



EMPLOYMENT TRIBUNALS

Claimant: Ms J Linde

Respondent: The Royal Borough of Kensington & Chelsea

Heard at: Watford

On: 6,7,8,9 November 2023
(In chambers 15 December 2023)

Before: EJ Bansal
Members – Mr B Dykes & Mr D Bean

Representation

Claimant: In person

Respondent: Mr Simon Harding (Counsel)

RESERVED JUDGMENT

The unanimous judgment of this Tribunal is that the Claimant's claims of direct and indirect discrimination are not well founded and are dismissed.

REASONS

Background

1. The claimant claims direct and indirect race discrimination in relation to a job application she made to the respondent on 18 April 2021 to be an Adult Social Worker.
2. By a Claim Form presented on 3 November 2021, following a period of early conciliation from 2 September 2021 to 14 October 2021, the claimant brought complaints of direct discrimination on the grounds of race, age, and disability, and indirect discrimination on the grounds of race.
3. At a Preliminary Case Management Hearing held on 20 January 2023, the claimant withdrew the complaints of age and disability discrimination. Accordingly, a Withdrawal Judgment was issued on 2 February 2023.
4. The respondent defends the claim asserting that the decision not to offer the claimant a role as a Social Worker does not constitute discrimination.

The Legal Issues

5. At a Preliminary Case Management Hearing held on 20 January 2023, Employment Judge M Bloom discussed and agreed with the claimant and The respondent representative the legal issues to be determined. At this hearing Counsel for the respondent produced a draft List of Issues. This List of Issues was discussed at the outset of the hearing. The claimant made some minor amendments, and also amended the PCP for the indirect discrimination claim. The amendments were noted. At the start of day 2 of this hearing, the claimant wanted to make a further amendment to the PCP for the indirect discrimination claim. Following discussion, Mr Harding decided not oppose the amendment. The revised agreed List of Issues is as set out below.

Direct Discrimination

1. The claimant is Eastern European.
2. Do the following acts constitute less favourable treatment than the respondent would have treated the relevant comparator;
 - A. In respect of the interview on 10th May 2021.
 - (1) The claimant's background was not taken into account in the interview.
 - (2) The respondent interview panel expected the claimant to demonstrate more knowledge than it was necessary to start the role specifically. The the claimant was expected to be ahead of mandatory training.
 - (3) He respondent acted arbitrarily and it did not follow any recruitment guidance.
 - (4) The interview panel did not consider that the claimant's skills and experience are transferable.
 - (5) The interview panel failed to prompt the claimant sufficiently and to implement positive actions contrary to their own recruitment policy.
 - (6) The respondent interview notes were inaccurately recorded and not handled appropriately.
 - (7) The interview scoring was not objective and the interview panel did not score the claimant's responses fairly.
 - (8) Was the claimant not selected for the post because she was Eastern European.
 - B. The respondent did not provide feedback in a fair way on 9th June and 18th June 2021.
3. The claimant relies on a hypothetical interview candidate for the social worker role who was from a white British background.

4. If so, was this because of the claimants race.

Indirect discrimination

5. Did the respondent have the following PCP (“Provision, criterion or practice”)
- (a) The respondent had an expectation that candidates obtained their social work degree in the UK and/or gained experience within adult social care in the UK.
 - (b) Did the PCP put persons of Eastern European origin who did not study social work in the UK and/or did not obtain adult social care experience in the UK at a particular disadvantage in comparison to candidates who were not of Eastern European origin.?
 - (c) Did the PCP put the claimant at the disadvantage?
 - (d) If so, was the PCP a proportionate means of achieving a legitimate aim.
 - (e) The respondent relies on the following as its legitimate aims;
 - (i) to comply with factory obligations in employing qualified social workers with the skills and experience to meet the service users needs.
 - (ii) to comply with public sector equality duty in creating a recruitment process which treated all candidates fairly and consistently

