EMPLOYMENT TRIBUNALS

Claimant: **Mr S Altaf**

Respondent: **Chief Constable of West Yorkshire Police**

Heard at: **Leeds** **On:** **28 and 29 January 2019 and (in chambers) 15 February 2019**

Before: **Employment Judge Bright**
Ms H Brown
Mr M Brewer

Representation
Claimant: Ms M Moore (non-legal representative)
Respondent: Mr S Mallett (Counsel)

RESERVED JUDGMENT

The complaints of discrimination because of race and/or religion or belief fail.

The claim is dismissed.

REASONS

The complaints

1. The claimant complains of direct race and/or religious or belief discrimination in the respondent's recruitment process.

2. At the start of the hearing the claimant's representative, Ms Moore, suggested that there were aspects of indirect discrimination in the claimant's complaint. As there was no indication of that complaint in the claim form, nor had it been raised at the case management hearing, it was explained to Ms Moore that an application would need to be made to amend the claim to add that complaint. The Tribunal also explained that, if such an application was successful, there would likely need to be a postponement to enable the respondent to properly respond to that complaint. If so, while not wishing to discourage such an application, the claimant needed to be aware that there might be a question as to costs arising from any such postponement, if he could reasonably have presented the complaint at an earlier stage. Ms Moore confirmed that the

claimant wished to continue with the direct discrimination complaint only and would not be making an application to amend to include a complaint of indirect discrimination.

The issues

3. At the outset of the hearing it was agreed that the issues were:

   3.1. Has the respondent subjected the claimant to treatment falling within section 39(1) of the Equality Act 2010 ("EQA") by not offering him a position of Driver Trainer on 20 February 2018?

   3.2. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the six successful candidates appointed and/or a hypothetical comparator in the same circumstances as the claimant but who was not a British Pakistani/Muslim.

   3.3. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic(s)?

   3.4. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

4. As the hearing progressed it became apparent that the parties' dispute about less favourable treatment encompassed, not just the failure to offer the claimant a position, but also in the application of the recruitment process and the way he was assessed. While this was not expressly distinguished by the parties from the offer of a position, we considered that it was implicit throughout.

The evidence

5. The claimant gave evidence on his own behalf and called no further witnesses. He relied on two written witness statements.

6. The respondent called the following witnesses, who each relied on written witness statements:

   6.1. Police Inspector P Smith, Head of Foundation Training in Learning and Development;
   6.2. Chief Inspector C Norbury, People Department, Learning and Development;
   6.3. Ms S Higgins, Human Resources Officer in the Leeds District.

7. Mr Mallet for the respondent indicated that it had intended to call Police Sergeant C Beddis, but he was unexpectedly unavailable to attend the hearing. The respondent did not seek a postponement but presented PS Beddis' written witness statement. The Tribunal initially had concerns that the middle two pages of that statement (which were not separately signed or initialed) showed signs of having been inserted at a different time to the final signed page. The respondent's solicitor, Mrs Clegg, was able to satisfy the Tribunal, by providing a signed witness statement of her own, that the anomaly was merely a quirk of

the approval process for the witness statement. We were satisfied that the inserted pages were identical in content to the statement signed by PS Beddis. In any event, given that the claimant did not have an opportunity to challenge PS Beddis' evidence in cross examination, we accorded little weight to its contents.

8. The parties presented an agreed bundle of documents, to which a number of extra documents were added by consent at pages 576 to 600. They were:

    8.1. A chronology;
    8.2. A document from the College of Policing;
    8.3. A spreadsheet created by Ms Moore;
    8.4. A photograph; and
    8.5. The claimant's interview preparation notes.

9. We only read those documents in the bundle to which we were specifically referred. References to page numbers in these reasons are references to the page numbers in the agreed bundle.

Submissions

10. Ms Moore for the claimant made oral submissions which we have considered with care but do not rehearse here in full. In essence, it was submitted that the respondent discriminated against the claimant in the arrangements for whom to make an offer of employment. Ms Moore invited the Tribunal to find that the decision not to offer the claimant employment was because of his race and/or religion. She submitted that there were various factors pointing to that conclusion:

    10.1. The respondent did not follow its own policies, defined by the College of Policing;

    10.2. The claimant could have been employed under the positive action provisions of section 159 EQA, but the respondent chose not to apply those provisions;

    10.3. Statistics show that the respondent employs disproportionately low numbers of BAME officers and employees;

    10.4. The claimant only missed out by one point, having met the desirable and essential criteria to the same level as the successful candidates;

    10.5. The respondent has only employed employees in the driver training department who look like them and will fit in;

    10.6. The respondent was prepared to employ retired staff who were unable to start at the required date, rather than recruit the claimant who met the requirements but was visibly different;

    10.7. Had the respondent given appropriate weighting to the criteria, in particular the advance driving instructor ("ADI") qualification, the claimant would have been successful;

