EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr Wainwright **Marks and Spencer Plc**

Heard at: **London Central Employment Tribunal**

On: **26, 27 July 2023**
5 October 2023 (In chambers)

Before: **EJ Webster**
Mr D Clay
Ms C Marsters

Appearances
For the Claimant: **In person**
For the Respondent: **Mr A Leonhardt (counsel)**

RESERVED JUDGMENT

1. The Claimant's claims that he was refused employment by the Respondent in respect of one role on 31 January 2023 and 5 roles on 1 February 2023 in contravention of The Employment Relations Act 1999 (Blacklists) Regulations 2010 are not well founded and his claims fail.

REASONS

The Hearing

2. The issues in this case had not been set out in advance of the hearing as no case management hearing had occurred.

3. The issues were agreed at the outset of the hearing and are set out below.

4. The Tribunal was provided with two bundles – one for the Claimant and one for the Respondent. We were also provided with witness statements for the Claimant, Caitlin Williams, David Andrews, and Rebecca Ashley. In addition to the two bundles we also had 11 videos which documented the application process online carried out by the claimant in respect of himself, and the following fictional applications:
   (i) Jamie McNally
   (ii) Mary Jones
   (iii) Julie Roberts
   (iv) Andrew Roberts
   (v) Jamie Roberts
   (vi) Emma Roberts

5. Mr Leonhardt asked permission to ask additional questions of Mr David Andrews because he accepted that the videos showed that the dummy applicant's online application process worked differently from his and it was only on reading the Claimant's witness statement that they realized Mr Andrews had not dealt with those points in his evidence. The Tribunal allowed it but said that we would take into consideration when making its decision the lateness of the production of the evidence. The Claimant was given time to think about the additional evidence before he cross examined Mr Andrews.

6. At the conclusion of evidence, it was agreed with the parties that written submissions would be sensible given the time that this case had been listed for (two days) and the fact that the claimant said that he was unaware that he would be required to give submissions. The purpose of submissions was explained to the Claimant prior to the Tribunal adjourning and the Claimant was assured that they did not need to be legalistic or include any law unless he wanted them to given that he was a litigant in person. EJ Webster originally ordered them to be sent within 28 days of the hearing but the claimant asked for more time and a deadline of 29th of August was agreed instead.

7. We have taken into account when considering the evidence and submissions given that the claimant is a litigant in person albeit one with some previous experience of litigation. Therefore, we have analysed the evidence given to us by the witnesses and not relied upon the fact that some of the witness evidence provided by the respondent was not challenged by the claimant in cross-examination.

8. At various points in answering the cross-examination put forward by Mr Leonhardt, the claimant appeared to not want to answer on the basis that he would be giving away the basis of his case and/or cross-examination. On these occasions, EJ Webster instructed him to answer the question as opposed to simply wanting to think about it and think about the tactics and whether to answer it or not. Generally speaking tribunal is trying to establish the facts of

the case as presented to them as opposed to the tactics involved in litigating them.

The Issues

9. Did R refuse C employment?

10. Was a prohibited list created?

11. Was the reason for refusal of employment related to a prohibited list?

12. If yes did the Respondent:

    (i) breach Regulation 3 in that it compiled, used, sold or supplied a prohibited list as defined in Regulation 3; or

    (ii) rely on information supplied by a person who has contravened Regulation 3; or

    (iii) rely on information that it ought reasonably to know was supplied in contravention of Regulation 3?

The Law

13. The Employment Relations Act 1999 (Blacklists) Regulations 2010

    a. Regulation 3 — General prohibition

(1) Subject to regulation 4, no person shall compile, use, sell or supply a prohibited list.
(2) A *"prohibited list"* is a list which—
(a) contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions, and
(b) is compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers.
(3) *"Discrimination"* means treating a person less favourably than another on grounds of trade union membership or trade union activities.
(4) In these Regulations references to membership of a trade union include references to—
(a) membership of a particular branch or section of a trade union, and
(b) membership of one of a number of particular branches or sections of a trade union;
and references to taking part in the activities of a trade union have a corresponding meaning.

    b. Regulation 5.— Refusal of employment

(1) A person (P) has a right of complaint to an employment tribunal against another (R) if R refuses to employ P for a reason which relates to a prohibited list, and either—
(a) R contravenes regulation 3 in relation to that list, or

(b) R—
(i) relies on information supplied by a person who contravenes that regulation in relation to that list, and
(ii) knows or ought reasonably to know that the information relied on is supplied in contravention of that regulation.
(2) R shall be taken to refuse to employ P if P seeks employment of any description with R and R—
(a) refuses or deliberately omits to entertain and process P's application or enquiry;
(b) causes P to withdraw or cease to pursue P's application or enquiry;
(c) refuses or deliberately omits to offer P employment of that description;
(d) makes P an offer of such employment the terms of which are such as no reasonable employer who wished to fill the post would offer and which is not accepted; or
(e) makes P an offer of such employment but withdraws it or causes P not to accept it.
(3) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that R contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must find that such a contravention or reliance on information occurred unless R shows that it did not.

