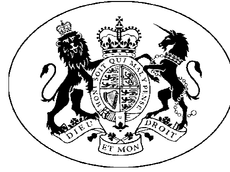
Case No: 2303137/2021



EMPLOYMENT TRIBUNALS

Claimant: Ms H Allahwala

Respondent: Home Office

Heard at: **London South Employment Tribunal**

On: 6, 7, 8 and 9 June 2023
and 14 June 2023 (in Chambers)

Before: Employment Judge T Perry
Mr P Mills
Mr R Shaw

Representation
Claimant: In person
Respondent: Mr S Crawford (Counsel)

RESERVED JUDGMENT

It is the unanimous Judgement of the Tribunal that:

1. The Claimant's claims of direct race discrimination are not well founded and are dismissed.

2. The Claimant's claims of direct religious discrimination are not well founded and are dismissed.

3. The Claimant's claims of direct disabilty discrimination are not well founded and are dismissed.

4. The Claimant's claim of victimization is not well founded and is dismissed.

5. The Claimant's claims of detriment due to making a protected disclosure are not well founded and are dismissed.

REASONS

Introduction – postponement application

1. On the first morning of the hearing, the Tribunal had to make a decision on the Claimant's application to postpone the hearing. For the reasons given to the parties orally at the time, the Tribunal decided to proceed with the hearing. There were effectively four matters advanced in support of postponement. First, the Claimant complained that she had been provided with late disclosure of somewhere under 100 pages of documents on 12 May 2023, which the Claimant had not looked at. Second, the Claimant had suffered a head injury in February 2023 which had affected her vision and had been signed off work for a month from mid April 2023 due to poor mental health. Third the Claimant complained about the state of the bundle and asserted some of her documents had been excluded. The Claimant was unhappy that some documents had been provided in disclosure that had not been provided in response to her Data Subject Access Request. Fourth, witness statements had been exchanged at 4pm on Friday 2 June 2023 and the Claimant had not read the statements of the Respondent.

2. The Tribunal decided it was in accordance with the overriding objective not to postpone the hearing and rather to take the entire first day to read. A significant factor was that the window for relisting a hearing of this length was August 2024. Moreover, as to late disclosure, this is not in itself unusual and the Claimant had had a significant period of time to review the late disclosure. As to the Claimant's health, the Claimant provided no medical evidence suggesting she was unfit to participate in the hearing. There was limited medical evidence regarding the effects of the Claimant's head injury in February and the Claimant had been able to prepare her documents for disclosure shortly thereafter with only minimal delay. The Claimant was able to prepare a lengthy witness statement notwithstanding her illness in April. The state of the bundle seemed broadly satisfactory to the Tribunal (albeit very long). The Claimant was unable to say what documents had not been included and it was confirmed by both sides that the bundle had generally been put together to include any document the Claimant wanted. The Claimant had had the bulk of the bundle since April 2023. As to the witness

statements, this was the Tribunal's biggest concern. However, the Respondents witness statements were overall quite short and could be read by the Claimant that day and the evening of the following day. It was the Claimant who had delayed exchange of witness statements and then chosen (for reasons that were largely unclear) not to read the statements after exchange.

3. There was a discussion with the Claimant about any adjustments required for her Raynaud's syndrome and efforts were made to keep the temperature at an appropriate level.

The Claimant's claims – applications to amend.

4. At the start of the hearing it was confirmed that the issues in the case were those set out at a Preliminary Hearing before EJ Clarke on 6 December 2022. These were direct discrimination claims because of race, religion and disability and a detriment claim due to whistleblowing. The claims related to two applications: one from 2019 for an Entry Clearance Manager role; and one from 2021 for a Chief Immigration Office role. The Claimant's ET1 claim form had been significantly more extensive and covered matters stretching back to the last century.

5. During the course of the Claimant's evidence on the second day, the Tribunal became concerned that the Claimant's actual claim in relation to the 2019 application was actually a claim of victimisation. Having regard to the Court of Appeal's guidance in **Mervyn v BW Controls Limited** 2020 EWCA Civ 393 on the morning of the third day of the hearing the Tribunal raised the possibility of whether the list of issues accurately reflected the Claimant's actual claims as now being advanced. After a brief adjournment, the Claimant made a written application to amend to include a claim that the outcome of the 2019 application was an act of victimisation arising from the Claimant's grievance raised on 27 April 2018. For the reasons given orally to the parties at the time, the application to amend was granted. In summary, whilst recognising that the amendment created a new cause of action, it was one that did not significantly expand the scope of the factual investigation to be undertaken by the Tribunal. The timing of the application mitigated against granting it but the practical consequence of granting the application did not appear certain to lead to a postponement. The question

of whether the new claim was in time was left to be considered at the end of the hearing. In the end, the prejudice to the Claimant in denying her a claim just outweighed the prejudice to the Respondent in having to answer that claim.

