RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Mayanja**

Respondent: **Praxis Community Project (A Company Limited by Guarantee)**

Heard at: **East London Hearing Centre**

On: **Thursday 7 November 2019**

Before: **Employment Judge John Crosfill**

Members: **Ms S Campbell**
Mr M L Wood

Representation

Claimant: No appearance or representation
Respondent: Ms A Johns of Counsel

JUDGMENT having been sent to the parties on 10 December 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The Respondent is a charity that provides assistance and advice to migrants. In August 2018 the Respondent advertised two vacancies, one for an Immigration Advisor and the other for a Migrant Advisor. The Claimant applied for both roles, was shortlisted and attended for an interview. He was not appointed to either role. He has presented claims of direct discrimination because of sex and/or race in relation to not appointing him and not providing information about why those decisions were taken.

Procedural matters

2 The matter was listed for a Preliminary Hearing and that hearing took place on 10 July 2019. Prior to that Preliminary Hearing taking place the Claimant, who lived in Manchester, had applied to covert the hearing to be Telephone Case Management Hearing. That request was granted by EJ Gilbert who at the same time enquired whether the Claimant was seeking a transfer of his case to Manchester. She indicated that that was a matter that could be dealt with at the Preliminary Hearing. The Claimant responded by e-mail stating that he did wish for the case to be transferred.

3 On 10 July 2019 the Telephone Case Management hearing was listed before EJ Warren. The Claimant did not dial in to that hearing and was recorded as having not attended. He later e-mailed the Employment Tribunal suggesting that he had expected the Employment Tribunal to ring him, realised his error half past ten, spend an hour and a half on the telephone thinking that the telephone hearing had not started before he had given up. EJ Warren responded saying that many litigants in person have very little difficulties following the very basic instructions which the Employment Tribunal gives for dialling in today's hearing. We concur with that view.

4 One of the matters that was dealt with at the hearing was the application by the Claimant to transfer the proceedings to Manchester. EJ Warren recorded that at paragraph 14 of his Case Management Order under the heading "transfer to Manchester". There it is recorded:

> *'By an email dated 9 July 2019 the Claimant was asked by the Tribunal on instructions of Employment Judge Gilbert, whether he wished the case to be transferred to Manchester. At 16.56 yesterday the Claimant replied to the tribunal, but did not copy to the Respondent, his reply that he did so wish. In doing so he made reference to this being the best course of action to ensure the case proceeds to the final hearing in a timely way. In fact, the reverse is the case. The case is listed for November, if it is transferred, it will lose that hearing date and there is no telling how long it will be before the case is listed in Manchester. Very likely later than November.*
>
> *The Respondent, a charity, has three witnesses who live in London and they would have to travel to Manchester. Given the Claimant's failure to attend this hearing by telephone I decline to take the question of transfer any further forward.'*

5 The Claimant could not have believed in the light of what EJ Warren said that the matter had been transferred to Manchester. The request to transfer had plainly been refused for quite proper reasons. We are satisfied that the Claimant received a copy of the case management summary as amongst the various orders made and set out in that Case Management Order was an order that the Claimant provide some additional information in respect of his case. The Claimant complied with that order which tells us that a copy of the case management summary must have come to his attention.

6 The matter was listed for a final hearing at the East London Employment Tribunal commencing on 7 November 2019 (the hearing having been shortened from a two-day listing). At 10 o'clock there was no sign from the Claimant and we invited the clerk to contact him on the mobile telephone number that he had given. We were then told by our clerk that when she made contact the Claimant had said he was on the fourth floor of the Tribunal. When it was pointed out that this Tribunal building does not occupy the fourth floor the Claimant said that he was in the Manchester Tribunal building.

7 We discussed with the Respondent's Counsel how to proceed in the light of that information and invited her to comment upon three possible alternatives. The first was to adjourn the matter to give the Claimant a further opportunity to attend. That was resisted by the Respondent. The second possibility was to consider any application to strike out the Claimant's claim on the basis that it had no reasonable prospect of success or that he

was acting unreasonably or finally that he was not progressing the proceedings or dismiss it pursuant to Regulation 47 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Finally, we discussed whether we should proceed in the absence of the Claimant (again pursuant to regulation 47).

