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EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Y Li

AND

Vision Security Group Ltd

HELD AT: London Central **ON:** 17 June 2019

BEFORE: Employment Judge Palca
Members: Mrs G Bradfield
Ms G Gillman

Representation:

For Claimant: In person
For Respondent: Mr J Cook, of Counsel

JUDGMENT

The Judgment of the Tribunal is that the Claimant's case that he was discriminated against on ground of race and/or age fails.

REASONS

Parties

1. The Claimant is a Chinese British citizen who, on 23 March 2018, applied for a job as an operative/controller of the Global Security Operations Centre of the Respondent in London. The Respondent is a subsidiary of the Mitie Group which amongst other things runs security operations. On 28 March 2018 the Claimant was informed that he was unsuccessful in his application for a position with the Respondent. Following an application to ACAS for an early conciliation certificate, the Claimant launched proceedings against the Respondent on 20 July 2018 claiming he had been discriminated against on the ground of his

race, age and marital status and seeking compensation. The claim in relation to discrimination on grounds of marital status was struck out as having no reasonable prospect of success on 13 March 2019. The Respondent filed its ET3 on 19 December 2019 and, pursuant to an order made by the Tribunal at a preliminary hearing on 2 February 2019, served an amended response on 15 February 2019.

Additional Matters

2. The parties had not exchanged witness statements before the hearing, because there was a dispute over a number of issues including how to effect simultaneous exchange. The parties exchanged their statements at the beginning of the hearing. Both parties were keen to proceed with the hearing and we therefore agreed that the hearing would be adjourned until 2pm, which would still allow sufficient time for the hearing to proceed.
3. There were further issues which were discussed before the hearing began. The Claimant objected to the inclusion of the Respondent's amended ET3 in the bundle instead of the original one. The Tribunal ordered that the amended ET3 should be included, since it had been served upon the Claimant on 15 February 2019 pursuant to an order by an Employment Judge on 2 February 2019 at a preliminary hearing. The Claimant also maintained that no documents should be included in the bundle save those which had been disclosed between the parties prior to the exchange of documents date of 15 February 2019. The Tribunal observed that all parties have a continuing duty to the court to disclose relevant documents, and that those disclosed by both Claimant and Respondent following 15 February 2019 should be before the Tribunal.

Evidence

4. There was a bundle of documents. The Respondent added two documents to the bundle (207 and 208 relating to marking and analysis of the assessment scores) which the Claimant did not accept were valid documents. The Claimant filed a witness statement to which were attached a number of additional documents. Witness statements were exchanged on the first day of the hearing. The Claimant gave evidence. Mr Alex van der Merwe and Ms Irena Abebe, respectively Global Security Operations Centre Manager and Global Security Operations Centre Lead at the material time, gave evidence on behalf of the Respondent.

Issues

5. The issues were agreed between the parties orally at the start of the hearing. The case arises out of the Claimant's failure to be appointed to a job vacancy advertised by the Respondent's for an operative in its Global Security Operations Centre. The issues are:

1. Section 13: Equality Act 2010 direct discrimination on grounds of race and age

- 1.1 The Claimant describes his race as Chinese and his nationality as Chinese. He was aged 58 at the material time.
- 1.2 Has the Respondent subjected the Claimant to the following treatment falling with s.39.1(a) (the arrangements made for deciding to whom to offer employment) or (c) (not offering employment) of the Equality Act 2010, namely:
 - 1.2.1 Not appointing him to the position of operative/controller at the Respondent's Thomson Reuters Site, despite being the best qualified person to be so, for the following reasons:-
 - 1.2.1.1 he performed the best of all the candidates overall in what the Claimant cites as the material tests;
 - 1.2.1.2 his previous experience in similar roles;
 - 1.2.1.3 his previous experience as a journalist;
 - 1.2.1.4 the fact he is a multi-linguist
 - 1.2.2 Using inappropriate selection criteria, namely focusing on the unnecessary requirement of Excel proficiency rather than issues such as knowledge of current affairs and relevant laws and procedures;
 - 1.2.3 Not scoring his tests fairly;
 - 1.2.4 Not treating all the candidates the same, namely requiring him to leave the assessment centre before the others, informing him that it was not necessary to complete the Q23 essay question; and not sending all the candidates Event details before the interview.
- 1.3 Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on Candidates B and D, who were the successful candidates. The tribunal may also refer to hypothetical comparators.
- 1.4 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? The Claimant relies on:
 - 1.4.1 He was the only person to be asked for his passport, in full view of all the other candidates;
 - 1.4.2 He was the only candidate asked by the interviewers exactly where he was from in his country of origin
 - 1.4.3 Comments, regarded by the Claimant as racist, made by Irena Abebe that they were searching for a character to be part of a team, with concomitant focus on cultural differences

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

2. Remedies

- 2.1 The issue of remedy will be dealt with at a later hearing, if necessary
- 2.2 If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy
- 2.3 There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendation and/or compensation for loss of earning, injury to feelings, aggravated damages and/or the award of interest

Law

6. Section 13 of the Equality Act 2010 defines direct discrimination. This occurs when:-

"13.1 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." Race (which includes nationality and ethnic or national origin) and age are both regarded as protected characteristics.

