



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P S Bhogal

**Respondents:** The Council of the City of Newcastle Upon Tyne

**Heard at:** Newcastle                      **On:** 1, 2, 3, 4 February 2022  
Remotely by video                      7 February 2022

**Before:** Employment Judge S Shore  
NLM – Mrs A Tarn  
NLM – Mr D Cattell

## Appearances

For the claimant: In person  
For the respondent: Mr R Stubbs, Counsel

## JUDGMENT AND REASONS ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's claims of direct discrimination because of the protected characteristic of race (contrary to section 13 of the Equality Act 2010) are determined as follows:
    - 1.1. **First Claim** - The claim that the respondent failed to shortlist the claimant for, and withdrew, the role of Senior EP-INA in October 2019 fails.
    - 1.2. **Second Claims** - The claims that the respondent, in a recruitment exercise for the post of Senior EP-INA in July 2020:
      - 1.2.1. Deliberately designed the interview questions so as to disadvantage him at interview relative to others/or to favour others relative to him; and
      - 1.2.2. Failed to offer the post to the claimant
- both fail.

1.3. **Third Claims** - The claims that the claimant's manager, Lara Lillico, subjected him to excessive scrutiny in relation to psychological advices in 23 instances (there was no number 14 in the claimant's list) set out in the claimant's Response to Request for Further Information (we have used the claimant's verbatim words as much as possible) all fail. They are determined as follows:

- 1.3.1. From 25 March 2013, Ms Lillico began to highlight errors and changed the usual process for draft advice report checking by peers. The differential treatment of the claimant by Ms Lillico was highlighting even minor errors, writing style starts and carries on till present time 2021. Peers treated very differently with smiles and laughter in the office, but not claimant. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.
- 1.3.2. On 28 March 2013, the claimant acknowledges errors in the draft advices in long documents (4000 words) as might be expected, high work pressure and suggests supportive ideas to reduce errors etc. But Ms Lillico did not agree to supply sought for support. It was a draft advice but Ms Lillico made it into a performance issue. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.
- 1.3.3. On 25 January 2013, level of scrutiny, amplifying errors, style etc. Ms Lillico and Deputy Manager (Ms Woodburn) meet with claimant alone is differential treatment and unfair. Ms Lillico support Deputy Manager only. Claimant feels not being supported when reasonable ideas are suggested and the way he was treated was personal, differential treatment to peers. Claimant felt that merely asking to 'do better checking' is tantamount to victimisation and unhelpful. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.
- 1.3.4. Between 9 September 2013 and 18 November 2013, the level of scrutiny despite seeking support and none given – leads to stress and anxiety. Ability to concentrate on advices and work increases and error rates increase. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.
- 1.3.5. On 3 February 2015, claimant seeks meeting with Ms Lillico over the excess scrutiny and victimisation and to seek support from her. Ms Lillico does not agree to ideas suggested by claimant to help improve matters. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.

- 1.3.6. On 24 March 2015, scrutiny over draft advices, even after the claimant has asked for further help and support. Ms Lillico did not agree to provide any support asked for by the claimant. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.
- 1.3.7. On 5 May 2015, a matter that did not need to be highlighted as schools' work took priority over staff meetings. Claimant made to feel it was his fault and thus undermining confidence and anxiety raising. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.
- 1.3.8. On 18 March 2015, as a result of an error using another colleague's advice (as is normal practice) as a template to write a new draft advice leads to IPR. The claimant sought criteria used for escalating into IPR and thus adding more pressure on claimant even when support strategies were sought. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.
- 1.3.9. On 30 March 2015, the claimant received no supportive measures and as a result wrote to Ms Lillico. She did not respond. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.
- 1.3.10. On 1 May 2015, the claimant wrote to Ms Lillico to highlight that he was being treated differently to peers and as a result his self-confidence resulting ability to focus on work, especially writing reports. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.
- 1.3.11. On 24 January 2016, the claimant sought support, but Ms Lillico sought to highlight errors without offering support. Claimant sought support to reduce errors again, which were denied by Ms Lillico, who said "...just read the reports in your head..." to reduce errors, thus adding to stress and anxiety and without any support and tangible measures suggested by the claimant. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.
- 1.3.12. On 22 April 2016, ongoing scrutiny and intimidation without agreeing to sought for support not provided to claimant (sic) by Ms Lillico. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.
- 1.3.13. On 26 April 2016, the claimant highlighted that peers are treated with more positive interactions which appear collaborative, in the office, and supportive. The claimant did

not receive the same 'positive' interactions but instead it was negative and negatively critical. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.

1.3.14. There was no point 14 in the claimant's list, so no decision is required from us.

1.3.15. On 16 January 2017, Ms Lillico picked up style errors in advices and reports prepared by the claimant as a way to be negative to the claimant. Ms Lillico did not agree to supportive measures sought by the claimant. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.

1.3.16. On 24 January 2017, the claimant felt that Ms Lillico was persisting with ongoing and unnecessary scrutiny on a draft advice which normally has been seen for peers to highlight errors etc. The claimant felt that this was a 'personal assault' by Ms Lillico to undermine him. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.

1.3.17. On 1 December 2017, there was an issue that did not need to be escalated by Ms Lillico. A demonstration of the hypervigilance and scrutiny that even minor diary meetings were challenged. The claimant felt that a school had requested a meeting that suited them and thus it was difficult to change and date/time of the meeting as school trades EP time (sic). Ms Lillico turned this into a 'telling off'. We find the evidence did not meet the threshold to switch the burden of proof onto the respondent.

1.3.18. On 14 December 2018, Ms Lillico picked up style errors as a way to be negative to the claimant. Ms Lillico did not agree to provide support to the claimant, even though he had listed these (sic). No recognition of workload over number of advices. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.

1.3.19. On 4 September 2019, Ms Lillico picked up style errors as a way to be negative to the claimant. Ms Lillico did not agree to provide support to the claimant, even though he had listed these (sic). We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.

1.3.20. On 7 October 2019, Ms Lillico picked up style errors as a way to be negative to the claimant. Despite saying that a report was good, Ms Lillico proceeded to make negative comments. Thus, actually undermining the claimant's

feelings. Ms Lillico still did not agree to provide support to the claimant, even though the claimant has listed theses (sic). We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.

1.3.21. On 31 January 2020, Ms Lillico was very negative and intimidatory in the manner in which the claimant was treated over draft advices. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.

1.3.22. On 6 March 2020, despite the claimant seeking support and working in challenging times, Ms Lillico continued to be negative. She provided ongoing negative comments. We find that the allegation was extremely vague and was not made any clearer by the claimant's evidence or the documents. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.

1.3.23. On 11 November 2020, there were ongoing negative comments that belittled the claimant. We find that the allegation was extremely vague and was not made any clearer by the claimant's evidence or the documents. We find that the evidence did not meet the threshold to switch the burden of proof onto the respondent.

1.3.24. From 6 September 2019 "to present", the Deputy Manager (Ms Woodburn) has had a positive and collaborative approach to checking draft advices, "as it seems to be other colleagues" (sic) by Ms Lillico and Ms Woodburn. Ms Woodburn's approach is not based on fault finding, as is the approach of Ms Lillico. We find that this is not an allegation of direct race discrimination. If it was, we would have found that the evidence did not meet the threshold to switch the burden of proof onto the respondent.

