EMPLOYMENT TRIBUNALS

Claimant: Mr D Taheri

Respondent: Perry Motor Sales Limited

Heard at: Manchester **On:** 19 and 20 December 2018

Before: Employment Judge Horne
Mr D Wilson
Mr W Haydock

REPRESENTATION:

Claimant: In person
Respondent: Mr A Sugarman, Counsel

Judgment was sent to the parties on 9 January 2019. The respondent asked for written reasons on 3 January 2019. The following reasons are provided accordingly.

REASONS FOR LIABILITY JUDGMENT

Complaints and issues

1. By a claim form presented on 28 February 2018, the claimant raised two complaints:

   1.1. direct discrimination against an applicant for employment because of race, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA"); and

   1.2. direct discrimination against such an applicant because of age, also contrary to sections 13 and 39 of EqA.

2. Both complaints arose out of the claimant's application for employment with the respondent. He was invited to an Assessment Centre, the first stage of which involved a group exercise. Following the group exercise the claimant was told he was unsuccessful in his application and was not given an opportunity to progress to the second stage. In that respect he was treated less favourably than others.

3. The issues that we had to decide were set out in a helpful case management order prepared by Employment Judge Franey following a preliminary hearing on 24 August 2018. At Annex A, paragraph 8, the order stated:

"…the issues for determination appear to be as follows:

(1) Are the facts such that the Tribunal could conclude that in refusing his application for employment the respondent treated the claimant less favourably because of race?

(2) If so, can the respondent nevertheless show that there was no contravention of section 13 Equality Act 2010?

(3) Are the facts such that the Tribunal could conclude that in refusing his application for employment the respondent treated the claimant less favourably because of age?

(4) If so, can the respondent nevertheless show that it did not contravene section 13? The respondent does not rely on the justification defence in section 13(2).

(5) If either of the above complaints succeed, what is the appropriate remedy?"

4. At the start of the hearing the parties confirmed that the list of issues was agreed.

Evidence

5. The parties gave us a hearing bundle which we marked "CR1". In general we read all the documents in the bundle to which the parties had drawn our attention, either in witness statements or orally during the course of the hearing.

6. There were two exceptions. The first related to page 118 onwards. The respondent asked us to read those pages, but the claimant objected. The parties agreed that, to help us reach a decision on that point, the respondent's counsel could summarise the broad nature of the documents, which he did. We ruled in favour of the claimant. Not only did we refuse to read the disputed pages, we also undertook to put (and did put) the respondent's summary of them out of our mind. We gave oral reasons at the time. Written reasons will not be provided unless a party makes a further request in writing.

7. The second exception related to an e-mail thread dated 18 April 2018. Initially there appeared to be no dispute about whether this document should appear in the bundle. When, during cross-examination, Mr Sugarman started asking the claimant questions about the document, the claimant objected on the ground that it was covered by "without prejudice" privilege. Whilst maintaining the respondent's stance that no such privilege applied, Mr Sugarman was content for the tribunal to ignore the document for the purposes of determining whether or not the claim was well founded. Accordingly we put it out of our minds.

8. We heard oral evidence from the claimant on his own behalf. The respondent called Mr Hallam, Mr Buckley and Mr Hughes as witnesses. They all confirmed the truth of their written witness statements and answered questions.

9. We also read the witness statement of Ms Leah Kentish-Beard. At the start of the hearing there was a discussion about whether or not Ms Kentish-Beard should be called as a witness. The respondent was prepared to call her, but only wished to do so if it was necessary. As part of that discussion, the claimant confirmed that he did not challenge Ms Kentish-Beard's evidence, nor would he seek to hold it against the respondent if they did not call her. On that basis the respondent chose not to call Ms Kentish-Beard. Against that background we regarded her witness statement as reliable.

10. That now brings us to the credibility and reliability of the witnesses who did give evidence before us.

11. We will start with the claimant. We decided that we needed to take a cautious approach to the reliability of the claimant's evidence. There were three matters that in our view affected its reliability:

    11.1. The first was that some of the claimant's answers appeared to have been given in a way designed to fit his case more than his recollection. For example, when the claimant was asked why he thought the assessors had taken against him from the start, his answer was that he was a "strong personality" and had asked "pertinent questions" during the initial presentation. In the same vein, he said, "I got the impression that they were looking for sheep and I wasn't one of those sheep". According to the claimant, the respondent "felt he would take a lot of controlling". Apparently as an afterthought, he then added that the respondent also viewed him as older and Middle Eastern. As Mr Sugarman pointed out, it looked as if the claimant had realised at the last moment that his answers had not helped his case and needed correcting.

    11.2. The second point that we had to be wary of was that we found an inconsistency in the claimant's evidence about when he telephoned Ms Kentish-Beard. Initially he told us that he had not done it on the same day as the Assessment Centre and had done so after an email. That piece of evidence appeared to be inconsistent with an email from Ms Kentish-Beard on 21 December 2017 (the day after the Assessment Centre) referring to a telephone call the previous day. Moreover, if there had been no phone call between the claimant and Ms Kentish-Beard the day of the Assessment Centre, then another part of the claimant's evidence could not have been right. He told us that he only contacted ACAS after it had been made clear to him by the respondent that they were not going to reconsider their decision or pay his expenses. It is clear from the email trail that that position had not been made clear in any emails by the time the claimant had contacted ACAS. There must have been a telephone call prior to that time otherwise the respondent could not have outlined that stance. When the claimant was asked about the timing of his contacting ACAS, he changed his evidence to say that he may in fact have called Leah Kentish-Beard on the same day as the Assessment Centre.