7. Section 39 of the Equality Act 2010 deals with discrimination at interview stage as follows:-

*"39(1) an employer (A) must not discriminate against a person (B) –
(a) In the arrangements A makes for deciding to whom to offer employment; ...
(c) by not offering the employment"*

Facts

The Tribunal decided that the material facts were as follows.

8. The Respondent is a security company within the Mitie Group. It operates a Global Securities Operations Centre, (GSOC) for clients including Thomson Reuters. In 2018 it took the decision that it wanted to expand its team. It advertised for security controllers online, stating that it was looking for an operative to be part of the GSOC. The advertisement included the following:

"The position is within a security control room environment operating 24/7/365. The role will require the management of security systems (CCTV and ACS), monitoring intelligence feeds and risk for our clients globally, and subsequently escalating, invoking and managing appropriate responses when an incident or event occurs.

The client is looking for people who can monitor what is going on around the world, think under pressure, communicate well and be part of a small

cohesive team. We are seeking people with a professional attitude, excellent customer service and communication skills. They must have the ability to work in a shift pattern which includes, days, nights, weekends and bank holidays, therefore a flexible approach to work is essential for this role”.

9. Items of essential experience required included: excellent communications, patience and courtesy; a minimum of three GCSEs including English and maths; superior IT skills including working knowledge of all MS Office applications (Word, Excel, Outlook, PowerPoint). *“The role will require individuals to learn several new computer based security and communication systems; strong analytical skills; good team work, the ability to organise and prioritise work under pressure to deadlines, the ability to operate professionally, calmly and confidentially at all times and a full five year checkable employment/academic history”.* Desirable experience included; a degree or equivalent; bi-lingual experience working in a similar role; use of intelligence management systems; possession of valid SIA licence and knowledge of CCTV and access control systems.
10. The job was paid at £14.94 per hour, to be full time, four hours on/four hours off, days, nights and weekends on a rolling roster.
11. The Respondent adopts a standard practice for interviews, which was in place before the Claimant came to its assessment centre on 23 March 2018. The assessment centre consisted of four exercises: a group discussion exercise, an intelligence reporting assessment testing current affairs knowledge and writing skills; an assessment in the use of Microsoft Excel; and an interview. Six people were invited to interview, but one did not attend. It appears that not everyone was sent event details in advance, though the Claimant was sent them. Those who attended, in addition to the Claimant, were:
 - a. Candidate A, an English internal candidate, male, aged in his early 30s. His CV showed that from 2014-2018 he had been a security officer at Bluewater. He had a number of relevant professional qualifications; candidate B an internal candidate, male in his mid to late forties of Pakistani origin.
 - b. Candidate B, a male who had been acting as a security officer for the Respondents from 2012 to the present, having before then worked for G4S as a security officer between 2007 and 2013. He was awarded a Masters in business and administration from Coventry University in 2010;
 - c. Candidate C was a Romanian woman in her early 20s who had various security industry authority (SIA) licences, had worked as a control room coordinator for Discovery Networks Europe from February 2017 to the interview and had a bachelor degree in economic science from a Romanian university;
 - d. Candidate D was 39 and had matriculated in South Africa with five subjects. He had worked as head of security in the West

End from 2004 to 2016 and from 2017 he was a control room supervisor for Interserve at the Stratford Market Depot, monitoring depots and incidents across various tube lines and liaising with police.

12. The Claimant submitted a brief CV covering the previous five years. It showed that he had been working during that time in JP Morgan's Global Data Centre Security Operation, managing security access systems within a security control room for JP Morgan across the globe, monitoring and authorising and progressing the access of visitors to the data centre sites worldwide. His CV said to perform his role effectively he resorted to IT skills having fully mastered superior IT skills including working knowledge of all MS Office applications (Word, Excel and Outlook), business intelligence and share point. It showed he had two bachelor degrees, was multi lingual and had an SIA licence.
13. It was apparent to the Tribunal that the Claimant misunderstood the nature of the job for which the Respondent was advertising. He assumed it would be the same job as he had been performing at JP Morgan and would primarily relate to physical security, with CCTV monitoring being the predominant task. However, the Respondent's job specification required not only the management of security systems via CCTV and ACS but also monitoring intelligence feeds and risks for the client globally, and responding appropriately. In reality, the Tribunal accepted, while the role had a physical security (CCTV) aspect, more critical aspects of the role were to monitor and analyse intelligence and to make appropriate incident responses (whether for example to a terrorist attack or serious weather conditions). The Tribunal accepted the Respondent's evidence that physical security skills can be taught quite easily and that they were looking for experienced incident managers. It is clear that the assessments which the interviewees were to conduct supported that view.
14. There were three members of the interview panel on the day, Mr van der Merwe - the Respondent's Global GSOC Manager, who was South African; Mr M Bereza - then the Respondent's Risk and Resilience Manager for the relevant region, who was Polish; and Ms Abebe, the Respondent's GSOC lead, who was from Uzbekistan.
15. The day began with everyone introducing themselves. The Claimant says that Mr van der Merwe said that he was interested in football, and that other candidates followed suit to attract his attention. This seems unlikely given that the Employment Tribunal accepted Mr van der Merwe's evidence that he does not like football, preferring instead rugby and cricket. The Claimant told those present that he liked table tennis and that he spoke Cantonese and Mandarin as well as English. He alleges that Mr Bereza asked whether he was from mainland China or Hong Kong, and then followed this up by asking if he was from Beijing, to which the Claimant replied that he was from a city close by. The Respondent's witnesses have no recollection of this incident. In his ET1 the Claimant refers to mentioning that he was multi lingual, but does not refer to any follow up questions from Mr Bereza. In his statement the Claimant describes himself as being not very comfortable about the conversation. In those circumstances it is very