2. The Tribunal does not need to consider remedy because all the claimant's claims have been dismissed.

## **REASONS**

### **Introduction and History of Proceedings**

1. The claimant has been and remains employed as an Educational Psychologist by the respondent, which is a large local authority, since 1 May 2005. The claimant started early conciliation with ACAS on 9 October 2020 and obtained a conciliation certificate on 4 November 2020. The claimant's ET1 was presented on 28 November 2020. The respondent has over 5,000 employees.

2. The claimant presented claims of:

2.1. Direct race discrimination contrary to section 13 of the Equality Act 2010 as set out in the Judgment above.

3. The claims were case managed on 29 January 2021 by Employment Judge Aspden, who made case management orders. Her case management order dated 4 February 2021 notes that the claimant's claims of direct race discrimination relate to his colour and his Indian ethnic origins. At the start of this hearing, Mr Bhogal said that he identifies his colour as 'black' and that he was comfortable using the terms 'BME' and 'BAME' to describe himself and people from non-white ethnic backgrounds generally. We are aware that both terms are the subject of some debate as to their appropriateness at the present time, but have used them on the basis that the claimant used the terms and was content for us to do so.
4. No list of issues was determined at the preliminary hearing, but Employment Judge Aspden was able to identify the claims arising out of the recruitment exercises run by the respondent in October 2019 and July 2020 (referred to in our Judgment above as "First Claim" and "Second Claims"). The claim form also made allegations that the Manager Service, Lara Lillico, had "overscrutinised" the claimant's work to such an extent that he regarded her actions as direct discrimination because of race ("Third Claims").
5. The claimant was required to give further information about his case. He gave the further information in a document titled "Response to Request for Further Information" (which we refer to in these Reasons as the claimant's "Response"), which he did on 12 February 2022 [34-38]. The document sets out 23 discreet claims, although they are numbered from 1 to 24. There is no number 14.
6. In his Response, the claimant prefaced his specific allegations with the comment that they were "examples of many incidents which are all similar in nature...the following is a selected summary of the many incidents with regard to excessive scrutiny...". He then set out six bullet points that summarised the nature of the allegations:
  - Changing the process by which draft advices were previously checked and making it into a 'performance' issue with the claimant
  - Hypervigilant in picking up stylistic issues; minor typo errors in draft advices shared for checking sent by the claimant and ongoing
  - Increasing pressure on claimant by not providing reasonable supportive strategies asked for
  - Not recognising work load issues impacting on writing advices and possible checking errors by claimant
  - Often not responding when reports are submitted early and thus adding to workload, anxiety and stress

- Claimant sought criteria used to move to IPR (Informal Performance Review) being investigated, none given by Ms Lillico

7. On receipt of his Response, EJ Sweeney wrote to the claimant on 27 February 2021 as follows:

*“Employment Judge Sweeney directs the claimant has provided what appears to be a comprehensive account of the things which he says constituted “excessive scrutiny”. However, he prefaces this by saying it is a selective summary. The purpose of setting out these matters is so that as a matter of fairness the respondent knows what allegations it will face at the final hearing. The reference to a “selected summary” leaves the possibility of other examples being raised for the first time in witness statements or at the hearing. To avoid this, the claimant must confirm within 7 days if the particulars provided by him on 12/2/21 represents all the allegations he will be advancing on this subject at the hearing.”*

8. We find that EJ Sweeney’s explanation was precise and full. In reply, the claimant wrote to the Tribunal by email on 4 March 2021 and stated “I am writing in reference to the letter sent to me dated 27/2/21 and would like to confirm that the particulars which I provided on 12/2/21 represent all the allegations which I will advance on this subject at the hearing.” He sent a copy of that email to the respondent on 12 March 2021.
9. We find that the language used by the claimant demonstrates a clear and unequivocal understanding of the question asked of him by EJ Sweeney and a clear and unequivocal response that confirms that his case on the Third Claims of over scrutiny were entirely set out in his Response document. We ought to note that at no time since has the claimant ever sought to amend his claim. For the purposes of this hearing, the claimant’s claims are as set out in EJ Aspden’s case management order and points 1-24 in the claimant’s Response to Request for Further Information.
10. We found the way that the claimant had set his Response out to be a little vague, but we were still able to determine the claims made and have dealt with our findings of fact in relation to each of them below. The claimant had made it clear that all claims were of direct discrimination because of the protected characteristic of race.
11. The case was listed for a five-day hearing beginning on 18 October 2021, but was withdrawn from the list.
12. The claimant wrote to the Tribunal, copying in the respondent, on 14 January 2022 with an application for documents to be added to the bundle, including a COT3 from proceedings between him and the respondent in 2011.
13. The respondent was asked for comments by the Tribunal on 17 January 2022 and provided lengthy submissions in a letter dated 17 January 2022. EJ Arullendran considered the matter on the papers (i.e. without a hearing) and refused the application to add the COT3 to the bundle. She also ordered the parties to agree a list of issues by 28 January 2022. They were unable to do this.

## **Issues**

14. As the parties were unable to agree a list of issues as ordered by the case management order of EJ Arullendran, we considered the competing lists produced by the parties. We found that neither was entirely effective, so produced our own draft list that was given to the parties on the first morning of the hearing.
15. It should be noted that when we discussed the list of issues with the parties, we were under the impression that there were 24 discreet allegations of alleged over scrutiny. On preparing this Judgment and Reasons, we realised that the claimant had not included an allegation numbered 14. This list, therefore has been amended to refer to 23 instances in paragraph 2.2.3 below when compared to the list given to the parties. The issues (questions that the Tribunal has to find the answer to) are set out below.

### **1. Time limits**

- 1.1 *Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 9 July 2020 may not have been brought in time.*
- 1.2 *Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:*
  - 1.2.1 *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?*
  - 1.2.2 *If not, was there conduct extending over a period?*
  - 1.2.3 *If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*
  - 1.2.4 *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*
    - 1.2.4.1 *Why were the complaints not made to the Tribunal in time?*
    - 1.2.4.2 *In any event, is it just and equitable in all the circumstances to extend time?*

### **2. Direct race discrimination (Equality Act 2010 section 13)**

- 2.1 *The claimant self-identifies as Indian in his ET1. The case management order of EJ Aspden dated 4 February 2021 confirms that the claimant's nationality and skin colour are his features that led to the alleged discrimination because of race.*
- 2.2 *Did the respondent do the following things:*
  - 2.2.1 *Failed to shortlist the claimant for, and withdrew, the role of Senior EP-INA in October 2019;*



2.2.2 *The respondent, in a recruitment exercise for the post of Senior EP-INA in July 2020:*

2.2.2.1 *Deliberately designed the interview questions so as to disadvantage him at interview relative to others/or to favour others relative to him; and*

2.2.2.2 *Failed to offer the post to the claimant; and*

2.2.3 *The claimant's manager, Lara Lillico, subjected him to excessive scrutiny in relation to psychological advices in 23 instances set out in the claimant's Response to Request for Further Information.*

2.3 *Was that less favourable treatment?*

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

*If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.*

*The claimant says he was treated worse than the successful candidate for the job in the second allegation, Andrew Scott, but has not named anyone in particular who he says was treated better than he was in respect of the other allegations.*

2.4 *If so, was it because of race?*

2.5 *Did the respondent's treatment amount to a detriment?*

### **3. Remedy for discrimination or victimisation**

3.1 *Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?*

3.2 *What financial losses has the discrimination caused the claimant?*

3.3 *Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?*

3.4 *If not, for what period of loss should the claimant be compensated?*

3.5 *What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?*

3.6 *Should interest be awarded? How much?*

16. As we did not find in favour of the claimant on any of his claims, we do not have consider any issues concerning remedy.