    11.3. The third point which we thought did affect his reliability was that he had sent a deliberately misleading CV to the respondent. He sent his CV in support of a job application in 2018 for a position in Burnley. The CV indicated that the claimant was employed by a particular employer up to the present time. At the time of sending his CV, that statement was incorrect. His employment with that employer had ceased in 2017. The claimant described that as a "difference in formatting", in that his CV had been correct at the time he prepared it but he had not updated it. His reason for not updating the CV was that he already felt that he was at a disadvantage by being Middle Eastern and 59 years old and did not want to put himself to further disadvantage by indicating on his CV that he was currently out of work. Although we could sympathise with the claimant's perception that he faced disadvantages in the job market, we could not ignore the fact that he had deliberately chosen not to tell the truth.

12. We turn now to the evidence of the respondent's witnesses. In general terms we found their evidence to be relatively straightforward and we were able to place a good deal of reliance on what they said.

13. The claimant submitted that we should take a contrary view. As a factor affecting their reliability, he pointed us to an alleged inconsistency between two documents. The first document was an answer given by the respondent's solicitor to the claimant's questionnaire under the Equality Act 2010. In answer to a question about how many non-white sales staff worked for the respondent, the solicitors had stated that the respondent did not retain such data. The second document was a set of data prepared by Ms Kentish-Beard and confirmed by her in her witness statement. The document set out a detailed breakdown of the ethnicity of candidates in the particular recruitment exercise about which the claimant complains. According to Ms Kentish-Beard's agreed statement, she obtained those data from Mr Emerson of Steer Solutions who organised the Assessment Centre.

14. In our view there was no inconsistency between the two documents. It is quite possible, and indeed understandable, that Steer Solutions would keep data on the applicants who had been involved in a recruitment exercise that they had organised. The fact that the respondent might not retain data about its existing employees would not affect in any way whether Steer Solutions would keep the data that they kept.

Facts

15. The respondent is a large multi-site franchise car dealer with approximately 2,000 employees. Surprisingly, in our view, it has no centralised record of the ethnicity of its employees, although we accept that at least some dealerships keep local data of that kind.

16. The breakdown of age profiles shows that there is a spread of ages across the sales force. The majority belongs to younger age groups, but employees over the age of 55 still make up approximately 13% of the sales force.

17. The claimant describes himself as being of Middle Eastern origin and Iranian ancestry. He describes himself as not looking British. He was 58 years at the time with which we are concerned, and he is now 59.

18. In 2017 the respondent identified a number of vacancies for sales executives in the North West. The respondent had two methods of recruiting sales executives. The first we may describe as the traditional method. It involved applicants sending in their CVs. If the CV was attractive, they were invited to interview, possibly followed by a second interview. The second method did not involve preparation of a CV, or any other kind of document setting out their qualifications and experience. Instead, all candidates who expressed an interest were invited to an Assessment Centre organised by an outsourced provider. As we know, the provider in this case was Steer Solutions. The main advantage of the Assessment Centre method was that it gave applicants a chance to show what they could do without necessarily having experience in the trade. It was not without its challenges, however. Assessors were presented with a large field of candidates which they had to narrow down based on their observations of the candidates' performance. In practice this meant making relatively swift decisions with limited opportunity to articulate their reasons.

19. Steer Solutions invited 190 candidates to an Assessment Centre which took place on 20 December 2017. Of these, 110 were white. The ethnicity of the remaining 80 candidates was "BAME", by which we mean Black, Asian and Minority Ethnic. Put another way, the BAME candidates made up 42% of the cohort of 190. Of those 190 candidates, 60 confirmed that they would attend. As it turned out, only 39 actually turned up on the day. Of the 39 who attended 17 were white and 22 were BAME.

20. One of the candidates who attended the Assessment Centre was the claimant. Before describing how the claimant fared, we continue with our overview.

21. The Assessment Centre took place in a country house hotel. The 39 candidates assembled in a large dining room. There was an introductory presentation during which the candidates were given information about the Sales Executive role. There followed a series of exercises in which the candidates were assessed. The exercises included a group session, an individual presentation and a negotiation role-play. After each exercise, a number of candidates was eliminated. Following the final exercise, the successful candidates would be invited to a separate interview with a view to offering them the role. All the assessors involved in the exercise were white.

22. As it turned out, the Assessment Centre on 20 December 2017 resulted in eight offers of employment. Three of the eight (37.5%) were BAME and the remaining five were white. This percentage is very close to the 42% of successful candidates who were BAME. Steer Solutions did not keep data on the age profile of the candidates involved in the Assessment Centre. Most of the candidates were significantly younger than the claimant. One of the 8 candidates who were ultimately offered a role, one was aged between 50 and 54.

23. The group session was the first exercise in the selection process. Candidates were presented with an imaginary scenario, set in the "jungle" of the Central African Republic. Their group was confronted with an emergency, and they were given a list of items of equipment which might come in useful. Their task was, first, to make their own list of items in private, and then to discuss in a group setting what the list of items should be and to try and get as many items as possible from their own list onto the group list. The real purpose of the exercise was not so much to see who was the most persuasive in getting their items on the list, but to see how people interacted with others in a group discussion. The assessors were on the alert for people who were overbearing and unprepared to listen to the opinions of others. People who displayed those tendencies were not allowed to progress to the second stage. In total, 21 candidates passed the group exercise. Ten of them were BAME and 11 were white.

