

MS



# THE EMPLOYMENT TRIBUNALS

BETWEEN

*Claimant*

*Respondent*

Mr J McCririck

AND

(1) Channel 4 Television Corporation  
(2) IMG Media Ltd

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT:** London Central

**ON:** 30 September 2013 &  
1, 2, 3, 4, 7, October 2013.  
In Chambers: 9 & 10  
October 2013.

**EMPLOYMENT JUDGE:** Miss A M Lewzey

**MEMBERS:** Mr D Buckley  
Ms A R Mitchell

### Representation

**For Claimant:** Ms J Eady, QC of Counsel

**For Respondent:** Mr T Linden, QC of Counsel

### RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's claim of direct age discrimination fails.

RESERVED JUDGMENT

13<sup>th</sup> November 2013 London Central  
Date and place of signing

D. M. Leary  
EMPLOYMENT JUDGE

13/11/13  
.....  
JUDGMENT SENT TO THE PARTIES ON

12/11/13  
.....  
AND ENTERED IN THE REGISTER

[Signature]  
.....  
FOR THE TRIBUNAL OFFICE

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## REASONS OF THE EMPLOYMENT TRIBUNAL

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**For Claimant:** Ms J Eady, QC of Counsel

**For Respondent:** Mr T Linden, QC of Counsel

## RESERVED REASONS

1 The Claimant, Mr John McCririck presented a claim to the Employment Tribunal against the First Respondent ("Channel 4"), the Second Respondent ("IMG") and four individual respondents, Mr David Abraham, Mr Carl Hicks, Mr Jamie Aitchison and Ms Jay Hunt ("the Third to Sixth Respondents"), on 22 January 2013.

2 At a Case Management Discussion on 26 March 2013, the Third to Sixth Respondents were dismissed as respondents to the proceedings on withdrawal of the claims against them by the Claimant.

3 At a Pre-Hearing Review on 3 and 4 June 2013, Employment Judge Snelson held that:

“(1) The Claimant was at all material times employed by Highflyer Productions Limited (“Highflyer”), within the meaning of the Equality Act 2010 (“the 2010 Act”), Section 83(2)(a);

(2) At all material times

(a) The First Respondents were a ‘principal’ within the meaning of the 2010 Act section 41(5), and

(b) The Claimant was a ‘contract worker’ supplied by them to Highflyer within the meaning of the 2010 Act section 41(7).

(3) The Claimant was at all material times an employee of Highflyer within the meaning of the Transfer of Undertakings (Protection of Employment) (Regulations) 2006, reg 2(1).”

4 By a letter dated 20 September 2013 (page 542.64) the Claimant withdrew the TUPE part of his case.

### **The Issues**

5 It being accepted that Channel 4 (as principal) did not allow the Claimant (the worker) to do or continue to do work of presenting or otherwise contributing to Channel 4 horse-racing programmes, the issues agreed between the parties for the Tribunal to determine are as follows:

5.1 Was the Claimant not permitted to work as a presenter on Channel 4 Racing, or to continue to do so, because of his age?

5.2 If so, was the treatment of the Claimant a proportionate means of achieving a legitimate aim?

5.3 If Channel 4 acted in contravention of the Equality Act 2010, did IMG knowingly help Channel 4 to do so for the purposes of Section 112 of that Act?

**Evidence**

6 The Tribunal heard evidence from the following witness called on behalf of the Claimant, each of whom gave evidence by means of written witness statement:-

Mr J McCririck, the Claimant

Ms L Graham, former Channel 4 Racing Presenter

Mr P A Davies, MP for Shipley, West Yorkshire

7 The Tribunal heard evidence from the following witnesses called on behalf of the Respondents, each of whom gave evidence by means of written witness statements:

Mr J G Aitchison, Commissioning Editor Sport for Channel 4 (witness statement & supplemental witness statement);

Mr G R Fry, Managing Director Sports Production Worldwide at IMG (witness statement & supplemental witness statement);

Mr C D Hicks, Executive Producer of Channel 4 Racing (witness statement);

Ms J Hunt, Chief Creative Officer of Channel 4 (witness statement & two supplemental witness statements).

8 After the evidence had closed Ms Eady, for the Claimant, made an application for permission to adduce and rely on a witness statement of Ms Miriam O'Reilly together with exhibits dated 6 October 2013. Mr Linden sought to introduce and rely on a second supplemental witness statement of Ms Hunt, also dated 7 October 2013. With the agreement of the parties, both witness statements were admitted, although neither Ms O'Reilly nor Ms Hunt were cross-examined on these additional witness statements.

9 The Tribunal also had before it an agreed bundle in 8 volumes to which we refer by the bundle number followed by the page number.

10 The Tribunal also had before it as evidence from the Claimant a number of DVD extracts of broadcasts of "Morning Line" and "Race Course" in December 2012 and of the IMG Media presentation for the pitch to Channel 4 dated June 2012. For the Respondents the Tribunal had before it extracts of broadcasts from Highflyer "Channel 4 Racing" and "Morning Line", extracts of broadcasts from IMG Media "Channel 4 Racing" and "Morning Line", and extracts of broadcasts from "Celebrity Big Brother", "Celebrity Wife Swap" and "Ultimate Big Brother" in which Mr McCririck appeared. The Tribunal has viewed all the DVDs and makes reference to them as appropriate.

## The Material Facts

11 Mr McCririck is aged 73 and was 72 during the period October to December 2012. He has always been involved in the horse-racing industry and has worked in betting shops, race courses as a tic-tac, clerk, and floorman checking on rival's prices and as a bookmaker. He compiled a Form Index (a private handicap service), before he became a Fleet Street racing journalist (winning the British Press Awards Specialist Writer of the Year in 1978 and Campaigning Journalist of the Year in 1979).

12 From 1970 until 1984 Mr McCririck worked as a Sub Editor on BBC1's Saturday "Grandstand" and BBC midweek racing programmes.

13 When ITV won a contract to broadcast the Derby in 1981 it approached Mr McCririck to ask if he would report from the betting rings. The BBC gave permission and he was the first journalist to broadcast news and market moves direct from any course.

14 Channel 4 is a public service television broadcaster which utilises various independent production companies to produce the majority of programmes that it broadcasts. Highflyer won the tender for "Channel 4 Racing" in 1996 and this continued until the end of 2012. IMG provides sports, athletics and event marketing and management services and has produced "Channel 4 Racing" since the beginning of 2013.

15 Mr McCririck has worked for "Channel 4 Racing" since 1984 and from 1996 he was employed by Highflyer under a series of agreements. Mr McCririck told the Tribunal that if he was approached to do other work he obtained permission from Highflyer. If permission was refused he would not take the other work.

16 In 2002 At The Races Ltd, approached Mr McCririck to work for them. At The Races Ltd is a cable television channel covering daily race meetings from Britain and Ireland. When approached initially, Highflyer did not agree to Mr McCririck taking this work, but, after further discussion, permission was granted and Mr McCririck signed a contract with At The Races Ltd. Thereafter, he continued to work for both "Channel 4 Racing" and At The Races Ltd.

17 Racing became a central part of Channel 4 and Mr McCririck became well known as a betting pundit. "Channel 4 Racing" covered around 80 days annually including, at various times, big race meetings in France, America and the Japan Cup and Mr McCririck worked on all of these and averaged about 70 appearances a year. Channel 4's horse-racing programme "Morning Line" was launched in 1989 and Mr McCririck appeared regularly. In these appearances he regularly covered a Saturday newspaper review, betting news, historical contexts, statistics and current market moves and participated in interviews.

During the afternoon he reported from the betting ring with statistics for upcoming races, interviews and details of price fluctuations.

18 Mr McCririck became well known for his expertise in relation to horse-racing and betting and also for his style of presentation. This style included making tic-tac gestures. He also had his own style of dress and jewellery and frequently appeared from the betting ring with members of the public goading him. Mr McCririck was known for his outspoken views.

19 From 2002 Mr McCririck worked alongside Ms Tanya Stevenson who had worked in betting shops and on course as a bookmaker, clerk and tic-tac. She specialised in the new alternative punting opportunity, namely the betting exchanges. Mr McCririck and Ms Stevenson worked as a team. Part of Mr McCririck's style included his sexist views and male chauvinism. He referred to Ms Stevenson on air as "Female".

20 Over the years Mr McCririck has appeared on other programmes, both for Channel 4 and other channels involving light entertainment and also programmes such as "Question Time", "Newsnight" and has contributed to US networks including being a guest on NBC's "Jay Leno Tonight" show three times. He also had a column in the Sun newspaper which came to an end in 2012.

21 Mr McCririck first appeared on a Channel 4 reality show, "Celebrity Big Brother" in 2005 and on "Ultimate Big Brother" in 2010. He has also appeared in "Celebrity Wife Swap" with Edwina Currie. (Extracts from all these programmes have been viewed by the Tribunal). There were other celebrity shows up to as late as August 2012. Mr McCririck said that Channel 4 encouraged these appearances and as he states at paragraph 36 of his witness statement:

"Throughout, C4s suits and skirts also enthused over my appearances outside racing".

Mr McCririck explained that he was paid for his reality TV appearances and that this was lucrative work for him. He regarded these reality TV appearances as pantomime. During this period Mr McCririck was doing ongoing racing coverage.

22 Mr McCririck had a profile for personal appearances (6/1895) in which the heading is:

John McCririck

Racing pundit, loud mouth and male chauvinist extraordinaire, long standing betting guru.

Famed for his outspoken attitude as much as his deerstalker hats".

This profile lists his appearances (including "I'm a Celebrity Get Me Out Of Here: Jungle Drums", in which Mr McCririck said he had not appeared). Mr McCririck

agreed that the heading of his profile was a fair description. He maintained that his reality show appearances were pantomime. His view was that there was no conflict with his serious image in appearances on such programmes as “Question Time” and “Newsnight” and that Channel 4 had never spoken to him about his image. Mr McCririck was of the view that his appearances did not detract from his gravitas.

23 In cross-examination the Tribunal was taken to a large number of press articles about Mr McCririck (8/2645 to 8/2844.1). Mr McCririck was cross-examined at length on the content of these articles. They largely expressed his views on women and the pantomime nature of his appearances on “Celebrity Big Brother” and the other programmes. The Tribunal restricts itself to quoting a limited number of examples. In a Daily Mail article of 13 January 2005 (8/2659 to 2660) it states:

“They moan. God they moan. Headaches, periods you have to put up with all this moaning when you employ women.

Women should never show their foreheads or their necks. They are disgusting and ugly.

Women should never wear high heels. Why do they? Men never notice what shoes women wear and they must be so uncomfortable. They should never wear make-up either.