## **Law**

17. The statutory law relating to the claimant's claims of discrimination is contained in the Equality Act 2010 (EqA). The relevant sections of the EqA were sections 13 (direct discrimination); 123 (time limits) and 136 (burden of proof). The relevant provisions are set out here:

### **13. Direct discrimination**

*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.*

*If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

*The relevant protected characteristics are—*

- (a) age;*
- (b) disability;*
- (c) gender reassignment;*
- (d) race*
- (e) religion or belief;*
- (f) sex;*
- (g) sexual orientation.*

### **123. Time limits**

*(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—*

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) such other period as the employment tribunal thinks just and equitable.*

*(2) Proceedings may not be brought in reliance on section 121(1) after the end of—*

- (a) the period of 6 months starting with the date of the act to which the proceedings relate, or*
- (b) such other period as the employment tribunal thinks just and equitable.*

*(3) For the purposes of this section—*

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

*(b) failure to do something is to be treated as occurring when the person in question decided on it.*

*(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

*(a) when P does an act inconsistent with doing it, or*

*(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

### **136. Burden of proof**

(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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal...

18. We were referred to a number of precedent cases by Mr Stubbs:

18.1. **Igen v Wong** [2005] ICR 931;

18.2. **Madarassy v Nomura plc** [2007] EWCA Civ 33;

18.3. **Shamoon v Chief Constable of the RUC** [2003] UKHL 11; and

18.4. **Robertson v Bexley Community Centre t/a Leisure Link** [2003] EWCA Civ 576.

### **Housekeeping**

19. The claimant is unrepresented. On the first morning of the hearing, we reminded him that the Tribunal operates on a set of Rules. Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. It is reproduced here:

*The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —*

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

*A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

Whilst we acknowledge that the claimant is a litigant in person, we note that he confirmed that he is a member of a trade union and an official of that union. We therefore have to assume that he has had access to advice from his union. The claimant has asserted that he had no experience of Employment Tribunal proceedings. The respondent states that the claimant issued proceedings against it in 2011 that were resolved by the COT3 in 2012 that he was refused permission to add to the bundle by EJ Arullendran. In his application dated 14 January 2022, he quoted the case number of the 2011 claim. The claimant did not dispute the respondent's assertion.

20. We strived to ensure that Mr Bhogal was given every opportunity to put his case and ask any questions he had about procedure and the law. There were times when we had to intervene to advise the claimant that some questions were not assisting us to answer the questions raised in the list of issues, but we gave both parties more time than we had allotted to them for their respective cross-examinations.
21. We were mindful of the fact that this is a claim of race discrimination and that the panel was made up of three members who self-identify as white British. Mr Bhogal reminded us on a number of occasions that he was the only non-white face in the Tribunal room and mentioned the concepts of institutional racism and unconscious bias. We are all aware with the barriers facing participants in Tribunal proceedings who are from non-white or other BAME backgrounds and we reminded ourselves of the guidance given to the judiciary in Chapter 8 the Equal Treatment Bench Book, particularly on "Social and economic inequality" and "The black perspective."
22. However, this Tribunal was not an inquiry into whether the respondent is institutionally racist. We do not have the jurisdiction to conduct such an inquiry. This Tribunal was to determine the issues in the case that had been agreed with the parties following previous case management.
23. The parties produced a joint bundle of 908 pages. If we refer to pages in the bundle, the page number(s) will be in square brackets (e.g. [43]). If we refer to a particular paragraph in a document, we will use the silcrow symbol (§) with any paragraph number. If we refer to more than one paragraphs, we will use two silcrows (§§).

24. Whilst hearing the respondent's evidence, Mr Bhogal put a question to a witness that referenced an email that he had, but which we had not seen. Later, a witness referred to a document, that was not in the original bundle. The documents were:

24.1. An email from Lara Lillico to Sarah Woodburn dated 10 August 2020; and

24.2. Minutes of an Educational Psychology Service meeting on 18 December 2018.

The email was added to the bundle at pages 707a and 707b. The meeting minutes were added at pages 908 to 910 with the agreement of the parties.

25. The respondent had produced a chronology, but this was disputed by the claimant and was not used.

26. The claimant gave evidence in person and produced a witness statement dated 16 July 2021 that ran to 18 paragraphs over 15 pages.

27. Evidence was given in person on behalf of the respondent by:

14.1. Ms Lara Lillico, who is the Manager of the respondent's Educational Psychology Service (EPS), in which the claimant works. Her witness statement dated 13 July 2021 consisted of 84 paragraphs. Ms Lillico was one of the panel of three people who interviewed the claimant on 24 July 2020.

14.2. Ms Sarah Woodburn, who is the who is the Deputy Manager of the respondent's Educational Psychology Service (EPS). Her witness statement dated 15 July 2021 consisted of 27 paragraphs. She is currently the claimant's line manager. Ms Woodburn was one of the panel of three people who interviewed the claimant on 24 July 2020.

14.3. Ms Alyson Barrett, who is currently the Senior Adviser for Inclusive Schools for the respondent. Her witness statement was undated, but consisted of 16 paragraphs. At the that we are concerned with in this hearing, Ms Barrett was employed by Kenton School in Newcastle as Assistant Principal Lead Special Educational Needs and Disabilities Co-Ordinator (SENDSCO), but was seconded to the respondent as a School Effectiveness Advisor with an Inclusion remit. Her role in the case was that she was one of the panel of three people (the others being Ms Lillico and Ms Woodburn) who interviewed the claimant on 24 July 2020.

15. All the witnesses gave evidence on affirmation. The claimant was cross-examined by Mr Stubbs in some detail. All the respondent's witnesses were cross-examined by the claimant in some detail. We advised the claimant that evidence that was unchallenged was likely to be accepted as credible by the Tribunal. The Tribunal asked questions of the witnesses either during cross-examination, or when cross-examination had finished.

16. At the end of his evidence, Mr Bhogal was given the opportunity to clarify or expand upon any of the answers he had given to questions he had been asked. Mr Stubbs

was offered the opportunity to ask re-examination questions of the respondent's witnesses.

