EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No. 4106438/2019

Final Hearing Held at Aberdeen on 10, 11 and 12 March 2020

Employment Judge A Kemp
Tribunal Member D Massie
Tribunal Member N Richardson

Mr B Cochrane	**Claimant** **In person**
The Moray Council	**Respondent** **Represented by** **Mr B Caldow** **Solicitor**

JUDGMENT

The unanimous decision of the Tribunal is that the Claim does not succeed and is dismissed.

REASONS

Introduction

1. This was a Final Hearing into the claims of disability discrimination made by the claimant against the respondent under sections 13, 19, 20 and 21 of the Equality Act 2010, all of which were defended. They were made in respect of an application for employment made to the respondent by the claimant, which did not proceed to shortlisting.

2. At the commencement of the hearing a number of preliminary matters were addressed. Firstly the claimant indicated that he wished to play an audio recording of a telephone call made by Mrs Garrow of the respondent. That was not opposed, although it was noted that Mrs Garrow was not informed of the recording at the time. Secondly he wished to produce a letter and email as additional productions, which again was not opposed although part of the email had not been produced completely. Thirdly the respondent raised questions as to the claimant's membership of the IOSH, referred to in evidence later. The claimant confirmed when asked about the matter that he had not been a member from January 2017, but stated that he could apply to join again, and would then be admitted.

3. The respondent then sought a strike out of the claim on the basis that there were material inaccuracies in the application form made to the respondent. That included his membership of IOSH but also prior employment history, and a reliance on a qualification which had expired. After hearing from the claimant in answer, and then retiring to consider matters, the Tribunal unanimously decided to reject the application for strike out, giving its reasons orally at the time. No application for written reasons has been made at the date of preparation of this Judgment.

Issues

4. The Tribunal had earlier determined that the claimant was a disabled person under the Equality Act 2010. The Tribunal discussed the issues

with the parties at the commencement of the hearing and it was agreed that they were the following:

(i) Did the respondent know that the claimant was a disabled person when adjudicating on his application for employment?

(ii) If not, ought they reasonably to have so known?

(iii) Did the respondent directly discriminate against the claimant when not affording him an interview for the post he had applied for under section 13 of the Equality Act 2010? In that regard, he put forward as comparators applicants E and F, referred to below.

(iv) Did the respondent indirectly discriminate against the claimant under section 19 of the said Act and in that regard did they apply a provision, criterion or practice in relation to working in small confined spaces or at height?

(v) If so, has the respondent objectively justified their doing so?

(vi) In the event that the respondent applied the said provision, criterion or practice, did that place disabled persons at a substantial disadvantage, and if so did the respondent fail to take reasonable steps to alleviate that disadvantage under sections 20 and 21 of the Equality Act 2010?

(vii) In the event that any claim succeeds, what remedy ought to be afforded to the claimant, and in that regard (i) what loss if any did he sustain and (ii) did he mitigate that loss?

5. In submission the claimant did not pursue an argument under sections 20 and 21 of the Equality Act 2010 such that issues (ii) and (vi) were no longer applicable.

Evidence

6. A Bundle of Documents had been prepared in accordance with a case management order. Two documents were added to it initially as referred to above. During the evidence the claimant produced a full copy of the email referred to. The claimant played the audio recording of a telephone conversation, for which a transcript had been prepared by him. It had included some comments by the claimant, such as “agrees”, which were not the words spoken, and were deleted. The respondent accepted that

otherwise it was accurate in all material respects. In the course of the claimant's cross-examination the respondent produced records from Companies House in relation to Full Circle Safety Limited. The claimant objected to them being so produced, but the Tribunal considered that they should be as doing so was in accordance with the overriding objective. They were public documents, from records provided by a company of which the claimant was a director.

7. Not all of the documents in the bundle were spoken to.

8. The documents included six application forms made to the respondent for the same post as that for which the claimant had applied. They had been redacted so as to remove identifying materials, in accordance with Orders granted following a case management Preliminary Hearing, and were referred to by letters A – F. During the evidence of Mrs Garrow there was introduced into the evidence a spreadsheet that she had prepared in relation to the shortlisting process, as referred to further below. An extract from it, which contained the details of candidates A – F but not that for the claimant, had been within the Bundle.

9. The claimant gave evidence himself. By agreement, he referred to an aide memoire document when doing so.

10. Evidence for the respondent was given by Mrs Frances Garrow.

Facts

11. The Tribunal found the following facts to have been established:

12. The claimant is Mr Barry Cochrane. His date of birth is 24 December 1970. He was at all material times a disabled person under the Equality Act 2010.

13. The claimant has a number of qualifications in health and safety, the highest of which is a NEBOSH Diploma in Occupational Health and Safety he gained on 27 September 2010. It took him over three years of study to achieve.

14. The claimant joined the Institute of Occupational Health and Safety (IOSH) as an Affiliate member, the entry level, on 21 October 2010. He became a

Graduate Member on 17 August 2011. He was able to do so as the NEBOSH Diploma was regarded by IOSH as equivalent to a University degree. His membership of IOSH ceased on 23 January 2012. He re-joined as an Affiliate Member on 10 October 2012. He became a Graduate Member on 16 October 2013. His membership lapsed, but did not cease, on 12 January 2015. He was reinstated on 26 January 2015 as a Graduate Member. His membership ceased on 9 January 2017.

15. The respondent advertised a post as Senior Health and Safety Adviser in about January 2019. It was a Grade 11 post and was regarded as a senior one. The salary level for it started at £42,959 per annum.

16. The respondent has a Recruitment and Selection Policy, under which "disabled applicants who meet the minimum selection criteria for the job are guaranteed an interview".

17. The respondent provided prospective applicants for the post with a Job Description and Person Specification. The latter set out six criteria, with columns for what was essential or desirable. Essential was stated to be "The minimum acceptable levels for safe and effective job performance." The format used was the standard one for applications for roles within the respondent. The respondent has a practice of seeking to support disabled applicants and employees. It is located in a rural location and frequently has few applicants for a post.

18. Under the criterion for "Experience" it stated under what was essential

> "Minimum 3 years in safety adviser role with experience/knowledge of:
>
> - H&S investigations, inspections and monitoring
> - Providing advice on H&S legislation & practical implementation
> - Role of HSE and liaison work
> - Promoting H&S improvements & line manager responsibility
> - Accident reporting and investigation

> Working collaboratively to identify and agree requirements and remedial action"

19. Under the criterion “Education and Qualifications” the following was stated:

> “Degree in relevant discipline (or equivalent)
> Chartered Membership of IOSH or demonstrable equivalent
> NEBOSH diploma (or equivalent)”

An asterisk after the criterion indicated that “Candidates will be required to show these documents if invited for interview.”

20. Under the criterion “Working environment & physical demands” was stated:

> “Ability to carry out the duties and responsibilities of the job including working at height, in small confined spaces and in a variety of external environments e.g. near water”

21. Prospective applicants were provided with a pro forma application form to complete electronically. They were also provided with an Information for Applicants form, which stated, amongst other details: “Please read these notes carefully before completing the application form.”

