



EMPLOYMENT TRIBUNALS

Claimant

Mr J Mayanja

Respondent

**v Bradford Metropolitan Borough
Council**

PRELIMINARY HEARING

Heard at: Leeds by CVP

On: 17,18 and 19 October 2022

Before: Employment Judge O'Neill

With Ms J Hiser

Mr G Corbett

Appearance:

For the Claimant: In person

For the Respondent: Mr J Flaherty of Counsel

RESERVED JUDGMENT

1. The claim for

- Breach of contract fails
- Direct discrimination because of race – section 13 EQA 2010 fails
- Indirect discrimination because of race – section 19 EQA 2010 fails
- Harassment – race – section 26 EQA 2010 fails
- Victimisation – section 27 EQA 2010 fails

REASONS

Introduction

2. The claimant describes himself as black African ethnicity. He applied for the post of Refugee and New Communities Integration Officer with the respondent council. He contends that he accepted the post which was offered to him unconditionally by the chair of the selection panel Mrs Helen Clipsom and/ or the contract crystallised when the conditions were met. He says the council is in breach of contract by withdrawing the offer/ post and directly discriminated against him because of race.
3. The respondent contends that no offer was made but the claimant was merely informed that he was the preferred candidate in an ongoing selection process. That process included the provision of satisfactory references and the respondents say that they withdrew the claimant from that process because of unsatisfactory references.
4. In addition, the claimants alleges that on the 5th of November 2021 Mrs Clipsom made remarks which constitute racial harassment. This is denied by the respondent.
5. The claimant also alleges that he suffered indirect discrimination because the respondent's requirements to provide employment history and salary details disadvantaged black Africans in general and him in particular. This is denied.
6. The claimant also contends that he was victimised by the respondent it having emerged from the references that he had previously taken employment tribunal proceedings against a previous employer namely Stockport MBC and that was a factor in the respondent's decision to exclude him from the recruitment process. This is denied.

Claims

7. The claims are for
 - Breach of contract
 - Direct discrimination because of race – section 13 EQA 2010
 - Indirect discrimination because of race – section 19 EQA 2010
 - Harassment – race – section 26 EQA 2010
 - Victimisation – section 27 EQA 2010

Applications

8. The claimant made a number of applications during the course of the hearing which are summarised in appendix 1.

Documents

9. There is an agreed bundle of documents of some 160 pages paginated and indexed. The claimant had been provided with an electronic bundle. This proved to be difficult for the claimant and on the direction of the tribunal a paper copy was delivered to him during the first morning by courier. Until the paper copy arrived, I shared each document referred to on the screen and in addition the claimant already had some of the documents in paper form.
10. At the hearing the claimant asked for a disclosure order relating to the telephone records for the period 3 to the 6 November inclusive which was refused. Counsel for the respondent assured the tribunal that all the relevant telephone records in the respondent's possession were already in the bundle and those records covered that period.

Evidence

11. The tribunal was supplied with a cast list and a chronology.
12. We heard evidence from the claimant and from Mrs Clipsom. Mrs Clipsom was the Outreach and Private Rented Options Service Manager, she chaired the recruitment panel and was responsible for the decision to exclude the claimant from the recruitment process. Each provided a written statement which was taken as read and cross examined. Each adopted their statement without amendment or addition.

Law

13. Equality Act 2010 Sections 13,19,26,27.
14. *Igen v Wong Igen Ltd v Wong; Chamberlin Solicitors v Emokpae; Brunel University v Webster [2005] IRLR 258, Hewage v Grampion Health Board [2012] IRLR 870, agreed with a warning given by Underhill J in Martin v Devonshires Solicitors [2011] ICR 352,*

The Claimant provided a skeleton with a number of authorities of which the above were the most useful .

Issues

15. At the beginning of the hearing we identified the discrimination issues as follows:
 1. **Direct race discrimination (Equality Act 2010 section 13)**
 - 1.1 The claimant describes himself as of black African ethnicity.

1.2 Did the respondent withdraw an offer of employment and if so was it because off the claimant's colour and or ethnicity.

1.3 Was that less favourable treatment?

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

2. Indirect discrimination (Equality Act 2010 section 19)

2.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

2.1.1 The provision of accurate salary details from previous employment as a mark of competence.

2.1.2 The provision of employment history details and the adverse weight given to periods outside the relevant field of expertise

2.2 Did the respondent apply the PCP to white people and or those without African ethnicity or would it have done so?

2.3 Did the PCP put black Africans at a particular disadvantage when compared with others in that the claimant says black Africans are more likely to be employed in the 'twilight economy' and are more likely to have to take jobs outside their field of expertise.