6. On the morning of the fourth day of the hearing the Claimant made a further application to expand her claim in relation to the 2021 recruitment round. The Claimant sought to include in her discrimination and whistleblowing claims her failure to secure a second more junior Immigration Officer role in 2021 that the Claimant had unsuccessfully applied for. The Claimant also sought to change the nature of her claim in relation to the 2021 Chief Immigration Officer role to focus not on why she was not appointed to this role after applying but rather on the decision to run the recruitment exercise at all rather than simply appointing the Claimant to this role off a reserve list that the Claimant had been placed on in February 2020. The Tribunal rejected both applications for the reasons given orally at the time. In short, the scope of the factual investigation in relation to the changes was significantly different to that currently being undertaken and would necessitate further evidence from the Respondent. It was almost certain to lead to a postponement. The application was made even later in the course of proceedings with no real explanation as to why. The balance of prejudice to the Respondent in granting the amendment in relation to the Immigration Officer role or adjusting the list of issues in relation to the Chief Immigration Officer role outweighed the benefit to the Claimant.

The issues

7. The Respondent conceded that the Claimant had made a protected disclosure on 28th February 2010 in an e-mail to the Home Office in which the Claimant advised the home office that a locally engaged Entry Clearance Assistant in Amman was tampering with visas and trying to get visas granted for sky martials who purported to be from the Jordanian Army without there being sufficient documentation to satisfy the requirements of the entrance clearance regulation and that the Entry Clearance Officer was manipulating and colluding on the visa applications.

8. The Respondent also conceded that the Claimant's grievance of 27 April 2018 regarding inter alia, Mrs Crowther, was a protected act for the

purposes of section 27 Equality Act 2010 in that it included an allegation of failure to make reasonable adjustments.

9. Accordingly, the issues the Tribunal ultimately had to determine were as follows:

Time limits - discrimination

Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

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

ii) If not, was there conduct extending over a period?

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

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

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

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

Time limits - detriment

Was the claim submitted within the time limit in the Employment Rights Act 1996? The Tribunal will decide:

i) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of.

ii) If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

iii) If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

iv) If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Detriment (Employment Rights Act 1996 section 47B and 48)

i) Did the respondent by doing the following things subject the claimant to detriment?

a. Refuse to offer the Claimant an Entry Clearance Manager role on 19th July 2019;

b. Refuse to offer the Claimant a Chief Immigration Officer role on 21st May 2021.

ii) If so, was it done on the ground that she made a protected disclosure in 2010?

Direct discrimination (Equality Act 2010 section 13)

i) Did the respondent by doing the following things subject the claimant to less favourable treatment?

a. Refuse to offer the Claimant an Entry Clearance Manager role on 19th July 2019;

b. Refuse to offer the Claimant a Chief Immigration Officer role on 21st May 2021.

ii) Was that less favourable treatment? The Claimant relies for the Entry Clearance Manager role on the fourteen candidates appointed to role who scored less well than her at interview and for both roles on a hypothetical comparator.

iii) If so, was it because of her race (Kashmiri ethnic origin), religion (Islam) or a disability (Raynaud's syndrome)?

Victimisation (Equality Act 2010 section 27)

i) Did the respondent by doing the following things subject the claimant to detriment?

a. Refuse to offer the Claimant an Entry Clearance Manager role on 19th July 2019;

b. Refuse to offer the Claimant a Chief Immigration Officer role on 21st May 2021.

ii) If so, was this because the Claimant by her grievance of 27 April 2018 did a protected act?

Evidence

10. The Tribunal was provided with a final hearing bundle running to 1760 numbered pages. The last 6 of these were provided by the Respondent during the hearing and inserted without opposition by the Claimant. The parties took the Tribunal to relatively few of these document (either in witness statement cross referencing or in cross examination).

11. The Claimant gave evidence from a lengthy witness statement in three parts.

12. For the Respondent, Mrs Yasmeen Crowther (SEO Business Manager UK Visas and Immigration), Mr Christopher Cannon (Head of Ops Delivery, National Asylum Intake Unit) and Mr Kane Dempster (Border Force Higher Officer) gave evidence from witness statements.

