



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr S Hinds

v

Education Support Partnership

Heard at: Watford

On: 24 & 25 May 2017

Before: Employment Judge Daniels

Members: Mr M Kalz
Ms A Crighton

Appearances

For the Claimant: In person

For the Respondent: Mr C Day, Solicitor

JUDGMENT

1. The claims brought under section 13 of the Equality Act 2010 for direct race and sex discrimination are not well founded and are dismissed.

REASONS

The issues

1. The issues to be determined were set out by Employment Judge Bedeau at a preliminary hearing on 9 January 2017 (page 29 of the bundle):

“Section 13: Direct discrimination because of race

1. “Had the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act 2010, namely:
 - 1.1 Not offering him the position of Press Officer after interviewing him and the other candidate, Claire Coveney; and/or
 - 1.2 After Miss Coveney had turned down the Press Officer position, failing to offer that position to the claimant;

- 1.3 Has the respondent treated the claimant as alleged less favourably as a black person that it treated Miss Coveney who is white?
- 1.4 If so, had the claimant proved primary facts from which the tribunal could properly and fairly conclude⁴ that the difference in treatment was because of race?
- 1.5 If so, what is the respondent's explanation? Has it proved a non-discriminatory reason for any proven treatment? It is the respondent's case that the claimant was properly and fairly assessed during the interview process and scored poorly when compared to Miss Coveney. As he was deemed unsuitable for the position, following Miss Coveney's rejection of the offer, the post was not offered to him. Race did not play a part in the respondent's decision making process."

Section 13: Direct discrimination because of sex

2. Had the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act 2010, namely:
 - 2.1 Referring to the claimant during interview as "aggressive".
 - 2.2 After interviewing the claimant and Miss Coveney, not offering the claimant the post of Press Officer as he was the better candidate.
 - 2.3 After Miss Coveney had declined the Press Officer position, not offering the post to the claimant.
3. Had the respondent treated the claimant as alleged less favourably because of sex than it treated Miss Coveney;
 - 3.1 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference was because of sex?
 - 3.2 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment? The respondent will repeat its response to the same question under race discrimination."

Case management issues

2. The claimant's claim for direct age discrimination was dismissed on withdrawal at the preliminary hearing on 9 January 2017.
3. At the commencement of the employment tribunal hearing a claim for direct sex and race discrimination in relation to an allegation that the claimant had been described as aggressive in the interview was withdrawn. Such claim was dismissed on withdrawal by the claimant.
4. In the course of the hearing an order for disclosure of documents was made on the respondent firstly in respect of documents relevant to the handwritten notes made by one panel member, Ms Smith. There was also a further order for disclosure made in respect of Ms Gatley's complete

interview notes. Both orders were complied with, so far as relevant documents existed, in the course of the hearing.

5. The claims were brought under section 13 of the Equality Act 2010 for direct race and sex discrimination in respect of the respondent's recruitment process for a Press Officer in early 2016, following an interview at which the claimant was unsuccessful.

The evidence

6. We heard from the Claimant on his own behalf. We had evidence from Ms Katy Smith the Head of Administration and HR for Education and Support Partnership for the respondent and Mr Jeremy Reynolds (Chair of the Board of Trustees).

The facts

7. Ms Katy Smith was the Head of Administration and HR for Education and Support Partnership. She worked for the respondent for nearly 21 years.
8. Until April 2016 Rachel Gatley was a freelance PR consultant for the respondent. Ms Gatley subsequently moved to the role of interim Head of Marketing and interim Head of Campaigns and Communications for the respondent before leaving the organisation in February 2017.
9. Ms Gatley identified the need for a Press Officer within the PR Team and devised a job description accordingly. The Press Officer role was advertised during late January and early February 2016.
10. The Person Specification stated as follows:

“Person Specification

Essential skills

- Demonstrate experience and proven track record in generating press and media coverage in a similar role and to do so in a what can sometimes be a pressurised environment with a dynamic, creative and diverse team of people, where tact, mature judgment and discretion is required.
- Strong interpersonal skills with the ability to support, motivate and inspire confidence in colleagues.
- Ability to think ahead and anticipate needs before they arise, calm under pressure with a focus on finding and presenting solutions.
- Ability to identify, lead and drive projects from conception to completion.
- Appetite for understanding and responding to emerging marketing, sales and education trends.
- Confident and able to work in own initiative and with limited supervision, but be willing to seek clarification, to ask for support when required and take direction.
- Effective communicator/good organisational skills/attention to detail.
- Ambition to move into a more senior role in the future.