22. It included comments that applicants could add further sheets of information but the application form must be completed in full, that “applications will be shortlisted solely on the basis of information provided by applicants on their application form, accompanying sheets and references” and that “You are asked to sign a declaration on the application for that the information provided is true and complete to the best of your knowledge and belief. If you are appointed and it is subsequently discovered that you have made a false statement on the application form, the Council reserves the right to terminate your appointment.”

23. The claimant did not read that Information form carefully, but did so by skim reading it.

24. The claimant completed an application form for the post on 28 January 2019.

25. Against "Current/most recent employer" he stated "Robert Gordon University" having indicated that he was an "undergraduate student (Nursing)". He was not employed in that role. His most recent employer had been Meallmore Limited.

26. Under qualifications he included "BS OHSAS 1800 1 Lead Auditor (BSI)". That qualification had expired in 2013.

27. Under "Work History" the form stated "Please note when entering Work History this must include current and all previous employment. The entries for the last three years must include any time spent at School, College, University, Career Breaks, Periods of Unemployment, Volunteering or Travelling/Time Spent Abroad, and these dates must run consecutively with no gaps in the 3 year period prior to the date of your submitted application….."

28. The claimant provided in answer as the first entry "Arnold Clark Automobiles…..From 18/01/2018 – 07/03/2018". That was not accurate. His employment with that company had been in 2016.

29. He did not include employment with Meallmore Limited, nor with Inspire (Partnership for Life Limited) with each of which he had been employed for brief periods on a part-time basis whilst a student at Robert Gordon University in about August 2018. Meallmore Limited had been his most recent employer.

30. He did not include any entry for the period 2 May 2017 to 1 September 2017, on which latter date he had commenced studying with the Robert Gordon University, undertaking a three year course in Nursing on a full-time basis.

31. He represented that he had been conducting health and safety work through a company Full Circle Safety, which was a limited company, in the period 1 July 2012 to 2 May 2017. The company had not traded since 31 July 2015. It did not file accounts for the period after 31 July 2016. In the year to 31 July 2016 it had income of less than £300.

32. Under “Memberships” was stated: “Please enter any memberships you have that may be relevant to your application”. The claimant entered IOSH as the organisation, that it was at Graduate Level, and that he had been a “Member since 29/092010”. That was not accurate. He had not been a member of ISOH since 9 January 2017.

33. The claimant had worked for Arnold Clark Automobiles as a Regional Health and Safety Adviser in the period 18 January 2016 to 7 March 2016. That was the last occasion on which he worked in a health and safety role before applying to the respondent. Prior to the employment with Arnold Clark Automobiles, he had worked at 2 Sisters Food Group, a meat processor, as Health and Safety Manager in the period 1 July 2014 to 31 August 2015; at Hydrasun, an oil and gas services company as Health and Safety Adviser in the period 1 January 2012 to 1 July 2012 and for the British Standards Institution as Client Manager OHS Specialist, carrying out an audit function, in the period 1 August 2010 to 1 January 2012. The claimant had also provided consultancy services through a limited company of which he was the director and shareholder Full Circle Safety Limited during the period 1 July 2012 to 31 July 2015. He provided an outline of the work he had carried out for each of the roles, but did not relate the information provided to the bullet points under “Experience” set out above. He did not provide a detailed explanation of the consultancy services he had given.

34. The form had a section to provide further information including why the candidate was applying and how he considered he met the criteria of the person specification. The claimant stated that he had “recently left University while studying as a Nurse and have now become available”. He said that he met the specification as he had excellent knowledge of health and safety legislation and guides, referred to his working history, and his personal skills and attributes.

35. The application form had a box to tick if the applicant considered himself to have a disability under reference to the Equality Act 2010. The claimant ticked the box to indicate “yes”. Nowhere on the form did the claimant provide further details of that. The respondent was not aware of the nature of the disability in any way.

36. The respondent had 19 applicants for the post, including the claimant. The only person who applied who indicated on the application form that they considered themselves to be a disabled person was the claimant.

37. The decision on who to take forward to a short list for interview was taken by Mrs Frances Garrow, in conjunction with Grant Cruickshank, HR Manager who reported to her. The role for which the claimant applied would report to Mrs Garrow as the then Organisational Development Manager.

38. Mrs Garrow was a Chartered Member of the Chartered Institute of Personnel and Development. She had been trained in the operation of the respondent's policy for Recruitment and Selection, and that included issues of discrimination law and practice.

39. Mrs Garrow has close family members who are disabled persons.

40. Mrs Garrow drafted information on a spreadsheet which assessed all of the applications. They were assessed against the criteria as to experience, and education and qualifications, set out above, both as to essential and desirable criteria. Applicants were scored as 2 meaning met the criterion, 1 meaning partially met criterion, and 0 meaning did not meet criterion. No assessment was undertaken against other criteria including criterion 6.

41. Mrs Garrow interpreted the word "essential" to mean "ideal" rather than strictly required such that if an applicant did not demonstrate full compliance with an essential criterion their application required to be rejected.

42. She determined that there would be six candidates called for interview. The claimant was not amongst them. Each of the candidates were rated 0, 1 or 2 for each of the first two criteria both regarding the essential and desirable elements.

43. She assessed the claimant as zero for the essential criterion of experience. She assessed him as 1 for the essential criterion of education and qualifications.

44. She had looked through his application but was concerned at the limited nature of the experience it referred to. Its terms were succinct. There was an absence of explanation or of detail of the nature of what had been done. She was not aware that the employment at Arnold Clark Automobiles was in 2016, not 2018 as the form stated, but did note that it was for a short period of less than eight weeks, crossed over with the period as a student nurse, and was not in an area relevant to the Council as a local authority. She considered that the remaining health and safety adviser experience on the form was similarly not relevant to the work and activities of the respondent as a local authority. 2 Sisters Food Group was a meat processor, employing 330 staff. Hydrasun was an oil and gas service company. None of the employments had been particularly lengthy. Little detail was provided in relation to the consultancy work with Full Circle Safety Limited. The role with British Standards Institute was as an external auditor, she considered, not that of a safety adviser. She noted further that the claimant had moved out of occupational health and safety and commenced a degree course in Nursing in September 2017. She concluded that he did not meet the experience required of three years in a safety adviser role.

45. She considered that he did not have a degree, nor was a Chartered Member of IOSH, which is a level above that of Graduate Member. She was at that stage not aware that he was not a member of IOSH at that time. She did not find evidence elsewhere in his application that in her opinion evidenced equivalence to those elements.

46. A degree was sought as that evidenced academic achievement. She construed reference to the relevant discipline broadly. She considered that a degree would be relevant in areas such as social sciences as she had herself a degree in social sciences, and when studying for that had been involved in issues of organisational change, with health and safety a part of that. She considered that a candidate could demonstrate similar knowledge and thinking without having a degree, but found no evidence of that from the claimant's application. The NEBOSH Diploma was sought for a different reason, to evidence technical understanding and experience of health and safety practice. Chartered Membership of IOSH was sought

as evidence of a recognition of, and participation in, continuing professional development such that the candidate demonstrated a level of knowledge of current practice. The claimant did not demonstrate in his application equivalent experience to that, particularly as he had left the field of safety to study as a nurse.