13. The Tribunal heard oral submissions from both sides.

Findings of fact

14. In 2004 the Claimant brought Employment Tribunal proceedings against the Home Office. The case went to a Full Merits Hearing.

15. In late February 2010 the Claimant whilst working on secondment from the Home Office at the Foreign and Commonwealth Office in Jordan made a disclosure regarding visa tampering and corruption. The Respondent accepts this was a qualifying protected disclosure for the purposes of section 43B Employment Rights Act 1996.

16. In October 2016 the Claimant joined the Croydon Visa Section as a Cadre Entry Clearance Officer, reporting to Paloma Devine.

The 2017 BEIS role and promotion

17. In late 2016 the Claimant applied for and secured a temporary loan posting as a Higher Executive Officer within the Department for Business, Energy

and Industrial Strategy (BEIS). This was a maternity cover role advertised as open to all staff regardless of grade. The Claimant started this role in January 2017.

18. The Claimant wrote to Ms Devine on 12 December 2016 querying whether she would return to her substantive post as a Cadre Entry Clearance Officer or end up as an Higher Executive Officer (HEO) on return. Ms Devine was on sick leave so this was taken up by Manisha Kotecha. On 4 January 2017 Manisha Kotecha emailed the Claimant to confirm that she would not automatically qualify to return to the cadre as an HEO. The Claimant had asked for confirmation of whether this would be the case as she was considering an HEO role as Developing Markets Support Officer with BEIS. Paulette Lemonious of The Career Transition Service emailed later that day to quote the requirements for promotion at the start of a loan to be permanent. Whilst the Claimant moved to BEIS on promotion, this was seen by the Respondent as only a temporary promotion.

19. On 6 July 2017 the Claimant responded to Paulette Lemonious stating "This is the first time I have logged on to my FCO account since last year (it had been put in a dormant state and I only just today got it reinstated), so I didn't realise that I owe you once again another huge thanks and favour.". The Claimant suggests that she only saw the emails of 4 January 2017 some six months later when she checked her Home Office email account.

20. On 17 July 2017 the Claimant stated in an email to Denise Hession that she had been told she would return to the Cadre as HEO after the end of her loan period. This was a misinterpretation of what Paulette Lemonious had set out in her email and was directly contrary to what Manisha Kotecha had set out in her email both of 4 January 2017.

The 2017 Cabinet Office role

21. In October 2017 the Claimant transferred to an HEO role in the Cabinet Office. The Claimant had not obtained permission in advance from the Respondent for this transfer as required by policy. From the Respondent's point of view, the Claimant had not technically been eligible for this role given her HEO role at BEIS was not a permanent substantive promotion. Mrs Crowther stated in an email on 10 January 2018 that she was not going to stand in the way of the Claimant's career progression. Retrospective permission for the temporary transfer was given at some point in early 2018.

22. The Claimant's time at the Cabinet Office was not a success. The Claimant was moved off tasks and considered to be underperforming. The loan agreement was ended early at the Cabinet Office's request. In fact, the Claimant's line managers from both her time in BEIS and the Cabinet Office informed Mrs Crowther that the Claimant had scored in the bottom box marking in their appraisal processes.

Return to the Home Office in 2018

23. On 24 January 2018 Yasmeen Crowther emailed John Forrest regarding practicalities relating to the Claimant returning to the Home Office after her time at the Cabinet Office. In this email Mrs Crowther pointed out that there had been performance concerns during the secondments, that the Claimant would not be returning to an HEO role and raising the possibility of a meeting to discuss whether reasonable adjustments might be needed

24. On 2 March 2018 the Claimant emailed Yasmeen Crowther informing her that she had a Home Office Talent and Leaders Course to attend on the Monday 5th March and a doctors appointment. Later that day, Yasmeen Crowther emailed the Claimant saying that the course was only open to

substantive HEOs and SEOs so the Claimant was not eligble for it but that it had been decided that the Claimant could attend. Mrs Crowther went on to say that there were a lot of things that needed to be discussed and asked the Claimant to return to work in the Home Office on Wednesday 7 March 2018.

25. In fact the Claimant returned to work on Tuesday 6 March 2018. The Claimant informed Mrs Crowther that she had an interview to attend on 7 March 2018 (which had been postponed due to snow in London) and that she was due to attend the Commonwealth Observance on Monday 12 March 2018.

