



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mr X

McKinsey and Company Inc., United Kingdom

Heard at: London Central Employment Tribunal

On: 24-29 January 2024

**Before: EJ Webster
Dr Holgate
Mr Pearlman**

Appearances

For the Claimants:

In person

For the Respondent:

Mr Northall (Counsel)

JUDGMENT

1. The Claimant's claims that were subject to a Deposit Order dated 12 October 2023 stand as struck out as no deposit was paid by the Claimant by the requisite date.
2. The Claimant's claims for direct race discrimination are not upheld.
3. The Claimant's claims for indirect race discrimination are not upheld.
4. The Claimant's claims that there was a failure to make reasonable adjustments are not upheld.

WRITTEN REASONS

The Hearing

5. The hearing was listed for 5 days from 24 January until 30 January 2024. Evidence was heard on Days 1 and 2. Unfortunately the third Respondent witness was not available until Monday 29 January and therefore the Tribunal could not sit from lunch time on day 2 until the morning of day 4. The parties were informed that their submissions would be expected almost immediately after the completion of the final witness evidence. The Respondent sent in some authorities which we have had due regard to but the Claimant chose to rely solely on oral submissions.
6. The Claimant required adjustments which were accommodated. They were that frequent breaks were taken and that he be entitled to record the proceedings on the basis that he did not share that recording with anyone else.
7. A Rule 50 Order and a restricted reporting order were in place throughout these proceedings. Therefore, by agreement, the Claimant was addressed as Mr X as on occasion there were third party observers to these proceedings. The Rule 50 order and Restricted Reporting Order remain in place and therefore the published Judgment will remain anonymised.
8. On occasion EJ Webster assisted the Claimant with questions given that he was litigant in person. That included, on occasion, EJ Webster asking the Claimant as to the relevance of his questions given that they did not appear to pertain to the Issues in the case or the grounds of claim in the ET1.
9. It was notable to us that there were several apparently relevant documents that were not in the bundle. Those that we could identify were:
 - (i) The rubric that Ms Payne was provided to score applicants for the role
 - (ii) Any email or other evidence that Ms Payne referred a reconsideration to a senior colleague for reassessment
10. Oral judgment was given to the parties on the last day of the hearing. The Claimant requested written reasons at the conclusion of the Judgment.

The Issues

11. The issues were referred to by a relatively complicated numbering system, and so that those numbers are not altered, the List of Issues is attached to this Judgment as Schedule 1. These issues were discussed with the parties at the outset of the hearing. During that conversation it was confirmed that the Claimant had appealed against the Deposit Order judgment but that he had not paid the deposit. Therefore the Deposit Order had operated and the claims had been struck out without further order when the Claimant failed to pay the deposit by 23 November 2023. The claims that had been struck out are marked in the List of Issues below. The Respondent confirmed on the final day of the hearing that the Claimant's appeal against the deposit order had not passed the EAT sift.

The Law

12. S136 Equality Act 2010 - The Burden of Proof

S.136(2) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

13. The EHRC Employment Code states that 'a claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. If such facts are proved, 'to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

14. The leading case on this point remains *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc* 2007 ICR 867, CA; and confirmed in *Hewage v Grampian Health Board* 2012 ICR 1054, SC.

15. In the case of *Igen*, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

16. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd* 2003 ICR 1205, EAT, gave guidelines as follows:

- (i) it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail
- (ii) in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'
- (iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal
- (iv) The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be drawn

- (v) 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
- (vi) these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information
- (vii) inferences may also be drawn from any failure to comply with a relevant Code of Practice
- (viii) when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent
- (ix) it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act
- (x) to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground
- (xi) not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment
- (xii) since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice

Direct Discrimination

17. 13 EqA “(1)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.”

18. S13(2) EqA states

For A to discriminate directly against B, it must treat B less favourably than it treats, or would treat, another person. The Tribunal must compare like with like (except for the existence of the protected characteristic) and so “there must be no material difference between the circumstances” of the claimant and any comparator. (*section 23(1), EqA 2010*).

19. The claimant has relied upon a hypothetical comparator. We have born in mind the guidance set out by HHJ Mummery in *In Stockton on Tees Borough Council v Aylott 2010 ICR 1278, CA*, According to Lord Justice Mummery: ‘*In this case the issue of less favourable treatment of the claimant, as compared with the treatment of the hypothetical comparator, adds little to the process of determining the direct discrimination issue. I am not saying that a hypothetical comparator can be dispensed with altogether in a case such as this: it is part of the process of identifying the ground of the treatment and it is good practice to cross check by constructing a hypothetical comparator. But there are dangers in attaching too much importance to the construct and to less favourable treatment as a separate issue, if the tribunal is satisfied by all the evidence that the treatment (in this case the dismissal) was on a prohibited ground.*’ Thus, it

seems that, although considering the treatment of a comparator will often be the most straightforward way of determining whether direct disability discrimination has occurred, the issue may sometimes take a back seat to a common-sense appreciation of the facts.