They've got to have a decent pair of breasts. Not the false ones, not the Jordans - I don't like those - but I do like really well-developed ones.

....

I call her the Booby because, like the South American bird of the same name, she is not very bright, she squawks around a lot and was easy to catch.

She knows her place. She's a team player. The Minister of Cooking, the Minister of Washing Up, the Chancellor of the Exchequer, the Minister of Transport.

I fell in love with her labrador, Simon, and my wife came along as a makeweight ...”

In the Sports Argos (8/2663) it states:

“John McCririck might have set himself up for life in the Big Brother house with the spin offs which will undoubtedly come his way from Diet Coke advertisements, but his chauvinistic, ill-mannered, baby-like behaviour has done little to promote the sport of horse racing.



I have witnessed many incidents of McCririck's boorish antics in the racing press boxes – on one occasion he publicly humiliated a female journalist he didn't recognise because she had the temerity to sit in his chair.

I have also had the misfortune to interview him. But up until now gambling's colourful guru has always had racing's best interests at heart and in front of the cameras he has been an outspoken but entertaining ambassador for the sport.

However, his image has now taken a terrible self-inflicted battering and so has horse racing's.

The sport struggles to attract a young, vibrant audience despite McCririck's familiar battle cry to 'Come Racing'.

He won't have won over any new fans with his BB publicity stunt."

In an article in the Sunday Times of 13 March 2005 (8/2668 to 2675) it states:

"He's the racing personality with radical views and comical clothes. Paul Kimmage tries to pin down the man behind the giant cigar.

John McCririck has never needed a stage to perform. At racecourses all over Britain each week he earns his plaudits on a soapbox in the betting ring interpreting the nods and numbers for Channel 4. But offer him a platform on Question Time or a week on Big Brother and he is equally at home.

...

Let's just start and see where it goes.

And like a flick of a switch he is off, licking his chops with lust for the lovely Kate Winslet

...

My favourite fantasy is to be marooned with Kate Winslet. She's wonderful. I have never met her but she comes over with one of the most important things in a woman - she makes you laugh. Sex with her would be fantastic, same with Dawn French.

It would be fantastic having sex with Dawn French because there's meat on her and you'd be roaring with laughter all the time. I think Kate and I would get on very well. A young man like me is exactly what she needs.

Barking his dislike of Vanessa Feltz....

Imagine being Mr Vanessa Feltz. Can you imagine anything worse in life. The great big bossy know all! ...

And no girls should wear make up; it's terrible for the skin. They should grow fringes and cover their foreheads and necks ..."

24 In cross-examination, Mr McCririck said:

"I am an unpleasant person. I am a loud mouthed bigoted bore. I am bossy bombastic and domineering. The Booby is wonderful, she is very bright, far brighter than I am ... "

25 In paragraph 75 of Mr McCririck's witness statement he states:

"On C4 Racing I have, like the late Brian Johnston on Test Match Special, given nicknames to my colleagues. The Noble Lord, Fat Al, the Greatest Jockey, Lord Snooty, the Cat, Languid and for the ladies, Saucy Minx, Pouting Heiress and Female, all with their agreements. A viewer once wrote saying one of our presenters was a piece of crackling. I asked her if she minded being called Crackling. She did and so of course, I didn't. My pantomime villain sexist image has been deliberately cultivated and played up. Because Captain Hook is horrid to children in Peter Pan it doesn't mean the actor playing him goes around abusing kids. Even calling my wife Booby is all part of a perhaps childish public school juvenile habit of labelling friends and workmates."

In cross-examination Mr McCririck accepted that asking Ms Stevenson if she was "lay of the day", reflecting the words on his mug, was going too far.

26 In 2008 Mr McCririck's days were reduced to 55 days per year and this was followed in 2010 by a further reduction to 40 days per year. These decisions were taken by Mr Andrew Thompson, who was then Head of Sport at Channel 4. Mr McCririck told the Tribunal that in 2008 he was told that he was too popular and attracting too much publicity and dominating the programme. He said there was an extension of the same reason in 2010 and that Channel 4 "put him on the substitute's bench". Mr McCririck's view was he could not believe anyone would sack someone respected by the racing fraternity, and that he thought he was a bonus for the programme. After his days were reduced in 2010 he went to see Kevin Lygo, who was at the time the Director of Television at Channel 4. He was told that the decision would not be revisited, but Mr Lygo subsequently agreed to pay an ex gratia payment of £20,000.

27 Mr McCririck appeared in Channel 4's booklet to celebrate 25 years in broadcasting in 2008 (8/2844.1), which states:

"John McCririck, a self-described "failed journalist, failed bookmaker and failure at everything" quickly became the best-known face, voice and side-whiskers of the sport of kings. Always outspoken and frequently controversial, McCririck's notoriety has spread far beyond the racing fraternity, bringing renewed interest to the sport he loves. For all his outrageousness, McCririck's passion is undeniable, as is his dedication to the interests of punters, which has frequently brought him into conflict with bookies, riders and owners."

28 There is no evidence that Channel 4 told Mr McCririck at any time that his mode of dress, outspoken views or use of tic-tac language should be moderated. He was not told that these were unacceptable or deprecated.

29 Mr Aitchison joined Channel 4 as Commissioning Editor, Sport in March 2011. Mr Aitchison reported to Stuart Cosgrove, Channel 4's Director of Creative Diversity. He also had direct contact with Jay Hunt, Channel 4's Chief Creative Officer at various times.

30 A competitive bidding process for UK's terrestrial horse-racing rights, including the Grand National meeting at Aintree, the Derby and Royal Ascot (these three meetings being collectively known as the "Crown Jewels") took place in around February 2012. The Crown Jewels had previously been televised by the BBC. Channel 4 successfully won the bid in March 2012. It viewed its success in the bid as a watershed because the Crown Jewel events would attract a wider non-specialist audience, which was an opportunity for Channel 4 to draw in the new audience to its other horse-racing coverage.

31 On 18 March 2012 Channel 4 announced that it had secured exclusive rights to broadcast horse-racing coverage on terrestrial television (3/842). In the press release it states:

"Channel 4's financial commitment to racing over the next four years amounts to one of its largest programming outlays. As part of its wider commitment to the sport and as states focus to strengthen its relationship with broader and younger audiences, Channel 4 will seek to creatively enhance the production values of its racing programme over the course of the new rights period."

32 At the end of March 2012 Channel 4 issued an invitation to tender (3/854 to 855). The guide to the minimum requirements that Channel 4 had for its racing coverage for 2013 to 2016 states (3/855):

"The Morning Line ...

.....

The show should be a compelling weekly (and daily during major racedays and festivals) racing magazine show that provides an invaluable guide to the day's action, the issues behind it, as well as being an attractive shop window into the world of racing for the general sports fan. It should also act as a driver to encourage viewers to watch the live racing action that afternoon.

Live Afternoon Channel 4 Racing

...

It is essential that the coverage maintains – and develops – C4's current award-winning live coverage of racing, and now cements C4's new position as the terrestrial home of the sport. The key objective is to grow new audiences while retaining the support of the core loyal racing loving viewer."

33 Mr Aitchison gave evidence that Channel 4's core audience was aged over 55 and male as shown in the viewer demographic figures (3/853.3). For the future of the sport and programming it, it would be important for Channel 4 to grow a wider audience whilst not losing focus on the core viewer.

34 Channel 4 received notices of intention to tender on or around 16 April 2012 from IMG, Sunset & Vine, North One Television, and At the Races/SIS each two pages in length. Since Highflyer was the incumbent production company it was not required to submit the initial two page document. IMG's two page document is at (3/862 to 863) and states:

"Our aim is to strike a balance between much of what currently works whilst bringing a fresh feel to the experience that will attract a younger audience. We will achieve this by adding stronger feature content, a more modern approach to analysis, better build ups to the races and a greater interaction with our audience via multi media platforms. It's about Entertainment, Education and Excitement."

The document goes on:

- We believe that we can bring on new talent. Sam Thomas has shown real potential on the Morning Line and along with other new talent like Helen Chamberlain (Sky presenter who own horses) would attract a younger demographic. Channel 4 Presenter and Vet, Mark Evans could be used for some scientific horse content and when it comes to the glamour/fashion of the big events mix it with C4's Gok Wan. We would balance the new talent with C4's existing strong portfolio of racing talent and integrate Clare Balding to enhance the team. ...
- Feature material is essential to the new look afternoon programme. A huge archive is at our fingertips and can be used to entertain our older audience who love to revel in the nostalgia of past racing heroes. To build up the new younger following, we need to develop features that give a greater insight into the personalities of the sport.

...

We also suggest developing a Morning Line betting panel to appear with Tanya Stevenson"

35 Channel 4 proceeded to the second stage by inviting each of the independent production companies to submit a more detailed production proposal. They were asked to expand on their initial proposals by providing greater detail on production and editorial issues, as well as details relating to graphics, design, on-line content, major events and budgeting. These proposals were requested by 8 June 2012.

36 Channel 4 received detailed proposals from IMG, Highflyer, Sunset & Vine, At the Races/SIS and North One Television on or around 8 June 2012. Extracts of the proposals appear at 7/2386 to 8/2644.

37 The request for proposals for the second stage were invited by letter of 25 April 2012 (3/864 to 865), which attached a guide (3/866 to 931). The guide states:

"Channel 4 believes that this is the beginning of a new era and is keen to take every available opportunity to present viewers with the most ambitious coverage ever enriching the experience for existing viewers and also find a way to bring racing to new audiences.  
...

#### Presentation and Talent

How will you deliver the on screen experience? Are all programmes on-site? Where will you present from on course? How will you differentiate between the Crown Jewels and quieter days? How much will you present from 2<sup>nd</sup> sites on days when we have multiple sources? Outline your vision for both the ML and live shows. ...

#### Pundits

Who are your experts? How many do you need across the year? As with other sports how can you continue to develop their roles to educate the viewers? From parade ring to race analysis, will you use the same talent or are there specific people for specific roles? How will they tell the story of the day via graphics and on screen technologies? Where will they be during the broadcast. ...

#### Commentary

Please outline who's who when it comes to your top team. Is it different for the Crown Jewels vs the other days for main commentator? Is it the same for continuity? We appreciate that course commentators on second sites are traditionally provided by courses.

#### Betting

How should we present this? What would it look like? Who should do it? What is the balance between editorial and betting on the shows? Is there a new way of presenting this very important part of the sport? Where should we present this? In the "jungle" or is there somewhere else? What technology is available? ..."

In the Online section (3/871) it states:

#### "The Opportunities

A sport of heritage and tradition – what can we do to revamp, refresh, renew whilst respecting its history.