14. We also had regard to the Black Listing Guidance dated March 2010 as complied by the then BIS. Having checked this is the most up to date version of this document and remains appropriate guidance when considering the Regulations.

15. The Claimant relied in part on the legal analysis of the Regulations set out in a previous Judgment given by REJ Clarke (as he was then) dated 16 January 2017 Wainright v Balfour Beatty Engineering Services Ltd and Ors (1601751/2015). That Judgment followed a preliminary hearing in respect of various strike out applications. We have considered it but note that it is a first instance case and therefore not binding on us. However it contains helpful and relevant analysis of some aspects of Regulation 5 which we discuss below in our conclusions.

Facts

16. We have only made findings of fact in relation to the matters which were relevant to our conclusions. Where we have not addressed any evidence or submissions expressly below that does not mean we did not consider it, it means that we did not consider it relevant to our conclusions.

17. All of our findings are reached on balance of probabilities. If we have reached a conclusion where there was a dispute of fact between the parties it is because we preferred the evidence of one party.

18. Much of the claimant's witness statement was dedicated to describing his background in exposing blacklists. It is clear from reading the claimant's witness statement and the articles about him that were produced in the bundle as well as the previous relevant tribunal decisions, that the claimant has carried out important work in respect of challenging the use of blacklists. He has a website

dedicated to his work in this respect and has been featured in various newspaper articles and similar.

19. The claimant's claim before us was whether he had been refused employment by the respondent on six separate occasions for a reason related to a prohibited blacklist. The claimant accepted that he had never seen the list he says exists, he had not heard any allusions to a blacklist during the application or interview process and he did not think that any of the respondent witnesses had seen a blacklist either.

20. His claim before us was predicated on the absence of any plausible explanation as to why he had been rejected from employment. He considered that this absence of a reasonable or plausible explanation ought to shift the burden of proof and therefore to lead to the inference of the existence of a list and this being the reason he was not offered employment.

21. His submissions (which we have read and carefully considered but do not repeat here) make much of various aspects of the reliability of the witness evidence provided by the Respondent and their failure to make disclosure regarding possible Teams communications and other possible evidence regarding their recruitment processes and their failure to call the witnesses he felt were necessary to refute the claims he has brought.

22. As an overall observation, contrary to the Claimant's assertions, we found the Respondent witnesses to be reliable and as helpful to the Tribunal as possible. They could not answer all of the Claimant's questions for various reasons including having forgotten the events or not having sufficiently detailed knowledge of the Respondent's overall recruitment processes. The Claimant went to great lengths during cross examination to try to demonstrate inconsistencies in the witness evidence and reveal holes in their recruitment processes and practices. On several occasions, he succeeded in demonstrating that their recruitment processes and practices were at times poor and had significant room for subjective opinions of individuals to take precedence as opposed to them operating a strict marking regime with transparent accountability that was applied to each and every recruitment process that they ran. Nevertheless, we did not find that any of the three respondent witnesses attempted to hide that, nor were their answers to questions as flawed as he seeks to suggest to the extent that their credibility was harmed before us. We address this below when considering their evidence on the relevant facts.

23. He also put forward the contention that the possible prohibited list was a list of one (him) that was created in the mind of those interviewing him and that this fell within the definition of a prohibited list under the Regulations. He also put forward the contention that this list or the knowledge of this list was integrated into their automated online application process OR (our emphasis), possibly, that a human with this list in mind, altered the online application process in respect of his applications so that they did not progress in the same way other people's application progressed. He also relied upon the fact that it was very easy for anyone at the Respondent to discover his previous involvement with

Blacklists and his subsequent campaigning work. We assess the relationship between the evidence we heard and the existence of those lists below.

The Interviewed for role

24. On 19 January 2023 the Claimant applied for the role of Part Time Customer services advisor role. The Respondent has a Candidate Self Service page on their website where he could monitor the progress of his application. On 23 January 2023 he received an email from Catalin Axon inviting him to an online video interview. He completed that video interview . The interview platform was provided by Hireview.

25. The Claimant attended the Chester Business Park on 30 Jan 2023 where the Respondent was based for this application process. He said he was one of 12 being interviewed for the role. Ms Ashley said that there were 14. We do not think anything turns on this but we had interview notes from 13 candidates including the Claimant.

