



EMPLOYMENT TRIBUNALS

Claimant: Mr R Rashid

Respondent: The Commissioners of H M Revenue and Customs

Heard at: Manchester

On: 24, 25 and 26 September 2019
And 25 November 2019
(in Chambers)

Before: Employment Judge Ross
Ms C S Jammeh
Mrs C A Titherington

REPRESENTATION:

Claimant: Mr F Powell
Respondent: Ms C Knowles

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim that the respondent's failure to appoint him to the position of Criminal Investigator within the Respondent's Fraud Investigation Service was an act of discrimination on the grounds of race and/or perceived religion and/or age is not well founded and fails.

REASONS

1. The claimant applied for a role as a Criminal Investigator, Band O, and was unsuccessful. It is the claimant's case that the reason he was not appointed was his race and/or perceived religion and/or age. The claim was case managed before Employment Judge Porter on 2 October 2018. (Page 22-31)

2. At the outset of the hearing the claimant clarified that for the purposes of section 9 Equality Act 2010 he defines himself as a British national of Pakistani heritage. So far as section 5 Equality Act 2010 is concerned (age), the claimant defines the age group to which belonged at the relevant time as aged 55-60 years.

3. So far as section 10 of the Equality Act 2010 is concerned (religion or belief), the claimant relies on the respondent perceiving his religion was that of a Muslim.

4. For the respondent all claims are denied.

5. We heard from the claimant. For the respondent we heard from Carol Boyle, Higher Officer at HMRC and Chair of the interviewing panel. We also heard from Mr Toft, Higher Officer with the respondent and the other panel member. Finally, we heard from Mr Bowler, a Workforce Planning Officer for the respondent.

Findings of Fact

6. We find the following facts.

7. We find that the job of Criminal Investigator CSR2585/17 was advertised online in 2017, in accordance with the evidence of Mr Bowler. The claimant told us he completed his application online.

8. The job advertisement describes the position as an Executive Officer (see page 42). It states the business area is HMRC Customer Compliance Group-Fraud Investigation Service. The type of role is investigation. The number of posts is 39 at a variety of locations including Manchester, Salford, Ralli Quay, M60 9LA.

9. We find the job description gives a generic description of HMRC's Fraud Investigation Service ("FIS"). It explains:

"FIS is responsible for the department's civil and criminal investigations. FIS ensures that HMRC has an effective approach to tackling the most serious tax evasion and fraud. FIS is home to a wide range of people with a variety of skills and professional backgrounds including accountants, cybercrime specialists, criminal justice professionals, tax professionals and operational delivery support teams to name but a few. We use a range of powers and approaches to protected funding for UK public services, investigating the most harmful tax cheats and ensuring nobody is beyond our reach."

10. The job description goes on to state: "The responsibilities for the role of Criminal Investigator include:

- Gathering evidence on individuals and organised crime groups.
- Preparing cases for court.
- Attending court to give evidence as well as obtaining orders and warrants.
- In addition you may receive training to carry out arrests and searches."

The description goes on to state:

"There will be appearances in court and you will be required to make and be accountable for decisions and activities within the Criminal Justice System. These will also be subject to scrutiny and inspection by external authorities."

11. The respondent's witness, Carol Boyle, informed us that this specific vacancy was in the Organised Crime Department, although that is not apparent from the job description.

12. The job description gives links to further information. It explains that the candidate will be assessed against competencies during the selection process which are:

- Making effective decisions;
- Seeing the big picture;
- Managing quality service;
- Strength based scenario;
- Competency based questions;
- Candidate statement.

13. It goes on to state:

"You must provide evidence against the following on your application form:

- Making effective decisions;
- Seeing the big picture;
- Managing a quality service."

14. The document then refers to the Civil Service Competency Framework which is underlined. We accept the evidence of Mr Bowler that where a phrase or sentence is underlined then there was a link in the online document so that if the candidate clicked on it would take the candidate into a new document. Therefore the potential candidate could view the competency framework.

15. The application form goes on to explain the process. It states:

"As part of the application process you will be asked to complete a personal statement. Further details around what this will entail are listed on the application form."

It then states:

"After submission of your application you will be invited to complete two online tests (verbal reasoning, numerical reasoning). You must be successful at each stage to progress to the next test."

16. The advertisement goes on to state that after the test:

"...selection will be by paper sift, followed by face to face interview."

17. The Tribunal heard evidence that a candidate had to be successful at each stage to progress to the next stage.

18. We also saw evidence that originally there were 4,000 applicants but after the numerical and verbal reasoning tests and the full sift these had been reduced to the last 400 (see page 64).

19. There is no dispute that the claimant passed the online tests and the sift and so reached the interview stage. The claimant's application is found at pages 52-59 of the bundle.

20. We rely on the evidence of Mrs Boyle and Mr Toft that when they conducted the interviews in this case in January 2018 they had only the candidate's number and candidate's name on a scoring sheet. A completed sheet for the claimant together with notes of his interview is found at pages 107-110.