Racing is often "wrongly" associated with older and downmarket men and with traditional betting imagery. This is now an outmoded view - the demographic of Racing as an event is much closer to Channel 4's core viewership, and increasingly so. We want to grow this new audience and online is a key opportunity."

We were told in evidence that Channel 4's core viewership refers to ABC1 and 16-34s. The ABC1 viewers are viewers of any age. Mr Aitchison said that the expression "older downmarket men" was incorrect, but that the key demographic was older and downmarket men. He said that it should have said that racing is associated with older downmarket men and that the expression "wrongly" should not be there.

38 The Tribunal was taken to the individual detailed proposals by Ms Eady in cross-examination of various witnesses on behalf of the Respondents to demonstrate that Channel 4's desire to appeal to younger audiences had been understood. In the proposal by Sunset & Vine (7/2386 at 7/2401) in relation to "Digital Strategy", it states "New Younger Audience".

39 In the At The Races/SIS proposal (7/2403 at 7/2406 to 2407) it states:

"As part of the research for this bid we canvassed opinions from a wide range of people about Channel 4 Racing.

.....

But the key word they used time and time again about Channel 4 Racing was that it was ... "Old"

And when you look at the audience figures, it is not surprising to find that just 10% of viewers are under 34 and 80% are over 45. Racing's age profile is unlike any other sport ...

The consensus was that racing needs a revolution in the way it is covered. It needs to skew younger, to skew broader."

40 In the proposal by North One (8/2557 at 8/2564) it states:

"2013 will be the start of a brand new era for racing. For decades television coverage of racing has been solid and reliable but has barely changed. Like a pair of old shoes, it does the job but it could be so much better. Currently it skews towards down-market older men. Now is the time for change

...

Working with bright new talent and selected stars of the existing team we will produce exciting and engaging television for all. Channel 4 Racing will be fun, glamorous and entertaining and we will truly reflect Britain's second most popular sport ...

The pitch did not refer to Ms Stevenson but made the following reference to Mr McCririck (8/2573):

"This will not mean that the much loved John McCririck will disappear completely from our screens but we would seek to involve him mostly in the Crown Jewels with a broader remit than simply betting."

41 The proposal from Highflyer (8/2583 at 8/2587) set out the talent and in particular stated:

"TANYA STEVENSON is seen as the most reliable tipster on TV and she will make sense of the search for winners and value in the market via "The Cloud". JOHN MCCRIRICK, research tells us is Mr Racing to many punters. He may not be universally loved but he is a character and they want to see and listen to. We believe he is best utilised on the Morning Line where he has a better platform for his strong, assertive opinions ..."

Highflyer did commission research from Sparkler (8/2595 to 2644). That research shows (8/2598) that Sparkler spoke to

"Heavy Channel 4 Racing viewers (regular watching of Morning Line and afternoon racing).

Ages 25-70

Mixed gender (male skewed)"

At 8/2632, the research states:

"John McCririck is seen as Mr Racing"

with various views expressed which are,

"I hate him but you have to have him",

"He knows absolutely everything there is to know, even though his tipping is dreadful".

"It wouldn't be the same without him, you know it's his life"

"He brings the show alive with his clothes and interaction with the crowd".

The comment at the foot of the page is

"John McCririck is key to Channel 4's offering. If anything he can appear more".

Mr Aitchison in cross-examination said that in late 2012 he would not agree that Mr McCririck as a broadcaster was at the top of his game, but that in betting, he would say he was "up there".

42 The IMG bid is at 8/2419 to 2556. In the racing overview and background (8/2436) it states:

“The viewer and the racegoer

There is a bigger picture to be considered – its not just about televising the sport, its also about attracting a younger demographic to actually go to the races.

...

**Our proposal is about a new production, a new type of relationship with the viewer, new platforms and the sport.**

There is no doubt that the biggest hurdle is going to be balancing Channel 4’s stated aim of bringing in a younger audience with the challenge of not alienating the core viewership. Bringing in owners Ant and Dec to present racing is not the answer. The way forward is to get people interested in the personalities of the sport and in a clever and unobtrusive way to explain the technical elements and to have presenters who exude knowledge that satisfy the avid race goers and punters, but who are sympathetic enough to a more general audience ...

In the section entitled “The Dream Team” (8/2441) it states in relation to Ms Stevenson:

“Tanya Stevenson is now a well respected betting analyst and she should take over the main role. IMG suggests that while she takes over the overview and analyses the flow of the betting market she is teamed up with someone like Liverpoolian bookie Pat Whelan or Rory Jiwani who would be placed in the “jungle” amongst their fellow bookmakers.

Our feeling is that John McCririck is now more of a celebrity than a true betting expert. The misnaming of jockeys and horses whilst “Murray Walkerish” in its charm is starting to grate more than it amuses. A recent survey by the BHA found that John only scored well with white males over 40. All other groups, and in particular women as a whole marked him down as negative. We feel John should now be an occasional big event specialist, maybe teamed with a celebrity”.

43 In evidence, Mr Fry of IMG told the Tribunal that IMG was thinking that “new audience” and “younger audience” were pretty much the same thing. He interpreted “new audience” looking back to the press announcement which said “younger audience”. He said IMG was looking to appeal to a broad demographic and that younger refers to age, but one also has to consider older viewers. IMG wanted to appeal to a broader audience and provide entertainment, thus the reference to a “Top Gear” type audience. Mr Fry said that the decision concerning the on screen presenters was ultimately a decision for Channel 4. IMG made proposals, but it was up to Channel 4 to decide, although IMG would expect to have an influence over that decision.

44 In June and July 2012 each of the tenderers made an initial pitch presentation to a Channel 4 panel. The Channel 4 panel comprised Mr



Aitchison, Martin Baker, Stuart Cosgrove, Geoff Riding (Sales), Hayley Thornton (Head of Production Finance) and Pennie Crocker (Legal & Business Affairs Manager). Copies of the handwritten notes from the pitch meetings commenced at (6/1898).

45 The IMG pitch took place on 20 June 2012. IMG were represented by Carl Hicks (Programme Editor), Graham Fry (Managing Director), Denise Large (Senior Director), Sophie Veats (Producer), Charles Balchin (Head of General Programmes), Ben Nicholas (on behalf of Digital) and Sarah Gordon Jones (Head of Production).

46 Mr Hicks was employed by the BBC for 22 years between July 1999 and 28 September 2012. His most recent position was as BBC Sports Senior Programme Editor. He had edited 9 Grand Nationals and 8 Royal Ascots for the BBC, together with many other horse racing events. Immediately prior to leaving the BBC he was responsible for editing the BBC's coverage of the London 2012 Olympic Games. Mr Hicks had known Mr McCririck since Mr McCririck became a horse-racing editor in about 1997. Mr Hicks was approached by IMG on 8 May 2012 when he received a phone call from Mr Fry. Mr Fry explained that IMG intended to tender for the right to produce Channel 4 Racing and wanted to know whether Mr Hicks was interested in the job of editing the programme if IMG was successful. Mr Hicks did not want to commit to anything straight away and asked for more time to think about it. He spoke again to Mr Fry in mid May 2012.

47 Mr Hicks told the Tribunal that he was excited by the prospect of editing the extended Channel 4 Racing programmes from 2013 and agreed to be part of the IMG tender proposal, which included being referred to in the written tender proposal document (8/2450). Mr Hicks helped with the editorial briefs about how IMG would cover the big events but did not contribute to writing the sections on IMG's proposals regarding the on-screen line up. IMG was focusing on Clare Balding and Nick Luck as likely lead presenters. There was no discussion between Mr Hicks and Mr Fry about a possible role for John McCririck. Mr Hicks was asked to help with the pitch in June 2012.

48 Mr Hicks received a copy of the final written tender proposal on around 19 June 2012 and told the Tribunal that he picked up that IMG was looking to be genuinely innovative and creative with its suggested coverage. When he saw the tender document Mr Hicks thought that the proposal as far as Mr McCririck was concerned stood out as being "a bit odd". In Mr Hicks view John McCririck was perceived in the same way by people of all ages. If anything, he thought that Mr McCririck's comedic and somewhat anarchic style may have actually been more popular with younger viewers. Mr Hicks was not convinced that Mr McCririck was consistently popular with current viewers and agreed that his involvement with and actions in reality television programmes had led to the public seeing him as a comic celebrity with a tendency to offend, rather than a horse-racing betting expert. Mr Hicks felt that Mr McCririck's larger-than-life presentation style was

off-putting to many viewers and potential viewers, and, specifically women, and was at odds with the slicker and more serious style of coverage intended.

49 Prior to the presentation, the IMG pitch team met at IMG's offices in Chiswick on 20 June to make final preparations for the pitch itself. The preparation meeting lasted for about two hours and it was agreed that Mr Hicks would present the IMG editorial overview and summarise the proposals regarding on-screen talent and that Mr Fry would lead the meeting and introduce each of the IMG speakers. At this meeting Mr Hicks raised the possibility that Channel 4 might ask for an explanation of IMG's stance on John McCririck's potential involvement. Mr Hicks was of the view that John McCririck was not right for the programme and that he should not be included in any capacity. He thought that the exaggerated presentation style of Mr McCririck was inconsistent with a more serious programme and was aware that he had the potential to offend and alienate viewers and potential viewers.

50 The pitch meeting took place on 20 June 2012. There was much of the Respondent's witnesses in relation to the notes of the IMG pitch meeting. In particular (6/2079) there is a reference to:

"Attract younger viewers with new/young presenters".

It is unclear who made these notes. It may be they were the combined notes of Ms Thornton and Ms Crocker, but there is no evidence to confirm that. At 6/2103 it states after an arrow pointing from the word "diversity":

"Younger presenters – audience attractors".

However, it is unclear who made these notes. The reference seems to link diversity with younger presenters. The words are followed by

"Francesca Cumani (see taster tape)".

We were also taken to the note of Mr Stuart Cosgrove (6/2127) in which he states:

"Identified new on screen talent, young and upmarket".

51 The pitch meeting included a taster tape showing a presentation by Francesca Cumani as a potential new, young presenter. During the pitch Mr Hicks ran through IMG's proposed on-screen talent team with the focus on the parts for Clare Balding and Nick Luck, as two lead presenters, rather than the previous approach of having separate pairs of presenters covering the flat and jump seasons. There was no mention of Mr McCririck. Reference was made to the survey which IMG had prepared about Channel 4 Racing (4/1345). The

survey was prepared by IMG to assist the pitch. Those surveyed were individuals travelling by train to Royal Ascot.

52 After the pitches, the Channel 4 panel considered IMG's proposal to be very impressive, picking up on Channel 4's aim to grow the programmes audience, to innovate and to achieve a more serious and professional style of coverage.