20. Therefore as well as using a comparison exercise, where this is not of material assistance, we have considered what is referred to as the 'because of' or 'reason why' test to the claimant's assertions. We have considered, the subjective motivations — whether conscious or subconscious — of the respondents in order to determine whether the less favourable treatment was in any way influenced by the protected characteristic relied on. As set out in *Nagarajan v London Regional Transport 1999 ICR 877, HL* we have considered the relevant mental processes of the respondents and the context in which they made their decisions. As Lord Nicholls put it in '*Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.*'

21. We have reminded ourselves that it does not matter if the motive is benign or malign. This is set out in the EHRC Employment Code (see para 3.14). In other words, it will be no defence for an employer faced with a claim under S.13(1) to show that it had a 'good reason' for discriminating.

22. We have also reminded ourselves that the protected characteristic need not be the main reason for the treatment provided it is the 'effective cause'. (*O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33, EAT*).

23. **S 20 Equality Act - Duty to make adjustments**

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

24.S 21 Equality Act - Failure to comply with duty to make reasonable adjustments

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

25. Schedule 8, Equality Act 2010 states that the duty to make reasonable adjustments arises unless the employer can show that it did not know or "could not reasonably be expected to know" that the employee is disabled or that there was a substantial disadvantage.

26. Case law and the EHRC Code suggest that knowledge will sometimes be imputed to the employer. The EHRC Code advises that employers must "do all they can reasonably be expected to do" to find out this information.

27. An employer is not under a duty to make reasonable adjustments unless it knows or ought to know the employee has a disability and is likely to be placed at the substantial disadvantage in question (per paragraph 20(1) Schedule 8, EA 2010)

28. Guidance for a tribunal's approach to reasonable adjustments was given in *Environment Agency v Rowan* [2008] ICR 218:

- The PCP must be identified;
- The identity of the non-disabled comparators must be identified (where appropriate);
- The nature and extent of the substantial disadvantage suffered by C must be identified;
- The reasonableness of the adjustment claimed must be analysed.

29. The duty does not arise however unless the employer knows or ought reasonably to know that the employee is disabled *and* that the PCP put him at a substantial

disadvantage. The EHRC *Code of Practice on Employment* gives useful guidance on knowledge particularly at paragraph 6.15 – 6.19.

30. It is for the tribunal to assess for itself the reasonableness of adjustments. The Equality and Human Rights Commission Code of Practice gives useful guidance at paragraphs 6.28 and 6.29 upon potentially relevant factors.

Indirect Discrimination

31. S19 Equality Act 2010 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

32. A Claimant must establish that the PCP has placed those sharing his or her characteristic at a 'particular' disadvantage. Therefore a Tribunal must concentrate particularly on people who share the protected characteristic in question and consider whether they are at a disadvantage because of the PCP — see *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia 2015 IRLR 746, ECJ*.

Facts

33. We have only made findings of fact relevant to our conclusions. If we do not refer to evidence that we were taken to that does not mean that we have not considered it, it means that we have not found it relevant to our conclusions. All our findings are reached on the balance of probabilities.

Background

34. The Claimant applied for the role of Associate Consultant with the Respondent on 19 November 2022. The Respondent's recruitment process for that role involves two initial key stages that are relevant to our decision. The first was an online test or game called Solve. The second was an application screening process where the applicants' CVs were considered by a recruitment person (in this case Ms Isobel Payne) and scored out of 9 possible points.

The Solve Test

35. The Solve Test or game is an online scenario which the Respondent states is designed to test candidates' problem solving abilities via a set of ecology-themed game-based tasks. The test involves a series of tasks such as building food chains, protecting endangered species and managing predator and prey

populations. Dr Jacobi gave us evidence on this point and it was not challenged by the Claimant that this is what was entailed.

36. Everyone who applied for the role was invited to take the test. The letter inviting them to take the test said as follows (p71):

“McKinsey recruits and hires talented people from a range of backgrounds, including people with disabilities. If you need special arrangements or accommodations during the interview process, reach out as soon as possible to help us better understand what accommodations would be helpful. We do not seek diagnosis information.”

37. The Claimant did not, at any point during the recruitment process, indicate to the Respondent that he required any special arrangements or accommodations for any part of the process. He only raised these issues after a decision had been made not to invite him to interview. During cross examination he said that he could not say that he needed any adjustments for the Solve test because he had passed it.

38. The Claimant’s witness statement included information about how the Solve test disadvantaged him because of his educational background and the fact that English is not his first language. He accepted that he had studied and obtained a first class Bachelors degree in English and that he was proficient in business level English. He also confirmed that this was the information he gave on his CV and to the Respondent. He accepted during these proceedings that this was a requirement of the role particularly given that he applied for roles in 3 offices – two in the USA and one in London - where the language of the offices itself would have been English.

39. It is clear that the Solve Test is offered in other languages but not Russian. The Claimant said that this disadvantaged him though he did not expressly set out how given that he accepts that his English language skills were good enough to fulfil the role he was applying for which had a job requirement of a certain level of English. Dr Jacobi confirmed in evidence that their studies regarding whether English was a person’s first language or not did not impact on their pass rate of the Solve Test. We accept that evidence.

40. The issues surrounding the Claimant’s educational background are less clear cut. He says that the fact that he had studied biology and ecology made it difficult for him to disregard certain inaccuracies of the premise of the test. Most of this part of the claim had been struck out by operation of the Deposit Order so we have not made significant findings regarding this evidence beyond noting it in relation to the Claimant’s race discrimination claim.