Desirable skills

- Experience of working in the Third Sector.
 - Knowledge of the education sector.
 - Knowledge of Salesforce.”
11. The respondent received nine applications for the Press Officer role. Eight applicants were short-listed. Three applicants were invited for interview and two attended; the claimant, Mr Hinds and Ms Claire Coveney. Prior to the interviews taking place the respondent arranged for Mr Hinds and Ms Coveney to complete a psychometric assessment.
 12. The interviews for the claimant and Ms Coveney took place on 25 February 2016. Ms Smith interviewed the candidates alongside Rachel Gatley and Dr Jeremy Reynolds (Chair of the Board of Trustees).
 13. In the course of the interview the claimant gave some examples of his work experience including with the Highways Agency. From an early stage Ms Smith became worried about his communication skills and noted that he was “very nervous”. She considered that he did not appear to fully engage with the interview panel and was somewhat lacking in enthusiasm in his answers. In response to question 8 Ms Smith was concerned that the claimant appeared to describe a situation about problem solving which ultimately resulted in a row with various engineers. She did not consider this to be a good example used for problem solving bearing in mind it involved a row and was not the kind of influencing style that they were necessarily looking for.
 14. Ms Gatley had concerns in the interview about the claimant’s presentation style which she considered was verging on disinterested. She considered that the claimant’s manner demonstrated a lack of engagement and a lack of people skills. Initially this was put down to nerves but as the interview continued Ms Gatley considered that the claimant was giving terse responses and her concerns about people skills increased. Ms Gatley was concerned that if a candidate lacked the ability to develop relationships, the candidate would potentially not be able to carry out the job effectively. She was concerned that the claimant was not giving a good impression of being able to do this well. Ms Gatley considered that at times his media experience seemed more tactical and responsive and he had not provided evidence of pushing the strategic objectives of the organisation he was working for. Ms Gatley considered that the claimant appeared to lack understanding of communication strategies.
 15. In the interview of Ms Coveney, Ms Smith recorded that she was able to give a series of good examples of previous press and public relation roles. She considered that Ms Coveney came over as very enthusiastic and interested in the human element of her work although she did note one of her answers being negative where she was slightly defensive at one stage.
 16. Dr Jeremy Reynolds made handwritten shorthand notes during the course of the interviews and then wrote up his views in an email dated 25 February

2016 at 18:27pm. This was sent to Kay Smith and Rachel Gatley. As the email is important the contents are set out below:

“Thank you for arranging the interviews today. As promised, as (sic) quick summary of my views.

Simon Hinds

On paper, the strongest candidate. His response was detailed and addressed the criteria set out in the specification in a methodical manner. There were, however, 2 red flags in his CV: First, he has 16 years of experience yet is still operating at the Press Officer level and, second, (notwithstanding temporary roles, he does not stay long in each job. His interview was not good. His body language was evasive and showed a lack of confidence. He clearly operates at a tactical level and was out of his depth when it came to any discussion of strategy. He had little idea of what we do or the issues at play and education. Overall, his responses were waffly and inadequate. I do not believe he would be a good fit with the organisation.

Claire Coveney

Claire was a little hung up on her “unconventional” career path. This is not a problem, although I think she needs to give some thought to how she explains the move from one job to the next. She comes across as confident and likeable. I found the answers to our questions to be thoughtful and well articulated. Even when she was clearly thinking on the hoof. I like the way she explained and managed her challenges at the British Museum. I think she would be open to development and would enjoy working on new issues.

On the negative side, she could have found out more about the organisation, our campaigns in particular, and was not great in her thoughts about media stakeholders we might deal with. In the great scheme of things, these do not worry me much as they can be addressed very quickly. There were three typos on the front of her application (red rag, bull etc...), so I would like to see how she writes. I would also like to see how she gets her head around a new issue. As discussed, a test set by Rachel would be a good idea. She should meet Julian at the same time if at all possible.

In summary, I liked her and am pretty sure she could do the job well. She showed a high level of enthusiasm would, I think, fit well with others in the office. I would be happy for us to appoint her....”