47. She took no account in making her assessment of his being a disabled person, nor did she take any account of whether or not he could fulfil the sixth essential criterion. The assessment she undertook was solely in relation to criteria one and two, both for the claimant and all other candidates.

48. Candidate A's application form stated that he had a degree in social sciences, was a Chartered Member of IOSH, and held a NEBOSH Diploma. He had 20 years' experience in a health and safety adviser role at the respondent, and in his application he referred to each of the bullet points under the "Experience" criterion and demonstrated how he met that. Mrs Garrow concluded that he met directly all of the essential criteria. He was assessed on the shortlisting spreadsheet as 2 for each of the two essential criteria that were assessed. He was included on the shortlist as he met the essential criteria and was regarded as a strong candidate.

49. Candidates E and F in their application forms did not state that they held a degree, Chartered Membership status of IOSH, or a NEBOSH Diploma.

50. Candidate E stated that he had been a firefighter for a lengthy period and remained a retained firefighter. He had substantial experience in that area, had acted as a Watch Commander, had wide and lengthy experience in matters of fire safety and prevention, and had set out in detail in his application the work that he had carried out in relation to safety and related that to the bullet points under the "Experience" criterion. He stated in detail how he would operate in the role if selected in a personal statement. In the further information section he stated that he was aware that he did not hold all the qualifications required. He was at the Technical level of IOSH membership, being that below Graduate. He had provided details of why he met the specification generally. She considered that his application form, which provided substantially greater detail than that of the claimant,

was sufficient to demonstrate a degree of equivalence to each of the requirements, such that it was appropriate to take him to interview.

51. Candidate F stated that she had wide experience in safety issues in relation to vehicles, driving, and related matters, as well as in safety issues in relation to housing, both of which were relevant to the activities of the respondent. She had been in a Health and Safety role for almost two years, prior to which she had a variety of roles with safety advising responsibilities, the detail of which her application provided, and in doing so she related her response to the bullet points under the “Experience” criterion. She was at the Affiliate level of IOSH membership, which is the entry level. In the further information section she related her current role to that advertised, and gave examples of the work she was undertaking. Mrs Garrow concluded that although she partially met the essential aspects of the education and qualifications criterion, taking the application as a whole she had sufficient to warrant being taken for interview.

52. Mrs Garrow completed the spreadsheet for all 19 candidates for the post on 5 February 2019 after discussion with Mr Cruickshank, with whom there was substantial agreement. All the assessments took place on that day.

53. Mrs Garrow assessed each of candidates E and F as fully meeting the experience essential criterion, and partially meeting the essential criterion for education and qualifications, being scores of 2 and 1 respectively. She called them for interview as they each had experience in areas that were relevant to the activities of the Council, and were otherwise strong candidates.

54. Under a section to provide the reason for not shortlisting she wrote in relation to the claimant - “Experience”. In a comments section that followed she set out a basic summary of his work history, referred to what she understood was his Graduate membership of IOSH and concluded “varied career to date, no mention of degree, mostly narrow unrelated H&S experience.”

55. The claimant was informed of the decision not to short list him for interview on 7 February 2019, a Thursday, by email from Mrs Garrow. He asked for

feedback on his application and the reasons why he was unsuccessful by return email, and arrangements were made for a telephone call to do so by Mrs Garrow.

56. That call took place at about 1pm on Monday 11 February 2019. Unknown to Mrs Garrow the claimant recorded it. A transcript of the call is a reasonably accurate record of it. Mrs Garrow had been at meetings that day, and had not had time to prepare for it. She wished to call the claimant at the time she had indicated she would.

57. During the call Mrs Garrow gave a standard explanation that she gave to candidates that on another day the application may have been carried forward. She said that there was nothing wrong with his application. She made those comments without having re-read the documentation. She had intended to do so but meetings had overrun. She explained that all three elements under the education and qualifications criterion were required, which surprised the claimant who had thought that only one was necessary. She was unsure of whether all candidates called for interview met all the essential criteria when asked about that, but said that she would look into it. The claimant asked her for an email to confirm matters. She was concerned that questions were asked of her which related to other candidates, and she wished to check responsibilities as to confidentiality.

58. The respondent held its interviews on 12 February 2019 for the post, save for one candidate who was interviewed earlier when in the area to avoid him having a return trip.

59. Candidate A was offered and accepted the post after those interviews. He had performed materially better than the other five candidates taking account of his application and the interview.

60. On 14 February 2019 the claimant emailed Mrs Garrow to seek information under a freedom of information request. He also sought similar information through the respondent's website on the same day.

61. On 21 February 2019 the claimant emailed the respondent with a complaint about his application. He also sought further information with two additional questions he asked.

62. Mrs Garrow replied to the request for information on 25 February 2019 by providing answers to the questions asked as follows:

(i) How many applicants were selected for interview? 6
(ii) Did all the applicants selected for interview have 2 separate degrees? Yes, or relevant experience
(iii) If the answer to Q2 above is no, how many of the applicants had 2 separate degrees? 3
(iv) Was the successful candidate already a Council employee? Yes
(v) What was the official decision not to offer me an interview? Did not meet essential criteria in terms of experience or qualifications"

63. On 15 March 2019 Mrs Garrow prepared a timeline document to assist in answering the complaint by the claimant.

64. On 19 March 2019 the respondent replied to the claimant's complaint dated 21 February 2019 and rejected it. They stated that there was no evidence to suggest that he had been discriminated against as a result of a disability. The letter referred to the conversation with Mrs Garrow in relation to education and qualifications, and on experience stated, "your application did not evidence the breadth and depth of experience that we would require in this senior role". It stated that all those selected for interview met the requirements set out in the person specification.

65. On 22 March 2019 the respondent emailed the claimant in relation to the remaining two questions he had asked, stating that to answer them would in their view contravene the Freedom of Information (Scotland) Act 2002, such that they did not answer it. That was given after advice from the Council's solicitor.

66. The claimant later pursued a complaint to the Information Commissioner with regard to the failure to provide that information, who upheld his complaint, and on 9 March 2020 the respondent provided written information. The reply stated that one candidate had a degree, which was

incorrect as two candidates had a degree. The respondent is to send a revised response to the claimant with correct information.

67. Had the claimant been informed that he was called for interview, that would have been intimated to him on or about 6 February 2019. Had he then sought to join IOSH it would have taken him until at least around early March 2019 in order to obtain Graduate level, had that been granted to him. He would not have been able to provide evidence of his Graduate level membership of IOSH for an interview on 12 February 2019. Obtaining Graduate level membership requires both a degree or equivalent such as a NEBOSH Diploma, and evidence of continuing professional development.