24. We now rewind the clock to describe how the claimant got on. He first came to the attention of the assessors during the initial presentation. Mr Hallam was identifying some of the less attractive aspects of the role, with a view to contrasting them with the "great positives". One of the drawbacks was that candidates would routinely be expected to work regular Saturdays and occasional Sundays. As Mr Hallam explained the working pattern, the claimant asked a question along the lines of "So is it a six-day week, then?". The claimant's impression, in his own words, was that by asking this question, and other "pertinent questions" of this nature, he "ruffled a few feathers". There is a dispute about whether, at the time of asking that particular question the claimant

rolled his eyes, but nothing very significant turns on that dispute. The impression that was gained by the assessors was that the claimant appeared disgruntled.

25. The candidates then separated into groups for the first exercise. Eight of them sat around a table and discussed the Africa scenario whilst the assessors stood nearby with their clipboards.

26. There is a difference of opinion between the parties as to how well the claimant performed during the course of this exercise. Here is how the claimant saw it. He saw himself as ideally placed to lead the group discussion. He had served in the armed forces, he had been to Africa and he had received survival training. He was older than the other candidates in the group, who, in his opinion, seemed "immature". He thought they would benefit from his guidance and advice. This was one of the times, he believed, where "one has to act like an officer and lead". He therefore decided to "lead from the front".

27. The assessors noticed that the claimant was dominating the discussion. In their view, his participation was overbearing. He did not seem prepared to listen to the views of others and appeared to be frustrated when they expressed a different point of view. This was the kind of negative behaviour that the exercise had been designed to expose.

28. Following the group exercise, the assessors met to discuss their impressions of the candidates. They unanimously agreed that the claimant was unsuitable to progress to the next stage. They each marked their decision on their list of candidates without writing down the reasons. We are not especially surprised at the lack of written reasoning – this was the first stage of the assessment process and there was still a large field to narrow down. Their record-keeping became more detailed as the size of the field diminished throughout the day.

29. Meanwhile the candidates were waiting in the dining room to find out who would go forward to the next stage. One of the assessors came into the room and informed them. It was at this point that the claimant learned that he had been eliminated.

30. The same afternoon, after the claimant had left the hotel, he telephoned Ms Kentish-Beard to complain about the Assessment Centre. He complained of age discrimination. He did not mention anything to do with race or ethnicity. In order to reach this finding, we compared the unchallenged evidence of Ms Kentish-Beard, supported by her contemporaneous e-mail, with the claimant's oral evidence that he "may have mentioned it". We preferred Ms Kentish-Beard's account.

31. This brings us back into the dining room at the moment when the results of the first exercise were announced. There is a dispute as to what happened. The claimant's version is that it was the list of successful candidates that was read out (as opposed to the list of unsuccessful candidates). According to the claimant, none of the people whose names were read out were BAME. We find that piece of evidence impossible to accept, for a number of reasons:

    31.1. First, if the claimant's evidence were correct, he would have very strong grounds for believing that ethnicity had been a factor, if not the main factor, in deciding who should go through the second stage. He has brought between 20 and 30 tribunal claims complaining of discrimination in relation to a number of different protected characteristics, including race. The claims all stem from unsuccessful job applications. The claimant was well practised in

spotting facts from which discrimination could be inferred. On the claimant's version of the facts, race discrimination would have been at the top of his agenda for his conversation with Ms Kentish-Beard. Yet he did not mention race at all.

31.2. The second reason we have for preferring the respondent's evidence is that it is supported by the assessors' contemporaneous records. The candidate lists from each assessor's clipboard show who progressed to which stage of the exercise. What is clear is that there are a number of people with Muslim first names who passed the first round. Needless to say, we must not draw stereotypical assumptions about their ethnic origin simply from their names. We do, however, have a certain amount of general knowledge about the ethnic origins of large sections of the Muslim population in the North West of England. We thought it appropriate to draw on our general knowledge. It lends support to the other evidence about the ethnicity of the candidates who progressed.

31.3. The third reason for preferring the respondent's version to the claimant's, is that the claimant did not challenge Ms Kentish-Beard's evidence about the profile of candidates who progressed beyond the first round.

31.4. Fourth, we accept the evidence of Ms Kentish-Beard and the oral evidence of Mr Hallam about the identity of the people who were offered the role. As we have already recorded, 3 of the 8 successful candidates were BAME. They included a person whose first name was Arnold. He is visibly black, being of Afro-Caribbean ethnic origin. There was another person whose first name was Hamza. Not only was she visibly of Asian ancestry, but her name stands out as one that is likely to belong to someone of BAME origin. Neither of these candidates could have been offered the role unless they had passed the first exercise.

32. On 5 March 2018, about a week after the claimant presented his claim, he e-mailed Ms Kentish-Beard with a discrimination questionnaire. We have referred already to the questionnaire at paragraph 13. The respondent's solicitors provided a reply by letter dated 19 April 2018.

33. The claimant's disappointing experience at the Assessment Centre did not put him off applying for employment with the respondent. Shortly before the tribunal hearing, the claimant applied for a role in the respondent's Burnley dealership. He submitted his CV (about which we have already commented) and was invited for interview, followed by a second interview. At the time of the tribunal hearing he was waiting to hear the outcome. These facts tend to show that the claimant was capable of giving a good account of his skills and experience in an interview setting. They do not, in our view, shake the reliability of the respondent's witnesses' evidence about how the claimant performed at the Assessment Centre. The group exercise was quite different in nature from a traditional job interview and called for a different set of skills.

Relevant Law

Direct discrimination

34. Section 13(1) of EqA provides:

> (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.

35. Section 23(1) of EqA provides:

> (1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.

36. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

37. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572*.*

38. Tribunals dealing with complaints of direct discrimination must be careful to identify the person or persons ("the decision-makers") who decided upon the less favourable treatment. Where a decision has been made jointly, the motivation of all the joint decision-makers is relevant: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.

39. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

40. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … 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 ... 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 … 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 …from an evasive or equivocal reply to a [statutory questionnaire].
>
> (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…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.

41. The initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA 1913

42. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals

proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

43. For the burden of proof to shift, it is not enough for a claimant to show a difference in treatment and a difference in characteristic. Something more is required. There must be facts from which the tribunal could conclude that it was the difference in characteristic that materially influenced the less favourable treatment: *Madarassy v. Nomura International plc* [2007] ICR 867.

44. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Conclusions

45. Applying the law to the facts we unanimously reached the following conclusions.

Race discrimination

46. We accept the respondent's submission that the claimant has failed to discharge the initial burden of proof. In coming to this view, we have considered the claimant's submission that the burden shifts to the respondent because of the respondent's inadequate record-keeping of ethnicity information in relation to its employees. We are bound to observe that it is not particularly impressive for such a large organisation as the respondent to fail to hold a central database of ethnic monitoring information. Data such as this helps to identify disadvantages and areas where subconscious bias may have affected decision-making. But this observation does not help us conclude that race was a factor in this case. Whatever the adequacy of record-keeping in relation to the established workforce, the fact is that precise and detailed ethnicity data was kept by Steer Solutions in relation to this particular recruitment exercise. There is an almost exact correlation between the BAME make-up of the initial Assessment Centre invitees and the BAME make-up of the successful candidates. There is nothing else, in our view, that would shift the burden. In particular, we have rejected the evidence that it was only the white candidates who were allowed to progress beyond the first stage.

47. If we are wrong about that and the burden does shift to the respondent, we accept the explanation given by the respondent on the balance of probabilities that the reason why the claimant did not progress to the second stage was because of his manner that he demonstrated during the group exercise as it appeared to them. Considerations of the claimant's race, whether Middle Eastern or Iranian origin or any other aspect of his race, simply did not enter into their thinking, either consciously or subconsciously.

Age discrimination

48. We now turn to the age discrimination complaint. In our view there are no facts from which we could conclude that the claimant's age was taken into account when deciding that the claimant should not progress. We looked not just at the events of the Assessment Centre itself, but at surrounding circumstances such as the general age profile of the respondent's sales force. Whilst younger age

groups were over-represented, the difference was not stark. We also bore in mind that one of the ultimately successful candidates was over 50 years old.

49. If we are wrong in our application of the burden of proof, we would go on to say that respondent has in any event proved to us that the claimant's age had nothing to do with the selection decision. The claimant was rejected after the first round because the assessors believed, based on their observation of his performance in the group exercise, that he was overbearing and unlikely to work well as part of a team. The claimant's age was neither a conscious nor a sub-conscious part of their thinking.

Disposal

50. It follows from these conclusions that the less favourable treatment was not because of age or race. The claim is not well-founded and must therefore be dismissed.

REASONS FOR COSTS ORDER

The application and issues for determination

1. After we had announced our oral judgment on liability, the respondent applied for a costs order in the sum of £7,000.00. The application was based on two grounds:
   1.1. that the claim had no reasonable prospect of success, in that it was founded on an unreasonable premise; and
   1.2. that the claim was vexatious, in that the claimant did not actually think that the respondent had discriminated against him, but brought the claim in order to pressurise the respondent into making a financial settlement.
2. We had to decide:
   2.1. Whether either ground was established;
   2.2. If so, whether in our discretion we ought to make a costs order; and
   2.3. If so, in what amount.

Evidence

3. Where it was relevant, we reminded ourselves of the evidence that had been given at the liability stage. In addition, we heard oral evidence about the claimant's ability to pay.
4. With one exception, the parties did not rely on any new documents. This brings us back to the e-mail chain of 18 April 2018. The respondent asked us to consider the document which, it will be remembered, was the subject of an unresolved dispute about "without prejudice" privilege. With the parties' consent, we looked at the document for the purpose of deciding whether or not it should be admissible, and left the decision on admissibility to be made at the same time as our decision on the costs application itself.

The claimant's participation

5. Part-way through the respondent's submissions on costs, the claimant became angry and upset. In abusive language he indicated that he had had enough of listening to the respondent's personal attacks on him. He then got up and made to leave the room. The tribunal took a break, following which the claimant asked to see the tribunal in the absence of the respondent. The tribunal was unable to agree to this request, but the claimant was persuaded to come back into the room with just the respondent's counsel. He said that he was getting "really wound up" and that the respondent's attacks on his character were "bringing up a lot of hurt". He asked for the hearing to adjourned, with the re-listed hearing to take place by telephone. He did not say that he was unwell. Following a discussion, he agreed to stay until he had given his oral evidence about his ability to pay. His agreement to do so was on the understanding that, before his oral evidence, the respondent's submissions would resume and that, if the claimant did not feel able to listen to them, the employment judge would summarise them in writing and give the claimant the opportunity to make further representations. The claimant initially stated that he would remain in the waiting room whilst the respondent's submissions continued. He then changed his mind and said that he would sit quietly and listen. With the claimant's agreement, Mr Sugarman was then joined by his pupil and a representative from the respondent who could give him instructions. The hearing continued in public, but no members of the public happened to be present.

6. Mr Sugarman briefly concluded his submissions without interruption by the claimant. The hearing moved on to the claimant's oral evidence. Once the claimant had finished answering questions about his means, the employment judge gave him an opportunity to complete his evidence by dealing with any matters that had arisen in questioning (often called "re-examination"). The claimant spoke for a few minutes and then got up to leave. The employment judge asked the claimant if he was prepared to sit down for long enough to discuss how he could present his arguments if he could not continue with the hearing. At that point, the claimant said that he wanted to "get it over with" and started making his own oral arguments in response to the respondent's application.