26. The interview process was comprised of the following:

    (i) An online test where the individuals had to go on the Respondent's shopping website and put three shopping items in the online basket.
    (ii) Six applications were split into 2 groups of three and had to define six things each group would take to a desert island if they were to be stranded there.
    (iii) Each application had to write a short response to a customer feedback email. This was done with pen and paper as there was a problem with the Respondent's computer system at the time.
    (iv) A one to one interview

27. The Claimant says that he was confident he had performed well in each of the tasks. His analysis was:
    (i) He easily completed the computer shopping task
    (ii) He interacted well with his group during the second task
    (iii) His written answer for task three was better than the others we have now seen
    (iv) His one to one interview went well

28. The respondent's evidence that the computer shopping task was performed well by everyone.

29. Ms Williams' evidence was that the claimant performed well in the group discussion about the desert island but that he was not the strongest performer so she scored him 2/3.

30. There was a significant amount of debate about the quality of the written answers provided by the other candidates when compared to the Claimant's. In essence the Claimant felt that given the spelling mistakes and grammatical mistakes made by the person who scored 3/3, it was strange that he had only scored 2/3. We note that several others also scored 2/3. Ms Williams was not

able to give a definitive answer that explained the scoring system or why the other individual got 3/3 over the Claimant's answer. We note that Ms Ashley disagreed with the scoring and said she would not have given the other candidate a perfect score.

31. We are not in a position to reassess or rescore these exercises. By definition the scoring system was subjective to an extent. However that subjectivity was applied across the candidates. There were several people who scored both better and worse than the Claimant across the tasks. There was nothing to suggest that the Claimant ought to be scored better than others who also scored 2/3 even if the 3/3 score was disagreed about between the Respondent witnesses. Ms Williams explained why she had scored the other candidate 3/3 and whilst the Claimant and Ms Ashley may disagree with that score, it is not necessarily indicative of anything other than the inherently subjective nature of the exercise undertaken.

32. Ms Ashley undertook the one to one interview. Through cross examination the Claimant sought to establish the following issues with the interview.

    (i) That Ms Ashley's notes were not comprehensive
    (ii) That he had mentioned his Trade Union activities in some detail
    (iii) That he had given good examples to Ms Ashley
    (iv) That he had demonstrated significant relevant experience for the role as he had written or taught the Respondent's CIPD course and managed two FTSE 100 HR teams in the past.

33. It is a fair observation that the Claimant remembered the interview more clearly than Ms Ashley. We are not surprised given the roles they were undertaking on that day and the number of interviews Ms Ashley has no doubt performed on that day and since. This interview was more important to the Claimant than it was to Ms Ashley.

34. Ms Ashley accepted that her notes were not very thorough. However she said that she would have orally given her feedback on him to Ms Williams prior to the calibration meeting at the end of the day.

35. She accepted that the Claimant mentioned his Trade Union activities however she says that she did not then mention it to anyone else as she did not consider it important or relevant to the recruitment process. She accepted that he had mentioned the BBC journalist Andrew Pearce and the documentary as well as accepting that he had fought against workplace injustice.

36. However, she felt that his examples of relevant experience did not sufficiently tie back to the work he was going to be undertaking for the Respondent or demonstrate why he wanted to work there. The Claimant put to her in cross examination that he had told her of his extensive experience running large HR teams, his research into the Respondent's Trust Pilot scores and he gave a good account of his positive performance in the interview.

37. Ultimately, the Claimant and Ms Ashley disagreed as to how well he had performed. Ms Ashley, to the best of her memory, scored him 2/3 because he had not tied his examples back to working for the respondent. Had he done so, she says, he may well have scored 3/3 as Mr Chamberlain, another candidate that day, had done.

38. There was considerable debate about the use of the word 'passion' and the Claimant's apparent lack of demonstration of passion for working for the Respondent. Ms Ashley says that until she was asked for the purposes of these proceedings, she had not used the word passion (or lack thereof) about the Claimant. All other sources of her comments about him had not been run past her and did not use her words. Nevertheless, we do not consider that this word is as decisive or important as the Claimant does. With or without the word 'passion' it is clear that Ms Ashley did not think that the Claimant demonstrated that he wanted to work for the Respondent as much as someone needed to in order to give them the score of 3/3.

39. Again, what is clear is that this was a fairly subjective exercise and it was flawed. Ms Ashley did not manage to get through all the questions that she could have asked the Claimant. There were therefore some questions some candidates were asked that day that others were not. She also did not make particularly helpful or coherent notes. Nevertheless, we accept that her evidence was plausible because she did not seek to make up a keen memory of the interview. She accepted that she could not remember some elements. She was clear as to what she could and could not remember and she was clear that the Claimant's Trade Union activities were not relevant to her view of the Claimant or the score that she gave her.