68. The claimant was not a Chartered Member of IOSH at any time. That is the level above a Graduate Member.

69. A NEBOSH Diploma is deemed in guidance issued by the Quality Assurance Agency for Higher Education and other bodies as equivalent to a degree

70. Had the claimant been taken forward to interview, he would have been asked about the gaps in his application work history. He would have been asked to provide evidence of his IOSH membership. He would have been asked about the work he had done in his consultancy business. The errors in his application form and the omissions identified above are likely to have been disclosed. The respondent would then not have taken his application forward in light of the loss of trust in the claimant.

71. The claimant has applied for about 50 health and safety roles. For six of them he was granted an interview, and for none was he successful. He is in the course of commencing his own business.

72. He has not claimed benefits since making the application to the respondent.

Claimant's submission

73. The following is a basic summary of the claimant's submission. He argued that the respondent needed someone who was fit and able. He referred to the sixth essential criterion, and that Mrs Garrow knew that he was disabled as he had ticked the box for that. She knew of the terms of the Act, and what being a disabled person under it involved. He was immediately shut out when he ticked the box.

74. During the telephone conversation he held with her she admitted that he met essential criteria but then the penny dropped that that meant he was guaranteed an interview. The respondent started to cover it up. It was crazy that he was not interviewed but candidates E and F were. There was a 100% match between the application by A and the person specification. Mrs Garrow had said that there was nothing wrong with the claimant's application, and the truth was that that was the case.

75. If he had gone to interview he had a very good chance. The best thing on his CV was the BSI job. He might get the job over candidate A. In comparison to E and F he was qualified to a far higher level. He was the only one with the Diploma, which was equivalent to a degree. He had been a graduate level member of IOSH and it was most likely that that would have had that reissued in time for the interview. If not he would have taken an email about his applying for that. It was just a piece of paper.

76. The scoring of 0 for experience he could only put down to his disability. She had scored E and F 2 for that. E had been a health and safety adviser for only two months. It was clearly treating him less favourably. Experience was not a substitute for qualifications.

77. The responses to questions were lies. That on 25 April 2019 said that all candidates for interview had two degrees or equivalent, but that was known not to be the case. The lowering of the criteria for E and F was not applied to the claimant himself. In response to question 5 there was a question mark. That indicated that it was being made up. The Response Form stated that criteria were not applied flexibly. They have been. E and F did not have Chartered Membership of IOSH but were at far lower levels, which would take years to get to Chartered Membership status. The claimant was held to a higher standard. The Response Form at paragraph

30 stated that the interviewed candidates held a degree and diploma, which was also a lie. Mrs Garrow could not explain that.

78. Candidate A got the job after interview but did not have a degree in a relevant discipline. Social sciences were not health and safety. A did not have a degree, and the Freedom of Information reply given on 9 March 2020 that there was only one degree for a candidate, in Biology, should be accepted as correct.

79. There was a pre-emptiveness about what happened. Candidate E said in his own application that he did not meet the qualifications. There were conflicting documents in the Response Form, Freedom of Information replies, and witness evidence. The respondent's credibility was in serious doubt, and in not interviewing him they broke the law.

80. In answer to questions, he confirmed that he did not pursue the argument as to reasonable adjustments. On the provision, criterion or practice for the indirect discrimination claim he argued that that was section 6 of the essential criteria, and that it was applied because he ticked the disability box. On the IOSH membership not being current at the time of application he argued that the respondent was making a mountain out of nothing. As to remedy he referred to his schedule of loss, and that on injury to feelings for him it had been a relentless campaign for the respondent to admit its mistake. He had given presentations many times and would have interviewed well, and he genuinely thought that he had a very good chance of getting the job. He had been robbed of the opportunity.

Respondent's submission

81. The following is a basic summary of the respondent's submission. Mr Caldow argued that the IOSH membership was an important issue. He referred to the letter from that organisation with details of membership, and when it ceased. It should be accepted as coming in response to the Order from the Tribunal and after checking records. That confirmed that in 2012-13 it took over a year to obtain Graduate status on re-entering membership. That was consistent with the evidence on the process followed. It was more than just providing the Diploma.

82. It illustrated what was an inaccurate and misguided position taken by the claimant throughout. His application was made on 28 January 2019, and the shortlisting took place on 5 February 2019. Mrs Garrow provided feedback as requested on 11 February 2019. She was seeking to assist. The application form of the claimant was shown to have fundamental falsehoods. That is sufficient to dispose of the case.

83. The Tribunal should find Mrs Garrow credible and reliable. She now knew that the claimant had recorded her when she was not prepared, and flustered as she was working under pressure. She regretted that as she stated in apology to the claimant. She was concerned at the accusation of disability discrimination, which she found abhorrent. It should never have been made. The purpose of the box about disability was a positive one, to assist disabled persons. She diligently answered the claimant when he enquired. It was clear that she was not giving a definitive answer initially as she had not opened the documents on her computer. She did not know what his disability was, as he accepted. His claim must fail also at that point. More is needed to suggest a prima facie case. The claimant's case was based on an unnatural and limited view of the person specification. The claimant was fixated on qualifications, and thought that a Diploma was all that was required for box 2. That was not the case.

84. He accepted that the word "essential" was applied in a meaning of "ideal". There would be a period of reflection as any responsible employer would do following such a case. But Mrs Garrow applied the process faithfully across all candidates.

85. It was peculiar that the claimant recorded the call. It was unusual that the Freedom of Information request was made two days later. That puts colour to the case which has to be looked at. The most recent letter was wrong, as has been explained. The respondent sincerely assured the Tribunal that there was nothing awry. The errors in the Response Form arose from a number of people being involved in its preparation.

86. The claimant had not discharged the burden of a prima facie case, and in any event the claimant relies on a demonstrably false application in comparison with those of E and F. The falsehoods would have come out

in interview. He was a nursing student, and had been so for longer than in a health and safety role.

87. Mrs Garrow had no motivation to treat the claimant less favourably because of his disability. She explained her decision. It makes sense to look at vocational experience and acquired knowledge, and there is no hint of the claimant being affected because he had ticked a box. It was not an assessment of the quality of the exercise, but there are no facts and circumstances from which infer that discrimination had occurred.

88. No indirect discrimination claim had been made out. There was no evidence even to begin an enquiry on that. In the event that remedy was considered, no award should be made. It would offend notions of justice to do so when the application was demonstrably false, as the claimant knew. There was no prospect of the claimant being offered the position.

Law

(a) Statute

89. The provisions on disability discrimination are within the Equality Act 2010, and are construed purposively against the background of the EU Framework Directive. Section 4 of the Equality Act 2010 ("the 2010 Act") provides that disability is a protected characteristic. The 2010 Act re-enacts large parts of the predecessor statute, the Disability Discrimination Act 1995, but there are some changes.

90. Section 13 of the Equality Act 2010 states:

> **"13 Direct discrimination**
> 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."

91. Section 19 of the Equality Act 2010 states:

> **"19 Indirect discrimination**

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if —

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

……

disability;…."