7. The arguments raised by the claimant in opposition to the costs application were essentially these:

    7.1. His claim was "legitimate" and he did genuinely believe that the respondent had discriminated against him.

    7.2. The respondent had had the opportunity to apply for the claim to be struck out on the ground of prospects of success, but chose not to do so.

    7.3. His ill health should be taken into account.

    7.4. He could not afford to pay a costs order.

8. When the claimant confirmed that he had finished making his submissions, the tribunal indicated that it would give judgement at 3 o'clock the same afternoon. When, at 3pm, the tribunal called the parties in to announce the costs judgment, the hearing clerk informed us that, during the break, the claimant had "stormed out", saying that he had "had enough". We considered the possibility of either reserving our judgment and sending it to the parties in writing, or re-listing the hearing solely for the purpose of informing the parties of the decision. Our view

that both these steps would be disproportionate and would lead to additional delay. Instead, we decided to announce the judgment in the presence of the respondent only. By the time anyone from the respondent entered the room, we had already made our decision on the costs application.

Additional facts

9. Amongst the many claims presented to the tribunal by the claimant (between 20 and 30 on the claimant's evidence) was claim number 1800403/2017 against a company called Wren Living Limited. In a judgment sent to the parties on 4 August 2017, Employment Judge Franey struck out the claim on the ground that it was vexatious. Paragraph 64 of the written reasons summarised the judge's reasoning:

> "… I concluded that the claimant did not believe that he was the victim of age discrimination; at best all he was doing was asserting his frustration that he did not accept the reasons given for rejecting his application. He alleged age discrimination to give him an opportunity to litigate so as to pressure the respondent into an out-of-court settlement. That was evident from his conduct beginning with the decision to withhold the film of the interview; the complete disregard of CMOs until the eve of this hearing; the attempts to persuade the respondent that it would not get sight of his evidence before the hearing; the reference to having a film which had not been disclosed which would be provided to the BBC; the threats of publicity and a press conference, and the reality that he did not believe his own case has merit. The impression that he was bringing the case for the improper purpose of fixing the respondent to obtain a payout was supported by the kitchen design appointments which he did not attend."

10. We now return to the claimant's dealings with Perry's Motor Sales. Following her telephone conversation the claimant on 20 December 2017, Ms Kentish-Beard emailed the claimant on 21 December 2017 seeking to reassure him that there had been no age discrimination. The claimant was not satisfied. He replied later that day asking for reimbursement of his time and fuel costs. He followed up his email on 10 January 2018. This time, he copied his email to a wider distribution list, which included watchdog@bbc.co.uk. When questioned at the hearing about why he had copied in *Watchdog,* the claimant replied that *Watchdog* did not normally reply to his e-mails and that they had "more newsworthy stories to investigate". His answer caused us to wonder why the claimant bothered to make contact with the BBC at all if he did not expect any investigation or indeed any reply. In our view, the most likely explanation is that the claimant wanted the respondent to know that he was prepared to alert the media to his allegations of discrimination. His purpose in conveying that message to the respondent was to put additional pressure on them to make an offer of payment.

11. The claimant's claim form, presented on 28 February 2018, asserted that none of the successful candidates in progressing to the second round had been BAME. (We have found this to be incorrect.)

12. Following presentation of the claim, the respondent instructed solicitors, who wrote to the claimant on 21 March 2018. There then followed an exchange of e-mails between the claimant and Mr Haynes of the respondent's solicitors. We have not been shown the entire thread, but it is clear from Mr Haynes' e-mail of 9

April 2018 that the claimant had invited an offer of settlement. In reply, Mr Haynes' e-mail stated:

> "Thank you for your e-mail. My client is not prepared to make any offers of settlement. However, I can confirm that if the claim is withdrawn within the next 14 days that no application will be made against you in respect of my client's legal costs."

13. The claimant replied later that day. His e-mail began:

> "That's nonsense they will not get their costs so tell them to do the right thing and make a sensible offer of settlement.
>
> Financially it makes sense to settle to avoid unnecessary costs but you of course will relish protracted litigation as you will make your money."

14. The e-mail then made generalised assertions that the ET3 response was a "tissue of lies" and that the respondent had "falsely answered some questions".

15. The exchange resumed 9 days later on 18 April 2018. Mr Haynes reiterated the respondent's stance that it "will not be making offers of settlement to you", but confirmed that "the previous offer that they would not pursue an application for costs against you if the claim is withdrawn still stands."

16. The claimant's reply, later that day, began:

> "Tell your clients to pay up now as they will incur substantial costs which they will not recover.
>
> Your idle threats will not work and if you continue I will make a formal complaint against you to the SRA."

17. He then asked how the respondent knew about the ethnicity of all the applicants. The e-mail concluded with an offer to settle his claim in return for a sum of money.

18. None of the e-mails on 9 or 18 April 2018 was marked, "without prejudice".

19. In order to decide whether this chain of correspondence is admissible, it is relevant for us to make a finding about what its purpose was. In our view it was an attempt from both sides to negotiate a settlement to a dispute which would otherwise result in litigation. The respondent was making an offer to refrain from applying for costs if the claimant withdrew. The claimant was making an offer to settle his case in return for payment of money.

20. We also make a finding about the predominant argument advanced by the claimant to persuade the respondent into making an offer of settlement. As typically happens in negotiation, he drew the respondent's attention to what would happen in the absence of an agreement to settle. The claimant's main point, which he repeatedly made, was that if there was no settlement, the respondent would incur irrecoverable costs. Whilst he made generalised assertions about the nature of the respondent's defence, those points were vague and always subsidiary to his main argument which was that, even if he lost, the respondent would still be financially worse off because of the cost of successfully defending the claim. He also sought to increase the pressure on the respondent's solicitors by threatening them with a regulatory referral if they did not back down.