41. The Claimant took the Solve test and passed. He was therefore moved onto the next stage. There was no evidence before us that the score he got influenced any of the CV screening process. The Respondent was clear that in England, the Solve test was applied in a binary way. If you passed you moved on to the next stage. How good your pass was, was not relevant and did not influence the subsequent recruitment process. We accept that account.

Application screening

42. The Claimant appeared to assert throughout his questions, that he had a reasonable expectation that when considering the Claimant's CV, Ms Payne would also consider his application form and LinkedIn profile as well because he had submitted them as part of the process.
43. Ms Payne stated that the Respondent's process was such that they only screened on the basis of the CV. The Claimant suggested two things which were mutually exclusive:
- (i) That Ms Payne had unfairly failed to consider the additional information that he had included in the application form and his LinkedIn profile; and
 - (ii) That Ms Payne had considered the information within the application form and his LinkedIn profile and therefore discriminated against him because she had therefore known about his protected characteristics of disability and race.
44. We conclude, based on Ms Payne's evidence, that she did not look at the additional information submitted and made her decision based solely on the CV. She indicated that the Respondent had a policy not to look at an individual's social media at this stage, including any LinkedIn activity or profiles.
45. We find that she was unaware of the Claimant's disability, namely PTSD. There was no way of inferring any sort of health issues from the information he provided in his CV. The Claimant has not put to us any plausible evidence of how she might have inferred that from his CV. He suggested that the career breaks he had taken and the fact that he had taken 6 years to complete his Bachelors degree ought to have raised questions for her. However she confirmed that these were not things that caused her any concern or that she would have factored in to her decision making at this stage. Her evidence about what she did and did not consider on any CV was clear and helpful.
46. In respect of whether the Claimant's expectation that the Respondent would look at the additional information was reasonable, we accept that it could have been clearer on the correspondence sent to the Claimant as to what information would be considered at which stage particularly in relation to the application form. We do not accept that attaching a link to a LinkedIn profile could give rise to a reasonable expectation that the Respondent would look at this information.
47. The Claimant then proceeded to ask a series of questions regarding the criteria which Ms Payne said she applied. The apparent thrust of the majority of his questions was that Ms Payne had failed to give appropriate weight to his experience and that at least some if not all of that was because his experience was overseas or not properly recognized by her.
48. Ms Payne's responses can generally be categorized as thoughtful and considered. We take each stage in turn. She said there were three categories that they considered and each was given a maximum score of 3:
- (i) Problem solving/academics
 - (ii) Leadership

(iii) Work experience

49. During submissions the Claimant asserted that the Respondent ought not to be able to rely upon these points because the Respondent had not advanced the detail of this defence in their ET3 and because there was no documentary evidence as to the guidance and rubric applied by Ms Payne. We do not accept that the Respondent cannot rely upon this 9 point scoring system. The respondent always denied discrimination and has used witness evidence to explain what processes they did follow. That is permissible. We accept that the Respondent could and should have disclosed the scoring rubric which Ms Payne applied and we have been given little explanation for that failure. Although it is open to us to draw a negative inference from this failure, we found Ms Payne's evidence on this point plausible. She was very knowledgeable about the process and why and how she gave certain scores. She gave considered and thoughtful answers to the Claimant's questions and overall we found her to be a credible witness. She has been very clear in all her explanations as to how these criteria apply and why and we have no reason to doubt her evidence in this regard.
50. We note that the Claimant's CV only gives 3.5 years' of working experience, despite being 43 years old. Whilst some of his adult life is accounted for in his CV by his relocation indication and his studying, it is nevertheless clear that there are huge gaps in his employment history which he does not explain in the CV. There may well be legitimate and impressive reasons behind them, nevertheless, Ms Payne was not in a position to know what those reasons were as no steps were taken by the Claimant to explain them at this stage.
51. The Claimant says that his application form ought to have been considered as well and although we do not have his complete application form in the bundle, he did not disagree that the only information in that form relevant to his career history was a list of employment that mirrors what was in his CV. It is therefore unclear as to what he says Ms Payne could have gleaned from this form (other than his disabled status and his nationality) that was relevant to her assessment of his CV. Even then, he has not set out how these matters ought to have affected her screening of him given that as bald facts, they ought not to affect an employer's screening of a CV without further information concerning what 'adjustments' or issues these characteristics could mean regarding competencies or qualifications. The Claimant at no point during the Solve process and the CV screening process, provided any information whatsoever regarding the impact that his disability or the fact that he is Russian might have on his application.
52. The Claimant has a first from Durham university and this meant that he was scored two out a possible three for his academics/problem solving. The Claimant appeared to suggest that he ought to receive a higher score given that he had completed the degree in English. Whilst Ms Payne acknowledged that this might be more challenging, she said that this was not part of their scoring rubric and that to satisfy that score, as per her witness statement, the Claimant would need something more than this.