40. The Claimant put to Ms Ashley that whilst the members of his group had a 15 minute break and she had a break between interviews, she used that time to go back into her office and tell people about his trade union activities. She denied that. She said that she could not remember what happened in that break but as she was near her office she may well have gone back in. However the only time she discussed the interviews and interviewees was when she fed back to Ms Williams at the end of her day for the purposes of the calibration process.

41. We accept that evidence. Ms Ashley had no reason to share the Claimant's trade union activities with colleagues as she found them unremarkable. Prior to this case she knew little about Blacklists and had no reason to tell Ms Williams or Ms Saxon or anyone else about the Claimant's activities during this break. The Claimant has provided us with no plausible evidence that this occurred. He relies solely on issues with Ms Ashley's credibility and their subsequent scoring of him to say that this therefore must have been based on a knowledge of the

42. The Claimant put to Ms Ashley that she had accessed his website and watched the videos he had produced and she denied it. He made this assertion based on his monitoring of those who watched it and said that one person from the same area that Ms Ashley lived had watched it a few days after my interview.

43. On balance of probabilities we do not consider that it was Ms Ashley that watched these videos. We do not think that she considered the Claimant or his interview so important that she chose to spend her time looking the Claimant up online or watching his videos. This was one interview amongst many that Ms Ashley and her colleagues undertook as part of a rolling recruitment process and whilst it stood out to the Claimant, we do not consider that it did for Ms Ashley until the Claimant sought feedback and pursued this action against the Respondent.

44. Our overall assessment of the evidence we heard was that the Claimant was not that memorable to Ms Ashley in the scheme of her job. Her assessment of him was according to the totality of his interview and she did not consider that he should be scored 3/3. We accept that this was primarily due to the fact that his examples did not tie back sufficiently to the work he would do for the respondent even though he could demonstrate appropriate previous experiene. We accept that she did not consider that he demonstrated to her that he wanted to work for the Respondent as much as she was looking for in a candidate on that day.

45. We accept that this is what she told Ms Williams and that she did not tell Ms Williams or anybody else at the Respondent about the Claimant's Trade union activities as she believed it to be irrelevant.

46. The Claimant's final overall score after all three aspects of the recruitment day was 6. On the day, they made a decision to offer roles to everyone who scored over 7. They also offered the role to the only other person who scored 6. Their explanation for that was that the other person was a better fit but they could not provide an exact explanation of what that meant.

47. The Claimant has demonstrated to us that there were weaknesses in Ms Ashley and the Respondent's recruitment methodology and we consider that below in making our assessment of the reason for their failure to offer him a job. However we have found, on balance, that Ms Ashley did not consider his trade union activities when scoring him 2/3 and Ms Williams and the others carrying out the final scoring did not consider his trade union activities because they did not know about it nor did anyone else involved in the decision making regarding offering the Claimant a job on this day.

48. The Claimant made considerable submissions about the fact that the Respondent offered a role to someone else who had the same overall score as him. He says that the difference in treatment suggests that there must have been a reason as to why he was treated less favourably than that person. We consider this issue in our conclusions below.

49. The Claimant also questioned Ms Ashley and Ms Williams about how they could not have offered him a role when, at the conclusion of that day they had not recruited enough people to fill the roles. Their responses were mixed.

50. We also heard evidence about how they ran recruitment drives subsequent to this particular recruitment day which we will call ‘Coffee and chat days’. We did not hear much evidence as to how these recruitment days worked. There was a question as to whether Ms Ahsley had taken part in such a day and whilst she originally said she had not, it transpired that she probably had. It was not clear to us, other than as an issue regarding her credibility, as to how this was relevant to the evidence Ms Ashley gave about her decision making regarding the Claimant’s score.

51. It was put to Ms Williams that if such an informal process as a coffee and a chat resulted in job offers it seemed strange that the Claimant was not offered a role given his performance at the interview stage and his experience and was further indication that the failure to offer him a role must have been in relation to a prohibited list. Ms Williams refuted this stating that the ‘chat’ stage of these days was equivalent to an interview.

The online applications and the Videos

52. The Claimant, having not secured the position through the interview process, applied for some roles online. His rejection letter for the above role had expressly suggest that he did so. He applied for 5 different roles as a Customer assistant in the café. It was the same role but with different shift patterns and hours. The Claimant realised, probably at around application 4, that he was being immediately rejected from the application process. He realised this because when looking at his online application portal, as soon as he pressed submit, the portal registered him as refused. This is recorded on the Respondent’s system as ‘regretted’.