Hearing

6. The Tribunal was provided with an agreed bundle of documents of 592 pages. In addition, the claimant produced her own supplementary bundle, containing a further 53 pages. Mr Harding did not object to this supplementary bundle. The parties were informed that only documents referred to in the witness statements and those referred to in evidence will be read.
7. The Tribunal was also provided with a bundle containing witness statements of the claimant, which was 62 pages long; and the respondent witnesses, namely, Mrs Katherine Alexander-Williams (Team Manager) (“KAW”), Mrs Sita Rangunath Kotilingam,(Interim Service Manager) (“SRK”), and Mr Jason Wisniewski (Strategic HR Lead.) (“JW”) All witnesses gave oral evidence and were cross examined. The Tribunal also asked questions for clarification.
8. At the conclusion of the parties evidence, both the claimant and Mr Harding provided written submissions. They also made oral submissions.

Findings of Fact

9. Having considered all of the evidence, on the balance of probabilities the Tribunal made the following findings of fact. Any reference to a page number is to the relevant page number in the bundle.

10. The respondent is a local authority. It is an Equal Opportunities Employer. and as at June 2021 it employed 2418 employees. The respondent's Adult Care team provides professional assessment and care management service to persons over the age of 18 years within the borough.
11. Following the Covid pandemic in 2020, the respondent found that a significant number of employed social workers had left the profession and did not return to work with the respondent. Therefore, the respondent relied on agency workers to meet the service needs which was not financially sustainable. In 2021, the respondent had a rolling recruitment drive for social workers, thus applications would be considered as and when received. In December 2020, the respondent placed an advertisement for social workers on its Intranet Careers site. The job summary confirmed the salary range to be £36,618-£44,598 per annum; Work Location- London; Hours per week-36; Position-Permanent. All candidates were required to apply online. The advertisement stated the respondent was committed to promoting equality and respecting diversity and welcomed applications from all sections of the community. (p159-162)
12. The advertisement was accompanied by a detailed document, which contained the Job Description; information about the Job purpose; Selection Criteria and Values and Behaviours. (p163-167) The note to candidates, stated, *"When completing your application form, please address answers directly to each of the selection criteria. This enables the panel to assess your ability to meet each criterion. It is essential that you give at least one example of your ability to meet each of the four Values and Behaviours; Putting Communities First, Respect, Integrity and Working Together."*
13. The Guide to the Recruiting Managers, stated *"The following values and behaviours are essential criteria in each post and must be addressed directly by candidates. The guidance notes on values and behaviours for managers give example questions to probe candidates in the interview and application stages of the recruitment process. "*
14. As part of the Values & Behaviours, the respondent identified four key behaviours and values that need to be demonstrated by all current employees, and successful candidates will have to show the ability to meet these behaviours. The key behaviours were, Putting Communities First; Respect; Integrity; and Working Together.
15. In relation to the job role, it was a requirement that the candidate possessed Qualifications in the form of BA, Bsc, DIPSW or CQSW or MA in Social Work or equivalent, and was Registered with Social Work in England.(p165) In terms of the Skills, Experience and Attitude, it set out essential requirements. In particular, the essential requirements were;
 - (i) experience working with vulnerable adults and/or children within a health and social care setting;
 - (ii) knowledge and understanding of relevant Social Care legislation e.g Care Act 2014. Experience of using the Care Act in practice and understanding of eligibility criteria.
 - (iii) ability to undertake Mental Capacity Assessment in accordance with the

- Mental Capacity Act 2005.
- (iv) knowledge of safeguarding procedures and making safeguarding personal. Experience in leading safeguarding investigations.