26. The Claimant attended a job interview on the morning of 7 March 2018. Mrs Crowther was expecting the Claimant to return to work around mid-morning. In fact, the Claimant arrived at work at 4:30pm and met with Mrs Crowther. Mrs Crowther informed the Claimant that she would be considering the failure to communicate when she would be out of the office as minor misconduct. The Claimant started screaming and crying and walked out of the office. The Tribunal is not able to say whether Mrs Crowther physically blocked the Claimant from leaving the room as the Claimant alleges although it is clear the Claimant was in a heightened emotional state.

27. Mrs Crowther emailed the Claimant later that day saying that she had not intended to upset the Claimant but that they needed to discuss issues regarding communication, eligibility for the Access Programme, the Claimant’s appraisal with BEIS and reasonable adjustments. Mrs Crowther mentioned the Employee Assistance Programme. The Claimant emailed a colleague with her account of the meeting.

28. The Claimant was then absent on sick leave from 8 March 2018 and does not appear to have returned until July 2018 (by which point she had secured a role in a different department).

The Claimant's 2018 grievances

29. On 27 April 2018 the Claimant raised two grievances: one regarding various issues with UK Visas & Immigration and the incident with Mrs Crowther on 7 March 2018; and another in relation to failure to provide a guaranteed interview under the Guaranteed Interview Scheme in relation to an HEO application from 2016. The grievance that included allegations against Mrs Crowther stated there was a "disregard" to the fact that the Claimant needed "special adjustments due to disabilities whilst training and conducting the 1-to-1 meeting".

30. Mrs Crowther in evidence stated that she was not aware that a formal grievance had been raised against her. This was later qualified to confirm that she was aware of the grievance but was unaware of the contents.

31. On 29 May 2018 the Claimant made similar allegations to those contained in the grievance in an email regarding her ongoing absence. In particular the Claimant complained of a failure to make special adjustments for disabled staff in the context of the meeting on 7 March 2018 being in a "dark and freezing cold storage room". Mrs Crowther saw this email on 30 May 2018 and replied stating that the whole point of her meeting with the Claimant had been to discuss reasonable adjustments.

32. In an email on 5 July 2018 Mrs Crowther acknowledged that she knew that the Claimant had raised a formal complaint against her. It seems to us it was likely that Mrs Crowther did know what the contents of the grievance

were, whether or not she was expressly told, or at least suspected that they were similar to the complaints in the email of 29 May 2018).

33. Following a meeting with David Fairbank on 11 July 2018, the Claimant effectively withdrew her grievance regarding various issues with the UK Visa & Immigration and Mrs Crowther. At this meeting, Mr Fairbank explained to the Claimant that Mrs Crowther has a daughter, who is disabled, and stressed implicitly that she would likely be sympathetic towards adjustments for disability.

34. In an email on 9 August 2018 Mrs Crowther wrote about the meeting between the Claimant and Mr Fairbank and the Claimant's grievance against her stating "it transpired that she had written them in anger and without proper thought so there was no substance behind any of them. He made her think of both sides, not just hers and she agreed that it would not come to fruition."

35. There are no documents recording the withdrawal of the grievance regarding Mrs Crowther. Equally, there are no documents from the Claimant chasing up this grievance. It appears to have been accepted on both sides that the grievance would not proceed.

36. There were various unsuccessful attempts made to hold an attendance management meeting with the Claimant. The Claimant made it clear she did not want Mrs Crowther involved in this process. Before this meeting could take place, having secured a permanent HEO role in July 2018, the Claimant left to start a role in the MOJ working in HMPPS.

37. On 9 July 2018 the Claimant's grievance regarding failure to provide a guaranteed interview under the Guaranteed Interview Scheme in relation to an HEO role from 2016 was upheld.

38. The Claimant formally left the Home Office on 1 October 2018 to take up her new role in HMPPS.

The 2019 Recruitment round

39. In April 2019 the Home Office ran a recruitment process for 15 HEO level Entry Clearance Managers (ECM) within UK Visas & Citizenship (International). These vacancies were all within Mrs Crowther's department. It is unclear whether Mrs Crowther was formally the vacancy holder or whether that position was held by one of her direct reports.

40. The Claimant applied for this role and was interviewed. The Claimant scored an overall rating of 42. This was made up of top rated scores of 6 and 7 on her written application and top rated scores of 4 for her interview. The Claimant scored 42 out of 44. The Claimant scored the second highest score, higher than 14 people who were appointed to role.

