EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Atanda	**v**	**The Royal College of Paediatrics and Child Health**

Heard at: London Central
On: 17 – 20 January 2017

Before: Employment Judge Hodgson
Ms K Church
Mr S Ferns

Representation
For the Claimant: in person
For the Respondent: Mr D Mason, counsel

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on 4 June 2016 the claimant brought a claim of direct discrimination.

The Issues

2.1 On the first day of the hearing we considered the issues. The claimant alleged direct sex discrimination by the respondent's decision to refuse his application for promotion on 15 January 2016.

2.2 We noted that the issues had been considered at a previous case management hearing when the comparator was identified as Mrs Williams, the person appointed. The claimant confirmed that it was his view that Mrs Williams was less well-qualified, and less suitable for the role. It follows that he considered her material circumstances to be different to his own. It follows that as it is his case that her circumstances are materially different, she cannot be the comparator. We agreed that there should be hypothetical comparator.

Evidence

3.1 We heard from the claimant, C1.

3.2 For the respondent we heard from Ms Louise Frayne, R2; and Mr James Clark, R3.

3.3 In addition the respondent relied on the written statement of Mrs Alison Williams, but chose not call her.

3.4 We received a bundle, R1, from the respondent and a supplementary bundle, C2 from the claimant.

3.5 The respondent had served statements from Ms Monika Ma and Ms Julia O'Sullivan, but elected not to rely on them.

3.6 Both the respondent and the claimant filed skeleton arguments in support of their oral submissions.

Concessions/Applications

4.1 The claimant had obtained witness orders for Ms Monika Ma, Mrs Alison Williams, and Mrs Emily Gooday.

4.2 Mrs Williams objected to attending, as she had recently given birth. Mrs Gooday also objected and she relied on a doctor's report to the effect that she was suffering from postnatal depression. It was said she was not in a fit state to give evidence.

4.3 Both witness summonses were set aside by Employment Judge Pearl. The claimant elected to proceed without those witnesses.

4.4 The claimant elected not to call Ms Ma.

The Facts

5.1 The Royal College of Paediatrics and Child Health employed the claimant on 3 August 2015, as an exams scenario/committee administrator in the education and training division.

5.2 The claimant was employed as a grade 4 member of staff. On 7 December 2016, the respondent advertised the position of recruitment and careers coordinator, this was a grade 6 post. It was advertised internally and in the Guardian, Charity Jobs, jobs.ac.uk, and Linkedin.

5.3 The post became available, as the incumbent, Mrs Emily Gooday, left. The closing date for applications was 17:00, 7 January 2016. At least two

internal applicants applied for the post: Ms Alison Williams and the claimant. We do not know if any other internal candidate applied. There were eight applicants in total. Three were shortlisted, including the claimant and Ms Williams.

5.4 The interview proceeded on 15 January 2016. The external candidates did not attend. The panel consisted of Mr James Clark, recruitment and careers coordinator (chair of the recruitment panel); Ms Emily Gooday, (the then current holder of the post); and Ms Robinson, assistant director (education and training).

5.5 The panel should have been appointed in accordance with the respondent's policy on recruitment and selection (R1/91). The selection and recruitment policy provides at 12.1 that the selection panel will consist of trained internal assessors. No party has defined what is meant by a trained internal assessor. It is common ground that none of the panel was a trained assessor.

5.6 We have limited detail of the training given to each member of the panel. It is clear that Mr Clarke, at least, had training in competency based interviews from the respondent, as this is recorded in his training records.

5.7 As to why there was a failure to ensure that there were any trained internal assessors, we have received no explanation.

5.8 It is clear that a structure was followed. The original advert identified that there would be a requirement for a presentation. Specific questions were set, with regard to the job description and the person specification. The questions were directed at identifying relevant characteristics of candidates. There has been no suggestion that the basic framework, which revolves around a competency based interview, was inappropriate and unfair.

5.9 It has been suggested that questions were repeated from a previous round. It is apparent that there are generic questions used by the respondent. However, individual questions were selected and adapted.

5.10 All panel members received a pack which included the relevant questions and which required scores from each panel member for each question.