Respondent Recruitment Policy

16. The respondent recruitment policy states the respondent is committed to build a workforce that reflects and understands the diverse range of communities that live in the Borough and a workplace that is respectful, fair, safe and inclusive for all. The respondent's strategic objective is to increase diversity within its workforce and ensure equality and inclusion in the workplace. (p102)
17. The policy provides for an inclusive recruitment approach, which requires diverse recruitment panels to be used for all roles at £36k and above; Inclusive Recruitment Training for all hiring managers/panel chairs, and diverse shortlists for all roles at £36k and above to be sourced by hiring managers. (p103)

The Claimant

18. The claimant is Eastern European. She was born and grew up in Latvia. She completed her formal education in Latvia where she obtained a degree in Economics. She then moved to Germany where she attained a Bachelors degree in Social Work in 2006. She gained practical work experience by working with different vulnerable people. In February 2013, she moved from Germany to the UK to further her career as she was made aware that the career and earning opportunities for Social Workers are better in the UK than Germany. The claimant found a role as an Employment Advisor at a Mental Health Charity, which she continues to do. To enhance her career prospects in social work, she also studied for and attained a Master's degree in Social Work.
19. The claimant explained that because her role is in a field relevant to social work, she has been able to obtain and maintain a professional registration with Social Work England.
20. The Tribunal found the claimant to be an intelligent and articulate individual. Although English is not her first language, she spoke well and showed no difficulties in understanding the proceedings or the issues to be determined.

The application

21. On 18 April 2021 the claimant submitted her application online as required. The application was submitted with a covering letter and her CV. (p173-181) The application form required information about the applicants' education; work history and a statement explaining how they meet the role requirements, as specified in the job posting. The respondent acknowledged receipt of the application that same day. (p200) The claimant was shortlisted for an interview based on her application, which confirmed she had a degree and training in social law, and provided evidence of relevant work experience utilising the social care legislation.

The interview

22. In preparation for the interviews for this post the interview panel were provided with an Interview Notes Pack, which provided guidance on conducting the interview; recording of notes and information for each candidate; and contained the Interview Question sheet to be used and completed at each interview. (p112-121)
23. In particular the guidance given was that all panel members may take notes which must be recorded in the document provided and not in a personal notebook; all records must be collected and stored locally by the panel chair for six months following the interview; that the scoring must be done independently, and then the scoring should be moderated collectively with the Chair at the end of the process; and that the Chair must record the consensus score for each question, the concluding comments and feedback for the candidates. (p112)
24. The interview assessment process was the same for all candidates. It entailed asking specific questions focusing on key behaviours and experience. The scoring assessment was – 4 points – Excellent; 3 points – Good; 2 points – Fair; 1 point – Weak, and 0 points – Poor.
25. The interview panel comprised of Mrs Sita Ragunath-Kotilingam (SRK) (Interim Care Service Manager) and Mrs Katherine Alexander Williams (KAW) who at the time held the position of Team Manager. SRK, is South African who moved to England and first worked for London Borough of Ealing as a social worker. Both panel members are experienced social workers who have previous experience of conducting interviews in a recruitment process.
26. Before the interview process was commenced SRK and KAW formed and agreed eight set questions for the candidates. (p123-125) These questions were asked of all candidates. The questions were a combination of behaviour, technical and scenario based. These were designed specific to the job description; to test their knowledge of legislation and skills to meet the job specification and how safeguarding issues would be managed along with the workload.
27. The eight questions were;
 - (i) Please can you tell us why you applied for this post? What relevant skills and experience can you bring to the role.
 - (ii) You receive the following call, a daughter calls the service, she explains that her father has been taken to hospital. Daughter lives in Japan and cannot get to London. Dad is normally the main carer for mum. Mum has dementia. Can you talk through all steps you would take on duty? (scenario question)
 - (iii) Can you give me 3 principles of the Mental Capacity Act 2005? Can you tell us about an assessment you recently carried out?(behaviour question - Innovative)
 - (iv) Can you tell us about the 6 principles of safeguarding? Are you able to talk us through a recent safeguarding case and link them to the six principles? (behaviour question – collaborative)
 - (v) How do you determine whether someone is eligible for services under the