53. She explained that much of the Claimant's working experience was disregarded from her scoring in the work experience category because he had held the roles for less than a year. She indicated that this was part of the Respondent's policy and/or scoring rubric. Therefore, whilst some of his roles could be seen to have provided relevant experience, it was not sufficient to score anything in this section. To do that, amongst other things, the Claimant would need to have demonstrated those skills in any one position for more than a year. She said therefore that it was not the job that he done or the organisations he had worked for that kept his score low but the duration of his contracts. However she also noted that to score highly in this category a candidate would need to work at a top tier world leading consultancy, law firm, bank or technology company for example. She acknowledged that the Claimant had worked in a leading bank when questioned but it is also clear that the Claimant provides no information at all as to what role he held during this period and again it is for a short period of time. We accept her evidence that the combination of lack of information regarding the work actually done and the lack of time spent at any one institution were the main reasons for the low score.
54. With regard to leadership the Claimant put several questions to Ms Payne about the examples in his CV that gave her the requisite information about leadership. In no particular order, the Claimant appeared to suggest that the following experiences and/or background ought to have been taken into account by Ms Payne as examples of leadership:
- (i) His experience as a marketing manager in 2011 ought not to have been disregarded because although he was only therefore a short period of time, good leaders achieve results quicker
 - (ii) Managing a start-up business ought to demonstrate suitable leadership skills (2008)
 - (iii) He had demonstrated leadership with a role at university (course representative) that liaised between students and staff.
55. Ms Payne also gave similar answers to the questions posed to her by the Claimant about his work experience. She indicated that he would need to demonstrate such skills in a position for over a year at a time. She said that the Respondent considered leadership across all different aspects of someone's life including sports, membership of university societies or being a diversity and inclusion officer within a company. Again however she indicated that to score highly in this category one might have to lead a team of 10 or more or 100-200 in a military context for example.
56. The Claimant made it clear in his evidence that he had been in the Russian military. However this was not on his CV nor was any information about what his role in the military entailed. It was therefore impossible for Ms Payne to have factored this into her scoring of the Claimant. The Claimant provided no evidence to Ms Payne at the time that she was scoring him, that indicated why he should be given a different score for his leadership experience.
57. It is also clear that his role at university was not on his CV and therefore could not be considered by Ms Payne.

Reconsideration

58. The Claimant received the rejection of his application on 12 December. He then wrote back on 13 December. In that email he accepts that his recent experience was not expressed in the CV. In that email he refers to his disability, the challenges of being gay in Russia and a high profile military background – none of which was in his CV.

59. The Claimant's request for reconsideration is set out at page 74 as follows:

“Instead of addressing these, your responses were dismissive and indicated a variety of issues i.e. technological, ethical, professional, organizational, and legal issues. I will appreciate your response about reconsideration by the end of next week. I also believe my suggestions demonstrate the qualities and abilities to pass the case study assessment at the consultant/associate level.

60. We do not accept that this was a clear indication that he wanted his application to be reconsidered. We think that he has pointed out, in the previous emails, that he believes that their recruitment processes were flawed and discriminatory because they did not take into account his life experience with the weight he considered to be appropriate. We note however that several of the issues he says that they didn't take into account were not clear on his CV – for example his disability, and his experience in the Russian military. The Russian military experience has not been outlined at all in his witness evidence or information provided to the Tribunal either.

61. He also does not say on what basis his application ought to be reconsidered, simply that he wants a response. Thus implying, in our view, that he had already asked for a reconsideration – which he had not.

62. He did not get a response until 5 January when Ms Payne wrote to him to say that she did not discriminate against him and informing him that if he wanted to apply again he could indicate at an earlier stage that he required adjustments.

63. In the meantime, on 26 December, the Claimant submitted a grievance. (p80). That grievance made various points including:

“...your recruitment staff failed to move my candidature to a next step because they did not consider my circumstances as relevant experience. Which was shocking and upsetting to learn. They also failed to take into account my race characteristic as refugee in considering past struggles in employment in Russia where I was discriminated as gay during career, which contributed to distress caused.”

When I made request to reconsider my application which could be a form of a reasonable adjustments and provided some points about why it should done, your team failed to respond in the given timeline. These made me feel bad about myself and my disability, sexuality and race. Failure to respond to the reasonable adjustment request for reconsideration of my job application due to

disability pointed out on disregard of my protected characteristics and further direct discrimination and distress arising from these.

My first-class degree from one of the top business schools in the UK fully prepared me to handle consulting job, and treatment received was clearly inappropriate.”

64. We consider that the above paragraphs reveal the crux of the Claimant's concerns. First that the failure to reconsider his application was a failure to make a reasonable adjustment and, secondly that he considered the Respondent's failure to offer him an interview as inexplicable given his first class degree.

65. Ms Payne, in oral evidence and in her witness statement confirmed that she had asked a senior colleague, Ms Akida John-Ambrose to review the Claimant's CV. We have considered this evidence carefully given that there have been no emails or evidence of a re-scoring provided to the Tribunal which could adversely affect our view of Ms Payne's evidence in this regard. However we see no reason as to why Ms Payne would lie on this point. She was overall a helpful witness and we accept her evidence. She was also very clear that she did not disclose to Ms John-Ambrose the additional evidence that the Claimant had submitted in his emails about his disability or Russian nationality in the emails from December. She simply re-scored the CV according to the information in the Claimant's CV alone and on this basis came to the same score that Ms Payne had done.