17. Mr Reynolds considered that the claimant’s interview was very poor. He considered his manner to be evasive and he did not make good eye contact with members of the panel. He did not see evidence of him being a good communicator or influencer which he considered to be crucial to the Press Officer role. The role required the ability to build strong relationships internally and externally. Mr Reynolds considered the claimant was unable to build rapport with the panel and would not be likely to be credible or effective with colleagues.
18. Following the interviews the claimant was informed that on 26 February 2016 that his application had been unsuccessful. In the letter Ms Smith stated that “The calibre of the candidates was exceptional” and that the

panel had been “very impressed” with the claimant’s interview. This was in the form of a standard letter which Ms Smith regularly sent to other candidates using a form of words which involved a pleasantry and avoided having to say anything unpleasant about a candidate who had been unsuccessful.

19. Ms Smith subsequently received a letter from the claimant dated 22 March 2016 seeking reassurances about the recruitment process and asking numerous questions about the successful candidate. Ms Smith responded to the claimant’s letter by two letters dated 24 2016 and she provided a copy of his personality profile. She reassured him that the panel’s decision was based on skills and experience. However, she did not answer a number of his questions stating unexplained data protection reasons.
20. Further questions were raised in an email dated 30 March 2016 which the respondent replied to on 31 March 2016; again, the response was incomplete and did not answer all of the questions.
21. Following the interviews the interview panel decided to invite Ms Coveney to a second interview with Mr Stanley which she attended. Following the second interview she was offered the press officer role but she decided not to accept the role.
22. Subsequently, the respondent decided to review the structure of its public relations department and the Press Officer role was removed from the department’s structure. It was decided that a Communications Manager would be more appropriate for the organisation at a significantly higher salary package of around £33,000 to £35,500. The role of Press Officer had been at a band of around £27,000 only. There were significant additions made to the role and significant added responsibility with a broader remit to liaise with similar organisations and write speeches as well as work more closely with the Marketing and Fund Raising Teams and the Chief Executive. Subsequently an experienced candidate was appointed to this role around six months after the earlier interview process.
23. The respondent failed to submit handwritten notes of the interviews from two of the three panel members. One of the panel members notes were typed and suggest that the notes were created after the recruitment decision was made.
24. By ET1 dated 21 June 2016 the claimant claimed unlawful sex discrimination, unlawful age discrimination and unlawful race discrimination. The claim for age discrimination was subsequently withdrawn.

Relevant legal provisions

25. The current statutory definition of direct discrimination is contained within section 13(1) Equality Act 2010 (EA 2010) which states:

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

26. Protection is extended to job applicants by s.39EA, which provides:

“39

(1) An employer (A) must not discriminate against a person (B) –

[(a)...(b)]

(c) by not offering B employment.”

27. S23(1) EA 2010 provides that:

“On a comparison of cases for the purposes of section 13 [direct discrimination]... there must be no material difference between the circumstances relating to each case. The need for a comparator whose circumstances are not materially different from the claimant’s has recently been qualified in a number of ways.

First, it was pointed out in *Amnesty International v Ahmed* [2009] ICR 1450 at [33], that there are cases where the treatment itself is inherently discriminatory, so that an examination of the alleged discriminator’s reasoning becomes irrelevant, and a comparator may be dispensed with. Examples might include exclusion from a shop displaying a “no blacks” sign; inherently discriminatory comments; or cases where the admitted reason for the treatment is inherently discriminatory.

Second, the “no material difference” rule does not mean that the comparator needs to be identical to the claimant[4]. The question whether a comparator is appropriate is one of “fact and degree”: *Hewage* at [22].

Third, even where the comparator’s circumstances differ materially from those of the claimant, the comparator may still be useful in constructing a hypothetical comparator.”

28. In *Watt v Ashan* [2008] ICR 82 Lord Hoffmann said at [36]:

“It is probably uncommon to find a real person who qualifies ... as a statutory comparator. Lord Rodger’s example at para 139 of *Shamoon* of the two employees with similar disciplinary records who are found drinking together in working time has a factual simplicity which may be rare in ordinary life. At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are “materially different” is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator.

Fourth, there is an increasing tendency to go even further than this, and to head straight to the reason for the treatment, rather than become entangled with complex issues of comparators, real or hypothetical.

Fifth, Elias P also made clear in *Ladele* that there will be some cases where attempting a comparative exercise is not only unnecessary but positively unhelpful, and will lead to completely the wrong answer.”

29. Mr Justice Elias said in London Borough Council – v Ladele [2009] ICR 387, EAT:

“[...] in practice a tribunal is unlikely to be able to identify the statutory or hypothetical comparator without first answering the question why the claimant was treated as he or she was.

