible and reliable but we did make the following observations.

172. Mr Kevin Campbell was a credible and reliable witness who gave his evidence in a very straightforward manner. He had been responsible for recruitment for the small vessel fleet. Mr Campbell is a member of the trade union Nautilus.

Mr Campbell clearly explained why the claimant had not been selected for interview and he also confirmed that he had, at the time of making that decision, no knowledge of the 2014 incident or the fact the claimant had used the services of a trade union.

173. Ms Laura Farina, HR Assistant, was involved in collating applications and CVs and forwarding them to the hiring managers, and issuing standard template emails to candidates who had not been successful. Ms Farina did not know the claimant but on the basis of hearsay chatter in the HR team she was willing to give a very damning judgmental view of the claimant.

174. Ms Leeanne Taylor, gave her evidence in a very straightforward and honest manner. She understood the meaning of the word "blacklist" and she took action to investigate the circumstances in which it was being used.

175. Ms Patricia Harwood also gave her evidence in an honest and straightforward manner.

176. Mr Evan Mackay was a credible and reliable witness and he impressed the tribunal with his evidence that he had not simply accepted at face value that the claimant was a "No". He had asked for an explanation. Mr Mackay also confirmed to the tribunal that he had, at the time he made his decision regarding the claimant's application, no knowledge of the 2014 incident, or of the fact the 2017 offer of employment had been withdrawn or of the conviction.

177. Mr Lee McDowell spoke to some of the more technical aspects of the respondent's vessels and certification. Mr McDowell, who had been an NEC member of the trade union Nautilus, surprised the tribunal when he acknowledged the word "blacklist" would be a red flag for him, yet he took no action to question it when he saw it on the claimant's CV. His evidence that he thought someone was playing a joke on him, or that maybe the claimant had put "Blacklist.doc" on his CV or maybe it was something to do with the oil industry was incredible and could only perhaps be explained by an absolute belief that the respondent would not be operating a trade union blacklist and therefore there had to be some other explanation for it.

178. Mr McDowell told the tribunal that at the time he had made his decision regarding the claimant's application, he had not been aware of the 2014 incident or the conviction.

179. Mr Dario Spadavecchia was a credible and reliable witness. He also told the tribunal that he was not aware of what the term "past issues" referred to.

180. Ms Kerr was also a credible and reliable witness: she was calm and measured in giving her evidence. She clearly described what she had done and why and was willing to say when she could not remember or did not know the answer to a question .

181. Ms Nellis' evidence did not add to the hearing.

182. Ms Tylee was a credible and reliable witness who gave her evidence in a straightforward manner. Mr Merck, in his submissions, invited the tribunal to find/infer that the blacklist.doc had been created on the instruction of Ms Tylee because she had knowledge of the 2014 events. The tribunal could not accept that submission primarily because it had not been put to Ms Tylee in cross examination. Further, the mere fact Ms Tylee had knowledge of events of 2014 was not a sufficient basis upon which to draw the inference that the term "blacklist" had been put on the document on her instruction. Ms Tylee confirmed in cross examination that she was aware of the Blacklist.doc, but she was not asked to clarify a timeframe when she became aware of it. Ms Tylee described the document as being "for hiring managers to shortlist".

183. Mr Merck also suggested in his submissions that Ms Tylee had clearly thought the claimant did not deserve two payouts and that she would have made this known to her colleagues. The tribunal noted Ms Tylee did not express this sentiment during her evidence. Ms Tylee did speak to the payments made to the claimant and explained the fact of there being collective agreements governing the payments to be made in the circumstances. Ms Tylee may well have thought the claimant did not "deserve" a payment of wages and compensation for one day's work, but neither Ms Tylee nor the HR Assistants with whom she shared an office space were decision-makers in this case.

184. Mrs MacFarlane's evidence was focussed primarily on the changes she had made to the recruitment process and her dealings with the claimant. Mrs MacFarlane only saw the "Blacklist.doc" within the context of the documents prepared for this hearing. The Tribunal found this surprising given Mrs MacFarlane's role and the fact the RMT had raised the issue with Ms Taylor.

185. Mrs MacFarlane accepted the respondent could, and should, have been more direct in their dealings with the claimant insofar as informing him that following the issues with certification, conviction and his behaviours not being in line with the respondent's values, he would not be employed. This approach may have prevented the number of applications made by the claimant.

186. Mrs MacFarlane referred in her evidence to a letter sent to the claimant via ACAS explaining why the respondents would not consider any application from him for any post. Mrs MacFarlane acknowledged that following that letter, there had been no further applications from the claimant.

187. Mrs MacFarlane, notwithstanding the above, went on to say the claimant could still apply for a job.

188. This demonstrated starkly the real issue for which the respondent could be criticised: no-one took control of the situation and this resulted in no-one explaining to the claimant that whilst he was free to apply for vacancies, the respondent would not consider any application from him for any post. The reasons why the claimant's applications would not be considered were because of the issues regarding certification and the behaviours connected with the conviction which were at odds with the respondents' values. The respondent was, and is, of the view the claimant was, and remains, unsuitable for employment with the respondents.

Respondent's submissions

189. Ms Mackie had, at the start of the hearing, indicated she wished to make an application to strike out that part of the claimant's case brought under section 146 of the Trade Union and Labour Relations (Consolidation) Act because, it was said, it had no reasonable prospect of success. The tribunal were

reluctant to delay the start of the hearing to deal with this, particularly when the hearing would need to proceed in any event to determine the claims brought under the Blacklisting Regulations. It was therefore agreed the application would be dealt with at the end of the hearing. Ms Mackie indicated prior to submissions that the application was no longer relied upon, and any relevant points would be included in the submissions.

190. Ms Mackie submitted the claimant had tried, by two separate routes, to construct a case round the respondent's evidence rather than having regard to his pleaded case or his evidence in chief. The claimant's pleaded case (at paragraph 22 of the statement of claim) was that the purported blacklist was the "James MacNaughton – Blacklist.doc". There was no suggestion that the blacklist was arranged in another format or in a different form. The claimant's representative had suggested to one witness (Ms Farina) that the blacklist was in the form of a spreadsheet. Ms Mackie noted she had objected to this line of questioning.

191. The claimant had tried on three occasions to expand his case during the hearing: for example, when suggesting the blacklist was a recruitment spreadsheet, or that the blacklist had been spread across a number of documents or that the blacklist had been in the mind of a witness and Ms Mackie had been required to object to the extension of the case.

192. Ms Mackie, relying on the case of ***Contract Security Service v Adebayo EAT 0192/12*** submitted that it was not for a party to put forward in evidence a case which had not been pleaded or set out in a witness statement. The respondents, on this basis, invited the tribunal to have regard to Ms Mackie's objections and to find that the pleaded case is that the purported blacklist was the "James MacNaughton – Blacklist.doc".

