EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Y Iqbal	v	Wokingham Borough Council

Heard at: Watford (via CVP) **On:** 30 November 2022 (part-heard); 16 January 2023 (adjourned); & 19 May 2023

Before: Employment Judge Fredericks-Bowyer
Tribunal Member Betts
Tribunal Member Smith

Appearances
For the claimant: In person
For the respondent: Ms Gyane (Counsel)

RESERVED JUDGMENT

1. The claimant's complaints of less favourable treatment on the grounds of his age and sexual orientation are confirmed as dismissed following the unless order dated 8 February 2022.

2. The claimant's complaints of less favourable treatment on the grounds of his sex and/or race and/or religious beliefs are not well-founded and are dismissed following determination at this full merits hearing.

REASONS

1. This is our reserved judgment following the hearing of this case over two separate days (convening on another day and adjourning upon the claimant's non-availability). The judgment is the unanimous conclusion of us all after careful and detailed deliberations on what we heard over the two days, together with our assessment of the written evidence.

The claim and issues

2. The case is about an unsuccessful application made by the claimant to take a role as a 'Pay and Reward Specialist Consultant'. He was one of two candidates interviewed for the post, and was the candidate not considered by the respondent to be appointable. He brought a claim, by ticking the boxes of his ET1, of direct discrimination against the respondent on the grounds of: sex; sexual orientation; age; race; and religious belief. The complaints were not all particularised in the narrative of the ET1.

3. On 8 February 2022, Employment Judge Anstis made an unless order for the claimant to provide reasons in writing why the age and sexual orientation discrimination complaints should nor be dismissed. The claimant did not provide those reasons, but no confirmation has been produced confirming those dismissals until this judgment.

4. On 30 June 2022, the case came before Employment Judge Tegerdine in a telephone preliminary hearing. The issues which we determined in this hearing were set at that point, and were below. The issues relating to remedy are not included below because they are not relevant following the outcome of the cliam:-

    4.1. ***Time limits –***

        4.1.1. *Were the discrimination complaints made within the time limit in <u>section 123 Equality Act 2010</u>? The Tribunal will decide:*

            4.1.1.1. *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?*

            4.1.1.2. *If not, was there conduct extending over a period?*

            4.1.1.3. *If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*

            4.1.1.4. *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*

                4.1.1.4.1. *Why were the complaints not made to the Tribunal in time?*

                4.1.1.4.2. *In any event, is it just and equitable in all the circumstances to extend time?*

    4.2. ***Direct sex, race and religion/belief discrimination (Equality Act 2010 section 13) –***

        4.2.1. *The claimant's a male and is Muslim. The claimant's racial group is Asian Pakistani. The claimant compares himself with people in the non-Muslim, non-male, non-Asian Pakistani group.*

        4.2.2. *Did the respondent do the following things:-*

            4.2.2.1. *Not initially shortlist the claimant for interview, even though he satisfied the relevant criteria;*

4.2.2.2. *Add an extra layer to the recruitment process, namely a "fit call";*

4.2.2.3. *Arrange for Jon Forde to conduct the fit call with the claimant instead of the director, Keeley Clements, who was supposed to conduct the call;*

4.2.2.4. *Make a pre-determined decision not to recruit the claimant before the fit call;*

4.2.2.5. *Ask the claimant questions during the fit call which were inappropriate in an aggressive manner, in an attempt to find a way of excluding the claimant;*

4.2.2.6. *Deliberately arrange the claimant's interview at 1:30pm on a Friday afternoon and not offer any flexibility, to try to discourage the claimant from attending the interview (the claimant attends the local mosque on Fridays);*

4.2.2.7. Lead the claimant to believe in an email that he would be able to rely on his notes during the interview, but then say at the beginning of the interview that the interview was going to be quick, and imply that the claimant could not use his notes;

4.2.2.8. Tell the claimant that he would be asked behavioural questions during the interview, but then not ask behavioural questions;

4.2.2.9. Did Christine Bennett look disinterested during the interview, keeping rolling her eyes during the interview, keep rolling her eyes, and not ask the claimant probing questions;

4.2.2.10. Did Christine Bennett and Jon Forde have negative body language during the interview;

4.2.2.11. Did Jon Forde keep asking the claimant during the interview whether "YOU" had done things, thereby implying that the claimant wasn't telling the truth;

4.2.2.12. When the claimant offered to give the respondent copies of reports, did Jon Forde and Christine Bennett 'snap' at the claimant and say they didn't want the reports;

4.2.2.13. Was Christine Bennett reluctant to provide the claimant with feedback after the interview, and did she send a rude and aggressive email to the claimant in which she spelt the claimant's name wrong;

4.2.2.14. Did Christine Bennett provide oral feedback to the claimant, in which she said the claimant had been waffling and going off subject during the interview, and suggest he had been ill prepared for the interview;

4.2.2.15. Did Christine Bennett provide written feedback to the claimant, in which she implied that the claimant didn't have the experience to be able to handle stakeholders, which was not true;

4.2.2.16. Did the Deputy Chief Executive cover up the discriminatory conduct of the individuals who had interviewed the claimant by justifying their decision not to include him, whilst saying at the same time that the claimant had been the strongest candidate on paper.

4.2.3. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who he says was treated better than he was.

4.2.4. If so, was it because of race, sex, and religion/belief?

4.2.5. Did the respondent's treatment amount to a detriment?

The hearing

5. The hearing was listed for one day. This was not sufficient time to hear the claim, and the first day ended without hearing the evidence of Ms Bennett or closing submissions.