17. The first two hours of the first morning of the hearing had been set aside to enable the Tribunal to read the papers. This turned out to be an underestimate. We drew up a draft list of issues for the parties and started our reading before asking the parties to join the hearing at 12:00pm.
18. When the hearing started, we discussed preliminary matters with Mr Bhogal and Mr Stubbs, which included:
  - 18.1. the overriding objective;
  - 18.2. the list of issues;
  - 18.3. the timetable for the hearing;
  - 18.4. the claims, which the claimant confirmed were as set out in our Judgment above; and
  - 18.5. the documents.
19. The case had been listed for 5 days to include remedy. After discussing the matter with the parties, we agreed that we would complete our reading and commence the evidence at 2:00pm. We would then give the respondent the rest of the first day and until lunchtime on the second day to cross-examine the claimant. We proposed that the claimant would then have two days to cross-examine the respondent's witnesses, so we could hear closing submissions on the afternoon of the fourth day. We would then make our decision on the fifth day. Mr Stubbs submitted that he did not think that the schedule of loss filed by the claimant was in a format that would enable us to deal with remedy on the fifth day if the claimant was successful in one or more of his claims. He said he would return to this after closing submissions.
20. We reminded the parties of our indicated and agreed timetable on a number of occasions during the hearing and emphasised that the overriding objective meant that we should do everything we could to hear the case within its allotted time provided we undertook a proper consideration of the issues. Mr Stubbs overran his estimate for cross-examination of the claimant, which ended at 14:45pm on the second day. We afforded the claimant the same sort of latitude and he finished his cross examination of the respondent's witnesses at 15:20pm on the fourth day.
21. We had planned to hear closing submissions on the fourth afternoon. Mr Stubbs had produced written submissions. Mr Bhogal had not produced written submissions. We reminded Mr Bhogal that our plan had been to hear closing submissions on the fourth afternoon, but agreed, after discussion with both parties, to the joint suggestions of Mr Stubbs and Mr Bhogal that:
  - 21.1. Mr Stubbs would submit his written submissions to the Tribunal and Mr Bhogal immediately (they were handed up at the hearing);

- 21.2. Mr Bhogal would complete his written submissions and send a copy to the respondent as soon as possible and, in any event, by 9:00am on Monday 7 February;
  - 21.3. Mr Bhogal would submit his written submissions to the Tribunal by 9:00am on Monday 7 February;
  - 21.4. Mr Stubbs would have a right to reply to Mr Bhogal's submissions by 10:00am on Monday 7 February 2022. We made this decision as the claimant had had sight of the written submissions of Mr Stubbs before writing his own, so could answer every point therein. The requirement to hold a fair and just hearing meant that we should give Mr Stubbs the right of reply that the claimant had been given;
  - 21.5. The Tribunal would meet to make its decision at 10:30am on Monday 7 February. The hearing was converted to a video hearing;
  - 21.6. The Tribunal would endeavour to deliver its oral judgment and reasons on Monday 7 February; and
  - 21.7. If the claimant was successful in one or more of his claims, we would make case management orders to set up a remedy hearing, which would include orders for production of a revised schedule of loss and supporting documents. However, Mr Stubbs indicated that, as the employment relationship with the parties was ongoing, the respondent would seek to deal with the issue of remedy by negotiation and consent. We endorsed that strategy, as Rule 3 of the Employment Tribunal Rules of Procedure requires us to encourage the use by the parties of the services of ACAS or other mediation or other means of resolving their dispute by agreement, wherever practicable and appropriate. We felt that this was particularly relevant given that the claimant remains an employee of the respondent working in the same job in the same department.
22. The claimant's submissions were received on time. They ran to 36 pages. We appreciate that the claimant is a litigant in person, but there were a number of matters contained in the closing submissions that should be noted:
- 22.1. The submissions contained more than 10,000 words. They were more than twice as long as the claimant's witness statement. That was not proportionate. We had to put back our timetable to read and digest the document;
  - 22.2. The claimant repeated his claim of institutional racism by the respondent, despite being reminded by the Tribunal on many occasions that the issues that the Tribunal has to determine were those agreed on the first day of the hearing;
  - 22.3. The claimant raised matters of evidence in his closing submissions that were not raised in written evidence, oral evidence or the documents. We cannot consider new evidence that is presented in closing

submissions because it has not been tested by cross-examination. An example of this is paragraph 1.7 of the written submissions.

- 22.4. We find that the claimant misrepresented or misquoted the evidence given in the hearing. On a number of occasions (e.g. §§1.8, 1.10, 1.11, 1.12) he draws conclusions from evidence that, firstly, misrepresented the evidence given and then used the misquoted evidence to assert facts that cannot be drawn for the evidence he has “quoted”, even if his quotations had been accurate.
- 22.5. The document frequently strays into hyperbole and makes a number of claims that are plainly not true, such as:
  - 22.5.1. The claimant is the only BAME member of the EPS team (§ 1.2);
  - 22.5.2. The respondent did not promote the claimant because of his report writing. We find that this was not the evidence of any of the three witnesses that interviewed the claimant. All said that he was not promoted in 2020 because he was not the best candidate at interview (§§1.10, 1.12 and 1.16);
  - 22.5.3. The claimant claims that he was effectively silenced for raising allegations of racism in a business meeting on 21 April 2014 [93]. The truth of the matter is that the claimant had accused the EPS and its management of racism on the basis that a mobile phone would have been provided more quickly for a “white middle-class family in Gosforth” that it had been for a refugee family; and
  - 22.5.4. The claimant’s assertion that the respondent’s witnesses accepted that they had little or no knowledge of the Equality Act 2010 is not true (§ 6.1).
23. Over the weekend between the fourth and fifth days of the hearing, we drafted the parts of the Reasons that dealt with uncontroversial or procedural matters, such as the list of issues, housekeeping matters, and agreed or uncontested facts.
24. The respondent’s response to the claimant’s written submissions were received on time. They ran to 3 pages. The Tribunal then received an email from the claimant asking for permission to file a further document in answer to the respondent’s response. We refused this as being disproportionate and a potential waste of time and costs.
25. The Tribunal met in virtual chambers at 10:30am on 7 February, to continue our consideration of our decision and give an oral judgment and reasons.
26. We anticipated inviting the parties to join the hearing at 2:00pm on 7 February to hear the Judgment and Reasons. Unfortunately, our discussions and decision drafting took much longer than we had anticipated. In the late morning of 7 February, we had to advise the parties that we would not be in a position to deliver our



Judgment and Reasons until 3:30pm. We advised the parties that the written reasons may differ in part from the oral reasons given

27. As we not found for the claimant on any part of his claim, a remedy hearing will not be listed.
28. With the consent of the parties, the fifth day of the hearing was conducted by video on the CVP application.

### **Findings of Fact**

#### **Preliminary Comments**

29. We are very aware of the fact that the claimant has been employed by the respondent for nearly 17 years. We note that Mr Stubbs introduced his skeleton argument by making it clear that the claimant continues to be a valued member of its Educational Psychology Service (EPS). The respondent acknowledges that the claimant performs well in much of his role and that the contribution he has brought and can bring to INA (International New Arrival) families in particular is not in question.
30. We were struck by the way that the claimant and respondent witnesses conducted themselves towards one another in the hearing. Even though the claimant was making very serious allegations against the respondent and the witnesses (as employees of the respondent), Mr Bhogal and the witnesses remained polite with one another and all conducted themselves with dignity and good humour. We are also grateful to Mr Stubbs for his empathetic cross-examination of the claimant and submissions on the various points of procedure and law that arose during the hearing.
31. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so we have dealt with the case on the basis of the documents produced to us and the claim as set out in the list of issues.
32. The claimant was reminded on several occasions that if he did not challenge the evidence of the respondent's witnesses, we were likely to find that unchallenged evidence was credible. We make the following findings.