5.11 Mr Clarke confirmed both candidates gave presentations and that each was asked the same questions. Mr Clarke made notes for each answer and gave each a mark. He confirmed that, to the best of his knowledge, the other two panel members did the same.

5.12 Ms Williams was part of the team managed by Ms Gooday. It is common ground that they were friendly. Unknown to Mr Clarke, Ms Gooday had, prior to the interview, commented on Ms Williams preparation for the presentation. Mr Clarke accepts that Ms Gooday should not have done this, as it was inappropriate. However, he had no knowledge of the discussion at the time of the interview. We have no evidence on which we

could find Ms Robinson had any knowledge that Ms Williams and Ms Gooday had discussed the presentation. We have no evidence on which we could find that Ms Gooday discussed any questions with Ms Williams, or offered any form of coaching, other than assistance with the presentation. We do not know how much assistance was given with the presentation.

5.13 At the interview, Ms Williams was marked higher than the claimant for her presentation. She also received, from each of the panel, higher marks in relation to the questions. The scores for the questions appear to be out of 36. The scores were as follows (we give the claimant's first in each case): Mr Clarke (22/31.5); Ms Robinson (24/33.5); and Ms Gooday (22.5/33.5).

5.14 It can be seen there was broad consensus.

5.15 Mr Clarke gave direct oral evidence. His evidence was to the effect that the claimant was considered appointable, but there was a clear need for training. He found that Ms Williams was a better candidate, who did not need training: her presentation was better; her answers to questions were better.

5.16 Mr Clarke denies having any lobbying, or request, from Ms Gooday that he appoint Ms Williams. We accept his evidence that he had no idea that Ms Gooday had assisted with the presentation. We accept his evidence that in no sense whatsoever did he discuss who should be appointed, other than during the legitimate discussion of performance at interview. He knew of no attempt to influence Ms Robinson, and we find there is no evidence that Ms Robinson was influenced by Ms Gooday, other than through the legitimate process of discussion following interview.

5.17 We have not heard from Ms Gooday. We have not heard from Ms Robinson. We do have what appear to be their interview notes. Mr Clarke is able to say that he believes they are the notes. We have no reason to believe that they are not the notes of either Ms Robinson or Ms Gooday.

5.18 Ms Williams was offered the job on 15 January 2016. She accepted the position. That evening, Ms Gooday left. She invited members of the department out for a leaving drink. The claimant attended.

5.19 At a training event on 29 January 2016, the claimant had a discussion with a colleague. The claimant failed to identify that colleague to us. He alleges a colleague told him that Ms Ma, and Ms Gooday, wanted "their girl," Mrs Williams, to take over from Ms Gooday. He alleges there was gossip to the effect that Mr Clarke was unpopular and they wanted to avoid having a similar person appointed into Ms Gooday's old role. It was alleged that Mrs Williams, Ms Ma, Mrs Gooday, after the leaving drinks, went out "raving exclusively later that night to celebrate Ms Williams appointment." It was also alleged that Mr Clarke did not have a say in who was appointed.

5.20 None of the allegations made by the colleague about Ms Ma and Mrs Gooday can be found as a fact. It is all hearsay about the opinion evidence of an unidentified person. What is clear is the claimant formed the view that there had been impropriety in the recruitment process. He formed the view that he had been discriminated against on grounds of sex.

5.21 The claimant then started an informal process whereby he complained informally to his line manager, Mr Crane. He complained on three separate occasions. The extent and content of the complaint is unclear. It is accepted that Mr Crane should have done more and should have escalated the matter. He did not. He was later criticised by the respondent for his lack of activity.

5.22 The claimant was frustrated and therefore started a specific appeal under the respondent's recruitment and selection policy. This provided for a single stage of appeal for complaint about a recruitment exercise. The matter was investigated by Ms Louise Frayne, head of HR. She interviewed a number of witnesses including the claimant, Ms Williams, Ms Crane, and Mr Clarke. She did not interview Ms Gooday. She did not interview Ms Robinson. Ms Robinson was unavailable, she was on a sabbatical for at least a year and was not in contact. Ms Frayne chose not to interview Ms Gooday, as she had left the college. She sent her findings to the claimant on 20 May 2016.