- Care Act? (behaviour question)
- (vi) RBKC is a very diverse borough. What strategies have you used to respond to diversity needs with clients? Can you give us an example?
 - (vii) You are working with Mr Bell as his social worker. Mr Bell informs you that he doesn't like his carers because they are always late, they don't talk to him and he always gets different carers coming. What things can you put in place to address Mr Bell's concerns? (scenario question)
 - (viii) Duty of a social worker can often be very busy. How do you prioritise your day with competing tasks and cases/ (technical question)
28. In evidence SRK confirmed that they did not create a model answer to each question to assist them in marking the candidate for each question.
29. On 10 May 2021 the claimant attended an interview with SRK and KAW, which was carried out remotely via MS Teams. Both SRK and KAW confirmed they made their own notes during the interview. SRK made handwritten notes,(p193-199) and KAW typed her notes.(p184-192) Both SRK and KAW maintained they conducted the scoring independently and objectively. Following the interview with the claimant they held a discussion and reviewed their own assessment, and agreed a joint end score as opposed to giving a score for each question. The interview sheet with each question was completed with their notes of the responses received, and the mark given. (p183-192) The claimant scored 11 marks out of 32. The pass mark was set at 19 marks. (i.e 60%)
30. From the notes of the interview, and the evidence given by SRK, the claimant's scores were as follows (p183-191);
- (i) For Q1, she was scored 1 (weak). The justification was that she did not demonstrate her skill, as was required.
 - (ii) For Q2, she was scored 2 (fair). The claimant did not focus on the key risks.
 - (iii) For Q3, she was scored 1.5 (weak). The claimant did not show that she understood the principles of the Mental Capacity Act or know how to apply those in practice, which was essential skill for role. Given the claimant had completed an MA Post Qualified Professional Knowledge in the UK, which included a Best Interest Assessor module, it was expected that the claimant would be able to demonstrate her knowledge and its application.
 - (iv) For Q4, she was scored 1 (weak). She named the safeguarding principles but did not give any examples of how she would apply these principles in practice.
 - (v) For Q6, she was scored 1.5 (weak). She did not talk about well being and impact of need, which was required.
 - (vi) For Q7, she was scored 1 (weak). The reply given was considered to be unclear as it was unclear if the example given was about visual impairment/disability or cultural.
 - (vii) For Q8, she was scored 1.5 (weak). The score was low as she gave limited solutions/recommendations for working with agencies.
 - (viii) For Q9, she scored 1.5 (weak). She gave limited examples of assessing risks and how to prioritise her daily tasks.
31. SRK, in oral evidence was clear that the scoring was fair. This reflected the claimant's failure to demonstrate her knowledge of the requirements of the

role or adapt her existing experience to provide practical examples of how she could meet the requirements of the role. Also, of concern was the claimant's inability to demonstrate her knowledge of the Care Act 2014 and the Mental Capacity Act 2005, which is an essential requirement of the role.

32. Accordingly, the claimant was not selected for the role. By email dated 18 May 2021 the claimant was informed that she had not been successful in the interview, and if she would like feedback to make that request. (p204-205).
33. Following this notification the claimant requested feedback on her interview. (p204). This feedback was first given by KAW in a telephone call held on 9 June 2021. KAW did not make a note of this call. In her witness statement and oral evidence to the Tribunal, KAW explained that she always gives interview feedback in a phone call as it is more personal and supportive. Her recollection of their conversation was that it was a difficult conversation, as the claimant was agitated and upset, and she had to tell her to calm down. In discussion, the claimant asked for her advice. KAW suggested that one option would be to apply for an assistant social worker position. She explained that for this role there is less onus on having previous knowledge and skills to do the qualified role and also this role would enable the claimant to get experience of the UK system and assist her in future interviews. In evidence, she refuted this suggestion had anything to do with the claimant's background or her race. KAW was clear that this was general advice, and that she would suggest this option to anybody who asked for advice on securing a social worker role without having direct relevant experience of the specific area of work.
34. Following this discussion, the claimant emailed KAW on 11 June 2021, in which she stated that believed she had done very well in the interview, and she did not understand from her discussion what she could have done differently. She asked for a copy of the interview questions and also asked if HR could reconsider her interview based on the Equality Act. In the email, she acknowledged that she never had the chance to work in Adult Social Care.(p208) This email was forwarded to SRK who then gave further feedback to the claimant.
35. By email dated 18 June 2021, SRK confirmed her feedback. SRK advised as the interview process was continuing she was unable to provide a copy of the interview questions. She confirmed having reviewed the interview notes her feedback was as set out below:
 - (i) The interview consisted of eight questions each carrying a maximum of four marks therefore a total of 32 marks you scored a total of 11 marks. (28%) Please note that the scoring was consistent with both interviewers.
 - (ii) Looking at the responses to all the questions I found what was common throughout is that you did not fully answer the questions asked. For example with the first question, you told us about your experience, but not about why you applied for the post and you did not elaborate on your skills I would advise them for future interviews you ensure that all