21. We also rely on the evidence of Mr Bowler that it was usual in a recruitment exercise of this type to provide only the candidate name and candidate number to the interviewing panel. We also rely on the evidence of Mrs Boyle and Mr Toft, the interviewing panel, that the same information i.e. candidate name and candidate number only, was provided for all eight candidates they interviewed.

22. The Tribunal's attention was drawn to an email dated 20 December 2017 sent from Joanne Green to numerous individuals including Mr Toft (see pages 60-62).

23. The email appears to have been sent to individuals at different centres conducting interviews for the Criminal Investigator post. The email notes: "There are only two people per panel: one chair and one independent." It also notes the number of interviews per day which would normally be five.

24. It states: "The interview format for this exercise will be conducted slightly differently to a traditional interview and a dial-in will be hosted by Nick Sharpe (Grade 6 Lead for this project) the week before interviews commence."

25. The final paragraph states: "All the candidate applications and information you require for the interview is currently being prepared and will be sent by TNT to the Panel Chair in the first week in January."

26. Joanne Green was not at the Employment Tribunal to give evidence but we rely on the evidence of Mr Bowler, Mrs Boyle and Mr Toft to find there was no expectation that the candidate applications would be disclosed to them and indeed they were not.

27. We find at pages 64-66 there is an email from Nick Sharpe to Joanne Green and others with the subject "Re Band O interview panel briefing". It states it is a "update following our call yesterday". It states: "Thank you to all of those who were able to dial in to the interview briefing today. As promised below is an outline of the key points discussed and a few attachments which you should also receive in hard copy. Jo Green will be sending a further note setting out who on what panel/admin team links for recording scores electronically and the names of candidates being interviewed."

28. There is no dispute that the circulation list is relatively small and neither Mrs Boyle nor Mr Toft are on it. However, Mrs Boyle agrees she did have a dial-in conversation about this panel briefing as did Mr Toft.

29. We turned to the content of the email following the dial-in process. It specifically states, "Rather than three competency based questions we are using a different process for this exercise based on three core questions: a scenario question, a competency question and a skills based question, all three questions to be scored 1-7."

30. In relation to the scenario question:

"There is no right or wrong answer to this question. You are assessing if they can explain the decision they would make clearly. As a general steer, the more than can explain the rationale for the decision they make the higher the score will be as long as it makes sense." (Page 65)

31. We find that Mrs Boyle and Mr Toft were relying on that guidance in scoring the scenario question, question 1 and they used that approach for all candidates.

32. The feedback lines provided to the interviewers for including in their reports are found at page 66A-C. The Panel confirmed they also used the scoring guidance listed at page 37.

33. We rely on the evidence of Mrs Boyle that she was sent the interview guidelines at pages 68-72 of the bundle. We find relying on her evidence and the guidance that the interview was split into three parts: a scenario question (elsewhere referred to as Part 1 or Question 1), a competency question (elsewhere referred to as Part 2 or Question 2) and a skills question (elsewhere referred to as Part 3 or Question 3). The Panel was guided that they should aim to spend no more than ten minutes on each part. The interview guidelines go on to state:

"In Part 1 and Part 2 candidates are to be tested on the lead competency, making effective decisions, via a scenario based question which they are given time to prepare for, and then a traditional competency based question. In Part 3 they should be assessed for their strengths and potential."

34. The note for panel goes on to state:

"To ensure a fair and open competition all questions in bold capitals must be asked at the interview. Follow up questions are provided for assistance but do not have to be asked."

35. Mrs Boyle told us in evidence that in assessing the scenario question (Part 1) she did not use the competency guidelines listed as "making effective decisions" (assessment guidelines page 70) for question 1. Her understanding was that she was assessing the scenario question on the basis of page 65(scenario question section) and p.69. Mrs Boyle specifically said:

"We were assessing logic, what decision is made and the logic behind it."

36. When she was asked about the guidance on page 70 she specifically stated:

“This is just for Part 2.”

She went on to state:

“For Part 1 it was how they made a decision and the logic behind it.”

She agreed when asked if there were no competency guidelines for question 1 and stated:

“That is correct.”

37. The second part of the interview was a competency question. The interviewers had to ask the candidates:

“Describe a time where you have had to make a difficult decision: what did you do and why?”

38. The guidance says, under “Making Effective Decisions Assessment Guidelines”, using answers from both questions score the candidate from 1-7.

39. We find Mr Toft adopted the same process as Mrs Boyle.

40. Part 3 was a skills question.

41. Page 71 informs the panel the question to be asked of the candidate is “What skills can you bring to this role and why do you want to be an investigator in HMRC?”. The Candidate Assessment Guidelines state that the question is designed to test the candidate’s potential to be an investigator. It states their answer should be used with the “making effective decision” score to give an overall score for the interview.

42. Page 71 gives effective examples and less effective examples.

43. We rely on the evidence of Mrs Boyle and Mr Toft that each candidate’s interview took approximately 30 minutes and that they scored the candidates immediately after they left the room.

44. The scores are found at page 37 of the bundle. Score 1 is “not demonstrated” through to score 7 which is “outstanding demonstration”.