Application to admit additional documents

6. Part of the reason time was limited was because the respondent had produced additional late disclosure in the form of a supplementary bundle of documents which ran to 13 pages. These related to additional e-mails discovered relating to the recruitment process the claimant went through, and statistical information showing the backgrounds of members of staff at the respondent. The respondent made an application to include these documents into the written evidence available at the hearing.

7. The claimant objected to the application, saying that they *"would not be allowed"* because they were submitted after the disclosure deadline set by Judge Tegerdine. He acknowledged that he had been sent the documents some weeks previously, but said that he had not read the documents. He had sent an e-mail to the respondent saying that he would not read them. The respondent urged us to include the documents, as they are relevant to the issues and disclosing them once discovered was in line with the respondent's disclosure obligations.

8. In our view, the documents were directly relevant to the list of issues. We considered that the claimant had had ample opportunity to read and consider the documents disclosed, them being few in number and being in his possession for some time prior to the hearing. It was unreasonable for him to choose to ignore the documents. More fundamentally, we noted that the 'deadline' referred to is not a date after which disclosure cannot be made; it is the date by which all known or discoverable documents should be disclosed. Anything discovered after that time can still be admitted into the evidence if it is relevant. It was open to the claimant to conduct the research required to appreciate this. The rules of litigation and procedure apply to him in the same way as a represented party (per Lord Sumption in *Barton v Wright Hassell [2018] UKSC 12)*. It was in accordance with the overriding objective for us to consider the documents and so we admitted them.

9. The claimant was unhappy with our decision, and commented that the decision showed that we were going to take against him at every turn right from the beginning. We reject that view. We applied the rules of procedure to an application made in front of us, and we would make that particular decision every time no matter what the parties are in front of us.

Reconvening the hearing

10. At the end of the first day, the Panel identified the three earliest dates upon which the Panel could re-convene. These were 16, 17 and 18 January 2023. The parties were instructed to write into the Tribunal to inform it if any of those days were not acceptable, failing which the matter would be listed on one of those days. The respondent confirmed availability for 16 January 2023. The claimant did not send any e-mail, and so the case was listed for 16 January 2023 on the understanding that no objection had been made.

11. Shortly before 16 January 2023, the claimant complained that he was unable to attend on that date due to work, and said that the hearing had been listed without consulting him. He says he had been awaiting correspondence from the Tribunal. The Panel and the respondent attended the hearing on 16 January 2023. The claimant did not, and cited a family bereavement in an application to postpone the hearing. That postponement was granted on the morning of 16 January 2023.

12. There followed correspondence about convening a return date for the end of the hearing. Each side had dates to avoid, and we agreed that no hearing should be listed when the claimant was observing Ramadan. Eventually, I asked the return hearing be listed for 19 May 2023 to ensure it was heard. This was a Friday, when the claimant attends Friday prayers. Indeed, part of his claim against the respondent relates to fixing his interview across his prayer window. We made consequential adjustments to the hearing, with a long lunch break, to allow the claimant to attend his prayers.

13. We reserved our decision to ensure we had time to properly reflect on the evidence we heard over the course of two days which were, in the end, regrettably spaced apart. We have so reflected, and this judgment is a result of those careful thoughts and deliberations.

Representatives, witnesses and documents

14. The claimant represented himself throughout these proceedings and gave sworn evidence in support of his own case. The respondent was represented each time before us by Ms Gyane of Counsel. For the respondent, we heard sworn evidence from: Christine Bennett (former Interim Assistant Director of Human Resources and Organisation Development at the respondent); Jon Forde (former human resources consultant at the respondent); and Graham Ebers (Deputy Chief Executive at the respondent). We had access to an electronic bundle of documents which ran to 296 pages and the additional bundle of documents which ran to 13 pages. In this judgment, references to 'pages' or 'page' refers to the pages in that bundle. Reference to 'additional pages' or 'additional page' refers to the pages of the additional bundle.

Relevant facts

15. The relevant facts, as we find them, are as set out below. These facts are found, as a Panel of three, on the balance of probabilities. In other words, we consider it more likely than not that these facts occurred and, when considering a direct conflict of fact, we consider that the facts we find are the most likely to have occurred. Where we have resolved a conflict in the evidence, we explain how we have done so at the relevant point.

16. Generally, we noted the claimant's propensity to interpret matters against his interests even when those matters are neutral or where those things would happen every time in any event. His reaction to our case management decision is one example played out live in front of us, but the propensity is also displayed throughout the written evidence where the claimant seems to see ulterior motives behind common practices.

17. This means that, when assessing the reliability of his recollection of events of the relevant time, we were conscious that the claimant's lens and interpretation may not have been accurate at the time even before this passage of time where he is likely to have replayed and rehearsed his thoughts about the claim during its preparation. For this reason, we have in our usual way also sought to understand the evidence we heard through verification with the documentary evidence.

18. We have looked at that documentary evidence to consider the overall context before we have simply accepted what is being said as factually correct.

The claimant

19. The claimant is a practising Muslim, Asian Pakistani man. His religious practice includes observing Muslim holidays and attending prayers for around a two hour block on a Friday. He attends one of either an early afternoon prayer, or a mid-afternoon prayer. His first name is Yaser.

The application stage

20. In May 2021, the respondent advertised a role of 'Reward Specialist'. It was a 18 month fixed term contract with the closing date of 25 May 2021. The job was advertised on 'Jobs go Public' and an application system was hosted on a web based

programme. The advert was not shown to us in the bundle, but it is agreed between the parties that the job process required there to be a completed application form for the application to be processed.