92. Section 39 of the Act provides:

"39 Employees and applicants

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

(a) In the arrangements A makes for deciding to whom to offer employment;

….

(c) by not offering B employment."

93. Section 136 provides:

"136 Burden of proof

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

94. Section 212 defines "substantial" as meaning "not minor or trivial".

95. Section 124 provides the following on remedy

> "**124 Remedies: general**
>
> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may—
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) order the respondent to pay compensation to the complainant;
>
> (c) make an appropriate recommendation.
>
> (3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant] of any matter to which the proceedings relate ….
>
> (4) Subsection (5) applies if the tribunal—
>
> (a) finds that a contravention is established by virtue of section 19, but
>
> (b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.
>
> (5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).
>
> (6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119."

(b) Case law

(i) Direct discrimination

96. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572.*** In some cases, such as ***James***, the grounds

or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15.***

97. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

98. General guidance, including an overview of the relevant authorities, was provided by the EAT in ***Ladele v London Borough of Islington [2009] IRLR 154*** which was later approved by the EAT and Court of Appeal in ***McFarlane v Relate Avon Ltd [2010] IRLR 872).***

(a) Less Favourable Treatment

99. In ***Glasgow City Council v Zafar [1998] IRLR 36***, also a House of Lords case, it was held that it is not enough for the Claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

(b) Comparator

100. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the

prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

101. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646,*** in the Court of Appeal.

102. The EHRC Code of Practice on Employment provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

(c) Substantial, not only or main, reason

103. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause.

104. In ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal an employee who was disabled was made redundant. The disability was as a result of a back injury. The employee worked in financial services. The scoring was based around the size of the client base. He claimed that his client base was smaller and that that was because of his disability, but the evidence was that there would have been a redundancy for any employee with a smaller client base. The Tribunal held that there had been direct discrimination but the EAT and Court of Appeal disagreed. Lord Justice Elias said this in summarising the law:

> "5
>
> Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment

> – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: see the observations of Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** paragraphs 8–12. That is how the tribunal approached the issue of direct discrimination in this case.
>
> 6
>
> In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason"

(d) Burden of proof

105. There is a two-stage process in applying the burden of proof provisions in discrimination cases, which may be relevant to the issue of whether the respondents applied a PCP to the claimant, as explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246,*** both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondents at the second stage. If the second stage is reached and the respondents' explanation is inadequate, it is necessary for the tribunal to

conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

106. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and that the onus did remain with the claimant at the first stage. As the Court of Appeal then confirmed in ***Efobi v Royal Mail Group [2019] EWCA Civ 19*** unless the Supreme Court reverses that decision the law remains as stated in Ayodele.

(ii) Indirect discrimination

107. Lady Hale in the Supreme Court gave the following guidance in ***R (On the application of E) v Governing Body of JFS [2010] IRLR 136***

> "The basic difference between direct and indirect discrimination is plain……Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins."

(a) Provision, criterion or practice

108. The provision, criterion or practice applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In ***Hampson v Department of Education and Science*** it was held that any test or yardstick applied by the employer was included in the definition, for example.

109. The Equality and Human Rights Commission Code on Employment at paragraph 4. 5 states as follows:

> "The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also

include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision."

(b) Objective justification

110. The test in section 19 derives from an equal pay case ***Bilka Kaufhas GmbH v Weber von Hartz [1987] ICR 110,*** applied to discrimination cases in ***Hampson v Department of Education and Science [1989] ICR 179.*** It was decided at Court of Appeal level and although later appealed to the House of Lords the issue of justification was not addressed. It is for the employer to establish the defence on the balance of probabilities. It has the elements of

(i) The means to achieve the aim must correspond to a real need for the organisation
(ii) They must be appropriate with a view to achieving the objective
(iii) They must be necessary to achieve that end.

Observations on the evidence

(i) The claimant

111. The claimant's evidence was not considered by the Tribunal to be reliable. His application form contained a number of what were at best inaccuracies, and a number of material omissions. They are set out above. The Tribunal was surprised that the claimant surreptitiously recorded the conversation with Mrs Garrow on 11 February 2019, when that was supposed to be to obtain feedback on his application. He pursued a freedom of information request and complaint with surprising haste. That gave the impression of someone keen to make a claim.

112. He presented matters on occasion on the basis of what he would like the position to be, rather than what it was. He asked questions that related to a requirement for two degrees, but there was no such requirement. Each criterion under the education and qualifications aspect was followed by "or

equivalent" or similar wording. He concentrated on that criterion, but the reason for his application failing was the lack of identified relevant experience, as Mrs Garrow understood it. He admitted having only skim read the information to applicants. He had not provided the kind of information and detail that other applicants had. He appeared to consider that merely by having a Diploma he met all the requirements. That indicated to the Tribunal a lack of insight, and a lack of appreciation of what was sought in the application form itself.

113. The claimant appeared to take no account of his leaving the field of health and safety and turning to a different discipline, nursing. His last work in the health and safety field as a consultant was, in fact, no later than 31 July 2015. His last work as an employee in that field was, in fact, 7 March 2016. These facts were not those he represented on his application form, in which the dates represented were respectively 2 July 2017 and 7 March 2018. There were material gaps in his application, both in not covering all periods of the three years prior to the application, but also in not including two short periods of employment whilst a student. The Tribunal considered that these were not likely all to be mistakes, but that the claimant had done so in an effort at making his application appear better than it would otherwise have been.

114. His application was inaccurate, at best, about his membership of IOSH. He had accepted when first cross examined about it that the letter from IOSH sent in response to the Order had been made by checking records, but when it was pointed out later that on re-joining that organisation he had not immediately been returned to a Graduate Member, becoming so only in October 2013, he suggested that that was a typographical error. The Tribunal did not accept that. It considered that the letter was likely to be accurate, as it had been prepared from records in response to the order granted by the Tribunal.

115. The claimant had a NEBOSH Diploma, which other candidates did not, but he had no health and safety experience since a short position in a role considered by the respondent not to be relevant, terminating in March 2016, nearly three years before the application was made. Yet he felt that his experience and qualifications were materially greater than those of

other candidates, including A, E and F. For reasons set out below, that evidence was we considered not reliable, at best. Whilst the Tribunal considered that he genuinely believed that he was an excellent candidate, and deserved to be interviewed, that ignored the lengthy period out of safety work, the decision to move into nursing, and what were at best errors, if not deliberate falsehoods, in his application form. He treated the issue of membership of IOSH as an irrelevance, but it was not. It went to issues of the accuracy and completeness of his application, as the Information form had referred to. He was somewhat cavalier in his view that he would return very quickly to Graduate membership, which was not accepted by the Tribunal.

(ii) Mrs Garrow

116. Mrs Garrow we consider gave obviously credible and reliable evidence. She answered questions directly, honestly and candidly. She was conscious of the fact that when she spoke to the claimant on 11 February 2019 she had not been prepared properly, and that her answers were not the best ones. She apologised to him for that when giving her evidence. We considered that her doing so was genuine.