2.4 Did the PCPs put the claimant at that disadvantage? The respondent says not as the claimant's previous employment had not in the twilight economy but had been with Kirklees CAB, Stockport MBC and a law firm and in any event were not applied to him in the way he claims.

2.5 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims are:

2.5.1 The PCP of employment history was applied to all and previous roles are an indicator as to the suitability of the candidate for the role

2.5.2 The PCP (salary) was applied to all and previous wages were not taken as an indicator as to the suitability of the candidate for the role but an indicator of market rate and appropriate starting salary in certain circumstances.

2.6 The Tribunal will decide in particular:

- 2.6.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;
- 2.6.2 could something less discriminatory have been done instead;
- 2.6.3 how should the needs of the claimant and the respondent be balanced?

3. Harassment related to race (Equality Act 2010 section 26)

- 3.1 Did Mrs Clipsom make the references to Africa on 6 November 2021 which the claimant alleges at paragraph 2 (iv) ET1
- 3.2 If so, was that unwanted conduct?
- 3.3 Did it relate to race
- 3.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 3.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. Victimisation (Equality Act 2010 section 27)

- 4.1 Did the claimant do a protected act as follows:
 - 4.1.1 Make an employment tribunal claim against a previous employer namely Stockport metropolitan borough council?
- 4.2 Did the respondent do the following things:
 - 4.2.1 Withdraw the offer of employment
- 4.3 By doing so, did it subject the claimant to detriment?
- 4.4 If so, was it because the claimant did a protected act?
- 4.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

Findings

- 16. Having considered all of the evidence both oral and documentary we make the following findings of fact on the balance of probabilities which are relevant to the

issues to be determined. Where we heard or read evidence on matters on which we make no finding or do not make a finding to the same level of detail as the evidence presented to us that reflects the extent to which we consider that the particular matter assists us in determining the issues. Some of our findings are also set out in the conclusions below in an attempt to avoid unnecessary repetition and some of our conclusions are set out in the findings of fact adjacent to those findings.

18 – 20 October 2021

17. On the 20th of October 2021 Mrs Clipsom informed the claimant that he was the '*preferred candidate*' and confirmed same by e-mail that day which also set out the requirement for a medical and two satisfactory references '*in order to progress your application*'.
18. In the pleadings, in the discussion at the outset of the hearing and during his own evidence and cross examination it was the claimant's position that he had received a voice message on the 18th of October 2021 informing him of the respondent's offer of employment which he accepted by e-mail on the 19th of October 2021 and there had been no conditions attached to the original offer.
19. The bundle of documents contains the e-mail from Mrs Clipsom of the 20th of October 2021 but not any e-mail from the claimant accepting an offer on the 19th of October 2021. During the cross examination, in answer to questions from me the claimant admitted that he had sent no e-mail on the 19th of October 2021 or at all, accepting the respondents offer. The claimant had maintained in his statement dated the 30th of September 2021 which was adopted without amendment at the beginning of his evidence that such an e-mail had been sent which was patently untrue.
20. The claimant also maintained in that statement that Mrs Clipsom had left an unconditional offer on the claimant's answering service and that he had evidence of those messages. In cross examination the claimant conceded that he had no evidence of such calls, he claims the messages were erased, he had no transcripts of them. He failed to explain when he intended to disclose such messages. He then agreed that the length of the incoming calls from Mrs Clipsom were too short to encompass a formal offer.
21. Mrs. Clipsom is an experienced manager who has undergone training in the council's recruitment and HR policies and practices and demonstrated in her evidence a thorough knowledge of them. She denies having made any offer to the claimant on the 18th or 19th of October 2021. The council's guidance to managers instructs them not to make offers at this stage of the process and the tribunal accepts her evidence that she did not do so. We prefer her evidence to that of the Claimant. In any event during his submissions the claimant said that he no longer relied on a contract having been made on the 18th of October 2021.

22. The tribunal also find that the inconsistent statements made by the claimant in respect of the alleged messages and emails on the 18th and 19th of October casts doubt on his credibility as a reliable witness.
23. On the 20th of October 2021 Mrs Clipsom sent an e-mail to the claimant in the following terms '*further to your interview for the above post I am pleased to inform you that you are the preferred candidate ... in order to progress your application further we need to receive medical clearanceto received two satisfactory references*'. The claimant agrees that this was the first time anything was put in writing.
24. In the emails which followed the 20th of October 2021 the claimant expresses no surprise that these things have been requested and raises no protests about it. We accept Mrs Clipsom's evidence that no offer was made and that the email of 20 October 2021 had been merely a step in the process towards an offer.