21. The claimant applied for the role by filling in the application form. He did not attach a CV to the application form because he felt that all of the information was within the application form itself. The claimant's application form was from pages 57 to 70. When asked to give his availability for interview, the claimant indicated that he was available at any time and he submitted no dates to avoid. The respondent witnesses told us, and we accept, that they had no access to the equal opportunities data where the claimant may have disclosed his religion. We find that the claimant gave no indication in his written application that he was (1) a Muslim, and (2) that his practice included attending prayer on Fridays.

22. Page 73 records that three individuals applied for the job. The other two candidates attached CVs to their application forms. The claimant did not. The respondent has not presented any witness evidence which indicates that a CV was a required part of the application process. The claimant maintains in his evidence that there was no requirement for there to be a CV.

23. Page 74 shows that the claimant was not initially shortlisted for interview, and he was told he was unsuccessful on 4 June 2021. The record at page 74 indicates that Becky Weeks decided to decline the claimant's application. He requested feedback (page 77) because he considered that he had met all of the criteria required for the role.

24. On 7 June 2021, Becky Weeks e-mailed Mr Forde to ask for him to provide feedback for the claimant (page 80). Mr Forde replied on the same day saying that he had not been sent an application form for the claimant. He had only seen the other two and asked for the application to be sent to him. Becky Weeks then writes (page 79):-

> *"Oh ignore me, I went back as the application form wasn't even completed nor did he send in a CV when requested so Keeley told me to decline as no effort was made"*.

25. Becky Weeks wrote to the claimant again on 8 June 2021 (page 81). The relevant part of her e-mail says:-

> *"I believe the CV wasn't submitted as part of your application which was requested as part of the online process. Due to the high volume of applicants, only completed applications which combined of application form and CV have been considered.*
>
> *If you have an up to date CV that you can send me, I can ask the team to review your documents and provide feedback."*

26. We pause here to observe that this e-mail contains a misrepresentation. The evidence indicates that only three people applied for the role, of which two were shortlisted. It cannot be correct that the decision was taken to only consider applications which attached CVs *due to the high volume of applicants*. The claimant replies on 9 June 2021 (page 224). He objects to the notion that his application was

incomplete: *"the online statement specifically mentioned that application must be completed and CV would not be accepted"*.

27. There is a live conflict between the parties about whether or not the application process required a CV to be uploaded for it to be progressed. We do not have the primary documents which would resolve the conflict, which is unfortunate. The claimant considers that there was no requirement for the CV to be uploaded, and relies on the interpretation set out at page 81 above. He admits that there was an option to upload a CV but says he chose not to. He observed in his evidence that it would be duplication to fill in an application form and a CV and does not think it is a reasonable expectation. He considers that the fact he did not submit a CV is being used against him to screen the real reason that his application was not shortlisted, which he contends is that his name revealed his protected characteristics.

28. None of the respondent witnesses were involved with the construction of the advert or the application portal. Their understanding is that the candidates were asked to submit an application form or CV, but none of them had direct knowledge about that issue. It is apparent from the e-mails quoted above that Becky Weeks understood that a CV was required for candidates to be shortlisted. She was sufficiently confident about that to (1) tell Mr Forde that this is the reason he was not sent the form, and (2) tell the claimant that this is why he had not been shortlisted.

29. We also consider that the claimant's words about this issue are illustrative. His understanding is that a CV would not be accepted, but this interpretation is at odds with his understanding that a CV could be submitted. If a CV was not going to be accepted, then why would there be the ability to send one? Additionally, we consider it relevant that the other two candidates did attach a CV, which we consider would be an unlikely occurrence if the instructions were that a CV would not be accepted. Finally, we are aware from public sector recruitment processes more generally that it is common for such platforms to require both a CV and an application form to be completed.

30. We are finding facts on the balance of probabilities. Given the internal e-mails at the respondent, the fact the other candidates did upload CVs, and the simple fact that the claimant was not shortlisted when he did not provide a CV, we find that the candidates were requested to upload a CV alongside their application forms. As a result, we find that the claimant's application form was not complete when he submitted it, and this is why his application was not initially shortlisted. We find that the comment made to the effect that there was a high value of applicants was a falsehood to provide more context for the decision made; but it does not of itself undermine the core requirement for a CV to be present.

31. Mr Forde reviewed the claimant's CV (pages 84 to 90) and instructed that he should be shortlisted with the additional comment: *"best one on paper so far"* (page 93). In cross examination, Mr Forde stood by this view. He said that the claimant presented the strongest application at this stage, but that his interview performance did not support the information given on the written application.

The 'fit call'

32. On 10 June 2021, Becky Weeks wrote to the claimant to invite him to a ‘fit call’ (page 94). The operative part of the e-mail reads:-

> *“Ahead of the interviews, the Director likes to select candidates who’s CVs show some of the experience they could be looking for to participate in a ‘fit call’.*
>
> *These video calls only last 20 minutes and it’s just an initial chat to identify some key attributes that they are looking for within candidates.*
>
> *You have been selected for a “fit call” and I would like to invite you to this on Friday 18 June at 15:00 for 20 minutes”*.

33. In our view, the wording of this e-mail is unfortunate. The tenor of the e-mail implies that the claimant has been selected individually for a ‘fit’ call for some reason, and the very fact it is called is fit call is likely to be alarming for someone who has any sort of insecurity about ‘fitting in’ because of, for example, a protected characteristic. However, despite our reservations about the way this part of the process was labelled and presented, it is a fact that every shortlisted candidate was invited for a fit call and the claimant was not singled out in any way by this step. Becky Weeks also confirmed this with the claimant when he asked for more detail on 14 June 2021 (page 95).

