EMPLOYMENT TRIBUNALS

Claimant: Ms N Ali

Respondent: Lincolnshire County Council

Heard via Cloud Video Platform **On:** 17 and 18 March 2021

Before: Employment Judge Brewer
Mrs G Howdle
Mr S Hemmings

Representation

Claimant: In person
Respondent: Mr L Middleton, Solicitor

JUDGMENT

1. The claimant's claims for race discrimination fail and are dismissed.
2. The claimant's claims for religion or belief discrimination fail and are dismissed.

REASONS

Introduction

1. This claim began in 2018. The case came before the Tribunal for a 2-day final hearing via CVP. The Tribunal was presented with an agreed bundle running to 268 pages. During the first morning we also received some further documents we had requested, being the interview notes for NW, the comparator in this case. The claimant represented herself and the respondent was represented by Mr Middleton, Solicitor. We heard evidence from the claimant and, on behalf of the respondent from, Sally Partridge, RCO2 at The Beacon residential care home, and Antoinette Balchin, then Home Manager at The Beacon. At the end

of the evidence, we heard and have considered submissions from the claimant and Mr Middleton.

Issues

2. The claimant applied to the respondent, a local authority, for the position of Residential Care Officer 2 (RCO2). She was unsuccessful. She asked for feedback and says this was not provided. The claimant is claiming direct discrimination because of race and/or religion. The claimant describes herself as of South Asian descent, and says she is a Muslim. This is a recruitment case, and the claimant compares herself with the successful candidate (NW) who is white and not a Muslim. At a closed preliminary hearing before EJ Blackwell on 15 August 2019 the following issues were agreed as those which arose to be considered at the final hearing in this case:

    a. Did the respondent do the following things:

        i. Not appoint the claimant to the role of RCO2 at The Beacon, Grantham;

        ii. Not provide the claimant with feedback when requested;

        iii. Not place the claimant on the respondent's "Silver Medal Scheme"?

    b. Was that less favourable treatment?

    c. If so, was it because of race and/or religion.

3. We pause to point out that there was no mention of the allegation at a(iii) above in the claimant's witness statement, nor did she raise it in cross-examination or in her submissions and for those reasons, and applying the principles set out below, that claim must fail.

Law - Direct Discrimination

4. In a direct discrimination claim under **s.13 Equality Act 2010** (EqA), there are two intertwined issues: (a) the less favourable treatment and (b) the reason for any less favourable treatment (the "reason why" question).

5. The above provision of the EqA, and its predecessor provisions, have been the subject of significant case law. We summarise the key principles we have applied as follows.

6. There is no need for the Tribunal to adopt a strict sequential approach when considering the two questions posed by s.13 EqA. In some cases it may be sensible to approach the less favourable treatment and the reason why questions together, given they are *"intertwined"* and *"essentially a single question"*, *per* Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337.

7. A comparator must *"be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class"* (**Shamoon** above).

8. Unreasonable treatment, even if established, is not the same as *less favourable* treatment. As the House of Lords said in **Glasgow City Council v Zafar** [1998] 2 All ER 953:

   "The fact that, for the purposes of the law of unfair dismissal, an employer has acted unreasonably casts no light whatsoever on the question whether he has treated an employee less favourably for the purposes of the [RRA 1976]"

9. The burden of proof provisions are contained in **s.136 EqA**. The leading cases on the burden of proof pre-the EqA were the Court of Appeal cases of **Igen Ltd v Wong** [2005] EWCA Civ 142 and **Madarassy v Nomura international Plc** [2007] EWCA Civ 33, [2007] IRLR 246.

10. In **Hewage v Grampian Health Board** [2012] the Supreme Court approved the guidance given in **Igen** and **Madarassy** (and said no further guidance was necessary) and thus the principles from these cases still apply under the EqA. We summarise here the **Igen** guidance:

    Stage 1

    1.1 It is for the **claimant** who complains of direct 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. These are referred to below as "such facts";

    1.2 If the claimant does not prove such facts she will fail;

    1.3 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 direct 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";

    1.4 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;

    1.5 It is important to note the word "could" in s.136 EqA. 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;

1.6 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;

1.7 These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw from an evasive or equivocal reply to a questionnaire;

1.8 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;

Stage 2

1.9 Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably because of the protected characteristic, then the burden of proof moves to the employer;

1.10 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;

1.11 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 because of the protected characteristic since "no discrimination whatsoever" is compatible with the Burden of Proof Directive;

1.12 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 the protected characteristic was not a ground for the treatment in question;

1.13 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."