aspects of the question is answered as some questions can have more than one part to it.

- (iii) With regards to questions in relation to social work practice with Adult Social Care, we were aware that you did not have experience working in the field, nevertheless the expectation is that you will be able to adapt your skills to the role. However you were not able to demonstrate this at the interview. You also did not provide practical solutions to the scenario questions asked.
- (iv) Your knowledge in relation to the Care Act 2014 was not sufficiently in depth and you were unable to link legislation and theory to practice which is a requirement for social workers working within Adult Social Care.

36. SRK ended the email by confirming that the above 4 points were common throughout the answers given; that no further feedback would be provided or a copy of the questions for reasons given previously, and no offer for a Social Work post would be made. (p206)
37. Following this, by letter dated 2 July 2021, the claimant made a complaint to the respondent claiming that during her interaction with the respondent she got the feeling that the recruitment process was unfair, also as an Eastern European of Russian origin she felt being racially discriminated. She therefore asked for detailed information about the policies and procedures, the recruitment process as applicable to the position of Social Workers; and statistical information about the number of Eastern European employees and their job grades employed by the respondent. (p209-212) In response to this email, the respondent advised the claimant to re-direct her complaint to Jason Wisniewski Strategic HR Lead (JW). As directed, by email dated 5 July 2021, the claimant forwarded her complaint accordingly.
38. Following receipt of the claimant's email, JW investigated the complaint. In his witness statement and oral evidence to the Tribunal he explained he conducted an objective evaluation. This process involved a comprehensive review of all relevant documentation meetings with the selection panel and an assessment whether the rejection was reasonable and justifiable on sound objective grounds. From his investigations he concluded that he was satisfied the interview panel assessed the claimant's suitability for the role based on the claimant's replies to the questions asked. There was no evidence that the scoring was influenced in any way by the claimant's origin. Further he was confident that the interview had been handled in accordance with their professional obligations under the Equality Act and he did not find any evidence that the recruitment process was flawed.
39. By email dated 26 July 2021, JW informed the claimant of the outcome of the complaint, namely that she was unsuccessful because she had failed to establish that she could meet the criteria for the role, and that the interview process had been dealt with professionally and in accordance with the requirements of the Equality Act. (p215). In reply, the claimant wrote a lengthy letter to the respondent dated 11 August 2021, in which she set out her views and repeated the point that she experienced unfair and unequal treatment; she had been scored unfairly and they violated their own recruitment policies; that Eastern Europeans were not in the privileged group. She ended by

stating that, unless her complaint is resolved, she will escalate her complaint to the Employment Tribunal.(p245-248). On 3 November 2021 the claimant presented her claim form, in respect of this claim.

The applicable Law
Equality Act 2010 (“EQA”)

40. Section 39(1) provides, “An employer (A) must not discriminate against a person (B) –
- (a) in the arrangements A makes for deciding to whom to offer employment;
 - (b) as to the terms on which A offers B employment;
 - (c) by not offering B employment.