53 On 16 July 2012 Mr Aitchison and Mr Martin Baker submitted a written report to senior management at Channel 4 recommending that IMG be appointed as the new production company for Channel 4 Racing (5/1372 to 1423). This stated that two bids namely, Sunset & Vine and IMG stood out for a number of reasons. The report goes on:

- "7. IMG's bid was felt to be the strongest. They reflected a passionate desire to take on the challenge of delivering on C4's ambition to create a refreshed and re-energised coverage of the sport (which was not matched by any of the other bidders), while at the same time ensuring safe delivery of the key events."

In relation to Highflyer (5/1378) the report said:

"The panel also felt, unanimously, that Highflyer Productions had not adequately responded to the opportunity to present a compelling and new creative vision. The panel believed that the 'Crown Jewel' events were essentially being seen as add-ons, albeit of scale, to the regular calendar. There were concerns about some of the ideas for innovation (i.e. the practicality of presenters on horseback), and that the approach to refreshing the Presenter set up had been un-ambitious (and that old loyalties may affect decisions in any restructure of the presenter set up and/or selections)."

The report was presented on 16 July 2012. The meeting was with Jay Hunt, David Abraham (Chief Executive of Channel 4) and Stuart Cosgrove. Anne Bulford (Chief Operating Officer) was unable to attend. At the meeting Jay Hunt and David Abraham were satisfied that IMG had presented the best proposal for the production of Channel 4 Racing, but that there were two provisos namely, the necessity of ensuring that Carl Hicks would be Lead Producer and confirmation that Clare Balding would join the on-screen team.

54 The announcement was delayed because both Clare Balding and Carl Hicks asked independently that any announcement be delayed until the Olympic Games were finished. Both Ms Balding and Mr Hicks committed to Channel 4 Racing from 2013 shortly before 10 August 2012.

55 By a letter dated 10 August 2012 (5/1445 to 1447). Channel 4 confirmed to Mr Fry that IMG had been appointed as the new production company for horse-racing coverage from 1 January 2013 to 31 December 2016 subject to fulfilment of the conditions set out in the letter.

56 A press release was issued on 13 August 2012 (5/1458 to 1460) which announced that IMG had been awarded the 4 year production contract for Channel 4 Racing including the Crown Jewel events and that Clare Balding was joining Channel 4 as Lead Presenter. It also stated that Carl Hicks was joining to head the team as Executive Producer.

57 On 13 August (5/1470) Mr Fry e-mailed Mr Aitchison proposing a meeting between Mr Aitchison and key members of the IMG team to discuss IMG's technical and creative proposals in more detail. Mr Fry suggested a series of questions and Mr Aitchison's answers are set out in the e-mail (5/1470 to 1474). Mr Aitchison agreed that it was necessary to sit down to deal with the roles on the team. In particular he said (5/1472):

"I think we need to sit down with a jigsaw puzzle of faces and work this out. It is key we deliver a fresh approach to betting. I'm not convinced with Tanya's broadcasting skills and have been approached by a number of people. John M discussion to be included. I know that we will be under scrutiny to move this forward. When you watch a show back how much of what you hear is just reporting of facts which could be graphic. We must editorialise this. Sean Boyce? Rory J? D Stevens and Simon Clare ..."

58 On 17 August 2012 a meeting took place recorded in an e-mail from Mr Fry to the IMG team (5/1475 to 1477). In particular the e-mail states:

4. JA wants a 'job description' for each of the pundits and reports so that we can easily determine roles and what gaps we have for certain roles. He also wants the girl v boy thing determined as a result of this and also the diversity issue – so Alice and Rishi still play on that basis alone. **Action. CB and DL to work on job descriptions as soon as DL/SV situation re Highflyer resolved.**
5. JA wants Jim McGrath involved. Likes Mick Fitzgerald (even more so if Francome refuses at the first fence), is skeptical [sic] that Tanya can deliver the betting in a journalistic way. The job descriptions will apply here too. **Action. We need to drill down our approach to betting on screen and other potential candidates for this ..."**

59 On 26 August 2012 Ms Veats sent CVs of various presenters to Mr Fry and the IMG team (5/1503 to 1510). This did not include Clare Balding and Nick Luck because they had already been selected. The presenters concerned were Graham Cunningham, Alice Plunkett, Rishi Persad, Emma Spencer, Chris Dixon, Jim McGrath, Mike Fitzgerald, Tanya Stevenson, Richard Hoiles, Sam Thomas, Chris Cook, Francesca Cumani, Walter Swinburn, Gina Bryce, Ollie Bell. Mr McCririck was not included because IMG did not feel they would need to assess his well known attributes for the purposes of the limited celebrity guest role that was, at that time, envisaged.

60 There was an internal meeting at IMG on 24 August when it became clear that Mr Hicks would lead discussions about talent with Channel 4 as he was the driving force behind many of the editorial decisions.

61 A meeting took place with Channel 4 on 11 September 2012. There are no notes of this meeting. Mr Hicks, Mr Balchin, Ms Veats, Ms Large and Mr Fry met Mr Aitchison at Channel 4's offices. There was discussion of the on-screen line up, and, at this point the assumption was that Mr McCririck might be included in a more limited role as a celebrity guest at big events. IMG were unsure as to what Channel 4 thought of Mr McCririck. Mr Fry was keen to find out what Mr Aitchison thought of Mr McCririck. Mr Hicks explained IMG's reasoning for reducing Mr McCririck's involvement. Mr Hicks explained that his view of Mr McCririck was that Mr McCririck was loud, overbearing, confrontational and offensive and used nicknames for other members of Channel 4 Racing team. He cited the use of 'Female' for Tanya Stevenson as something that was likely to alienate viewers. Mr Hicks highlighted that Mr McCririck's pantomime style of delivery would not fit well with the more serious style of coverage. IMG was of the view that Ms Stevenson would be a strong betting pundit but they continued to discuss whether someone else would appear alongside her at bigger events.

62 IMG had not included Derek Thompson (aged 62) because he was not felt to be in keeping with the more polished tone of IMG as a result of his propensity to joke. Mike Cattermole (aged 51) and Alastair Down (aged 55) were dedicated presenters at that time and it was not obvious what role they could play. Emma Spencer (aged 35) and Alice Plunkett (aged 40) were designated as presenters, but it was agreed that they would take on reporter roles.

63 On 21 September 2012, Ms Veats sent an e-mail to Mr Aitchison with a draft of "Morning Line" ideas (5/1538 to 1541) in which she states in

"**Off the Bridle** – Hard hitting, no bars held interviews with big names in sport, where the trainer, jockey, bookmaker, politician.... (could be a good one for John McCririck?)"

64 On 24 September 2012 Mr Aitchison received the talent tracker data from a market research agency known as GFK, based on a survey in early July 2012 (5/1543 to 1558). The talent tracker is conducted bi-annually via an online survey and asks a nationally representative sample of the UK for their opinions on a variety of talent. The talent tracker was requested by Stuart Cosgrove because he was aware that the tender process would prompt some difficult decisions regarding the on-screen talent.

65 In terms of awareness, Mr McCririck scored 78% just under Sue Barker who scored 82%. Clare Balding scored 66% and Nick Luck scored 7%. 61% did not enjoy Mr McCririck, this being the worst mark, the next poorest mark was John Francome on 15%. Mr McCririck scores 41% in the column entitled "I see too much of this persona and I am bored with them". In the column "Would enhance the reputation of any channel", he scores only 7% and in the column "Adds value to the programme that he appears in" he only scores 13%. This is the lowest score in that category. Overall Mr McCririck scores badly. In the breakdown (5/1547) Mr McCririck is at the lowest point in the quadrant entitled

“Doesn’t make good TV and doesn’t encourage me to watch”. Tanya Stevenson fell into the quadrant entitled “Makes good TV and encourages me to watch”.

66 Mr Cosgrove told Mr Aitchison that Mr McCririck’s talent tracker results were the worst Mr Cosgrove had come across in his career from any genre of programming. Mr Aitchison became increasingly sceptical about whether Mr McCririck should be included, but the talent tracker reinforced the thinking that Tanya Stevenson could be successful if allowed to flourish as the main betting presenter.

67 On 2 October Ms Hunt met Mr Aitchison and Mr Cosgrove. Mr Aitchison mentioned that the current proposal was to reduce Mr McCririck’s role to 10 days per year because of his presenting style and tone not being in keeping with the coverage plans. Ms Hunt was unsurprised that the feedback for Mr McCririck was so bad.

68 A further meeting took place on 9 October between Channel 4 and IMG where on-screen talent was discussed.

69 A meeting took place on 17 October 2012 to finalise arrangements. Again this is not minuted. The decision had been taken to retain Alice Plunkett and Emma Spencer as reporters. Ms Stevenson was in place as betting presenter, although there was still discussion about whether she would be accompanied by another. Mr Francome had ruled himself out. Mr Cattermole and Mr Down were not considered for reporter roles as it was felt that this would be a step down for them but there was no discussion with them. Graham Cunningham was involved as a pundit. There was no discussion of Ms Graham (aged 52) or Mr D Thompson (aged 62) as they were not even within contemplation. Mr McGrath (aged 58) was to be a pundit.

70 Mr Hicks raised the question of Mr McCririck. Mr Hicks wanted to take this final opportunity to raise his continuing concerns of Mr McCririck having any involvement. He made the point that given that the concerns that Mr McCririck’s on-screen persona alienated viewers and potential viewers, it followed that, if anything, having him appear on the big event days was likely to have a most disadvantageous effect because those days represented the best opportunity to draw in viewers who would not normally watch horse racing. In , Mr Hicks explained his trenchant views. The very events from which Channel 4 wanted to attract a new audience was not the appropriate place to put Mr McCririck, citing the example of the Grand National. Mr Hicks told the Tribunal he did not want Mr McCririck anywhere near Channel 4 Racing. He said:

“I found Mr McCririck’s image and manner in total opposition to how we were hoping to broaden the image of the sport.”

Mr Hicks did not know Mr McCririck’s age, although he knew he had been on television for 30 years and “could have guessed that he might be eligible for a

bus pass". Mr Hicks quoted from Desmond Lynam that, "The racing reporter is the uninvited guest in people's living rooms".

71 Mr Aitchison in his evidence confirmed that all those present agreed that Mr McCririck was likely to alienate potential new viewers. Mr Aitchison was persuaded there was not a strong enough case to include Mr McCririck but was mindful there would be a lot of publicity relating to the decision and some of it would be negative. Mr Fry said that having reached the decision unanimously that Mr McCririck would not be included, Mr Aitchison had to confirm that decision within Channel 4.

