Case No: 1306111/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr R. Kumar**
Respondent: **MES Environmental Ltd**

Heard at: **Birmingham** **On: 24,25,26 & 27 February 2020**

Before: **Employment Judge Hughes, sitting with**
Mrs R.A. Forrest and Mr R. Moss

Representation:
Claimant: **Mrs R. Hodgkin, Counsel**
Respondent: **Miss N. Owen, Counsel**

REASONS

Background and Issues

1 The Claimant presented a Claim Form on the 27 December 2018 complaining of race discrimination and victimisation in relation to an unsuccessful application for a job with the Respondent as Plant Manager. The Early Conciliation requirements had been complied with and the claim was in time. The Claim Form referred to an earlier period of employment with the Respondent. The Claimant had worked for the Respondent some years previously but was not working for the Respondent at the time of the unsuccessful job application.

2 The Respondent submitted a Response (in time) denying discrimination and at paragraph 25 [page 34 of the trial bundle] categorically denying a breach of the Equality Act 2010 statutory Code of Practice.

3 References in square brackets in these reasons are to pages in the trial bundle. A summary of the relevant history to this matter follows. The Claimant worked for the Respondent until 2003 when he was made redundant. Our understanding is he made an unfair dismissal claim to the Employment Tribunal and that it was settled by a compromise agreement via ACAS and therefore we cannot say anything further about that claim. The Claimant applied again for work with the Respondent in 2006 and was not successful. He made a complaint to the employment Tribunal. There was a Hearing before Judge Hutchinson, Mr Delicate and Miss Leader in 2007 which concluded that the Claimant was not victimised but found in his favour in relation to a complaint of direct race discrimination. We shall summarise the relevant findings and conclusions (paragraphs 40 to 52 of the Judgment [51-53]). The factors taken into account in finding for the Claimant were: he had previously been employed by the Respondent and promoted three times; he was of Asian ethnicity and was not shortlisted whereas those interviewed were white European; the person making the decision (Mr Joly) was white European as were other managers involved in

the appointment; that the Claimant was well qualified and experienced for the post; and that his dismissal in 2003 was because of redundancy not capability or conduct. At paragraph 43, the Employment Tribunal said, "It was not correct that those that were shortlisted had experience and qualifications more closely matched to the Respondent's requirements". The Employment Tribunal at concluded (paragraph 50) that the burden of proof had been reversed due to (amongst other things) to a wholesale breach of the statutory Code of Practice. The Employment Tribunal made reference to the following: there was no documentary evidence about the decision to reject the application; the reasons the Respondent was putting forward were not mentioned in the response to a Statutory Questionnaire; and that they did not accept Mr Joly's evidence that he was not influenced by the Claimant's race. The victimisation complaint was brought under the Disability Discrimination Act 1995 and was dismissed. The present claim did not contain allegations of victimisation by reference to a protected act concerning disability but did allege victimisation by reference to a protected act concerning race i.e. the previous Employment Tribunal claim.

4 There was a Preliminary Hearing on 1 May 2019 year at which Judge Harding set the case down for a Hearing and made directions [39-44]. It is relevant to note that at 3.1 of her Order [40], each party was ordered to send all relevant documents to the other party including documents relied on and those adverse to their case by 22 May 2019. The Claimant failed to disclose the fact that he had covertly recorded his job interview (having been shortlisted for a Stage 1 interview). He also failed to disclose that he had made a covert recording of a telephone conversation with Ms. Nir (a member of the Respondent's Human Resources Team) seeking feedback on the interview. Before the Claimant presented his Claim Form he had prepared transcripts for his own use in order to produce the grounds of his claim and (later) his witness statement. The Claimant's failure to disclose these documents was a clear breach of Judge Harding's Order, and the consequence was that the Respondent's witnesses did not have the benefit of the transcripts when producing their witness statements. It was not until after exchange had taken place that an application was made to admit the transcripts. It was heard on 14 January 2020 by Judge Flood at which point the Claimant was represented by Mr Keith of Counsel. The result was that transcripts were admitted and the Respondent's witnesses were allowed to produce supplementary witness statements limited to dealing with the subject matter of the transcripts. The Claimant was allowed to produce a supplementary witness statement in respect of further disclosure from the Respondent and did so. The Claimant applied the last working day before the Hearing before us to submit a second supplementary witness statement. Having heard that application as a preliminary matter at the start of the Hearing, we decided to admit that in part because, as the Respondent's representative rightly submitted, the first twelve paragraphs were relevant, whereas the rest was a lengthy analysis, commentary and the Claimant's interpretation of the respondent's supplementary witness statements. The Respondent's representative submitted the remainder should, insofar as relevant, be dealt with by cross-examination. The Claimant's representative did not disagree with that point, quite rightly, in our view. For those reasons, we admitted the first twelve paragraphs.

Documents and witnesses

5 We had before us a trial bundle [R1], an agreed List of Issues [R2] an agreed Cast List and Chronology [R3] which had one agreed amendment, and

both representatives had produced opening submissions [C1 and R4]. The Claimant had produced a witness statement, a supplementary witness statement and the second supplementary witness statement already referred to as having been admissible in part. He gave evidence in support of his case. The Respondent called Ms. Nir an HR Advisor, who was involved in the recruitment process, and Mr Stefano, the Respondent's Regional Operations Manager, who was the decision-maker in respect of the interview process, with Ms. Nir providing HR support to him. They had both produced written witness statements and supplementary witness statements.

Assessment of witnesses

6 We think it important to summarise our assessment of the witnesses at this point. The reasons why we made that assessment will be clear from our Findings of Fact.