surprising that during his long ET1 the Claimant did not mention the conversation at all. The Tribunal notes that in his ET1 the Claimant states, as must have been the case, that the panel was aware that he belonged to an ethnic Chinese minority group in the UK from the start of the day.

16. The Claimant says he was reportedly told not to worry about his performance in the exercises. Ms Abebe gave evidence that this would not have happened. The Respondent would not have encouraged candidates not to take the exercises too seriously. Instead they said something along the lines that no single test would be the be all and end all and the Respondent would be looking at every test that a candidate completed rather than focusing on any one test in particular. While the difference between these two accounts is a question of degree, the Tribunal concluded that the Respondent's explanation was more likely – otherwise there seems little point in asking the candidates to go through the exercises in the first place.
17. The Claimant alleges that the only person whose passport was collected during the course of the day was his own. There are documents before the Tribunal which indicate that all three external candidates' passports were taken by Mr van der Merwe and scanned into his phone. The Claimant alleges that these documents are forgeries. . The Claimant cites his reason supporting that they are false is that the size of documents in kilobytes is recorded differently on the face of each document, and that it was implausible that two or three documents would be scanned in one minute, as was indicated in the forms. The Employment Tribunal accepted the Respondent's explanation that the difference in kilobyte size, which was small, was accounted for by the covering letter or note. The Employment Tribunal believed that it is very plausible that two or three one page documents could be scanned by an individual within a minute. The Employment Tribunal therefore does not accept the documents are false
18. All three external candidates' passports were collected and scanned during a thirty-minute period. Mr van der Merwe says that he collected all the passports at the same time. There was a twenty two minute gap between photocopying the other two passports and then the Claimant's who was last. It is possible that the Claimant was asked for his passport slightly later than the other candidates. However, the Employment Tribunal was satisfied that the Claimant was not singled out as being the only candidate to asked for his passport on the day. In addition, they were satisfied that, since all candidates were in the same room at the material time, the other two candidates would have been asked for their passports in front of other people.
19. The Claimant's passport shows that he is a British citizen and that he was born in Yanpeng. It will also have shown his age. The Employment Tribunal accepted the Respondent's evidence that Mr van der Merwe did not pay any attention to the contents of the passport, that he did not show it to anyone else, discuss it with either of the other panel members or tell them the Claimant's age or country of origin. The Tribunal accepted this evidence. There was no evidence to the

contrary. Immediately after scanning the document, Mr van der Merwe began interviewing one of the candidates.

20. Following the group introduction there was a group exercise. The Respondent's evidence was that it was designed to look at candidates' teamwork and communication skills. The Claimant's evidence was that the exercise involved prioritising five security situations individually, and then discussing them as a group. The Claimant regarded himself as having won the exercise because he persuaded the other candidates to his point of view. He states that the interview panel looked pleased with his contribution as he had demonstrated the correct degree and level of judgement and intelligence. The Respondent's evidence was that this was not what they were assessing, that it was a discussion and not a debate, and that they were analysing individuals' communication skills and team work. The Respondent's witnesses have no specific recollection of this element of the day, save that none of the candidates particularly stood out as having very strong or weak communication and team work skills.
21. The Claimant says that all three managers looked very pleased with his performance at this stage, and that it was only after they had seen his passport that their attitude towards him changed. The Tribunal noted that by this stage the panel would have realised at the introduction stages that the Claimant was ethnically Chinese and, on the Claimant's evidence, that he had said he had been born near Beijing. It therefore seems implausible that attitudes towards him would have changed because of the contents of his passport. If the Respondent had not wanted to recruit a Chinese person, its attitude towards the Claimant would have been consistent from the start.
22. It is common ground that after this exercise Mr van der Merwe told the candidates that the papers for the group exercise would not be marked. The Claimant says that this was because candidate D was sending looks to his South African compatriot, begging for his support because he had performed badly, indicating that the Respondent was already biased in favour of appointing the South African candidate because of his nationality. The Tribunal accepted the Respondent's convincing evidence that the papers would not be marked because the point of the exercise was to study communication skills and team work, and that they were collected in to ensure that they were not shown to future candidates who might be asked to perform the same test. The Employment Tribunal also accepted that the Respondent had destroyed the papers on the basis that they were not relevant, and that this was the reason why they were not disclosed to the Claimant during the course of the proceedings, rather than any more suspicious reason.
23. At around 10am the Claimant was asked to carry out an Excel exercise, which involved performing eight tasks on a spreadsheet in thirty minutes. The front page specifically stated that people could use internet search engines to allow them to complete the tasks. The Claimant had said in his CV that he had a working knowledge of Excel. However, he only attempted one question. Candidate C performed similarly. Candidate D performed several tasks and either candidate A or B seems to have performed all the tasks. Mr van der Merwe said