Burden of proof

41. The burden of proof provisions are set out in section 136 EQA:-
- (1) This section applies to any proceedings relating to a contravention of this Act.
 - (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.
42. In Barton v Investec Henderson Crosthwaite securities Ltd (2003) IRLR 332, the EAT set out the guidance to tribunals on the burden of proof rules then contained in the Sex Discrimination Act 1975. This was approved by the Court of Appeal in Igen Ltd and others v Wong and others (2005) ICR 931
43. The conventional approach involves a two stage approach by the tribunal. At stage 1 the question is; can the claimant show a prima facie case? If so, then the tribunal moves onto stage 2 and asks itself; is the respondent’s explanation sufficient to show that it did not discriminate.?
44. Tribunals are cautioned against taking too mechanistic an approach to the burden of proof provisions, and that the tribunal’s focus should be on whether it can properly and fairly infer discrimination (Laing v Manchester City Council [2006] ICR 1519). The Supreme Court has observed that provisions “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” (Hewage v Grampion Health Board [2012] UKSC 37).
45. The Court of Appeal has emphasised that “The bare facts of a difference in treatment, without more, sufficient material from which the tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination” (Madarassy v Nomura International plc [2007] IRLR 246). “Something more” is needed for the burden to shift. Unreasonable behaviour without more is insufficient, though if it is unexplained then that might suffice (Bahl v Law Society [2003] IRLR 640).

Comparators

46. Section 23(1) EQA deals with comparisons, and provides:-
“On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case”.

Direct discrimination

47. Section 13(1) EQA provides, “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.” In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual.
48. When considering direct discrimination, the tribunal must examine the “reason why” the alleged discriminator acted as they did. This will involve a consideration of the mental processes, whether conscious or unconscious, of the individual concerned (Amnesty International v Ahmed [2009] IRLR 884). The protected characteristic need not be the only reason why the individual acted as they did, the question is whether it was an “effective cause” (O’Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor [1996] IRLR 372).
49. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator.- Bahl v Law Society 2004 IRLR 799 (CA). Unreasonable behaviour alone cannot found an inference of discrimination but if there is no explanation for the unreasonableness, the absence of an explanation may give rise to this inference of discrimination. The Court of Appeal said that proof of equally unreasonable treatment of all is one way of avoiding an inference of unlawful discrimination, but it is not the only way. At paragraph 101 Gibson LJ said quoting from Elias J in the EAT in the same case; “ *The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made.*”
50. The fact that a claimant has been treated less favourably than an actual or hypothetical comparator is not enough to establish discrimination. Something more is required, In Madarassy v Nomura International Plc (2007) ICR 867, Mummery LJ said; “ *The base facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, a sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*”
51. In determining whether discrimination has taken place, the tribunal must enquire as to the conscious or subconscious mental processes which led the alleged discriminator to take a particular course of action in respect of the

claimant, and to consider whether a protected characteristic played a significant part in the treatment. (Nagarajan v London Regional Transport and others (1999) ICR 887 (HL))

Indirect discrimination

52. Section 19 of the EQA provides:

- (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.

53. In Essop v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27, [2017] IRLR 558: the following points and (points to 2-7) the six “salient features” of indirect discrimination are set out:

- (1). "Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.'
- (2). There is no requirement in the Equality Act 2010 that the claimant show why the PCP puts one group sharing a particular protected characteristic at a particular disadvantage when compared with others. It is enough that it does. Sometimes, perhaps usually, the reason will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage.
- (3). The contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination

does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.