45. There is no dispute in this case that the claimant scored 5 for the scenario question, 3 for the competency based question and 3 for the skills based question. 3 shows “moderate demonstration and moderate positive evidence provided”. 5 shows “good demonstration and substantial positive evidence provided”.

46. It was not disputed that a candidate needed 4 in each part (1, 2, and 3) to progress to an appointment. 4 is “acceptable demonstration and adequate positive evidence provided”.

47. We rely on the evidence of Mrs Boyle at paragraph 14 and of Mr Toft at paragraph 10 of their statements that once they had concluded all of the interviews they met to review the scores and their notes. We find the purpose of this was to ensure that they had acted consistently and to ensure that the scores they had allocated and the comments they had made were correct.

48. The guidance given before the interviews in the email at pages 64-65 was that:

“Therefore when you are interviewing candidates you are really assessing evidence which shows that this person could be a successful part of the team within the next 12 months. It also states that if that was ‘yes’ and they provided suitable answers to the questions then the expectation was that they would be scored a minimum of 4.

If somebody is a near miss (i.e. they score 4/3/3 or 4/4/3) but you feel they could do the job, moderate them up.”

49. We find that for the claimant the front sheet at page 107 was completed by Mrs Boyle. She completed the notes for question 1 and question 3. For question 2 the notes are completed by Mr Toft (see page 110). We accept the evidence of the respondent’s witnesses that the notes they wrote were “trigger notes” which encapsulated the main points of each candidate’s answers. We also accept their evidence that one panel member wrote notes whilst the other panel member asked questions. We also accept the evidence of the respondent’s witnesses that because they knew they were going to discuss the candidate immediately the interview finished and score them immediately the notes were therefore relatively limited. Mr Toft in particular gave evidence that if he knew he was in a situation where he would be giving evidence in court a long time later, he would complete a much more detailed note.

50. Very helpfully both counsel liaised to produce a table of all candidates. The same information is contained within the bundle. The front sheet with the scores of candidate RN is at pages 73-77; candidate JB at pages 78-83; candidate MF at pages 84-88; candidate NY at pages 89-93; candidate MA at pages 94-97; candidate SH at pages 98-102; candidate IW at pages 103-106; and the claimant at pages 107-110.

51. Each set of notes contains a set of notes completed by the candidate. We accept the respondent’s evidence and the evidence of the claimant that each candidate answering the scenario question was given five minutes to read the scenario and an opportunity to make notes.

52. We accept the evidence of the claimant that page 111 are his notes. The notes at the very top of the page the claimant says he made in the interview. The notes below the line drawn across the top of the page are the notes he made prior to going into the interview. We find all candidates were given time to consider the scenario question and make notes before going into the interview. We find that all candidates were required to hand in the handwritten notes they made on that day at the end of the interview.

53. We accept the evidence of Mrs Boyle and Mr Toft that despite the suggestion in the email at page 65 that “you should input score and feedback into the electronic record-keeping system”, neither of the panel did this. We accept they completed their handwritten scores and handed those documents in, and that the electronic record was compiled into a spreadsheet elsewhere by someone else.

54. At that later stage an error occurred and the claimant’s score of 5 for the scenario question was incorrectly inputted as a 4. We heard no direct evidence from anyone about that error. We find that it post-dated the decision making process by Mrs Boyle and Mr Toft and they were not involved in the error. We find it was not relevant to the claimant not being appointed. He was not appointed because he did not reach at least a score of 4 in each part of the interview.

55. Employment Judge Ross asked each of the interviewers about the race of national origin and/or age group and/or religion, if any, for each of the candidates. After this length of time (20 months) both Mrs Boyle and Mr Toft had very limited recollection of the candidates except those who were ultimately successful and with whom they were now working.

56. We find that Mrs Boyle had no recollection of candidate RN; candidate JB was male white British over 40 and his religion was not known; he had no recollection of candidate MF. Candidate NY was female white in her mid 30s to early 40s. Her religion was not known. Candidate MA he had no recollection of. Candidate SH was male, white, in mid to late 30s and religion not known. Candidate IW was white, in his late 30s and religion not known. Mr Toft could not recall candidates RN and MF. He described candidate JB as white British, late 40s or 50s, who is now working in the department. He had no idea of his religion. Candidate NY was white in late 30s and was unaware of her religion and she was also now working in the department. He believed that candidate MA was an Asian male, probably in his early 20s, but he was not aware of his religion. Candidate SH, now working in the department, was white, late 30s, and he was not aware of the candidate’s religion. Candidate IW was white, now working in the department, late 30s and he was unaware of the candidate’s religion. Both Mrs Boyle and Mr Toft said that they were unaware of the claimant’s religion.

Assessment of Witness

57. The Tribunal found the claimant was not always a reliable witness. In particular he stated in his witness statement that:

“Furthermore the interviewers also mentioned to me that the position required that I had to perform at least two years of work to justify the training provided as part of the role. It seemed as if the interviewers had doubts given my age as to whether I would be able to work satisfactorily for the required minimum period of the role.”