8 The Claimant's poor excuse for not attending the telephone hearing (and earlier failing to comply with a direction to prepare a schedule of loss suggested that the Claimant had not engaged with the proceedings. However, more recently the Claimant had exchanged a witness statement and had participated in organising for a bundle of documents to be produced. His witness statement contained facts which, taken at their very highest, might allow at least some parts of his claim to succeed. In those circumstances we found that it would be inappropriate to strike out the Claimant's case or to dismiss it under rule 47.

9 We then turned to the question of whether we should adjourn the case and we had little hesitation in concluding that we should not. We doubt the Claimant genuinely believed that the claim was to be heard in Manchester. We have regard to the fact that the Claimant did not attend by telephone on the last Preliminary Hearing playing no active part and putting forward an excuse so weak as to be incredible for not attending on that hearing. In addition, he received a Case Management Order which could not have been clearer in its terms. We note that the Claimant worked in the legal field for many years and is abundantly plain on the face of that order that the case had not been transferred. Furthermore, no revised notice of hearing had ever been sent. Following that hearing the Claimant continues to correspond with the East London Employment Tribunal. If the Claimant had actually entered the Tribunal in Manchester he would have had to report to security and would immediately have been told his case was not listed. We would have expected him to have contacted the Tribunal in those circumstances not simply wait until 10am when the Tribunal contacted him. Taking these matters together, we reached the conclusion that the Claimant had not accidently attended Manchester but had consciously taken the decision not to attend the hearing before us. We did not rely on that finding in respect of our decision not to adjourn as we conclude in any event that the Claimant has acted wholly unreasonably in failing to have regard to the terms of the case management order which makes it clear that there has been no transfer of the proceedings.

10 The Respondent attended with three witnesses anxious to conclude the case. We acknowledge that proceeding in the absence of the Claimant caused him some prejudice regardless of how culpable his failure to attend might be. That prejudice had to be weighed up against the prejudice to the Respondent and to other court users. Had the matter been adjourned it would have been many months before it could be relisted. Taking, into account all of those matters we concluded that the interests of justice favoured proceeding in the Claimant's absence.

11 We proceeded to hear from three of the Respondent's witnesses who were the three individuals who interviewed the Claimant, Lydia Peacock, Bethan Lant and Lucy Rix. Each of them adopted their pre-prepared witness statement and each of them were questioned by the Tribunal exploring some of the issues we have expected the Claimant to raise had he attended.

12 The issues to be determined by the Tribunal were set out in an amended Case Management Order which is found at pages 44 and 45 of the agreed bundle and we shall

not set them out in full in the judgment but deal with each issue below.

Findings of fact

13 The Tribunal makes the following findings of fact setting out the matters which it considered were material to its conclusions.

14 The Respondent is a charity operating in East London and offering advice and assistants to migrants. In August 2018 it advertised two job vacancies, one which we shall describe as an Immigration Advisor role and the other as a migrant advisory role working within hospitals. We shall refer to that as the 'hospital role'.

15 The recruitment process followed standard good practice. The application included a diversity questionnaire but that information was not available to the people undertaking the shortlisting. In respect of the immigration caseworker role the initial advertisement did not get many candidates but the matter was re-advertised and ultimately four people were short-listed.

16 The Claimant was short listed for interview for both roles and was invited to an interview on 17 August 2018.

17 When the Claimant attended for these interviews he arrived something in the order of half an hour late. We find that, whilst mildly irritated by this, the three members of the interview panel understood that he had travelled a long way and we accept their evidence that that was not held against the Claimant in any way.

18 The selection process had been designed to include a 25 minute long written assessment followed by an interview before a panel of 3 which was expected to last 45 minutes. One member of the interview panel had another appointment and needed to leave promptly therefore, to accommodate the Claimant's lateness, a decision was taken to reverse the order and conduct the oral interview first.