34. The claimant was told that Keeley Clements was the director who liked to do the fit call process. Mr Forde’s evidence was that Ms Clements was the intended interviewer but that she was not available on the day in question. Mr Forde therefore conducted the ‘fit calls’ with all three candidates on that Friday 18 June 2021. The call took place on a Friday afternoon, which the claimant claims was an instance of less favourable treatment because it meant he was unable to go to his usual Friday prayers. In evidence, he explained that a 20 minute fit call did not in itself pose a problem because he could still attend prayers around that short meeting. We note that the claimant did not flag an issue with attending interviews on Fridays at this point.

35. The claimant alleges that Mr Forde conducted the fit call in an unnecessarily rude and aggressive manner. In his witness statement, he says he found the line of questions to be inappropriate, but does not expand specifically about what it is he thought was inappropriate. Mr Forde is unsure what part of the call the claimant would find inappropriate. He does not recall anything particularly about the call other than his overall assessment that the claimant appeared competent to do the job and should be progressed to interview.

36. We are not persuaded by any evidence that the fit call was conducted in an inappropriate or aggressive or rude manner. If Mr Forde or the respondent were trying to eliminate the claimant from the application process, he could have simply been eliminated. Tellingly, in our view, the claimant had not been shy about raising issues he perceived at the time only days earlier. If he had encountered a problem with the fit call and the way it was actually conduced, we consider he would have said so. Consequently, we do not find as a fact that the claimant was subjected to a rude, aggressive or inappropriate fit call by Mr Forde. We find that the call was conducted appropriately and as anticipated by Mr Forde.

37. Following conducting the fit calls, Mr Forde provided his comments to Becky Weeks on the same Friday afternoon (page 98). One candidate did not attend. He recommended that the claimant and the other candidate should be interviewed. Of the other candidate, he wrote:-

> *"good, relevant experience at [REDACTED] (19 yrs) – recommend interview."*

38. Of the claimant, he wrote:-

> *"plenty of relevant experience, local government experience but as a consultant rather than employee – recommend interview."*.

The interview

39. The respondent decided that Ms Bennett and Mr Forde would conduct the interviews for the role. Mr Forde had initially suggested that Keeley Richardson interview instead of him (page 100), but Ms Richardson decided that he and Ms Bennett should conduct the interviews. We consider this a relevant fact because if, as the claimant seems to contend, Mr Forde had a hand in a scheme designed to make things difficult for the claimant to participate or succeed, then we do not consider he would seek to remove himself from the process.

40. The claimant was told on 28 June 2021 that he was going to be invited to an interview (page 103), with the invite itself arriving from Becky Weeks on the following day (page 104). The interview was to take place at 1.30pm on Friday 2 July 2021, over Microsoft Teams. He was told that the interview *"should last no longer than 90 minutes"*. He was also told:-

> *"The format of the interview will be competency based. You will need to provide specific examples of behaviours at your interview. You will be able to bring notes in with you and refer to these as prompts throughout your interview."*

41. The claimant responded to the invite on 30 June 2021 to confirm that he was available to attend. He did not raise any problem with attending a 90 minute interview from 1:30pm on a Friday afternoon. He did not ask whether it would be possible to move the interview slot either.

42. The interview was conducted by Ms Bennett and Ms Forde. The claimant contends that the interview was conducted in an extremely unprofessional manner and that he considered a decision had already been made. He says that the decision was made not to employ him because of one or more of the three protected characteristics. In his view, the problems began at the outset of the hearing. He says that Mr Forde told him that the interview would be 'quick', and this led him to feel that he would be rushed in the hearing and unable to use his notes.

43. Mr Forde and Ms Bennett disagree that there was any premeditation to the interview. Neither can recall with certainty whether anything was said which might have given the claimant the impression that his interview was rushed. Mr Forde admits he may

have indicated that the interview would not last to its full 90 minutes slot. He says this is because he did not consider that the questions to be asked would be sufficient for the interview to last that long. He thought it was more likely that the whole planned interview could be done by around an hour instead.

44. We do not consider that the respondent interviewers rushed the claimant's interview. The written record of the claimant's fit call does not indicate that Mr Forde felt the claimant was not suitable. In our judgment, if Mr Forde had decided not to employ the claimant, then he would not have been shortlisted following the fit call. It makes no sense to us that the respondent would decide, in the interim period, to not recruit the claimant. In our view, Mr Forde did make a comment to the effect that the interview would not be a long one, but this was made for the reasons he identified in his evidence. Nothing was said which was meant to stop the claimant from looking at his notes. We find that the claimant was mistaken with his interpretation that he could not look at his notes.

45. The claimant complains that his first interview questions asked him to define 'total reward'. He says that this unsteadied him because he was told that the interview would consist of behavioural questions and so he had not prepared for technical questions. This is claimed to be an instance of less favourable treatment. In fact, it is clear from the interview records (pages 120 to 138) that both candidates were asked this question. Additionally, we note that the e-mail instructions tell the claimant that the *"format of the interview will be competency based"*. This is evidently not the same as being told that there would be <u>only</u> competency based questions. We do not find any impropriety in the respondent asking the claimant non-behavioural questions in the interview, noting as we do that the other candidate was asked the same set of questions.