58. The claimant’s answers in cross examination in relation to this allegation were inconsistent. The claimant said it was quite possible that this was not said. He then said it could have been raised “obliquely”. He then said he himself may have raised it. Finally, he said that the respondent had raised it. The Tribunal is not satisfied this comment was made. Mrs Boyle and Mr Toft denied making that comment.

59. The Tribunal found the claimant was mistaken in part in his recollection in attending the interview. The claimant described up to 15 people being in a toilet which had, by his recollection, six cubicles and six urinals. The Tribunal prefers the evidence of Mr Toft who was familiar with the building and finds the toilet had only two cubicles and two urinals.

60. The Tribunal finds the claimant perceived events as set out at paragraphs 5-13 of his statement. However, the Tribunal has taken into account that the claimant was unfamiliar with the building and his recollection is not always accurate as his evidence about the toilet shows. Inevitably he was nervous because he was attending an interview. Furthermore, other examples given by the claimant about the attitude of staff in the respondent's building when he was asked in which part of Manchester he lived or a comment being made about the numbers of people who attended for interview, the Tribunal finds are comments likely to be made as "small talk" made to those attending interviews. The Tribunal finds Mrs Boyle and Mr Toft had no part in the administrative arrangements of applicants as they arrived at the building, were guided to the waiting area and had their eligibility documents checked.

61. The Tribunal finds the individual referred to at paragraph 12 is likely to have been interviewed by a different panel, not Mrs Boyle and Mr Toft given she and the claimant were attending at the same time and that there were 2 panels running that day (page 63).

62. The claimant also complains about a remark made by a member of the security staff at paragraph 31 of his statement about a 5p charge for a carrier bag. Given the introduction of a 5p charge for carrier bags in shops the Tribunal finds this is likely to be an ill-judged attempt at humour. There is no doubt the claimant did not find it amusing and was upset by it. The Tribunal reminds itself that candidates attending for interview are likely to be ill at ease and nervous.

63. The Tribunal find Mr Toft and Mrs Boyle to be convincing witnesses. They answered questions carefully and conscientiously. They gave concessions when needed. For example, Mrs Boyle conceded that her summary of the claimant (page 107) with hindsight was slightly overstated and she agreed that she would now word it as "little understanding of how HMRC fits into the Criminal Justice System" rather than "no understanding".

64. The Tribunal finds it is likely that some of the confusion which arose in this case on the claimant's part may have related to the fact that he was not aware that the interviewing panel did not have and had not seen his personal statement and therefore he did not understand that he needed to give evidence of competency rather than mere assertions of competency at the interview. For example, Mrs Boyle explained that it was only by her further questioning of the claimant that she discovered he was a Chartered Accountant. The claimant did not volunteer it.

The Law.

65. The relevant law is s.13 (direct discrimination) and s39(1)(c) (not offering employment) Equality Act 2010. The burden of proof provisions at s136 Equality Act

2010. The Tribunal reminded itself the established authorities demonstrate there is a two stage process in a direct discrimination case. These authorities include *Wong v Igen Ltd* 2005 3 All ER 812 and *Madarassy v Nomura International plc* 2007 IRLR 246 and *Efobi v Royal Mail Group Ltd* 2019 2 All ER 917. The burden is on the claimant to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. If the burden is discharged the onus shifts to the employer to satisfy the tribunal there is a non-discriminatory explanation for the treatment.

66. The Tribunal reminded itself that a difference in treatment and a difference in protected characteristic alone is not sufficient to shift the burden of proof. There must be “something more”. See *Mummery LJ in Madarrassy v Nomura International plc*.

67. We also reminded ourselves that it is necessary to explore the alleged discriminator’s mental processes. We took into account Lord Nicholl’s guidance that bias may be unconscious. See *Nagarajan v London Regional Transport* 1999 ICR 877.

The Issues

68. At the outset of the case we confirm the issues where as set out by Employment Judge Porter in her case management note of 4 September 2018:

- (1) Was the claimant treated less favourably than it would have treated a real comparator when it failed to appoint him to the post of criminal investigator? The claimant relied on all the successful candidates but at the hearing in particular IW.
- (2) In answering this question, the Tribunal must consider whether the claimant has adduced primary facts from which the tribunal could conclude the difference in treatment was because of race and or perceived religion and or age.
- (3) If yes, the burden shifts to the respondent to provide a non-discriminatory explanation for the treatment.
- (4) If yes, in age discrimination only, can the respondent show the treatment is a proportionate means of achieving a legitimate aim?

Applying the law to the facts

69. Tribunal turns to consider the first and second issues namely:

Was the claimant treated less favourably than it would have treated a real comparator when it failed to appoint him to the post of criminal investigator? (The claimant relied on all the successful candidates but at the hearing in particular IW)

70. In answering this question the Tribunal must consider issue 2 ie whether the claimant has adduced primary facts from which the tribunal could conclude the difference in treatment was because of race and or perceived religion and or age

71. When considering this question, the Tribunal turned to the facts relied upon by the claimant's counsel to shift the burden of proof to the respondent.