193. Ms Mackie further submitted that the claimant's case was that he was subjected to detriment in terms of section 146 TULRCA because he used the services of a trade union. In cross examination the claimant's representative suggested the claimant had been subjected to detriment because he was a member of Prospect which is not one of the four trade unions recognised by

the respondents. Ms Mackie had objected to this line of questioning because it was not the pleaded case.

194. Ms Mackie, referring to the case of ***Chandhok***, submitted the claimant's case had been drafted by a very experienced legal professional and the claimant's case, as set out within the pleadings, was the case to be determined by the tribunal.

195. Ms Mackie noted the comments made regarding witnesses who had not appeared to give evidence and submitted the claimant had been aware of the respondent's witness list for some time and could have sought a Witness Order for the attendance of certain witnesses, but had not done so. The respondents had endeavoured to bring witnesses who could speak to the decisions not to employ the claimant, but inevitably, with the passage of time in this case, some employees had moved on or retired.

196. Ms Mackie invited the tribunal to keep at the forefront of its mind that no trade union representative was called to give evidence for the claimant. The claimant is a member of two trade unions (Prospect and RMT).

197. Ms Mackie referred to the relevant statutory provisions and to the authorities ***Yewdall v The Secretary of State for Work and Pensions UKEAT/0071/05; Bone v North Essex Partnership NHS Foundation Trust 2016 IRLR 295; Serco Ltd v Dahou 2016 EWCA CIv 832*** and ***CLFIS (UK) Ltd v Reynolds 2015 ICR 1010.***

The section 146 TULRCA claim

198. Ms Mackie noted the claimant brought a claim under section 146(1)(ba) and (5) of TULRCA that he had suffered a detriment by being prevented, penalised or deterred from using the services of a trade union. The factual basis of the claim was that in 2014 the claimant had the assistance of a trade union representative in relation to the termination of his employment as a Watchkeeping Engineer with the first respondent. Mr Richard Hardy attended a dismissal meeting in June 2014 and corresponded with the respondents'

Anne Allen to secure a financial payment for the claimant. That fact was not in dispute.

199. The right set out in section 146(1) is that "a worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of [ba] preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so."

200. The above section is qualified by subsection 5A which states the section does not apply where (a) the worker is an employee and (b) the detriment in question amounts to dismissal.

201. Ms Mackie referred to the case of ***Jet2.com Ltd v Mr J Denby UKEAT/0070/17/LA*** at paragraphs 34 – 37 where the nuances of sections 137, 146 and 152 of TULRCA were addressed. Ms Mackie submitted this was relevant because in a case where the detriment relied on is the refusal of an application, it must be past trade union activity that is said to have been the reason for refusal. Further, section 146 includes the words "at an appropriate time" which is intended to protect current employees, who have made use of services at a time during their employment. It does not extend to trade union services that have been used in the past in respect of individuals seeking to work.

202. Ms Mackie referred to a tribunal decision in the case of ***Mr I Armstrong and others v API Foilmakers Ltd 4104417/2020*** where the tribunal did not accept the claimants' argument that section 146 did not exclude applicants for work.

203. Ms Mackie submitted that in circumstances where an individual has been refused employment and is relying on a previous use of trade union services, section 146 does not apply. Section 146 only applies to trade union activities, including making use of trade union services, that have been undertaken at the appropriate time, during the employment relationship.

204. Ms Mackie submitted that should the tribunal consider the claim under section 146 TULRCA, then there had been no contravention of that section. The

burden of proof only transferred to the respondents to establish what the purpose was if there is a prima facie case that there was an act in this case, causing detriment, for the sole or main purpose of penalising the claimant for taking part in trade union activities. There was no such act causing detriment to the claimant.

205. The claimant used a trade union representative in 2014 to negotiate a payment. The negotiation was in relation to an action of strict liability – the claimant was either certified or he was not. The claimant did not have the certification required and he had not been honest in disclosing his limitations. The facts were unchanged by his trade union representative: the respondents had already drawn a negative inference against the claimant for the seriousness of his omission.

206. There was no dispute regarding the fact the claimant was repeatedly refused job applications. It was not enough however to say that the source of the refusals was because of his union representative's negotiations in 2014 to amount to a contravention of section 146. There needs to be something more to demonstrate that the cause of his refusals was because of his use of trade union services. This is where the claimant falls shy of the requirements. The act in question (being the claimant's employment on the vessel in 2014 with the incorrect certification) had already been committed before the trade union representative was engaged for negotiations. The dismissal had already been agreed (R340). Furthermore, using the services of a trade union once in 2014 and relying on that 9 years later, at a time when most of the respondents' witnesses were not even employed, is too remote and cannot be used to establish a prima facie TULRCA case.

207. The claimant had not been treated any differently to any other employee who does not have the correct certification for the job they are employed to do. Mr McDowell confirmed that the process for someone with incorrect certification on board a vessel is to remove them and the company and individual could potentially face an MCA investigation. The claimant could have been dismissed for gross misconduct, but he was not and the respondents honoured the collective agreement by paying the claimant 3 months' notice.

208. Ms Mackie submitted there are no established facts to transfer the onus of proof to the respondent under section 148 TULRCA.

The blacklisting claim

209. Ms Mackie submitted the claimant's blacklisting claim must fail because the requirements of Regulation 3 had not been met. Ms Mackie referred the tribunal to page 4 of the Department for Business, innovation and Skills Guidance on Blacklisting which provides that *"the list must have been compiled with a view to being used by employers or employment agencies for the purposes of discrimination when recruiting or during employment on grounds of trade union membership or activities".* The respondent operates no such prohibited list. The claimant had not identified a list that meets the requirements of the Blacklisting Regulations. If the tribunal however finds the respondent did compile and/or operate a list, then it was submitted they did so for a legitimate purpose and not to assist hiring managers to discriminate against individuals based on trade union status.

210. Ms Mackie referred to the evidence of the respondents' witnesses that no such list exists; that nobody else had ben flagged "not for hire" other than the claimant and the hiring managers each said that they had never seen or known a blacklist to operate. The evidence demonstrated the hiring decisions had not been restricted by the "do not hire" reference because hiring managers bypassed the "Blacklist" reference in the title of the claimant's CV. Further, the evidence supported the claimant had been sifted out for certification reasons, and because vacancies had been filled by internal trainees.

211. Ms Mackie acknowledged a blacklist could be a mental list, but this was not the claimant's pleaded case, and the claimant had not clarified in whose mind it existed or who else knew about it. Ms Mackie referred to the case of ***Miller v Interserve*** at paragraphs 12 and 17. Ms Mackie further submitted the Blacklisting Regulations were not intended to apply to lists purely in the mind, and the respondent's witnesses were not questioned about this.