41. After the Claimant's interview, Mrs Crowther became aware that the Claimant was a potentially successful candidate. At this point, Mrs Crowther appears to have contacted someone to make them aware of some outstanding issues Mrs Crowther had with the Claimant. It is unclear whether that was raised with one of her direct reports who Mrs Crowther says was the vacancy holder or HR. It is unclear exactly what points Mrs Crowther raised about the Claimant. It is surprising that there is no documentary evidence of this. Mrs Crowther says in evidence that the issues she raised were the Claimant suggesting her promotion to HEO on taking up the BEIS role had been permanent, failure to secure approval from her department before going on secondment, performance concerns during both her secondments, taking part in a talent programme for which she was

not eligible, and failure to properly communicate her absences in March 2020. Mrs Crowther denies that the grievance was a factor.

42. The Respondent says that an email was sent to the Claimant stating that she should discuss with Mrs Crowther or one of her team the expectations in the role and some of the Claimant's previous issues. A similar email was sent to all staff seeking the role on promotion. The Claimant did not respond to this email. We do not accept that this email was sent because we have seen no evidence of it.

43. Mrs Crowther says she took legal advice on not offering the role to the Claimant and was advised that this was low risk because of the history of employment issues. We have not seen evidence of this advice. It does appear that Mrs Crowther was the ultimate decision maker.

44. The Respondent frames Mrs Crowther comments as effectively standard pre employment checks. The Claimant says that as a candidate from another government department her references should have come only from her current line manager. We conclude that the steps Mrs Crowther took were outside normal pre employment checks.

45. On 19 July 2019 the Respondent's Recruitment Team posted the Claimant's scores from her interview. The Claimant saw this score and was left certain she had got the role. That same day, the Respondent's Recruitment Team emailed the Claimant telling her that she had been unsuccessful at her HEO ECM interview. The Claimant's initial response was that she was being black balled from the role. The Claimant was convinced not to take matters further by colleagues who told her that other staff must have scored higher than her.

The 2020 recruitment round

46. In early 2020 the Claimant applied for the HEO role as Chief Immigration Officer (CIO) at the Asylum Intake Unit in Croydon. The Claimant was placed on the reserve list for this role for 12 months from 12 February 2020, meaning that during this period she did not have to interview for any CIO roles and would be directly appointable subject to others higher than her on the reserve being offered before her and consideration of at risk employees, who also a right to be offered before her.

The 2021 recruitment round

47. In March 2021 the Respondent ran another recruitment round for the HEO role as Chief Immigration Officer at the Asylum Intake Unit in Croydon. On 21 March 2021 the Claimant applied for this role. By the time of this application, the reserve list for the 2020 application for CIO had expired. We do not consider it surprising that the Respondent ran a new recruitment process rather than appointing the Claimant directly from the reserve list given they were hiring for multiple roles and would naturally want to secure the best possible candidates.

48. The Claimant interviewed with Christopher Cannon and Kane Dempster for the HEO role of Chief Immigration Officer on 5 May 2021 (having been rescheduled from 29 April 2021). There was an interview script and competency based questions were asked. Mr Cannon felt underwhelmed and disappointed by the Claimant's performance in the interview. The handwritten notes of the interviews should have been retained for two years but have been lost. The Claimant scored 22 and was the second lowest performing candidate. The Claimant was not included on the reserve list. The Claimant accepted that she had performed very poorly and had no issue with the decision of Mr Cannon and Mr Dempster.

49. In 2021 the Claimant had a conversation with a colleague who had been successful in the 2019 HEO level Entry Clearance Manager exercise. This individual told the Claimant what he or she had scored at interview, which was lower than the Claimant's score. The Respondent suggested that the Claimant's refusal to name this person and failure to provide details as to when exactly the conversation took place means that we should not accept that this happened. We disagree. We consider that this was the likely spark for the freedom of information request.

50. The Claimant submitted a Freedom Of Information Act (FOIA) request on 9 April 2021. The Claimant received the outcome of this on 10 May 2022. The Claimant was familiar with the process for making FOIA requests.

51. The Claimant commenced ACAS Early Conciliation on 11 May 2022.

52. On 21 May 2021 the Claimant was informed that she had not been successful at interview and would not be being offered a position.