72. Mr Toft said the criteria were not before him but was aware of them. Mrs Boyle said she have the criteria and she was the Chair and they were before her.

Question 1 – the scenario question

73. The Tribunal finds that the claimant scored well in this question achieving a score of 5. The Tribunal accepts the evidence of Mrs Boyle and Mr Toft that their notes were trigger notes only because the claimant like all candidates was scored immediately the interview was over when his responses were fresh in their minds. The tribunal finds there was no allegation in the claimant's amended particulars of claim that this question was underscored. Mrs Boyle and Mr Toft scored all candidates in the same way for this competency as set out in our findings of fact. The fact the claimant scored well in this exercise is not suggestive of bias on the part of the interviewers.

74. It was suggested by the claimant's counsel that the interviewers had followed the procedure for scoring incorrectly for scenario question 1 because they should have scored in accordance with page 70 because p65 states the scenario is "testing making effective decisions". Page 70 describes "Effective Decisions-Competency Question and then lists "making effective Decisions Assessment Guidelines"

75. The interviewers explained that they understood they were scoring the candidates in accordance with pages 65 and 69 and their understanding of the guidance: "There is no right or wrong answer to this question-you are assessing if they can explain the decision they would make clearly. As a general steer the more they can explain the rationale for the decision they make the higher the score will be as long as it makes sense." This is consistent with Mrs Boyle's evidence that she was testing a candidate's logic.

76. The Tribunal finds the documentation before it means it is unclear whether or not a candidate should have been scored on the scenario question one as suggested by the interviewers or as suggested by the claimant's counsel. The documentation is ambiguous in places.

77. However the tribunal finds that because the interviewers applied the same scoring technique to all candidates there is no evidence to suggest it was discriminatory and in fact the claimant achieved a good score and a positive comment "good reasoning on the decision made".

78. The Tribunal was taken to page 111. The claimant said the notes made below the line were what he said in interview about Q1. The Tribunal finds these notes were made before the interview. It may well be they were said in interview. However it is unsurprising they are not recorded in the respondent's notes as they are trigger notes only. Other candidates notes are not reflected in the interviewer's notes either.

Question 2

79. Candidates were asked to “describe a time where you made difficult decision and why?” The interviewers confirmed they were scoring in accordance with the guidelines at p70. The claimant’s scores are at p110 and IW at p104. The claimant scored 3. IW scored 4. We accept the evidence of Mrs Boyle that this was a competency-based interview where marks were given based on the information provided by the candidate at the interview. We accept the evidence of Mrs Boyle and Mr Toft that they did not have any candidate’s application form. We find based on the evidence of Mrs Boyle that the claimant gave answers but they not as full as other more successful candidates. This is consistent with the claimant’s evidence in cross examination that his answers were not as full as they could have been.

80. The candidate was required to give evidence of not just of a difficult decision but why he reached the outcome. We find the notes are consistent with the claimant having given relatively little information about how he reached his decision. “Your responses were too narrowly focused. Not enough detail regarding the decision made...” By contrast the successful candidates provided a greater level of information. Candidate IW provided details of the options he considered and why. The Tribunal is not persuaded that the detailed information the claimant now says he gave at interview was provided at the time. The claimant suggested he could recall this level of detail because he had noted the information down when he got home. However the Tribunal records that this note has never been disclosed. The Tribunal also notes that this detailed information was not referred to in the amended particulars of claim despite the clear guidance of EJ Porter in relation to relevant matters (paragraph 9, page 25). In addition we have found on other matters such as his recollection of the building, the claimant’s recollection is not always accurate.

81. It was suggested by the claimant’s counsel that the interviewers prompted other candidates but not the claimant. We find this is incorrect. We rely on the evidence of Mrs Boyle that she did seek more information from the claimant. In cross-examination she explained she asked about “the risks and options”. The Tribunal finds the claimant was scored 3 because that reflected the level of detail and evidence he provided at the time.

82. Question three-the skills question. The claimant scored three. IW scored five. The interviewers confirmed the claimant was scored in accordance with the guidance on page 71. The question was “what skills can you bring to this role and why do you want to be an investigator in HMRC?”. The guidance provided to the interview panel directed that the skills base question is “a general assessment of what the person could bring to the role and if the candidate has a grasp that they will be working in the criminal justice system and demonstrates some enthusiasm for that”.

83. The successful candidates demonstrated clear evidence of their knowledge of the CJC and enthusiasm for the role in their responses e.g. IW previous HMRC experience/spoken to fraud investigation service (FIS) criminal investigation team, p103,105. JB - previous experience of criminal procedures including disclosure applications. Knowledge of Regulatory Investigatory Powers Act (RIPA), surveillance experience. p78,81-2. NY- working as a caseworker within the senior fraud division at the CPS and specific awareness of procedure, p89,91. SH-having previous experience of Regulatory Investigatory Powers Act (RIPA). p98,99-100.