10.8. On application, the claimant was not informed of the competencies to be assessed and was therefore disadvantaged as against internal candidates. Serving or retired police officers would have understood the competency process;

10.9. The claimant felt discriminated against and the interviewers, especially PS Beddis, treated him coldly. The claimant was asked no follow up questions, leading to the conclusion that this treatment was different to that afforded to the other interviewees;

10.10. PI Smith's comment regarding a 'taxi' showed that there was stereotyping (association of the claimant as a British Pakistani with driving taxis);

10.11. The claimant was viewed less well by PS Beddis, who marked him down. Where PI Smith recorded 'good answer', PS Beddis wrote "poor answer". There was no consensus. PS Beddis had the final say as lead interviewer; and

10.12. The interviewers were subject to unconscious bias, including the 'contrast effect' (the claimant was contrasted with previous candidates and they felt that he did not 'fit'), 'negative information bias' (they were influenced by negative, rather than positive, information), and the 'similar to me effect' (in which the interviewer favours candidates who look like them). PS Beddis, in particular, did not have any training in mitigating unconscious bias.

11. Mr Mallett for the respondent also made oral submissions which we have considered with equal care but do not rehearse here in full. In essence, it was submitted that the reason why the claimant wasn't successful was nothing to do with race, but everything to do with the fact he did not perform as well as others at interview. He was not put at a disadvantage, compared to the other external candidates, because he did not know about the competencies.

11.1. The claim was brought on the basis of race and religion. In fact, there was no evidence before the interview panel that the claimant was Muslim or to identify religion. That case has not been fully pursued at the hearing;

11.2. The central question is whether there was conscious or unconscious discrimination because of the claimant being British Pakistani. The two stage burden of proof was reiterated in **Royal Mail Group Ltd v Efobi** [2019] EWCA Civ 18, and the claimant cannot satisfy the first stage to establish facts from which the Tribunal could conclude that the alleged discrimination occurred;

11.3. In this case, the ADI qualification was not an essential criterion (despite it being so in other organisations). It was merely desirable and was not relevant at the later stages of selection;

11.4. The policy material referred to by the claimant was merely guidance, not a definitive process which must be adhered to. Even if internal candidates were favoured because they knew about the competencies, this was not related to race and the disadvantage applied to all external

candidates, irrespective of race;

11.5. Ms Moore's statistics and research do not assist in showing that the decision makers in this case were influenced to a significant extent consciously or unconsciously. It is evident from the research that the number of BAME recruits and police officers are relatively low compared to the population of West Yorkshire as a whole, but page 427 shows significant improvements from 2014 to 2017;

11.6. The decision makers in this case were both trained in recruitment, and it can be assumed from PS Beddis's involvement in recruitment and the training which had gone on that PS Beddis was aware of unconscious bias. PI Smith was fully aware of it and had received training in 2016;

11.7. There was no evidence of collusion or any deliberate failure to employ the claimant because of his race, or later changing of scores. The timing of the claimant's interview and use of different interviewers over the days of interviewing suggests that unconscious bias could not have played a part. On the day of the claimant's interview he was third out of five and was potentially successful. It was only later that others scored higher than him, gradually pushing him down to 7th position;

11.8. PI Smith explained his marking and agreed with PS Beddis. There was a logical explanation as to the marks given and a comparison of the marking with other candidates reveals a clear pattern of evidence to support a finding that the scoring was appropriate and corresponded with the answers given. The claimant performed exceptionally well;

11.9. The evidence suggests that the comment recorded by PI Smith was 'grade A instructor' not 'grade A answer';

11.10. The context of the 'taxi' comment in PI Smith's notes suggests that he was making note of the claimant's own answer regarding a higher level of driving skills, not that the claimant had driven a taxi;

11.11. There is clear evidence, recorded at the time, that PI Smith was very impressed with the claimant. The evidence does not suggest that the claimant was treated 'coldly';

11.12. The fact that the respondent could or should apply positive discrimination measures does not mean that, on this occasion, they treated the claimant less favourably by not adopting positive discrimination.

Findings of Fact

12. The Tribunal made the following unanimous findings of fact. Where there was a dispute we resolved it on the evidence, applying the balance of probabilities.

13. Although the claimant suggested in his claim form that there may have been a deliberate failure to employ him because of his race, it was clear from Ms Moore's cross examination and submissions, that the real focus was on unconscious bias on the part of the interviewers. There was insufficient

evidence to support any finding of collusion between the interviewers, PI Smith and PS Beddis and others, or any deliberate failure to employ the claimant because of his race. There was no suggestion that any of the claimant's scores in the interview process had been adjusted after the event to engineer his failure.