66. The Respondent did not conduct a meeting with the Claimant but Ms Payne responded on 11 January 2023 with a relatively short email explaining that they were an equal opportunities employer, that applicants need to ask for adjustments when they apply and if so accommodations will be made and explaining that many factors are considered in the application i.e. a first class degree is not the only requirement to be offered an interview.

67. The Claimant's response was that he would be directing the situation to his lawyers. The Claimant then contacted ACAS on 26 January with the EC period ending on 21 February 2023 and he submitted his ET1 on 20 March 2023.

Conclusions

Direct race discrimination (Equality Act 2010 section 13)

68. The Claimant relies on 3 possible races/nationalities:

- (i) Russian national;
- (ii) Not British national;
- (iii) Refugee.

69. S 9 Equality Act 2010 defines race as follows:

(1) *Race includes—*

(a) *colour;*

(b) *nationality;*

(c) *ethnic or national origins.*

(2) *In relation to the protected characteristic of race—*

(a) *a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;*

(b) *a reference to persons who share a protected characteristic is a reference to persons of the same racial group.*

(3) *A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.*

(4) *The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.*

70. We heard very little in the way of submissions on this point. We make a provisional observation that we consider it is possible that being a refugee could fit within the definition of race for the purposes of the Equality Act 2010. A refugee in the UK is a group which could comprise two or more distinct racial groups and is by and large defined by the fact that they are not UK nationals and require refuge. We accept that there is a political and social element to the definition of 'Refugee' in the definition given by the UN Convention Refugee Convention and that not all of the definition relates to race – it is a nuanced and multi-faceted definition. Given the lack of submissions on this point we have stopped short of making a definitive finding on the basis that we do not consider that it adds anything to the Claimant's claims in that the treatment he complains about would be covered by being "Russian" and/or "not British". He has not advanced any suggestion that being a Refugee was the reason for his treatment over and above the issues he experienced as a Russian person or someone who was not British given that he has focused on language barriers and social differences. We have carefully considered whether the Claimant's race howsoever it is defined, including a careful consideration of whether the refugee status somehow put a gloss on him being non British, was a factor in the treatment he received from the Respondent and have concluded that it did not.

71. The first detriment complained of did occur. The respondent did not invite the Claimant to an interview.

72. However the second detriment complained of is more nuanced. Ms Payne says that she asked a colleague to check her scoring of the Claimant's CV. We had no documentary evidence that this took place nor was the Claimant informed

of this at the time. Nevertheless we accept Ms Payne's evidence that this did occur.

73. However, this is not the reconsideration that the Claimant believes would have been appropriate in any event. We believe that he is asserting that his application be re-scored taking into account his disability and his nationality so that more weight was given to the various qualifications and experiences set out by him in his application. That type of reconsideration did not occur and it is not in dispute that this did not occur.
74. However the Claimant has provided us with no evidence that he was not invited to an interview because of the Claimant's race whether it be Russian, British national or refugee. The Claimant has provided no evidence whatsoever that this was the reason for the treatment. He has not addressed us on the possibility that a person who was British, or not Russian, with exactly the same level of experience and qualifications and information about them on his CV, would have been treated more favourably and invited to an interview.
75. The Respondent has explained that they frequently employ international employees including 73 Russian nationals in the last 12 months. The Respondent has explained that the reason why they did not offer the Claimant an interview was because he did not have the requisite experience set out on his CV. The Claimant's direct race discrimination claim appears to be mostly based on the assertion that the Respondent failed to give the appropriate weight to his international experience because they did not understand the level of that experience or recognise how much harder it was to get that experience as a Russian national. We disagree. We find that the reason for the treatment was his lack of experience in a far more nuanced way such as the length of time he had in each role and, to be fair, the fact that he had demonstrated only 3.5 years of any work experience in his adult life. The Respondent had a scoring system that required an incredibly high level of experience to score enough to get through to an interview. This was a high level role and they were looking for a large amount of very high level experience, leadership skills and qualifications.
76. With regard to not reconsidering the Claimant's application – they have explained that they do not have such a process. We will address below whether that is a failure to make a reasonable adjustment however the Claimant has again provided no evidence that the lack of a reconsideration process was because of his race. We accept the Respondent's case that they do not have any such process and that allowing the Claimant to, in effect, re-apply by providing more of an explanation than he had already done would be unfair to other candidates. They have a policy, applied to all candidates, that no such reconsideration occurs. The Claimant has not provided evidence that someone who was British or not Russian or not a refugee would have been treated differently. We do not accept that the reason for this policy or decision was informed wholly or partly by any relied upon aspect of the Claimant's race or nationality. It is simply a decision that the Claimant disagrees with. The Claimant had every opportunity to raise both a narrative concerning his work experience and leadership skills and how it may or may not have been harder

for him to gain that experience as a Russian or a refugee or as someone who was not British. He did not do that in his CV nor did he give much information about any of his work or roles. He also did not do that in his emails after his application had been rejected.