84. The claimant said at tribunal he had mentioned the Criminal Finances Act 2017 in his answer to question three. Although the interviewers' notes are trigger notes only they reflect key points. Mrs Boyle said if the claimant had referred to the Act she would have noted it down. In addition the claimant did not mention the Criminal Finances Act 2017 in his amended particulars of claim.

85. In fact in that detailed document completed after the case management hearing with Judge Porter, he suggested that the advertised role did not require knowledge of the Criminal Justice System. (Paragraph 9, page 34.) If he thought that, it is puzzling why he would mention the Criminal Finances Act.

86. Stating the advertised role did not require knowledge of the CJS suggests that at the stage the amended particulars was filed, the claimant did not appreciate how the role of criminal investigator fitted into the criminal justice system. However at the tribunal in cross examination the claimant said he did understand question 3 was looking to understand his awareness of the Criminal Justice System. He said he told the interviewers he was aware and hoped it would be covered in training. He then went on in cross examination to mention the University of Portsmouth and a counter fraud qualification. When questioned further by counsel he said he couldn't recall who mentioned this and was not saying he had such a qualification. The Tribunal found the claimant's evidence in relation to question 3 to be contradictory and not persuasive.

87. The claimant was noted as having "no understanding of how HMRC fits into the criminal justice system". Mrs Boyle conceded in cross-examination that it would be more accurate to say he had little understanding.

88. She stood by the comments recorded in the interview notes(p109) that the claimant said he would need to "brush up on criminal justice service" if given this role. The tribunal finds in accordance with Mrs Boyle's evidence that such a remark is not consistent with "enthusiasm for the role" as required. Mrs Boyle stated she would have expected a candidate at interview to have researched the criminal justice system given the role was of a fraud investigator and the job description refers to duties such as preparing cases for court and attending court to give evidence (job advert p42).

89. It was suggested to the interviewers that because the claimant was a chartered accountant and was noted to have a "range of skills which would assist in some areas of work", he should have received a higher score. The Tribunal relies on the evidence of Mrs Boyle that the role of fraud investigator is not a chartered accountancy role. She explained that specialist accountants are employed in the Department but this was not such a role. The tribunal also relies on her evidence that the claimant did not volunteer information about his skills in chartered accountancy. That information was obtained by Mrs Boyle when she probed information supplied by the claimant.

90. The Tribunal finds in a competency based interview of this type the interviewers were looking for evidence: "when interviewing candidates you are assessing evidence which shows this person could be a successful part of your team within the next 12 months" (page 65).

91. Having considered the decision making process by the interviewers the Tribunal considered whether there was any evidence to shift the burden of proof, bearing in mind there is often no direct evidence of discrimination and that bias can be unconscious.

Evidence to shift the burden of proof

92. The claimant's representative relied on a number of matters.

93. **Organisation** – the claimant's representative said that the respondent was less diverse than the general population. It accepted that HMRC was BAME 11.3% and that in the 2011 census the population BAME in Manchester was 33% (page 133). The respondent disputes this analysis. The respondent states it is not reasonable to compare the percentage of 2011 Manchester population said to be BAME with R's staff who declared themselves BAME in 2017 and then conclude R employs a small percentage of staff who are from an ethnic minority.

94. The respondent statistics for Manchester for 2017 are at page 204 further data is at page 134 to 152.

95. Unlike in the census, the respondent's data contains people who completed the questionnaire and chose not to declare their ethnic origin and a number of individuals simply did not fill in the form so their ethnic background is not known.

96. Looked at another way a comparison of the statistics shows that 67% of the respondent's staff who declared their ethnicity in 2017 were white (p204) which is almost equivalent to the figure of 66.7% in the 2011 census.

97. The Tribunal is not satisfied that the statistics supplied by the parties are sufficient to shift the burden of proof.

98. The claimant also relies on his perception on the day that he there was a lack of diversity amongst staff in the office describing it in his amended claim as an "all white" office. The claimant's evidence is not wholly consistent because at paragraph 14 of his statement he refers to "very few people of ethnic minority background". The claimant was arriving at lunchtime when staff may have been out at lunch or on an operation and his brief time in the office, en route to an interview does not give an opportunity of a detailed conclusion to be drawn.

99. The Tribunal is not satisfied this is evidence to shift the burden of proof.

100. The claimant relies on the fact that those who were appointed were all younger and white British in their 30s and 40s compared to the claimant who is 57, British Pakistani and Muslim. The Tribunal finds that a difference in protected characteristic and a difference in treatment is not enough to shift the burden, there must be "something more."

101. The claimant relies on the fact that the organisation as a whole inferred the claimant was a Muslim and relies on page 205 of the bundle. The Tribunal finds that p205 is a document which post dates the decision made by the interviewers and was not compiled by them. It appears to be a document compiled as a result of the

Tribunal proceedings as a result of information supplied by the claimant. The Tribunal finds this is not a document which shifts the burden of proof.

102. Counsel invited the Tribunal to draw an inference the interviewing panel had inferred on the basis of his name or the way he looked that he was a Muslim. The Tribunal finds there was no evidence of perception of the claimant's religion on the part of Mrs Boyle and Mr Toft. When questioned Mrs Boyle said she considered the claimant was Asian but did not know his religion. The Tribunal is not satisfied this is evidence to shift the burden of proof.