#### **Undisputed Facts**

33. We should record as a preliminary finding that a number of relevant facts were not disputed, not challenged or actually agreed by the parties. These were:
  - 33.1. The respondent is a local authority that employs more than 5,000 people.

- 33.2. The claimant has been and remains employed as an Educational Psychologist by the respondent since 1 May 2005. The claimant started early conciliation with ACAS on 9 October 2020 and obtained a conciliation certificate on 4 November 2020. The claimant's ET1 was presented on 28 November 2020.
- 33.3. It has never been the claimant's case that he is bringing any form of disability discrimination claim. He never suggested that he has a physical or mental impairment that has affected his ability to carry out his work. It was agreed that he was referred to Occupational Health in 2015.
- 33.4. The claimant is very well-qualified for his position. There is no need to list his qualifications in these reasons, as they were never in dispute.
- 33.5. The claimant is of Indian origin and self-identifies as black.
- 33.6. The claimant has always worked in the respondent's Educational Psychology Service (EPS) during his employment. He has always had the job title of Educational Psychologist (EP). It was agreed that he is a specialist EP in working with asylum seekers, refugees and what the respondent terms as "International New Arrivals" (INA).
- 33.7. This case concerns the period since the claimant returned to work after a period of suspension from 2011 to 2012. We do not need to know about why he was suspended or what the resolution of that situation was. We are aware that the claimant issued Employment Tribunal proceedings against the respondent in 2011 and that they were resolved by a COT3 in 2012.
- 33.8. Lara Lillico had been appointed as Manager of the EPS on 11 June 2011. She has remained in that post ever since.
- 33.9. The EPS currently employs a Manager and Deputy Manager, 3 Specialist Senior EPs, 13 EPs (including the claimant) and 2 trainee EPs. Two of the EPs identify as BAME (including the claimant). This evidence was continued in Ms Lillico's witness statement (§10) and was unchallenged by the claimant.
- 33.10. The EPS broadly undertakes two types of work: the preparation of 'advices' which are statutory documents into students that are funded by government. This is known as "Statutory" work. The EPS also produces 'reports', which are documents commissioned by schools into students. The schools pay for the reports. This sort of work is known as "Traded" work.
- 33.11. It was Ms Lillico's unchallenged evidence (§13 of her witness statement) was that the claimant is a dedicated EP who brings a range of expertise and knowledge to his work. He is particularly focused on the issues of equality of race and ethnic background and strives to 'champion' those issues. He is a 'team player' who is willing to volunteer for tasks, is generous in sharing his time and knowledge to support others and actively contributes to service development activities.

- 33.12. EPs are remunerated on a scale called the Soulbury Scale. In addition, they may be awarded Structured Professional Assessment Points (SPA), which increase salary further. EPs at the respondent's EPS are classified as Senior EPs, who are on the Soulbury "B" scale; EPs, who are on the Soulbury "A" Scale and Trainee EPs, who are not relevant to this case.
- 33.13. Ms Lillico gave unchallenged evidence that the way that the Soulbury Scale can operate may mean that EPs on Scale A could earn more than Senior EPs on Scale B, depending on their scale points and SPA points.
- 33.14. From 2012, the claimant was line managed by Kathleen Richardson, who was the EPS Deputy Manager at the time. Ms Richardson has since retired.
- 33.15. On 27 November 2012, Ms Lillico instigated an Informal Performance Review (IPR) [64-66] into three statutory advices written by the claimant. Ms Lillico held a meeting with the claimant on 27 November 2012. Minutes were taken by Ms Richardson [68-68].
- 33.16. There was an incident that we need not be concerned with, as it is not part of the claimant's claim, between the claimant and Ms Richardson that led Ms Lillico to conclude that the supervisory relationship had broken down – her evidence was not disputed. Ms Lillico proposed that Dennis Wilson replace Ms Richardson as the claimant's supervisor. Mr Wilson was not a Senior EP at the time.
- 33.17. By an email dated 27 March 2013, the claimant advised Ms Lillico that "I am happy to have Dennis Wilson as my service supervisor if you deem that to be a suitable arrangement." Mr Wilson also specialised in work with asylum seekers, refugees and INA clients on the respondent's Kaleidroscope Project. He retired in December 2019.
- 33.18. In February 2015 (the exact date was in dispute), Ms Lillico instigated a second IPR in respect of the claimant.
- 33.19. Sarah Woodburn was appointed as Deputy Manager of EPS on 1 February 2017 and took on line management responsibility for the claimant from Mr Wilson at the start of the new academic year in 2017. Her evidence (§4 of her witness statement) on this was unchallenged.
- 33.20. In anticipation of Dennis Wilson's retirement in December 2019, the respondent advertised for a Senior EP at the Soulbury B Scale in October 2019. The post was referred to in the papers as "Senior EP-INA". This is the subject of the claimant's First Claim. It was agreed that the claimant was the only applicant for the post. It was agreed that the post was withdrawn without inviting the claimant for interview or shortlisting him.
- 33.21. It was not disputed that when the vacancy was withdrawn, Ms Lillico obtained authority to recruit to three Senior EP posts at a higher salary scale than had been offered for the single post in October 2019. The three posts were to specialise in:
- 33.21.1. International New Arrivals (INA);

- 33.21.2. Autism Spectrum Disorder; and
  - 33.21.3. Social, Emotional and Mental Health (SEMH).
  - 33.22. It was agreed evidence that the claimant applied for the INA specialist role. There were 3 applicants for the role in addition to the claimant. One of the applicants for the INA role also applied for the SEMH role.
  - 33.23. The respondent appointed an interview panel of three people: Ms Lillico, Ms Woodburn and Alyson Barrett. At the time, Ms Barrett was employed by Kenton School in Newcastle as Assistant Principal Lead Special Educational Needs and Disabilities Co-Ordinator (SENDCO), but was seconded to the respondent as a School Effectiveness Advisor with an Inclusion remit.
  - 33.24. It was agreed that the claimant was interviewed for the role on Friday 24 July 2020.
  - 33.25. The claimant was not appointed. The appointee was a white British candidate, Andrew Scott.
  - 33.26. On 10 August 2020, Ms Lillico sent an email to Ms Woodburn [707A], in which she stated “PS I haven’t heard anything from Rachel. I don’t know if your jungle drums have passed on anything new?”
34. We note that there was a significant amount of written and oral evidence and documents that we did not find relevant to the issues that we had to determine. For example:
- 34.1. The claimant’s written evidence about his application for a senior post in 2007 (§3 of his witness statement).
  - 34.2. The management of the EPS in 2011, before Ms Lillico was appointed (§4 of his witness statement).
  - 34.3. The allegation that he was the only EP managed by Dennis Wilson, who was not a Senior EP for 5 years, without being given a choice (§5 of his witness statement). This allegation was in his ET1, but not in the claims that were agreed with EJ Aspden.
  - 34.4. The allegation that he was not appointed to the post of Deputy Manager of EPS in September 2016 (§9 of his witness statement).
35. There was not much dispute about what happened. The dispute between the parties is the interpretation that should be put on the events that were largely agreed.