that he scored all the papers and that he scored A four out of five, B five out of five, D three out of five and C and E one out of five. The Claimant claims that no candidate performed well at Excel and said in evidence that he was shocked to find that the job required Excel capability because he knew what the job entailed and Excel skills were appropriate for a manager not an operative. He also said that the exercise was fabricated to find an excuse to reject him. The Tribunal rejected both statements. The job description is clear that a working knowledge of all Microsoft applications including Excel was essential, not least because of various auditing procedures that needed to be regularly undertaken, and the test had been prepared before the Claimant came into the assessment centre. The Respondent also stated that there were two points to the test: one was to examine Excel capability, and the other was to see how proficient candidates were in problem-solving if they did not already have the relevant skills – this was why they had been invited to search the internet for hints how to do the task at the beginning of the paper. The test was therefore designed to test initiative for how to carry out tasks should they not be proficient at it immediately, and therefore the Claimant's failure to attempt more than one of the eight tasks was a significant factor in their assessment of him.

24. At 10.30am the Claimant was interviewed by Mr van de Merwe and Ms Abebe. He performed reasonably well, scoring 25. Candidate A scored 28, Candidates B & D scored 24 and Candidate C scored 18. It is noteworthy that he was scored second highest, which indicates that a fair and unprejudiced assessment of his performance was carried out. The Claimant claims that his performance at interview was underscored. However, he received low scores for some answers and high scores for others. Looking at the contemporary notes made by the managers, and hearing their explanation for some of the low scores in evidence, the Employment Tribunal believed that the scores were fair. The Respondent's evidence was that the Claimant often answered questions without giving sufficient supporting evidence. It is noteworthy that when he did give examples he scored highly against a question, and when he did not he received a low score.
25. The Claimant told the Tribunal that he had told the interviewers that he had journalistic experience and that this was ignored. The Respondent's witnesses say they have no recollection of this: it is not in their notes, and they say that had the Claimant believed it was a relevant skill he could have brought it up when asked about relevant previous experience, and had he done so this would have been noted. The Tribunal accepted the Respondent's evidence that this sort of experience would not have been material for the role in question in any event because the Respondent was operating a security department, albeit for an organisation which includes media companies, and not a news organisation.
26. The Claimant states that Ms Abebe told him that they were looking for "suitable characters to work as a team" and that he interpreted this as a racist remark dividing him from the others because of his cultural background. The Employment Tribunal accepts that

- something similar was said. This would be likely given that team work was highlighted as an essential skill for the successful candidate.
27. During the course of the interview the Claimant, when asked about his weaknesses, cited his poor ability at Excel. The managers' contemporaneous note was that "lack of experience with Excel could be significant. This is to be verified based on Excel results". This remark shows how important Excel skills were regarded by the interviewers.
28. The Claimant has also alleged that candidate D's interview had been very generously marked. Candidate D got one mark less than the Claimant, and looking at the contemporary notes the Employment Tribunal considered that his marks were plausible. Had the Respondent been keen to appoint D above all others, the interviewers could have marked his scores more highly in some areas, but did not do so. The Claimant drew attention in particular to one comment in response to a question of where D saw himself in two years' time. D had replied that he did not know. The interviewers' note liked his honesty about not knowing what he wanted but said "*however, would expect further pre-interview preparation around his role within the company*". The Claimant took this as meaning that the Respondent would further D's candidacy by given him interview preparation in the future. However, this was to be the only interview and therefore did not indicate, even if one accepts the Claimant's interpretation of the phrase, that D was going to get any advantage over the other candidates. In addition, the Tribunal accepted the Respondent's evidence that the Claimant had misinterpreted the comment, which was in fact a negative comment about D thinking that he should have prepared better for the interview.
29. The final element of the Claimant's testing was an intelligence reporting assessment. It consisted of 22 questions about international affairs and one essay (question 23) about the world in the future, in total to be completed in fifty minutes. The Claimant answered the 22 questions well, obtaining 33 points to B's 34 and D's 28. However, he did not attempt the essay question. The Claimant says that this was because, before he began the paper, Mr Bereza told him to answer questions 1-22 and not to attempt the essay question because there was not time. The Claimant also said that as a result, despite Mr Bereza telling him to do so, he had written void across the relevant page.
30. The document disclosed as being part of the Claimant's intelligence reporting assessment did not show that "void" had been written across the page. Instead, it was blank, apart from the proposed essay title. The Claimant claims that this final page was fake, and that a blank page had been substituted for the one on which he had written "void". The Respondent's evidence was that the assessment pages had all been stapled together, and had been photocopied in their entirety. It is noteworthy that, despite criticising Mr Bereza for several actions in his ET1, the requirement not to complete the essay question, which might have been regarded as very significant, was not set out in the claim form. While Mr Bereza did not give evidence to the Tribunal,