21. The respondent included the 18 April 2018 correspondence in the bundle for the tribunal hearing. The claimant did not object until he was asked questions about it in cross-examination.

22. As we have already recorded, there was a preliminary hearing before Employment Judge Franey on 24 August 2018. At that hearing the claimant gave further details of his age discrimination complaint. He told the judge that nobody over the age of 35 had progressed beyond the group exercise. This assertion was incorrect. At least one candidate over the age of 50 was ultimately successful.

23. Part of the case management order provided a mechanism for the respondent to apply for the claim to be struck out. A preliminary hearing was provisionally listed with a time allocation of two hours to cater for that eventuality. Ultimately the respondent chose not to make such an application.

24. We now have to make another contentious finding of fact. The way in which the costs application has been formulated requires us to examine what the claimant believed at the time he presented his claim. Did he genuinely believe that the respondent had discriminated against him because of age? In our view, he did. He had correctly observed that most of the candidates at the Assessment Centre were younger than him. He made a connection in his mind between his age and his preparedness to "ruffle feathers" and thought, wrongly, that the respondent had been motivated by both considerations together. Likewise he saw the respondent as looking for "sheep" and, in his mind, attributed the success of the younger candidates to their being relatively "immature" and in need of guidance. We did not agree with him, but that does not mean that he did not genuinely believe it. When he complained to Ms Kentish-Beard of age discrimination, he believed, albeit unreasonably, that his complaint was justified.

25. As we see it, the claimant had mixed motives in bringing the complaint of age discrimination. We cannot ignore the claimant's history of bringing claims. The prospect of a settlement cannot have escaped his mind. But, in our view, he was at least partly motivated by a desire to obtain a finding of discrimination if the respondent was not prepared to settle. Support for this view can be found in the fact that the claimant pursued his claim to a final hearing even though the respondent made it abundantly clear that it would not make any offers of settlement. He was not trapped into continuing by fear of a costs order: he had an easy way out, if he wanted it, by withdrawing with no order for costs.

26. By contrast, we find that, at the time of presenting his claim to the tribunal, the claimant did not believe that the respondent had discriminated against him because of race. As we have already observed, he did not mention race discrimination to Ms Kentish-Beard. The central premise of his claim was that only white people out of a predominantly BAME field made it past the group exercise. He had no basis for making such a contention and must have known that he had no such basis.

27. In our view, the most likely explanation for including the race discrimination complaint was that he wanted to pressurise the respondent into making an offer of settlement. He knew that the more protected characteristics upon which the claim was based, the more time-consuming and expensive it would be to defend. Here are our reasons for making this finding:

27.1. The claimant has brought many other claims to the tribunal arising out of unsuccessful job applications. Few of them have resulted in final hearings. At least 8 of them have been dismissed on withdrawal. In our view, the more claims that the claimant brings and withdraws, the more likely it is that his main purpose in bringing them is to achieve a financial settlement rather than to seek a declaration in his favour.

27.2. The claimant has brought at least one vexatious discrimination complaint in the past.

27.3. He did not believe that this complaint was well-founded.

27.4. The claimant resorted to other methods of increasing pressure on the respondent to make an offer of settlement. He had already made clear his preparedness to go to the media, and later relied on the nuisance value of his claim as his main argument in trying to persuade the respondent to settle. The inclusion of a complaint in which he did not believe was another one of those methods.

28. In defending the claim, the respondent has incurred approximately £7,000.00 in legal costs.

29. The claimant is out of work and has made many unsuccessful job applications. He receives £62.00 per week in benefits. He has about £3,000.00 in his current account, but has credit card debts of about £7,500.00. He owns a Mercedes car worth about £5,000.00.

30. The claimant owns an end-terraced house in Rossendale. It is not mortgaged. Nobody depends on him financially. When asked about its value, he replied that he would burn it down, rather than allow the respondent to secure a charging order against it. He then moderated his reply to say that he would make it uninhabitable instead of setting fire to it.

Relevant law

Costs

31. Rules 75 to 84 of the Employment Tribunal Rules of Procedure 2013 provide, relevantly:

> **75.**—(1) A costs order is an order that a party ("the paying party") make a payment to—
>
> (a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented …
>
> …
>
> **76.**—(1) A Tribunal may make a costs order …, and shall consider whether to do so, where it considers that—
>
> (a) a party… has acted … vexatiously in … the bringing of the proceedings (or part) ..; or
>
> (b) any claim… had no reasonable prospect of success.
>
> **78.**—(1) A costs order may—

> (a) order the paying party to pay the receiving party a specified amount, not exceeding
>
> £20,000, in respect of the costs of the receiving party;
>
> …
>
> **84.** In deciding whether to make a costs…order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay.

32. A tribunal faced with an application for costs must decide, first, whether the power to award costs under rule 76 has been triggered and, second, whether in its discretion it should make a costs order and, if so, in what amount.

33. In deciding whether unreasonable conduct should result in an award of costs, the tribunal should have regard to the "nature", "gravity" and "effect" of the conduct. There is no need for rigid analysis under the separate heading of each of those three words. 'The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects if had': *Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255, [2012] IRLR 78*.*

34. The meaning of the word, "vexatious" has been the subject of a number of reported cases. In *Attorney General v. Barker* [2000] 1 FLR 759, Bingham CJ described the hallmark of a vexatious proceedings was that it had:

> "Little or no basis in law (at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and it involves an abuse of the process of the court, meaning a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process".