5.23 We will consider further factual matters when dealing with our conclusions.

The law

6.1 Direct discrimination is defined by section 13 Equality Act 2010.

Section 13 - Direct discrimination

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

(2) ..

6.2 The burden of proof is found at section 136 Equality Act 2010

Section 136 Equality Act 2010 - 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.

…

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

(a) an employment tribunal;
(b) …

6.3 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

Annex

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

> **(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.**
>
> **(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.**
>
> **(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.**
>
> **(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.**
>
> **(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.**

Conclusions

7.1 It is the claimant's case that he was not appointed because he is a man.

7.2 We discussed in detail the nature of the comparator. At the preliminary hearing on 4 July 2016, Employment Judge Segal, QC had identified Mrs Alison Williams as the comparator. It was clear on the claimant's case that he alleged he was more qualified, and more suitable for the role; therefore, Mrs Williams could not be the comparator. It was agreed that the actual comparator was hypothetical, and was a woman in the same material circumstances as the claimant. The relevant circumstances included qualification, experience.

7.3 There are occasions when it is not necessary to consider the burden of proof as a two-stage process, but this is not one of those occasions.

7.4 It is important to identify whether there is any factual matter from which we could conclude that the respondent contravened the relevant provision (direct discrimination). We remind ourselves that it is not enough to show a difference in sex and a difference in treatment. We also remind ourselves that unreasonable treatment will not of itself prove discrimination. We acknowledge that a failure to give a proper explanation for unreasonable treatment can lead a tribunal to infer discrimination. We note the guidance of Gibson LJ in **Bahl v Law Society** [2004] IRLR 799, paras 100-101:

> **100. At this point, it is appropriate to refer to Anya, a decision of this Court. Its ratio takes matters no further than King and Zafar, both of which are cited in the judgment of the Court given by Sedley L.J. However, the judgment contains an obiter passage which has attracted debate in a**

number of cases including the present appeal. It reads ([2001] ICR at p. 857A):

> **" As Neill LJ pointed out in King…., such hostility [i.e. unreasonableness] may justify an inference of racial bias if there is nothing else to explain it: whether there is such an explanation…..will depend not on a theoretical possibility that the employer behaves equally badly to employees of all races but on evidence that he does."**

It has been suggested, not least by Mr. de Mello in the present case, that Sedley L.J. was there placing an important gloss on Zafar to the effect that it is open to a tribunal to infer discrimination from unreasonable treatment, at least if the alleged discriminator does not show by evidence that equally unreasonable treatment would have been applied to a white person or a man.

101. In our judgment, the answer to this submission is that contained in the judgment of Elias J. in the present case. It is correct, as Sedley L.J. said, that racial or sex discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it. However, the final words in the passage which we have quoted from Anya are not to be construed in the manner that Mr. de Mello submits. That would be inconsistent with Zafar. It is not the case that an alleged discriminator can only avoid an adverse inference by proving that he behaves equally unreasonably to everybody. As Elias J. observed (para. 97):

> **"Were it so, the employer could never do so where the situation he was dealing with was a novel one, as in this case."**

Accordingly, proof of equally unreasonable treatment of all is merely one way of avoiding an inference of unlawful discrimination. It is not the only way. He added (ibid.):

> **"The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason."**

We entirely agree with that impressive analysis. As we shall see, it resonates in this appeal.

7.5 It is necessary to consider, first, whether there was unreasonable behaviour; the specific behaviour must be identified? Second, is the unreasonable treatment connected to the specific allegation of discrimination? Third, if so, could a failure of explanation lead to an inference of discrimination? If so, has the respondent explained the unreasonable behaviour? Even if there is no explanation for the unreasonable treatment, has the respondent established an explanation for the specific allegation of discrimination? It is important to bear in mind two matters: first, the tribunal is deciding specific allegations of

discrimination;[1] second, the respondent is only obliged to give an explanation for the specific alleged act of discrimination.

7.6 It is not any unfair treatment which can cause the burden to shift. The allegation of unfair treatment must be considered in context. The alleged unreasonable treatment must be identified carefully. There must be some basis for saying that the unreasonable treatment can assist with the question of whether there is more than a difference in protected characteristic and a difference in treatment. The more remote and unconnected that unreasonable treatment from the allegation of discrimination, the less probative its value: it is not all unreasonable treatment that will require an explanation.