72 By an e-mail dated 22 October 2012 from Mr Fry to Mr Aitchison (5/1723) attaching a talent roster and pay details which were redacted. The e-mail also says:

"Have a look and please confirm you are happy for us to proceed on the basis of the attached. Mrs McCririck not happy by the way – I guess you have heard that."

73 By an e-mail dated 22 October 2012 from Mr Aitchison to Ms Hunt, Mr Aitchison stated (5/1732):

"Jay – here is an outline of the situation with the racing pres team. ....We are looking to telling people this week. The only thorny issues for me are managing Derek Thompson's exit as he is undergoing chemotherapy and the John McCririck question – I need to talk to you about this again please".

74 The Racing Presentation proposal (5/1733 to 1735) states:

"Going forwards we are trying to achieve a new tone that is more focused, more journalistic and slightly more serious. Our team needs to reflect the fact that we are now the home of all Racing with an increased focus on us. We need to integrate some of the elements of the current output with some new faces the wider public feel comfortable with from the BBC shows. The team is too large at present and we wish to have more clarity around the team size. We also wish to introduce some new talent to the shows to inject a new approach .....

Main Presenters:

Clare Balding and Nick Luck

They will replace the two current pairings of (a) Alastair Down and Alice Plunkett and (b) Mike Cattermole and Emma Spencer.

We are going down to a presentation style of one presenter rather than two. This is to achieve a new tone that feels more serious and journalistic rather than the current feel which feels more casual and "daytime tv". This is not how any other major sport is presented in the UK and 4 needs to be more focused on continuing to be seen as a serious sports broadcaster post Paralympics.

....

Mike and Alistair wouldn't be stepping down to reporter roles, having been main presenters."

This was not discussed with either Mr Cattermole or Mr Down. In relation to betting presenters, the proposal states:

"Tanya Stevenson, John McCririck

Tanya will retain her position. John will be asked to make guest appearances on the bigger days where his role may be more pertinent as the most recognisable person in the sport. Again John's style of broadcast has become somewhat "pantomime" with his exaggerated delivery and playing to the crowd. With betting becoming more and more digitally driven, his tic-tac action is also increasingly irrelevant. Our feeling is that there is a team profile within which John sticks out as incongruous. There are others in the business who are much more on top of the game and I believe we will have guest experts including Graham Cunningham rather than one person with Tanya.

NB Update – following a meeting last week with the production company there was a unanimous decision to terminate John's contract based on his broadcasting skills. This of course does not take into account the PR around what this would mean. His wife has already been on the phone mentioning age. I wish to discuss this further with you!"

Derek Thompson and Lesley Graham were not given roles in the new team. In the case of Mr Thompson on the grounds of his broadcasting style and in the case of Ms Graham on the basis that (5/1734):

"Lesley was only doing 12 days a year and slipped in when things were really tough. Her days were given to her as a favour by the current producer when the contract renewed 2 years ago. As we reduce the numbers we don't have the room or the budget to take her arrangement forward. The other reporters are working in and around racing all week, their knowledge is up to speed and Lesley is unfortunately not. Last week Lesley was employed as CEO of Racing Welfare and announce [sic] she's no longer broadcasting."

In relation to Mr Cunningham the proposal states:

Graham Cunningham – a new addition to the team. Graham is an experienced pundit working on Racing UK and also having worked for Timeform (racing stats). I want some more edgy journalism – it's all too nice – and he'll bring opinion. He is not pushing anyone out as his role will be guest/pundit although he may do some feature reporting which currently hardly exists."

75 Mr Aitchison had a brief discussion with Ms Hunt about the on-screen team decisions near to her desk on 23 October. Mr Aitchison's evidence was that his reason for wanting to discuss the decision not to include John McCririck, was the close association of John McCririck with Channel 4 Racing and the likelihood of a public dispute. Ms Hunt said that Mr Aitchison also explained that there was, by that time, a concern that John McCririck's tone and style and attitudes would be particularly out of place on the big national events. She



understood the decision to go from reducing the contribution of Mr McCririck, to him having no involvement at all, and told Mr Aitchison that she saw no reason to disagree with the decision.

76 Mr Aitchison also met Ms Rosie Ranganathan, at that time Head of Human Resources Operations at Channel 4, on 24 October to seek further guidance about the best approach of communicating the decision to Mr McCririck. There are no notes of this meeting.

77 By an e-mail of 24 October 2012 (5/1767), Hannah Walker, Senior Publicity Manager, Racing, e-mailed Mr Aitchison about Mr Cattermole, Mr Down, Ms Graham, Mr Thompson and Mr McCririck, who were not being retained. In relation to Mr McCririck the e-mail states:

“John McCririck

Will be critical about the late notice

Will use ageism card

Good friends with the Sun

Racing Post will also support John’s campaign – he is very much a love and loath person. However, they may respect C4’s bold decision”

78 At this time James Macleod, Head of Corporate Press, suggested that it would be best to obtain an HR and legal opinion on the language of the press release and questions and answer document before finalising it. On 24 October, Ms Ranganathan produced a job description (5/1773 and 1774). As Mr Aitchison said in , this was too late, events having overtaken Channel 4. In Mr Aitchison said that he thought HR were asking him to document the reasons, but said he did not know that this was because of “back protection”. In any event, the job description is after the event.

79 Internal meetings and discussions with lawyers took place, prior to Ms Ranganathan e-mailing Mr Aitchison with a proposed script for his conversation with Mr McCririck (5/1806 to 1807). The key point in the proposed script is:

“Going forward we want our presenters to be authentic and not an exaggerated and flamboyant character”.

The proposal also had some possible questions:

“Is this decision based on my age?”

Absolutely not. That did not factor into our decision making in any way.

Why am I going?

As I explained, the style and tone of programme is changing. Your style and tone no longer fit into what we are aiming to do. We want our presenters to be themselves as opposed to a character.

What was the decision based on?

It was based on what we require from the coverage going forward together with skills and audience research.”

80 On 24 October Mr Aitchison let Ms Hunt know it would be helpful to receive guidance from her as to how to handle the telephone call with Mr McCririck and other team members who were not being retained. Ms Hunt responded (5/1777 to 1778) to say that she was shortly leaving for a holiday but would be happy to speak over the phone. Ms Hunt did speak to David Abraham, Chief Executive of Channel 4, and later met Mr Abraham and Lord Burns, Channel 4's Chairman. Ms Hunt briefed them about Mr McCririck and that the decision was likely to lead to a reaction in the press. Both Mr Abraham and Lord Burns supported the decision.

81 On 25 October Mr McCririck was on holiday in Las Vegas. Arrangements were made through Mrs McCririck for Mr Aitchison to telephone him. Mr Aitchison's telephone call took place at 4.00pm (5/1792). Mr McCririck told the Tribunal that Mr Aitchison advised him that his services were no longer required. Mr Aitchison accepts that he did not stick to the script he had been provided with. He said that as soon as he mentioned the decision Mr McCririck said it was because of his age. In Mr McCririck said that Mr Aitchison read out a script that had been written for him and also said that Mr Aitchison did not have the guts to face up to Mr McCririck. Mr McCririck said that it was not a happy and fruitful conversation and, somewhat inconsistently, that he did not know that Mr Aitchison was reading from a script. It is clear that although Mr Aitchison used the script in part, he deviated from it. Mr McCririck was clearly angry. The call became heated and Mr Aitchison suggested it would be best to bring the conversation to a close. Mr McCririck accused Mr Aitchison of age discrimination. He also suggested that Mr Aitchison was so ashamed of what he was doing that he did not make the phone call until as late as possible.

82 Within approximately 30 minutes of the telephone call, Channel 4 issued the press release and questions and answers (6/1837 to 1838 and 6/1839 to 1841). In relation to Mr McCririck the question and answer document states:

“Why would you not include John McCririck as a core member of your team?

- In 2013 Channel 4 becomes the terrestrial home of racing and will significantly increase its portfolio to include major events such as the Grand National, the Derby and Royal Ascot. We made clear when we announced these rights that we would be

looking to modernise and improve coverage so that we can bring racing to the widest audience possible – and this would include making changes to the presenting team.

- With an expanded portfolio of major events, C4's racing coverage would take a more journalistic approach and a presentation style in line with other high profile sports. Our on-air line up for 2013 reflects this approach.
- John McCririck will not be part of the 2013 Channel 4 racing team. We would like to thank John and all of the presenting team who have worked with Channel 4 racing over the years and have helped bring the sport to millions of viewers.

How are you going to cover betting within the programme? Isn't John the industry's most established commentator on betting and odds?

- With betting becoming increasingly digitally driven, we are looking to take a different approach with our coverage of betting and odds.
- We are also looking to move the section of the programme into the sphere within which it now exists in the UK and therefore be looking at using a range of guests who work in that world."

83 Mr McCririck issued a press release which is quoted in an e-mail to Ms Walker of 25 October 2012 (6/1869). The press release states:

"Naturally I am devastated at being sacked after covering betting, first on ITV then Channel 4, for 31 years.

It had always been a dream to report from the racecourse betting jungles at Aintree and Ascot.

According to Channel 4, I'm being sacked after audience research.

Yes, I do antagonise people as reactions to being twice in the Celebrity Big Brother house and also on Coach Trip prove.

Yet, as Clare Balding, a terrific choice to lead to the new young team, said recently, I've become the face racing alongside Frankie Dettori and now of course Clare herself.

It is so sad that Channel 4 boss Jay Hunt and Production Chief Carl Hicks, both long time BBC Executives, have again gone down their well worn path of ageism.

Among the 13 slated to be on screen, only Jimbo McGrath is over 50.

Without any consultation or being asked to change my presentation style, I was only told by Channel 4's Head of Sport Jamie Aitchison half an hour before the press release.

Racing continues to prosper and is a magnificent sport for all ages and classes of society."

84 On 14 November 2012, Ms Hunt received an e-mail from Clare Balding, whom Ms Hunt had known for a number of years, in which Ms Balding says to Ms Hunt (6/1884):

"Jay, Hello hope all is well. I'm back from a fabulous holiday in America but have hateful jet lag. I spoke to John McCririck at length yesterday evening and while I understand the decision totally, I do have sympathy with him on one point. He made some pretty dodgy (in my opinion) decisions to go on things like Wife Swap and CBB but he did it because he thought Channel 4 wanted him to.

I've lain awake most of the early hours and while not all of it has been thinking about Big Mac (God forbid), I do appreciate that he's given most of his working life to C4 Racing and although he is ranting on about ageism like a loon, I think he probably deserves a call from the top. You would have to put up with listening to a lot of crap and bear in mind that anything you say will be repeated by him (and probably to the press) but you have the concrete block of audience research to fall back upon if needs be. Not that you need any advice from me on how to deal with tricky presenters – I am sure you have had your fair share.