### **Points of Dispute**

### **General Points**

36. We find that the email from Ms Lillico to Ms Woodburn dated 20 August 2020 [707A] contained a sentence - “PS I haven’t heard anything from Rachel. I don’t know if your jungle drums have passed on anything new?” – that constituted

unwanted conduct related to race that had the effect of violating the claimant's dignity. However, the claimant had not cited this incident in his list of claims and did not seek to amend his claim to include the incident. We also note that Ms Lillico apologised unreservedly to the claimant in the hearing for writing the comment and said that she would not use the phrase again.

37. We also find that the recipient of the email, Ms Woodburn, should have raised the wording of the email with Ms Lillico and reported it to managers, but, again, no claim was indicated in the ET1 or claimant's Response and no application to amend was made to this Tribunal. Ms Woodburn apologised unreservedly for not taking Ms Lillico to task over its use and for not reporting the matter.
38. In making our findings in this case, we have considered the weight that should be given to the email. Our findings are set out in relation to each of the three heads of claim.

### **First Claim**

39. This is the claim that the respondent failed to shortlist the claimant for, and withdrew, the role of Senior EP-INA in October 2019. Our findings are:
  - 39.1. We find that this claim was presented within the time limit in section 123 of the EqA. We make that finding because we find the allegation so closely linked to the failure to appoint the claimant in 2020 to a post that was essentially the same level of seniority as the Senior EP-INA role advertised and withdrawn in 2019 that it forms part of a linked series events that constitute conduct extending over a period.
  - 39.2. Accordingly, time begins to run at the end of the 2020 recruitment process, which cannot be before the claimant's interview on 24 July 2021. The claimant started early conciliation on 9 October 2020 and presented his ET1 on 28 November 2020. Therefore, the claim is in time.
  - 39.3. It was agreed that the respondent failed to shortlist the claimant for, and withdrew, the advertised position of Senior EP-INA in October 2019 and that the position was due to arise on the retirement of Dennis Wilson in December 2019. Mr Wilson was on a 0.5 FTE contract.
  - 39.4. We find that the decision to create and advertise the post was Ms Lillico's. Her evidence (§62 of her witness statement) on the point was not disputed.
  - 39.5. We find that the respondent's process for setting salaries for posts is that a business case has to be made and approval to advertise given. Those documents for this vacancy are at pages 303 and 304. The job description for the post [306-307] sets the salary at Soulbury Scale B, points 2-5 and 3 SPA where eligible. We find that the salary is set by the finance department, not Ms Lillico. We make the findings in this

paragraph because we found Ms Lillico's evidence on the points to be credible. It was not challenged by Mr Bhogal.

- 39.6. We find that Ms Lillico had doubts about whether the salary offered would attract sufficient numbers and quality of candidates because:
- 39.6.1. Her written evidence on the point (§§ 62-63) was unchallenged;
  - 39.6.2. Her evidence that the salary offered in October 2019 was less than many EPs who were Scale A, because the Senior and 'standard' EP scales overlapped was unchallenged;
  - 39.6.3. When the post was effectively re-advertised, the salary was increased; and
  - 39.6.4. Ms Lillico's strategy is set out in the document titled "Service Improvement Plan: Proposal to Regrade the Senior Specialist EP and Deputy Manager EP posts" dated 29 October 2019 [385-387] and accompanying emails [388-390] that included benchmarking salaries with other local authorities.
- 39.7. We find that Ms Lillico had reservations about the claimant's ability to carry out the role because of the quality of his report and advice writing, because her evidence (§64) was unchallenged. We find that Ms Lillico's main reason for withdrawing the post was to enable her to regrade the post and include the two new Senior EP posts that were advertised in 2020. We find that the reason for withdrawing the role was not the quality of the claimant's report writing.
- 39.8. We find that the email of 20 August 2020 [707A] is not determinative of the allegation of direct race discrimination in respect of this allegation because it was the only instance of conduct on the part of Ms Lillico that we find to be discriminatory. We find that the email was entirely inconsistent with her lengthy written evidence, answers to cross examination questions that were spread over 3 days and the documents in the bundle. We drew an inference from the comment, but such an inference does not outweigh the other evidence of how the claimant was treated.
- 39.9. We find that there were facts from which we could decide, in the absence of any other explanation that the respondent contravened section 13 of the EqA. We make that finding because the claimant was an experienced and well-regarded EP and had applied for the post in the knowledge of the salary offered. The burden of proof therefore switches to the respondent to show that it did not contravene section 13 of the EqA.
- 39.10. We find that the respondent met the burden upon it because of our findings of fact above. We find that it was a legitimate management decision to want to have the widest and best selection of candidates

for the role. We find that whilst there was nothing in the respondent's policies and procedures that stopped Ms Lillico appointing the claimant as the only applicant, there was nothing in those policies and procedures that said it had to shortlist, interview or appoint. We find that the respondent has shown on the balance of probabilities that the reason why the claimant was not appointed to the post and that the post was withdrawn was not because of the protected characteristic of race.

39.11. We agree with Mr Stubbs' submission that the claimant could only compare himself with a hypothetical comparator, who was the same as the claimant, save for the protected characteristic of race. If such a person applied for the Senior EP – INA role in the circumstances of the findings of fact we have made above, the hypothetical comparator would have been treated in the same way as the claimant: the post would have been withdrawn and re-advertised with a higher salary.

39.12. We find that the respondent has shown on the balance of probabilities that the decision to withdraw the role was made for the reasons we have set out above and not because of the claimant's race.

## **Second Claims**

40. These are the claims that that the respondent, in a recruitment exercise for the post of Senior EP-INA in July 2020:

40.1.1. Deliberately designed the interview questions so as to disadvantage him at interview relative to others/or to favour others relative to him; and

40.1.2. Failed to offer the post to the claimant.

41. We find that it is indisputable that these claims were brought within the time limit contained in section 123 of the EqA.

42. We find that the email of 20 August 2020 [707A] is not determinative of the allegation of direct race discrimination in respect of this allegation because it was the only instance of conduct on the part of Ms Lillico that we find to be discriminatory. We find that the email was entirely inconsistent with her lengthy written evidence, answers to cross examination questions that were spread over 3 days and the documents in the bundle. We drew an inference from the comment, but such an inference does not outweigh the other evidence of how the claimant was treated.