1 November to 5 November

25. On the 1st of November 2021, having had no response to her requests for references, Mrs Clipsom asked the claimant to chase up his referees. In later emails it is clear that she is seeking to assist the claimant in tracking down the correct e-mail addresses for his referees. From this the tribunal infer at this stage she was doing all she could to support the claimant and reveals no reluctance on her part to appoint him.
26. In the period to the 5th of November 2021, it appears that Mrs Clipsom is becoming increasingly frustrated over the claimant's failure to supply correct e-mail addresses which is causing a delay in obtaining the references. From this the tribunal infer that she is anxious to complete the recruitment process and it reveals no reluctance on her part to appoint him. However, by the 5th of November she's losing patience and informed the claimant that she would withdraw him from the recruitment process if the references were not forthcoming. After some difficulty, references were supplied by Kirklees CAB and Stockport MBC on 9 November.
27. On the 5th of November 2021 Mrs Clipsom wrote to the claimant in terms which suggests that she was beginning to lose confidence in the claimant's ability a willingness to provide the references '*I really must insist you provide me with the correct e-mail contact details for two referees.... If I do not receive this by the end of business day on Wednesday the 10th of November 2021 I will have to withdraw you from the recruitment process*'.

6 November 2021 Harassment Conversation

28. In the ET1 the claimant says he was harassed by Mrs Clipsom in a telephone call of the 6th of November 2020. In the ET1 he alleges she said '*this is not Africa, the procedure in this country you provide all former employee details*'. Such a remark is denied by Mrs Clipsom. The claimant then changed his mind and contended that this conversation took place on 5 November 2021. The telephone records, which we accept as a complete record, show no conversation at all on the 5th of November 2021 or the 6th of November 2021.

In his witness statement the claimant deals with this conversation at paragraph 36 and 37. Nowhere in his witness statement does he mention the reference to Africa and he gives an account which is materially different from that set out in the ET1. In his witness statement he only says '*she kept ranting about the procedure in this country is you provide a proper functional e-mail*'. The claimant gives the date of this alleged conversation as the 5th of November 2021 (a different date from that in the ET1) and he makes no mention of any offending reference to Africa.

29. Mrs Clipsom denies those remarks and says there were no telephone conversations on either the 5th or the 6th of November 2021, although there was an e-mail exchange in which she asked again about correct e-mail addresses and the claimant notified her of his COVID. The telephone records support her evidence that there were no such calls on the 5th or 6th of November 2021.
30. The tribunal find the claimant be unreliable in his evidence relating to this conversation which is at the heart of his harassment claim. Given that this allegation is the core of the harassment claim the tribunal finds it incredible that the witness statement contains no reference to the Africa remark and there is an inconsistency between the dates and in the conversation as described in the witness statement and the ET1.
31. Under cross examination the claimant was unable to give an account of what had been said by Mrs Clipsom and was unable to recall the words used or provide a consistent date. In his cross examination of Mrs Clipsom and his own cross examination and evidence in chief he refers only to 5 or 6 November, but in his submissions the claimant sought to rely on another date for the alleged conversation namely the 3rd of November 2021, this date was never put to the respondent witness.
32. The tribunal prefers the evidence of Mrs Clipsom and find that this conversation did not take place at all. The tribunal has reached the conclusion that the claimant has invented this telephone conversation and his harassment allegation is fabricated.

Stockport Litigation

33. Mrs Clipsom says that the first she knew of the Stockport litigation was on the 9th of November when she received the references from Stockport. At an early stage in the recruitment proceedings the claimant had made a request to change his interview date on the basis that it clashed with an employment tribunal listing. His request was granted and Mrs Clipsom assumed without making any further inquiry that this referred to a case in which he was representing in a professional capacity at Kirklees CAB. The tribunal accept that this was her view and that she thought no more about the matter until she received the Stockport reference on the 9th of November 2021.
34. The tribunal also accepts her evidence that she first became aware of the Stockport case on the 9th of November 2021. The claimant says that he made Mrs Clipsom aware of the Stockport case at an earlier stage when they were discussing the problems with the Stockport reference. We generally prefer Mrs

Clipsom as a more reliable witness. Taking into consideration the e-mail chain between the 9th and the 11th of November the tribunal finds that if there was a discussion between the claimant and Mrs Clipsom it was more logically set in this period when they each made comments about the legal case.