53. It is not disputed by the Respondent that this occurred. We heard evidence from Mr Andrews that the reason for this was that, for any customer assistant role, the business operated a 6 month ‘cooling off’ period. This meant that if you ticked the box that you had applied for a role with the respondent in the last 6 months, when applying for that category of role, you were automatically given a score of 60 and this meant that you were automatically rejected. The Claimant does not accept this explanation as he said that this matter, when taken together with all the other issues with his applications, suggest the existence of a blacklist and that he has been treated badly in relation to that list. He considered that this was one of many issues with the process. He did not pretend that he knew for sure that this was not part of the Respondent’s programme – he however said that it was part of the overall illustration that he was painting for us. This was disputed by the Respondent and we address the matter in our conclusions.

54. The Claimant, having not had any explanation as to why this was occurring, thought that this immediate rejection was odd and decided to apply for roles using fake profiles. He carried out the following applications:

    (i) Contact Centre Advisor
    Mary Jones
    Julie Roberts

Andrew Roberts

(ii) <u>Customer Assistant Roles</u>
Mary Jones
Julie Roberts (x2)
Andrew Roberts
Jamie Roberts
Emma Roberts

55. In making the above applications, none of the above applicants in any of their applications were immediately 'regretted'.

56. We watched all of the videos provided. We summarise the relevant questions that they showed in the following table:

Name	**Role applied for**	**Have you applied for a job with us in the last 6 months?**	**What happens?**
Claimant	Customer assistant – Café - role 5x (different shift patterns)	Yes	'Instantly ' regretted' But Receives automatic email each time
Jane McNally	Customer Assistant – café	No	Goes through
Video 5	Contact Centre adviser	No	Goes through
Mary Jones	Café role	Yes	Under consideration
Julie Roberts	Customer assistant, café	Yes	Under consideration
Julie Roberts	Assistant clothing and Home	Yes	Under consideration
Video 8			
Andrew Roberts	Customer Assistant Cafe	Yes	Under consideration

57. The Claimant identified a number of inconsistencies in the process that he went through compared to the way the computer system treated the fake persona's applications. He identified that some individuals went straight through to under consideration despite applying for exactly the same role or roles as him.

58. The respondent explained the difference in treatment as follows:
    (i) Customer assistant roles ask if you have applied for a role within the last 6 months. If you answer yes you are likely to be regretted (though see (iii) and (iv) below for further information).
    (ii) The Customer Adviser roles process does not ask that question and therefore you are likely to go through to 'under consideration' even if you have applied for a role in the last 6 months.
    (iii) If a candidate submits multiple applications then the multiple that is detected, will be 'held' until such time as a human being within the Respondent ascertains whether the application is a duplicate and whether the individual applicant intended it and wanted to apply for multiple roles.
    (iv) If a candidate has an application already on the system that is 'Under consideration' then the application will be 'held' as described at (iii) above regardless of how you answer the 6 month question until a human goes into the system and clears it.

59. We found Mr Andrews' evidence on this point helpful. It tallies and explains all of the glitches identified by the Claimant. We accept that he has only given this evidence late and only in response to the Claimant's witness statement. Had the Claimant not raised it in his witness statement, the Respondent would not have known that they had to address these issues in their evidence. Nevertheless, despite the lateness of the evidence, we consider that Mr Andrews' account was plausible and helpful. He accepted that he could not explain all of the errors in the system.

60. The Claimant raised concerns regarding Mr Andrews' expertise and suitability for giving evidence on this point both during cross examination and his written submissions.

61. We found Mr Andrews to be a helpful and clear witness who was able to explain the system which he had largely designed and was in charge of on a daily basis. We consider that he had appropriate expertise and was able to answer most if not all of the questions put to him about the system. We do not accept that Mr Andrews lacked the relevant knowledge or expertise. He did not have all the answers and behave like the smartest guy in the room as suggested by the Claimant in his submissions. He attempted to answer the questions put to him about a system which he knew and understood well.

62. We turn then to the inconsistencies and problems that the Claimant identified within the system. To consider these issues we watched the videos submitted, checked the order and timing of the applications and considered both the Claimant and Mr Andrews' evidence to reach our factual findings.

63. The existence of the 'Have you applied for a role within the last six months' question explains why all of the Claimant's personal café role applications were rejected. As they had been rejected, there was no reason for any subsequent application for any of the other roles to be 'held' as under consideration. There

was nothing else on the system under his name or address to 'clash' with and therefore no human had to go into the system and check any of his applications before rejecting them.