7.7 It may not be necessary to give explanations for all alleged unreasonable behaviour two examples may be illustrative: first, when the unreasonable behaviour is not sufficiently connected to the allegation of discrimination such that no explanation is called for; second; when the explanation for the allegation of discrimination is established in any event. If it were otherwise, a claimant could point to any alleged unreasonable behaviour, of any sort, at any time, by any person, and claim a failure of explanation must prove discrimination.

7.8 The claimant relies on alleged factual circumstances to turn the burden. They can, broadly, be divided into four separate areas: unreasonableness; the interactions between members of staff; the competency of Ms Williams; and breach of the EHRC Code of Practice on Employment (2011). We will take each of those in turn.

Unreasonableness

7.9 The claimant relies on a number of alleged factual circumstances said to constitute unreasonableness. It is said the respondent should not have used Ms Gooday on the panel. It is said that the panel should have been made up of trained internal assessors. It is said Ms Gooday should not have coached Ms Williams on her presentation. It is said that Ms Gooday should not have given Ms Williams advance warnings of the questions. It is said that Mr Crane's failure to progress the grievance was unreasonable.

7.10 We consider each of these allegations in turn.

7.11 We find it was not unreasonable to use Ms Gooday on the panel. She had relevant expertise, and her input was useful. It follows that there is no unreasonableness to explain.

7.12 It is clear that there was some breach of the respondent's own policy by failing to ensure the use of internal assessors on the panel. We have no proper evidence about who selected the panel, or when. There is no

[1] See paragraph 9 of *Anya v University of Oxford and another* 2001 IRLR 399, CA (per Sedley LJ).

evidence to suggest that the individual panel members chose themselves. If follows that a decision was made by someone else. The person responsible for selecting the panel failed to have specific regard to the respondent's own procedure. That in itself tells us nothing of whether the panel discriminated in the way it approached its decision. It cannot be assumed that a failure of process leads to a panel which is bound to discriminate. It is possible to suggest that there was unreasonableness in failing to observe the respondent's own policy. However, it is not necessary to have trained assessors to avoid discrimination: either it was avoided or it was not. There is no specific allegation that the constitution of the panel itself was a discriminatory act. The failure to provide a full explanation about the panel's selection provides no evidence from which we could infer the panel itself made a discriminatory decision. In this case, the failure of explanation cannot found an inference of discrimination.

7.13 The next point relied on is Ms Gooday's coaching of Ms Williams on her presentation. There is no doubt that offering some assistance, at whatever level, was inappropriate. We have not heard from Ms Gooday. We note there is no evidence on which we could find that the other panel members had any knowledge at all of this coaching.

7.14 Offering advice to one candidate and not to another is unreasonable. This gives some evidence about Ms Gooday's involvement, and about her approach. There is no direct allegation that the giving of the advice was in itself an act of discrimination. Nevertheless, it may be seen as an act of favouritism. It may be reasonable to argue that there is a direct connection between Ms Gooday's giving advice, and Ms Gooday's decision. It may have been part of a process whereby Ms Gooday either consciously or subconsciously favoured Ms Williams. This leads to a question as to whether that act had anything to do with Ms Williams' sex. There is a difference in treatment. There is a difference in sex. As regards the actions of Ms Gooday, it may be possible to say that her unreasonable conduct in coaching Ms Williams could call for an explanation; even though the unreasonable treatment is not directly concerned with the specific allegation, it does concern overall treatment of Ms Williams in the general process leading to her appointment. It follows that whilst there is no specific allegation that coaching Ms Williams was in itself an act of discrimination, it could be argued as unreasonable treatment that calls for an explanation, the absence of which may lead to an inference of discrimination.

7.15 That said, there is no allegation before us that mere coaching was itself discrimination. In order for the actual decision not to appoint the claimant to be discrimination, it will be necessary to consider the effect of any act by Ms Gooday on the actual decision not to appoint.

7.16 We note that the failure to give an explanation for Ms Gooday's coaching does not prevent the respondent giving an explanation for the decision not to appoint the claimant. We will come to that explanation in due course.