35. The reference to the Stockport case emerged in an e-mail from a solicitor from Stockport MBC which was sent to Mrs Clipsom by the claimant on the 9th of November 2021 as part of a longer e-mail chain. The e-mail chain contains one from the solicitor to the claimant saying '*please do not contact 'D' directly as you are involved in extant litigation when the tribunal is not finished and therefore it would not be appropriate for you to contact him directly*'.
36. Whilst it appears never to have been expressly admitted, the respondents have never challenged the claimant that this is a protected act within the meaning of the Equality Act, the tribunal infer that Mrs Clipsom understood from the Stockport email that the claimant had made an employment tribunal discrimination claim of some kind.
37. Mrs Clipsom refers to this litigation in her e-mail to HR of the 17th of November 2021 and it comes up again in an e-mail exchange with HR on or about 18 November 2021.

The References 9 – 24 November

38. On receiving the references Mrs Clipsom went through them in conjunction with the application form as was her normal practise, and found a number of discrepancies between the information provided by the claimant on the application form and that provided by his referees. Therefore, she asked for more information from the claimant and from the referees.
39. Her concerns are outlined in the e-mail 17th of November 2020 sent to HR, in brief the key concerns were as follows
- 39.1 failure to include the correct salary details in the current Kirklees post
 - 39.2 failure to provide a complete history of employment and explain the gaps
 - 39.3 failure to mention the Stockport position at all
 - 39.4 assessing 10 years experience as an immigration case worker whereas he could only demonstrate four years
 - 39.5 failure to format e-mail addresses correctly
 - 39.6 describing the role at the law firm as a full time position on a higher salary although he subsequently admitted it to be a part time job on a lower salary
 - 39.7 claiming to have a higher level of standing under the OISC system
 - 39.8 claiming to have 10 years experience of advice work whereas he could only demonstrate two years welfare benefits and four years immigration and no employment advice work.

40. The claimant sent a holding letter on the 24th of November 2021 which included the following paragraphs.

*'I must admit though, I struggle to understand the cause and rationale prompting the questions and the correlation to the core of essential - desirable roles expected of the post holder to be. Helping me differentiate a lawful request from a 'stereotyping and racial profiling' exercise, I would appreciate if I could be directed/ provided to Bradford Council's published policy on **'Pre-Employment Background checks'** if there is any as a Freedom of information request to ensure I'm not providing no more information than what a legitimate aim for this purpose requires'.*

'GDPR and ICO working principles,

(ii) si 9 & 148/PSED Equality Act.

It's good practice, any other background checks other than those prescribed by law should have been forewarned at the application or conditional offer stages to avoid any unfounded fears of being 'singled-out.

Kindly let me know if I can have this information by the 27-11-2021, if not I will still respond to your questions under protest on statutory defense conferred from primary legislations above'.

41. On 24 November 2021 Mrs Clipsom emailed HR with reference to the Claimant's email set out above. *'He's clearly - in my opinion - tap-dancing at this point, as he's been caught out. All his guff about GDPR and background checks is just that- - guff. I wouldn't now trust him to accurately record or report anything, or be able to give strictly factual information'.*
42. She told the Tribunal that she regrets using the word 'guff' in the email and wishes she had used a more polite term but she was expressing her view in private to a colleague and that view has not changed. By this stage she has lost trust and confidence in the claimant and was not impressed by this letter which contains legalistic references difficult to read and understand.
43. The Tribunal has taken this letter and the use of the term guff into account in considering whether it evidences a prima facie antipathy towards the Claimant based on ethnicity or colour and we find that it does not but reflects her views about trust.

The Claimants answer to the Respondents concerns

44. On the 3rd of December 2021 the claimant provided his answers to the questions the respondents had posed but his answers failed to satisfy Mrs Clipsom in the light of the information she had obtained from the referees.
45. She had identified that the claimant had overstated his Kirklees salary by about £3000. In his written answers to her the claimant maintained that he was paid the higher rate of pay and his P60 would evidence that. At the hearing the

claimant explained that in fact he had never received the stated higher rate of salary from Kirklees but he expected to do so and felt entitled to the higher rate. Mrs Clipsom reached the reasonable conclusion that the claimant had provided inaccurate salary details in the application. In his answers on the 3rd of December he had had an opportunity to correct it but had not done so. Instead he asserted that the P60 would show the higher rate. The P60 has never been provided and Mrs Clipsom concluded that the P60 would not show the higher rate and again we accept her evidence and find that to be a reasonable conclusion particularly as it is now admitted that no such sum was ever paid..