Process

103. The claimant's representative relied on the way the process was conducted as evidence to shift the burden of proof.

- (i) The claimant's counsel suggested the claimant's application form and the scores the claimant achieved at that stage and the verbal or non verbal reasoning test completed by the claimant (he was in the top quartile) should have been considered. The Tribunal finds that information was not relevant. The interviewers did not have it for any candidate and the Tribunal relies on their evidence that each stage of the application process was wholly discrete and they had no information of the previous stages.
- (ii) The claimant expected his application to have been given to the interviewers and he answered on the basis that they thought they had that knowledge from his statement. The Tribunal finds that not disclosing the application to the interviewers was a feature of the respondent's process and affected all candidates regardless of protected characteristic. The Tribunal is not satisfied it shifts the burden of proof.
- (iii) The claimant's representative relied on a failure to moderate up the claimant's scores. The email at page 65, following the dial-in states "if a candidate is a near miss should be moderated up if suitable". The Tribunal finds that the panel did consider moderating up the claimant, a borderline candidate with scores 5:3:3. We rely on Mrs Boyle's evidence in cross examination that she and Mr Toft did consider moderating up but they could not find sufficient evidence in his answers to bring him up to a 4 across each question. Even if they took a point from Q1 and moved it to one of the other questions to bring up to a 4, he would remain a 3 on the other question.
- (iv) The failure to independently moderate. The claimant's counsel said this should have happened. The Tribunal finds this was not part of the respondent's process. The Tribunal is not satisfied there was any evidence to suggest that failure to adopt which a procedure which is outside the respondent's process is evidence which shifts the burden of proof.

104. **Experiences in the building** – the claimant relied on his statement. At paragraph 10 he said that “members of staff working were looking at me in a quizzical manner as I was traversing the offices. It felt as if my presence at the offices was not normal or even welcomed and I found this made me feel very self-conscious and nervous.” In cross examination he said that members of staff made eye contact with him and looked at him because he was an outsider. The claimant also relied on the comments of the person making the document check about which area of Manchester he lived in. Finally he relied on the fact that the female interviewee was engaged in conversation and he felt this demonstrated bias (paragraph 12). The Tribunal accepts the claimant found the process that day stressful. The Tribunal is satisfied that it is not uncommon that when someone attends an office who is not a current member of staff, employees are curious and will look up and make eye contact. The tribunal finds it is not uncommon when individuals are waiting for interview for a person conducting the administrative arrangements to make conversation and ask about where they have travelled from. In relation to paragraph 12 the Tribunal heard evidence that a number of candidates were internal candidates and it is possible she was known to the employee dealing with the administrative arrangements.

105. The Tribunal finds crucially none of these matters had anything to do with those who made the decision whether or not to appoint the claimant namely Mrs Boyle and Mr Toft. For these reasons we find the claimant’s perception of these matters do not shift the burden of proof.

Unnerved by security

106. The Tribunal is not satisfied that the security guard not having been advised about the claimant attending the office (which was corrected following a telephone call by the security guard) and the checking of the claimant’s papers is evidence to shift the burden of proof the Tribunal. The Tribunal is not satisfied that the “joke” about the 5p carrier bag at paragraph 31 of the claimant’s statement is evidence which could shift the burden of proof. There is nothing to suggest this comment was related to the claimant’s age perceived religion or age. Crucially we find that the behaviour of the security guard was nothing to do with the panel decided not to appoint the claimant. For these reasons we find it does not shift the burden of proof.

Trigger notes

107. The claimant’s representative said Mrs Boyle and Mr Toft failed to record salient information which the claimant provided in answer to the scenario question. He relied on the claimant’s personal prompt note at page 111 and the respondent’s record of what the claimant said in relation to question one. It was the claimant’s evidence that these notes were partly his preparatory notes for question one prior to the interview and he was sure he had given all this information to the interviewers. He relied on evidence of notes he made at home but the Tribunal has not seen those notes because the claimant has not disclosed them.

108. The Tribunal relies on the evidence of Mrs Boyle and Mr Toft that they recorded the key information in trigger notes but as they discussed the candidates

immediately they left the room their notes were not verbatim. The Tribunal also notes that the claimant scored well on question one. The tribunal is therefore not satisfied that the difference in the claimant's note at page 111 and the trigger note at p107-9 is evidence to shift the burden of proof.

Scoring

109. Counsel for the claimant said the score the claimant was awarded for question one was inexplicably lower than the score of comparator IW. The tribunal is not satisfied this is accurate. The Tribunal found that Mrs Boyle and Mr Toft approached the task conscientiously, using the scoring as set out at paragraph 37 of the claim form. The difference in scoring is 1point. Mrs Boyle gave evidence that she and Mr Toft took turns to ask the question and take notes and that styles of note taking differ. For the claimant she wrote the overview notes at p107-8 and Q1 note at p108 and Q2 at p109.Mr Toft wrote p110. She wrote the overview note for IW at 103 and Q2 at p104 and Mr Toft wrote the Q1 note and Q3 note at 105.We find all notes were made in joint consultation. We find the overview states that on Q1 the claimant was "Good reasoning on the decision made" but the comparator IW was "Very good reasons and clear thoughts given to the decision made and risks involved" which suggests more detailed information and better reasons were given. The Tribunal finds the burden of proof does not shift.