53. The Claimant received an Early Conciliation Certificate on 18 June 2022.

54. The Claimant issued this claim on 17 July 2022.

The Law

Discrimination

55. Section 13(1) Equality Act 2010 provides that

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

56. Section 27 Equality Act 2010 provides (in so far as it is relevant) that

    (1)A person (A) victimises another person (B) if A subjects B to a detriment because—

B does a protected act

…

(2) Each of the following is a protected act—

…

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

57. Section 123 Equality Act 2010 states, in so far as it is relevant

(1) ...Proceedings on a complaint within section 120 may not be brought after the end of—

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

...

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

58. Section 136(2) and (3) Equality Act 2010 provide that

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

The burden of proof

59. The leading case on the burden of proof remains the joined cases known as **Igen Ltd v Wong** [2005] IRLR 258 which confirmed the guidance given in **Barton v Investec Securities Ltd** [2003] IRLR 332

"(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".

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

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

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

(5) It is important to note the word "could" in SDA 1975 s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

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

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.

60. In **Hewage v Grampion Health Board** [2012] UKSC 37, Lord Hope stated regarding the burden of proof provisions, 'they will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence, one way or the other'.

61. In **Efobi v Royal Mail Group Ltd** [2021] IRLR 811, the Supreme Court said that so far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so.

62. That conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof per Elias J in **Bahl v Law Society** [2003] IRLR 640, EAT at [100], approved by the Court of Appeal at [2004] IRLR 799.

63. The Court of Appeal in **Madarassy v Nomura International** [2007] IRLR 246 at para 54 to 61 set out that the onus of proof does not shift simply on proof of a difference in status and a difference in treatment.

Causation

64. The definitive approach to causation is set out in by the House of Lords in the cases of **Nagarajan v London Regional Transport** [1999] IRLR 572, and **Chief Constable of West Yorkshire Police v Khan** [2001] UKHL 48.

65. In **Nagarajan** Lord Nicholls said:

"'Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.'"

66. In **Khan** Lord Nicholls considered that the test (in the context of victimisation) must be: what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously, was their reason? Looked at as a question of causation, 'but for …' was an objective test; but the anti-discrimination legislation required something different. The test should be subjective: 'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.''

67. In a victimisation case, the requirement of knowledge of the protected act was seen in was emphasised in the case of **South London Healthcare NHS Trust v Al–Rubeyi** UKEAT/0269/09 (2 March 2010, unreported), where an employee of the trust threatened to resign if the trust permitted

the complainant to return to work, but did so in circumstances where that employee had not known that the complainant had lodged a grievance complaining of discrimination.

68. In the Court of Appeal in **CLFIS (UK) Ltd v Reynolds** [2015] IRLR 562, Underhill LJ stated that liability will only be established where the protected characteristic formed the motivation for the individual performing the act complained of; unwittingly acting on the basis of someone else's tainted decision will not be sufficient: 'I see no basis on which [the individual employee who did the act complained of] can be said to be discriminatory on the basis of someone else's motivation'.

Whistleblowing

69. Section 47B(1) Employment Rights Act 1996 states

A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

70. Section 48(3) and (4) Employment Rights Act 1996 state in so far as is relevant

(3)An employment tribunal shall not consider a complaint under this section unless it is presented—

(a)before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4)For the purposes of subsection (3)—

(a)where an act extends over a period, the "date of the act" means the last day of that period

Burden of Proof

71. Section 48(2) Employment Rights Act 1996 states provides that 'it is for the employer to show the ground on which any act, or deliberate failure to act, was done'

72. **Kuzel v Roche Products Ltd** [2008] IRLR 530, is authority from the Court of Appeal that if the employer fails to show an innocent ground or purpose, the tribunal may draw an adverse inference and find liability but is not legally bound to do so. At [53] Simler J summed the position up as follows:

"Accordingly, if a tribunal rejects the employer's purported reason for dismissal, it may conclude that this gives credence to the reason advanced by the employee, and it may find that the reason was the one asserted by the employee. How-ever, it is not obliged to do so. The identification of the reason will depend on the findings of fact and inferences drawn from those facts. Depending on those findings, it remains open to it to conclude that the real reason was not one ad-vanced by either side."

73. On further appeal, the Court of Appeal agreed in clear terms, saying that the President had 'reached the right result for the right reasons' and summing up their view at [40] as follows:

"As regards dismissal cases, this court has held (Kuzel, paragraph 59) that an employer's failure to show what the reason for the dismissal was does not entail the conclusion that the reason was as asserted by the employee. As a proposition of logic, this applies no less to detriment cases. Simler J did not hold that it would

never follow from a respondent's failure to show his reasons that the employee's case was right. Usually no doubt it will...."