46. The claimant complains that the interviewers had negative body language during the interview, and that Ms Bennett was rude and was rolling her eyes in the interview. He raised these issues in his complaint to the respondent after the interview. Both Mr Forde and Ms Bennett deny that these happened. It is clear to us that the respondent was not impressed with the claimant's interview. In particular, it was said that the claimant (page 120):

> *"when off topic an rambled at times, had to be brought back to the question twice and stopped himself on one occasion when he realised he wasn't answering the question."*

47. It was also recorded that the claimant was (page 125) *"not suitable for role"* and *"goes off track and does not stick to the point"*.

48. In our view, it is likely that the claimant picked up on some negativity in the interview as the interviewers formed their views about him. However, we are not persuaded on the balance of probabilities that the interviewers had overly negative body language or that Ms Bennett was rude or rolled her eyes during the interview. Having had the benefit of seeing her in cross examination, we consider that scenario to be inherently unlikely. It also seems extremely unlikely that a professional in this field would behave in that way. We consider that this issue is an example of the claimant's mistaken interpretation of things he perceived around him. He did not have a good interview. We consider it would not have been pleasant to have a poor interview.

This does not mean that the interviewers are at fault, and we find no fault in respect of these factual allegations.

49. This theme extends to our findings about Mr Forde asking the claimant what he had done with an emphasis on "YOU". Mr Forde agrees that he did ask follow up questions with this emphasis in the interview. He does not agree with the claimant that these questions were designed to catch the claimant out or imply that he was lying. He says that he was trying to elicit evidence from the claimant about his contribution to projects where the claimant was either speaking in broad terms or referring to 'we'. Support for this is found on page 120, where a follow up question is recorded as *"what was his role?"* before a specific and focused answer is recorded. We prefer the respondent's evidence on this point.

50. It seems to us to be extremely unlikely that Mr Forde would be seeking to expose the claimant in this way. We consider it more likely than not that Mr Forde was simply trying to gather the evidence required to support the competency being explored – and this required the claimant to advise what he specifically did in the scenario being discussed. In our view, Mr Forde was trying to help the claimant by asking these questions.

51. Finally, the claimant contends that the interviewers snapped at him when he offered to share reports to support his interview performance. The respondent witnesses deny snapping, but both said it would be inappropriate to view those reports which may contain commercial information about other organisations. We prefer this explanation to the account of aggression coming from the claimant's views. The claimant does not give any reason why there would be any aggression in his direction apart from a suspicion of racism or sexism. We find the claimant's account to be extremely unlikely to be accurate, and he did not uncover any matters in cross examination that has caused us to conclude anything differently.

52. In summary, in relation to the interview, we resolve none of the conflicted facts in the claimant's favour. In our judgment, the interview transpired as the respondent has recorded in its records of the interview, and as Mr Forde and Ms Bennett describe it doing.

Feedback

53. The claimant did not get appointed to the role. Ms Bennett called him to tell him on 5 July 2021. The claimant says that the feedback was that she did not feel he could manage the respondent's senior stakeholders. Ms Bennett denies that she said this, and says that the feedback was to the effect that the successful candidate had more applicable experience for the role. Ms Bennett's account of the conversation (page 132) records that the claimant complained about issues with the interview process and that he had taken legal advice before requesting written feedback. She considered that the claimant would submit a complaint.

54. The claimant e-mailed on 6 July 2021 to ask for written feedback (page 133). Ms Bennett replied on 7 July 2021 (page 134):-

> *"Dear Yasser, further to our conversation on Monday, I would like to confirm that you have not been successful following your interview on*

> *Friday the 2nd July, as there was another candidate whose experience matched the requirement for the role."*

55. We note here that the claimant's name is spelt 'Yaser', not Yasser. We do not consider this e-mail to be 'rude and aggressive' as the claimant alleges. It is curt, but it is written feedback. The claimant replied on the same day (page 135), and wrote *"This is not you stated in the phone conversation… it is clear that the process was not fair and a predetermined decision has been made"*.

56. Ms Bennett responded to that e-mail on 8 July 2021 (page 140). The claimant alleges that this e-mail included an implication that he could not handle senior stakeholders. The e-mail itself says:-

> *"Yaser I am sorry, but I am going to have to disagree. This is exactly what I said, that other candidate was more suitable/matched the demands of the role.*
>
> *You stated you had taken legal advice before the interview as you did not think you would get the role and wanted written feedback. It is not custom and practice to provide candidates with written feedback. However, for the record other candidates answered the questions detailing their relevant experience. You did not. And I mentioned when we first spoke that you went off topic several times. The interview panel had no option but to rate you according to how you interviewed on the day.*
>
> *The interview was fair, and all candidates were asked the same questions. Candidates were rated according to their responses to the questions. It may be difficult to accept that you were not the best candidate, however, you came across as less prepared and provided the panel with general responses and monologues that went off topic.*
>
> *I am not sure what else to say but wish you well in your search for a role."*

57. Aside from the respondent again seeking to portray an image that more candidates were involved in the process than actually were, we do not consider there is anything untoward in this response. We do not interpret these words to be implying that the claimant cannot handle senior stakeholders. The e-mail is a model of clarity in terms of why the claimant was not recruited. It also notes that the claimant took legal advice prior to the interview, which only supports an impression that the claimant went into the interview process seeking to find flaws for the purposes of this legal action. We acknowledge that Ms Bennett was not keen to provide written feedback, and clearly considered it to be an unusual step, but we do not see that it was particularly reluctant in that written feedback was provided quickly after it had been requested and when it became clear that the claimant wished for more detail after the initial feedback had been sent.