4. The reasons why one group may find it harder to comply with the PCP than others are many and various [...]. They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between “women's jobs” and “men's jobs” or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, as in *Homer v Chief Constable of West Yorkshire* [2012] IRLR 601, where the requirement of a law degree operated in combination with normal retirement age to produce the disadvantage suffered by Mr Homer and others in his age group. These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are “but for” causes of the disadvantage: removing one or the other would solve the problem.
- (5). There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. The fact that some BME or older candidates could pass the test is neither here nor there. The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test requirement would be a proxy for race or age).
- (6). It is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. That was obvious from the way in which the concept was expressed in the 1975 and 1976 Acts: indeed it might be difficult to establish that the proportion of women who could comply with the requirement was smaller than the proportion of men unless there was statistical evidence to that effect. Recital (15) to the Race Directive recognised that indirect discrimination might be proved on the basis of statistical evidence, while at the same time introducing the new definition. It cannot have been contemplated that the “particular disadvantage” might not be capable of being proved by statistical evidence. Statistical evidence is designed to show correlations between particular variables and particular

outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.

(7). It is always open to the respondent to show that his PCP is justified – in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question – fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in *Essop*, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result."

54. A one-off decision could amount to a provision, criterion or practice, but it is not necessarily one, and PCP carries a connotation of a state of affairs indicating how a similar case would be treated if it occurred again *Ishola v Transport for London* [2020] IRLR 368.

Conclusion

Direct discrimination

55. We address each of the alleged acts of less favourable treatment as set out in 2 A(1)-(8) & B of the list of issues.

(a) (1) *The background was not taken into account in the interview.*

56. The claimant clarified, in evidence that by her "background" she was not only referring to her being Eastern European, but that, it was reference to her whole background, which included, she obtained her Social Work degree and work experience abroad and not in the UK.

57. In evidence, SRK explained the claimant's background was known to the respondent when she was shortlisted for interview. A candidate's background was not relevant or a criteria for selection. Candidates were judged on their skills and ability to perform the role, irrespective, that their qualifications and experience was obtained outside UK. The fact is the claimant's background was not the reason for the claimant not being offered the role.

58. The claimant has not shown a prima facie case. Further, there are no facts before the Tribunal to conclude that a hypothetical comparator would have been treated differently than the claimant.

(b) (2) *The interview panel expected the claimant to demonstrate more knowledge than it was necessary to start the role specifically, the claimant was expected to be ahead of mandatory training.*

59. The claimant asserted that the attitude shown by the panel towards her made her feel that they wanted her to demonstrate specific knowledge

ahead of the mandatory training. She believed it was unfair and discriminatory to expect her having not gained any experience within the UK Adult Social Care to present in-depth knowledge on specific topics.

60. The claimant provided no evidence in support of this assertion. This is a belief the claimant has held. The claimant has not shown a prima facie case. In any event, the Tribunal is satisfied that there was no expectations and that all candidates were asked the same questions and given an opportunity to demonstrate their knowledge.

(c) (3) The respondent acted arbitrarily and it did not follow any recruitment guidance.

61. The claimant has failed to provide any examples of arbitrary treatment or how the guidance was not followed. The claimant has not shown a prima facie case. In any event, we are satisfied from the respondent's evidence that the same process was applied to all candidates irrespective of their race.

(d) (4) The interview panel did not consider that the claimant's skills and experience are transferable.

62. The claimant asserted that the interview panel must have known that because of her background it was basically not possible for her to gain more knowledge and experience in Adult Social Care than she possessed. She claimed the interview panel did not consider that her skills were transferable to Adult Social Care in the UK, and therefore it was fair for her to expect the interview panel would have taken her circumstances into account.

63. In evidence, SRK explained that candidates were judged on their skills and ability to perform the role, irrespective, that their qualifications and experience was obtained outside UK, and that the candidates may not be performing the same type of work in their current role. It is not in dispute that the claimant's background was known to the respondent when she was shortlisted for interview. The interview was an assessment process giving each candidate the chance to demonstrate how their existing skills were transferable. The respondent found the claimant did not demonstrate any skills or was able to show how her existing skills were transferable for her to perform the role.

64. On the evidence we heard, we do not find the claimant has shown a prima facie case.

(e) (5) The interview panel failed to prompt the claimant sufficiently and to implement positive actions contrary to their own recruitment policy.