46. Her concerns about the Stockport position were that the claimant had simply failed to mention this period of employment at all but instead in relation to an overlapping time period stated he was working full time for a law firm in Manchester. In his answers on the 3rd of December the claimant asserted that this information was on his application form but we have seen the application form and it does not include any mention of the Stockport position which only came up at the reference stage. It further transpired that the work at the law firm which appeared to overlap with the period of employment at Stockport was in fact only part time and at a lower salary than that stated on the application form.
47. By this time this is Clipsom had reached the conclusion that the claimant had been deliberately misleading in his application form details and we accept her evidence that the issue became a question of the claimant's integrity. At the hearing she told us that she believed he had lied on the application form.
48. We accept evidence that she was satisfied as to the claimant's competence on the basis of his performance at the interview and the confirmation by Kirklees that he had experience in a relevant position with them.
49. We accept her evidence that salary details are not gathered as a measure of competence but it is conventional for these to be obtained by the council and the information is used to place an applicant on the wage scale in some exceptional circumstances, (such as when an employee from another authority is transferring in) although the usual starting salary is applied at the bottom grade in most circumstances.
50. We accept her evidence that respondent requires all employment history to be produced and gaps explained and if provided is used to establish past experience likely to render a claimant suitable for the post in the recruitment exercise.
51. We accept her evidence that she formed the view that the claimant had intended to conceal his position as a traffic warden in Stockport as he, wrongly, believed that such a post (outside his field of specialism) would count against him. The claimant's indirect discrimination claim is founded in part on a PCP as a consequence of which periods of employment outside a person's field of expertise is counted against them. We also accept her evidence that in terms of judging competence the claimant's history at Kirklees was sufficient relevant experience and the period of time he spent as a traffic warden at Stockport did not count against him and would not have counted against him had he put it on

the original application form. She posed the question if he had concealed this what else might he conceal.

52. We accept her evidence that the reasons she discontinued the recruitment process and withdrew the claimants preferred candidate status were those given in her letter of the 4th of January 2022 underlying which was her reasonable concern about his integrity.
53. In the guidance notes supplied to candidates for the purposes of completing the application form it says clearly ' you need to record all your employment history and if there are any breaks you need to explain any in your employment history'. The sentence however falls under a section heading Recent Recruitment History at the third sentence of which it says '*you need to give details of past employment relevant to the job you are applying for*'.
The claimant explained at the hearing that he had misunderstood the guidance and omitted the Stockport traffic warden post because he felt it wasn't relevant and he was only required to list relevant past history. In his written explanations given on the 3rd of December 2021 the claimant does not provide that explanation to Mrs Clipsom and does not put her on notice that he had made an innocent but genuine mistake.
54. The tribunal finds that the guidance is capable of being misinterpreted by a candidate in the way the Claimant suggests. However in the absence of an explanation given by the claimant to that effect in December 2021 we find that Mrs Clipsom had reached the reasonable conclusion on the information before her that the claimant had attempted to conceal this part of his employment history.
55. After seeking the advice of the respondents' legal advisors Mrs Clipsom made a decision shortly before Christmas bringing the recruitment process to a halt and excluding the claimant from it. On the 4th of January 2022 she wrote to the claimant with her decision. She did not revert to the candidate who was the runner up to the claimant because she did not think that person met the requirements. Instead, she reran the whole recruitment process.
56. The letter of 4 January 2022 reads as follows

'You were later able to provide a referee with your present employer, however the information contained within this reference differed from the information which you provided on your application form, and the referee has not confirmed your statements when further enquiries were made.

You stated on the application form that your salary in your present role is £23,000. The reference from your present employer stated that your current salary is £19,723. When this was queried with yourself, you stated "On joining the Law centre as a former 01 SC Level 2 operating at level 1 at the time, contract had fixed contractual and performance related bonus pays, the current actual pay is £3000 above fixed contractual I started on." When this was queried with the referee, asking specifically whether what you were actually paid by the organisation might include other components that

would bring it up to £23,000, the response from the referee was that the figure of £19,723 was correct, and the only other remuneration was an 8% pension contribution.

The amount itself is inconsequential. Salaries are not used by Bradford Council as an indicator of performance or otherwise to determine suitability for a role. Salary levels for the same role can vary widely between the private, public and voluntary sectors. It is the relevance of the previous role to the role applied for, in special knowledge, skills required, level of responsibility etc that is important, and used to decide whether a candidate has the necessary experience. The concern here is not the amount that you are paid, but that you have put an amount down as your salary that is considerably higher than the figure your employer says they pay you

You did provide a second referee. You were unable to provide correct contact details for this referee but the Council was able by its own means to establish contact. A reference was provided, however this was for a job which you had not listed on your application form. This employment overlapped by several months with a previous employment which you had listed on your form, and had described as full time. When this was queried with you, the dates of employment you provided differed from the dates provided by the referee, although still overlapping with the other role, and you said that the job listed on your form was in fact part time.