14. The claimant came seventh out of a total of 92 applicants for the post of Driver Trainer. The first stage of the recruitment process was an application form. The claimant complained that he received a score of two, rather than the top score of three, in the shortlisting process and that he should have scored three because he had the ADI qualification. The claimant obviously considered that the ADI qualification should have been classified as essential, as we understand is the case for some other emergency services. However, the claimant accepted that the respondent classified the ADI qualification as merely 'desirable', and that the categorization of criteria was the respondent's prerogative. We were persuaded that the claimant's application form (for example, page 101) contained fewer examples and less full answers than some of the other application forms (for example, page 181). We could see why his application was awarded a lower score than some of the others.

15. In any event, the claimant was one of 37 applicants shortlisted for the next stage. The claimant accepted that his score at the shortlisting stage was ultimately irrelevant, as it was not taken into account at later stages. Applicants were assessed on their performance at each stage separately, with no regard to previous stages. Ms Moore appeared to suggest that this approach was used specifically so that the claimant's ADI qualification would not count in later stages so as to give non-Muslim, white British colleagues (who did not have the ADI qualification) an advantage. She submitted that, had the ADI qualification been given appropriate weight throughout, the claimant would have been successful. We disagreed. It was clear that the application process was set down long before the claimant's success at the shortlisting stage was known. There were no last minute changes to the methods of assessment or criteria used nor any other evidence which might have suggested deliberate engineering of the process or scores.

16. The second stage of the assessment process was an examination. The claimant scored a mark of 85 in the exam, which was the pass mark. Of the 37 candidates who progressed to the exam stage, only 18 passed the exam. Of those 18, twelve scored higher than the claimant. That fact suggests that, if the exam had had any relevance thereafter, the claimant would not have been in the top tranche of applicants. In fact, however, the exam mark was also irrelevant, once the candidates had progressed to interview stage. The interviewers took no account of the exam results.

17. The disputed facts arise mainly in respect of the interview process. The candidates were required to do a presentation on the same topic, after which there was a structured interview with the same questions for each candidate. The questions were designed to allow the interviewees to be scored against certain competencies which were required for the job.

18. The first treatment which Ms Moore submitted was less favourable to the claimant, was the fact that he was not issued with the competencies against which the candidates would be shortlisted and interviewed. The respondent

accepted that these competencies (page 171) would have been available to the internal candidates, and potentially to those candidates who were retired police officers, as they were posted on the respondent's intranet and available through the College of Policing. It was clear from Ms Higgins' evidence that, while it was intended that there be a link to the competencies in the application papers, in fact that had not occurred. This appeared to be an administrative error rather than intentional. The claimant's preparation notes for his interview, while very thorough, did not mention the competencies and he clearly did not know what they were. We find that external candidates in general did not have the same access to the competencies as internal candidates or retired police officers. In effect, those candidates who had an existing or past relationship of employment with the respondent had knowledge of and access to the competencies, while anyone applying externally (including the claimant) suffered a potential disadvantage in that they did not have that knowledge and/or access. Serving or retired police officers might also have an advantage in that they would be more likely to have experience of the kind of driving which the successful candidates would be required to train. Four of the six successful candidates were internal candidates or retired police officers.

19. Ms Moore next pointed to certain undisputed facts as evidence that there was discrimination against the claimant. Firstly, it was not disputed that the proportion of BAME employees and police officers working for the respondent is low compared to the population of West Yorkshire. We agreed with Mr Mallet that the statistics (page 423) suggest some (albeit slow) improvement in recent years, which is indicative of some attempts to address the lack of diversity. There was unchallenged evidence from PI Smith and CI Norbury regarding various positive action initiatives and unconscious bias briefings. Nevertheless, it is clear to us that the respondent's workforce is still not representative of the diverse society it polices. Moreover, in the driver training department of 26 employees, there were no BAME employees and the interview panel for the Driver Trainers did not include any BAME interviewers.

20. Ms Moore submitted that the respondent could have applied positive action in the claimant's case. The respondent's witnesses were unable to explain why its positive action initiatives were apparently not applied in the driver training department nor why positive action was not used in the claimant's application. However, there was no evidence that the respondent had any legal obligation to apply positive action in its recruitment of driver trainers, nor was it clear that it would have benefitted the claimant in any event. There were six posts available. The claimant came seventh out of the 18 candidates interviewed. Had he come joint six in the process, the use of positive action might have assured his appointment in a tie break. It may not operate to appoint an applicant over another applicant who achieves a higher score. As set out below, we were satisfied that his performance at interview justified the scores given.

21. The claimant scored 23 out of a total 36 points available. There was a sizeable gap between his score and that of the candidate who came eighth, with 17 out of 36. Had the claimant achieved one more point, he would have come joint sixth. All of the six successful candidates were white British. The claimant was the only British Pakistani candidate. He was also the only Muslim candidate. Five of the successful candidates identified as Christian. We can see why, in this particular set of circumstances, the claimant felt that his race and/or religion

or perceived religion must have been a factor in his lack of success. His position in the scoring matrix and the bare margin by which he missed out, combined with the race/religion of those who were successful, might cause him to question whether his race and/or religion played a role in him missing out.