77. We consider therefore that the Claimant has failed to shift the burden of proof and provide a prima facie case that the Claimant was treated less favourably because of his race or nationality defined as Russian, not British or a refugee.
78. In any event we conclude that the Respondent has explained its decision by stating that they did not select him for interview because he failed to demonstrate adequate experience that fit their legitimate, non-discriminatory criteria.

Indirect race discrimination (Equality Act 2010 section 19)

79. It is accepted that the Respondent had a Practice, Criteria or Policy (PCP) in place namely the Solve Test. The other selection criteria is more nuanced because it is not entirely clear what other criteria he is relying upon but the Respondent accepts that they did have recruitment criteria in place as set out by Ms Payne in her witness and in the job advertisement.
80. It is clear that the Solve Test was applied to the Claimant but he was not disadvantaged because he passed and was moved on to the next stage of the process. The Claimant cannot therefore show that he was disadvantaged by the test and his claim must fail.
81. We accept that the criteria that apply are those that Ms Payne explains in her witness statement. We consider that applying these could amount to a PCP and therefore assess them below.
82. Problem solving/academics - The Claimant scored 2/3 on this so it is difficult to ascertain how he was disadvantaged. Even if he scored 3/3 on this area, he would still have failed to be shortlisted because of the shortcomings in the other areas.
83. The Respondent has given clear evidence that such qualifications from across the world would count. There does not appear to be a discount applied for international degrees. There is also allowance for work experience to make up for any academic difficulties where someone has worked for 5+ years. Again no specific country is required for that experience. The Claimant speaks English to the requisite level and Ms Payne assumed that when she was screening his CV so the requirement of business level English did not disadvantage the Claimant although it could be seen to disadvantage other non UK nationals. What the Claimant appeared to be suggesting, through his questions, was that UK nationals and those in Western countries would find it easier to get these qualifications and therefore those from other countries where education was harder to achieve, would struggle more. However he has not evidenced that in any way and his assertions about this are nebulous.

84. Leadership – Ms Payne clearly outlines in her witness statement what the criteria were. Had the Claimant said that he was a Captain of the Russian army then he would have got a point or if he had demonstrated that he was the LGBTQ+ Society Chair (or similar) at a University he would no doubt have scored points. However absolutely none of this information was on his CV. Even if they had looked his LinkedIn and/or application form – none or very little of this information would have been available. He says that his application for reconsideration gave some information and that a dialogue with him would have meant that the Respondent could have learnt this information. However he has not said on what basis the Respondent was obliged to take that step nor why he did not include it on his CV in the first place. We note that it was not part of the Claimant's claim that the Respondent ought to have had a dialogue with an individual to find out what their qualifications were after they had submitted their application and CV.
85. Given the broad set of possible examples of leadership that the Respondent was willing to accept, we do not consider that they placed a non UK national, a refugee or a Russian person at a disadvantage as examples from across professional and personal spheres were clearly welcome including sport and volunteer work and positions whilst a student.
86. The Claimant has advanced no evidence to suggest that these groups (Russians, non-British and refugees) would overall be disadvantaged by the PCP of requiring evidence of leadership skills. Further, what is clear is that he provided the Respondent and the Tribunal with no examples of how he could demonstrate any of the relevant criteria. Those examples are not clear from anywhere in the documentation he has provided for the purposes of the claim or to the Respondent at the relevant time.
87. Work experience – there were no criteria which, on the face of it could be inferred or assumed to disadvantage someone who was Russian, not British or a refugee regarding the respondent's work experience criteria. We do not accept as appeared to be suggested by the Claimant that there was any evidence provided to us that there was a bias towards English speaking or UK companies when assessing someone's work experience.
88. The Respondent is a global company that recruits globally. The Claimant in particular pointed to his experience at Japanese bank identified on his CV. However Ms Payne stated that the reason this was not recognised was twofold – firstly it was only for 6 months and secondly he does not expand in any way as to what he was doing in that role. The key point again is that the Claimant provided no evidence to the Respondent at the time, of work experience that warranted any sort of score in this category.
89. In any event the Claimant's pleaded case that remains and has not been struck out by the operation of the Deposit Order, is that these PCPs put him at a substantial disadvantage because the Solve test had no particular language and limited language choices.
90. We conclude that the Claimant was not put at that disadvantage. He speaks business level English. He was not prevented nor has he advanced any

evidence to suggest that he could not meet the criteria that were applied to the recruitment process because of his English language skills. Further, he passed the Solve test. Therefore he has failed to demonstrate that either stage of the recruitment process put him at the particular disadvantage that he relies upon. He has also not put forward any information that people with the same racial background as him (Russian, not British or refugee) would be put at a disadvantage either. Therefore his claim for indirect race discrimination is not upheld.

Reasonable adjustments claim

91. It was conceded that the Claimant was, at the relevant time, disabled by reason of PTSD. We have therefore not considered any medical evidence regarding his condition.

92. There was no information in the Claimant's CV that indicated that he was disabled. Ms Payne said that this was all that she considered.