because he is no longer employed by the Respondent, the Respondent's other witnesses said that during the discussion on candidates they had talked about why the Claimant had not attempted the essay question, and Mr Bereza had not said that he had told the Claimant not to do so. Taking all these facts into account, the Tribunal accepted the Respondent's evidence that the essay page of the document was not fake, and has not accepted the Claimant's evidence that he wrote void across the page. Because of this, and because it seems extremely implausible that Mr Bereza would have told the Claimant at the start of the process that there was no time for him to right the essay and therefore he should not attempt it, the Employment Tribunal finds that this statement was not made.

31. The Claimant claims that Mr Bereza at one stage told him to leave the room and walk about the building, thereby potentially putting him in breach of acting appropriately as a security officer, had he walked unauthorised and unaccompanied into private or secure areas. His account of the timing of this issue is muddled. He states it took place soon after his passport was scanned. However, he then seems to place it shortly before he departed from the building approximately two hours later. It seems likely that the Claimant must have misinterpreted what Mr Bereza told him. Given that the Claimant acknowledges that he only had a paper and not a magnetic pass, he would only have had access in the building to the interview area and the stairs. Therefore, any alleged plot to wrong foot him could not possibly have succeeded because he could not have had access to private areas. Mr Bereza, as a senior member of the team, would have known this. The Tribunal also did not think there could be any link between the comment, if it had taken place, and the Claimant's age or race, having accepted Mr van der Merwe's evidence that he had not shown Mr Bereza the Claimant's passport, nor had he discussed its contents with him. Therefore, the Tribunal did not find that the Claimant had been told that he should go around the building.
32. The Claimant says that Mr Bereza told him to leave the building early, once he had finished his intelligence reporting assessment. The Tribunal accepted that this happened. The Claimant says that since all the candidates arrived at the same time they should all have departed at the same time. The Respondent said it did not require people to stay once they had finished all elements of the assessment. This seems reasonable, it is standard practice generally, and the Tribunal did not find that it indicated that any act had been performed which might prefer or disadvantage any of the candidates, including the Claimant.
33. The Tribunal did not find the Claimant to be a credible witness. He was clearly mistaken as to what had occurred in relation to the photocopying of passports. He placed considerable emphasis, in his statement and before the Tribunal, on issues such as that he had been told he did not need to write any answer to question 23, yet this potentially significant fact was not referred to in his otherwise detailed ET1.

34. Following all the interviews, all three panel members took part in the decision-making process. Mr van der Merwe marked the Excel tests and Mr Bereza marked the intelligence tests. They then reviewed all the papers together, using a white board to analysis the candidates' performance, and to decide whom to appoint. It was not simply a mathematical exercise, but behavioural characteristics were deemed important too. The panel identified Candidates B and D as being more knowledgeable, providing more relevant answers to the interview questions, and trying harder than the other candidates. They were therefore appointed.
35. From the documents before the Tribunal Candidate B appears to have been the strongest candidate. He performed well at interview and in the intelligence questions, appears to have completed an excellent Excel test and to have written a reasonable essay answer to question 23. He completed all the tasks allotted to him. Looked at numerically, candidates A, D and the Claimant all performed similarly. D was chosen, and A and the Claimant were not. It is noteworthy that A was not selected even though he had scored best at interview, because the panel was disappointed by his response to the essay question. The Respondent told the Employment Tribunal that the key reasons they had not offered the Claimant a role was because he had not attempted the essay question and had only completed one of eight tasks in the Excel exercise, showing not only poor understanding of Excel but also limited problem solving/initiative skills. Failure seriously to attempt the questions was regarded as showing an attitude which was lacking in initiative and which was indicative of an inability to perform well the specific role that was being advertised for. The Respondent said that D had performed better than the Claimant.
36. The Claimant alleges that the interview process was inadequate because the Respondent did not follow Security Industry Authority or CCTV Licence Guidelines on the criteria for assessment of suitable candidates. The Tribunal accepted the Respondent's evidence that no CCTV licence was required to carry out the role because the licences are only relevant where members of the public are being watched in open spaces, and that when a member of the public enters a private space they become designated a "visitor", and so standard CCTV rules do not apply. No operative at the Respondent has a CCTV licence because the Respondent does not monitor open spaces. Therefore, if there are any guidelines on how to assess people for a CCTV licence (and there were none before the Employment Tribunal) they would not be relevant to the current appointment. The Respondent said it was not aware of any guidelines from SIA on how people should be assessed for security industry roles. The witnesses asserted it was open to them to determine what criteria were relevant, including, for example, possession of good Excel skills. The Claimant could not point to anything which restricted the Respondent from conducting the interview process as it chose. The Claimant drew the Tribunal's attention to a course operated by BIIAB on working within the private security industry. It sets out various learning outcomes which would result in someone talking the course, which does not include Excel skills.