110. Question 2: claimant got lower score than IW and counsel for the claimant submits there was no explanation why. The Tribunal relies on its finding of fact above namely that the claimant gave answers but they were not as full as other more successful candidates. We find there is relatively little information from the example the claimant gave and limited options. The Tribunal is not persuaded that the detailed information the claimant now says he gave at interview was provided at the time. The claimant suggested he could recall this level of detail because he had noted the information down when he got home. However the Tribunal records that this note has never been disclosed. The Tribunal also notes that this detailed information was not referred to in the amended particulars of claim despite the clear guidance of EJ Porter in relation to relevant matters (paragraph 9, page 25). In addition we have found on other matters such as his recollection of the building, the claimant's recollection is poor. The Tribunal finds there is no evidence to shift the burden.

111. Question 3: counsel for the claimant submitted the claimant was treated and scored unfavourably compared to IW. The Tribunal relies on its finding of fact above that the candidate IW received a higher score than the claimant because his answers were fuller. So far as the suggestion that IW had more favourable prompts, the claimant's own evidence accepted that he was asked some follow-up questions. The Tribunal finds that Mrs Boyle did prompt the claimant- she drew out of him that he was chartered accountant. The claimant did not volunteer that information.

112. Counsel suggested that Mrs Boyle's concession that she should on reflection have noted the claimant had "some" knowledge of CJS (rather than "no knowledge") shows subliminal bias. The Tribunal is not satisfied this is correct. The Tribunal finds that Mrs Boyle had attended an e-learning course on conscious and unconscious bias. The Tribunal finds Ms B said the online course made her aware of

conscious and unconscious bias: “It’s a case of doing training and try hardest to put in practice”. As well as the E learning package she attended a management course 4-5 years earlier with training on Equality issues. The Tribunal finds Mrs Boyle was a conscientious witness who made concessions where appropriate. The clear evidence before the interviewing panel was that the claimant did not demonstrate adequate enthusiasm for the role. We find he said he would have to “brush up” on the CJS an intrinsic area of the role which does not suggest enthusiasm for the role.

113. So far as the process is concerned the Tribunal heard evidence that it was a competency based process where a candidate had to give evidence and examples. It was not sufficient simply to make an assertion. the claimant had to explain and give evidence and examples to achieve. The Tribunal finds there is no evidence to shift the burden of proof

Transparency of Process

114. The claimant says the process was not transparent because there was a lack of clarity about the job description, the personal statement was not before the panel and there was an advantage to internal candidates because they were more likely to have insider information. Counsel for the claimant suggested this discriminates against BAME applicants disproportionately. The Tribunal finds that it is true the claimant’s application (personal statement) was not before the Panel but that was part of the respondent’s policy and affected all candidates. As in most recruitment exercises internal candidates may well be at an advantage because of insider knowledge but no evidence was adduced to show why this affected candidate of the claimant’s race/age or perceived religion. There may have been a lack of clarity about the job description but that affected all candidates regardless of race age or religion. The Tribunal finds there is no evidence to shift the burden.

Comment about age

115. The Tribunal relies on its finding of fact that the comment: “the interviewers also mentioned to me that the position required that I had to perform at least two years of work to justify the training provided as part of the role. It seemed as if the interviewers had doubts given my age as to whether I would be able to work satisfactorily for the required minimum period of the role” was not said. Accordingly it can not shift the burden of proof.

116. Therefore, for all those reasons we find the burden of proof has not shifted for the race discrimination claim, the perceived religion claim or age discrimination claim and so the claimant’s claims fail at this stage.

117. However in case we are wrong about that we have gone on to consider whether there was a non-discriminatory explanation. We find there was. The claimant was not appointed because he scored below the score of 4 in Question 2 and Question 3 and therefore did not reach the threshold required for appointment: he required a score of at least a 4 in answer to each question.

118. We rely on our findings of fact in relation to the scoring. We find the process was fair and was conducted consistently by Mrs Boyle and Mr Toft who had both received training on equality issues including unconscious bias. The claimant was

not appointed because of the scores he received and not because of his race or age or perceived religion.

119. If there was unfairness in the process in relation to the claimant being unclear as to the nature of the role or being unaware the panel did not have his application form, this unfairness applied to all candidates regardless of race/ perceived religion or age.

120. The final issue was in relation to the justification defence in the age discrimination claim. Given the claimant has failed to show he was less favourably treated on the grounds of age, there is no need for us to consider this issue.

121. For these reasons the claimant's claim does not succeed.

Employment Judge Ross

Date: 29 November 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
12 December 2019

FOR THE TRIBUNAL OFFICE

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