58. The claimant complained about the outcome of the process through the respondent's complaint procedure, and this was picked up by Mr Ebers. A copy of the complaint e-mail is at page 145. Mr Ebers had had nothing to do with the process, and so relied upon the input of Ms Bennett when dealing with that complaint. The internal emails in the bundle show that Ms Bennett constructed the draft responses to the claimant's

complaint, with a comprehensive grid document used to respond to the claimant's complaint.

59. The complaint was not upheld by a letter dated 30 July 2021 (page 184). The letter attached Ms Bennett's documents addressing the claimant's allegations. The operative part of Ms Ebers' letter says:-

> *"I note that you alleged that one of the interviewing managers was racist, however I do not consider this is possible given that the manager did not know your ethnic origin or religion. You were asked to provide a CV to complete your application as the initial application form received contained very little information. Once this happened your application was screened and you were shortlisted, even though technically the closing date had passed.*
>
> *During the process I am satisfied with the managers responses that you did not respond to the questions in a way that gave them the evidence that you were the better candidate."*

60. The claimant alleges that, during this process, Mr Ebers covered up discriminatory conduct by justifying the decision not to recruit him whilst also saying he had been the strongest candidate on paper. Mr Ebers agrees that Mr Forde considered the claimant to be the strongest candidate on paper, but we do not consider that Mr Ebers 'covered anything up' during his process and we do not find any facts which could support that conclusion. To do so, we would need to find that there had been some factual circumstances which Mr Ebers actually covered up. We have found none. We consider that Mr Ebers' process in dealing with the complaint was robust and sound, he sought appropriate input from Mr Forde and Ms Bennett, and he did not hide that input in the response pack sent to the claimant.

61. In summary, we find none of the conflicted facts relating to this stage of the process to be resolved in the claimant's favour. We note, thought, that Ms Bennett sent the claimant an e-mail where his name was spelt incorrectly.

Relevant law

62. *Section 4 Equality Act 2010* lists protected characteristics for the purposes of that Act. Age, race, and religious belief are all listed as protected characteristics. Each of the protected characteristics that the claimant identifies as holding are within the list at *section 4*, and are therefore protected characteristics which the claimant has (by operation of *sections 9, 10 and 11 Equality Act 2010*.

63. *Section 13(1) Equality Act 2010* provides:-

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

64. This means that the claimant would have suffered from direct discrimination if we find that he was treated less favourably than someone who was not a man, Pakistani, or Muslim, because of one of those characteristics.

65. The claimant must establish that he was objectively treated in a 'less favourable' way. It is not sufficient for the treatment to simply be 'different' *(Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 HL*). The person(s) with whom the comparison is made must have *"no material difference in circumstances relating to each case"* to the person bringing the claim (*section 23(1) Equality Act 2010*). The comparator should, other than in respect of the protected characteristic, *"be a comparator in the same position in all material respects as the victim" (Shannon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL)*. If there is no such comparator in reality, then the Tribunal should define and consider how a hypothetical comparator would have been treated if in the same position as the claimant save for the fact that they would not have the protected characteristic relied upon *(Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646, CA)*.

66. The phrase 'because of' is a key element of a direct discrimination claim. In *Gould v St John's Downshire Hill [2021] ICR 1 EAT*, Mr Justice Linden said, in respect of determining 'because of':-

> *"It has therefore been coined the 'reason why' question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of. In need not be the sole ground for the decision… the influence of the protected characteristic may be conscious or subconscious."*

67. It is a defence for a respondent to show that it had no knowledge of the protected characteristic relied upon, on the basis that the protected characteristic it did not know about could not have caused the treatment complained of (*McClintock v Department for Constitutional Affairs [2008] IRLR 29 EAT*. However, this defence does not apply where the act itself is inherently discriminatory (such as differentiation on the grounds of a protected characteristic), and in such cases whatever is in the mind of the alleged perpetrator of the discrimination will be irrelevant (*Amnesty International v Ahmed [209] ICR 1450 EAT*).

68. Under *section 136(2) Equality Act 2010*, the claimant needs to show facts, found on the balance of probabilities, which could lead the Tribunal to properly conclude that the discrimination has occurred before any other explanation is taken into account. If the claimant succeeds with this, then it is for the respondent to show that the contravention has not occurred (*section 136(3) Equality Act 2010*). The Tribunal must first consider whether the burden does shift to the respondent. The claimant must show more than simply there is a protected characteristic and a difference in treatment (*Madarassy v Nomura International Plc [2007] IRLR 246*).

69. Once the burden has shifted, if it does, the respondent must to show that the treatment was 'in no sense whatsoever' due to the protected characteristic *(Igen Ltd v Wong [2005] IRLR 258)*. In weighing up whether or not there has been discrimination, the Tribunal should consider all of the evidence from all sides to form an overall picture. Causation, or the 'why' the conduct was committed, is a subjective conclusion of law rather than objective conclusion of fact: what is the reason for the conduct and is that reason discriminatory (*Chief Constable of West Yorkshire Police v Kahn [2001] UKHL 48*. It is almost always the case that the Tribunal needs to

discover what was in the mind of the alleged discriminator (*The Law Society v Bahl [2003] IRLR 640*).