22. In respect of religion, however, we accepted that the interviewers did not know of the claimant's religion, although they may have perceived it to be Muslim on the basis of his race. However, that proposition was not put to the respondent's witnesses and we can make no finding of fact to that effect. We find that there is insufficient evidence for us to find that the interviewers knew or took a view as to the claimant's religion.

23. Ms Moore outlined to us in submissions some kinds of unconscious bias which she says might have affected the minds of the interviewers. Taking into account what we know of the pervasive effects of a variety of unconscious, implicit or social biases, we accept that there is undoubtedly a possibility that the claimant's race could have been a factor in his lack of success, whether the respondent's interviewers realized it or not. For that reason, the precise facts around the interview are important, in our view.

24. The claimant's interview was at 13.00 on the first day of interviewing (page 357). We consider that is significant, because it meant that his was the fifth interview out of 18. The second candidate scored 27/36, the third candidate scored 25/36, the claimant scored 23/36 and the final candidate that day scored 33/36. At the end of the first day, therefore, the claimant was in fourth position. There were 6 posts available. The interviews continued over the following three days, during the course of which the claimant's position slipped to seventh. There was no evidence that the interviewers on the first day of interviewing would have had any way of knowing how good or bad the later candidates (particularly any external candidates) might be. We conclude that, as far as they were concerned, all of the subsequent candidates could have scored poorly and the claimant could have been in the top six. The fact that the claimant scored so highly and did so well so early on suggests to us that the interviewers took a positive view of his performance. There was no suggestion that the claimant's scores were changed after his interview and no evidence of any 'massaging' of the figures of the claimant or other candidates after the event.

25. The above chronology suggests to us that the claimant and other candidates were scored objectively. There was a real chance that the claimant could have been successful, if the subsequent candidates had proved to be less employable. It might be different if the claimant had been the last or later in the candidates interviewed. It might then have been more plausible that the interviewers, consciously or unconsciously, might have engineered the results so that the claimant slipped below the others. But for a candidate near the start of the process who scored well to be consciously or unconsciously excluded, would have required the interviewers to keep his score in mind throughout the remaining interviews and to engineer the later scores so that he only just lost out. There was no suggestion of collusion in this sense.

26. Moreover, making that even less likely was the fact that the interviews were not carried out by the same panel throughout. PS Beddis and PI Smith carried out most of the interviews, but PI Smith was replaced by CI Norbury on the first day

for an internal candidate and by Inspector Caukwell on the third day. The only member of the interview panel who was consistent throughout was PS Beddis. The claimant accepted that PI Smith did a good job. Ms Moore suggested that PS Beddis was the lead interviewer, influenced the others' scores and was ultimately responsible for the claimant's lack of success. However, we accepted PI Smith's evidence that PS Beddis was not the 'lead interviewer', in that he did not have seniority and was not ultimately responsible for the final scores.

27. We were interested to hear how the scoring had been carried out. PI Smith explained that after each interview, during which he and PS Beddis made notes on the competencies forms, they had half an hour for a 'wash up' discussion to try to reach a consensus, following which they circled the score given to each answer. CI Norbury explained that he did it differently, in that he and PS Beddis both circled the score first, then had their 'wash up' discussion and tried to reach a consensus. While we were concerned that the approach used by PI Smith and PS Beddis opened up the possibility of one influencing the scores of the other, we accepted PI Smith's evidence that that did not happen. While there were some discrepancies and differences between the answers and views recorded by the two interviewers in relation to certain answers given by the claimant, they were not sufficiently stark as to suggest that the interviewers intended to award different scores. Ms Moore invited us to draw a comparison between PI Smith's general comments on the claimant's interview (page 186) and his general comments on one of the successful candidates (page 324). For the claimant, PI Smith recorded "*Definitely got the driving knowledge. Q1 – good answer, understands teamwork. Q2 – lacked depth more than likely due to working alone without supervision for past 10 years. Q3 – very good. Really likeable guy, wants job and would do well in it*". The interviewers awarded the claimant scores of 7 for the presentation and 5, 4 and 7 for questions 1, 2 and 3 respectively. For the comparator candidate, PI Smith wrote, "*Good subject knowledge – stats shows research. Timely and interesting. Q1 – Not enough depth – could have done more about his attributes. Q2 – Good answer. Q3 – Good answer*". That candidate was awarded scores of 7, 4, 6 and 7. Given the similarities in the comments and the similarities in the scores, and the fact that the interviews took place eight days apart, the scores awarded seemed to us to be appropriate to the commentaries and did not contain any noticeable discrepancies.