43. We find that the claimant's criticism of the make up of the interview panel was not well-founded. We make that finding because:

43.1. We find that it is entirely logical and reasonable for the Manager of the EPS to be a member of the interview panel because it was her department and she had written the service plan that envisaged the three new posts;

- 43.2. We find it entirely logical and reasonable that the Deputy Manager to be a member of the interview panel because she would be the direct report for all three new posts; and
- 43.3. We find that the claimant's criticism of the selection of Alyson Barrett as the third member of the panel was not logical or reasonable. We make that finding because we found her evidence of her experience and work history showed that she was an appropriate person to sit on the panel. The chief piece of evidence that undermined the claimant's complaint about Ms Barrett's competence to sit on the panel was his admission that he had asked her for a reference when he applied for the 2019 post.
44. We find that the claimant's allegation that the respondent deliberately designed the interview questions to disadvantage him and/or favour others over him was entirely misconceived. We make that finding because:
- 44.1. We entirely disagree with the claimant's assertion that the process that allowed a single interview to deal with candidates who had applied for more than one of the three posts favoured Andrew Scott (the successful candidate for the INA role) over the claimant. We make that finding because it was the respondent's unchallenged evidence that candidates were allowed as much time as they liked to answer each of the questions.
- 44.2. The claimant's assertion that by allowing Mr Scott to answer the same questions (numbers 4 and 5) in respect of the SEMH post and the INA post gave him an advantage over the claimant and/or put the claimant at a disadvantage is entirely undermined by the fact that the candidates all had as much time as they needed to answer the questions.
- 44.3. If the claimant was correct on this point, then all the three unsuccessful candidates would have been disadvantaged, so the less favourable treatment contended for could not have been on the grounds of race.
- 44.4. We entirely disagree with the claimant's assertion that the interview questions were generic or vague. We find that questions 1, 3 and 6, gave scope for the claimant to set out his extensive experience in INA work and that questions 2, 4, 5 and 7 made specific reference to the area of expertise that the post related to, which was INA clients [592-599].
- 44.5. We find that the questions and process for the interviews were constructed to ensure, as far as possible, that all the candidates were on a level playing field: the panel deciding the outcome of the process was the same for all four candidates for the INA post; the questions were the same; the candidates were given the same amount of time (15 minutes) to prepare answers to the questions before the interviews; and the interviewers completed their marking of the candidates independently. The same arrangements applied to all candidates.



- 44.6. We find that Ms Lillico and Ms Barrett moderated their scores at the end of the interview process, whilst Ms Woodburn did not because their evidence was not challenged on the point. We find that this was neither unfair nor discriminatory, as the practice was applied to all candidates.
45. We find that the claimant's assertion that the specific reference to the INA role in the 2019 job description [306-307] which was removed from the 2020 version [427-428] was, in some way, evidence of illegality was entirely misconceived. It was clear to us that the 2020 job description was a generic one for all three posts, but that each of the specialisms was set out in the advert [425]. We cannot find that the claimant was put to any disadvantage. The same circumstances applied to all candidates.
46. We have dealt with the make-up of the panel above. We find that the claimant's assertion that the respondent's failure to appoint him was an act of direct discrimination was unfounded. We make that decision because:
- 46.1. We preferred the cogent, consistent and internally logical evidence of the respondent's three witnesses as to how they marked the interview process to the claimant's assertion that they had undermarked him because of race;
- 46.2. It may be difficult for the claimant to accept, but the clear evidence of the answers given by the candidates in interview (particularly the claimant and Mr Scott) made it obvious to us that the better candidate on the day had been appointed;
- 46.3. The claimant mistakenly conflated his unblemished work record in relation to safeguarding – it was agreed that the respondent had never received a complaint about his conduct in the area of safeguarding – with his performance in relation to question 6 on the subject of safeguarding, for which he scored low marks from all three interviewers;
- 46.4. Two of the Tribunal have experience of safeguarding matters. We find that the rationales given by the interviewers for their low marks for the claimant on safeguarding were credible. The claimant did not answer the question anywhere near as well as Mr Scott.
- 46.5. Mr Scott's total score was 79. The claimant's score was 60.5. Although 2 of Ms Lillico's scores had been moderated down, the claimant would still have been unable to get close to Mr Scott's score if the higher marks had been used;
- 46.6. Ms Lillico was the person about whom Mr Bhogal had most complaints. He had no complaint with Ms Woodburn, but we note that Ms Lillico gave the claimant the highest score of the three interviewers and Ms Woodburn gave him the lowest score. Those marks are inconsistent

with the thrust of the claimant's evidence that Ms Lillico discriminated against him over a nine-year period; and

46.7. We find the decision to appoint Mr Scott to be reasonable, lawful and not discriminatory.

47. On the findings above, we find that there were no facts from which we could decide, in the absence of any other explanation that the respondent contravened section 13 of the EqA in respect of either leg of the Second Claims. We make that finding because the claimant's evidence was mere assertion. Accordingly, the claimant's claims fail at that point because he has failed to switch the burden of proof to the respondent.
48. In the alternative, had we found that the burden had switched, we would have found that the respondent did not design the interview questions so as to disadvantage the claimant at interview relative to others/or to favour others relative to him; and did not fail to appoint him because of his race. He was not appointed because he was not the best candidate at interview.

### **Third Claims**

#### **General Comments**

49. These are the 23 claims that the claimant's manager, Lara Lillico, subjected him to excessive scrutiny in relation to psychological advices as set out in the claimant's Response to Request for Further Information. We repeat our remarks made above that the claimant was fully aware of what was required of him from his Response and that he confirmed to us that his claims were as set out therein.
50. We found the claimant's Response to be a little vague and unfocussed, but we were able to determine what it was that the claimant was complaining about. We note that there was no allegation numbered 14.
51. We considered whether some of the claims were brought out of time, but decided that the complaints were concerning the same thing across a long period, so were continuing acts.
52. Regrettably, we found that the vast majority of the claimant's evidence about the alleged over scrutiny was no more than assertion and assumption on his part. He produced little by way of corroborative documents, despite accepting in answer to a question from the Tribunal that he had access to all the documents produced by him and his colleagues.
53. In general terms, the claimant's complaints about over scrutiny can be divided into the following categories:
- 53.1. Complaints that he was put through the IPR process twice;
  - 53.2. Complaints that his reports and advices were subject to more rigorous or critical checking than his colleagues;

53.3. Failure to provide him with support to ensure that his reports and advices contained fewer errors; and

53.4. Reminders to prioritise team meetings over client meetings.

### **IPR processes**

54. We find that the claimant accepted that his reports and advices contained mistakes throughout his employment with the respondent.
55. We were surprised at the claimant's reticence to accept that mistakes about matters such as the age of a child; which year or class they were in; what sex they are; and mistakes in making recommendations that didn't match identified issues and/or assessments would cause reputational damage to EPS and cause parents and schools to lose faith in the efficacy of EPS and the claimant as an EP. We find that these consequences are entirely foreseeable.
56. We therefore take judicial notice and accept the evidence of Ms Lillico that it is important for EPs to produce professional reports with no significant errors. The claimant seemed to be unable to understand that not all mistakes carry the same weight of consequence. For example, a spelling mistake in a word of no consequence is a mistake of relatively little consequence, but referring to a girl as "he"; or getting the name of the student or their school wrong; or misinterpreting test results is a serious mistake that could and should be avoided.
57. It was significant for us that the claimant never suggested that there was any medical reason for making the volume and nature of mistakes that he did. He produced no medical evidence at all of any disability. An OH report dated 30 April 2015 [172-173] was produced that mentioned no issues of ill health that could have contributed to the quality of the claimant's report-writing.
58. We repeat the comment made in the hearing that there is no equivalent to the duty to make reasonable adjustments in race discrimination cases. No claim of indirect discrimination was presented to the Tribunal. The claimant has never suggested that his ethnic origin or colour mean that he is less able to complete professional and error-free reports and advices than colleagues who are not of Indian origin and/or not black.
59. The claimant's case was that everyone makes mistakes. He was, of course, correct. However, his supervisor, Ms Woodburn, gave unchallenged evidence that 90% of the claimant's reports and advices that she checked contained significant errors. The height of the claimant's evidence was that he had spoken to colleagues (none of whom gave evidence and none of their work was produced) who said that they had also made mistakes. We had no evidence with which to compare the standard of the work produced by the claimant's colleagues with the voluminous evidence of the quality of the claimant's written work, other than the claimant's assertions.