The Claimant

7 We accepted from the Claimant's evidence that he believed that he should have been successful in his application for the job of Plant Manager and that he was the best person for the job. However, it was clear to us that during the interview process, he was much less confident about his performance in a technical test and his ability to do the job straight away, having described himself as "rusty" and "needing training". In the Hearing before us, the Claimant's evidence was that no other candidate could have performed better or been more suitable than him. When asked to explain why the interview notes did not reflect this, the Claimant's evidence was that he had not been more assertive about his abilities in the interview because he was "trying not to seem arrogant". We found that explanation somewhat fanciful. We concluded that the Claimant had a closed mind to the possibility that other candidates might be more suitable for the job. We also concluded that he did not accept that someone who had current experience in the role, rather than the Claimant (who had not undertaken it for a period of some fifteen years and was working in a different field) would inevitably be better placed in any recruitment process subject to that person satisfying the decision maker (Mr Danieli) that they were as good as they looked on paper. We concluded the Claimant was very suspicious of the Respondent's motives and that this was almost certainly because of his previous successful claim. By way of examples: (1) the Claimant felt it necessary to covertly record the interview; and (2) the Claimant argued in the Hearing before us that he was only shortlisted because of his previous claim i.e. to avoid the same allegation being made in relation to this application, and that the interview process was a sham because it was a foregone conclusion that he would not get the job. The latter argument, of course, depended on whether the Respondent's witnesses knew he had made a successful claim in 2007.

Ms. Nir

8 Ms. Nir was not the decision-maker. She was there to assist Mr Danieli and provide input on the more general management questions asked of the Claimant during the interview (team working etc.) but the reality was that the most important factor was technical ability rather than management skills. We thought this wholly unsurprising having regard to the job description and the fact that Plant Manager is a highly technical role On occasions Ms. Nir was unsure of

the facts, but we accepted that she tried to answer questions to the best of her ability. It was very clear to us that she was worried about answering some questions, specifically those she thought could be harmful to the Respondent. For example, Ms Nir found it very difficult to acknowledge that the process that was followed could be seen to be an unfair one from the perspective of an outsider viewing it objectively, although she did eventually accept that but only in reply to questions from the Employment Tribunal. Of course, a desire to protect the Respondent's interests does not make her an untruthful witness, but she was evidently a reticent one at some points. We fully accepted that she was genuinely surprised that the Claimant had challenged his non-selection and that she did not know (until he later told her) that he had brought a previous claim.

Mr Danieli

9 We thought that Mr Danieli was a very honest and straightforward witness and completely credible. We found him a very impressive witness. He was comfortable in conceding that, with the benefit of hindsight and the experience of these proceedings, the process could have been conducted in a fairer way, for instance by requiring everyone to undergo the same format of interview. Again, we accepted he was genuinely shocked to find that the Claimant had challenged the process as being discriminatory and that he had no knowledge that the Claimant has brought a previous claim when he decided the claimant should not progress to a Stage 2 interview. His evidence about his own working history showed experience of working with people in a diverse range of countries with diverse backgrounds. We accepted that his sole concern was finding the most skilled person for the job, rather than their racial, ethnic or cultural background.

The Hearing

10 We read and heard evidence and submissions over the first three days. We started our deliberations on the afternoon of the third day and completed them this morning. We handed down this Judgment orally with Reasons in the afternoon. The Claimant was not able to attend because of ill-health and his representative understandably requested written reasons. They are to be sent to the Claimant directly because his representative was only instructed for this Hearing.

Findings of Fact

11 From the evidence we saw and heard, the Employment Tribunal made the following primary findings of fact relevant to the issues which we had to determine.

12 The Claimant was employed by the Respondent from 1997 to 2003. On 1 August 1997 he was employed as a Plant Operator in Wolverhampton; he was then promoted to a Team Leader at some stage; in 2002 he became Operations Manager at Wolverhampton; and in or about April 2003, was promoted to Plant Manager at Dudley. On the 14 October 2003, the Claimant's employment terminated by reason of redundancy and he brought an unfair dismissal claim which was subject to a settlement agreement. In 2006 He made an unsuccessful application for employment which resulted in the 2007 claim referred to above. His claim of direct race discrimination succeeded. That claim is accepted to be a

protected act, subject to the question of whether the decision maker knew of it, because otherwise it could not influence his decision.

13 At some point in 2015, Mr Danieli commenced employment with the Respondent. He had worked in the same industry in many countries and progressed through various roles (including Plant Manager) before he was engaged as Regional Operations by the Respondent. His evidence was he has changed jobs quite frequently because he likes a challenge. We accepted that. He told us that he had spent a period of time working in Azerbaijan and was very aware of the different cultural and racial traditions of that country, which was important to enable him to perform his role as effectively as possible.

14 At some point in June 2017, Ms. Mir commenced employment with the Respondent as an HR Advisor.

15 The Respondent has an Equality Policy which was produced in 2015 [57 onwards]. For these purposes, it is material to note that paragraphs 4.1 – 4.6 deal with recruitment and selection and that the process is designed to ensure there is no less favourable treatment due to a protected characteristic. Paragraph 7 recognises that equal opportunities training is important. Ms. Nir and Mr Danieli both said they had not been provided with equality and diversity training generally, or specifically in relation to recruitment. Each had been given an induction of about an hour by a member of the Human Resources Team. They had both read the Respondent's Equality Policy amongst other policy documents which they were informed about in the induction training.

16 The Respondent runs plants converting waste to energy. The Job Description for the Plant Manager position [60 onwards] stated the purpose of the job is to manage the operation of the Waste to Energy Plant; to ensure proper performance by all workers in relation to this; and to ensure that legal and regulatory requirements, quality and environment assurance standards, and Health & Safety standards, are met; to work in accordance with the permit to operate under PPC Regulations; and in accordance with the Company Policies and the Company's Safe Working Practices. The post-holder would report directly to the Regional Operations Manager (in this instance Mr Danieli). Other management functions were regular review of competence of all members of the team; identifying relevant training needs; and ensuring that the management of budgets and expenditure. The Plant Manager has responsibility for ensuring all controls/tests/mishaps and technical reports were being monitored and recorded as required [61]. In addition the role requires: contributing to the overall performance of the company; participating in preparation, planning and execution of the annual outage (i.e. shutdown for maintenance) and any unplanned shutdowns and keeping abreast of them; being conversant with all relevant legislation; and being able to interpret and communicate that to all staff whilst giving clear guidelines in respect of appropriate action required [61]. There is a section on Health & Safety which lists quite a number of responsibilities including: a reporting function in respect of contraventions of statutory or the Respondent's safe working practices; acting as a Safety Controller; and highlighting any necessary changes [62]. In a section headed "Limits of Authority", the post-holder has delegated responsibilities: "to take any decisional steps necessary in case of emergency associated with any matters relating to Health & Safety, the environment, members of the public and/or contractors being on the Plant, or any issues which may prejudice continuing operations or result in damage to

equipment or materials". In such circumstances any such action must be Reported to the Regional Operations Manager and the General Manager as soon as possible [62] The post-holder also has full authority and responsibility for all operations personnel, sub-contractors, and visitors to the Plant [62].