28. It was agreed that PI Smith had received some training on cognitive bias during his recruitment training in 2016 (page 168), and it was agreed that PS Beddis had done his recruitment training at a time when it did not include cognitive bias training. Mr Mallett made much of the fact that PI Smith was fully conversant with the dangers of unconscious biases following that training in 2016. We should record that it is our understanding that implicit and cognitive biases operate on all human minds and an isolated session of training is not sufficient to prevent or mitigate such biases. In the absence of any other evidence, we do not feel able to infer any particular susceptibility to or immunity from such bias on the part of any individual by dint of them having attended or not attended a single training event some years ago.

29. The claimant complains that PI Smith and PS Beddis were cold in the interview, unlike his experience in interviews for other jobs. However, the claimant

accepted in cross examination that PS Beddis made a comment at the start of his interview about how he would looking at the top of the interviewers' bald heads because they would be taking notes throughout. The claimant knew not to expect eye contact, therefore. We accepted the claimant's evidence that he felt the interviewers were cold but we accepted the respondent's evidence that that was the style of interview and that it was the same for all applicants. The interviewers' notes of the other interviews do not suggest a warmer approach. In fact, PI Smith's notes of the claimant's interview (page 186) recorded warm sentiments towards the claimant, saying he definitely had the driving knowledge, and was a "*really likeable guy, wants job and would do well in it*".

30. The claimant was surprised that the interviewers did not ask him questions about his experience and interpreted that as a lack of interest. We accept that the claimant was expecting more two-way interaction and we also respect his asssertion that he felt this was indicative of bias against him. Although the College of Policing document '*Values Based Recruitment and Selection'* suggests (page 590) that assessors may need to probe behaviours to identify underlying values, there is no suggestion from the interviewers' notes of other interviews that they asked follow up questions or probed any more deeply than they did with the claimant. We find that the style of interviewing was the same for all candidates. The notes made on the claimant's score sheet, as well as the high scores he achieved, placing him in the top seven candidates, suggest to us that there was no lack of interest in what he said.

31. The interview required the claimant to do a presentation. PS Beddis' notes were at page 170 and PI Smith's at page 179 of the agreed bundle. The claimant performed well in the presentation and was in the top 6 candidates. There was some discussion at the hearing as to whether his lack of use of a flipchart was a negative or positive factor and whether or not the presentation was intended to be a test of his training ability. We find that, while the interviewers found it unusual that he did not use a flipchart for a presentation for a training role, he nevertheless scored highly for his presentation and, had success only been reliant on the presentation, he would have got the job.

32. The claimant pointed to the word 'taxi' recorded in PI Smith's notes on page 179 and provided in evidence a newspaper article (page 382 – 384) entitled '*How being mistaken for an Uber driver made me wonder if unconscious bias can be beaten'*, suggesting that associating British Pakistanis with taxi drivers was a common stereotypical assumption. The claimant gave evidence that he had not referred to taxis or being a taxi driver in his interview and Ms Moore submitted that the fact the word appeared at page 179 was indicative of PI Smith being subject to unconscious bias. While we agree with the sentiments expressed in the newspaper article and would not be surprised to learn that the writer's experience was widespread, we are required to look at what occurred in the facts of the claimant's case. The word 'taxi' at page 179 occurs in comments on the claimant's presentation and in the following context, "*Gave good explanation of safety critical matters. Competency to do the job – Police, Taxi. Important to know what you will do in changing standards…*". PS Beddis' notes for the same part of the presentation read, "*Importance of good standards. – ID hazards on the road – cyclists, m/cycles, pedestrians, horseriders. Most vulnerable – less protected. – Competent to do your job – safely and required manner*". PI Smith's evidence was that "*One comment he made was that driving standards are important because particular drivers,*

which he cited as "Police, taxi", have to be competent given the higher risks they face, which I understood him to mean driving at high speed and carrying passengers respectively" (paragraph 12, PI Smith's witness statement). We accepted PI Smith's evidence that the claimant, in this part of his presentation, was not talking about his own experience, but was talking about higher standards expected of certain road users. The context of the other comments of both PS Beddis and PI Smith support that interpretation. It is not clear why PI Smith would have recorded the word "police" if he was making notes of the claimant's own experience, given that the claimant had no experience of driving for the police either. The claimant accepted that he mentioned 'police' because he was referring to their need for high competency to do the job. We concluded that the 'taxi' comment was not about the claimant, nor did it imply, in our view, that the claimant was somehow associated in PI Smith's mind with taxi driving. Whether or not the claimant actually used the word 'taxi', PI Smith was clearly recording types of other road users, not making the association suggested by Ms Moore.