I am therefore writing to advise you that as we have not received satisfactory references, we are unable to proceed further, and your preferred candidate status has been withdrawn.

Credibility

57. The tribunal find Mrs Clipsom to be a reliable witness and where there is a conflict we prefer her evidence. She answered questions in cross examination in a clear and straight forward manner and was at pains to check her understanding of the questions put in order to address them fully. She was an experienced manager who was knowledgeable and reliable in respect of the respondents procedure and the steps of the recruitment exercise.
58. In contrast the claimant was a more difficult witness who on a number of occasions did not give a straight answer to the questions put and was evasive. In respect of a number of key issues he changed core evidence at a very late stage and in some aspects was inconsistent in the evidence given. In respect of the harassment claim the tribunal has concluded that the allegation was fabricated.

Conclusions

Contract claim

59. In his submission the claimant changed the whole basis of his contract claim and confirmed that he was no longer relying on an unconditional offer of contract made on 18 and accepted on 19th of October 2021. He now concedes that he sent no e-mail of acceptance on the 19th of October 2021, he has no

recording or transcript of the voicemail messages and the telephone records show that such messages were too short to contain an offer which he now accepts. For avoidance of doubt had these concessions not been made the tribunal preferred the evidence of the respondent and find no offer was made.

60. In his submission the claimant put his contract claim differently. He said he relied on the e-mail of the 20th of October 2021 as being a conditional offer and the contract crystallised when those conditions (medical clearance and two references) were met.
61. The tribunal prefers the evidence of Mrs Clipsom to the effect that no offer was made in the e-mail of the 20th of October 2021 or at all. The e-mail of the 20th of February says *'I am pleased to inform you that you are the preferred candidate'*, it goes on to say *'in order to progress your application we need to receive medical clearance..... receive two satisfactory references'*. and this was the next step in an ongoing recruitment process but short of an offer.

The tribunal does not accept the claimant's submission that the e-mail of the 20th of October 2021 was a conditional offer in respect of which the conditions have been met. The tribunal finds it unlikely, on the balance of probability, that Mrs Clipsom, a very experienced manager who has evidenced a reliable knowledge of the council systems, would have made any kind of offer at that stage given the clear instructions to the respondent's managers not to do so. In any event an ordinary reading of the e-mail supports Mrs Clipsom's evidence that no offer had been made, the claimant had been designated the preferred candidate but that was merely part of the process and the recruitment was a process which was ongoing. Having confirmed his preferred candidate status further steps were required.

The tribunal concludes that the e-mail of the 20th of October 2021 falls short of being a conditional offer

62. Further and in the alternative if a conditional offer has been made we do not accept the claimant's admission that the conditions had been met and the contract crystallised when Mrs Clipsom was in receipt of the references.
63. The tribunal also finds that Mrs Clipsom was entitled to conclude the references were not satisfactory, in that although she had been satisfied as to competence the references threw up a number of discrepancies between the information supplied by the claimant and that provided by the referees. These discrepancies led her, not unreasonably, to doubt the claimant's integrity and lose trust and confidence in him. The claimant has argued that Mrs Clipsom was not entitled to go beyond the narrow lines of inquiry set out in the pre-employment checks document and the references as supplied. The tribunal does not accept that proposition which is dealt with more fully below.
64. In the circumstances we find that the contract did not crystallise on receipt of the references or at all and the claimant has failed to show that a contract had been concluded.
65. In all the circumstances the breach of contract claim fails.

Harassment

66. The claim for harassment fails. The tribunal finds that the claimant has fabricated the allegation. The tribunal prefers the evidence of the respondent's

witness that no such remark was made on the 5th or 6th of November 2021 or at all.

Victimisation

67. It is not disputed that the claimant has done a protected act in that he has brought a relevant employment tribunal claim against Stockport MBC. The claimant can establish detriment in that a decision was made to remove him from the recruitment process. The tribunal can detect no behaviour from Mrs Clipsom after (9 November 2021) the date she acquired the knowledge of the Stockport case to suggest she weighed that matter in the balance or that influenced her in making the decision at all. In the circumstances we find that the claimant has failed to show a prima facie case ie facts from which could find discrimination but for an explanation.
68. In any event we are satisfied with the explanations given by Mrs Clipsom for her decision which the tribunal accepts as truthful and well founded and not related to any extent to the knowledge of an employment tribunal claim against Stockport.
69. The Victimisation claim fails.