17 It is beyond doubt (and the Claimant accepted this) that since he last worked for the Respondent fifteen years ago, technology has moved on considerably, and regulatory standards have changed and are higher than they were fifteen years ago from a Health & Safety and technical point of view. The Claimant has not worked in this field since 2007. It is perhaps stating the obvious to conclude that recent relevant experience would clearly be a distinct advantage to any applicant for the Plant Manager post. The converse also applies i.e. an applicant with quite a long break from that industry would require time to get up to speed on the very important technical and Health & Safety requirements of running and taking responsibility for the site. To put it another way, it is obvious that the Plant Manager role carries heavy responsibilities and requires outstanding technical competence.

18 On the 27 July 2018, the Claimant submitted a direct application for the Plant Manager vacancy [63A] with his CV [63B onwards]. For these purposes it is material to note that at although he described his experience working for the Respondent, he did not give the dates, but did say he had worked for the Respondent for six years. Beside that he gave the job title MES Environmental Wolverhampton Plant Manager [63C]. This caused Mr Danieli to think when sifting the CVs for short-listing purposes that the Claimant had in fact worked as a Plant Manager for six years. It is fair to say that reading down from that, the Claimant did refer to promotion from Shift Team Leader to Plant Manager but did not say when that occurred. The CV we have was annotated as a result of information received during the interview to show from 2003-2005 the Claimant was at university and from 1997-2003 had worked for the Respondent in what was described as a Team Leader role of a shift for four years, and was Plant Manager in Dudley for one year (although from the evidence before us that period was in fact about six months).

19 In total, the Respondent received 29 CVs. These were initially looked at by Ms. Nir and then by Mr Danieli. He took the decision as to which candidates should be shortlisted.

20 Ms. Nir sent an email to Mr Danieli on 30 July 2018 at 15:05 about the claimant's application for the Plant Manager job. It was copied to Mr Andrew Jackson who is the General Manager and Financial Controller and who was to be involved in the second stage interviews. Mr Danieli responded the following day the 31 July at 8:44 saying "Hi Sonia please arrange his interview", which duly happened. An argument put forward on behalf of the Claimant was that having seen that the Claimant had worked for the Respondent previously, it would be natural for Ms. Nir to have looked up his personnel file. Her reply to that which we considered to be quite genuine was "why would I?". Ms. Nir also told us that the Claimant's employment records from 1997-2003 would have been archived, which we accepted was undoubtedly the case. Her evidence was she saw no reason to go and find them at that point. It is also pertinent to record that during the Claimant's interview (which is covered later), Ms. Nir asked him why he had left the Respondent company, but she would not have needed to ask if she had seen his personnel file. Mr Danieli said he thought nothing of the fact that the

Claimant had worked for other companies, because he himself had moved around a lot.

21 It was very clear they both thought the Claimant was of potential interest and worth shortlisting because of his previous employment with the company (which at that point Mr Danieli thought to be six years as a Plant Manager). We find as a fact that they did not check and were unaware of the Claimant's previous employment history. We really could not understand the Claimant's representative's assertion that not doing so was something to be criticised. Based on our collective experience, we think it possible that some employers may have chosen to research a period of employment fifteen years ago, but a great many would not have done. In addition, and self-evidently, the argument cuts both ways because a prospective employer who did research an applicant's previous employment records, could be accused of being biased for doing so. In this case, the argument being put was that it must have been done (which we did not accept) because it should have been done (which we also did not accept). Doubtless if it had been done, we would be urged to accept that was evidence of bias/victimisation. Furthermore, and using our collective experience as an industrial jury, we think it unlikely that the Claimant's personnel file would make any reference to his subsequent claims which occurred after the termination of his employment, such documentation would most likely have been dealt with by the Respondent's solicitors. Consequently, if the file had been inspected, it is likely that it would have recorded that the claimant was made redundant in 2003 and nothing after that point.

22 There was a further argument put on behalf of the Claimant which, given our finding there was no knowledge, may be strictly speaking unnecessary to deal with but we shall for the sake of completeness. That argument was that Mr Jackson (the person who was copied into Ms. Nir's email attaching the Claimant's CV, would have verbally (because it is accepted there was no email in reply from him) informed Mr Danieli and Ms. Nir about the Claimant's previous claim. Ms. Nir's evidence was that when she later found about the previous claim, at a date we shall come to because it is disputed, she asked Mr Jackson if he knew about it because somebody in HR thought it possible that there had been such a claim, and he told her he did not. Mr Jackson has subsequently clarified he did have "some knowledge". We accepted that he told Ms. Nir that he did not. It is possible he may have remembered at a later point. The Claimant's theory on this point is that Mr Joly (the Director involved in the 2006 recruitment exercise whose evidence was not accepted by the Hutchinson Tribunal in 2007) told Mr Jackson about the claim and he passed that information on to Ms. Nir and Mr Danieli. Frankly, there is no evidence whatsoever in support of that proposition and we did not accept it had any merit. There are a number of reasons for that: (1) the time frame for the emails about shortlisting the Claimant [63F] – Ms. Nir's email was sent to Mr Danieli at 15:05 and he replied the following day at 8:44; (2) by that point, Mr Jackson had not replied to the shortlisting email, which was unremarkable given that he was to be involved in the stage 2 recruitment interviews, not stage 1; (3) there was very little time before Mr Danieli's email shortlisting the claimant for Mr Jackson to have spoken to them; and (4) we accepted they did not know of it until the Claimant informed Ms. Nir which was after he had been informed he was unsuccessful. Based on this theory, the Claimant contends that the Respondent shortlisted him because of fear that there would be a claim for failing to shortlist him as had happened in 2007. We did not accept that was a tenable proposition.