33. The claimant took us to another comment (page 185) in PI Smith's notes of the interview answers. In the top right hand corner PI Smith has written something and circled it. The words "*GRADE 'A"* are clear, but the following noun is unclear. The claimant says it reads "*Grade A Answer*" and is PI Smith's comment on the overall quality of the claimant's answer to that question. He says that the score given to that question of 7 out of a total possible score of 9 does not reflect it being a 'grade A answer' and that it is evidence that PS Beddis persuaded PI Smith to score the claimant lower. PI Smith disputed that and, although he could not recall the comment being made, said he believed the comment read "*Grade A instructor*" because that was what the claimant said in answer to the question. He says he would have recorded it in the top right hand corner because he had no more space at the bottom of the page. Ms Moore directed us to another page (page 186) where PI Smith had written the word 'answer' in lower case handwriting and asked us to find that the handwriting was sufficiently similar for us to conclude that it was the same word on page 185. We are not handwriting analysts and did not feel competent to reach any conclusion from the similarities or differences in the two words. It seemed to us that, on the basis of the handwriting alone, the word on page 185 could have read either 'answer' (in lower case) or 'INSTRUCTOR' (in upper case). Given that PI Smith wrote the words 'Grade A' in upper case, it seems likely that he would have continued the phrase in upper case, rather than switching to lower case. However, more revealing in our view, is the fact that the claimant's own preparation notes for the interview which Ms Moore disclosed at the hearing, record on the second page the words "*currently a Grade A driving instructor*". On the balance of probabilities, we find that PI Smith's comment reads 'Grade A instructor' and was merely recording what the claimant was telling him, rather than an overall assessment of the quality of the claimant's answer to the question.

34. In his witness statement, the claimant pointed out a number of perceived discrepancies between what he was told by PS Beddis in his telephone interview feedback and the answers he gave and scores he was given at interview. We accepted the claimant's evidence about what PS Beddis told him. However, in cross examination, the claimant accepted that some of the other interviewees provided more evidence and examples than he did at

interview. Scrutinising the comments and scores awarded, we find that there was insufficient evidence for us to find that the interviewers failed to accurately record what he said at interview, given that they were recording his answers in note form. Rather, both interviewers recorded how well the claimant interviewed, something which is reflected in the fact that he was in the top tranche of candidates. None of the witnesses were able to give evidence regarding PS Beddis' feedback to any of the other candidates, for comparison with the claimant's experience. There was insufficient in the claimant's account of that feedback to suggest to us that PS Beddis viewed the claimant differently from other candidates or had recorded other candidate's evidence more fully or more favourably.

35. Finally, Ms Moore directed us to the fact that one serving officer's retirement date and holiday dates meant that he was unable to start the new post at the required start date. She asked us to find that the fact allowances were made for this retired officer suggested that white British applicants were treated more favourably than the claimant. We agree that this applicant was treated more favourably than the claimant, in that the requirement to start on a particular date was not applied to that candidate. However, we accepted the respondent's evidence that serving officers were not required to undergo the induction training process. While that does not wholly explain the adjustment of dates for this particular candidate, we consider that it is evidence which shows that serving or retired police officers were treated more favourably than external candidates. It does not suggest different treatment of candidates because of race.

The law

36. Section 39(1) of the Equality Act 2010 ("EQA") reads

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

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

37. Section 13 EQA reads

(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

38. Section 23(1) EQA reads

On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

39. Section 159 EQA reads

(1) This section applies if a person (P) reasonably thinks that –
(a) Persons who share a protected characteristic suffer a disadvantage connected to the characteristic, or
(b) Participation in an activity by persons who share a protected

characteristic is disproportionately low.

(2) Part 5 (work) does not prohibit P from taking any action within subsection (3) with the aim of enabling or encouraging persons who share the protected characteristic to –

(a) Overcome or minimize that disadvantage, or

(b) Participate in that activity.

(3) That action is treating a person (A) more favourably in connection with recruitment or promotion than another person (B) because A has the protected characteristic but B does not.

(4) But subsection (2) applies only if -

(a) A is as qualified as B to be recruited or promoted,

(b) P does not have a policy of treating persons who share the protected characteristic more favourably in connection with recruitment or promotion than persons who do not share it, and

(c) Taking the action in question is a proportionate means of achieving the aim referred to in subsection (2).

40. Section 136 EQA concerns the burden of proof and reads:

(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.

41. A tribunal has a wide discretion to draw inferences of discrimination where appropriate, providing those inferences are based on clear findings of fact. Inferences can be drawn from the full factual background of the claim, not just the specific incidents and acts set out in the claim form.

42. Ms Moore provided extracts from a number of cases, including **London Borough of Ealing v Rihal** [2004] EWCA Civ 623, in which it was held that an employment tribunal had been entitled to draw an inference of a culture of racial stereotyping that unconsciously influenced management decisions about promotions from the Council's statistics, which showed that no non-whites held senior management positions within the claimant's department. A tribunal must not, however, rely upon generalised assumptions or a mere impression of a discriminatory culture as the basis for drawing an inference in a particular case.