19 We accept the Respondent's evidence of what took place during the interview process. The process was documented and follows a standard recruitment practice. Each candidate had been asked a series of question each designed to demonstrate competency in a particular area of the work they intend to do. Candidates were expected to give examples of situations where they had demonstrated each competency.

20 The Claimant's interview got off to a difficult start. When he was asked the first question there was a long silence leading the panel to wonder whether or not he knew he needed to give an answer. It transpired that the Claimant was simply thinking about what he needed to say. That was a pattern which was repeated. Insofar as the Claimant did give answers, they were long, rambling and discursive and did not necessarily address the points that were made. We accept the evidence we were given that the Claimant was reminded from time to time to stay on track.

21 The Claimant has said that he was reminded on at least three occasions one of the panel needed to leave early. He relies upon that to demonstrate dis-interest in his

application. The Respondent's witnesses deny this and say that the issue of a panel member needing to leave was only raised once. We find that the most likely explanation for the difference in recollection is that the Claimant knew that one panel member needed to leave and has conflated instances where he was reminded to stay on track with reminders that a panel member needed to leave. Overall the Claimant was given slightly more time than the other candidates which is explicable in part at least of the fact that he had applied for two roles and was asked some additional questions in order to cover the competencies required for the second role. That said, the timing of the interviews does not support the Claimant's suggestion that his interviews were rushed. Overall, he was not disadvantaged in any way by the fact that one of the panel members needed to leave. Indeed, we go as far as to say the Respondent bent over backwards to accommodate him.

22 The interviews took a standard format where the same questions were asked of each candidate for the immigration advisor role, they were separately marked by the three interview panel. In respect of the hospital role Ms Peacock took no part because she was unfamiliar with that area of work so the Claimant was scored by the other two panel members.

23 We have been provided with a record of interview and it discloses that, whilst the Claimant's scores were respectable when assessed for the immigration adviser role, his scoring was eclipsed by one particular candidate who was a qualified solicitor. She was given excellent scores across the board. The witnesses we heard from were of the view that she was by any standards a candidate that clearly stood head and shoulders above the others. We have reviewed the notes made at the time and conclude that those opinions were genuine and objectively reasonable. We find that the difference in scoring are unsurprising when comparing the level of qualification and between the Claimant and the successful candidate and, given that we have accepted the account given of the Claimant's interview, find that if anything he was scored generously.

24 In respect of his interview for the hospital role the Claimant's scores were such that he had failed to meet the basic standard competency required. The Claimant was not unique in this there was only one other candidate for this role. That candidate also failed to demonstrate an adequate level of competency.

25 The Claimant was the last person to be interviewed and his interview concluded around 2.30pm. Before departing Ms Peacock engaged in a discussion with the other panel members about the appointment of immigration adviser. We find that the focus of that conversation was on whether the top scoring candidate should be appointed. We find that unsurprising and the agreement was swiftly reached that an offer would be made to that candidate who had outscored the other candidates by a considerable margin.

26 A more detailed discussion then took place between Lucy Rix and Bethan Lant as to whether or not to appoint in respect of the hospital role. We were told, and we accept, that some thought was given to appointing notwithstanding the fact that neither candidate had reached the required level of competency or demonstrated the level of competency through interview. The difficulty of re-advertising and re-interviewing weighed in favour of an appointment. However, that was outweighed by the fact that neither candidate who

was thought to be sufficiently competent even with additional training. Ultimately the decision was made to appoint neither.

27 Ultimately the recruitment exercise for the hospital role was undertaken internally with a request for expressions of interest. A candidate came forward who was subjected to the same interview and the same test and scored sufficiently highly to satisfy the Respondent that he should be appointed. He was a male of Afghan heritage. The appointment in the case of the immigration casework adviser was a female of what is normally describe as white British heritage.

28 The Claimant was advised at 3.30 on the day of his interview that he had been unsuccessful for both posts. He was told in terms that the reason for that was that he had failed to give sufficiently cogent examples to demonstrate the competencies required in his role. He has recorded as saying at the time that he thought that unfair as he had travelled from Manchester.