64. Where the individuals who answered 'yes' to the 6 month question were put into 'Under consideration' they all already had a Customer Advisor role application that was labelled 'Under consideration' in the system. The Customer Advisor role did not automatically reject someone if they ticked 'yes' under the 6 month question so that went through. Then, when the next application was submitted, it was held as 'under consideration' until a human went in and checked and cleared the system.

65. The Claimant brought to our attention that this had not occurred though and at the time of the Tribunal hearing, the applications had not been cleared and rejected. Mr Andrews could not properly account for this but said that it was probably down to human error and a failure on the part of the person responsible for this recruitment process to check the 'held' applications in a timely manner.

66. We find that Mr Andrews' explanations plausibly account for all of the differences between the way the Claimant's applications were treated and the way the fake persona's applications were treated. The Claimant says we ought not to accept those explanations particularly when they have only been provided by Mr Andrews in response to his evidence. He says that this makes them unreliable and created to explain the problems as opposed to reflecting the reality of the system. Whilst we understand the skepticism of the Claimant in this situation, as explained above, we nevertheless, on balance accept Mr Andrews' evidence because we found that he had a thorough understanding of the system.

67. The Claimant asked a considerable amount of questions regarding the flaws in the reasoning behind the online applications blocking people in some circumstances and not others. Again, as with the recruitment day discussed above, the Claimant has established that not all of the Respondent's online processes are without fault.

68. In addition to the evidence above, Mr Andrews informed us that there was no setting within the system to prevent any one person from applying for roles. i.e. that it was not possible to put someone's name into the system as 'forbidden'. There was the functionality to block previous employees who had been dismissed for theft however which suggested that blocking certain categories of people was possible. Mr Andrews said however that there was no category within the process to filter it according to Trade Union relations. He accepted that perhaps such a function would be possible to create but that any person doing that would have to ask him to do it and/or he would immediately be aware of it if they put it into the system. We accept that evidence. We have no reason to dispute Mr Andrew's helpful and thorough account of the IT system. It was not a maze as suggested by the Claimant but clear to the extent necessary for our purposes. We found his answers clear and helpful and born out by the

evidence that the Claimant provided us regarding the fake persona applications he videoed and his own application process.

69. Whilst the Claimant understandably queried why the system rejected him and not others, he had no evidence to put to Mr Andrews beyond the difference in treatment between him and the fake candidates, to establish that there was any tainting of the system regarding a Blacklist or knowledge of a Blacklist.

Conclusions

70. It is not in dispute that the Claimant was not employed by the Respondent on 6 separate occasions. The first was for a part time Customer Services Advisor Role. The remaining applications were all for Customer Assistant roles in the café though they had different hours and shifts.

71. The Claimant asserts that all of his applications were rejected for a reason related to a prohibited list or a Blacklist. The List of Issues agreed with the parties suggests that we must first ascertain whether a prohibited list existed. There is not much case law on this point. The Regulations were introduced in 2010 and the mischief they were intended to counter was the use of industry wide lists such as those operated by Carillion (and others) in the construction sector. These lists were operated internally and by external agents to ensure that those with Trade Union links or feared Trade Union links were excluded from workplaces.

72. The definition of a prohibited list is set out at in Regulation 3(2) as follows:

(2) A "prohibited list" is a list which—
(a) contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions, and
(b) is compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers.

73. We note REJ Clarke's observations in Wainright v Balfour Beatty Engineering Services Ltd and Ors (1601751/2015) brought by the Claimant which were as follows:

"126…….. Mr Northall emphasised that, when defining a "prohibited list", Regulation 3(2)(a) refers to "persons" in the plural, rather than "person or persons". In my judgment, however, the provision should attract a purposive interpretation

127. I can see no reason in principle why a mentally reassembled list must, of necessity, contain a plurality of names. Were it otherwise, it would be lawful to blacklist one individual but not more than one individual. Certainly, I would not consider the point so clear that Mr Wainwright's claim should be struck out.

Secondly, even if I were wrong about the first point, I consider that it is within the scope of the Regulations for Mr Wainwright to contend that a refusal by Balfour Beatty to employ him simply because it recognised his name from a historic blacklist amounts to an actionable refusal for the purposes of Regulation 5 because it would still be "for

a reason which relates to" that list. I refer, in this regard, to the point I made earlier about the Miklaszewicz case, as analysed in Elstone. To summarise, then, it is open to Mr Wainwright to contend that Balfour Beatty has refused him employment for a reason relating to a prohibited list that pre-dated 2 March 2010 and which no longer exists or, alternatively, to contend that it has refused him employment because the process of remembering that his name was on a historic list constitutes the mental reassembly of that list, even to the extent of being a list of one name. The effect, either way, is the same: a continuation of being blacklisted.