Take a simple example. A claimant alleges that he did not get a job because of his race. The employer says that it is because he was not academically clever enough and there is evidence to show that the person appointed to the job had better qualifications. The claimant alleges that this was irrelevant to the appointment; it was not therefore a material difference. The employer contends that it is a critical difference between the two situations. If the tribunal is satisfied that the real reason is race, then the academic qualifications are irrelevant. The relevant circumstances are not therefore materially different. It is plain that the statutory comparator was treated differently. If the tribunal is satisfied that the real reason is the difference in academic qualifications, then that provides a material difference between the position of the applicant and the comparator.

The determination of the comparator depends upon the reason for the difference in treatment...”

Burden of Proof

30. Sections 136(2) and (3) EA 2010 provide for a reverse or shifting burden of proof:

"(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) This does not apply if A shows that A did not contravene the provision."

31. Only if the claimant establishes a prima facie case does the burden of proof then shift to the Respondent. At this stage the Respondent must prove that there was no conscious or sub-conscious discriminatory intent behind their conduct. If a prima facie case has been made out and the explanation for that treatment is unsatisfactory then discrimination has to be found by the ET. It is mandatory.

32. In Igen v Wong [2005] ICR 931 per Peter Gibson LJ stated that The ‘revised Barton guidance’ in *Igen* provides the following:

(1) Pursuant to section 63A of the 1975 Act, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the

tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the claimant. These are referred to below as “such facts”.

- (2) If the claimant does not prove such facts he or she will fail.
- (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that “he or she would not have fitted in”.
- (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
- (5) It is important to note the word “could” in section 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
- (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
- (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.
- (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
- (9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.
- (10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
- (11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever” is compatible with the Burden of Proof Directive.
- (12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

- (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice...."
33. The absence of an adequate explanation for differential treatment of the complainant is not ... relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. Mere difference of treatment is not enough to shift the burden of proof, something more is required: Madarassy per Mummery LJ:
34. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. "Something more" is therefore needed. Seller LJ observed in Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279 at [19]
35. "the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred..."
36. The fact that an employer's behaviour calls for an explanation does not automatically get a claimant to Stage 2: there still has to be reason to believe that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the prohibited ground (see B v A [2010] IRLR 400, per Underhill P at [22]).
37. In considering what inferences can be drawn, it is necessary for the tribunal to adopt a holistic rather than fragmentary approach: to look not only at the detail of the various individual acts of discrimination but also to step back and look at matters in the round. This was emphasised in Anya v University of Oxford [2001] ICR 855 and Qureshi v Victoria University of Manchester [2001] ICR 863, revisited recently by HHJ Eady QC in Fraser v University of Leicester UKEAT/0155/13 in which the principle was described as the requirement "to see both the wood and the trees".

Discharging the burden

38. If the burden shifts to the respondent, what must it do to discharge it? The Igen guidance suggests that there must be an "adequate" explanation, which proves on the balance of probabilities that the protected characteristic was not a ground for the treatment in question, and that the respondent would normally be required to produce "cogent evidence".

39. In some cases, a respondent will be able to demonstrate their true reasoning in detail and in concrete terms. But that is not always necessary. Osoba v Chief Constable of Hertfordshire Constabulary UKEAT/0055/13/BA was an age discrimination case concerning a redundancy scoring matrix which the tribunal described as “shambolic” and “at best inconsistent”. The tribunal held that the burden of proof shifted to the respondent to disprove discrimination. The respondent was unable to offer a positive explanation other than to say that they had acted honestly and in good faith and to deny that there had been discrimination. The tribunal accepted this and found that there was indeed no discrimination.
40. In the EAT, HHJ McMullen QC upheld the tribunal’s decision. He said:
- “[...] The central problem with someone who admits to making errors is whether a further explanation is to be wrung from her. Sometimes those errors are explained in mitigation, “I was overworked”, “I had family care responsibilities” but that is not the case here. The simple proposition advanced by Miss Pritchard [the alleged discriminator] is that she did what she thought was right in accordance with the policy and she was exposed in the course of the trial to the errors which she had made which she accepted.”
41. The Tribunal accepted her account that she had acted honestly. Most particularly in the face of the direct accusation of manipulation in order to do down the Claimant because of his age the Tribunal accepted the good faith of her account. Is that enough? Does she have to create some further explanation? We consider it would be wrong for a Respondent to have to give a yet further possibly dissembling explanation in order to meet the case. We accept Mr Ley-Morgan’s analogy to explanations above such as overwork or family circumstances, but there simply may be cases where there is nothing more to say, no further explanation than “Well, I got it wrong and I take responsibility for that.”
42. We also considered carefully the relevant parts of the Code of practice to eliminate discrimination.