Anyway, ignore me by all means, but John's back from holiday and I know it would mean the world to him to get a phone call from you – if only so that he can feel a bit special.

Love,

Clare."

Ms Hunt's response was:

"All v useful and I appreciate you sending it. It is pretty painful to countenance, talking to a man who attacked me in the press for ageism, inevitably a sensitive issue for me, having never spoken to me and with absolutely no evidence. Just so you can feel comforted, this had absolutely nothing to do with the decisions he has made about other work. Let me ponder.

Jay"

85 Ms Hunt sought guidance from Diane Herbert, Head of HR, and decided that contact with Mr McCririck was not a good idea because it would prolong coverage and give Mr McCririck new things to say.

### **Submissions**

86 Both parties produced written skeleton arguments and were given one hour each to supplement them orally. Since the skeleton arguments are in

writing, it is unnecessary to set them out, but they are dealt with in the appropriate part of our conclusions below.

**The issue of whether he Claimant was not permitted to work as a presenter on C4 horse-racing or to continue to do so because of his age.**

The Law

87 Section 13(1) of the Equality Act 2010 provides:

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

Section 5 of the Act provides:

- "(1) In relation to the protected characteristic of age-
- (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;
  - (b) a reference to persons who share a protective characteristic is a reference to persons of the same age group.
- (2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or a range of ages."

Section 23(1) of the Act provides:

"On a comparison of cases for the purposes of Sections 13, 14 or 19 there must be no material difference between the circumstances relating to each case."

Section 41 of the Act provides:

- "(1) A principal must not discriminate against a contract worker - ...
- (b) by not allowing the worker to do, or to continue to do, the work; ...
- (5) A "principal" is a person who makes work available for an individual who is:
- (a) employed by another person; and
  - (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

- (6) "Contract work" is work such as is mentioned in subsection (5).
- (7) A "contract worker is an individual supplied to a principal in furtherance of a contract such as is mentioned in sub-section (5)(b)."

Section 136 of the Equality Act provides:

- "(1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But sub-section (2) does not apply if A shows that A did not contravene the provision."

88 Ms Eady, for Mr McCrerrick, relies on a hypothetical comparator, albeit accepting that it is relevant to consider the circumstances of other actual individuals. As set out in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337**, the relevant question is likely to be the reason why Mr McCrerrick was treated in the way that he was. The Tribunal has to assess whether the protected characteristic of Mr McCrerrick's age operated on the mind of the relevant decision maker in deciding to act as he did.

89 Mr Linden, for the Respondent, refers us to Lord Nicholls in **Chief Constable of West Yorkshire v Khan [2001] ICR 2065 at paragraph 29** which states:

"For the reasons I sought to explain in *Nagarajan v London Regional Transport* ... The phrases "on racial grounds" and "by reason that" denote a difficult exercise: why did the alleged discriminator act as he did? What consciously or unconsciously, was his reason? Unlike causation, this is subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

90 It is sufficient that a discriminatory reason is a contributing cause in the sense of a significant influence (**Canadian Imperial Bank of Commerce v Beck UKEAT/0141/10**).

91 Mr Linden has referred the Tribunal to **Law Society v Bahl [2003] IRLR 640 EAT** as approved by the Court of Appeal at **[2004] IRLR 799**, on the relevance of unfairness. The issue in a discrimination case is not whether the treatment of the Claimant was unfair. Elias J, as he then was, stated:

"There is clear authority for the proposition that a tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably."

92 The Respondents rely on D’Silva v NATFHE [2008] IRLR 412, paragraph 38 EAT, which states:

“the drawing of inferences from such failures – as indeed from anything else – is not a tick box exercise. It is necessary in each case to consider whether in the particular circumstances of that case, the failure in question is capable of constituting evidence supporting the inference that the respondent acted discriminatorily in the manner alleged; and if so whether in the light of any explanation supplied it does in fact justify that inference.”

93 The Tribunal is mindful of the guidance on the question of the burden of proof set out in Igen v Wong [2005] ICR 931 CA as follows:

“Annex

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

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

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

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

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

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

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

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

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

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

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

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

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

94 The Tribunal also notes the guidance in **Madarassy v Nomura International Plc [2007] ICR 867**

"The court in *Igen v. Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

"Could conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

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



Conclusions

95 The first matter in relation to this issue is for the Tribunal to identify why Mr McCririck was not chosen for the new programme. In deciding this, the Tribunal has to consider Mr McCririck's character. He has argued that he has two persona, namely, what he terms his pantomime character, and his other character which he states has gravitas, and which is used in the Channel 4 Racing programmes. In his performances in Celebrity Big Brother, extracts from which the Tribunal has seen, and Celebrity Wife Swap with Edwina Currie, of which the Tribunal has seen the full programme, Mr McCririck comes over as overbearing and sexist. In the many press articles in volume 8 of the bundles, this is confirmed.

96 Mr McCririck told us in his witness statement and in that "just because Captain Hook is unpleasant to Peter Pan, it does not mean that the actor playing Captain Hook would behave in the same way outside the production" (paragraph 75 of Mr McCririck's witness statement). Mr McCririck says that even calling his wife "Booby" is all part of childish public school juvenile habit of labelling friends. The Tribunal was treated to a frank exposition of Mr McCririck's views on women and accepted that his views had caused him to be asked to leave a programme by Alan Titchmarsh and also thrown off "Hells Kitchen" and "Loose Women".

97 Mr McCririck encouraged viewers to vote him off "Celebrity Big Brother" by pronouncing that he should be evicted and by his unpleasant behaviour. He was frank that he wished to earn the fee and be evicted at the earliest opportunity. Prior to the increase in his media celebrity appearances, Mr McCririck had always been opinionated and had a flamboyant style of dress, using tic tac gestures and expressing his attitude to the racing public. Mr Hicks summed up the position in his . He accepted that the reality television shows on which Mr McCririck appeared were Channel 4 programmes and that Channel 4 may have benefited from that, but he was not sure whether Channel 4 Racing benefitted.

98 Mr Hicks expressed the view that Channel 4 reality shows could encourage a sports person's career, and gave the example of Phil Tufnell, a cricketer, who had used it to his advantage. Mr Hicks said he was quite sad to see Mr McCririck participating because he thought that it damaged his reputation in the sphere of horse-racing, where he did have expertise. Mr Hicks said that Mr McCririck's style and tone on news programmes was not that different from his style and tone on celebrity shows. The BBC always went to Mr McCririck because he had been very clever in making a role for himself over a number of years. Mr Hicks said that certain news programmes had taken the view that their function was to entertain, a view to which he did not subscribe.

99 Mr Hicks said that, as a broadcaster, image was all important, and that it was said that "John is John" and no one asked him to tone his behaviour down. Mr Hicks never spoke to Mr McCririck about his presenting style. Mr Hicks said that from the first day of the tendering process, it was in his mind that Mr

McCririck was not going to be part of the team. His view was that Tanya Stevenson was always going to be the betting reporter and she does appear as sole betting reporter. Mr Hicks did not have a chance to speak to Ms Stevenson, so he was not going to speak to Mr McCririck because he felt that would be disingenuous on his part.

100 Mr Hicks said that tic tac gestures were a minor irritation but part of the overall programme, and, at worst, Mr McCririck was a loud mouthed chauvinist. He did not want Mr McCririck as a central figure for that reason alone. It was at this point that Mr Hicks told the Tribunal that Desmond Lynam had said that "You are an uninvited guest in people's living rooms", and should act accordingly. Mr Hicks said that the conclusion at the 17 October meeting led by him was that Mr McCririck was not appropriate and there was no role for him. The very event from which IMG wanted to attract new viewers, referring to the Grand National, was not the place to put Mr McCririck. Using Mr McCririck as a celebrity betting pundit had been dismissed prior to the meeting of 17 October and was not a runner. Mr Hicks had discussed this with Ms Veats and felt that Mr McCririck was not right for the role. Mr Hicks did not want Mr McCririck anywhere near Channel 4 Racing. He found Mr McCririck's image and manner in total opposition to how Channel 4 was hoping to broaden the image of the sport. Mr Hicks did not know Mr McCririck's age, but knew he had been on television for 30 years and said that he could have guessed that "he might have been eligible for a bus pass".

101 In re-examination Mr Hicks said that;

"Mr McCririck is a larger than life character and genuinely eccentric but he hectored other broadcasters and bullied people at the time. I thought he would dominate people on the racing team. His style is haranguing and talking back to people and not a style that I am particularly fond of."

Mr Hicks felt that Mr McCririck was not a character that could be switched on and off and as a broadcaster. He did not feel that Mr McCririck's style was appropriate. He felt that Mr McCririck was far from the premier league of broadcasters, and that his tone and style of presentation left a lot to be desired. Ms Large had told Mr Hicks that she and a senior producer in Highflyer had found it difficult to reign in Mr McCririck.

102 The Tribunal has noted that the problems with Mr McCririck's persona had been acted upon in the past by the reduction of his days in 2008 and 2010. He was told that was because of his celebrity appearances.

103 It is clear from the evidence that, having won the Crown Jewels, Channel 4 wanted to attract a younger and broader audience whilst maintaining its existing horse-racing audience of down-market males aged over 55. In the tender proposals all the tenderers make reference to Channel 4's core viewer which is ABC1 and 16-34's. We reject Mr Linden's contention that a younger

audience is an audience under 55. Channel 4 wanted racing to appeal to a wider audience. The Crown Jewel events attracted a different audience from more day to day horse-racing audiences and Channel 4 wanted to capitalise on those events in order to broaden its horse-racing audience.

104 This is not an unfair dismissal claim. It is true that Channel 4 and, in particular Mr Aitchison and IMG, including Mr Fry and Mr Hicks, did not follow best practice. Mr Aitchison came over as weak and found it difficult to take and stand by decisions. Job descriptions and advice were not produced or obtained on a timely basis. Mr Fry came over as a straight-forward and honest witness. He was quite candid about the market research that they undertook for their pitch amongst the Royal Ascot race goers, who might not be representative of society as a whole. He said that the purpose of the survey was to illustrate to Channel 4 IMG's enthusiasm and commitment to make racing much better and to indicate that IMG were "really up for this".

105 Mr Hicks came across as a driver of the pitch and was excited by the opportunity and genuinely wanted to broaden the audience base. The criticism of, in particular Mr Fry and Mr Hicks, for a lack of notes is made, but failing to make notes does not demonstrate that they acted on the grounds of Mr McCririck's age.