212. Ms Mackie accepted the burden of proof passed to the respondents once the claimant had established a prima facie case (***Yewdall*** case) but submitted the burden did not pass in this case because the claimant had failed to discharge the requirement to prove a prima facie case in terms of regulation 5(3) of the Regulations. There was no blacklisting document to speak to. The document relied on by the claimant was the "James MacNaughton – Blacklist.doc", which was the claimant's CV (and no expansion of the pleaded case should be permitted). There was no list of names contained in the document and no information linked or relating to trade union membership or services. The respondents' witnesses confirmed they do not know who is a trade union member when they consider applications and it is not a factor used when shortlisting candidates.

213. Ms Mackie noted the claimant at no time raised concerns that he had been blacklisted. In contrast, what was clear, was that the respondents' witnesses had concerns about the claimant and discussed him via email. There was no part of the internal emails that pointed to discussions about the claimant's trade union membership. The concerns were about his behaviours and these concerns stemmed from the articles regarding his conviction.

214. The claimant had not, it was submitted, discharged his burden of proof. The claimant, when he was dismissed in 2014, was informed the reason related to his lack of certification. In 2017, the claimant was told the offer of employment was withdrawn because of his lack of suitability for the position. The respondents' witnesses had explained in evidence why the claimant had been unsuccessful for each application on the list, and none of the reasons related to his trade union status, and no different approach was applied to the claimant than to any other employee who was not certified for the job, had unspent convictions or demonstrated concerning behaviours inconsistent with the respondents' people and safety values.

215. Ms Mackie invited the tribunal to accept the evidence of the respondent's witnesses regarding the relationship which the respondents have with the trade unions. All of the respondents witnesses spoke of there being a strong trade union culture and a relationship of respect. Ms Mackie noted the

claimant had not provided any explanation why he had been discriminated against because of using the services of a trade union, when others had not been treated in this way.

216. The RMT representative had raised with Ms Taylor (R533) the issue of a blacklist. She investigated and responded to him. Ms Taylor had, in her evidence, stated "He understood we didn't have it". Ms Mackie submitted the trade union Prospect could have challenged the conclusions of the investigation, but did not do so. Ms Mackie invited the tribunal to draw an inference that the trade unions were content there was no blacklist and no unlawful treatment.

The Applications

217. Ms Mackie submitted that in relation to applications 2 – 21 (2014 – 2017) the sole reason why the claimant was dismissed and not subsequently successful in his applications was because he did not have the correct certifications. This was confirmed in the evidence of Ms Tylee and Mr Campbell. Mr McDowell spoke of the claimant's lack of mandatory certifications (passenger vessel certification), that would require the claimant to return to college full time for 12 months.

218. Mr Campbell gave evidence regarding the claimant not having the right skills, experience and certification for the Motorman role in 2015. IT was submitted the claimant would have faced the same outcome regardless of his use of trade union services or membership.

219. Application 22 (2017): the sole reason for the job offer being withdrawn was because of his unspent assault conviction This was confirmed by the evidence of Mr Spadavecchia and Ms Kerr. It was submitted that in and after 2017 there was not one sole reason why the claimant's applications were unsuccessful, but none of the reasons was the use of trade union services. Ms Mackie invited the tribunal to note that most of the hiring managers had not been employed in 2014 and were not aware of those events.

220. Applications 23 – 64 (2017 onwards): after 2018 the main reason why the claimant was not successful with his applications was because of concerns arising from the behaviours associated with his conviction for assault, and the knife allegations. The hiring managers each gave evidence that the claimant would be working face to face with members of the public in situations which could become tense. He would also have been working with a small crew. The respondents' concerns rested within their people and safety values.

221. Applications 23 – 64 (2018 onwards): after 2017 until the most recent application, the indirect behaviours manifested themselves into direct behaviours towards the respondents' employees in HR. The claimant demonstrated aggression towards Ms Tylee on the phone and harassed Ms MacFarlane via email.

222. Ms MacFarlane introduced the HR sift of applications in 2019 and a main reason for the claimant's rejection was his lack of relevant customer experience and poor CV. This, coupled with the main operating reason, the witnesses who were aware of the 2014 incident said that his dishonesty was a concern. The claimant took no accountability for his behaviour in 2014 and has not considered his behaviours or the manner in which he communicates with Calmac. It was submitted that his applications were not a genuine attempt to gain employment, but a matter of pride because he was embarrassed about his certification. This was not a case about trade union detriment or blacklisting: the claimant has made various accusations previously (negligent misrepresentation, age discrimination, breach of contract and petty childish vendetta).

223. The claimant was told in 2017 that he was an unsuitable candidate and should have stopped making further applications then.

Claimant's submissions

224. Mr Merck confirmed the claims brought by the claimant were under the Employment Relations Act 1999 (Blacklists) Regulations 2010 and section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). Mr Merck acknowledged the respondents' application to strike out

the claim brought under section 146 TULRCA had been withdrawn, but he sought to address the arguments raised by the respondents' representative.

225. The respondents' representative maintained that (i) having formerly worked under a contract of employment, the claimant could not (as an employee) rely on section 146; (ii) section 146 did not afford protection to the claimant against detriments after the termination of employment and (iii) individuals who are protected by section 146 lose that protection when they seek to work (again) for a former employer.

226. Mr Merck submitted in relation to point (i) above that this was incorrect and that the claimant could rely on section 146 because the detriment in question was not dismissal.

227. Mr Merck, in relation to point (ii) above, referred the tribunal to the cases of ***Smith v Carillion (JM) Ltd 2015 EWCA Civ 209*** at paragraphs 13, 50 and 51 and ***Rhys Harper v Relaxion Group plc 2003 ICR 867*** at paragraph 23 and ***Mercer v Alternative Future Group Ltd 2022 EWCA Civ 379*** and submitted that where there was some connection between employment and subsequent events, the statutory provisions (that is, section 146) should be read as including post-employment detriments.

228. Mr Merck, in relation to point (iii) above submitted the argument appeared to be based on the judgment of another tribunal (***Mr I Armstrong and others v API Foilmakers Ltd 4104417/2020***) and could be distinguished from the present case in circumstances where this was not a case where the claimant had never worked for the respondents.

229. Mr Merck invited the tribunal to reject the respondents' arguments and to determine the claimant's claim brought in terms of section 146 TULRCA.