117. She was adamant that disability had played no part in her decision making. She had not been aware of what disability was engaged, and it was part of the process not to be so aware at that stage. The claimant was, she said, treated in the same way as other candidates. That evidence we considered to be compelling, as it was supported by contemporaneous documents, in particular the application form by the claimant and the spreadsheet dated 5 February 2019. It was prepared prior to any hint of an issue arising with the claimant.

118. Mrs Garrow said that the claim that there had been direct discrimination she found abhorrent, and she spoke about family members who were disabled, as well as the policy of a guaranteed interview for disabled candidates who meet essential criteria, and policies of disability more widely. She was convincing in her evidence when doing so.

119. She accepted that there were some errors in what had been said, as part of the freedom of information process, and in the Response Form. She was candid when accepting that someone could perform well at interview. She made concessions in areas that were appropriate and did that in a manner that enhanced our impression that she was both credible and reliable.

120. That is not however to say that all that was said was accepted by us in its entirety. There are areas where the respondent's evidence was not consistent with its earlier position, in correspondence, or pleading, and there has been some looseness in the use of the word "essential". These matters did not however detract from our assessment of credibility and reliability of Mrs Garrow as a witness before us.

121. It is also appropriate to record that in the evidence no attention was paid to the desirable criteria or how they had been assessed for the claimant and the two comparators. The evidence concentrated on what were described as the essential criteria.

Discussion

(i) Direct discrimination

122. The first matter for us to consider is whether the claimant has established a prima facie case such as to engage the provisions of the shifting of the burden of proof set out above. We did not consider that we could simply dismiss the Claim because the claimant's application was so substantially inaccurate to the extent that we have found, as Mr Caldow invited us to do. We require to consider all of the evidence. We require to do so in the context that discrimination can be conscious, or unconscious.

123. The Tribunal accepted that not being short-listed could amount to less favourable treatment. It is also certainly true that there are a number of individual matters where the respondent has been inconsistent. They were partly set out in the claimant's submission, and are commented upon below. The process of short-listing involved identifying what were said to

be essential criteria, but in practice they were addressed as if the word "essential" meant "ideal". "Ideal" is not the natural synonym of the word "essential". Normally, essential in such a context would mean that if a candidate did not meet what was set out they would not proceed further. If that left no candidates, or insufficient candidates, the criteria may require to be re-drafted and applications assessed anew against those. But we were entirely satisfied that the same meaning was applied to all of the 19 candidates who applied, including the claimant.

124. There are matters where the evidence of the respondent is either inaccurate, inconsistent or otherwise worthy of comment. They are, in no particular order, as follows;

(i) In the pleadings in the Response Form, assertions were made which were not accurate. Paragraph 30 asserted that candidates had a degree and NEBOSH Diploma. That was not the case.

(ii) The word "Essential" in the person specification was given a meaning that does not accord with the normal definition of that word.

(iii) On 11 February 2019 during the telephone call with the claimant Mrs Garrow had not been prepared for the questions asked, but when asked whether all the applicants being interviewed have got a degree and a NEBOSH Diploma answered "as far as I can tell, yeah". That was not accurate. She also indicated that there was nothing wrong with the claimant's application, although she had scored him 0 for experience.

(iv) In the reply to the claimant's request for information made on 14 February 2019, the reply being dated 25 February 2019, Mrs Garrow stated in answer to the question "Did all the applicants selected for interview have 2 separate degrees" – "Yes, or relevant equivalent". The question was not accurately framed, as it did not properly repeat the terms of the criterion, but the answer was not fully accurate in that candidates E and F were assessed as a 1.

(v) In the reply to the complaint dated 19 March 2019 the respondent stated in reply to the question "Did all the candidates selected for interview have 2 separate degrees? And also have CMIOSH

status?" – "I can confirm that all those selected for interview met the requirements as set out in the person specification". That was not entirely accurate. Candidates E and F did not fully meet all requirements.

(vi) On 28 January 2020 the Scottish Information Commissioner upheld the claimant's complaint against the respondent in relation to the failure to disclose information on qualifications of candidates, after which on 9 March 2020 the respondent wrote to the claimant with inaccurate information as it omitted the degree of candidate A.

(vii) The Bundle of Documents did not initially include the spreadsheet which recorded the basis of the shortlisting decisions for the applicants, which included that for the claimant. It gave as the reason on criterion 1. In other written communications to the claimant by the respondent he had been informed that assessment of both criteria 1 and 2 were the reason.

125. These are matters that require careful consideration. Before that is done however, it is we consider appropriate to comment with regard to the comparators.

(a) Comparators

126. The claimant proposed as comparators candidates E and F. He argued that they were treated in a different way, given greater flexibility than he was. To a limited extent that is correct. They did not fully and directly meet the terms of the criterion for education and qualifications, such that the issue became one of equivalence. What else was found within the application did not amount to full equivalence. But Mrs Garrow accepted that that was the case when she assessed them as partially meeting that criterion, scoring each as a 1.

127. She scored the claimant as a 1. The reason she did so was as he did not have a degree, and although he had a NEBOSH Diploma what was sought was something separate to that, as that was the third of the elements. She could not find from the application evidence of something equivalent to a degree, and we consider both that she was entitled to such a view, and also that that was objectively correct. The application form submitted by

the claimant was short on detail. It was appreciably less substantial than those submitted by other candidates, including E and F. The claimant had not he accepted read the Information notes other than by skimming them. He ought to have read them carefully, and he had not completed the application with care.

128. She considered that each of candidates E and F met the experience criterion fully. That sought a minimum of three years' experience in a safety adviser role, and set out further details in bullet points. What the claimant appeared to consider was that only working as a Health and Safety Adviser or equivalent role was relevant for that. That however was not a correct interpretation of the form. It was more widely drawn than that. It was also seeking "experience/knowledge" in relation to bullet points, such that knowledge was sufficient alone.

129. Each of candidates E and F had set out in their applications wide and substantial experience in what was considered by Mrs Garrow to be a relevant area of activity. The Tribunal accepted that candidate E, someone who had been a Watch Commander with wide and lengthy experience of matters of fire safety and related work was possible to be considered as fulfilling a safety adviser role. There was sufficient in the application form by candidate E to demonstrate that.

130. The Tribunal considered the terms of application F. The candidate was in a Health and Safety adviser role and had been so since 13 February 2017, or just under two years. Prior to that she had been in a variety of roles in transport which did include safety adviser elements. There was detail given as to the work performed over many years. The Tribunal considered that candidate F could properly be regarded as having met the first criterion fully.

131. The Tribunal considered that it was material firstly that this was not the stage of appointment, but of a short list, and secondly that a great deal of information was given in each application by those who appear to have read the person specification and Information notes and responded to them.

132. If one takes the application by the claimant as it was presented, ignoring its deficiencies, there was a dearth of evidence of the required duties being performed. The claimant had admittedly not read the information to applicants. Had he done so he would have been aware that it was only what was in the application that could be taken into account. It appeared that he had not taken the time and trouble to detail all that he could have done as to what he had carried out in each of the roles, and why that would be relevant for the application made.