106 In relation to the decision to dismiss Mr McCririck, it is quite clear that Mr Hicks had wanted Mr McCririck to be excluded from the beginning, and, on 17 October, he came out and said what he thought. He expressed the view that there was a paradox of Mr McCririck being involved on Crown Jewel days, when those were the very days when Channel 4 wanted to attract the new broader audience. From the evidence before us it is clear that Mr McCririck's standing went down as his celebrity profile increased and further evidence of his personal behaviour and opinions became public knowledge.

107 Ms Hunt remained on the periphery and left matters to Mr Aitchison. There is evidence that there was a failure to engage with those who were removed from their previous roles, in particular in relation to Mr Cattermole and Mr Down who had been presenters. The view was that they would not want reporter roles because they had previously been presenters, but at no time did anybody sit down and ask them.

108 Mr Aitchison's request for job descriptions was desultory. The HR advice was given too late and after the event as Mr Aitchison himself admits. Ms Hunt did not use her experience over many years and as a result of the O'Reilly v BBC decision (3/626.1 to 626.52), to question the process or test that the process was being handled in a fair and open way. It is notable that Ms Hunt told the Tribunal that, when she joined Channel 4, she introduced specialist diversity training for commissioning editors as a result of her experiences in O'Reilly, but this was not compulsory and Mr Aitchison never attended. The Tribunal hopes that these shortcomings will be rectified in future.

109 Mr McCririck has complained of unfairness in that the Respondents did not warn him about his style, or ask him to modify his approach, and also in the way the decision was communicated to him. It is quite true that Mr McCririck was not warned about his style, although he may have had an inkling arising from his discussions with Mr Thompson when he was notified of the reason for the reduction of his days in 2008 and 2010. No discussion took place with him. Mr Hicks thought it would have been disingenuous for him to have spoken to Mr McCririck about what role he might play on the programme, given his clear view of Mr McCririck, but it would have been open for Mr Aitchison to speak to him. Mr McCririck has not been handled with courtesy or respect and his complaints of unfairness have some merit, but this is not an unfair dismissal complaint and the Tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably or unfairly. Unfairness is only relevant if there is evidence that others, who did not share the protected characteristic, would have been treated differently. None of the presenters of Channel 4 Racing, were told once the tender had been won by IMG, that there was going to be a new look and that this might result in individuals losing their roles.

110 Ms Eady has relied on what happened to others in the team from Highflyer. Mr Down (aged 55), Mr Cattermole (aged 51), Mr Derek Thompson (aged 62), and Ms Graham (aged 52) were not offered on-screen roles. However, Mr Cunningham (aged 52) and Mr McGrath (aged 58) were offered new on-screen roles and included in the new line-up, although Mr Cunningham was a new presenter who had not been involved with Highflyer. IMG wanted to involve John Francome (aged 60), but Mr Francome declined the opportunity to be a pundit and could not be persuaded to change his mind. There is no pattern of age discrimination in the light of this evidence.

111 Ms Eady has also relied on Tanya Stevenson (aged 43). Ms Stevenson on all the evidence was well respected, knowledgeable and liked. The only criticism of her was made by Mr Aitchison who stated in answer to an e-mail from Mr Fry on 13 August (5/1472):

"I am not convinced with Tanya's broadcasting skills and have been approached by a number of people".

No one else shared this view and Mr McCririck himself has been fulsome in his praise for Ms Stevenson for whom he had enormous respect. He had worked with her since 2002 and emphasised that they worked as a team. The Tribunal notes that Ms Eady has characterised Mr Stevenson as a direct comparator because Ms Stevenson (aged 42) was kept on and identified as the main betting reporter, whilst Mr McCririck (aged 72) had his contract terminated. The reason that Ms Stevenson was retained was that she was well respected, knowledgeable and liked, whilst Mr McCririck's broadcasting style was seen as incompatible with the aim to produce a high quality, serious mainstream programme to appeal to a wider audience.

112 The Tribunal is not satisfied on the evidence that the fact that Mr McCririck was dismissed whilst Ms Stevenson was kept on, and the fact that those dismissed were all over 50, is sufficient for the Tribunal to infer in the light of the evidence that the reason for Mr McCririck's dismissal, was as Mr Hicks said, that at best Mr McCririck was eccentric, and at worse he was a loudmouthed male chauvinist whom Mr Hicks did not want as a central figure for that reason alone.

113 The Tribunal has considered the role of Ms Hunt. Both Mr Aitchison and Ms Hunt agreed that the decision, of those who had worked intensively on the project and had the requisite expertise, was put to Ms Hunt on 22 October for her to sign off or veto. Ms Hunt's evidence was that she was not knowledgeable about horse-racing. Ms Hunt had not been previously involved in considerations of Mr McCririck until 22 or 23 October. She did give earlier advice to Mr Aitchison that he should seek advice from Human Resources, which was good advice. It is noted that as a result of her experiences in O'Reilly, Ms Hunt introduced training for commissioning editors on diversity when she joined Channel 4, although she did not make it compulsory. This, she should do. Mr Aitchison had not availed himself of the training. Ms Hunt did have the right to veto and did not question why the four individuals who were going were all aged over 50.

114 The Tribunal has noted the e-mail from Clare Balding to Ms Hunt of 15 November 2012 (6/1884). In on the e-mail, Ms Hunt said that the decision had nothing to do with decisions relating to other work, it was to do with Mr McCririck's appearances. She said that how one conducts oneself in reality shows is the issue. Mr McCririck's appearances led to him being diminished in the eyes of the viewing public. His decision was not the relevant factor, but what he allowed to the public to see was very relevant. She distinguishes between his appearances and the manner in which he conducted himself when making those appearances.

115 In Ms Hunt said that she apologised to Ms O'Reilly. In the witness statement of Ms O'Reilly, that was supplied to the Tribunal on 7 October 2012, Ms O'Reilly cited the London "Evening Standard" and referred to Ms Hunt stating that

"I have learned from that case. I have apologised personally to Miriam O'Reilly. The profound effect (of the case) made me acutely aware of my responsibilities in this area."

Ms O'Reilly states:

"(4) I can confirm that I have never received any form of apology from her. I was very angry when I read that Ms Hunt said she apologised personally to me. At no time did this happen."

As a result of this, Ms Hunt filed a second supplemental witness statement in which she says:

"(2) I did say in my evidence to the Employment Tribunal on 4 October 2012 that I apologised to Miriam O'Reilly following the decision in her case against the BBC in Bristol Magazines Ltd. I was referring to my comments quoted in a Guardian Newspaper article dated 18 July 2011 .....where I was quoted as saying '*I am very mindful now that decisions you take have a very deep impact on people's lives. I absolutely regret it, the distress it caused for Miriam*'. My expression of regret for the distress caused to Miriam O'Reilly was genuine and I am sorry."

Ms Hunt goes on to say in paragraph 3:

"Following the Employment Tribunal findings in Miriam O'Reilly's case, correctly or incorrectly, I thought it was unlikely she would welcome a direct approach from me. I therefore chose instead to say something in public and on record and did that through the interview I gave to the Guardian Newspaper ..."

The Tribunal finds it disingenuous of Ms Hunt to think that an expression of regret given in a newspaper article six months after the decision amounts to an apology to Miriam O'Reilly. The fact that Ms Hunt told the Tribunal without qualification that she had apologised to Miriam O'Reilly goes to her credibility and is disingenuous in the extreme.

116 Mr McCririck has alleged that Channel 4's viewing figures for racing have plummeted. On the evidence of (7/2385.9) there has been a 6% drop in viewing figures on a like for like basis and Mr Hicks accepted that Mr Aitchison said that in 2013, because of the weather, there were no race meetings in January, which meant viewing figures were down 18% by the end of January, but this has been made up to a deficit of 6%. The weather can cause similar fluctuations. Mr Hicks in his evidence said that "the jury is out" on the question of viewing figures. The Tribunal has insufficient evidence to draw any conclusions.

117 During the evidence, Mr McCririck has referred to Miriam O'Reilly, Arlene Phillips, Moira Stuart and Selina Scott as the basis for his allegation that Ms Hunt is a serial age offender. Mr McCririck also asserts that Mr Fry of IMG abruptly sacked Clive Everton (aged 69) from the BBC snooker team. The Tribunal has no evidence of any proceedings brought by Ms Phillips, Ms Stuart, Ms Scott or Mr Everton. The decision of the Employment Tribunal in O'Reilly v BBC (3/626.1 to 626.52) is not binding on this Tribunal. There has been extensive cross examination of Ms Hunt on findings made in that decision and the lessons that she learnt from it, but any connection with the decision in that case has not been identified in the list of issues, nor were the Respondents questioned about the findings in that case and what might have been learnt from them or otherwise in the Equality Act questionnaire (1/108 to 115).

118 Mr McCririck has been subjected to a detriment by not being permitted to work as a presenter on Channel 4 Racing. He is aged 73, 72 at the date his

contract was terminated. The Tribunal must consider whether he has shown the difference in age and a detriment in order to decide whether it could (not whether it would) draw an inference in accordance with the Barton guidelines set out in the Annex to **Igen v Wong**. Ms Eady argues that because the 72 year old Mr McCririck's contract was terminated, whereas Ms Stevenson who was 42 was kept on means that the burden shifts to the Respondent. She also argues that the shifting of the burden is further supported by those who were dismissed all being aged over 50. Ms Eady argues that the decisions taken by Channel 4 of those who will no longer be used for on-screen presenting, adversely affected older presenters, in particular those aged over 50. She also relies on the bid by IMG being predicated upon the fact that it was intended to use "younger presenters to attract younger audiences". All the evidence before us from Ms Hunt and Mr Hicks was that younger presenters did not attract younger audiences.

119 Ms Eady relies on the annotations on the score sheets for the tender process. This of itself will not be sufficient for the Tribunal to draw an inference. She also argues there is an absence of a credible explanation for the IMG media pitch. The Tribunal rejects this contention and notes that although in her oral submissions, Ms Eady relied on paragraphs 110.1 to 110.5 of her written closing submissions, she made no specific explanation of paragraph 110.4. Ms Eady does, however rely on the different explanation provided for the termination of Mr McCririck's contract in these proceedings to that recorded in Mr Aitchison's report setting out the reasons for the proposal that he was putting to Ms Hunt (5/1733 to 1735). That explanation was that Mr McCririck's style of broadcasting has become somewhat pantomime, with his exaggerated delivery and playing to the crowd, and that his tic tac action was also increasingly irrelevant. It was stated that his update noted at the end of that report said that the decision to terminate was based on Mr McCririck's broadcasting skills. We do not consider this to be sufficient for the Tribunal to be put in a position where it could draw an inference.