The Code of practice on discrimination: General principles

5.43

Arrangements for deciding to whom to offer employment include short-listing, selection tests, use of assessment centres and interviews. An employer must not discriminate in any of these arrangements and must make reasonable adjustments so that disabled people are not placed at a substantial disadvantage compared to non-disabled people (see Chapter 10). Basing selection decisions on stereotypical assumptions or prejudice is likely to amount to direct discrimination.

5.44

An employer should ensure that these processes are fair and objective and that decisions are consistent. Employers should also keep records that will allow them to justify each decision and the process by which it

was reached and to respond to any complaints of discrimination. If the employer does not keep records of their decisions, in some circumstances, it could result in an Employment Tribunal drawing an adverse inference of discrimination.

5.46

The records that employers should keep include:

- any job advertisement, job description or person specification used in the recruitment process;*
- the application forms or CVs, and any supporting documentation from every candidate applying for the job;*
- records of discussions and decisions by an interviewer or members of the selection panel; for example, on marking standards or interview questions;*
- notes taken by the interviewer or by each member of the panel during the interviews;*
- each interview panel member's marks at each stage of the process; for example, on the application form, any selection tests and each interview question (where a formal marking system is used);*
- all correspondence with the candidates.*

5.53 Interviews

5.57

An employer must not discriminate at the interview stage. In reality, this is the stage at which it is easiest to make judgements about an applicant based on instant, subjective and sometimes wholly irrelevant impressions. If decisions are based on prejudice and stereotypes and not based on factors relating to the job description or person specification, this could lead to unlawful discrimination. By conducting interviews strictly on the basis of the application form, the job description, the person specification, the agreed weight given to each criterion and the results of any selection tests, an employer will ensure that all applicants are assessed objectively, and solely on their ability to do the job satisfactorily.

5.61

An employer can reduce the possibility of unlawful discrimination by ensuring that staff involved in selection panels have had equality training and training about interviews, to help them:

- recognise when they are making stereotypical assumptions about people;*
- apply a scoring method objectively;*
- prepare questions based on the person specification and job description and the information in the application form; and*

- *avoid questions that are not relevant to the requirements of the job.*

5.63

Questions should not be asked, nor should assumptions be made, about whether someone would fit in with the existing workforce.

Example: At a job interview a woman is asked: 'You would be the only woman doing this job, and the men might make sexist jokes. How would you feel about this?' This question could amount to direct sex discrimination.

Conclusions

Had the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act 2010, by not offering him the position of Press Officer after interviewing him and the other candidate, Claire Coveney?

43. We shall deal with race and sex together here as the claimant did not identify any differences in his submissions or his evidence on these different protected characteristics. There was also no overt or other evidence pointing to or relevant to potential gender or sex discrimination at this organisation or in the relevant process. The claimant also made no reference to any difference between his cases for gender and race. Accordingly, the case turned on the same question, under both heads, namely whether the respondent had shown with cogent and detailed evidence that the claimant's interview performance was such that he was deemed to not be appointable to the post for reasons unrelated to gender or sex.
44. Applying the burden of proof provisions we found that the claimant has in respect of this question, proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex and/or race and the burden of proof shifted to the employer in this case.
45. First, we noted that the claimant was an experienced press officer with a good CV. Mr Reynolds himself noted in terms that he was the strongest candidate on paper.
46. Secondly, we drew a number of adverse inferences from the rather chaotic, inconsistent and disorganised way in which the interview process was conducted, including a failure to follow many of the salient guidance in the Code of Practice. The employer did not adopt a rigorous application of objective criteria; did not keep proper and comprehensive notes; did not apply the same questions to each candidate; did not score each candidate for each of the questions put in the interview but adopted a haphazard and inconsistent approach to scoring; Ms Smith suddenly stopped scoring the claimant half way through and stopped recording the claimant's answers but instead proceeded to make and record a number of snap or subjective judgments and comments in her notes. Mr Reynolds, did not even adopt any

scoring or systematic and objective system at all but simply wrote an email with some general big picture comments after the interview. Mr Reynolds also used a number of inappropriate subjective questions like whether he thought the candidate would "fit in" or whether he "liked" the candidate. The respondent also did not answer post interview correspondence from the claimant in an open and comprehensive manner.