230. The claim was also brought under the Blacklisting Regulations and specifically in relation to Regulation 3 and the compilation and use of a blacklist. Mr Merck submitted there must be a list, although it did not need to exist in real terms because compilation means it being put together. The renaming of the claimant's CV could be such a list if it was done with a particular view. Mr

Merck acknowledged that if there was only one document with the claimant's name on it, it was difficult to say there was a list already in existence.

231. There were arguably at least two documents in this case and this was supported by the fact the reference to the documents had been differently named. There was a document "James MacNaughton – Blacklist.doc" and "James MacNaughton-Blacklist.doc" (the difference being there was no space between the name and the word Blacklist). There was also evidence that there had been a recommendation to discount the claimant's son.

232. Mr Merck submitted that the obvious way to exclude an application was to rename the CV Blacklist. Mr Merck surmised that it was likely the same thing had happened to other people whom the respondent wished to exclude from employment for some reason.

233. Mr Merck acknowledged that if the blacklisting claim was to succeed then compilation for different treatment must be found. He invited the tribunal to infer others had been so treated (even if not for trade union reasons) and accordingly there had been a blacklist.

234. Mr Merck also invited the tribunal to infer that although there had been no clear evidence who created the Blacklist.doc, it had been done on the direction of Mr Tylee. Mr Merck submitted Ms Tylee had direct knowledge of the events in 2014 and had referred, with palpable disdain, to the fact the claimant had received a pay out for one day's work. The conduct which she assessed was the conduct of the trade union representative because the achievement of the pay out was through the trade union representative. Further, Ms Tylee had supervised a small HR team who sat in close proximity and chatted about matters. Ms Nellis told the tribunal she had been "coached" in making a response to the claimant regarding the reason why his application had not been successful, and this demonstrated the respondent had been unwilling to engage with the true reason for rejection.

235. Mr Merck invited the tribunal to accept the evidence of the claimant and his wife. Mr Merck described Ms Tylee has clearly thinking the claimant did not deserve the pay outs and suggested she would have made this point when

chatting to colleagues. Ms Farina had been highly critical of the claimant without foundation and Mr McDowell had been unduly hostile and argumentative. His suggestion that the claimant had named his own CV "Blacklist.doc" was incredulous as was the reference to the oil industry, particularly as he is an active trade union member. Mr Merck suggested that either Mr McDowell did not question the document because he had seen one like it before, or he knew it was a clear message not to consider the claimant for trade union reasons and had excluded the claimant's application for this reason.

236. Mr Merck clarified that applications 4, 21, 59 and 60 had been withdrawn. Further, the claimant relied on the Blacklist Regulations and section 146 TULRCA in respect of each application, except application numbers 1, 2 and 10 where only section 146 TULRCA was relied on.

237. Mr Merck submitted, in relation to application 1, that the detriment was not finding alternative employment. Mr Merck acknowledged this was not the strongest claim.

238. Application 2 – the comment "our friend is back" was made and Mr Merck invited the tribunal to infer the purpose or reason for the refusal was influenced by this.

239. Application 4 – withdrawn.

240. Application 10 – the comment made by Ms Robson that things had got "messy" related to 2014 and the claimant being punished for using the services of a trade union.

241. Applications 21 and 22 – these applications were taken together because Ms Kerr told the tribunal she had forwarded the same email to different managers in error. The offer of employment made by the respondent had been withdrawn.

242. Application 59 – Ms Robson's comment recommending Alexander MacNaughton be discounted added him to the list.

243. Application 26 – Ms Robson's comment that "James MacNaughton is a definite No" was capable of indicating a mental list with a view to discrimination.

244. Applications 29 and 30 – there were three emails where "Blacklist.doc" was included.

245. Application 36 – there was a comment about "issue in the past".

246. Application 44 – Ms Robson referred to the claimant as being a "Definite No".

247. Application 49 – Ms Robson commented "he has previous with the respondent and we wouldn't use him anywhere on the fleet". The tribunal should infer that this referred to 2014.

248. Application 51 – Ms Nellis' evidence that she had been coached by the rest of the team (which must have included Ms Tylee) regarding a response to the claimant.

249. Application 55 – the scoring of the claimant was spurious.

250. Mr Merck submitted that a view had formed that the claimant had used the services of a trade union to secure a pay out and he was subjected to detriment for that reason. Mr Merck invited the tribunal to find for the claimant.

Discussion and Decision

251. The tribunal had regard firstly to the statutory provisions under which the claims were brought.

252. Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) provides that a worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act, or failure, takes place for the sole or main purpose of … preventing or deterring him from making use of trade union services at an appropriate a time, or penalising him for doing so.

253. The claimant argued that in 2014 he had used the services of the trade union, Prospect, and had, as a consequence of this, been penalised for doing so by

being denied alternative employment in 2014 and denied employment in all subsequent applications for vacancies.

254. The Employment Relations Act (Blacklisting) Regulations 2010 provide, at Regulation 3 that subject to regulation 4, no person shall compile, use, sell or supply a prohibited list. A prohibited list is a list which contains details of persons who are or have been members of trade unions or persons who are taking part in or have taken part in the activities of trade unions and is compiled with a view to being used by employers, or employment agencies, for the purposes of discrimination in relation to recruitment or in relation to treatment of workers. Discrimination is defined as meaning treating a person less favourably than another on grounds of trade union membership or trade union activities.

255. Regulation 5 provides that a person has a right of complaint to an employment tribunal against a respondent, if the respondent refuses to employ him/her for a reason which relates to a prohibited list and either the respondent contravenes regulation 3 in relation to that list or the respondent knows or ought reasonably to know that the information relied on is supplied in contravention of that regulation.

256. Regulation 9 provides that a person has a right of complaint to an employment tribunal against his employer if the employer, by any act or any deliberate failure to act, subjects the person to a detriment for a reason which relates to a prohibited list and either the employer contravenes regulation 3 in relation to that list or relies on information supplied by a person who contravenes that regulation in relation to that list and knew or ought reasonably to know that information relied on is supplied in contravention of that regulation.

257. The claimant argued the respondent had compiled a blacklist and refused to employ him/subjected him to detriment because he had used the services of the trade union in 2014. The claimant did not rely on the Blacklisting Regulations in respect of applications 1, 2 and 10.

The section 146 TULRCA claim

258. The basis of this claim was that in 2014 the claimant made use of the services of the trade union, Prospect. The claimant asserted that because of having done so he was subsequently penalised by the respondent by being subjected to detriment as demonstrated by the fact he was denied employment. The tribunal, in considering this matter, had regard to the events of 2014.

259. There was no dispute regarding the fact the claimant was asked to leave the vessel, Loch Nevis, because he did not have the correct certification to allow him to sail on that vessel. The claimant asked the respondent to check if there was alternative employment, and they did so, but there were no suitable vacancies at that time because the seasonal positions had been filled. Ms Allen did subsequently identify one possible permanent vacancy, but the crew required to live locally to Colintraive and this accordingly excluded the claimant.