43. Ms Moore referred us to the observations of Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572 HL, referring to the equivalent provisions in the Race Relations Act, "*All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognize our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realized it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the interference may properly be drawn. Conduct of this nature by an employer, when the inference*

is legitimately drawn, falls squarely within the language of section 1(1)(a). The employer treated the complainant less favourably on racial grounds. Such conduct also falls within the purpose of the legislation. Members of racial groups need protection from conduct driven by unrecognized prejudice as much as from conscious and deliberate discrimination. Balcome L.J. adverted to an instance of this in ***West Midlands Passenger Transport Executive v Singh*** *[1998] I.R.L.R. 186, 188. He said that a high rate of failure to achieve promotion by members of a particular racial group may indicate that 'the real reason for refusal is a conscious or unconscious racial attitude which involves stereotyped assumptions' about members of the group."*

Determination of the issues

44. The claimant says that the failure to offer him a job and/or the way he was assessed was an act of direct race discrimination and/or religion discrimination, according to section 13 EQA. Those allegations fall within section 39(1)(c) and 39(1)(a) EQA respectively and the Tribunal therefore has jurisdiction.

45. The first question for a section 13 claim is whether there was less favourable treatment of the claimant? The claimant was not offered one of six posts of Driver Trainer, while six white British non-Muslim candidates were offered posts. However, the failure to offer the claimant a post as Driver Trainer will only be less favourable treatment if the successful candidates were appropriate comparators for the purposes of section 23(1) ERA. To assess whether there was no material difference between the circumstances relating to their case and the claimant's, it is necessary to look at the recruitment process. What was that process? Did the successful candidates' performances at interview justify their higher scores? This analysis will also answer the question of whether he was treated less favourably in the way he was assessed? Was the process itself tainted with race or religion discrimination?

46. Or, to look at it another way, was the reason for the failure to offer the claimant the job something to do with his religion or race, or was it because he performed less well at interview or was less qualified?

47. The claimant argued that he was as well qualified or better qualified than some of the successful candidates, because he had the ADI qualification. However, he accepted that it was for the respondent to determine what qualifications were essential or desirable and, we find that there was no evidence of anything artificial in the way the respondent determined its priorities. It did not adjust the criteria to disadvantage the claimant. We accepted that the respondent determined the criteria to get the best qualified candidates for the job. We also accepted that, ultimately, the ADI qualification did not come into the respondent's assessment of any of the interviewees' abilities, because it was not taken into account at the later stages of recruitment.

48. On the face of it, the reason the claimant was not offered one of the six Driver Training roles was that there were only six roles available and there were six candidates who scored better than him at interview.

49. The heart of the dispute in this case is whether the claimant was scored less well than he deserved and/or whether the recruitment process was tainted with discrimination, in particular, because of unconscious bias against the claimant.

Those are the issues which both parties came to the hearing seeking to litigate and to which the evidence and submissions were mainly directed.

50. The claimant says that his scores were lower than they should have been given his performance at interview and that they were not representative of his answers. We find as a fact that there was no deliberate manipulation of scores (paragraph 13 above) and that the claimant's scores on the application form were representative of the quality of his application (paragraph 14 above). We also find that the claimant did very well in the application process, coming very close to success (paragraph 21 above).

51. Most significantly, we found that there was insufficient evidence that the claimant's scores did not accurately reflect the evidence he gave and his performance at interview (paragraph 27 above). While the telephone feedback suggested that PS Beddis did not fully recall or record the whole of the answer given by the claimant about teamwork, there was insufficient evidence to suggest that this was caused by anything more than poor recall or inability to write fast enough in the interview (paragraph 34 above). While we had some concerns about the potential for the 'wash up' discussion before scoring to enable one interviewer to influence the other, there was in fact no indication that PI Smith was influenced in any way by PS Beddis, and we accepted PI Smith's credible evidence on the process and his perception of it (paragraph 27 above).

52. Ms Moore asked us to find that unconscious bias made the interviewers score the claimant lower than the other applicants. She referred us to the various types of bias which could have been at play, as set out above (paragraph 23). She suggested that we could conclude from the fact that the claimant only just missed out, that he had been marked down because unconscious bias. However, it seems to us that that fact could equally be interpreted as indicating a lack of unconscious bias because he did so well. We are not persuaded of the inference she suggests (paragraphs 21 and 24 above).

53. Ms Moore also suggested that we could conclude that the interviewers treated the claimant less favourably because of the prevalence of unconscious implicit social biases in human decision making. While we acknowledge the universal nature of unconscious bias, we do not feel we can conclude, on that basis, that the interviewers in this particular case did not have open minds. Just because all humans are subject to certain unconscious biases does not suggest that these particular humans were subject to these particular biases on this particular occasion. Nor do we feel able to extrapolate from the lack of diversity revealed by the statistics that it is a result of unconscious bias or that there was any unconscious bias in this particular case.