23 Furthermore, for reasons we will come to, stage 1 of the recruitment process was badly handled. Therefore, if Ms. Nir or Mr Danieli had known of the successful race discrimination claim in 2007, either they would not have shortlisted the Claimant at all and could have cited his lack of recent experience as the reason, or Stage 1 would have been handled impeccably because of fear of a further claim. In addition, we noted from the chronology that the interviews for the Plant Manager position started on the 24 July 2018 i.e. before the Claimant submitted his application. If the Respondent did not want to employ the Claimant because of the 2007 claim, it would have been open to the Respondent to reply saying the Claimant's application was made too late because shortlisting was completed and interviews were ongoing. Finally, we completely accepted that Ms. Nir and Mr Danieli were genuinely shocked when the Claimant after being told he was unsuccessful complained and made reference to a previous claim for race discrimination. In summary, the Claimant may well believe his theory, but we do not accept it holds water.

24 There are in fact a number of timing points. The first one we have dealt with above i.e. Mr Danieli was prepared by adjust the ongoing interview process to accommodate an interview for the Claimant, from which it follows that he wanted to interview him. The other material part of the chronology is that there was outage (i.e. a shutdown for maintenance) at the Respondent's plant in Stoke from the 15 July – 6 August 2018 which meant Mr Danieli (as Regional Operations Manager) had much less time to devote to the Stage 1 interviews than would have otherwise been the case. This meant the interviews were spread over some days, but he still decided to slot the Claimant in. Finally, there is a timing point about the date on which Ms. Nir became aware of the 2007 claim and informed Mr Danieli. That is dealt with later in our findings of fact but, and in summary, if the Claimant's case is right, they became aware of it at a later point than they say. On the face of it, arguing for an earlier date of knowledge would be a counterproductive strategy for the Respondent to pursue from which we infer there was no strategy i.e. the respondent's witnesses were telling the truth.

25 In summary, this theory is highly speculative. The fact that Mr Jackson was copied into the shortlisting email (which he did not reply to) is a million miles away from fixing the Respondent's witnesses with knowledge of a claim that occurred long before they worked for the Respondent. In that regard, we reiterate that Mr Jackson did not have any involvement in the process involving the Claimant because the Claimant did not get through to stage 2 as a result of a decision taken by Mr Danieli at stage 1.

26 From 29 prospective candidates, the Respondent shortlisted 9. The Respondent completely accepts that the approach adopted to the stage 1 interview/test was inconsistent because the test which featured in some of the interviews was not applied to everyone.

27 There is a point which the Claimant emphasised. It was whether, when he arrived for his interview, he was met by Ms. Nir or Mr Danieli or both. Neither of them could clearly recall this which is understandable because they were interviewing a lot of applicants and Mr Danieli had many other things to do because of the outage. It is likely that Mr Danieli was present when the Claimant arrived but had to leave very shortly afterwards to deal with the outage, with the consequence that the Claimant was offered the technical test first. It is common

ground that Mr Danieli entered the interview part-way through with Ms. Nir having begun the process as could be seen from the Claimant's transcript of his covert recording of the interview. We accepted Mr Danieli's evidence that he did not discuss the content of his witness statement with Ms. Nir other than to clarify what her understanding was of which of them were present, and when.

28 The Claimant's evidence to us was that when he attended the interview, he had no intention of recording it but changed his mind because Mr Danieli was off-hand with him when he arrived. We found that very difficult to accept. Mr Danieli would have been there for a matter of minutes to start the technical test and then had to leave.

29 The technical test had eighteen questions [243 onwards is an example]. It was designed by Mr Danieli. Its purpose was to test the candidates' ability to carry out the Plant Manager role. It was very clear that it that it was specific to the technical part of that job. For example, one question was: "If you saw this [showing a picture of an instrument panel] what action would you take?". The rest were similarly technical and specific to operating the plant. We concluded (as is reflected in the statutory Code) that a technical test of this nature was inherently unlikely to discriminate on grounds of a protected characteristic (other than perhaps having to adjust the process because of a disability, or because of pregnancy). We were mindful that there is case law that says that a test may indirectly discriminate for no apparent reason, but this was not a complaint of indirect race discrimination.

30 The Claimant's evidence was that the test he took only contained seven questions. He later said under cross-examination that he might have answered seven to ten questions and that it took him fifty minutes. It took Mr Danieli about twenty-three minutes to look over the Claimant's answers. The Claimant appeared to be suggesting that he was given a different test to other candidates. We simply could not accept that. It would require Mr Danieli to have deliberately designed a different test for the Claimant. We concluded that the Claimant only completed part of the test, which is consistent with his technical knowledge being (as he described it in the interview) "rusty".

31 Unfortunately, the Claimant's test results were mistakenly overwritten (i.e. saved over) by the results of a subsequent candidate. Mr Danieli explained that he had reviewed the Claimant's results, and that the intention was to save them. We accepted that.

32 The Claimant's interview was (as we now know) covertly recorded by him. It is fair to say that although the Claimant's case is that the transcript supports his version of events, the reality is that it does not. The transcript supports his version of the interview in part, and the Respondent's version in part. The Claimant when producing his witness statement had the benefit of the transcript but the Respondent's witnesses did not. The interview took place on the 2 August 2018, which meant he was one of the last candidates to be interviewed. The transcript shows that Ms. Nir told the Claimant she was going to start the interview and that Mr Danieli would join them shortly because he was dealing with the outage [82A@ para 1]. She then said: "Right, while we're waiting for Stefano, I'll do my bit", i.e. the HR managerial questions [82@15]. Ms. Nir started by asking why the Claimant had ceased to work for the Respondent. He told her he had been an Operations Manager for a year in Wolverhampton and a Plant

Manager at Dudley for a year. The Claimant explained he was made redundant and was not very happy about it but respected that decision. Ms Nir accepted that at face value.