260. The respondent arranged a dismissal meeting which was attended by Mr McAuslan, Technical Superintendent, Ms Allen, HR, the claimant and Mr Hardy of Prospect trade union. Mr Hardy had, prior to the meeting and in an email (R348) commented that “clearly the issue of certification would seem to be a fair reason for dismissal”. Further, at the meeting, Mr Hardy acknowledged the respondent had tried to look for another post. The purpose of the meeting, therefore, was, on the one hand to confirm the dismissal of the claimant and, on the other hand, to achieve a financial settlement.

261. The claimant invited the tribunal to accept that once Mr Hardy got involved, things had become “heated”, “hostile” and “strained” but, in the opinion of the tribunal, this description was not supported by the documentation. Mr Hardy was present at the meeting to act in the best interests of the claimant, and that meant to achieve the best possible settlement package. Mr Hardy entered into a negotiation with the respondent in order to secure the best possible settlement package. Mr Hardy started the negotiation by seeking 6 months’ pay: the respondent offered 3 months’ pay in lieu of notice: Mr Hardy sought 4 months’ pay and the respondent confirmed only 3 months’ pay would be

offered. This sum was agreed but Mr Hardy wanted it paid gross: the respondent confirmed it would be paid net. An agreement was reached on that basis.

262. We acknowledged Mr Hardy raised the issue of negligent misrepresentation and confirmed they would be prepared to test the case in the Sheriff Court, but immediately after having said this, Mr Hardy confirmed they were prepared to "look at" a settlement. The parties agreed to disagree regarding the issue of negligent misrepresentation.

263. The tribunal noted that following the meeting, Mr Hardy went back to the respondent (in correspondence) to seek payment of wages for the period of time between being asked to leave the vessel and dismissal. Ms Allen responded (R338) and in her email stated "in the spirit of agreed settlement" the respondent agreed to pay the claimant wages as sought plus 3 months' pay (net) as compensation for loss of office.

264. The tribunal acknowledged the claimant was the only person at the meeting who was present at the tribunal hearing to speak to what had happened, but we balanced this with the fact there was nothing in the documentation to support his position that things had become heated. There was, for example, nothing in the notes of the meeting and no change of tone in the email exchanges. The tribunal, drawing on its industrial knowledge and experience, considered that what took place was a standard negotiation whereby Mr Hardy sought to achieve the best possible settlement package for his member. The reference to negligent misrepresentation may have been an unusual issue to raise, but the tribunal considered this was done as part of a standard negotiation to try to put pressure on the respondent to offer a higher settlement.

265. The respondent is a highly unionised employer: this approach by Mr Hardy would not have been unexpected or surprising. Ms Tylee, in her evidence to the tribunal, referred to there being a collective agreement allowing for three months' pay following the termination of employment (in certain circumstances). The respondent, accordingly, would have attended the

meeting expecting to make a payment to the claimant. The only issue for discussion would have been the amount of the payment.

266. The tribunal concluded, having regard to the notes of the meeting and the email exchanges, the settlement achieved and the respondent being a unionised employer, that we could not accept the claimant's assertion that things had become hostile. There was, essentially, nothing to become hostile about in circumstances where the respondent would expect a trade union representative to be present at the meeting and to negotiate the best possible settlement for a member, and the respondent would expect to make a payment to the claimant in accordance with the collective agreement. The tribunal further concluded that what had taken place was nothing more than the usual, and expected, negotiation of a settlement package following the dismissal of an employee.

267. The tribunal considered it was supported in that conclusion by the fact the respondent did subsequently confirm the claimant for employment if there was a vacancy (application 4) and offer him employment (application 22). The tribunal considered this undermined the claimant's argument that he had been branded a troublemaker in 2014 and penalised for making use of the services of a trade union.

268. Mr Merck invited the tribunal to accept that the respondent formed an adverse view of the claimant because he used the services of a trade union to secure a payment. The tribunal could not accept this because there was no evidence to support it. The tribunal, instead, was entirely satisfied that the respondent formed an adverse view of the claimant because of what happened regarding his certification and the fact the claimant would not accept any responsibility or accountability for what had happened. We have set out above (in the section regarding credibility) our conclusion that the respondent's adverse view of the claimant for this reason was reasonable in the circumstances.

269. There was a suggestion made at the hearing that the respondent had been hostile because of the involvement of Prospect trade union, which was not a recognised trade union. We acknowledged Ms Mackie's position that this was

not part of the "pleaded case". In addition to this we were satisfied, in any event, that there was no evidence whatsoever to support that proposition. The evidence from the respondent's witnesses, which the tribunal accepted, was that (a) the respondent would expect an employee to be accompanied to a dismissal hearing and this applied equally to members of trade unions which were not recognised; (b) the witnesses had not ever witnessed any behaviour of the type alleged in terms of hostility towards trade unions which were not recognised and (c) that they found the suggestion surprising given the fact the respondent has a very healthy relationship with trade unions generally.

270. The claimant relied solely on section 146 TULRCA in respect of applications 1, 2, and 10. We turned to consider those applications.

271. The claimant argued, in relation to **application 1**, that he had been subjected to a detriment because he had used the services of a trade union. The detriment was said to be the fact the respondent did not find the claimant alternative employment. Mr Merck, in his submission, acknowledged this was not the strongest of claims.

272. The evidence regarding the finding of alternative employment was scant and not challenged by the claimant either at the time or at the hearing. There was no dispute regarding the fact the claimant wished the respondent to find him alternative employment, but there appeared to have been an acceptance that all suitable seasonal posts had been filled (these events took place in May and the seasonal posts require to be filled from April).

273. Ms Allen did identify one permanent vacancy and informed the claimant and Mr Hardy of this, but it was a vacancy on a small ferry where there is a requirement for the crew to live locally. The claimant does not live locally to Colintraive. The notes of the hearing on the 11 June 2014 (R340) record that Ms Allen and the claimant discussed this on the 29/30 May when the claimant stated he could not see himself and his family moving there, but that he was prepared to take the position on a short term basis with a view to moving somewhere else if another vacancy arose. Ms Allen subsequently confirmed that due to the need to live in Colintraive, the vacancy would not be pursued.

274. This was the totality of evidence before the tribunal regarding this application. The claimant did not, beyond the assertion of being subjected to a detriment by not being offered alternative employment, suggest suitable alternative employment had been available but which he had been denied. This was compounded by the fact Mr Hardy acknowledged the respondent had looked for alternative employment, and the respondent's position regarding seasonal positions was not challenged.