However, this document shows the contents of a course offered by a course provider. It does not set out any rigid criteria by which to select people for security roles. The Tribunal found that it had not been shown any rules or regulations to which the Respondent was bound to adhere during the interview process, and that no rules or regulations had been breached.

Submissions

37. The Respondent argued that the list of issues set out at paragraph 5 described the appropriate tests which the Tribunal would have to apply. The test was subjective: the fact that a Claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment (Burrett v West Birmingham Health Authority 1994 IRLR 7, EAT)
38. The Respondent accepted that failure to be appointed to the role of Operative would be a detriment. However, the Claimant would have to show a causative link between this and a discriminatory act. The test is whether a protected characteristic has a significant influence on the outcome. If so, discrimination is made out. The crucial test is why the Claimant received less favourable treatment – whether on the grounds on a protected characteristic or because of some other reason, for instance because he was not so well qualified for the job (Nagarajan v London Regional Transport [1999] ICR 877, HL). In Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 HL the House of Lords described the test as subjective, namely why did the alleged discriminator act as he or she did? What consciously or unconsciously was his or her reason? In some cases, less favourable treatment is intertwined with the issue of the reason why the Claimant was treated as he was (Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL).
39. The Respondent's then dealt with the shifting burden of proof as set out in s.136 of the Equality Act. These provisions are:-
136(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
136(3) but sub-section (2) does not apply if A shows that A did not contravene the provision.
40. The Respondent argued that this was a case where the shifting burden of proof had no bearing because the Tribunal was in a position to make positive findings on the evidence. In the Supreme Court, Lord Hope in Hewage v Grampian Health Board [2002] ICR 1054, SC stated that the statutory burden of proof provisions only have a role to play where there is room for doubt as to the facts necessary to establish discrimination – in a case where the Tribunal is in a position make positive findings on the evidence one way or another as to whether the Claimant was discriminated against on the alleged protective ground, the burden of proof provisions have no relevance. The Respondent argued that there are circumstances where, even where the Claimant is in receipt of unwanted treatment, this may not necessarily establish

prima facie evidence of less favourable treatment if as a matter of fact there is no less favourable treatment of the Claimant as compared with others. The Respondent should not need to discharge the burden of proof unless and until the Claimant had shown that there was a prima facie case of discrimination which needed to be answered (Ayodele v City Link Limited [2018] ICR 748 CA. This case was supported by Royal Mail Group Limited v Efobi [2019] EWCA Civ 18 – which found that where the allegations of discrimination were mere assertion and the Claimant had not backed up his claims with the necessary factual foundation, the shifting burden of proof was not engaged.

41. The Respondent made various submissions in relation to the facts. In brief, where the Claimant misunderstood the nature of the role for which he was applying; the two successful candidates performed better than he did and that the Claimant had accepted that candidate B was a strong candidate and that candidate D had fourteen years of relevant experience
42. The Respondent called into question the Claimant's credibility, stating the he had been proved to lie in relation to circumstances in which his passport had been taken to be copied, and this supported the inference that he was lying about other facts. The Claimant's case regarding the other disputed facts was implausible, for example the allegation that the Claimant had faked documents or had been told to walk around the building on his own. There were innocent explanations for some of the other facts alleged by the Claimant, even if they happened. Asking the Claimant where he was from in China, which was not in the Claimant's ET1, was not discriminatory, nor was stating that the Respondent was looking for suitable characters to work in the team. It would have been reasonable for the Claimant to focus on performance in the Excel spreadsheet test and the essay question, particularly because the focus on communication skills and computer skills as essential requirements in the jobs specification
43. Finally, on comparators, the Respondent argued that there were material differences in the circumstances between the Claimant and B and D. B was the best scoring candidate and there were differences between the Claimant and D, particularly in relation to performance in the Excel and essay questions. Any hypothetical comparators in relation to race would have to be not from mainland China. There was no evidence that this was a reason why he was treated differently. There was no discrimination at all. Even if the burden of proof flipped (and the mere fact that Mr Bereza told the Claimant not to carry out the test, if that happened, would not in the Respondent's view be sufficient to shift it, there was no evidence to show anything other than that the Claimant had been marked by the Respondent objectively. There was no evidence whatsoever in relation to age.
44. The Respondent denied it had put fake documents before the court and stated its witnesses had not misled the court.
45. The Claimant argued that the Respondent had put forward to the Tribunal a number of fake documents including an email from Mr Bereza of 4 June 2019 setting out his essay scores and a recent analysis of the scores conducted by Mr van der Merwe. The Claimant

alleged that since those had only been handed to the Tribunal at lunch time on the first day of the hearing, they had been manufactured by the Respondent following receipt, earlier that morning, of his witness statement. Other fake documents included scanned copies of his and candidate D's passport, which were clearly fake because they had inconsistent size measurements.