29 The Claimant followed up that telephone conversation by sending an email in which he sought information about a number of matters that appears to in the form of a letter mis-dated 6 August 2018 although in the letter refers to an interview on the 17 August 2018 so it must have been sent later.

30 In his letter the Claimant did asked for information as to the assessment criteria whether any panellist notes were taken during his interview clarification and he sought the scores awarded to him. He also sought a copy of any equal opportunities policy and he asked for a breakdown of the gender and racial composition of the Respondent's employees. There is no record of anybody ever responding to that document.

31 The witnesses that appeared before us had no first-hand explanation why the Claimant's letter had not drawn any response. They assumed that had the letter been received any failure to respond would have been an administrative oversight. During the proceedings the Respondent had provided the Claimant with his and the other candidates interview scores and the notes taken by each panellist. It had said that it did not have a breakdown of its workforce by sex or gender. When we asked for a breakdown we were told and accept that ethnic minorities formed 20 - 30% of the workforce and around 70% female. We were told and accept that the proportion of women in the workforce is generally higher than normal in the voluntary sector. This would accord with our own experience.

The law

The burden and standard of proof – discrimination cases

32 The standard of proof that we must apply is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established.

33 The burden of proof in claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

34 Accordingly, where a Claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the Respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**. Most recently in ***Base Childrenswear Limited v Otshudi*** **[2019] EWCA Civ. 1648** Lord Justice Underhill reviewed the case law and said:

17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in Igen Ltd v Wong [2005] EWCA Civ. 142, [2005] ICR 93, led to this Court in Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054. In Efobi v Royal Mail Group Ltd [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in Madarassy; but that decision was overturned by this Court in Ayodele v Citylink Ltd [2017] EWCA Civ. 1913, [2018] ICR 748, and Madarassy remains authoritative.

18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:

(1) At the first stage the claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from

which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

> *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. …"*

(2) If the claimant proves a prima facie case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> *"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.

35 Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

36 Discrimination cannot be inferred only from unfair or unreasonable conduct **Glasgow *City Council v Zafar*** **[1998] ICR 120**. That may not be the case if the conduct is unexplained ***Anya v University of Oxford*** **[2001] IRLR 377, CA.** Whilst inferences of discrimination cannot be drawn merely from the fact that the Claimant establishes a difference in status and a difference treatment see ***Madarassy v Nomura International plc*** **[2007] ICR 867** 'without more', the something more *"need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred"* see ***Deman v Commission for Equality and Human Rights*** **[2010] EWCA Civ. 1279** per Sedley LJ at para 19.

37 Where there are a number of allegations each single allegation of discrimination should not be viewed in isolation, but the history of dealings between the parties should be taken into account in order to determine whether it is appropriate to draw an inference of racial motive in respect of each allegation ***Anya v University of Oxford***.

38 The burden of proof provisions need not be applied in a mechanistic manner ***Khan and another v Home Office*** **[2008]** EWCA **Civ. 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said

> *"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race""*

39 Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim. We shall indicate below where we consider that it is open to us to follow this approach.

Equality Act 2010 - Statutory Code of Practice

40 The power of the Equality and Human Rights Commission to issue a code of practice to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Such a code must be laid before Parliament and is subject to a negative resolution procedure. The current code was laid before parliament and came into force on 6 April 2011. Section 15 of the Equality Act 2006 sets out the effect of breaching the code of practice. Paragraph 1.13 of the code explains that:

> *The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.*

Direct Discrimination

41 Section 13 of the Equality Act 2010 contains the statutory definition of direct discrimination. The material part of that section read as follows:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) ……"

42 In order to establish less favourable treatment it is necessary to show that the Claimant has been treated less favourably than a comparator not sharing his protected

characteristic. Paragraphs 3.4 and 3.5 of the code say:

> *3.4 To decide whether an employer has treated a worker 'less favourably', a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. If the employer's treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable: for example, where a job applicant is refused a job. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity.*
>
> *3.5 The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.*