Discussion and conclusions

The comparator

70. The claimant has not named any particular person as a comparator. At the preliminary hearing, he contended that he was treated less favourably than a non-Pakistani, Muslim male would have been in the same circumstances. The parties had prepared to argue the case on this basis. It was not apparent to us that there was any other comparator who could be adopted at the start of the hearing, which was very late in proceedings. We agreed with the parties that the hypothetical character is appropriate. This means that that hypothetical comparator must be the same as the claimant and in the same position in all other aspects other than those three protected characteristics. This means that they must have behaved in the same way as the claimant throughout the process.

Less favourable treatment

71. We have found some of the facts relied upon by the claimant to have been true. Taking each allegation made by the claimant in turn, we conclude as follows as to whether or not the claimant has established less favourable treatment:-

71.1. *Not initially shortlist the claimant for interview, even though he satisfied the relevant criteria*

71.1.1. The claimant was not initially shortlisted for interview, and was only shortlisted when he complained and queried about the lack of shortlisting. We found as a fact that the claimant was not initially shortlisted because he had not completed the application form as requested. In our judgment, the respondent would screen out any applicant who would have made the same omission.

71.1.2. The claimant's hypothetical comparator, completing the application form in the same way, would also not have been shortlisted. It follows that there is no less favourable treatment in respect of this allegation.

71.2. *Add an extra layer to the recruitment process, namely a "fit call"*

71.2.1. The 'fit call' process was introduced as an extra layer in the recruitment process, but it was one that was applied to all candidates. It would have been applied to the claimant's hypothetical comparator. It follows that there is no less favourable treatment in respect of this allegation.

71.3. *Arrange for Jon Forde to conduct the fit call with the claimant instead of the director, Keeley Clements, who was supposed to conduct the call;*

71.3.1. It is a fact that Jon Forde conducted the fit call rather than Keeley Clements. The claimant contends that this was done because of his name and indicates that the respondent was taking his application less seriously.

We have found that the call was taken by Mr Forde because he was available for the time slot, when Ms Clements was not available. In our judgment, any person with that time slot would have had Mr Forde conducting the call for the respondent. This includes the claimant's hypothetical comparator. It follows that there is no less favourable treatment in respect of this allegation.

71.4. *Make a pre-determined decision not to recruit the claimant before the fit call;*

71.4.1. The claimant has not established this allegation as a matter of fact and so the allegation is not capable of constituting an example of less favourable treatment.

71.5. *Ask the claimant questions during the fit call which were inappropriate in an aggressive manner, in an attempt to find a way of excluding the claimant*

71.5.1. The claimant has not established this allegation as a matter of fact and so the allegation is not capable of constituting an example of less favourable treatment.

71.6. *Deliberately arrange the claimant's interview at 1:30pm on a Friday afternoon and not offer any flexibility, to try to discourage the claimant from attending the interview (the claimant attends the local mosque on Fridays;*

71.6.1. The claimant has not established this allegation as a matter of fact and so the allegation is not capable of constituting an example of less favourable treatment.

71.7. *Lead the claimant to believe in an email that he would be able to rely on his notes during the interview, but then say at the beginning of the interview that the interview was going to be quick, and imply that the claimant could not use his notes;*

71.7.1. The claimant was told in an e-mail that he would be able to rely on his notes. We found as a fact that Mr Forde did say that the interview would be shorter than scheduled, but it is clear that he intended that comment to indicate that it would run to its scheduled time if required. It was not intended to be an indication that the claimant's interview itself would be shorter than anyone else's – we accept Mr Forde's evidence that he did not consider that there were sufficient questions for every interview to last the full 90 minutes.

71.7.2. We do not consider that the claimant was justified in his interpretation of the comment that he would not be able to use his notes. We have not found that the claimant was instructed that he could not use his notes. To that end, the claimant is simply mistaken in construing this comment as an indication that he could not use his notes, that his interview would be short, and that the interviewers had already decided not to construe him.

71.7.3. To that end, this allegation does not constitute an example of less favourable treatment. We also do not consider that any hypothetical comparator would be treated any differently, as the innocent remark from Mr Forde could have been made to anybody, and indeed we find that he considered all of the interviews conducted to be ‘quick’.

71.8. *Tell the claimant that he would be asked behavioural questions during the interview, but then not ask behavioural questions*

71.8.1. The claimant has not established this allegation as a matter of fact and so the allegation is not capable of constituting an example of less favourable treatment. The claimant was asked behavioural questions. The description of the style of interview for the claimant did not exclude the possibility that non-behavioural questions might be asked.

71.8.2. In any case, all interviewees were asked the same question on the back of receiving the same template e-mails. The claimant’s hypothetical comparator would have received the same instructions and the same questions. There is no less favourable treatment here.

71.9. *Did Christine Bennett look disinterested during the interview, keeping rolling her eyes during the interview, keep rolling her eyes, and not ask the claimant probing questions*

71.9.1. The claimant has not established this allegation as a matter of fact and so the allegation is not capable of constituting an example of less favourable treatment.

71.10. *Did Christine Bennett and Jon Forde have negative body language during the interview*

71.10.1. The claimant has not established this allegation as a matter of fact and so the allegation is not capable of constituting an example of less favourable treatment.

71.11. *Did Jon Forde keep asking the claimant during the interview whether “YOU” had done things, thereby implying that the claimant wasn’t telling the truth*

71.11.1. We found that Mr Forde did ask the claimant what he had done in follow up questions, with the emphasis on ‘YOU’. We have found that the respondent was keen to understand the individual contributions the claimant (and any candidate) had made in their examples, in order to be able to elicit evidence for the scoring matrix. This meant that, where a candidate was not clear about their individual contribution, they might be asked what THEY specifically had done.