133. His actual experience set out in the form was limited. 18 January 2018 to 7 March 2018, which he alleged to be his most recent post in the field of safety, was less than eight weeks. It was particularly short, such that Mrs Garrow was entitled to consider that it barely lasted beyond initial induction processes. Going back in time, the next role he alleged was up to 2 May 2017 as a Health and Safety Adviser in his own consultancy, but very little detail was given as to what that entailed and in which areas, it was not possible to relate it to activities relevant to the respondent in the bullet points provided under the essential criterion and there was nothing said about the period between 2 May 2017 when it was said to have ceased and when he started as a student nurse at University on 1 September 2017, a not inconsiderable gap of nearly four months. The earlier employed position was at a meat processor, from 1 July 2014 to 31 August 2015, a little over a year. Again little detail was given, and Mrs Garrow considered it not to be in an area of activity relevant to that of the respondent. Going back in time, prior to that there was employment at an oil and gas services company from 1 January 2012 to 1 July 2012, which is not a very lengthy period and not in an area Mrs Garrow considered to be relevant. Prior to that was the British Standards Institute work from 1 August 2010 to 1 January 2012 but that was, Mrs Garrow took from the form, audit work, not a safety role. The claimant argued that it was the same, but Mrs Garrow explained that in her view it was not, and the Tribunal accepted that there is a material difference between an internal safety adviser, and an external auditor. In any event, the claimant gave little if any detail to relate that role to the bullet points in the person specification, although he said in evidence this was the strongest part of his application.

134. Her assessment from the form was that there was not evidence of a three year period as a safety adviser, that the claimant had left that field to become a student nurse in September 2017, and that there was nothing to bring the application within the areas of relevance for the activities of the respondent. She rated him a 0. Whilst that seemed harsh to the Tribunal having heard evidence from the claimant in explanation, she did not have the benefit of that evidence. She only considered the form, as the guidance said would happen. Her decision was, the Tribunal considered, clearly not affected to any extent by the information given by the claimant that he considered himself disabled.

135. The decision about the claimant must also be seen in the context of all 19 candidates. 13 of them were not called for interview. Some scored a 2 for experience, but were not interviewed. All were assessed on the same day, 5 February 2019, over many hours.

136. The reason for the claimant not being included in the list of those called for interview was essentially the limited nature of the detail given on his own application form, and his failure to relate it to the bullet points of information sought.

137. Separately, the claimant has the difficulty of the many inaccuracies, which are either glaring mistakes indicative of someone who was not competent at completing a basic form, or someone lying on the form so as to increase the prospects of success of the application improperly.

138. He worked at Arnold Clark Automobiles not in 2018, the year before the application, but 2016, three years before the application. Prior to that, there was a gap before his next role, going back in time. That had been for not a particularly long period, at a meat processor. Prior to that, he had been a consultant, but that work had ceased by 31 July 2015. In reality he had no recent safety experience at all, and had had none for nearly three years prior to his application. Despite his representation that he was and remained a Graduate Member of IOSH he was not, and had not been so for two years, during part of which period he was undertaking a degree in Nursing. He was seeking however to return to the safety field in a senior position. He had stated that the most recent employer was Robert Gordon

University, which was not the case. He was not an employee of the University, but a student at it. The most recent employer was Meallmore Limited.

139. That true picture is a very different one to that of the comparators, each of whom had recent, and continuing, roles in safety. Each of them had provided very detailed commentary on what they had been doing in their roles. The comparators had also scored 1 for the second criterion, as had the claimant. The distinction between them in the scoring was as to the criterion for experience.

140. A comparator for the purposes of the section 13 claim must essentially be someone with no material differences to the claimant, save for the fact that the claimant has a protected characteristic. That was not the case in the Claim before us. The differences between the applications of the claimant, amended to be accurate, and those of the comparators, were material.

141. The claimant had concentrated most of his argument on the issue of qualifications, noting that candidates E and F met none of the three elements, whereas he had a NEBOSH Diploma. He did not appear to accept that the three elements were each required, and on that basis he met only one of them, but also failed to take proper account of the issue of equivalence. He did not appear to consider that there could be any issue with his own experience, which he thought wide and sufficient. There was, however, an issue with it, and properly so, for the reasons stated above.

142. It is however appropriate to add that the claimant was not, when he gave his evidence, in possession of the spreadsheet with the scores for all candidates at the shortlisting stage. He had been told that both criteria one and two were the reasons for the rejection of his application, not that it was criterion one only as that form had provided.

143. For completeness, although this point was not argued, the Tribunal considered whether a hypothetical comparator would have been treated any differently.

144. The claimant accepted that he had not made any mention in his application of what the disability entailed. Against that background, it was

not possible for someone in Mrs Garrow's position to know if the claimant would have an issue with criterion 6 at all. The disability might be not a physical one, or one which had no affect on that aspect of work, such as if the person had been diagnosed with a form of cancer which was being successfully treated with medication and masked symptoms.

145. She did not carry out any assessment against that criterion, but only criteria 1 and 2 as the spreadsheet confirms. That was undertaken on 5 February 2019. There was no other indication from the evidence that disability could have played any part in the decision not to short list him. It would only be if Mrs Garrow either consciously or unconsciously decided to reject the claimant's application when she noted the tick in the box for a disabled person for that very reason. That was not however her evidence of what she had decided. We accepted her evidence of her personal abhorrence for the suggestion that it had been, supported by the experience of close family members, and the evidence which we also accepted of the respondent taking active steps to support disabled applicants and employees. That was appropriate as a general matter, and to comply with duties under the 2010 Act including those of a public sector employer, but made organisational sense for a rural local authority which had frequently had few applicants for roles, and wished to retain the staff it had wherever possible.

146. The telephone conversation on 11 February 2019, on which the claimant particularly founded, must be considered against the background that Mrs Garrow was not aware that it was being recorded, indeed she had no reason to suspect that it would be as she was asked only to give feedback, which any candidate may do, and which routinely is done. She was, as she admitted, not prepared for it as she should have been. That was as it had been a busy day, a not unfamiliar circumstance in the real world. Her initial comments were generic, and tried to inform the claimant of his lack of success in a gentle manner. Again in the real world that is frequently done.

147. The claimant sought to argue that there is evidence in that call of Mrs Garrow agreeing that he met all criteria, pausing, realising that he was disabled such that the penny dropped, and in effect starting a cover up.