7.17 The next allegation of unreasonableness is that Ms Gooday gave Ms Williams advance notice of the interview questions. There is no evidence on which we could find that Ms Gooday gave Ms Williams advance notification of the questions. It follows this factual allegation fails, and the claimant has failed to establish the alleged unreasonableness.

7.18 The failure of Mr Crane to progress the grievance is unreasonable behaviour. However, there is no basis for saying this was in any sense connected to the specific allegation of discrimination before us (i.e., the failure to appoint the claimant). Mr Crane's action happened afterwards and was entirely his individual failure. There is no basis for saying that it was illustrative of a more general failure. No failure of explanation for Mr Crane's act could lead to an inference that the failure to appoint was an act of discrimination. Mr Crane's failure is not relied on as an act of discrimination and it takes the matter no further.

7.19 It follows that there is at least some possibility of arguing, in relation to Goody's actions, that was unreasonable treatment that calls for a explanation.

Interactions between members of staff

7.20 The claimant points to the following factual matters: Mrs Williams is popular in the team; there was reference to "growing our own" employees; Ms Ma (a colleague not involved in the decision) is alleged to have had a number of conversations about the recruitment process and expressed a desire for Mrs Williams to be appointed; it is alleged that a number of employees referred to "wanting their girl"; by Ms Ma, Mrs Williams, and Mrs Gooday celebrating on the evening Mrs Gooday left; and by Mr Clarke telling a number of individuals in the team that they must not discuss the upcoming interview process.

7.21 The tribunal has no evidence on which it could find that anybody said anything to the effect that they wanted their girl or had got their girl. If any such comments were ever made, the context is not set out.

7.22 Any reference to "growing our own" is not in any sense inappropriate. The respondent has a policy of developing its own employees' careers. Training needs are identified and training is given to facilitate and encourage promotion. In this context "own" simply means employees, of which the claimant was one.

7.23 It is inevitable that there will be discussion in a team about who will be promoted and who will get a job. There is no evidence of anything untoward. The suggestion that Mr Clarke should not have intervened to limit such discussion is puzzling. His intervention was not inappropriate.

7.24 Colleagues going out together to celebrate an appointment is not unusual. It is not evidence that could shift the burden of proof. Similarly, the fact that Mrs Williams is popular is of no significance.

7.25 When we stand back and consider the totality of the evidence, it is clear that Mrs Williams was popular with her team. That, however, is no guarantee of appointment. There is no fact identified concerning the interactions within the team on which we could find discrimination.

Mrs Williams's competency

7.26 The claimant's argument has been premised on two incompatible assertions. First, he argues that Mrs Williams was unfairly advantaged in the interview process by having advance warning of questions and having been coached on her presentation. This would suggest that she would be unfairly advantaged and would do better at interview. Second, he argues his performance at interview was better than Mrs Williams. These arguments are incompatible. The claimant also alleges Mrs Williams was not sufficiently competent such that she should not have been selected for interview at all, and in any event did not have core competencies.

7.27 As to the first point, Mrs Williams did have some assistance with her presentation. Her presentation was marked higher than the claimant's. It remains the claimant's case, however, that Mrs Williams presentation was demonstrably poorer than the claimant's, and that we should be able to identify that from the slides she produced in support.

7.28 We have considered Mr Clarke's evidence. We accept that he genuinely believed that Mrs Williams made a better presentation. It is at least arguable that Mrs Williams was advantaged in relation to the presentation.

7.29 Mrs Williams also scored higher on all the questions at interview. There is no evidence she had coaching on the questions.

7.30 The claimant's alternative argument is that Mrs Williams should not have been appointed at all. This is based on two main points. The claimant asserts that line management experience was an essential requirement for the job; however, we find this is not made out on the evidence. It is fair to say that the key responsibilities under the job description referred to line management, but that is not an essential criteria. The person specification refers to needing an "Appropriate degree/management/postgraduate qualifications or relevant, equivalent experience." It is clear that Mrs Williams satisfied that requirement.

7.31 As to the essential skills and knowledge required for the role, there is reference to ability to lead, manage and motivate a team. That does not require previous line management experience. It follows that the claimant is mistaken: line management was not an essential criterion.