33 Mr Danieli entered the interview and Ms. Nir informed him that the Claimant had left Respondent's employment because he was made redundant [82D]. She informed him about that because she knew he was interested that the Claimant had previously worked for the Respondent. The Claimant (in response to a question from Ms. Nir) said, "I might be a bit rusty on those questions, but I will try to recall what I can. I'd like to add I think it would only take me a few weeks to get up to speed again with the operational side, but it has been over ten years since I've been out of the industry you see" [82E@32]. The claimant later said [82H@78], "I've been out nearly fifteen years, so I don't know this technical thing, but I'm sure within a few weeks, I'd be up to scratch, get my skills back on the operations side". We concluded that the Claimant was acknowledging that he had not done well in the test.

34 Ms. Nir then asked some questions about managerial skills. The first question was about his knowledge of how the Respondent company works [82E@33]. The Claimant was able to answer quite extensively and Ms. Nir told him it was a "really good answer". Then the Claimant was asked two things: (1) "What has been your most positive experience with direct reporting?"; and (2) "Are you responsible for any direct reporting to your manager?" [82F@41]. The Claimant answered the second question quite extensively but did not answer the first question. Ms. Nir did not repeat it so it was unsurprising that the Claimant failed to answer that part. There was a follow-up question: "Was there any worse experience with the reporting?" which the Claimant answered quite extensively [82F@43]. He was also asked about what he had learnt from the experience and gave a full answer. When asked to describe his management style, the claimant gave a full answer [82H@47]. He later gave an example of being asked to take management responsibility for a difficult employee because none of the other managers could deal with him [82H@50]. Ms. Nir quite rightly described that as being positive feedback about his management style. In response to a further follow-on question the Claimant gave a good answer in part. That was because the way the question was asked narrowed down his opportunity to answer [82H@53]. It was worded as follows: "What is the most difficult change you have had to implement? OK, say for instance we focus on the example you have just given". The Claimant understandable replied to the second part of the question, which was far narrower that the first part. We accepted the Claimant's representative was right to say he had not been given the opportunity to give a full answer. When asked about steps he had taken to develop a team members skills, the Claimant gave a good answer [82H@60 to 66].

35 The above paragraphs demonstrate that the transcript to some degree assists both parties – the content of paragraph 33 assists the Respondent and that of 34 assists the Claimant. The latter showed that he came across as a good manager of people. Of course, any interview process assesses a candidate by how well they have done relative to the other candidates. However, in this case, the ability to manage people was very much a secondary factor as compared to technical skills and ability which was the primary factor. Put another way, the only scenario in which management skills would come into the evaluation, was if there were two leading candidates with excellent technical skills.

36 The transcript also showed that the Claimant had opportunities to give more technical examples than he did and to give more specific examples than he did. The one question which Mr Danieli recalled specifically (and without having the benefit of the transcript) was: "How would you assess the competency of your team" [82i@57]. The Claimant replied: "By talking to them and asking". Ms. Nir encouraged a fuller answer by asking: "Well… say for example you have been hired as a Plant Manager for the Dudley site, what are your expectations from your team and what protocol or procedure would you follow to assess your employees [to find out] where their weaknesses are and what protocol will you follow to [address] them?" [82J]. The Claimant replied: "I would ask for their backgrounds from Human Resources". Mr Danieli said that although he was still marking the technical test at that point, that answer really caught his attention because: "As far as I was concerned, this was, if you like, passing the buck, if you are going to assess the strengths and weaknesses of your team, especially a technical team, you don't ask the Human Resources Department". We could see why he was not impressed with that answer. Without wishing to go into the other candidates' responses in any great detail, it is fair to say that some of them gave specific examples such as holding regular 1 to 1 meetings, giving toolbox talks, and providing training and development opportunities etc.

37 We shall now deal with the technical questions which were asked by Mr Danieli. Mr Danieli said "Yes, I agree with you, I only want you to just tell me again how the system works because too many questions you actually gave the opposite answer" [82O]. There was a dispute about whether he said, "too many questions" or just "many questions", which was a distinction without meaning and immaterial, because it is clear this was a reference to the Claimant's scores in the technical test.

38 The Claimant replied: "Yes, I'm confident that within a month, if that, I'd be up to speed with any of the Team Leaders who are there now" [82P] and pointed out that he had (during his previous employment) been promoted to Shift Team Leader. We make two observations about that: the responsibilities of a Shift Team Leader are less than those of a Plant Manager; and that the Claimant acknowledged he was not presently up to speed. The Claimant later said that when he was Plant Manager at Dudley, the plant had 100% availability [82P@95]. Mr Danieli said "100% there?". In his evidence to us he said that the tone of his reply during the interview was one of "surprise or possibly even incredulity". The Claimant replied reiterating that there was 100% availability. The short point here is that Mr Danieli's evidence was that 100% availability is not achievable. We fully accepted that – as a matter of logic a plant cannot operate at 100% because of routine maintenance and, as and when required, closure because of emergencies or upgrading. Despite Mr Danieli's query, the Claimant did not place a caveat on 100% such as saying the plant operated at maximum efficiency when it was not closed, or partly closed, for maintenance, upgrading, planned outages or emergencies. Furthermore, the Claimant knew that Mr Danieli was in and out of his interview because of dealing with a planned outage and could have referred to it. Mr Danieli said that the Claimant's answer caused him concern and we could understand why.

39 There was then a discussion about budget. The Claimant was asked what item of budget as a Plant Manager he would keep under special control. He replied "PPE" [82S]. Mr Danieli followed this up by saying: "Yes, you said PPE, but PPE is the amount of money across any year of PPE and I don't want to say

it was negligible but it is negligible, this may lead you, sorry" [82S@126]. It may have been a leading question, but it was helpful to the Claimant because Mr Danieli was trying to get him to identify a much larger item of expenditure than PPE. Not long before that there had been a discussion about boiler tube leaks and installing in-canal lining which was very expensive [82Q]. The Claimant could have brought that up, but he did not. He did make reference to paying external contractors to clean overalls i.e. as Mr Danieli put it: "To do the laundry". It was wholly understandable that Mr Danieli found this to be an extraordinary answer in the context of budget. Mr Danieli persevered by asking "What else?". The claimant replied, "safety shoes" which, as Mr Danieli pointed out, are PPE. Mr Danieli then said: "but not only PPE, also in the budget there are…?" and the Claimant replied, "consumables as well". Mr Danieli then said, "yes there's electricity" and went on to say " On PPE we spend £1,000.00 per month, if you think about refractory or boiler repair, we're talking about £500,000 a year [82T]. The exchanges above demonstrated that Mr Danieli gave the Claimant every opportunity to focus on what he regarded as an important issue i.e. budget but the Claimant singularly failed to do so.