11. In **Madarassy v Nomura international Plc** [2007] EWCA Civ 33, [2007] IRLR 246, the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. race or religion) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed.

12. Showing that conduct is unreasonable or unfair together with a difference in status is not, by itself, enough to trigger the transfer of the burden of proof according to the EAT and the Court of Appeal (see **Bahl v Law Society** [2003] IRLR 640, EAT per Elias J at para 100, approved by the Court of Appeal at [2004] IRLR 799). Thus, an employer is not obliged to lead any evidence that other employees have been treated in the same (allegedly unreasonable) way.

13. Even if a Tribunal believes that a respondent's conduct requires explanation, before the burden can shift there must be something to suggest that the treatment was due to the claimant's possessing a protected characteristic (**B and C v A** [2010] IRLR 400).

14. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** [2014] EWCA Civ 73).

Findings of fact

15. We make the following findings of fact (numbers in brackets are references to the relevant pages in the bundle).

16. The respondent is the local authority for the county of Lincolnshire. Among other things the respondent runs residential care homes as part of its Children's Services function. This case concerns recruitment to the post of RCO2 based at The Beacon, a residential care home for children and young persons aged 9 to 18 who have physical and/or mental disabilities and/or challenging behaviours.

17. The role of RCO2 is relatively senior. As the advertisement at [71/72] states

> *"As a residential Care Officer level 2 in the absence of a senior member of staff you would be able to assume responsibility for the accommodation. You would be responsible for the supervision and appraisal of junior staff…You will be required to assume responsibility for the accommodation [in] the absence of the Assistant Homes Manager…"*

18. Within the RCO2 job description, 11 main responsibilities, tasks and duties are set out [78]. Key is to:

> *"work within the policies, practices and procedures of the service and to meet all appropriate legislative and regulatory requirements…taking action to minimize risk to people, plant and property"*

19. The reference to minimizing risk to people encompasses in this responsibility the critical function of safeguarding the residents. A copy of the job description was included in the pack sent out to applicants and the advertisement makes it clear that:

> *"all candidates are advised to read the attached job information pack prior to making an application" [72]"*

20. Both the advertisement and the job description make it clear that knowledge and experience are important factors for the successful candidate, either because of the nature of the role as described in the advertisement at [71/72], and indeed the other versions of the advertisement in the bundle, or within the "Knowledge and Skills" section of the job description.

21. The claimant applied for the RCO2 post at The Beacon Residential Care Home in Grantham. Her application form is at [115 – 120]. The claimant was shortlisted and invited for interview. Her interview took place on 12 December 2018. She was interviewed by Antoinette Balchin, then the Home Manager at The Beacon, and Sally Partridge, an RCO2 at The Beacon. Their interview notes are at [121 – 131] and [133 – 143] respectively. The interview notes set out the questions asked, and each candidate was asked the same questions. The candidates' responses are in note form. The interview notes were completed during the interview, as the candidates were speaking. The successful candidate for the RCO2 role at The Beacon was NW. Her interview notes were provided after the bundle had been completed.

22. There is no evidence that either interviewer knew the claimant's religion and we note that it was never put to the respondent's witnesses that they did. We do accept that if she was wearing a head scarf at the interview, it may have been presumed she was a Muslim.

23. The respondent's Recruitment Policy starts at [53]. It is very detailed, setting out relevant legislation in the recruitment field, including discrimination and victimisation. The Recruitment Policy also sets out in detail the recruitment procedure [62 *et seq*.]. The section dealing with interviews starts at [65]. Among other things, the Recruitment Policy states that:

> *"The Hiring Manager is responsible for ensuring that the assessments/interviews are chaired effectively and conducted fairly with equal treatment of all candidates. All candidates must be subjected to the same selection process…The Hiring Manager must ensure all relevant issues are covered during the interview process…"*

24. In this case the Hiring Manager was Ms Balchin and although the interview panels varied, in this case Ms Balchin interviewed both the claimant and the successful candidate NW.