Causation

74. The legislation requires that the act or deliberate failure to act of the employer must be done 'on the ground that' the worker in question has made a protected disclosure. This requires an analysis of the mental processes (conscious or unconscious) which caused the employer so to act and the test is not satisfied by the simple application of a 'but for' test (***Harrow London Borough v Knight*** [2003] IRLR 140*, EAT*).

75. The employer must prove on the balance of probabilities that the act, or deliberate failure, complained of was not on the grounds that the employee had done the protected act; meaning that the protected act did not *materially influence* (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower (**Fecitt v NHS Manchester** [2012] IRLR 64).

76. Lord Wilson (giving the only judgment) in the Supreme Court in the dismissal case of **Royal Mail Group Ltd v Jhuti** [2020] IRLR 129, noted at [42] that 'The need to discern a state of mind, such as here the reason for taking action, on the part of an inanimate person, namely a company, presents difficulties in many areas of law. They are difficulties of attribution: which human being is to be taken to have the state of mind which falls to be attributed to the company?' In that case the Supreme Court held that 'if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.'

Conclusions

Refusal to offer the Claimant a Chief Immigration Officer role on 21st May 2021

Direct discrimination

77. We note that the Claimant did not put this case with any force when cross examining Mr Cannon and Mr Dempster.

78. The Tribunal does not find that the Claimant has proven on the balance of probabilities facts from which the Tribunal could conclude absent an adequate explanation that the Respondent has committed an act of discrimination against the Claimant. There are no comparators identified and the Claimant appears to accept that she did not perform well at interview and this was the reason why she did not secure the role. In these circumstances the failure to retain records of the Claimant's interview is insufficient to shift the burden to the Respondent.

79. We do not consider the fact of conducting a recruitment exercise at all rather than appointing the Claimant from the reserve list she had been placed on as at 12 February 2020 shifts the burden. The reserve list had only extended until February 2021 and the recruitment exercise was in March 2021. It also seems to us inherently sensible and in no way indicative of discrimination when recruiting for several posts to run an open competition and to appoint the best candidates.

80. Accordingly, the direct discrimination claims in relation to this role fail and are dismissed.

Detriment because of a protected disclosure

81. We accept the evidence of Mr Dempster and Mr Cannon that they were unaware of the Claimant's protected disclosure when they interviewed the

Claimant. There is no evidence that their views of the Claimant were poisoned by someone else who was aware of the protected disclosure.

82. We accept that the reason Mr Dempster and Mr Cannon did not appoint the Claimant to this role was the Claimant's poor performance at interview.

83. Accordingly, the detriment claim in relation to this role fails and is dismissed.

Refusal to offer the Claimant an Entry Clearance Manager role on 19th July 2019

Direct discrimination

84. Unlike the 2021 recruitment process, the Tribunal does find that the Claimant has proven on the balance of probabilities facts from which the Tribunal could conclude absent an adequate explanation that the Respondent has committed an act of discrimination against the Claimant. These facts are:

    i) That the Claimant scored highly (42/44) and higher than 14 appointed candidates for this role but was not appointed;

    ii) That there is a notable absence of records regarding Mrs Crowther's involvement in the Claimant's application; and

    iii) It appears to the Tribunal that Mrs Crowther's involvement in the Claimant's application was not within the scope of the standard pre-employment checks that would apply to a candidate applying from another government department. Rather it appears that Mrs Crowther's intervention was the result of a personal desire not to have the Claimant return to her department.

85. We then turn to whether the Respondent has shown that race, religion and disability played no part in the decision not to offer the Claimant the role.

We are relatively easily satisfied that the Respondent has met this test. This is notwithstanding the failure to keep essentially any records of Mrs Crowther's involvement in the Claimant not securing the role. Ultimately, we accept Mrs Crowther's evidence that the Claimant's race, religion and disability played no part in the decision. We note that Mrs Crowther shares the Claimant's muslim faith. We accept the Claimant's point that there can be sectionalism within Islam but no evidence was advanced to suggest that this was at play. We accept that, given Mrs Crowther's daughter is disabled and Mrs Crowther has gone to great lengths to provide support for her and to champion disability rights generally that disability played no part in the decision. We also note that the meeting on 7 March 2018 had been set up with the express purpose on Mrs Crowther's side of addressing any need for reasonable adjustments for the Claimant. We also accept that Mrs Crowther's own racial background makes it unlikely (albeit not impossible) that she would have discriminated against the Claimant due to race. We note that the Claimant was unable to say why she thought these factors played any part in Mrs Crowther's decision that the Claimant not be offered a role, rather suggesting that the decision was made because the Claimant had raised a grievance. Finally, as will be set out in more detail below, we accept that Mrs Crowther was motivated solely by the historic issues with the Claimant's conduct (the Claimant suggesting her promotion to HEO on taking up the BEIS role had been permanent, failure to secure approval from her department before going on secondment, performance concerns during both her secondments, taking part in a talent programme for which she was not eligible, and failure to properly communicate her absences in March 2020).