40 We will turn from that to other candidates. The assessments of most of the candidates including the Claimant were at 267-268. Candidate B's assessment was at page 120. Candidate A was interviewed on 24 July 2018 [267]. Mr Danieli's evidence was that Candidate A had good, relevant, recent experience and that he did not require Candidate A to do the technical test because : "He knows how a plant works and how to operate it". He explained that candidate A was interviewed before the technical test was supposed to take place but time ran out. He decided that he would not ask A back to do the test because he could do the job. Consequently candidate A went through to a stage 2 interview without a technical test. We accepted Mr Danieli's explanation for that.

41 Candidate B at [@120] was interviewed on 24 July 2018 and Mr Danieli recorded: "He does the test very badly. He is insecure and he knows nothing". Candidate B did not go through to stage 2 interview.

42 Candidate C [@267] was also interviewed on 24 July 2018 and was progressed to second stage interview without a test because he was currently working as a Plant Manager.

43 Candidate D was interviewed on 2 August 2018 and the note so far as its material, refers to, him having worked somewhere "knowing Steve and Phil" who were presumably present or recent employees of the Respondent. Candidate D was offered the opportunity to take the test but said he was not able to do it. Mr Danieli's note said: "He is not capable to answer the questions with test. He is not the right person". Candidate D did not go through to stage 2 interview.

44 Candidate E was interviewed on the 2 August 2018. Mr Danieli's note said: "He knows absolutely nothing about waste to energy plants, but he looks willing and curious. I do not ask him to do the test but I show it to him to make him aware of what it is about. He cannot answer about the safety devices of the submarine". Candidate E had not worked in the Respondent's industry (producing energy from domestic waste) but he had worked on submarines, which was why Mr Danieli shortlisted him for an interview. However, when Candidate E was unable to answer technical questions about safety devices on submarines, he did not go through to stage 2 interview.

45 The Claimant was also interviewed on 2 August 2018 and Mr Danieli's note said: "He does the test very badly, he has no idea about the most important items of the budget, he says that in 2002 the availability at Dudley was 100%. He is not the right person."

46 Candidate F [@268] was also interviewed on 2 August 2018 and it was recorded by Mr Danieli: "He has no experience in steam production. He says he can read an electric diagram. He has no experience in budget preparation. He knows only compressors. He is not the right person." Candidate F was not asked to take the test because he had no experience of waste to energy plants. He did not go through to a stage 2 interview.

47 Candidate G was interviewed on 7 August 2018. This was after the outage had been completed (6 August 2018). Mr Danieli's note said: "He actually works for a great waste to energy plant" [we assume that was a competitor] but that he "didn't like the political situation at work and wants to change his job". Mr Danieli said that he had quite a detailed discussion of Candidate G's technical knowledge and his knowledge of instrumentation. Candidate G was not asked to do the test because Mr Danieli took the view that he had the requisite knowledge, experience, and skills, which were up-to-date because he was already doing the job. He decided candidate G should go through to Round 2.

48 Candidate H was the final candidate. He was interviewed on the 9 August 2018 and took the technical test. Mr Danieli recorded that: "He shows himself well [i.e. interviews well] but he does the technical test very badly and does not complete it within an hour. He is not the right person, I show him the mistakes he does in the test, but he looks not to understand very well."

49 Therefore what actually happened was that three candidates were invited to a stage 2 interview. They were candidates A, C and G. None of them took the technical test because Mr Danieli was satisfied that they had the necessary technical knowledge, skills and experience which were up-to-date. Of the four candidates who were asked to do the test, one was unable to, and the rest (including the claimant) did badly. Two candidates were not required to do the test because they had no experience of waste to energy production plants and Mr Danieli assessed them at interview as being unsuitable. We were informed that the Claimant and candidate H were non-white and the rest of the candidates, whether successful or unsuccessful at stage 1, were white.

50 The EA10 statutory Code of Practice appears in the bundle [@287A] and we were taken to specific parts of it. Paragraph 16.43 [@287L] addresses, in general terms, the importance of not discriminating in any of the arrangements related to shortlisting, selection tests, use of Assessment Centres and interviews, and it also refers to making reasonable adjustments. Paragraphs 16.44 to 16.46 amongst other things deal with records. 16.44 says an employer should also keep records that will allow them to justify each decision and the process by which it was reached and to respond to any complaints of discrimination. 16.46 talks about the records that should be kept such as records of interviews, discussion on scoring, and any selection tests. This is relied on by the Claimant because the Respondent did not keep the record of the Claimant's technical test. That is true, but the reason is that it was over-written because of an inadvertent error, whereas the intention was to keep it.

51 Further points made by the Claimant in relation to 16.46 concerned marking. The guidance stated that each interview panel member should mark at each stage of the process and their mark should be recorded. The Claimant suggested that this should have happened for the technical test. This was, it was argued, a breach of the Code from which discrimination could be inferred. We rejected that proposition. The reality is that Mr Danieli devised the test and it was he who marked it. Ms Nir did not have the skills or qualifications to do so. Mr Danieli's evidence was that test was designed to establish who the best person for the job was. We also rejected the argument that Mr Danieli had no marking system i.e. did not award points for questions answered. He had a binary marking system i.e. the candidate did the test very badly or did the test very well (although no-one who took it did well).

52 Paragraph 16.52 says ability tests, personality questionnaires and other similar methods should only be used if they are well designed, properly administered and professionally validated and are a reliable means of predicting a candidate's performance in respect of the post applied for. It states: "If such a test leads to indirect discrimination or discrimination arising from disability even if such discrimination is not intended and the reason for the discrimination is not understood, the test should not be used unless it can be objectively justified". Paragraph 16.53 states that all candidates should take the same test unless there is a health and safety reason why the candidate cannot do so, for example because of pregnancy, or because a reasonable adjustment is required.