25. In the event it was decided that NW was the better candidate, and she was appointed to the role.

26. The Recruitment Policy also deals with feedback stating:

> *"Candidates who are unsuccessful after interview must be informed of the outcome of their interview. The Hiring Manager should be sensitive to the need to provide feedback to candidates, if requested to do so citing the reasons they have entered onto the Candidate Interview and Verification template"*

27. The claimant asked for feedback by email on 14 December 2018. That request was forwarded to Ms Balchin on the same day and she was asked to respond directly to the claimant [163]. She never did.

28. On 5 February 2019 the claimant made contact with ACAS. This was the start of early conciliation. ACAS first wrote to the respondent on 14 February 2019. There is a significant number of emails between the respondent and ACAS in

the bundle and Mr Middleton confirmed that he waived privilege in respect of those documents.

29. The initial email from ACAS states that the claimant:

> *"considers that she was very well qualified and experienced for the role yet she failed to succeed at interview"* [171].

30. ACAS informed the respondent that the claimant:

> *"first and foremost wants feedback from her interview and a reason why this wasn't given initially upon her request"* [167].

31. Mr Middleton took instructions and provided that feedback in an email to ACAS dated 28 February 2019 [165]. He stated:

> *"I am advised that…during the interview it became apparent that the Claimant did not have sufficient knowledge to demonstrate the skills required for the Level 2 position. The Claimant was asked whether, if she was unsuccessful for a Level 2 post whether she would be prepared to accept a Level 1 position. The Claimant replied that she would like a role undertaking night shifts only as she had childcare commitments which meant that she would be unable to do shift work…Further, the Claimant did not request any feedback from the interview. If any feedback request had been received, then this would have been provided."*

32. Mr Middleton's response was clearly incorrect about the feedback request, but we shall return to that point below.

33. Early conciliation ended on 4 March 2019 and the claim form was presented on 5 March 2019.

Discussion and conclusions

34. The issues in this case are narrow.

35. It is clear that the claimant was not appointed to the role she applied for. It is clear that she asked for feedback after the interview and that was not provided in accordance with the respondent's Recruitment Policy.

36. But on the face of it, the claimant's case amounts no more than an assertion that she had the skills and experience for the RCO2 post, yet she was not appointed. From that she asserts that she has been the subject of racial and religious discrimination.

37. There is no doubting the claimant's strength of feeling. That came across during the hearing and the Tribunal considers that her feelings are genuine. But that is not evidence of discrimination. We therefore turn to the evidence.

38. The claimant asserted in her written evidence, and again under cross-examination, that the respondent was advertising the RCO2 role as "no

experience required". We looked at the advertisements and they do not say that. Indeed it is clear from the advertisements and the job description that considerable experience was required. Despite insisting a number of times that she had seen an advertisement which said that no experience was necessary, ultimately she conceded that she had been incorrect about that. She had, she said, been mistaken. She did at one point in answer to a question from Mr Middleton state *"I can't remember what I said 3 years ago*".

39. In relation to the interviews with the claimant and NW, we note first that the interview notes are fairly consistent in noting the answers given to the various questions asked at interview. Given the seniority of the position, the interview questions are fairly general and open. One key question (question 7) was around safeguarding. The question posed was simply "what can you tell me about safeguarding". Given the local authority context, and given that the job description makes it clear that at times the RCO2 will be the most senior person on duty, the interviewers were looking to see if the candidates understood not simply the immediate care of the vulnerable child, but also the procedures in place for escalation, and key to that was understanding escalation to the Local Authority Designated Officer (LADO). Within the respondent's Lincolnshire Safeguarding Policy (extract attached to the claimant's witness statement), two key roles are identified to whom safeguarding issues should be reported; a "designated senior manager" and a LADO. There is also reference to a "named senior officer" but that role has the responsibility to ensure that the correct procedure is followed.

40. Ms Balchin's evidence, which we accept, was that in answering the question around safeguarding, she was looking for the candidate to understand, among other things, that in the absence of anyone else to whom the safeguarding matter could be reported, the matter must be reported to the LADO.