35. In *Ashmore v. British Coal Corporation* [1990] ICR 485 the Court of Appeal observed that whether a case was vexatious depended on all the relevant circumstances of the case.

36. We have found the following passage in *Harvey on Industrial Relations and Employment Law* P1-1052.02 to be of assistance in taking account of the paying party's ability to pay:

> The fact that a party's ability to pay is limited does not, however, require the tribunal to assess a sum that is confined to an amount that he or she could pay (see *Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797*, *[2012] ICR 159, at para 37*). In *Arrowsmith* the Court of Appeal, in upholding a comparatively low costs order of £3,000 made by an employment tribunal against a claimant of very limited means, commented that '[h]er circumstances may well improve and no doubt she hopes that they will' (per Rimer LJ). In *Vaughan v London Borough of Newham [2013] IRLR 713*, the EAT (Underhill J

presiding) analysed the question of affordability in relation to the exercise of a tribunal's discretion in more detail. The tribunal in that case had awarded costs against the claimant of one-third of the respondents' total costs, which meant that she faced a potential bill of between £60,000 and £87,000. This represented more than twice her pre-tax earnings at the date of dismissal. The tribunal took into account her ability to pay. Although she was out of work at the date the order was made, and had no savings or capital assets, it concluded that there was no reason to assume that she would not return to her chosen career at her previous level of pay (about £30,000) 'at some point in the future'. Upholding the tribunal's award, Underhill J held that the question of affordability does not have to be decided 'once and for all by reference to the party's means as at the moment the order falls to be made', so that if there is a realistic prospect that the claimant might at some point in the future be able to pay a substantial amount, it was legitimate to make a costs order in that amount thereby enabling the respondents to make some recovery 'when and if that occurred' (para 28). In any event, as the order would be enforced through the county court, that court would be able to take into account the claimant's means from time to time in determining whether to require payment by instalments and, if so, in what amount. Underhill J added that questions of what a party could realistically pay over a reasonable period 'are very open-ended, and we see nothing wrong in principle in the tribunal setting the cap at a level which gives the respondents the benefit of any doubt, even to a generous extent. It must be recalled that affordability is not, as such, the sole criterion for the exercise of the discretion: accordingly a nice estimate of what can be afforded is not essential' (para 29).

<u>“Without prejudice” privilege</u>

37. Any communications between parties the purpose of negotiating a settlement or resolving a dispute are not generally admissible. This is known as the “without prejudice” rule and it applies regardless of whether the words “without prejudice” are used to describe the communications in question. The public policy behind the rule is the desirability of encouraging litigants to settle their disputes by agreement rather than litigate them to a finish and, to this end, of ensuring that their negotiations are not trammelled by the fear that what is said will be used in evidence (see *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280).

38. For a communication to fall within the rule, it is not essential that the words 'without prejudice' be used, because 'if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission': *Rush & Tompkins Ltd v Greater London Council*, at 1299H, per Lord Griffiths.

39. The privilege does not extend to communications which are evidence of “unambiguous impropriety”. This exception only applies in the clearest of cases: *Woodward v. Santander* [2010] IRLR 834.

40. The parties may waive “without prejudice” privilege, but only if both parties have consented to do so unequivocally: *Graham v. Agilitas* UKEAT 0212/16

Conclusions

Admissibility

41. In our view, the "without prejudice" privilege is potentially engaged. The purpose of the correspondence on 18 April 2019 was to negotiate a settlement, even if the settlement which the respondent wanted was one in which no money changed hands.

42. The claimant did not in our opinion waive any privilege by not objecting to the contents of the bundle. Mere silence on the part of a self-represented claimant, on receiving a bundle prepared by the respondent, is not an unambiguous consent to waive privilege.

43. We concluded, however, that this was a clear case in which the "unambiguous impropriety" exception applied. The correspondence, in its context, shows the claimant using the nuisance value of his claim as a lever to obtain an offer of settlement. That, in our view, is an abuse of the process of negotiation. The public policy that exists to promote settlement negotiation does not, in our view, extend to putting illegitimate pressure on another party to settle based on the cost of defending an unmeritorious claim. The claimant behaved improperly and cannot use the privilege to mask it.

44. Our view was that the 18 April 2019 e-mail chain was therefore admissible.

Race discrimination complaint – no reasonable prospect of success

45. In our view the race discrimination complaint had no reasonable prospect of success. In order to succeed, he needed to prove facts that would have enabled the tribunal to conclude that his Iranian ancestry had motivated the assessors to reject him following the group exercise. His claim form asserted only two such facts. One was his allegation that no "Asian or Black candidates" were successful in progressing to the second stage. The second was that all the assessors were white. His witness statement repeated those contention and also pointed to an alleged contradiction in the respondent's answers to his questionnaire.

46. Dealing with the two latter points first:

    46.1. We found at paragraphs 13 and 14 above that no contradiction existed. That was, in our view, the only reasonable conclusion to be drawn from the evidence. In any event, any supposed contradiction in the respondent's replies to questions could not have been a factor in the claimant's decision to present his complaint of race discrimination. The claimant did not e-mail his questionnaire to the respondent until after he had presented his claim.

    46.2. The mere fact that the assessors were white could not in our view reasonably be thought to be enough to enable a tribunal to conclude that they were motivated by race.

47. This brings us back to the claimant's contention that it was only the white candidates who went forward to the second round. That contention was false. In our view, the claimant must have known that he had no reasonable basis for making it. On the claimant's version of the facts, he heard the list of successful candidates. Just from the names on that list it was likely that some of them would be BAME. He cannot have visually observed just white people having been

called to the next round. At least two of the successful candidates were visibly from BAME groups.