54. Ms Moore submitted that the comment 'Grade A answer' suggested the claimant had not received the correct score. As found above (paragraph 33) however, we concluded from the evidence that that comment was not made. Similarly, we found as a fact, from the context, that PI Smith's 'taxi' comment was not indicative of stereotyping or unconscious bias (paragraph 32 above). We found that the interviewers were not unusually unfriendly or hostile and that they appear to have treated all interviewees the same and to have asked them all the same questions and engaged with them similarly (paragraph 29 above).

55. Ms Moore highlighted to us the respondent's failure to apply positive discrimination measures under section 159 EQA in the claimant's case. We agree that, where statistics show a disparity between the number of BAME employees and officers and the number of BAME members of the population at large, positive measures may well be appropriate. Ms Higgins told us that positive discrimination was used in certain circumstances and the College of Policing documents we were shown clearly identified that it was a useful tool for improving the diversity of the respondent. We were not offered any explanation as to why section 159 or diversity initiatives were not deployed in the driver training recruitment exercise. However, section 159 EQA is a provision which allows positive discrimination. It does not require it. We do not feel we can conclude that the failure to treat the claimant more favourably than others (by deploying positive discrimination) was indicative of any less favourable treatment or bias against people with the claimant's protected characteristic(s).

56. Ms Moore submitted that the lack of diversity revealed by the statistics suggested that unconscious bias or discrimination must be at play in recruitment. However, we accepted the evidence of the respondent's witnesses that there were a number of recruitment initiatives underway to try to improve the figures and we recognize that there are undoubtedly a multitude of factors which contribute to low numbers of BAME staff and officers in a particular police force. We accepted PI Smith's evidence that there was a slow improvement in the figures. Given the other facts of this case, we do not feel able to conclude, from these very general statistics about the diversity of the workforce, that there was any unconscious bias at work in this particular case.

57. Perhaps most persuasively, the scoring appeared to have been carried out scrupulously. While the interviewers may not have recorded every detail of what the applicants said, the correlation between the claimant's interview preparation notes and the notes on the interview forms were such that the interviewers appeared to have recorded what the claimant said. It was also clear from the comments recorded on the forms and the scores awarded that the interviewers were positive about the claimant. In particular, PI Smith's positive comments about the claimant's performance at the hearing had the powerful ring of truth, in that they repeated comments he made at the time on the interview sheet. He had clearly been impressed by the claimant at interview.

58. On the basis of this analysis we find that the six successful applicants were in materially different circumstances to the claimant, because they performed marginally better at interview than he did. He was not treated less favourably than them in the recruitment process, but was treated the same in all material respects, with one exception which we deal with below. In other words, the reason he was not offered the job was because he did less well at interview, not because of his religion or race. On the basis of his performance at interview, he would still not have been offered the job even if he had been white British.

59. The exception referred to in the above paragraph is that the claimant was treated less favourably than some of his comparators in two ways. Firstly, he was required to be available for the induction training, while some applicants were not. Secondly, some candidates had access to the competencies while

other external candidates, including the claimant, did not. However, those differences in treatment were because of the candidates' pre-existing relationship with the respondent (either because they were internal candidates or retired police officers) (paragraph 18 above). The claimant was therefore treated the same as the two other external candidates who were successful in their applications and who were white British and non-Muslim. He was not treated the same as the internal candidates and retired police officers, but the reason was not his race, but rather his lack of a pre-existing relationship with the respondent.

60. The fact that there were statistically fewer British Pakistani or Muslim internal candidates and/or retired police officers and that the respondent's more favourable treatment of those candidates may have had a disproportionate effect on people with the claimant's protected characteristics are matters relevant to a complaint of indirect discrimination, but that complaint was not before us.

61. Therefore, on the evidence before us in this case and on our findings of fact in the round, on the balance of probabilities, the claimant has not shown facts from which we could conclude that he was treated less favourably because of race or religion. Even if we are wrong in that assessment, and the statistics and/or other facts found above are sufficient to shift the burden of proof, we would find that the respondent has shown that the recruitment process and the interviewers' scoring was not tainted by race and/or religion. The claim therefore fails and is dismissed.

62. No doubt, however, the respondent understands that, in view of the statistics on diversity presented to us by Ms Moore, addressing racial and/or religious bias (conscious or unconscious) should remain a priority. We are conscious that, even if the claimant's claim had been successful, we no longer have the power to make general recommendations. However, we commend initiatives for positive action and regular training on cognitive and implicit biases, not just for recruiters but all staff and officers. The respondent may consider that it would be appropriate to consider making use of section 159 EQA in all recruitment exercises it undertakes and to keep a clear record of its decisions in that regard and the reasons for them, to reassure BAME applicants that the respondent treats its obligations to improve diversity as a priority.

Employment Judge Bright

14 March 2019
Date