41. The claimant's evidence changed during the hearing on this point. The claimant accepted that the interview notes were completed contemporaneously with the interview. She disputes that the notes are accurate. In her oral evidence the claimant said that at interview she accepted that she did not mention the LADO role, but she says she mentioned "going externally" which, she says, was meant to be a reference to the LADO. There is no mention of "going externally" in either set of interview notes. In the interview notes for NW, in answer to the same question, NW states that she would highlight the concern to managers, "report", and if there was no manager she would "go to safeguarding" which Ms Balchin understood to be a reference to the LADO. We have no reason to doubt that is what the reference means.

42. When the claimant was cross-examining the respondent's witnesses, she changed her approach from saying that she had talked about going externally, which had been her own oral evidence, to asserting that she had referred to the "designated manager". This arose only after we had looked at the respondent's safeguarding policy which refers to that role (although that is different from the LADO role). I had to remind the claimant that she could not put to the witnesses that she, the claimant, had referred in her interview, to the designated manager as that was not in fact her own evidence.

43. The other key difference between the answer given by the claimant and NW was around the need for a written report. There is no reference to this need in the claimant's response, but as stated above, this is one of the first things mentioned by NW. In her oral evidence the claimant said she did refer to making a written report.

44. We also noted that in their evidence the respondent's witnesses both stated that early on in the interview it became apparent that the claimant did not want, or would not be able, to fulfil the RCO2 role. It was, they said, clear that the claimant only wanted to work nights and that she could only work on a day shift if she was given 6 weeks' notice so that she could organise childcare. The RCO2 role is a mixed shift role, so the successful candidate would work days, nights and weekends depending on the specific shift pattern. We shall return to this point below.

45. In the interview notes Ms Balchin noted the claimant's answer to question 1 as follows [122]:

> *"I went back to work after having a baby. I am doing night shift for an agency. It is better for me to do night shifts."*

46. The final question is supplementary and is only to be asked if during the interview there were concerns, and it is clear from Ms Balchin's notes that this was the case as in the final supplementary question she revisited the working pattern issue [131]. She notes the claimant as stating:

> *"Shifts – 6 weeks notice…Would be better RCO1 night shifts"*

47. The relevant part of Ms Partidge's notes for question 1 [134] states:

> *"Care sector – elderly – night shifts, full time fits better with childcare for me"*

48. She did not make any notes on the final, supplementary question.

49. The notes are entirely consistent with the respondent's witness statements and the answers they gave both to the claimant's questions and those from the Tribunal.

50. Ms Balchin also said in evidence, that since it was clear that the claimant could not take up an offer of the RCO2 post, even if it was made, because she wanted to work night shifts, and as this happened at an early stage in the interview, the claimant was asked if she wished to continue the interview. She said she did. The claimant did challenge part of this evidence, stating that she did not say she could or would only work night shifts, however, and she did not cross-examine or contradict Ms Balchin's evidence that she was asked if she wanted the interview to continue after the first question was dealt with.
51. We can imagine that there were perhaps crossed wires over the shift issue. The claimant says that her reference to a 6 week period to arrange childcare, was a reference to a period needed before she could start work in the RCO2 role. As we have set out above, Ms Balchin and Ms Partridge understood the

claimant to say that she wished to work nights, and that she could only undertake a day shift with 6 weeks' notice. That is at best evidence of a misunderstanding.

52. The claimant did not take issue with any of the other notes of her interview although she made a general assertion that the notes were incorrect. The claimant did not raise any concerns about how she was treated during her interview.

53. After the interview, both interviewers went through the comments they had noted on the interview sheets and scored the answers to ensure consistency. In the event, the claimant scored 22, NW scored 28. The claimant scored 2 for the safeguarding answer which means that even if she had scored 4 or 5, NW would still have been the better candidate. NW scored 4 for that question.

54. Turning to feedback, we first note that Ms Balchin's evidence on this point was first that she gave the claimant feedback at the end of the interview. The claimant did not contradict this and did not cross-examine Ms Balchin on her evidence on this point, and therefore we accept that feedback had been given.

55. However, the respondent's Policy is clear that if feedback is requested, it should be given. Ms Balchin accepts now that the claimant did email the respondent and ask for feedback and that she, Ms Balchin, failed to respond. In her statement Ms Balchin says at pargraph 27:

> *"I thought she had received [feedback] during her interview…"*

56. Given the above, Ms Balchin accepts that she was wrong not to provide further feedback following the claimant's formal request.