46. The Claimant said he had not been confused about the nature of the job. The Respondent's witnesses were discredited. They were not telling the truth. He had been discriminated on the ground of race because he was both Chinese and from China. Where he was from in China was not relevant. It was therefore suspicious to ask him the question. He was the only person whose passport was collected. Mr Bereza telling him that he could walk around the building was clearly intended to trick into doing something he should not do.
47. The Claimant said he was not a young guy. He should have respect and be treated with dignity. He had been psychologically hurt. The job was relevant to his experience. Discrimination could be the only reason why he was not appointed. The Respondent's failure to produce documents concerning the first group discussion test must mean that they were protecting the people that they preferred. If he had performed well, he should have been appointed to the role, even if B and D should also have been appointed – they should have created another position for him. So far as age was concerned, the other candidates looked younger. When one is older one has more life experience and is more confident, one's judgement is more accurate and this should be valued, but the Respondent felt that he was not on the same platform as others.

Conclusion

48. The Claimant claims that he was treated less favourably than others because of either or both of his age or race in relation to the arrangements made for deciding to whom to offer employment or to not offering him employment, and that he had been directly discriminated against contrary to ss.39.1(a) and (c) of the Equality Act 2010.
49. The Claimant cited as comparators Candidates B and D. They were, he said, candidates from Commonwealth countries and he was treated differently because he was Chinese, from mainland China, and/or because of the fact that he was 58, and the other candidates were all under 50. The Claimant's thinking seemed to be that he knew he was extremely well qualified for the job, and therefore the only reason why he had not been appointed must be a discriminatory reason. However, as stated earlier in this judgment, the Tribunal has concluded that the Claimant misunderstood the nature and priorities of the role for which he was applying. As a result, his assumption on his fitness for the role was invalid.
50. The Claimant believed that he was the best qualified person for the role because of his experience during the previous five years of JP Morgan. This experience involved monitoring, authorising and progressing access of visitors to data centre sites across the world.

Therefore, it was very much a CCTV-oriented role. He had strong IT skills, two degrees, was multilingual and good analytically. On the other hand, the Respondent had made it clear that the key skills for which they were searching were the ability to respond to crisis situations and to handle them appropriately, alongside CCTV roles. This therefore made the Claimant's skills no more relevant than the background of some of the other candidates. The Claimant's experience as a journalist was not relevant to the role. While the Claimant was multilingual, this was regarded as a desirable rather than an essential characteristic, and in any event both the successful candidates were also multilingual.

51. The Claimant argued that inappropriate selection criteria had been used. The Tribunal has found as fact that the selection criteria were not illegal and did not breach any SIA or CCTV relevant rules and procedures. They also found that, given that Excel competence was a required skill, it was reasonable for the Respondent to test this during the course of the interview. The Tribunal therefore found that the selection criteria were not inappropriate.
52. The Claimant claims that his tests were not scored fairly. The Employment Tribunal looked at the test papers completed by the Claimant. He was marked well for some items and poorly for others. The marks seem to the Tribunal to be fair, taking into account the contemporary notes taken by the Respondent. Other candidates were marked similarly for similar-quality answers to those given by the Claimant. The Tribunal did not therefore find that the Claimant's tests had been marked unfairly.
53. The Claimant argued that the candidates were not treated the same, because he was required to leave the assessment centre before the others, because he was told to walk freely round the building because he was told it was not necessary to complete the question 23 essay question, and because not all candidates had been sent event details before the interview. The Tribunal has found as fact that the Claimant was not told that he could walk freely round the building, nor was he told that he did not need to complete question 23 essay question. The fact that the Claimant was invited to leave the building once he had finished the assessment, but before others had finished, was reasonable; it was not less favourable treatment, but a polite gesture allowing him to carry on with his day rather than to hang around with nothing further to do. The Claimant was sent event details before the interview, and was therefore not disadvantaged as a result.
54. Therefore, bearing in mind the tribunal's findings of fact relating to the majority of the Claimant's allegations, the only acts which might potentially be described as discriminatory treatment are not appointing the Claimant to the operative role, and allowing him to leave the premises early.
55. The Claimant relies on Candidates B and D as comparators. However, they are not suitable comparators because they performed differently from the Claimant during the assessments, and had different skills and experiences. The Tribunal therefore assessed the treatment of the Claimant by reference to two hypothetical comparators. A

candidate for the role of GSOC operative who performed the same as the Claimant during the course of the assessment and had the same skills and experience, but was not from mainland China or of Chinese origin; and a candidate for the role of GSOC operative who performed the same as the Claimant during the assessments and had the same skills and experience, but was aged 50 or below.