275. The tribunal also had regard to the fact the search for alternative employment took place before the dismissal meeting. The claimant asserted matters had become "hostile and strained" at that meeting following the mention of negligent misrepresentation. If that is correct (and we decided above that it was not) then that hostility came after the search for alternative employment and therefore could not have been the reason why alternative employment was not offered. We acknowledged the claimant did also say that matters had "got heated" after Mr Hardy became involved, but we have set out above our reasons for not accepting that assertion. The email exchanges between Ms Allen and Mr Hardy were warm and co-operative and Mr Hardy was accepting of the fact a search for alternative employment had been conducted.

276. The tribunal concluded there was no evidence to support the assertion the respondent had subjected the claimant to a detriment for using the services of a trade union.

277. The claimant argued, in relation to **application 2**, that an inference should be drawn from the comment "our friend is back" Mr Merck invited the tribunal to infer the refusal to select him for interview was coloured by the comment.

278. The comment was made by Mr Steve McCurdy, who was an additional HR resource employed for six months to help with the high volume of seasonal recruitment. The email chain (R482) appeared to suggest that the claimant contacted HR on the 11 July at 07.35 to ask for an application form for the post. Mr McCurdy responded to that email on the 15 July to send the application form to the claimant. Mr McCurdy also emailed Ms Mandy

MacMillan (position unknown) on the 11 July at 3.28pm, saying "I'll speak with you next week. Our friend is back. Have a good weekend".

279. There was no evidence to inform the tribunal who Ms MacMillan was and there was no evidence to suggest she was the decision-maker in terms of sifting applicants for interview. There was no evidence that Mr McCurdy's email to Ms MacMillan was seen by the decision-maker, or that it influenced him/her in their decision. In fact, apart from the fact Mr McCurdy made the comment to someone, there was nothing to link the comment to the subsequent decision not to offer the claimant an interview/employment. In the circumstances the tribunal had no basis for drawing any inference.

280. There was also no evidence regarding the knowledge or otherwise of Mr McCurdy regarding the settlement discussions and the use of trade union services.

281. The attempt to link the comment with the earlier events and the reason for the claimant not being offered an interview was a quantum leap without any basis.

282. The claimant argued, in relation to **application 10**, that he was penalised by the respondent by not being selected for interview, because of using the services of a trade union 2014. In support of that position the claimant relied on an email from Ms Robson to Mr Campbell (R376) where she had referred to *"an issue regarding certification and the offer was later withdrawn. I don't remember all the details but it did get a bit messy".*

283. The tribunal preferred the evidence of Mr Campbell which was supported by the documentation. We found as a matter of fact that Mr Campbell received all applications for the post and carried out a sift in which he identified those to be invited for interview. Mr Campbell did not, at the time of carrying out the sift, know of the fact there had been an issue with the claimant's certification in 2014, or that the claimant had used the services of a trade union to negotiate a package. Mr Campbell confirmed the names of those to be interviewed in an email to Ms Robson dated 25 October 2015, sent at 13.59 (R376) and this was prior to Ms Robson sending her email with the reference to "bit messy" on the 26 October at 08.36.

284. Mr Campbell confirmed the names of those to be interviewed in his email. He also went on to say that the name James MacNaughton rang a bell and he asked if "we" had issues with him in the past. Mr Campbell told the tribunal he did not know why the name had rung a bell, and that was why he asked Ms Robson the question. Mr Campbell thought perhaps he had interviewed the claimant previously.

285. The tribunal was entirely satisfied that at the time Mr Campbell selected those for interview (and decided not to interview the claimant) he did not know of the certification issue in 2014, and did not know the claimant had used the services of a trade union at that time. We accepted Mr Campbell did not select the claimant for interview because the claimant did not have the qualifications for the post, and others did. We also accepted that Mr Campbell had made his decision regarding who to interview, prior to Ms Robson sending her email which referred to things getting a bit messy.

286. The tribunal was satisfied that the reason for the claimant not being offered an interview had nothing to do with the claimant using the services of a trade union in 2014.

287. The remaining applications were challenged on the basis of section 146 TURLCA and the Blacklisting Regulations and are dealt with below. We would however make a general comment in relation to the issue of knowledge of the 2014 events. The claimant did not, in his evidence, suggest the basis upon which it was said the hiring managers were, or would have been, aware of him using the services of a trade union in 2014 or that the respondent was penalising him for having done so. The only witness who had knowledge of the 2014 events was Ms Tylee, who had been employed at the time, but she was not involved in sending the applications to the hiring managers, and she was not a hiring manager.

288. The tribunal accepted the evidence of Mr Spadavecchia, Mr McDowell and Mr Mackay (the hiring managers) that at the time they made their respective decisions regarding the claimant they were not aware of the 2014 incident

regarding certification or the fact the claimant had used the services of a trade union at that time.

289. The tribunal concluded, having had regard to all of the above points, that the respondent has shown (with regard to the above applications) the main purpose for which it acted, and it was not to penalise the claimant for using the services of a trade union at the dismissal meeting in 2014.

The Blacklisting Claim

290. The claimant's claim was that because he had used the services of a trade union in 2014, he had been branded a troublemaker and blacklisted by the respondents. Mr Merck, in his submissions, clarified the case was restricted to the compilation and use of a blacklist in terms of Regulation 3 of the Regulations. Regulation 3(1) of the Blacklists Regulations provides that, subject to a number of exceptions, no person shall compile, use, sell or supply a prohibited list. A prohibited list (regulation 3(2)) is a list that contains details of persons who are or have been members of trade unions … and is compiled with a view to being used by employers … for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers. The term "discrimination" means (regulation 3(3)) treating another person less favourably than another on grounds of trade union membership or trade union activities.

291. The definition of a "prohibited list" focuses more on the purpose of the list rather than its form: there is no requirement that a list be in a particular form and it need not be reduced to writing (***Miller v Interserve Industrial Services Ltd 2013 ICR 445***).

292. The first issue for the tribunal to determine is whether there was a prohibited list. In order to demonstrate there was a prohibited list, it must be shown there was a list with details of current or former trade union members and that it was compiled with a view to being used for discrimination on the grounds of trade union membership or activities. The tribunal, in considering whether there was a prohibited list, had regard to the points raised by Mr Merck in his submissions. Mr Merck invited the tribunal to find the respondent had

compiled/put together a list and in support of that submission he pointed to (i) the blacklist.doc; (ii) a suggestion there may have been two blacklist documents and (iii) an invitation to draw an inference that others must have been treated in the same way.