86. We did not consider the Claimant's comparators to assist much in reaching a decision in this regard. Those appointed ahead of the Claimant appear to have been a diverse group including people of Asian ethnic background, muslims and someone with a health condition requiring reasonable adjustments. There was no real evidence suggesting that any were in substantially the same situation as the Claimant or that race, religion or disability played any part in their appointment ahead of the Claimant.

87. Accordingly, the direct discrimination claims in relation to this role fail and are dismissed.

Victimisation

88. For the reasons given above under direct discrimination, we find that the burden shifts to the Respondent.

89. As to whether the Respondent has shown that the Claimant's grievance played no part in the decision not to offer the Claimant the role, we find this a much harder decision than in relation to the direct discrimination claims.

90. Some of the factors that inherently make direct discrimination less likely do not apply to the Claimant's grievance. In circumstances where Mrs Crowther was aware that the Claimant had raised a grievance regarding her it is extremely surprising that no evidence or record exists of her involvement in the Claimant not securing a role. Equally, we note that the matters said to have formed the basis of the decision to exclude the Claimant, whilst evidenced in correspondence at the time, did not lead to any formal disciplinary record against the Claimant. We were also concerned by Mrs Crowther's evidence as a witness. Mrs Crowther appeared defensive (which is to an extent understandable). Mrs Crowther was also inconsistent about whether she even knew the Claimant had

raised a formal grievance regarding her. These factors took the Tribunal to the very border of finding in the Claimant's favour on this claim.

91. However, on balance we find that the Respondent has just met the burden of showing that the reason the Claimant did not secure the role were as follows:

    i) the Claimant suggesting her promotion to HEO on taking up the BEIS role had been permanent;

    ii) failure to secure approval from her department before going on secondment;

    iii) performance concerns during both her secondments;

    iv) taking part in a talent programme for which she was not eligible; and

    v) failure to properly communicate her absences in March 2020.

92. These matters were all recorded in correspondence at the time. Mrs Crowther had been seeking to discuss a number of them with the Claimant in March 2018. The performance concerns were raised not by Mrs Crowther but by two different government departments. The Tribunal shares the concerns about the Claimant's good faith in her assertions that she thought her promotion when moving to BEIS was permanent, securing a place on a leadership programme only meant for permanent HEOs, and the Claimant's failure to secure approval in advance from the Home Office before moving to the Cabinet Office. The Claimant is by her own admission not above manipulating governmental processes for her own ends and we accept that this was what Mrs Crowther was concerned about.

93. Added to these factors, we consider that the grievance itself was both fairly mild in so far as it related to Mrs Crowther and also withdrawn at an early stage.

94. Accordingly, the victimisation claim in relation to this role fails and is dismissed.

Detriment because of a protected disclosure

95. There is evidence that Mr Fairbank had had a discussion with the Claimant on 11 July 2018 which covered past whistleblowing and we accept that Mrs Crowther knew some details of what had been discussed at this meeting. However, we accept the evidence of Mrs Crowther that she was unaware of the Claimant's protected disclosure and we do not accept that Mrs Crowther's views of the Claimant were poisoned by someone else who was aware of the protected disclosure.

96. We accept that the reason Mrs Crowther did not appoint the Claimant to this role was as set out above in relation to victimisation.

97. Accordingly, the detriment claim in relation to this role fails and is dismissed.

Time limits

98. The Claimant's claims having failed on the merits there is no need to move on to consider time issues in relation to the refusal to offer the Claimant an Entry Clearance Manager role on 19th July 2019. We note that this could not have formed a continuing act or series of related detriments with the 2021 role (as that was not discrimination or detriment because of whistleblowing) and would have required an extension for both discrimination and detriment claims.

Employment Judge **T Perry**

Date 19 June 2023