7.32 The second argument is that Mrs Williams application showed a lack of attention to detail. The application was dated with the wrong year. It should have read 3.1.16, but read 3.1.15. We accept Mr Clarke's evidence that this was not material to the selection process.

7.33 We reject the claimant's arguments that Mrs Williams was demonstrably not competent. It is clear that she was competent for the role.

Code of practice

7.34 The claimant has referred to the EHRC 2011 Code of Practice. We are obliged to take this into account where it is appropriate and relevant. We should consider briefly the specific elements of the code he has referred to.

7.35 Paragraph 3.6 notes that it is not possible to balance unfavourable treatment by offsetting it against favourable treatment. We accept that, but there is no basis on which we could find this occurred in the selection process.

7.36 The claimant notes paragraph 3.14 which records that an employer's motive is irrelevant. We also accept that. It does not assist us in this case.

7.37 The claimant referred specifically to chapter 16 which deals with avoiding discrimination in recruitment. He refers to 16.20 which emphasises the importance of advertising the post. This post was advertised appropriately. There were external adverts.

7.38 He refers to 17.91 and the need for an employer to have appropriate grievance and disciplinary procedures. This is not a matter we need to explore. It is clear there were procedures. It is possible those procedures could be criticised. It tells us nothing of the reasons for Mrs Williams's selection ahead of the claimant.

7.39 The claimant refers to 17.94, this is another point concerning grievances. It may be that Mr Crane can be criticised. However, it is no part of the claimant's case that any failure of Mr Crane tells us anything about the reason for the decision not to appoint the claimant. Mr Crane may have been unreasonable, but this is an example of unreasonableness which has no sufficient connection to the allegation of discrimination. Any failure of explanation is not a matter from which we could conclude the decision not to select the claimant was an act of discrimination.

7.40 The claimant refers to 18.23 of the code. This emphasises the need to monitor and review an equality policy. We accept Ms Frayne's evidence. The respondent monitors and reviews every three months diversity within the workplace and also considers the outcome of the recruitment processes. It is clear that monitoring takes place.

7.41 We do not consider there is any material breach of the code from which we could infer that the failure to appoint the claimant was an act of discrimination.

Does the burden shift?

7.42 When we stand back and look at all these facts together, we take the view that there is an argument that the failure to explain why Ms Gooday offered Ms Williams assistance with her presentation may suggest that there was discrimination in Ms Gooday's approach to the decision not to appoint the claimant. It is at least arguable that the burden shifts; this depends on when a failure of explanation for potentially unreasonable behaviour can lead to a finding of discrimination. We consider this further below. Given that it is arguable that the burden shifts to the respondent, we will consider the explanation.

The explanation

7.43 Has the respondent proved, on the balance of probability, by reference to appropriate cogent evidence, that the decision to appoint the claimant was not an act of direct sex discrimination?

7.44 We have not had oral evidence from all three members of the panel. However, we have seen the notes of all three members of the panel. We accept Mr Clarke's evidence that he marked the questions in accordance with the competencies. He found Ms Williams performance better than the claimant's in relation to her presentation and her answers to the questions. He, therefore, marked Mrs Williams higher both on the presentation and on the questions. We accept his evidence that in no sense whatsoever did he discuss with Mrs Gooday, except in the context of a legitimate discussion following interview, who should be appointed. His view was formed independently and was not materially tainted by any possible discrimination. There is no basis for saying that he either consciously or subconsciously discriminated.

7.45 It is also apparent that Ms Robinson appears to have been equally untainted. There is no evidence to suggest that she could have been influenced by Miss Gooday inappropriately, other than indirectly through Ms Williams giving a better presentation. For the reasons we will come to, any increase in the score given for the presentation was itself trivial.

7.46 We accept we have not heard from Ms Robinson. We have to decide whether the explanation is proven on the balance of probability. That does not necessarily require every member of the panel to be called to give evidence at a tribunal. As there is no evidence at all to suggest that Mrs Robinson did not apply her mind to scoring properly, and there is evidence of a systematic approach to marking, we accept the explanation, on the balance of probability, that she simply selected the best candidate based upon the competency interview and presentation.

7.47 It follows that there is a clear explanation, untainted by any discrimination, for why Mr Clarke and Ms Robinson appointed Mrs Williams. They appointed her because she was the better candidate.