47. The respondent argued that it could discharge the burden of proof on the basis that the interview performance of the claimant was so poor that it was unanimously decided that he was not an appointable candidate. The employment tribunal therefore gave very careful consideration to whether or not the employer could prove the interview performance was so poor that it proved that discrimination played no material part whatsoever in the decision. This required us to give careful consideration on the facts and evidence as to how the claimant performed as against the essential job criteria.
48. At this stage a comment on the oral evidence provided will assist in explaining our conclusions. We found Mr Reynolds to be a convincing and witness who gave his evidence carefully and with a command of the detail. His evidence was consistent with his emailed views. He made concessions where appropriate, including admissions that the claimant met a number of the essential criteria. He accepted that the process had been found wanting. He explained cogently why he had used comments like whether a candidate might "fit in" by direct reference to their skills, capability and credibility. This evidence suggested to us that the unusual approach was in fact backed up by objective factors. He was the key decision maker and gave cogent and clear evidence. The evidence of Ms Smith was not so impressive but was broadly helpful. The evidence of the claimant was, in very broad terms, not entirely convincing or clear at times. He was unable at times to provide clear or compelling answers to the questions put to him about his alleged inability to meet a number of the essential criteria. However, we base our main conclusions on the contemporaneous evidence and the notes taken.
49. We carefully applied the guidance in **Igen v Wong** and the case law set out above.
50. The first essential job criteria was:
 - Demonstrate experience and proven track record in generating press and media coverage in a similar role and to do so in a what can sometimes be a pressurised environment with a dynamic, creative and diverse team of people, where tact, mature judgment and discretion is required.

The second essential criteria was:

- Strong interpersonal skills with the ability to support, motivate and inspire confidence in colleagues.

The third essential criteria was

- Ability to think ahead and anticipate needs before they arise, calm under pressure with a focus on finding and presenting solutions. The respondent considered that this was a criteria the claimant met so we did not need to examine this issue further.

The fourth essential criteria was

- Ability to identify, lead and drive projects from conception to completion. The respondent considered that this was a criteria the claimant met so we did not need to examine this issue further.

The fifth essential criteria was:

- Appetite for understanding and responding to emerging marketing, sales and education trends.

The sixth was

- Confident and able to work in own initiative and with limited supervision, but be willing to seek clarification, to ask for support when required and take direction.

The seventh was

- Effective communicator/good organisational skills/attention to detail.

The eighth was

- Ambition to move into a more senior role in the future. This was another criteria the respondent accepted that the claimant met.

51. On the first essential criteria of generating media coverage we accept the clear evidence, supported by her notes, that Ms Gatley considered that at times the claimant's media experience seemed more tactical and responsive and he had not provided evidence of pushing the strategic objectives of the organisation he was working for. Ms Gatley considered that the claimant appeared to lack understanding of communication strategy but focussed on quantity not necessarily quality of coverage. Further, Mr Reynolds gave cogent evidence to back up his note that "He clearly operates at a tactical level and was out of his depth when it came to any discussion of strategy."
52. This criteria also required evidence of tact, maturity, judgment and discretion. The second essential criteria was "strong interpersonal skills with the ability to support, motivate and inspire confidence in colleagues". At interview the example the claimant gave of influencing and persuading at Luton Council was a "row" that he had with engineers: Pp 60/75 – interview notes. This was confirmed, without apparent awareness of its unsuitability, in the claimant's own witness evidence (paragraph 18). Ms Gatley considered that the claimant's manner demonstrated a lack of engagement

and a lack of people skills. Initially this was put down to nerves but as the interview continued Ms Gatley considered that the claimant was giving terse responses and her concerns about people skills increased. Ms Gatley was concerned that if a candidate lacked the ability to develop relationships, the candidate would potentially not be able to carry out the job effectively. The respondent reviewers repeatedly noted that they could have little confidence in the claimant's ability to "support, motivate and inspire confidence in colleagues", as per the second criteria. This evidence also supported the respondent's concerns over the ability of the claimant to show tact, maturity, discretion and judgment.