56. The Tribunal concluded that allowing the Claimant to leave early was not less favourable treatment than either candidates B or D or for any hypothetical comparator. Even though he was allowed to leave earlier, he suffered no detriment as a result.
57. While the Claimant was not appointed to the role, the Tribunal found that he was not comparable with candidates B or D because they performed differently from him at interview and had different skills and experiences.
58. The Tribunal also found as fact that had the Claimant not been born in China or of Chinese origin, or had been younger than 50 candidates B and D would nevertheless have been appointed because they performed better at interview. Therefore, he was not treated worse than either of the hypothetical comparators identified above.
59. Despite this finding, the Tribunal found it appropriate to look at the issue of the shifting burden of proof. The Claimant relies on having been the only person to be asked for his passport, in full view of the other candidates, being the only candidate asked by interviewers exactly where he was from, and allegedly racist comments made by the Respondent that they were searching for a character to be part of a team, which the Claimant said was racist because it should be that the Respondent's witnesses were looking for people with cultural similarities.
60. The Tribunal has found that all three external candidates for the role were asked for their passport on the material day. He was therefore not treated differently from other candidates, who would have been asked for their passports while other people were in the room. The fact that the Claimant did not notice that they had been asked does not mean that it did not happen. The Claimant was apparently the only candidate to be asked precisely where he was from. In the context, namely that he had said he was fluent in Mandarin and Cantonese, it is not surprising that he was asked whether he was from Hong Kong or China, and whereabouts in China. The Tribunal did not think that the question was relevant to the shifting burden of proof, the Tribunal notes in any event that the Claimant avers that his candidacy was being favoured by the panellists even after he had said he came from near Beijing. On his own evidence, therefore, neither his country of origin, nor his Chinese race appears to have influenced the Respondent's panel members.
61. The Tribunal has considered the comments made by Ms Abebe. Given that the job specification focusses on team work as an essential skill for the role, if Ms Abebe made this statement or something similar, it is not unreasonable and does not indicate any racist remark, even if made immediately after and in response to the Claimant's statement that he had journalistic experience. The Claimant states that Ms Abebe

used the word “character” rather than, say, person. The Tribunal did not find that any racist meaning could be attributed to the use of that word, if said. The Tribunal should also point out here that it did not find that the Claimant had been singled out from other candidates by being told that he should walk around the building on his own nor that it was unnecessary for him to attempt to answer question 23. Therefore, the Tribunal did not find that the Claimant had proved primary facts from which it could properly and fairly conclude that any difference in treatment between him and his comparators was because of his age or race/nationality.

62. The Tribunal nevertheless went on to consider the Respondent’s explanation for the failure to appoint the Claimant to the role, and for allowing him to leave the premises early. For all the reasons set out earlier in this judgment, the Tribunal accepted the Respondent’s evidence that it did not appoint the Claimant because it believed that candidates B and D had performed better at interview. This had nothing to do with their race, or their age. Various factors support the fact that race had nothing to do with the issue. Had the Respondent not wished to employ somebody of Chinese race or nationality, its attitude towards the Claimant would have been negative from the start. The Claimant only asserts that the attitude towards him changed once he handed Mr van der Merwe his passport. However, before this stage, at the start of the day, the Claimant had told people that he was from mainland China. There was nothing in his passport in relation to his race that added any additional information to this. His passport is a British passport, and therefore shows that the Claimant’s nationality is now British. So far as age is concerned, the Claimant has youthful looks, and the Tribunal accepted the Respondent’s evidence that Mr van der Merwe did not look at the Claimant’s passport, did not copy it or discuss its details with either of the other panellists. There was no indication whatsoever that the Claimant’s age was material in any part of the selection process. The Claimant had argued that because the role operated shift patterns, there would be a reason for the Respondent to want a younger candidate. But the Tribunal did not think that it was obvious that younger people are better at working in shifts than older people. Given the finding in relation to dissemination of information from the Claimant’s passport, the panellists were unaware of the Claimant’s age and would have made the same assumptions about it as when they first saw him, and when allegedly they were treating favourably, then deriving any information from his passport.
63. These comments, however, do not detract from the main conclusion of the Tribunal which is that the Respondent did not appoint the Claimant to the role because two other candidates performed better than he. It is for the Respondent to choose how many people it wishes to appoint. There was no obligation on it to appoint more than 2.
64. Finally, the Tribunal accepted that the Respondent allowed the Claimant to leave work early as a kind gesture, and that it did not indicate any discriminatory intent, or amount to discriminatory treatment.

65. For the reasons set out above, the Claimant's case that he was discriminated against on ground of race and/or age fails.

Employment Judge Palca

Dated:17th June 2019

Judgment and Reasons sent to the parties on:

31/07/2019

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For the Tribunal Office