That is simply wrong. The recording we listened to makes it clear that Mrs Garrow did not accept what the claimant was saying about meeting criteria. At the time of the humming sound she made initially, which the claimant argued was agreement with his having met the criteria, she had not opened the computer to see the application and remind herself. She said so later on in the call. She had not scored him as meeting the criteria, and she would not we consider have been likely to have intended to have said that he had. We considered that it was acknowledgement of the issue, not agreement with it. When she did see the documentation, she confirmed that he did not meet the criteria, and that all three elements of the education and qualifications criterion were required. The claimant was surprised by that, but it was clear to him that she considered that he had not met the essential criteria. He then moved from feedback about his own application to details of those of others. It is entirely understandable that Mrs Garrow was concerned by that, including the confidentiality implications. She did not, contrary to his submission, agree to provide detail. She said that she would look into it, and shortly afterwards, indeed very shortly afterwards, a freedom of information request was made, which in effect superseded that. She replied to it on 25 February 2019.

148. The Tribunal concluded that a hypothetical comparator who had made the claimant's application but without ticking the box as to disability would not have been shortlisted by the respondent.

(b) Prima facie case

149. The Tribunal considered whether the claimant had established a prima facie case under section 136 of the 2010 Act such as to shift the burden of proof to the respondent. There were a number of areas where there were inconsistencies, set out above. What was the strongest argument for the claimant, although he did not himself directly make it, was in relation to the scoring for him. As noted above, the full document setting out scores of candidates in a spreadsheet was not produced in the Bundle. That was surprising as it was written evidence, at the time, of the basis of the decision. Mr Caldow accepted that it had been sent to him by the respondent. That failure to include the document in the Bundle was a factor that required to be considered.

150. The reason given for not short-listing the claimant given in that form was only the first criterion, and not both criteria one and two which had been given in other documents provided by the respondent. That is a further factor.

151. What is the most significant factor is that the score given to the claimant for experience was 0. That was not easy to reconcile with the roles performed by the claimant, at least as he claimed them to be, including that at Arnold Clark Automobiles which he had stated was in 2018, together with the earlier roles going back to 2010 at 2 Sisters Food Group, Hydrasun, British Standards Institute, and with his own company Full Circle Training Limited. The total periods of those roles exceeded three years. The evidence given by Mrs Garrow was to the effect that there was insufficient detail provided in the form to relate that to the activities of the respondent, but that was not a part of the essential criterion. What there was, however, was the list of bullet points which set out the requirements in greater detail. Her evidence was that she did not consider that he had met them, as noted above.

152. That evidence was fortified by the reply given to a question from the Employment Judge to the claimant, which asked the claimant to point to the parts of his application which met the bullet points. The claimant made a very general reply, but did not seek to relate the words on his application form to those bullet points.

153. His application form had been completed with what were, in comparison to those of candidates E and F which were examined in detail in the evidence, very short answers. He had not engaged with the detail of the bullet points. He had stated in evidence that he had skim read the Information form for applicants. The impression left was that the completion of the form, with what he claimed were simply errors, but were considered to be an attempt to make the application look better, doing so however in such a limited way, gave the appearance of being superficial.

154. In light of the evidence as a whole, the Tribunal did not consider that a prima facie case of direct discrimination on the ground of disability had been made out by the claimant.

(c) Reason why

155. Even if the Tribunal had considered that the burden of proof had shifted (or indeed if such a burden were to be held not to fall on a claimant) we then considered whether the respondent had proved that the reason for the decision was not on the ground of disability under the terms of section 136. We concluded that the respondent had proved that its decision was not tainted by discrimination to any extent. We so concluded from the evidence of Mrs Garrow, which as we have stated we accepted. As indicated that was supported by the spreadsheet dated 5 February 2019.

156. The claimant argued that it was during the call on 11 February 2019 that the "penny dropped" with her that the claimant met the essential criteria and so was entitled to an interview, she having excluded him from consideration because he had identified on the application form that he was a disabled person. That suggestion is not consistent with that spreadsheet, prepared earlier, which gives as the reason for not shortlisting his lack of experience, supported by the comments she wrote.

157. The claimant was scored 0 and 1 against the two essential criteria. Mrs Garrow's explanation for her doing so was accepted by the Tribunal. It had nothing to do with disability. It was not affected unconsciously by the knowledge Mrs Garrow had that the claimant stated that he was disabled. He was the only applicant to do so. There is therefore no indication of any form of pattern that might infer a mindset against disabled persons, even if with only one other disabled candidate. There was no other evidence that the Tribunal considered was contrary to the evidence given that the reason for the rejection of the application form was because it had been poorly completed, and did not evidence the kind of experience set out in the bullet points of criterion 1.

158. Separately the Tribunal accepted the evidence Mrs Garrow gave of her own abhorrence of disability discrimination, her family experience, and that actions that the respondent takes to support disabled applicants and employees, which includes the scheme to guarantee an interview to those disabled candidates who meet the essential criteria of a post show a positive desire to support disabled persons both as applicants and

employees. She spoke of that being particularly required in a rural location where often there are very few applicants for some posts. These were matters that made discrimination whether conscious or unconscious less likely.

159. We therefore unanimously held that the claim of direct discrimination failed.

(d) Indirect discrimination

160. The claimant argued that there was a provision, criterion or practice (PCP) applied that a disabled person would not be interviewed as they would not be able to fulfil essential criterion 6. The evidence was clearly that no such PCP was applied. Had any of candidates A – F identified as a disabled person on the application form, they would still have been interviewed. The claimant's submission was not based on any evidence. That allegation was accordingly rejected by the Tribunal unanimously.

(e) Remedy

161. In light of the foregoing it is not necessary to make detailed findings as to remedy, but for completeness the Tribunal considered that in light of the many and material inaccuracies in the application form, and the absence of medical or other independent evidence of actual injury to feelings, that no award would have been made for injury to feelings, and there was no loss as the Tribunal concluded that had there been an interview the respondent would inevitably have discovered the inaccuracies, lost confidence in the application, and would certainly and properly have rejected it at that stage.

Conclusion

162. The Tribunal answers the issues as follows, with all decisions unanimous:

(i) Did the respondent know that the claimant was a disabled person when adjudicating on his application for employment? The respondent did know that the claimant stated that he was a disabled

person on the application form, but did not know what the nature of his disability might be.

(ii) If not, ought they reasonably to have so known? This question is not now relevant.

(iii) Did the respondent directly discriminate against the claimant when not affording him an interview for the post he had applied for under section 13 of the Equality Act 2010? No.

(iv) Did the respondent indirectly discriminate against the claimant under section 19 of the said Act and in that regard did they apply a provision, criterion or practice in relation to working in confined small spaces or at height? No criterion as alleged was applied.

(v) If so, has the respondent objectively justified their doing so? Not applicable

(vi) In the event that the respondent applied the said provision, criterion or practice, did that place disabled persons at a substantial disadvantage, and if so did the respondent fail to take reasonable steps to alleviate that disadvantage under sections 20 and 21 of the Equality Act 2010? No longer pursued.

(vii) In the event that any claim succeeds, what remedy ought to be afforded to the claimant, and in that regard (i) what loss if any did he sustain and (ii) did he mitigate that loss? Not applicable, but had it been no financial award would have been made.

163. The Claim is accordingly dismissed.

Employment Judge: **Alexander Kemp**
Date of Judgment: **02 April 2020**
Date sent to parties: **02 April 2020**