93. It is clear that on his application form the Claimant ticked that he had a disability. Underneath this the following statement is written:

"Identifying yourself as an individual with a disability is voluntary and we hope that you will choose to do so. Your answer will be maintained confidentially and not be seen by selecting officials or anyone else involved in making personnel decisions. Completing the form will not negatively impact you in any way, regardless of whether you have self-identified in the past. For more information about this form or the equal employment obligations of federal contractors under Section 503 of the Rehabilitation Act, visit the U.S. Department of labor's Office of Federal Contract Compliance Programs (OFCCP) website at www.dol.gov/ofccp ."

94. On occasion, knowledge regarding disability can be imputed. We consider that the Respondent knew or ought reasonably to have known that the Claimant was disabled given that he ticked this box. However they did not know what his disability was and the Claimant chose not to tell them despite the fact that when he was emailed regarding the Solve Test arrangements or any other aspect of the application process – he was told that he could ask for adjustments and they would not ask for diagnosis information in order to make any adjustments he required. The Claimant did not provide that information. Therefore although they might reasonably be expected to know that he was disabled, that does not mean that they could reasonably have known the substantial disadvantage to which he was placed as they had no knowledge of what his disability was at the relevant time.

95. We have addressed the existence of the PCPs relied upon already. We note again that the Claimant has provided no information that the requirement to take the Solve test would impose group disadvantage on people with PTSD when compared to those without it. The Claimant has also failed to demonstrate that he was disadvantaged by the Solve Test because he passed. This claim must therefore fail.

96. Turning then to the other selection criteria. We find that there was no obligation on the Respondent to make the majority of the adjustments proposed by the Claimant because they could not reasonably have known of the disadvantage that the Claimant was at because he did not disclose the nature of his disability to those making any of the decisions or to the Respondent as a whole.
97. One of the adjustments that the Claimant seeks is that his application ought to have been reconsidered when the Respondent was told about the Claimant's disability and nationality. There cannot be any obligation to make an adjustment because of nationality. Any obligation to make an adjustment could only arise on the basis of disability.
98. The information provided by the Claimant relating to his disability in the correspondence from 13-17 December and in his grievance is as follows:
- (i) I had to overcome challenges from a rare condition that developed because of my struggles. The condition does not have an effective treatment available elsewhere from London in England (13 December)
 - (ii) It is a topic of disability that is difficult to put in the initial stage of consideration. I have to face and overcome the challenges of being gay in Russia, and as my application reflected in a high-profile military background." (14 December)
 - (iii) Your recruitment process proved to be disability discriminating and putting refugees at a disadvantage (17 December – 17.25)
 - (iv) The Claimant's grievance does not provide any information as to what his disability was nor how it disadvantaged him in the recruitment process. (26 December)
99. We therefore consider that the Respondent continued to be in ignorance of the specific disadvantage that the Claimant was placed under by their PCP because he did not in any way explain the alleged disadvantage to them. The Claimant appeared to suggest in cross examination that they ought to have started a dialogue with him to establish what that was. However, during these proceedings he has continued to fail to articulate that disadvantage. He continues to state that more weight ought to have been given to his experience because he found it more difficult to achieve his qualifications and work experience. However he has given very little evidence of how that is the case focusing instead on suggesting that the Respondent does not recognise international experience or his military background – none of which was adequately set out in his CV or application form in any event. He also does not set out what the disadvantage was in what could constitute his application for reconsideration or any of the emails to the Respondent after his refusal for a role. It is not even included in his grievance.
100. Although we do not consider that the Respondent had the requisite knowledge of the specific disadvantage, we have considered whether the adjustments outlined by the Claimant are reasonable adjustments. We find that they are not in all the circumstances.

101. The Respondent would have considered whether to place weight on all of the information and experience which the Claimant now says the Respondent ought to have considered if the Claimant had explained them properly during the application process and he had every opportunity to do that. He has not suggested that he could not properly set out the relevant experience in a longer CV. We note that he has not done so even on his LinkedIn profile.

102. Further, it would not be a reasonable adjustment to place such weight on the Claimant's experience so as to give him more credit than his efforts are worth. Even through the evidence given at this Tribunal (either through his witness statement, in his answers to cross examination or by way of the questions he put to the Respondent witnesses), he has not demonstrated that he meets the criteria or experience levels that the Respondent was looking for to fulfil the role. The Claimant had every opportunity to state in his CV why he fulfilled the criteria. He could have explained that moving to London in difficult personal circumstances amounted to, say, leadership skills. Or he could have explained that although he only led a team for 9 months, he left because he had been so successful and therefore it ought to be considered in such a context. Or he could have told the Respondent that he had a high profile role in the Russian army. All of this information could, perhaps have amended how he was scored. However he gave absolutely none of that information to them. Instead what the Claimant is suggesting is that the Respondent's entire marking criteria ought to be adjusted to allow for experience that he has not even set out in his application. The Respondent cannot be expected to guess at such information.

103. For all of these reasons the Claimant's claim that the Respondent failed to make reasonable adjustments must fail.

Employment Judge Webster

Date: 7 February 2024

JUDGMENT and SUMMARY SENT to the PARTIES ON

15 February 2024

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FOR THE TRIBUNAL OFFICE

Schedule 1 – List of Issues

1. Direct race discrimination (Equality Act 2010 section 13)

1.1 The Claimant relies on the following protected characteristics:

- 1.1.1 Russian national;
- 1.1.2 Not British national;
- 1.1.3 Refugee.