Indirect Discrimination

70. The claimant identified two PCPs at the outset of the hearing namely
- 70.1.1 The provision of accurate salary details from previous employment as a mark of competence.
 - 70.1.2 The provision of employment history details and the adverse weight given to periods outside the field of expertise
71. The claimant's claim is founded on the submission that these PCPs were applied for those purposes namely as a mark of competence and in the case of employment history that adverse weight was given to periods outside the field of expertise.
72. In respect of salary the claimant's contention is that people of black African origin are likely to be in employment which is less well paid than other candidates and therefore if salary is used as a measure of competence it will disadvantage black Africans. We have had no evidence as to the disadvantage of black Africans but that presumption has gone unchallenged.
73. The tribunal accepts the evidence of the respondent that past salary was not taken as a measure of competence and the PCP was not applied as the claimant submits.
74. We accept Mrs Clipsom's evidence that the claimant's competence was measured by the interview tests and questions and confirmation by Kirklees of like experience of sufficient length. It would have made no difference to her had the claimant put down the correct salary of £19,723 and neither he nor anyone else would have gained an advantage from putting down £23,000 on the application form. The claimant had not been employed in the twilight economy and his salary records were readily available. In the circumstances the claimant was not disadvantaged at all by the requirement to put accurate to provide accurate salary details.

75. The claimant can establish detriment in that a decision was made to remove him from the recruitment process. The decision was not made in any part because of his level of salary, it was made because the claimant has given a false figure for his salary together with other factors as set out in the letter of 4 January 2022.

76. We are satisfied with the explanations given by Mrs Clipsom for her decision which the tribunal accepts as truthful and well founded and not related to race or ethnicity.

77. The second PCP relied on is the requirement to provide a full employment history. It is the claimant's case that black African candidates are more likely to have patterns of broken employment during which unskilled work has to be undertaken to make ends meet and such periods outside an area of specialism are weighed too heavily against such candidates in determining competence and or suitability. We have had no evidence as to the disadvantage of black Africans but that presumption has gone unchallenged.

78. We do not accept the client's submission that the required full employment history was applied by the respondent in order to test suitability or competence. We accept the evidence of Mrs Clipsom that his competence was not in doubt and his employment history with Kirklees alone was sufficient to meet any criterion as to competence or suitability. Mrs Clipsom accepts that many people may have a history in which they have done jobs below the level of their speciality.

The claimant argues that his role with Stockport as a traffic warden was something that would be and was weighed against him. We accept the respondent's evidence that it was not weighed against him at all and that Mrs Clipsom thought it was a perfectly respectable job and it was not weighed against him would not have been weighed against him had he listed it on his application form. We prefer the evidence of Mrs Clipsom and find that the claimant was not disadvantaged as he contends because the employment history PCP was simply not applied as he suggests.

79. The claimant can establish detriment in that a decision was made to remove him from the recruitment process. We prefer the respondent's evidence that the decision was not made, in any part, because his employment history as a traffic warden was outside his field of expertise. It was made because the claimant had omitted to mention on the application form his history as a traffic warden in Stockport, (together with other factors as set out in the letter of the 4th of January 2022) and Mrs Clipsom believed he had concealed it. The tribunal accepts that explanation as truthful and well founded and not related to ethnicity or race.

80. The indirect discrimination claim fails.

Direct Discrimination

81. The claimant is a black African. He has established that he has suffered a detriment in that having been the best candidate at interview and having been judged as competent and designated the preferred candidate, Mrs Clipsom decided not to continue with the recruitment process and not to offer him the post. This calls for an explanation.

82. We accept the explanations given by Mrs Clipsom for her decision set out in her letter of the 4th of January 2022 and the underlying matter of the claimants

integrity. As set out above we find that Mrs Clipsom's conclusions were well founded and reasonable. The team in which the job falls is diverse and the previous postholder had a BME background and when the position came to be advertised a black African was appointed.