43 Section 23 of the Equality Act 2010 provides that any comparator must be in the same, or not materially different, circumstances. What is meant by 'circumstances' for the purpose of identifying a comparator it is those matters, other than the protected characteristic of the Claimant, which the employer took into account when deciding on the act or omission complained of see - ***MacDonald v Advocate-General for Scotland; Pearce v Governing Body of Mayfield Secondary School*** **[2003] IRLR 512, HL**. Where no actual comparator can be identified the tribunal must consider the treatment of a hypothetical comparator in the same circumstances. Paragraphs 3.22 – 3.27 say (with some parts omitted):

> *3.22 In most circumstances direct discrimination requires that the employer's treatment of the worker is less favourable than the way the employer treats, has treated or would treat another worker to whom the protected characteristic does not apply. This other person is referred to as a 'comparator'.*
>
> *Who will be an appropriate comparator?*
>
> *3.23 The Act says that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.*
>
> *Hypothetical comparators*
>
> *3.24 In practice it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.*

3.25 In some cases a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless their treatment may help to construct a hypothetical comparator.

3.26 Constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the claimant, but not the same. Looking at these elements together, an Employment Tribunal may conclude that the claimant was less favourably treated than a hypothetical comparator would have been treated.

3.27 Who could be a hypothetical comparator may also depend on the reason why the employer treated the claimant as they did. In many cases it may be more straightforward for the Employment Tribunal to establish the reason for the claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the claimant's to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can then be made.

44 The proper approach to deciding whether the treatment was afforded 'because of' the protected characteristic is to ask what the reason was for the treatment. If the protected characteristic had a significant influence on the outcome then discrimination will be made out see - ***Nagarajan v London Regional Transport*** **[1999] UKHL 36; [1999] IRLR 572.**

Discussion and Conclusions

45 The Claimant has identified 5 separate detriments. He says that he was subjected to each because of race and/or sex. The detriments relied upon are set out in the list of issues as follows:

45.1 not being selected for either of the positions he was interviewed for;

45.2 not being given reasons as to why he was unsuccessful in respect of either of the positions he was interviewed for;

45.3 not being provided with the panels notes of his interview, performance chart of other candidates or the selection criteria;

45.4 not being provided with details of the sex or race composition of the Respondents workforce.

We shall deal with each one below.

‘not being selected for either of the positions he was interviewed for’

46 We note in his witness statement the Claimant appears to withdraw this allegation and suggests that he does not complain about the failure to appoint him per-se however as the claim is not formally withdrawn we should deal with it in any event.

47 In a recruitment case the question of whether there is any less favourable treatment is inextricably bound up with the question of whether the successful candidate was in the same material circumstances. Adopting the two-stage approach to the burden of proof we consider that the following matters are material:

47.1 The Claimant is a black male and was not appointed to either role;

47.2 A white female was appointed to the immigration advisor role and an Afghan male to the hospital role.

47.3 The appointee for the immigration advisor’s role was well qualified and performed well at interview.

47.4 The Claimant was sufficiently qualified for the immigration role but not as qualified as the successful candidate. The Claimant’s performance at interview was poor.

47.5 The Claimant was not criticised for being significantly late for his interviews.

47.6 The Respondent had a floor level of competency beneath which it would not ordinarily recruit which it applied to the hospital role.

47.7 The Respondent telephoned the Claimant and gave an explanation why he had not been appointed on the day of the interview.

47.8 The Respondent did not respond to the Claimant’s letter asking for information about the recruitment process. Had it done so the interview notes and scores would tend to support the Respondent’s case as would its equal opportunities policy and selection criteria. Had it compiled detailed statistics of its workforce, they would not have significantly supported the Claimant’s case.

47.9 The Respondent’s recruitment process followed a model which is well regarded and designed to eliminate actual or subconscious bias. We were particularly impressed that a small organisation kept good records of the interviews and scores awarded.

48 In respect of the immigration advisor role we have concluded that there is no sufficient evidence from which we could draw any inference that the decision not to appoint the Claimant was either his race or his gender. If we are wrong about that then looking at the Respondent's explanation we are satisfied that the reason that the Claimant was not appointed is that the Respondent wished to appoint a far better and far more qualified candidate who performed better at interview. We are satisfied that the appointment had nothing to do with sex or race.