74. As a matter of principle we accept the premise that it is possible for a prohibited list to have only one name or that it is possible for an employer to treat someone badly in relation to a prohibited list simply because they know that their name was, at some point, on such a list for the same reasons outlined by REJ Clarke above. However we do not seek to make any definitive conclusions on this point as we think it is largely unnecessary in all the circumstances.

75. In this case, much as in the above case, it appears that the Claimant was relying on the existence of two possible lists. He appeared to assert that a list consisting of just him had been created by someone at the Respondent. Secondly that the Respondent's knowledge of his previous presence on a historic Blacklist caused them to discriminate against him. We consider that the burden of proof is on the Claimant to establish the existence of any such list.

76. Addressing the first possible prohibited list. The Claimant did not definitively tell us who he says created this list. His case suggests that it must at least have originated with Ms Ashley as she was the person he says he told about his union and blacklisting activities. He suggested during cross examination that she then shared this information with Ms Williams and Ms Saxon and perhaps others in the office on the recruitment day. We found, on balance of probabilities, that she did not share that information with Ms Williams or anyone else at the Respondent. We reached this conclusion because she was not, we find, interested in or in any way influenced by the Claimant's union activities. Ms Ashley considered the Claimant's trade union activities to be irrelevant to her assessment of his capability in the interview. Her score of 2/3 was based on his answers to questions about what he could offer the Respondent. She did not then tell Ms Williams or anybody else within the Respondent about the Claimant's trade union activities in the broadest sense i.e. his membership of a union or his previous presence on a Blacklist.
77. We find that the Claimant has not established, on balance of probabilities, that Ms Ashley or anyone at the Respondent compiled a list with a view to it being used by them or anyone else for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers.

78. Any thoughts Ms Ashley may have had about the Claimant's trade union activities were not, we find, considered with the purpose of discriminating against the Claimant. To be a prohibited list the Claimant must demonstrate more than simply that Ms Ashley had his name in her head at the same time as knowing that he was a trade union member or took part in trade union activities. He must demonstrate that she thought about his name with the purpose of

treating him badly in relation to it. He has not established that. We have accepted her evidence that she gave his union membership little thought and that any thought she did give it was not negative nor with any purpose at all. We have also accepted her evidence that she did not tell anyone else about it within the Respondent including Ms Williams or any of the decision makers present at the recruitment day.

79. The Claimant has not provided us with any evidence that anyone else within the Respondent had created a list or knew about the Claimant's previous presence on a list through some other medium than Ms Ashley informing them. We do not accept that the flaws in the Respondent's recruitments processes demonstrate the existence of a list. The Claimant has pointed out flaws and differences in treatment but has not, in our view, demonstrated that a list compiled with the purpose of discriminating against people on it was created by anyone at the Respondent.

80. We therefore consider that the first prohibited list that the Claimant appeared to be relying upon did not exist either in the mind of Ms Ashley or anyone else within the Respondent or in hard or soft copy physical format.

81. The second possible prohibited list that the Claimant relies upon is the previous Blacklist that the Claimant was included on and that he has campaigned about it and brought a Tribunal claim about. He appears to contend that it was knowledge of his presence on and relationship to this earlier prohibited list that caused the Respondent to refuse him employment. The fact that the Claimant was previously Blacklisted is not in dispute.

82. The Claimant suggested that Ms Ashley knew about his previous Blacklist presence through him mentioning it during the interview or through her watching the videos on his website or 'Googling' him at some point during the process and finding reference to him in various articles. We have found that she did not Google him or look at his website and was unaware of the fact that he was on a Blacklist previously. She showed relatively little understanding of trade union activities and whilst she acknowledged that he told her he fought workplace injustice and that he was a union member, she did not demonstrate any appreciable understanding that this meant he was on a Blacklist or that she would consider treating him differently in any way if he was. As submitted by the Respondent in their written submissions, the Claimant must show not simply that he was treated less favourably because of Union activities, would render s 137 of the Trade Union and Labour Relations (Consolidation) Act 1992 entirely redundant. The Claimant must show that she treated him less favourably because of his presence on the list.

83. We also find that she did not communicate the existence of the previous Blacklist nor the Claimant's presence on it to Ms Williams so it was not considered by those making the decision as to whether or not to offer him the first role.

84. With regard to the online applications. We consider that nobody within the Respondent was aware of the Claimant's presence on either possible

prohibited list. They therefore did not alter the online system so as to reject the Claimant's applications for a reason relating to a prohibited list.

85. Therefore in the absence of the first possible list actually existing or being known about by the decision makers within the Respondent any claim relating to that prohibited list must fail.