120 Having undertaken that analysis, the first two matters that Ms Eady relies upon, namely the termination of Mr McCririck's contract whilst Ms Stevenson was retained, and that none of those dismissed were under the age of 50, are sufficient for the burden to shift in accordance with the guidance in **Igen v Wong**. In these circumstances, it is for the Respondent to demonstrate that the treatment of Mr McCririck was a proportionate means of achieving a legitimate aim.

**The issue of whether the treatment of Mr McCririck was a proportionate means of achieving a legitimate aim**

**The Law**

121 Section 13(2) of the Equality Act 2010 provides:

"If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

122 In order to determine this issue, the Tribunal must first identify the aim which is thought to be achieved and ask whether it is legitimate and secondly ask whether the means adopted to achieve that aim are proportionate.

123 Both parties have referred the Tribunal to **Seldon v Clarkson Wright & Jakes (a partnership) [2012] ICR 716 UKSC**. **Seldon** concerned the question of compulsory retirement ages, which is different from the claim made by Mr McCririck. **Seldon** made clear that the justification test for direct discrimination is narrower than that for indirect discrimination. In her judgment Baroness Hale stated at paragraph 51:

"It now seems clear that the approach to justifying direct age discrimination cannot be identical to the approach of justifying indirect discrimination and that regulation 3 of the 2006 Age Regulations (and its equivalent in Section 13(2) of the Equality Act 2010) must be read accordingly.

At paragraphs 55 to 62 Baroness Hale states:

"55. It seems, therefore, that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it.

56. Two different kinds of legitimate objective have been identified by the Luxembourg court. The first kind may be summed up as *inter-generational fairness*. This is comparatively uncontroversial. It can mean a variety of things, depending upon the particular circumstances of the employment concerned: for example, it can mean facilitating access to employment by young people; it can mean enabling older people to remain in the workforce; it can mean sharing limited opportunities to work in a particular profession fairly between the generations; it can mean promoting diversity and the interchange of ideas between younger and older workers.

57. The second kind may be summed up as *dignity*. This has been variously put as avoiding the need to dismiss older workers on the grounds of incapacity or underperformance, thus preserving their dignity and avoiding humiliation, and as avoiding the need for costly and divisive disputes about capacity or underperformance. Either way, it is much more controversial. As Age UK argue, the philosophy underlying all the anti-discrimination laws is the dignity of each individual, the right to be treated equally irrespective of either irrational prejudice or stereotypical assumptions which may be true of some but not of others. The assumptions underlying these objectives look suspiciously like stereotyping. Concerns about capacity, it is argued, are better dealt with, as they were in *Wolf* and *Prigge* under article 4(1), which enables them to be related to the particular requirements of the job in question.

58. .... The focus must therefore turn to whether this is a legitimate aim in the particular circumstances of the case.

59. The fact that a particular aim is capable of being a legitimate aim under the Directive (and therefore the domestic legislation) is only the beginning of the story. It is still necessary to inquire whether it is in fact the aim being pursued. The ET, EAT and Court of Appeal considered, on the basis of the case law concerning indirect discrimination (*Schönheit v Stadt Frankfurt am Main*, Joined Cases C-4/02 and C-5/02, [2004] IRLR 983; see also *R (Elias) v Secretary of State for Defence* [2006] 1 WLR



3213), that the aim need not have been articulated or even realised at the time when the measure was first adopted. It can be an ex post facto rationalisation. The EAT also said this [50]:

1.

“A tribunal is entitled to look with particular care at alleged aims which in fact were not, or may not have been, in the rule-maker's mind at all. But to treat as discriminatory, what might be a clearly justified rule on this basis would be unjust, would be perceived to be unjust, and would bring discrimination law into disrepute.”

60. There is in fact no hint in the Luxembourg cases that the objective pursued has to be that which was in the minds of those who adopted the measure in the first place. Indeed, the national court asked that very question in *Petersen*. The answer given was that it was for the national court “to seek out the reason for *maintaining* the measure in question and thus to identify the objective which it pursues” [42] (emphasis supplied). So it would seem that, while it has to be the actual objective, this may be an ex post facto rationalisation.

61. Once an aim has been identified, it has still to be asked whether it is legitimate in the particular circumstances of the employment concerned. For example, improving the recruitment of young people, in order to achieve a balanced and diverse workforce, is in principle a legitimate aim. But if there is in fact no problem in recruiting the young and the problem is in retaining the older and more experienced workers then it may not be a legitimate aim for the business concerned. Avoiding the need for performance management may be a legitimate aim, but if in fact the business already has sophisticated performance management measures in place, it may not be legitimate to avoid them for only one section of the workforce.

62. Finally, of course, the means chosen have to be both appropriate and necessary. It is one thing to say that the aim is to achieve a balanced and diverse workforce. It is another thing to say that a mandatory retirement age of 65 is both appropriate and necessary to achieving this end. It is one thing to say that the aim is to avoid the need for performance management procedures. It is another to say that a mandatory retirement age of 65 is appropriate and necessary to achieving this end. The means have to be carefully scrutinised in the context of the particular business concerned in order to see whether they do meet the objective and there are not other, less discriminatory, measures which would do so.”

### Conclusions

124 The first issue is for the Tribunal to determine what was the aim which was thought to be achieved? The aim of Channel 4, and indeed IMG, was that, Channel 4, having won the bid for the Crown Jewels, horse-racing should be brought to a wider audience.

125 The subset of that question is whether the aim was legitimate. Channel 4 is a public service broadcaster and is state owned, as is the BBC. Mr Linden submits that the objective of Channel 4 and IMG were sufficiently “of a public interest nature” to be legitimate. He argues that the entirely legitimate aim of the Respondents was that the new programme should appeal to as wide an audience as possible. Ms Eady argues that the categories of legitimate social policy objective identified by the Supreme Court in **Seldon** were, firstly, inter-generational fairness and, secondly, dignity. She argues that even if a legitimate objective was established in this broad sense, the Respondents must go on to

demonstrate that it was legitimate in the particular circumstances of the employment concerned, and that the discriminatory treatment in question was a proportionate means of achieving that aim. She argues that the assertion that the objectives of Channel 4 were sufficiently “of a public interest nature” to be legitimate is too broad. In oral arguments Ms Eady suggested that it would be wrong if a public service broadcaster seeking a wider audience dispensed with someone with Mr McCrerrick’s age and profile.

126 The Tribunal have taken into account that the evidence in this case is that the aim was to bring horse-racing to a wider audience. All the evidence is that Mr McCrerrick’s pantomime persona, as demonstrated on the celebrity television appearances, and his persona when appearing on Channel 4 Racing, together with his self described bigoted and male chauvinist views were clearly unpalatable to a wide potential audience. This is demonstrated by the talent tracker at (5/1543 to 1547).

127 In addition, the invitation to tender by Channel 4 (3/855) states:

“The key objective is to grow new audiences while retaining the support of the core loyal racing loving viewer”.

The aim is legitimate in the particular circumstances of the employment concerned, namely horse-racing coverage on television. Channel 4 is the contractor that provides this coverage. They needed to attract a wider audience and their aim is legitimate in the circumstances of better horse-racing coverage.

128 The Tribunal is satisfied that the Respondent had the legitimate aim of attracting a wider audience to horse racing.

129 The second part of this issue is whether the means adopted to achieve that aim are proportionate.

130 Mr McCrerrick’s celebrity persona was well known and he was also strongly linked to Channel 4 Racing. As Mr Hicks argued at the meeting on 17 October 2012, to engage him as a celebrity presenter for Crown Jewel events would be counter productive when it was from those very Crown Jewel events that Channel 4 hoped to attract new viewers. We are satisfied that the means adopted to achieve the aim by dismissing Mr McCrerrick were proportionate.

131 The Tribunal is satisfied that the Respondent has demonstrated a proportionate means of achieving a legitimate aim and in those circumstances it is the unanimous judgment of the Tribunal that Mr McCrerrick’s claim fails. However, lest we are wrong we have determined the remaining issue.

**The issue of whether IMG knowingly helped Channel 4 to contravene the Equality Act 2012 for the purposes of Section 112 of the Act**

*The Law*

132 Section 112(1) of the Equality Act 2010 provides:

“(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or Section 108(1) or (2) or 111 (a basic contravention).

(5) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating to the provision of this act to which the basic contravention relates.”

133 In **Anyanwu & Ebuzoeme v South Bank Students’ Union and South Bank University [2001] ICR 391 HL**, as analysed by Arden LJ in **Gilbank v Miles [2006] ICR 1297**, Arden LJ states:

“It is important to look at the precise acts of discrimination which the tribunal has found and consider whether the alleged aider has done anything to assist those Acts.”

134 The Tribunal has also been referred by both counsel to **Hallam v Avery [2001] ICR 408 HL**. In that case Lord Millett said:

“The man who helps another to make up his mind does not thereby and without more help the other to do that which he decides to do.”

In addition in the Court of Appeal in **Hallam v Avery [2000] ICR 583 CA**, Judge LJ stated:

“(36) ... liability is not established unless the secondary party knows that the party from whom his liability is alleged to derive is treating, or is about to treat, or is contemplating treating someone “less favourably” on racial grounds, and with that knowledge, or knowing that such treatment would be likely to result in doing so, he provides him with aid.”

*Conclusions*

135 Since the Tribunal has found that Channel 4 did not contravene the Equality Act, the primary position of the Tribunal is that IMG cannot have helped them to do so. However, even if we are wrong and Channel 4 did act unlawfully, it was Mr Hicks who persuaded Mr Aitchison that Mr McCririck should not be offered an on-screen position. That does not amount to helping. It was Mr Aitchison who decided not to include Mr McCririck. Mr Hicks’s views may have

been a catalyst, but they do not amount to help. The reason for Mr Hicks's views were nothing to do with Mr McCririck's age. They were related to his persona.

136 Mr McCririck was dismissed because of his persona emanating from his appearances from Celebrity television shows and the associated press articles resulting from them together with his appearances as a broadcaster on Channel 4 Racing where, as he accepted, his style of dress, attitudes, opinions and tic tac gestures were not in keeping with the new aims, and his opinions seen as arrogant and confrontational.

137 In these circumstances, even if Channel 4 had acted in contravention of the Equality Act, IMG did not knowingly help them to do so for the purposes of section 112 of that Act and in these circumstances, it would be the unanimous judgment of the Tribunal that IMG did not knowingly help Channel 4 for the purposes of section 112 of the Equality Act. .

**RESERVED REASONS**

13<sup>th</sup> November 2013 London Central  
Date and place of signing

*D. M. Hughes*

EMPLOYMENT JUDGE

13/11/13

REASONS SENT TO THE PARTIES ON

13/11/13

AND ENTERED IN THE REGISTER

*[Signature]*

FOR THE TRIBUNAL OFFICE