7.48 The position is slightly different when it comes to Ms Gooday. It is clear that the main allegation is against her. It is the claimant's case that Mrs

Gooday discriminated. It is his case that in some manner she influenced the panel.

7.49 There is no doubt that she was foolish in discussing the presentation with Mrs Williams. She should not have done it. We have no evidence from her from which we could find, for example, that she simply assisted because they were friends. Although this seems a real possibility, we do not have direct evidence to prove it.

7.50 All three members of the panel gave similar marks for Mrs Williams and for the claimant. There is evidence that Ms Gooday made appropriate notes in relation to each question. There is sufficient evidence to say, on the balance of probability, that she gave appropriate marks. There is no indication that her marking of the questions was distorted in any sense whatsoever because of the claimant's sex. When considering the balance of probability, it is appropriate to have regard to all of the evidence; the fact that Ms Gooday's marking was consistent with the others is evidence that she gave appropriate marks based on the answers given.

7.51 It is possible that her intervention inadvertently led to Mrs Williams giving a better presentation. However, that in itself was not enough to affect the outcome.

7.52 We remind ourselves that the claimant's complaint is his being refused the promotion. This was a three-member panel. Appointment would be by majority decision. There is clear evidence that two members of the panel were not tainted by discrimination at all. The appointment would have happened in any event. There is no sufficient evidence that Ms Gooday influenced the panel improperly. Only the coaching on the presentation could have led to a distortion of the outcome, but that score was marginal and did not affect the outcome. It was in itself, in the overall context of the appointment, trvial. There is no evidence on which we could find Ms Gooday marked the claimant down and marked Mrs Williams up. There is no evidence on which we could find that her approach to marking either the presentation, or the answers given, was discriminatory. The evidence that we have is that her marking was consistent with the others, and there is no evidence from which we could conclude that the marking itself was less favourable treatment of the claimant.

7.53 There is no additional allegation against Ms Gooday for any of her actions.

7.54 There is a general criticism of Ms Gooday for coaching Ms Williams on her presentation, but this is not an allegation of discrimination. The claimant could have alleged, e.g., the coaching was an act of discrimination. If he had, Ms Gooday would have been on notice to produce an explanation. We may then have examined her explanation as part of our decision, but that process is not engaged because there is no allegation.[2] As Ms Gooday marked the claimant's interview properly, this is an explanation

[2] See *Barts Health Trust v Kensington-Oloye EAT 137/14* (in particular paragraphs 33 and 43).

not tainted by discrimination, and it is established on the balance of possibility.

7.55 In reaching our decision, we have considered when it is appropriate to find a failure of explanation for alleged unreasonable behaviour can lead to an inference of discrimination. We wish to make some general observations. A difficulty may arise when the unreasonable behaviour relied on is not the alleged discriminatory treatment itself. In those circumstances, it does not necessarily follow that a failure of explanation for the unreasonable behaviour will lead to a finding of discrimination.

7.56 When the specific allegation of discrimination is also said to constitute unreasonable behaviour, there is no difficulty. The respondent is on notice that it may need to produce an explanation. If there is a failure of explanation for the unreasonable behaviour, it may be appropriate to draw the inference. It is appropriate because the respondent is on notice that it must produce an explanation based on cogent evidence.

7.57 Even if the unreasonableness is not fully explained this is not determinative: it is still open to the respondent to produce an explanation for the treatment.[3] The important point is that the respondent knows what allegation the explanation must address.

7.58 The position becomes more difficult when there is no specific requirement pursuant to section 136 Equality Act 2010 to provide an explanation. This may occur when the allegation of unreasonable behaviour is not the alleged discriminatory treatment. These situations can be thought of, generally, as allegations of related unreasonable behaviour. A failure to explain related unreasonable behaviour is not a failure to explain the material allegation of discrimination. Section 136 Equality Act 2010, the reverse burden, does not require related unreasonable behaviour to be explained, the explanation needed is for the specific allegation of treatment that contravened the act, and it is clear that there can be such an explanation, even if there is unreasonable treatment. Is it appropriate to draw an inference from a lack of explanation for related unreasonable behaviour? Arguably, it is not.