53 The claimant made a number of points about those paragraphs which we shall now deal with. Firstly, the technical test was criticised because it was Mr Danieli who devised it. The claimant did not suggest Mr Danieli was not a professional person with the knowledge, skills and qualifications to be able to devise such a test but did argue that the test had not been validated by an independent person with the same kind of technical background. That is factually correct but really takes the Claimant's case no further. The content of the test has not been criticised by the claimant and we were able to view it in the bundle. We also noted that paragraph 16.52 of the Code envisages the possibility of indirect discrimination i.e. the scenario where questions can disadvantage people from particular backgrounds and nobody quite knows why, see Essop & ors v The Home Office [2017] IRLR 558 UKSC. That is very different from a direct discrimination allegation such as "You deliberately scored me down" or, in this case, "You set me a different test", a proposition which we have rejected. From viewing the sample of the technical test we concluded that it was specific and relevant to the job of Plant Manager and therefore ought not to have carried with it any inherent disadvantage to any candidate able to do the job regardless of their racial or ethnic background. Finally, in relation to validation, it appears that Mr Danieli has used this test before and has found it a useful tool. It is of course a fact that not all candidates were asked to take the test and Mr Danieli fully accepted that it would have been much better if everybody had done.

54 Paragraph 16.44 of the Code [@287L] states: "An employer should ensure that these processes are fair and objective and that decisions are consistent". In this case the Respondent's witnesses, albeit with some reluctance on the part of Ms. Nir, accepted that viewed objectively, this was not a fair process because not every candidate underwent test and interview at stage 1. That is not the same as saying the process was discriminatory or amounted to victimisation. The test was

objective and any candidate with the technical ability to do the Plant Manager job would have been able to do the test well. Similarly, any candidate out of touch with the waste to energy industry, or without the technical ability to run the Plant, would do worse. Furthermore, in terms of consistency, Mr Danieli said "well I scored them all" which is certainly true for the four candidates who sat the test. Finally, and as already stated, we were completely satisfied that Mr Danieli was the decision maker and based his decision solely on getting the best person for the job. As such, his focus was technical knowledge and skills, rather that managerial skills.

55 As noted candidates A, C and G were invited to stage 2 interview without taking the test. In fact only candidate A attended the stage 2 interview. He was offered the job but turned it down.

56 On the 14 August 2018, Ms. Nir wrote to the Claimant [@269] saying: "I regret that after careful consideration your application has been unsuccessful on this occasion as there were candidates whose qualifications and experience more closely matched to our requirements".

57 There was a then a disputed telephone call. Ms Nir says that the Claimant spoke to her on the 15 August 2018 and made reference to his previous claim, whereas the Claimant says he did not. His case is that the Respondent's witnesses were not told of his previous claim until 6 September 2018. Ms. Nir did not make a note of the disputed 15 August conversation. In Ms. Nir's witness statement, she records that there was a call and an email on the 15 August. She says she was alarmed because during the call the Claimant had said something like: "I hope my previous claim of discrimination against the company is not counted against me"; that she replied that she did not know what claim he was referring to; and that she would provide feedback on his application once she had discussed it with Mr Danieli. Her account is that she asked Mr Danieli about the Claimant's reference to the previous claim and he knew nothing about it either. They decided they would discuss feedback when they were both in the office. In her statement, Ms. Nir said she then asked HR Colleagues about whether the Claimant had made an earlier claim. One knew nothing about it and the other thought she may have heard of a claim brought by the Claimant but had no direct involvement in it [@para 39.2]. Ms. Nir said she then spoke to Mr Jackson who had been with the Respondent for a long time and he told her he was unaware of any claim. Ms. Nir said that they later carried out a search which eventually unearthed several related papers. For the reasons we have already stated at some length, we rejected the proposition that Mr Jackson had "tipped anyone off" as to the existence of a previous claim before the Claimant's stage 1 interview. Consequently, it seems more likely than not that there must have been a telephone call for Ms. Nir to take the action she did on the 15 August. Her evidence was supported by Mr Danieli who said he was sure it was that date because he was shocked to hear that the Claimant had referred to a claim when asking for feedback.

58 On the 31 August 2018, there was a telephone call between the Claimant and Ms. Nir to discuss feedback on his interview. The Claimant covertly recorded that call [@269A]. It lasted just over 10.5 minutes. The general point we would make about the call is one that was made by Miss Owen in her submissions i.e. that the context is that the person providing feedback is trying to sympathetically explain to the unsuccessful candidate how they compared to the

best candidates and also to the worst. The feedback shows at that on the competency questions (which we take to be the questions about assessing the ability of team members) the Claimant had given a brief answer but other candidates had come up with examples. There was then a reference [@269C paragraphs 20 and 21] to technical diagrams being put forward by some candidates. This must have been at stage 1 because Ms. Nir was not part of the stage 2 interviews. The Claimant asked whether the post had been filled externally and Ms. Nir replied "Yes and an external candidate has taken it" [269E para 38]. The Claimant said he was disappointed: "Because they won't have had experience on that plant" and she replied: "Yes but they've got similar experience, or experience in the same industry and they are in the role at the moment". The Claimant later made reference to it being like an accountant coming out of accountancy and then going back into it after 15 odd years: "They are still an accountant". Ms. Nir replied that she understand what he was saying and was disappointed he did not get the opportunity to get as far as the second stage interview.

59 We concluded that at this point the Claimant was saying he could just walk straight back into the role because he was still qualified to do it. That did not take account of the 15-year gap. None of us are accountants, but we thought it evident that a person who has not practiced accountancy for 15 years would need to reskill because, for example: there may be different tax arrangements; each company may have its own payroll system; and there have been changes to the law and regulatory framework such as anti-avoidance measures and prevention of money laundering. It is perhaps stating the obvious to say any person wishing to go back to a job requiring technical skill, knowledge and experience will be at a disadvantage if they have not worked in the field for some considerable time.