83. The claimant submits that Mrs Clipsom had acted in bad faith and went beyond her powers under the respondent's written procedures by undertaking additional investigations following the receipt of the references. He argues by reference to the Council's guidance documents that Mrs Clipsom was only entitled to consider the pre employment checks, the interview and associated tests, the medical information and the two references as they were submitted and she was not permitted to go beyond that. In going beyond and making further inquiries the claimant argues that she was on a frolic of her own and must have been driven by conscious or unconscious racial bias. The claimant says he should have been offered the post once competence had been established and the references returned.
84. Mrs Clipsom's position is that the additional inquiries she made after receipt of the references was a normal part of her duties wherever a query over the references was found and it would have been remiss of her not to follow up any discrepancies.
85. The tribunal does not accept the claimants proposition that Mrs Clipsom was in some way constrained by the respondent's guidance to managers and that she had thus exceeded her authority. This tribunal agrees with Mrs Clipsom that it would be remiss of a recruiting officer not to investigate such discrepancies.
86. Having investigated the discrepancies and sought clarification from the claimant and the referees Mrs Clipsom remained dissatisfied and the investigation had cast serious doubt on the Claimant's integrity, the tribunal find her dissatisfaction to be reasonable in the circumstances.
87. The Tribunal have considered whether her degree of dissatisfaction was sufficient to warrant the removal of the claimant from the process or whether she seized on the discrepancies as a reason to be rid of the claimant, consciously or unconsciously because of his race and whether she would have reacted in the same way had the candidate not been black African.

Mrs Clipsom appeared before us and impressed us as an experienced professional manager working in an area with a significant number of BME staff appointed by her. She has undergone training in recruitment and equalities. She was happy to afford the claimant preferred candidate status and continues to accept him as a competent candidate who would have been appointed had the references been satisfactory. As a witness we found her straight forward and reliable.

The claimant did not press Mrs Clipsom in cross examination on this question and we have heard nothing to suggest that she would have treated a person without the claimant's characteristics differently.

88. In the circumstances we are satisfied by the explanation given by the respondent as to the reasons for removing the claimant from the recruitment process and that Mrs Clipsom would have treated any candidate in the same way if she had such doubts over that person's integrity and the claimant's colour or ethnicity had no bearing on her decision, consciously or unconsciously.

89. The claim of direct discrimination fails.

Summary

90. The claim for

- Breach of contract fails
- Direct discrimination because of race – section 13 EQA 2010 fails
- Indirect discrimination because of race – section 19 EQA 2010 fails
- Harassment – race – section 26 EQA 2010 fails
- Victimisation – section 27 EQA 2010 fails

Employment Judge O’Neill

1 November 2022

Appendix 1

Applications during Hearing

1. Paper Bundle: The claimant having been supplied with an electronic bundle expressed some difficulty because he was not in a position to print it out. The tribunal adjourned to read at the beginning of the case. I directed the respondent to send a paper bundle by carrier to the claimant during the adjournment. We began the cross examination of the claimant without the paper bundle and I shared on the screen each document referred to. The paper bundle was delivered before lunch

2. Order for Disclosure/ Inspection of telephone records Day 1 3.15pm

At the hearing the claimant asked for a disclosure order relating to the telephone records for the period 3 to the 6 November 2021 inclusive.

The claimant indicated that he had already made such a request of the tribunal but it had been refused. On examination of the file this was incorrect, he had

recently requested telephone records before the hearing but in relation to the 19th of October 2021 which had been refused.

Counsel for the respondent assured the tribunal that all the relevant telephone records in the respondent's possession were already in the bundle and on inspection those records covered the period 3 to 6 November.

Tribunal retired. Application refused.

3. Witness Order – 11.45am Day2

At the end of his own cross examination the claimant applied for a witness order requiring HR manager Ms PK to appear before the tribunal.

The tribunal retired to consider after hearing from the claimant and Counsel.

Application refused

- Exceptionally late application
- Claimant failed to explain why Ms K was required ie what evidence could she give that Mrs C could not cover

4. Application to amend Victimisation Claim – Day 2 15.45pm

Application made at 15.45 on day 2 almost at the end of Mrs Cs CX.

Amendment - To add that his freedom of information request made 24 November 2021 was a protected act and had a bearing on Mrs Cs decision.

Adjourned to consider

Refused

Excessively late application – evidence almost over – unjust – R had no chance to prepare /CX of either witness had not dealt with it / statement of Mrs C

5. Application to Amend Claim to include second act of less favourable treatment – made in submissions

Application considered at the close of case and refused.

Act relied on – the sending of email of 20 October 2021 and the imposition of those conditions.

Far too late to make such an application – unjust – R had no opportunity to prepare statements / cx/ address in submissions

For the avoidance of doubt the Tribunal considered the email of 20 October 2021 and do not find it to be less favourable treatment.

6. Application to Amend Harassment Claim / give evidence – during submission

During his submission the claimant purported to change the date of the harassment conversation from 5th / 6th of November 2021 to 3 November 2021.

This claim has been determined on the basis of the pleadings and the witness statements and oral evidence that the alleged harassment event happened on either the 5th or the 6th of November 2021.

The date of the 3rd of November was raised for the first time by the claimant in submissions and this date was not mentioned in evidence / was not put to Mrs C.