48. On the analysis most generous to the claimant, he might not have known one way or the other what was the ethnic breakdown of candidates who had progressed. In that event he should still have realised that there was no reasonable basis for him making a positively contention about the ethnic breakdown of the successful candidates, especially when that contention was the central premise of his race discrimination complaint. It would have been still less reasonable for him to maintain that contention when the figures were actually presented to him on 19 April 2018.

49. We therefore have power to make a costs order under rule 76(1)(b).

Race discrimination complaint vexatious

50. We also consider that the complaint of race discrimination was vexatious. Not only did it not have any merit, but, at the time of presenting his claim to the tribunal, the claimant did not actually believe that it had any merit. As we have found, he added the race discrimination complaint not because he wanted the tribunal to adjudicate on it, but because of the extra leverage it would give him in extracting a settlement.

51. Employment tribunals exist to adjudicate on claims brought by people with a genuine belief that their employment rights have been contravened. The purpose of the claimant's race discrimination claim was quite different. It was an abuse of the tribunal's process.

52. In reaching this conclusion we took into account the claimant's e-mail of 18 April 2019. But even if we had completely ignored this e-mail, our conclusion would have been the same. It was one example of the claimant putting pressure on the respondent to settle for reasons other than the merits of his claim. But it was not the only example: see his e-mail copied to *Watchdog.*

53. We therefore have additional power under rule 76(1)(a).

Age discrimination complaint not vexatious

54. We did not go as far as to consider that the claimant's complaint of age discrimination was vexatious. As we have found, he did think that his age had been a factor in the respondent's decision-making. His motives, though mixed, included a desire to use the tribunal for its proper purpose: see paragraph 25.

Age discrimination complaint – no reasonable prospect

55. The remaining strand of the application is under rule 76(1)(b). In our view, it has force. The complaint of age discrimination had no reasonable prospect of success. His claim form and witness statement asserted little more than a difference in age and a difference in treatment. The "something more", that might have shifted the burden to the respondent, emerged in the hearing before Employment Judge Franey, when the claimant contended that nobody over the age of 35 had made it past the first round. But that assertion was incorrect. The claimant ought to have known that he had no reasonable prospect of challenging the respondent's assertion that at least one of the successful candidates was over 50. In the event, he did not challenge that assertion at the hearing.

Discretion to award costs

56. Just because we have the power to make a costs order does not mean that we should necessarily do so. Our power is discretionary.

57. Before exercising our discretion we consider the claimant's arguments as to why a costs order should not be granted:

    57.1. *Genuine belief* - We have already dealt with his argument that he genuinely believed that he had a well-founded claim. As regards race discrimination, he did not.

    57.2. *Respondent should have applied to strike out the claim* – In our view, the respondent is not to blame for its decision not to pursue a strike-out application. It is only in rare cases that discrimination cases can be struck out, especially where there is a central core of disputed fact. Here, the claimant had made an important factual allegation that only the white people had progressed to the second round. That allegation was hard to debunk without hearing the evidence. It would be difficult at a preliminary hearing to establish that the complaint of race discrimination had been vexatious, since it would have involved exploring the evidence as to whether the claimant genuinely believed he had been discriminated against or not. Moreover, the respondent was entitled to keep proportionality in mind. The final hearing lasted only two days. It will have been more expensive than a two-hour preliminary hearing, but the difference in cost could quite reasonably be thought to be insufficient to justify a speculative strike-out application.

    57.3. *The claimant's health* – The claimant did not explain how his health had caused him to bring the race discrimination complaint (in which he did not believe), or to overestimate the prospects of success. He demonstrated an ability to engage with the respondent and its representatives and to participate in a case management hearing. We did not see why his health was a reason for refusing to make a costs order.

    57.4. *Ability to pay* – We thought that this consideration was highly relevant to the amount of a costs order. It was less important to the question of whether a costs order should be granted at all.

58. Looking at the whole case in the round, our view is that the claimant should be ordered to make a payment towards the respondent's costs. His actions in bringing a hopeless claim and abusing the tribunal's procedures have put the respondent to considerable expense. The claimant should at the very least make a contribution to putting matters right.

Amount of costs

59. We first considered whether or not the respondent's costs were proportionate. In our view they were. Allegations of discrimination need to be taken seriously. Claimants cannot complain if respondents instruct counsel in these sorts of cases. In our experience, £7,000 is by no means an excessive amount of money to spend on a case that involved a preliminary hearing and a two-day final hearing.

60. This just leaves the claimant's ability to pay. On the facts we have found, we think that the claimant, for the foreseeable future, will have a very limited income that will not substantially exceed his outgoings. He is unlikely to acquire substantial savings. It is unlikely that in the foreseeable future he will obtain

employment that will make him significantly better off than he would be on benefits.

61. We think it would be unreasonable to make a costs order that would require him immediately to sell his house. We also think it would be unreasonable to make a costs order that could only be satisfied on the sale of his house, even a delayed sale, if there was no prospect of the claimant acquiring either savings or a substantial income in the meantime. We do not think it would be reasonable to expect the claimant to sell his car without buying a replacement. If he is to obtain employment at all, it is likely to be in a field-based role. Selling his car would make it even more difficult for him to find employment.

62. We do, however, think that it is possible for the claimant to satisfy a costs order in the sum of £1,000. He can either dip further into his current account and continue to pay interest on his credit card, or he could afford to sell his car and buy a cheaper one. We think that there is sufficient value in his car to enable him to obtain £1,000 in disposable capital.

63. For these reasons the amount of the costs order is for £1,000. It would have been considerably more but for the claimant's limited ability to pay.

_____

Employment Judge Horne
17 January 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

25 January 2019

FOR THE TRIBUNAL OFFICE