57. We have referred above to the claimant's strongly held feelings about how she believes she was treated. She said that she was treated in a way that was "exclusionary" and "dismissive". She said that she had been "constantly belittled", she not only accuses Ms Balchin and Ms Partridge of direct race and religious discrimination, she concludes that the respondent is institutionally racist. But we also note that in her answers to Mr Middleton, she said that she reached these conclusions "because of the way I was treated afterwards". Upon listening to some of her preamble to her cross-examination questions, and to her submissions, it seems to us that the claimant was very upset that the respondent did not settle the case before the hearing. She said in submissions that she felt "bullied", "victimised", "made to feel a nuisance", made to feel "lesser that anyone else" and that there was an unfair process. It was clear that she was talking about the early conciliation process and the procedure leading up to the final hearing. We conclude that because, other than a disagreement over the claimant's answer to the safeguarding interview question, a potential disagreement or possibly a misunderstanding about what shifts the claimant could or would work, and the feedback issue, nothing else arose at the relevant time to give the claimant any reason to feel as strongly as she clearly does, or if it did, she neither raised it in her witness statement nor put it to the respondent's witnesses.

58. We turn then to our conclusions. We remind ourselves that it is for the claimant to prove, on the balance of probabilities, facts from which we could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful. We also remind ourselves that the outcome at this stage of the analysis will usually depend on what inferences it is proper to draw from the primary facts we have found given that there is rarely direct evidence of direct discrimination.

59. The key facts we find arising from the initial findings of fact and the discussion above are as follows:

    a. There is no evidence or even any suggestion that either of the respondent's witnesses knew the claimant's religion, and this was not put to the respondent's witnesses by the claimant. Again we accept that if the claimant had been wearing a head scarf her religion may have been presumed;
    b. There is no evidence that the respondent's witnesses knew that the claimant identified as "of South Asian descent" although we accept that she may have been perceived as "Asian". Again this was never put to the witnesses;
    c. The claimant had not seen anyone else's interview nor their interview notes before concluding that she had been the subject of unlawful discrimination. She maintained that she had been discriminated against even after she became aware that she was not the highest scoring candidate;
    d. The claimant's case amounts to an assertion that she had the skills and experience to undertake the RCO2 role but was not appointed, and that this is evidence of unlawful discrimination, however, she does not seem to have considered the possibility that notwithstanding that a) she did not do as well as she recalls at interview and b) even if she had, she was still not the best candidate. Further, at no point in the hearing, even in submissions, did the claimant assert that she was the best candidate;
    e. Even if the claimant had got the best score (5 marks) on the disputed safeguarding question, she would still not have been the best candidate. Indeed, in order to overtake NW's score the claimant would have to have scored 4 on every question save for one on which she would have had to have scored 5. NW did not score 5 on any question;
    f. The claimant was given feedback at the end of the interview albeit she was not given further feedback when she emailed to ask for it.

60. In our judgment, looking at the evidence and the inferences we can draw from it, the respondent ran a careful selection process. The same process was applied to all candidates. The claimant's responses to the interview questions were noted and the documents, being contemporaneous are given significant weight. We accept the interview notes are not verbatim, but they are consistent. There is nothing in the notes to indicate, or from which we can infer, unlawful discrimination.

61. On that basis we find that the claimant has failed at the first stage and has not shifted the burden of proof to the respondent. For that reason her claims fail. However, even if we are wrong about that, given the respondent's evidence we

find that they have shown that there was no unlawful discrimination by the respondent, Ms Balchin or Ms Partridge in the process they followed to recruit to the RCO2 position at The Beacon, nor in the decision not to appoint the claimant. In short, she simply was not the best candidate on the day. In relation to Ms Balchin's failure to provide post-interview feedback we find that was an oversight. Feedback had been given at interview and there was no evidence from which we can conclude or infer that Ms Balchin deliberately refused to give further feedback post-interview because of either race or religion. In short, the respondent has met the burden on it to prove, on the balance of probabilities, that the treatment the claimant complains about was in no sense whatsoever because of either race or religion. For those reasons the claims fail in any event.

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Employment Judge Brewer

Date: 18 March 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Note
Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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