60. Mr Bhogal seized on an admission by Ms Lillico that she made mistakes in reports, but ignored and did not challenge her evidence that she had never made mistakes of the seriousness of those made by the claimant.
61. Ms Woodburn has been proof reading Mr Bhogal's reports for some years and gave unchallenged evidence that she has effectively given up trying to get the claimant to change his ways and improve the quality of his reports and advices, she just proof reads the documents and suggests changes using the Track Changes function in Word.
62. The whole basis of the claimant's claim on the two IPR processes in 2012 and 2015 was difficult to ascertain.
63. It was unchallenged that the first IPR was instigated in November 2012, yet there is nothing in the 23 discreet matters listed in the claimant's Response that is dated before January 2013 and his ET1 is silent on the 2012 IPR. We therefore find that there is no claim before us in respect of the 2012 IPR. However, we will make findings so that the parties have determinations of the matters about which the claimant still harbours discontent.
64. We find that the claimant never challenged Ms Lillico's evidence that she instigated the 2012 IPR because of errors in three statutory advices. We find that the IPR itself [65-66] and the notes of the meeting [67-68] revealed nothing that the claimant can rely upon as evidence of direct race discrimination. The IPR [65-66] identified the following categories of error:
  - 64.1. Wrong names of children;
  - 64.2. School names spelt incorrectly;
  - 64.3. Sentences that don't make sense;
  - 64.4. Incorrect use of he/she and his/hers;
  - 64.5. Recommendations that don't match identified issues and/or assessments;
  - 64.6. Including large amounts of information about tests used; and
  - 64.7. Circulation lists not completed at the end of reports.
65. Had we been required to determine whether the claimant had a claim in respect of the 2012 IPR, we would have found that he produced no evidence, other than his assertions, that he was scrutinised more negatively than colleagues and that the evidence did not meet the threshold to switch the burden of proof onto the respondent.
66. It was not disputed that Ms Lillico instigated a second IPR in February 2015. We find that the claimant was informed about the IPR on 13 February 2015, because Ms Lillico's letter of 6 March 2015 [150] confirms that he was told about the IPR on

13 February 2015. The letter stated that the reason for the IPR was the quality of the claimant's reports, particularly:

- 66.1. There was evidence of wholesale cutting and pasting of another EP's advice that meant that information concerning another child was entered into the claimant's report for his child client;
  - 66.2. There was evidence of very poor proof reading; and
  - 66.3. There was evidence of internal inconsistencies, which meant that advices did not always make sense, or show a logical link between the description of the child and the recommendation that the claimant had made in the advice.
67. The claimant responded to Ms Lillico's letter by an email dated 10 March 2015. In the email he stated that his personal circumstances had contributed to his performance and that he felt that his work situation had been exacerbated by "the lack of support and inquisitorial and negative management style and that people (once again) have been coming to you to 'tell on me' without coming to me first." There is no mention of the claimant feeling that he has been discriminated against because of race.
68. The claimant met with Ms Lillico and his line manager at the time, Dennis Wilson, on 18 March 2015 [152-154]. An IPR report was produced [156-157]. The claimant refused to sign the form and wrote to Ms Lillico on 1 May 2015 with his reasons [174-177]. In his three-page letter, the claimant makes no claim of discrimination. He does not dispute the errors in the three reports that led to the meeting.
69. We find that the respondent was legitimately concerned about the quality of the claimant's advice writing. We repeat our findings above. We find that the claimant produced no evidence, other than his assertions, that he was scrutinised more negatively than colleagues and that the evidence did not meet the threshold to switch the burden of proof onto the respondent.
70. There was no evidence before us that the respondent would not have dealt with the quality of advice writing produced by the claimant differently for an EP who was not of Indian origin and/or not black.

### **More rigorous or critical checking than his colleagues**

71. The claimant's claims in respect of this aspect of alleged over scrutiny suffer from the same problem as much of his claim: despite having access to documents at work, he produced no witnesses or documents that evidenced his allegation to have been treated less favourably than colleagues who are not of Indian origin and/or not black.
72. We repeat our findings above on the need for reports and advices to be as professional and error-free as possible.

73. The evidence before us showed that the claimant's reports and advices were far from error-free and that the errors he made were on significant matters, as we have recorded above.
74. There is a contradictory juxtaposition between the claimant's complaint that his work required a proof reader to spot mistakes and the allegation that, by proof reading his reports and advices, managers were acting in a way that was discriminatory.
75. We find that the evidence does not reveal facts from which we can conclude, in the absence of any explanation, that the claimant may have been directly discriminated against because of race. He does not switch the burden of proof.

**Failure to provide him with support to ensure that his reports and advices contained fewer errors**

76. We repeat that there is no claim before us of failure to make reasonable adjustments because of disability or indirect discrimination because of race.
77. We found Lara Lillico's evidence on the support offered to the claimant to be more credible than the claimant's because her evidence (§21 of her witness statement) was unchallenged by the claimant, except for the points about voice recognition software and proof reading.
78. We find that a proof reader for an experienced EP, whose job it is to produce credible and professional reports and advices for a salary of more than £50,000 per year is not proportionate.
79. We find that the denial of a proof reader was made for economic reasons, not reasons related to race.
80. Dennis Wilson purchased voice recognition software himself to use at home, but the software could not be used in the office. The claimant did not challenge or contradict Ms Lillico's evidence on that point. The claimant did not challenge Ms Lillico's oral evidence that Dennis Wilson had a physical impairment that made typing difficult for him.
81. The issue of voice recognition software had been raised and "parked" because of an impending office move that was postponed for 5 years. We find that the claimant never raised this again until he made this clam.
82. We found the claimant's evidence on the allegation that he did not receive training on Track Changes to be weak. He could not deny that an offer had been made by a colleague to provide informal training on the application in a team meeting on 16 December 2018 [908-910]. We take judicial knowledge that Track Changes is a very simple application that requires little or no training to be able to use. The respondent provided the claimant a link to such training. The informal training was offered to anyone in the team who wanted it. The claimant did not take up the offer and did not access the links provided by email by the respondent that would have provided him with assistance.

83. We find that the claimant was treated exactly the same as every other member of the team regarding training for Track Changes and that the evidence does not show a case that means the burden of proof should switch to the respondent.

**Reminders to prioritise team meetings over client meetings.**

84. We find that the claimant was told to prioritise staff meetings and study days over other work. There was no evidence that suggested a hypothetical comparator would have been told to do anything different. Therefore, the evidence does not show a case that means the burden of proof should switch to the respondent.

Employment Judge Shore  
Date: 28 February 2022