65. The claimant asserted that during the interview the panel refused to prompt her sufficiently and even when she asked to be prompted it was not done. The claimant's interview notes show that she was given prompts to assist her. SRK also confirmed this in evidence. This was accepted by the claimant. In oral evidence the claimant's issue was that she should have been prompted more. In cross examination it was put to the claimant that

if she was prompted too much, she would be given the complete answers. She appeared to accept that.

66. The claimant has not shown that the interview panel failed to prompt her sufficiently compared to the other candidates or that the other candidates were prompted more than the claimant. Further, we are not satisfied a hypothetical comparator would have been treated differently in the same circumstances.

67. SRK explained that the respondent do not take positive actions to support any candidate as this would lead to an unfair interview process. They are required to treat all candidates fairly and objectively to assess their ability to undertake the role. We are satisfied the respondent applied the same process to all candidates.

(f) (6) The respondent interview notes were inaccurately recorded and not handled appropriately.

68. The claimant has produced no evidence to prove that the notes of her interview notes were inaccurately recorded or not handled appropriately. We accept the respondent's contention that it is not enough for the notes to be inaccurate. The claimant must provide primary facts from which the Tribunal could conclude the claimant's race was the reason for that inaccuracy. The claimant has not shown a prima facie case.

(g) (7) The interview scoring was not objective and the interview panel did not score the claimant's responses fairly.

69. The interview process, and the scoring/selection process was clearly set out in the guidance pack. It was applicable to all candidates irrespective of their background. The scores given reflected the responses given to each question.

70. The claimant has argued that she should have scored higher than she did. This is her subjective view based on her own assessment that she performed better than the view taken by the respondent. We are satisfied with the evidence given by SRK that the scoring for each candidate was done consistently and fairly and the scores reflected their individual performance in interview. The reality is that the claimant did not perform sufficiently well at interview to be considered for selection to the post.

71. The claimant has not shown a prima facie case.

(h) (8) The claimant was not selected for the post because she was Eastern European.

72. The fact as presented to the Tribunal are clear. The claimant was not selected because based on her interview performance she did not demonstrate she had the skills and experience to be able to perform the role. The claimant's race was not the reason for her non-selection.

73. In any event, there are no facts from which we could conclude that a

hypothetical comparator (i.e who was not Eastern European, and whose circumstances were similar to the claimant) would have been selected just because of their race.

B *The respondent did not provide feedback in a fair way on 9th June and 18th June 2021.*

74. At the request of the claimant, she was given feedback first by KAR verbally on 9 June 2021 and then by SKR in writing on 18 June 2021. It appears the claimant did not like the feedback and how it was given. We are satisfied with the respondent's evidence that the feedback given was consistent with the claimant's performance and identified the reasons why she was not selected.
75. The claimant has not identified why the feedback and the manner it was given was discriminatory. We find there are no facts from which could conclude that a hypothetical comparator (i.e. someone who was not eastern European and had asked for feedback after not being selected) would have been treated any differently.

Indirect discrimination

76. The claimant has alleged the PCP to be that *"The respondent had an expectation that candidates obtained their social work degree in the UK and/or gained experience within adult social care in the UK"*.
77. We find that the respondent did not have or applied this PCP to the claimant, to Eastern Europeans or to anyone who were not Eastern European. Our reasons are as follows;
- (i) the claimant has adduced no evidence to show or establish that there was such a PCP;
 - (ii) the claimant was selected for interview on the basis her social work degree and social care work experience was not in the UK. If the alleged PCP had been applied then she would not have been selected to attend an interview.
 - (iii) there was no expectation on the respondent that candidates obtained their social work degree or gained experience within adult social care in the UK. The respondent recognised that qualifications and experience are transferable.
78. Accordingly, the complaint of indirect discrimination fails. It is therefore not necessary to deal with the defence of justification and if it was a proportionate means of achieving a legitimate aim.
79. For the reasons stated above the claimant's complaints are not well founded and are dismissed.

Employment Judge Bansal
Date 5 February 2024

JUDGMENT SENT TO THE PARTIES ON
6 February 2024

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