49 In respect of the hospital role we have concluded that there is no sufficient evidence from which we could draw any inference that the decision not to appoint the Claimant was either his race or his gender. In respect of the allegation that gender was a factor in the decision the Claimant's case is fundamentally undermined by the fact that the person ultimately appointed was male. If we are wrong about the burden of proof passing to the Respondent that, then looking at the Respondent's explanation we are satisfied in respect of this job the Respondent was genuinely of the belief that the Claimant (and the other initial candidate) did not meet the basic standard of experience/competency required for the job and that that was the reason he was rejected. We are satisfied that the decision not to offer the Claimant the position had nothing to do with sex or race.

'not being given reasons as to why he was unsuccessful in respect of either of the positions he was interviewed for'

50 We have accepted the evidence set out above that the Claimant was told of the reasons why he was not appointed. As such this allegation cannot succeed taken literally. It seems that what the Claimant is really saying is that insufficient explanations were given in that he had no response to his letter. We deal with that allegation below. We are entirely satisfied that on the day of the interview an explanation was given to the Claimant whether or not he thought it adequate. The proper comparator would be a person not sharing the protected characteristics who had also not been appointed. Having regards to the same matters as we considered above, there is no evidence from which we could infer that any such comparator would have received any further or better explanation. For those reasons we find that the Claimant's race or sex played no part in the decision to give him the reasons he was given.

'not being provided with the panels notes of his interview, performance chart of other candidates or the selection criteria;

not being provided with details of the [sex or race] composition of the Respondents workforce.'

51 We shall take these two allegations together as they both relate to the failure to respond to the Claimant's letter. We would accept that the Claimant could reasonably consider that not getting any response was to his disadvantage. The proper comparator would be another disappointed candidate asking for the same information but not sharing the Claimant's protected characteristics. We have had regard to the same evidence as we set out above in asking whether the facts could support an inference in the absence of an explanation from the Respondent. We have concluded that the facts could not support any such inference. An important consideration in reaching that conclusion is that the Respondent had nothing to hide. The interview records strongly supported the

Respondent's contention that there were non-discriminatory reasons for its conduct and that the selection criteria themselves were but gender and race neutral. The composition of the workforce was unremarkable other than females being slightly overrepresented. Any disparity was insufficiently significant to begin to support an inference of discrimination.

52 We do consider it surprising that what appears to be a very well run organisation has failed to acknowledge correspondence but do not consider that this, together with the other material matters we have identified is sufficient that we could conclude that the reason for the lack of response was that the Claimant was male and/or black. We therefore do not need to look to the Respondent for an explanation. Had we done so we would have accepted that the only plausible explanation was an administrative oversight. Again we place weight on the fact that the Respondent was a diverse organisation catering to migrants which had a full and proper explanation why the Claimant had not been appointed.

Costs judgment

53 After we delivered our judgment the Respondent made an application for its costs. The basis of the application was twofold. Firstly, that the Claimant had not attended and secondly that the Claimant ought to have recognised that his claims had no reasonable prospects of success. Ms Johns passed the Tribunal a letter dated 27 August 2019 and marked 'without prejudice save as to costs' in which the Respondent invited the Claimant to withdraw his claims on the basis that the Respondent would forgo any right to apply for costs. A 'drop hands' offer. The letter contained an explanation of the reasons why the Claimant had not been appointed and stated in terms that the case had no reasonable prospects of success. The reasons dealt only with the decision not to offer the Claimant a job but do not differ markedly with our own reasons set out above.

<u>The relevant law</u>

54 The jurisdiction to make an order of costs is found in schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) 2013. Rule 76 provides:

> *"When a costs order or a preparation time order may or shall be made*
>
> *(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –*
>
> > *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;*

(b) any claim or response had no reasonable prospect of success".