71.11.2. We have found that the claimant was not clear in his interview answers and favour the respondent’s evidence that he had a tendency to give long answers which were not focused on answering the question with the evidence required for a clear assessment to be made about his

competency. We have found that this is why the claimant was asked what he specifically had done.

71.11.3. Against those findings, we conclude that the claimant's hypothetical comparator would have been treated the same way. There is no less favourable treatment in respect of this allegation. The claimant is mistaken in his belief that there was any element of the interviewers implying that he had not done the things he was speaking about.

71.12. *When the claimant offered to give the respondent copies of reports, did Jon Forde and Christine Bennett 'snap' at the claimant and say they didn't want the reports*

71.12.1. The claimant has not established this allegation as a matter of fact and so the allegation is not capable of constituting an example of less favourable treatment.

71.13. *Was Christine Bennett reluctant to provide the claimant with feedback after the interview, and did she send a rude and aggressive email to the claimant in which she spelt the claimant's name wrong*

71.13.1. We do not consider that Ms Bennett was reluctant to provide the claimant with feedback. We do not consider that the e-mail sent to the claimant was rude or aggressive. The claimant's name is spelt incorrectly. The claimant's name is particular to him, and we consider that having a name spelt wrongly can signify a lack of respect for the person. In our view, Ms Bennett is unlikely to have spelt a hypothetical comparator's name wrongly, it being a different name to that of the claimant.

71.13.2. Consequently, we consider that this is a matter which could constitute less favourable treatment.

71.14. *Did Christine Bennett provide oral feedback to the claimant, in which she said the claimant had been waffling and going off subject during the interview, and suggest he had been ill prepared for the interview*

71.14.1. The claimant has not established this allegation as a matter of fact and so the allegation is not capable of constituting an example of less favourable treatment. To the extent that the feedback we have found was given is a source of complaint to the claimant, we consider that Ms Bennett would give that same feedback to any candidate who had performed how the claimant had, including his hypothetical comparator. It follows that there is no less favourable treatment in respect of this allegation.

71.15. *Did Christine Bennett provide written feedback to the claimant, in which she implied that the claimant didn't have the experience to be able to handle stakeholders, which was not true*

71.15.1. The claimant has not established this allegation as a matter of fact and so the allegation is not capable of constituting an example of less favourable treatment.

71.16. *Did the Deputy Chief Executive cover up the discriminatory conduct of the individuals who had interviewed the claimant by justifying their decision not to include him, whilst saying at the same time that the claimant had been the strongest candidate on paper*

71.16.1. The claimant has not established this allegation as a matter of fact and so the allegation is not capable of constituting an example of less favourable treatment. It is true that the respondent had commented that the claimant was the strongest candidate on paper, but we do not consider that this initial assessment is one that the respondent considered by the time Mr Ebers was involved.

Less favourable treatment on the grounds of protected characteristic

72. The claimant has established one piece of treatment from the respondent which we consider would perhaps not have occurred to his hypothetical comparator. The question for us is whether Ms Bennett's mis-spelling of his name was done because of his sex, race of religious belief. This requires us to consider first whether the claimant has established a fact which on its face is capable of being caused by the forms of discrimination alleged.

73. The claimant's name is Yaser Iqbal. It is a male name and it is a name which most would recognise is of an Asian and Muslim origin. Although we consider it is not possible to discern the claimant's religious beliefs from his name, it is possible to discern that he is of an Asian ethnic origin. We consider that, absent any other explanation, the less favourable treatment could properly be found to have been done because of the claimant's sex (in that it is a mis-spelt male name), and his Pakistani Asian background (in that his name identifies him as having an Asian origin).

74. Following the operation of *section 136 Equality Act 2010*, it is then for the respondent to show that the discrimination formed no part of the conduct which amounts to the less favourable treatment. In our view, the mis-spelling of the claimant's name is a simple error on the part of Ms Bennett. Typographical errors in e-mails are extremely common, and it is not unusual for names to be mis-spelt. Indeed, there are examples in the bundle of where the claimant has mis-spelt names of people working at the respondent, and he admitted in cross examination that mis-spelling of names is not usually an indicator of discrimination. Considering the respondent's practice more broadly, we note that the respondent employs a significant number of males and a significant number of individuals of Asian origin. We do not consider that there is under-representation of particular groups.

75. Consequently, we do not find that the less favourable treatment was done on the grounds of sex or race. In our judgment, this was an innocent mistake which the claimant has seized upon in an effort to bolster his case.

76. It follows that we have not found any instance of the claimant being treated less favourably because of his sex, race or religious beliefs. The respondent has not discriminated against the claimant, and none of the substantive allegations the

claimant brought which he said amount to less favourable treatment have been proven.

Disposal

77. No part of the claimant's claim was successful. In our view, the claimant has been unable to reconcile that his performance in the interview stage was not, in reality, as he recalled it. He did not perform as well as the other candidate, and the respondent was clearly able to recruit the other candidate without discriminating against the claimant.

78. We find absolutely no indication that the respondent has discriminated against the claimant on the grounds of his sex, race or religious beliefs. This judgment is an exoneration of the respondent in terms of the complaints of discrimination.

79. We find it unusual that the claimant would wish to be successful when he had submitted a complaint prior to being shortlisted, and where he had taken legal advice prior to the interview because, he says, he thought he was being discriminated against.

80. The claims are dismissed.

Signed:

Employment Judge Fredericks-Bowyer

16 August 2023

Sent to the parties on:…17 August 2023………..

For the tribunal office: ………..