293. The tribunal, having regard to point (ii) above, noted the claimant's suggestion there may have been two blacklists was based on the fact that in the emails (R418 and R429) the reference to the blacklist was noted as James MacNaughton – Blacklist.doc and James MacNaughton-Blacklist.doc (the difference between the two being the space between the name and the word Blacklist). The respondents' witnesses who were asked about this all said they had only ever seen one document with the word Blacklist on it (and that was the claimant's CV) and that they understood the difference in the name of the document was down to typing rather than there being two documents.

294. The tribunal accepted the word "Blacklist" had been annotated onto the claimant's CV. The practice of renaming CVs was common, and someone renamed the claimant's CV by calling it "James MacNaughton – Blacklist.doc". The claimant's CV was sent by an HR Assistant to a hiring manager in this format on two occasions in October 2017. The tribunal accepted that in the circumstances it was more likely than not that the person collating all of the CVs to be sent to a hiring manager had included, or missed, a space between the name and the word Blacklist. We considered we were supported in this conclusion by the fact no document other than the claimant's CV had been produced following the Subject Access Request and none of the witnesses had seen any document other than the claimant's CV being named Blacklist.doc. The tribunal concluded for these reasons that there were not two documents.

295. Mr Merck invited the tribunal to draw an inference that others had been treated in the same way as the claimant (that is, had been placed on a blacklist). This was based on (a) the fact an application appeared to have been made in the name of the claimant's son, and in an email from Ms Robson (R478) she stated *"Find attached applications. We'd recommend discounting Alexander*

MacNaughton" and (b) a general assertion there must be others who had been treated in the same way.

296. The tribunal noted two points in relation to the above: firstly, the claimant does have a son called Alexander MacNaughton and secondly, the name on the application/CV referred to was Alexander James MacNaughton. There was no evidence to inform the tribunal whether it was generally known the claimant had a son called Alexander or whether he had in fact applied for the job. In addition to this, even if it was generally known, there was no evidence to suggest why the respondent may have wanted to treat the claimant's son in this way. Equally, there was no evidence to test whether an error may have been made in terms of Ms Robson, having seen the name "James MacNaughton" believed the application had been made by the claimant.

297. The tribunal concluded from the above points that there was no evidence upon which to infer that others had been treated in the same way as the claimant. We say that because all of the respondents' witnesses said they had not ever seen a blacklist and that the respondent did not operate a blacklist.

298. The tribunal, in considering whether the James MacNaughton – Blacklist.doc was a prohibited list, also had regard to the Department for Business Innovation and Skills Guidance on Blacklisting (to which it was referred). The tribunal noted the guidance *that "as a general rule a list would have to contain the details of 2 or more people ie one person records would not constitute a list as long as each one was genuinely unconnected to other records".* The documentation and evidence before the tribunal demonstrated there was one document with the claimant's name on it (being the claimant's CV) and we took from the general rule that this would not constitute a list.

299. The tribunal next considered whether the second part of the definition of "prohibited list" could be met and we asked whether (if the document James MacNaughton – Blacklist.doc was a list) it had been compiled with a view to being used for the purposes of discrimination in relation to recruitment. We noted "discrimination" means treating a person less favourably than another

on grounds of trade union membership of activities. We accepted that using the services of a trade union would be covered under the scope of "activities".

300. We have set out above our reasons for concluding that what had taken place following the involvement of Mr Hardy the trade union representative from Prospect was nothing more than a standard negotiation regarding a settlement following the claimant's dismissal. We were entirely satisfied there was nothing to suggest the respondent formed an adverse opinion of the claimant because of the involvement of the trade union, or that the respondent branded him a troublemaker.

301. We asked ourselves why someone may have renamed the claimant's CV as James MacNaughton – Blacklist.doc. Was it to ensure the claimant would be treated less favourably because he had used the services of a trade union or was it for some other reason? The tribunal accepted the evidence of Ms Tylee when she told the tribunal that an investigation had been carried out to ascertain who had renamed the claimant's CV, but they had not been able to identify the person responsible. The tribunal also accepted that none of the witnesses who appeared at the tribunal to give evidence was responsible for renaming the CV.

302. Mr Merck, in his submissions, invited the tribunal to infer that the claimant's CV had been renamed in those terms on instruction or direction of Ms Tylee. Mr Merck suggested Ms Tylee was responsible because she had knowledge of the 2014 events. The tribunal were not prepared to draw an inference on this basis for two reasons. Firstly, because it had not been suggested to Ms Tylee in cross examination that she had directed the claimant's CV been renamed in this way; and, secondly, the mere fact Ms Tylee knew of the 2014 events was not a sufficient basis upon which to draw that inference.

303. We next had regard to the fact the HR Assistants could be described as being "naïve/uninformed" about the meaning of the word "blacklist". Ms Farina, for example, told the tribunal that although she now understood the meaning of the term blacklist, she had not done so at the time of these events. Ms Kerr, HR Business Partner, also described herself as being "naïve" at the time. She

had understood only the general meaning of the word blacklist. The degree of naivety was demonstrated, and supported, by the fact the James MacNaughton – Blacklist.doc was sent by Ms Kerr, to the hiring managers without it even being noticed.

304. The evidence of the respondents' witnesses was that the term "blacklist" on the claimant's CV was used to denote "do not employ". The claimant argued this was because he had been branded a troublemaker for using the services of a trade union but this was not an argument the tribunal could accept for the following reasons.

305. Firstly, the claimant's position was that he was branded a troublemaker in 2014 after using the services of a trade union and blacklisted. The claimant's position was undermined by the fact that on two subsequent occasions the respondent took steps to employ him. The first occasion (which the claimant may not have been aware of until the hearing) was in January 2015 (application 4) when Mr Spadavecchia recommended a list of 7 candidates for the positions of Seasonal Seaman Purser. The claimant was number 6 on that list. The tribunal accepted the reason he was not employed was because there were not 6 positions to fill: if there had been 6 vacancies, the claimant would have been offered a position.

306. The second occasion was in January 2017 (application 22) when Mr Spadavecchia recommended the claimant for employment in the role of Seasonal Seaman Purser. An offer of employment was made but subsequently withdrawn because the respondent learned the claimant had been convicted for Assault to Injury and were concerned that his behaviours were not in line with the respondent's values.

307. The tribunal took from these facts that there was a willingness on the part of the respondent, at that time, to not only consider the claimant for employment, but to proceed to offer him employment. The claimant did not seek to argue that the reason for the offer of employment being withdrawn was because of the blacklist and this certainly was not put to Mr Spadavecchia. Mr Spadavecchia was asked about the email sent by Ms Robson (R402) asking

if he was happy to offer the claimant a seasonal role. Ms Robson referred in the email to the claimant being offered a role in 2014 but it then being discovered he did not have the correct certification and the offer being withdrawn. Ms Robson concluded her email by saying there was some fallout after this and she would be happy to discuss it if required. The tribunal accepted Mr Spadavecchia's evidence, which we considered to be very honest and straightforward, that he did not discuss the matter with Ms Robson because he was satisfied it related to a previous role. He was the hiring manager, and he was satisfied the claimant held the relevant certification for the position for which he was recruiting, and he was happy on that basis to offer the claimant the role.