53. On the fifth essential criteria "Appetite for understanding and responding to emerging marketing, sales and education trends" the claimant could only name one relevant journalist in his interview (interview notes pp 61/76). He had done little research into the main education correspondence, dealing with whom would have been "a fundamental part of the job" (interview notes – Rachel Gatley, p 76). The claimant also showed little knowledge of ESP's work (Katy Smith p59). We accepted the cogent evidence of Mr Reynolds that the claimant "had little idea of what we do or the issues at play and education" during the interview.
54. Turning to deal with the seventh essential skill, communication skills the claimant's answers were recorded as "waffly and inadequate" (Jeremy Reynolds – p57); he "waffled a lot" (Katy Smith – p58) – hardly the "effective communicator" with "attention to detail" required in the "Essential Skills" (p35). We accept the evidence that from an early stage Ms Smith became worried about his communication skills and noted that he was "very nervous". She considered that he did not appear to fully engage with the interview panel and was somewhat lacking in enthusiasm in his answers. The respondent proved with cogent evidence that the claimant had consistently failed to convince the panel of his communication skills, making limited eye contact and not engaging much with the panel and his manner and body language also showed a lack of confidence (interview notes, pp57 etc).
55. The claimant relies on the suggestion that he interviewed well from Katy Smith's outcome letter to attempt to infer discrimination. However, we accepted the open and frank explanation that this was nothing more than a pleasantries designed to spare his feelings (Katy Smith – witness statement, page 21) and this was from a standard letter that Ms Smith used in these circumstances. This letter did not therefore assist the claimant.
56. The application of the essential criteria to each candidate was also borne out by the respondent's cogent and consistent evidence regarding Claire Coveney and the reasons they decided she had much greater suitability for the role. In the interview of Ms Coveney, Ms Smith recorded that she was able to give a series of good examples of previous press and public relation roles. She considered that Ms Coveney came over as very enthusiastic and interested in the human element of her work. Mr Reynolds gave cogent and clear evidence that Ms Coveney came "across as confident and likeable. I

found the answers to our questions to be thoughtful and well articulated. Even when she was clearly thinking on the hoof. I like the way she explained and managed her challenges at the British Museum. I think she would be open to development and would enjoy working on new issues.”

57. In view of our clear findings above on the respondent proving that the claimant did not meet a significant number of the essential criteria for the role at the interview stage, (and the much better performance at interview of Ms Coveney overall) the respondent has proved with cogent evidence that gender and/or sex played no material part in the decision that the claimant was not appointable following the interview (due to the lack of evidence of him meeting many of the essential criteria at the interview stage).
58. Had the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act 2010, namely After Miss Coveney had turned down the Press Officer position, failing to offer that position to the claimant?
59. We shall again deal with race and sex together as the claimant did not identify any differences in his submissions or his evidence on these different protected characteristics, there was no overt evidence of gender or sex discrimination (as is not unusual) such that the case turned on the same question, namely whether the respondent had shown with cogent and detailed evidence that race and/or gender played no part in this decision.
60. For the detailed reasons explained above the respondent has proved that it had cogent reasons for deciding that the claimant was not appointable. It matters not that Claire Coveney later rejected the post so that it became available again. Further, we accepted the clear and convincing evidence of the respondent that events were superseded by a subsequent review of the employer's needs which identified that a significantly more senior hire was required in the media team instead, at a director level, at a package of around £35,000 per annum and with significantly greater skills and experience. This was also borne out by the later appointment of a person with significantly wider and deeper skills and experience than the claimant.
61. As the decision that the claimant was not appointable (based on cogent and convincing evidence in respect of the claimant's interview performance), was made before Claire Coveney turned down the post, the claimant has not in our conclusion proved primary facts from which the tribunal could properly and fairly conclude that the later alleged difference in treatment was because of sex or race. The claim therefore fails at the first stage.
62. In any event, we decided that this claim was also without merit as the respondent has proved with cogent evidence that gender and/or sex played no material part in the decision not to pursue his application (for the same reasons as described in detail above).
63. We would like, in passing, to make some concluding comments. The interview processes of this employer were chaotic, inconsistent and poor. They appear to require urgent review and improvement in order to reduce

the risks of subjective, stereotypical or discriminatory views creeping into the decision making process, whether consciously or unconsciously. Any such review should carefully reflect upon and implement the comments above and the guidance in the Code of Practice to eliminate discrimination.

Employment Judge Daniels

Date: ...19/07/2017.....

Sent to the parties on: ...18/08/2017..

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For the Tribunal Office