1.2 Did the Respondent do the following things:

- 1.2.1 Not invite the Claimant to interview following first assessment
- 1.2.2 Not reconsider the assessment in the light of the Claimant's correspondence between 13 and 17 December 2022 and/or his grievance of 26 December 2022.

1.3 Did the Respondent's treatment amount to a detriment?

1.4 Was that less favourable treatment?

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

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was.

1.5 If so, was it because of a protected characteristic?

2 Indirect race discrimination (Equality Act 2010 section 19)

2.1 The Claimant relies on the following protected characteristics:

- 2.1.1 Russian national;
- 2.1.2 Not British national;
- 2.1.3 Refugee.

2.2A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP

- 2.2.1 Solve Test;
- 2.2.2 Other candidate assessment criteria;

2.3 Did the Respondent apply the PCP to the Claimant?

2.4 Did the Respondent apply the PCP to persons with whom the Claimant does not share the characteristic or would it have done so?

2.5 Did the PCP put persons with whom the Claimant shares the characteristic(s) at a particular disadvantage when compared with other persons with whom the

Claimant does not share the characteristic, in that the Claimant scored a low mark on the Solve Test and was not invited to interview? The Claimant's case is that the PCPs disadvantaged those who share his characteristic because:

- 2.5.1 The design of the solve test game puts participant from non- western background at a disadvantage because
 - 2.5.1.1 it had no particular language and limited language choices;
 - 2.5.1.2 no adaptation for people from certain backgrounds despite the claim the test is for any background. For example, Soviet and Russian normally have a broader Secondary education background that might see the Solve Test as extremely flawed and face larger hidden challenges to deal with during the test compared to Western counterparts. These could lead to lower test results due to brain processes blocking the material and most of the information emerging from the test as irrelevant and false. In other terms processes of "selective filtering" and "selective attention" in candidates will perceive as redundant and irrelevant information and then filter out more information depending on the country of origin in the Solve Test. **Struck out due to lack of payment of deposit**
 - 2.5.1.3 It put at disadvantage candidates from cultures and nations studying biology and ecology in secondary education by intense amount of distraction with flawed presentations of ecosystem model, biology and ecology as it was in the Solve Test. **Struck out due to lack of payment of deposit**
 - 2.5.1.4 the application form did not include refugee status to provide in section about ethnicity, hence this component neglected in the PCP during selection and employment processes putting candidates with that race characteristic at disadvantage; **Struck out due to lack of payment of deposit**
 - 2.5.1.5 Requires candidates to achieve a pass mark in the Solve Test because achievements are not visible in a proper light for each characteristic; **Struck out due to lack of payment of deposit**
 - 2.5.1.6 Because the degree of challenges of combined characteristics and the results and its value achieved in spite of the challenges for the holders of such characteristics are not visible in a proper light. **Struck out due to lack of payment of deposit**

2.6 Did the PCP put the Claimant at that disadvantage?

2.7 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

2.8 The Tribunal will decide in particular:

- 2.8.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;
- 2.8.2 could something less discriminatory have been done instead;
- 2.8.3 how should the needs of the Claimant and the Respondent be balanced?

3 Disability – it is conceded that the Claimant was disabled at the relevant time

4 Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

4.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

4.2A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

- 4.2.1 Solve Test;
- 4.2.2 Other candidate assessment criteria;

4.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant scored a low mark on the Solve Test and was not invited to interview?

4.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

4.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

- 4.5.1 The Respondent should have provided advice and guidance to disabled applicants about preparation for the Solve Test;
- 4.5.2 Take into consideration experience of dealing with disability on personal and societal, administrative levels as relevant experience to the role?
- 4.5.3 Take into consideration experience of getting access to the effective treatment as relevant experience to the role?
- 4.5.4 Take into consideration moving to London in personal circumstances as a significant achievement that highlights the application of relevant project management and leadership skills?
- 4.5.5 Take into consideration that a combination of dealing with the disability and having refugee status account as relevant extracurricular activities in leadership,
 - 4.5.5.1 pioneering experience
 - 4.5.5.2 dealing with challenges
 - 4.5.5.3 overcoming difficulties
 - 4.5.5.4 dealing with change
 - 4.5.5.5 all above in a different country of origin;
- 4.5.6 Reconsider the assessment of the Claimant's application in the light of the Claimant's correspondence between 13 and 17 December and/or his grievance of 26 December 2022.

4.6 Was it reasonable for the Respondent to have to take those steps and when?

4.7 Did the Respondent fail to take those steps?

5 Remedy

5.1 What recommendations should the Tribunal make? The Claimants seeks recommendations:

- 5.1.1 That he is offered an interview; and/or
- 5.1.2 That he is offered a job.

Compensation

5.2 To what compensation, if any, is the Claimant entitled? This may include considering:

- 5.2.1 is there any contributory fault for which there should be a reduction (First Greater Western Limited v Waiyego UKEAT/0056/18/RN)?
- 5.2.2 has the Claimant taken reasonable steps to mitigate any financial loss suffered, whether by obtaining alternative employment or otherwise?
- 5.2.3 Is the Claimant in receipt of any benefits that should be taken into account as reducing any award payable?