86. Further, we conclude that nobody within the Respondent who had any input into the Claimant's in person or online application process knew about the Claimant's actual or perceived presence on the historic blacklist and therefore any claim in relation to that prohibited list must fail.

87. In case we are wrong with regard to our analysis of the existence of a prohibited list. We have gone on to consider the two stage test of Regulation 5(3) and again, find it prudent to have due regard to (as he was then) REJ Clarke's erudite summary of the test that a Claimant must establish to succeed in a claim under Regulation 5. We know that this is not binding on us but accept that this is a helpful summary and agree with the analysis therein.

"138. I will also observe that the provision at Regulation 5(3) plainly mirrors the two-stage approach to the burden of proof that applies in discrimination cases. In essence, at the first stage, the tribunal would consider whether Mr Wainwright had proved facts on a balance of probabilities from which it could conclude, in the absence of an adequate explanation from Balfour Beatty, that Balfour Beatty had breached Regulation 5 – the so-called "prima facie case". There would need to be some evidential basis upon which the tribunal could infer that Mr Wainwright was refused employment for a reason relating to a prohibited list. The tribunal could cast its net widely in this regard, which would extend to an examination of circumstantial evidence. At the first stage, the tribunal would be required to assume that Balfour Beatty had no adequate explanation for refusing him employment and therefore ignore any explanation it advances. This would only become relevant at the second stage where, if Mr Wainwright were to succeed in making out a prima facie case, the burden of proof would then shift to Balfour Beatty. The tribunal would be required to uphold Mr Wainwright's claim unless Balfour Beatty proved that it did not breach Regulation 5. The standard of proof would again be the balance of probabilities. To discharge that burden, there would need to be cogent evidence that the Regulation had not been breached."

88. It is here that the reverse burden of proof, similar to that of the Equality Act 2010 is used.

89. The Claimant was refused the first role. We do not think that this is sufficient for us to infer, in the absence of an adequate explanation that the Claimant was treated badly in relation to a prohibited list. He must produce something more to shift the burden of proof than simply point at a perceived injustice or unfairness. He has, we accept, demonstrated that the Respondent's recruitment process was at times sloppy in terms of note keeping and scoring

criteria which can inevitably then lead to a lack of transparency or accountability in decision making.

90. We also understand that the Claimant disagrees with their assessment of him and his skills and suitability for the role when compared to the other candidates who he appeared to view as inferior to him with regard to suitability. Nevertheless we do not accept that their subjective opinions of his performance are so at odds with his assessment of himself as to warrant any negative inference. Many others within the recruitment process were scored as he was in the different exercises i.e. 2/3 instead of 3/3 and many scored fewer points than him and were not offered the role.

91. There was one other candidate who scored the same as him and who was deemed to be a better fit and therefore was offered a role that day. It is possible that in the absence of any explanation, this situation could reverse the balance of proof and require the Respondent to explain why it preferred the other candidate who scored the same over the Claimant.

92. The Respondent's explanation for this was that the other candidate was a better fit. That is not a particularly helpful explanation. Nevertheless, they also explained that their decision was not in any way based on the Claimant's presence on any possible Blacklist because they did not know about it. In fact, these individuals, we have found, did not know about the Claimant's trade union activities either as Ms Ashley was not in the room when the decision was taken. The reason why the Claimant was not given the job on this day was not related to a prohibited list because those making this decision did not know about the any such list or the Claimant's relationship to any such list. It was not part of their decision making process. This claim must therefore fail as the Respondent has established that they did not treat him differently for a reason related to a prohibited list and cannot have done so when the decision makers did not know about any such list.

93. Turning then to the Online applications. We accept that the fact that the Claimant's applications were treated differently to those of the fake personas was confusing. However Mr Andrews' explanations for the various issues which the Claimant correctly identified as apparent differences were plausible. We have found his explanations, on balance, to be the genuine reasons for the differences in treatment between the Claimant's applications and the fake personas' applications.

94. All of the Claimant's applications numbering 2-6 were rejected because he said that he had applied for a different role in the previous 6 months and that was something which precluded you from applying on their system for the café assistant role. This was not something specific to the Claimant but a blanket rule for that role. This was the reason for his rejection.

95. Further, for the avoidance of doubt, the computer system and those who programmed it had no knowledge of the Claimant or his presence on a prohibited list. It therefore cannot have been the reason for his treatment.

96. For all those reasons, the Claimant's claims are not well founded and must fail.

Employment Judge Webster

Date: 22 December 2023

JUDGMENT and SUMMARY SENT to the PARTIES ON

2 January 2024

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FOR THE TRIBUNAL OFFICE