7.59 Nevertheless, we have taken the view that it may be appropriate to draw an inference from related unreasonable behaviour. We have suggested there may be occasions when there is such a sufficiently close relationship that the lack of explanation may lead to an inference being drawn, but this does lead to unwelcome uncertainty.

7.60 It seems to us that examples of related unreasonable behaviour fall into three broad scenarios. First, the unreasonable behaviour may be said to have led to some discriminatory act or decision which, when relied on later, determines the ultimate decision. Here the decision-maker may have no idea that his or her decision relies on, and is tainted by, a previous discriminatory act. This may be an example of unconscious

[3] See *Bahl* above.

discrimination.[4] Second, the unreasonable conduct may have some influence on the ultimate decision, but it may not be determinative. (Mr Atanda's case could be an example, if it is alleged the coaching was unreasonable, influenced the presentation, and thereby had some indirect influence.) Third, it may be some wholly unrelated unreasonable behaviour, but nevertheless is said to show some form of general attitude or disposition. (Mr Crane's conduct is an example.)

7.61 The difficulty in relation to all three examples is that no explanation is required by section 136 Equality Act 2010, for the related unreasonable conduct. The only requirement for explanation is for the alleged discriminatory treatment. In principle, therefore, it may be inappropriate to draw an inference from a lack of explanation for alleged related unreasonable behaviour which is not specifically advanced as an allegation of discrimination. The reason for this is obvious: the respondent is not on notice of the need to produce an explanation, and should not be criticised for a failure of explanation. It may be that there would be a proper explanation for the unreasonable treatment, which can be supported by cogent evidence, but if adverse inferences are to be drawn against a respondent for failure of explanation, the need to give evidence of the specific explanation must be clear. This will normally require a specific allegation of discrimination.

7.62 It may be that in a specific case, even though the unreasonable behaviour itself is not specifically relied on as an act of discrimination, it may be appropriate to draw an inference from a lack of explanation. We suggest that the connection must be clear and obvious.

7.63 In the first example we have given, whereby it is claimed that the decision-maker relied innocently on a discriminatory act, it may be reasonable to draw an inference from a lack of explanation, but only if the basis for the allegation is clear. Normally, the claimant would be expected to explicitly allege that it was an earlier act of discrimination which determined the ultimate decision.

7.64 In the second and third scenarios, the link between the ultimate decision, and the related unreasonable behaviour may be more tenuous. If will be more difficult to persuade a tribunal in the second and third scenarios that the lack of an explanation for the related unreasonable behaviour should lead to an inference of discrimination.

7.65 Mr Atanda's case, taken at its highest, is that coaching on the presentation was unreasonable. It is accepted there was unreasonableness. It is not alleged that the coaching was, in itself, an act of sex discrimination. Ms Gooday is not on notice to give an explanation. The respondent is not on notice to give an explanation for the coaching. The coaching cannot be found to be an act of discrimination, as it is not pleaded as such.[5] It follows that scenario one cannot be engaged: we cannot find that there was a

[4] We do not have to resolve whether this would be a discriminatory act of the 'innocent' decision maker (see *CLFIS Ltd v Reynolds 2015 EWCA Civ 439*).
[5] See *Barts Health Trust v Kensington-Oloye EAT 137/14*.

prior act of discrimination which was determinative of the ultimate decision not to appoint the claimant.

7.66 It is possible to argue that Ms Williams may have given a better presentation because of the coaching. Scenario two may be engaged. Can we say that the lack of explanation for the coaching undermines the explanation for the decision not to appoint? In this case the clear answer is no. The evidence is that any improvement in the presentation was trivial in the overall decision. The connection between the alleged related unreasonable conduct and the allegation of discrimination is too tenuous. There is not the clear, sufficient, or obvious connection and any lack of explanation cannot turn the burden. It was open to the claimant to say that the decision to appoint was tainted by the coaching because the coaching determined the outcome. In that case, the respondent would have been expected to realise the importance of the coaching allegation and an inference may have been appropriate, but the claimant's case falls far short of this.

7.67 In this case, for the reasons we have given, there is no basis for finding that the claimant was treated less favourably than a hypothetical comparator by not being appointed. It follows we must find that the claim fails.

Employment Judge Hodgson
30 March 2017