55 There is essentially a 2 (or perhaps 3) stage test. Other than in defined circumstances, before there is any jurisdiction to award costs at all the tribunal must be satisfied that one or more of the threshold conditions set out in Rule 76(1) has been satisfied. If, and only if, it has should the tribunal move on to consider whether, in the circumstances of the particular case, it is right to make a costs order. Finally, it is necessary to decide what amount, if any to award. Notwithstanding the existence of the jurisdiction to award costs the exercise of that jurisdiction remains exceptional ***Gee v Shell Ltd*** **[2003] IRLR 82**.

56 Rule 84 of the procedure rules provides that when deciding whether to make a costs order and if so in what amount the Tribunal may have regard to the means of the paying party. The rule is permissive rather than mandatory although it would be an unusual case where the means of the paying party were not a material factor. In ***Vaughan v London Borough of Lewisham*** **[2013] IRLR 713** the Employment Appeal Tribunal, following ***Arrowsmith v Nottingham Trent University*** **[2012] ICR 159** held that an assessment of means was not necessarily limited to the ability to pay at the time that the order is made but can have regard to the future prospects of the paying party.

Discussion and conclusion - costs

57 The core of this case was the question of whether the failure to offer the Claimant either of the roles he applied for was because of his sex or race. The Claimant was told on the day of the interview that he had not performed sufficiently well at interview to be appointed. He knew nothing about the sex or race of the successful candidates. Rather than accepting the possibility that he had not been the best candidate or of the requisite standard he appears to have believed that there may be a discriminatory reason. He wrote to the Respondent asking for more information and we have found that he got no response. He did not chase that up before issuing the present proceedings. When he issued the proceedings, the Claimant purported to 'reserve the right' to amend his claims depending on the information he received from the Respondent. His assumption that there must have been discrimination was not based on any positive case but a mere assumption. This was not a case where the Claimant could reasonably have imagined that his own qualifications and abilities meant that any refusal to appoint him cried out for an explanation. The Claimant breached several case management orders and was late disclosing his own documents. In the trial bundle he was provided with the interview scores and notes of his interview. Belatedly witness statements were exchanged and the Claimant was provided with a complete explanation of why he was not appointed. The Claimant's own witness statement tends to suggest that he recognises that he cannot show that the failure to appoint him was discriminatory. He then failed to attend the hearing of his claim either deliberately or by being reckless as to where the hearing was taking place.

58 We find that at the point in time that the Claimant had both the bundle and the Respondent's witness statement together with their costs warning letter he knew, or ought reasonably to have known, that his core case (the failure to appoint him) had no reasonable prospects of success. He never had any reasonable possibility of discharging the burden upon him of showing a prima facia case.

59 We find that the initial costs threshold is passed in two separate ways. The first is that proceedings have been conducted unreasonably. The Claimant failed to comply with a number of case management orders on time. He failed to attend two hearings each time giving an inadequate excuse. Secondly, we find that the Claimant has continued with proceedings which he knew, or ought to have known, had no reasonable prospects of success.

60 We therefore have a discretion whether to make an award of costs. The Respondent is insured but that is irrelevant. The schedule of costs provided to us totalled £10,318.32 including VAT. It later transpired that the insurers could recoup the VAT.

61 We find that this case was so hopeless, and pursued so hopelessly, that it would be appropriate to order the Claimant to pay costs. We find that the point in time at which the Claimant's behaviour passed the point where an award of costs was appropriate was the time when witness statements ought to have been exchanged (they were exchanged late principally due to delays by the Claimant). At that stage the Claimant had been in possession of the costs warning letter for over a month.

62 We had no evidence about the Claimant's means but know him to be an immigration advisor. We find that it is very likely that he would be able to pay the modest costs order that we would make, if not immediately, then within a reasonable period of time.

63 We order the Claimant to pay the Respondent's costs from 2 October 2019 to the date of the hearing. We asked whether Counsel's fees were affected by the length of hearing being reduced and the position was later confirmed in correspondence (they were). The fees were modest and proportionate. We ordered the Claimant to pay the Respondent the sum of £1,859.90 as a contribution to its costs.

Employment Judge Crosfill

3 March 2020