308. The second reason why we could not accept the claimant's assertion that the respondents wanted to penalise him because he had used the services of a trade union was because we found as a matter of fact the hiring managers Mr Spadavecchia, Mr McDowell and Mr Mackay were not aware, at the time they made their decisions regarding the claimant, that he had been employed in 2014 or used the services of a trade union. In addition to this Mr Spadavecchia and Mr Mackay did not see the document called James MacNaughton – Blacklist.doc.

309. Mr McDowell was sent an email by Ms Kerr, forwarding all of the applications for the vacancy for which he was the hiring manager. The tribunal accepted Mr McDowell's evidence that whilst he saw the document with that name on it, he disregarded it: he opened the CV, sifted it and decided not to interview the claimant because he did not have the right qualifications.

310. The third reason why we could not accept the claimant's position was because of the fact the respondent is a heavily unionised employer where the vast majority of employees are members of a trade union. The respondents' relationship with trade unions was spoken to by each of the respondents' witnesses (as set out above in the credibility section) and their evidence was not disputed. The respondent has a healthy, mutually beneficial relationship with the trade unions and works hard to maintain that relationship. The tribunal did not (for the reasons set out above) accept the suggestion the respondent

would have been hostile to Prospect trade union because it was not recognised.

311. The claimant was a member of two trade unions: Prospect (2014) and RMT (2017). Mr Martin, from RMT, questioned Ms Taylor about the fact the claimant had had employment terminated and subsequently had an offer of employment withdrawn. Ms Taylor, having investigated, advised Mr Martin of the reasons for this, being incorrect certification in 2014 and inappropriate violent and aggressive behaviour associated with a conviction for Assault to Injury in 2017. Mr Martin accepted this explanation.

312. The claimant, following the documents disclosed through the Subject Access Request, had his trade union Prospect, raise with the RMT the document called James MacNaughton – Blacklist.doc. RMT raised it formally with Ms Taylor in 2021. Ms Taylor carried out an investigation and explained to Mr Martin that there was no blacklist but there was a document, the claimant's CV, where it had been renamed James MacNaughton – Blacklist.doc and that this referred to a "do not employ". Mr Martin accepted the explanation provided by Ms Taylor and the issue was not raised again.

313. The tribunal, drawing on its industrial knowledge and experience, and having regard to the sensitivities surrounding blacklists, considered the RMT would not have been satisfied if there had been any hint of an issue regarding detrimental treatment of one of its members, or any hint of blacklisting.

314. The fourth reason why we could not accept the claimant's position was that it was clear that following the claimant's conviction in 2017 and the behaviours associated with that conviction, the respondent did not want to employ him. This had nothing whatsoever to do with trade union activities or blacklisting, and everything to do with the fact there had been an issue with certification in 2014 and the aggressive and violent behaviours associated with the conviction in 2017. The respondent operates passenger ferries and the positions for which the claimant had applied all involved being a member of a small crew and having interaction with the public. Members of the public may become agitated/frustrated/angry if, for example, a ferry is delayed or

cancelled and the behaviour of the claimant did not lend itself to safely dealing with that type of situation. Further, the respondent had had an anonymous complaint about the claimant's prospective employment. The respondent was conscious of the fact the claimant and the person who was the subject of the assault and complaint live in a small community and use the ferries regularly.

315. The respondents' HR department could be criticised for not getting a grip of the situation and simply telling the claimant the reality of the position in 2017 and discouraging any further applications. They, instead of doing this, continued to accept and put forward applications and issue standard rejection emails which encouraged further applications. The claimant became increasingly frustrated with this process and this culminated in his behaviour towards Ms MacFarlane. The respondent did, ultimately, inform the claimant that he would not be considered for any future positions but it is of regret this was not done sooner.

316. The tribunal concluded, having had regard to all of the above points, that the James MacNaughton – Blacklist.doc did not amount to a "list" and further, even if we are wrong in this, the list was not compiled with a view to being used by the respondent for the purposes of treating the claimant less favourably on grounds of trade union activities. The claimant's CV was renamed Blacklist.doc to indicate "do not employ" because of the issues with certification in 2014 and the behaviours associated with the conviction in 2017. The term "blacklist" was used in its general sense. There was no prohibited list in terms of Regulation 3 of the Blacklist Regulations.

317. The tribunal decided the claimant was not subjected to a detriment (that is, denied employment) for the purpose of penalising him for using the services of a trade union (section 146 TULRCA) and we further decided there was no prohibited list. We decided to dismiss the claim in its entirety.

318. We did not consider there was merit in setting out details of the reasons why the claimant was not selected for interview in respect of the remaining applications. We considered it was sufficient to note that in the period 2014 – 2017 there was good reason for the claimant not being selected for interview:

- Application 1 (February 2014) – incorrect certification;
- Application 2 (July 2014) – did not live local to Gourock or have ROR experience;
- Application 4 (January 2015) – on the list for offer of employment if there was a vacancy;
- Application 10 (September 2015) – lack of the correct certificates;
- Application 22 (January 2017) – offered employment which was withdrawn;
- Application 26 (August 2017) – application of the officer/ratings policy;
- Application 29 (October 2017) – vacancies filled by internal trainees;
- Application 30 (October 2017) – lack of correct qualifications.

319. The evidence demonstrated that after 2017 the respondent's consistent position was that they did not want to employ the claimant because of the issue regarding certification in 2014 and the violent and aggressive behaviour associated with the conviction in 2017. The internal communications saying the respondent did not want to employ him (application 36), or that there were no suitable applicants (application 38) or that the claimant was a definite no (application 44) or that the claimant was a no (applications 49 and 51) all support that position. The reasons why the respondent did not want to employ the claimant related to the fact of the issue regarding certification in 2014 and the fact of the behaviours of violence and aggression associated with the conviction in 2017 which were contrary to the respondent's values and had nothing whatsoever to do with the claimant using the services of a trade union in 2014.

Preliminary issues regarding entitlement to rely on section 146 TULRCA

320. The tribunal decided, having had regard to our above decision, that it was not necessary to determine the preliminary issues raised by the respondent regarding the claimant's ability to rely on section 146 TULRCA.

Conclusion

321. The tribunal decided to dismiss the claim in its entirety.

Employment Judge: **L Wiseman**
Date of Judgment: **22 May 2023**
Entered in register: **23 May 2023**
and copied to parties