60 The Claimant asked whether there were any other vacancies and Ms. Nir said: "Well we're actually advertising this role again" and went on to say that they had filled the role, but the offer had been turned down. The Claimant replied that was a surprise to him [269G]. The Claimant's case is that Ms. Nir having tried to pretend the Plant Manager vacancy had been filled, was forced to concede it had not. We did not accept that.

61 Ms. Nir said she felt that the Claimant was cutting across her and trying to lead her to say things. We thought that was certainly the case. We did not accept she tried to mislead him.

62 When the Claimant was told that the Respondent was going to re-advertise the Plant Manager post he offered to take the job: "Even if it's a 3-month trial period, because I am confident in my abilities, you see, because as I've said, I've done the job" [269H@ para 61]. Ms. Nir replied that she could not promise that because the role had been advertised and was with the recruitment agency. The Claimant then suggested he attend for an interview and Ms. Nir replied that she needed to discuss this with Mr Danieli. The Claimant asked her to emphasise that he had done the job, although he had been out of it for a while. Ms. Nir replied that she did not think it would be possible because the post had been advertised externally. We infer that she meant it would not be open to the Respondent to offer a trial period or re-interview the Claimant without any selection process.

63 The transcript does not make any reference to the previous claim.

64 On 6 September 2018, the Claimant sent an email to Ms. Nir saying: "As the Plant Manager position has been advertised again, I wish to apply again, please find a copy of my CV attached, I also wish to confirm my proposal for accepting the 3-month trial for the position" [276]. It goes on to say: "After the time that has passed, I hope the company does not hold my previous successful claim of race discrimination against me". On the Claimant's case, this is the first time the Respondent would have known of his previous claim, unless his theory about Ms. Nir researching the archives or Mr Jackson having tipped off Ms. Nir and Mr Danieli was accepted by us (which it was not). On either case, our conclusion is that the Respondent's knowledge of his earlier successful claim came after his unsuccessful stage 1 interview.

65 On 13 September 2018 Ms. Nir replied by email saying she had discussed feedback with Mr Danieli. She provided some fairly lengthy feedback. She said: "It is not disputed that you [have] previous relevant experience having worked for the company for a number of years, including latterly as the Dudley Plant Manager, however you have not worked in that role since 2003 [i.e. for 15 years] and have since held very different roles in different sectors. You did not therefore have as much up-to-date experience as other candidates who were working in the role of Plant Manager in similar industries at the time of the interview".

66 Ms. Nir then said: "In view of the above and notwithstanding that the vacancy remains, we do not consider there is any benefit in allowing you to re-apply for the role and will not be inviting you to a further interview. The requirements have not changed since your interview on the 2 August, and we therefore remain of the view you are not suitable for it and on that basis we are not willing to offer you the role subject to a trial period" [275]. In our experience as an industrial jury it is very common for employers not to consider applications from previously unsuccessful candidates where a post has to be re-advertised

67 In the same email, Ms. Nir said: "I would like to assure you that your previous claim against the company has had no bearing on the company whatsoever on your unsuccessful application…. We only became aware of this on the 15 August when you mentioned it to me over the telephone when you requested feedback following your unsuccessful application". This last point confirms our conclusion that there was a telephone conversation on that date.

68 The Claimant replied on the 17 September 2018 [273]. He said: "Thank you for your email I received on the 13 September. I have noted the contents and firstly I do not accept that my previous claim against the company is something that was not known by senior management when I first applied for the Plant Manager's role". He took issue with the feedback given. He did not deny there had been a telephone conversation on the 15 August. As noted above, we concluded there was.

69 Ms. Nir replied on the 28 September [273]. She stated: "We first became aware of this when you mentioned the claim in your telephone discussion on the 15 August, which was after your interview and I had already told you the decision, so it didn't play a part in our decision-making". She then stated that the Respondent would not accept the Claimant's formal application for the re-advertised role and would not invite him to a further interview and, for the

avoidance of any doubt, none of the other unsuccessful candidates would be allowed to re-apply.

70 The final point to make is that the Claimant did not seem to appreciate that by proposing the Respondent should not go through a new recruitment process which was already ongoing, and instead offer him a trial period, he was asking for preferential treatment with the veiled threat of a further claim. This would be something that other prospective candidates for the job role could well (and understandably) challenge as being discriminatory and contrary to the EA10 Code of Practice.

Submissions

71 I shall summarise the respective submissions briefly. The Respondent's representative argued that the claim had no factual basis and was speculative. The Claimant's representative relied on the various theories propounded by the Claimant and breaches of the Code of Practice, both of which are dealt with extensively in our findings of fact.

The Law

72 The relevant legislation in respect of the allegations of direct race discrimination and victimisation is the Equality Act 2010 ("the EA10"). It should be borne in mind that the legislative intention behind the EA10 was to harmonise the previous legislation and to modernise the language used. Therefore, in general terms, the intention was not to change how the law operated unless the harmonisation involved codifying case law or providing additional protection in respect of a particular protected characteristic, in line with that which had previously been afforded to persons with other protected characteristics. Because of that, much of the case law applicable under Race Relations Act 1976 is relevant to how the provisions of the EA10 are to be interpreted and applied.

73 Race is a protected characteristic as defined by section 4 of the EA10. Sections 39 and 40 of the EA10 prohibit unlawful discrimination against employees in the field of work.

Section 39(1) provides that:

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

(a) in the arrangements made for deciding to whom to offer employment.

(b) as to the terms on which A offers B employment;

(c) by not offering B employment."

Section 39(3) provides the same protection in respect of victimisation.

Section 120 EA10 confers jurisdiction on an Employment Tribunal to determine complaints relating to the field of work.

74 Section 136 of the EA10 provides that: "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". This provision reverses the burden of proof if there is a prima facie case of direct discrimination or victimisation. The courts have provided detailed guidance on the circumstances in which the burden reverses[1] but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred (see discussion below).

75 In summary, the EA10 provides that a person with a protected characteristic is protected at work from prohibited conduct as defined by Chapter 2 of it. In addition to the statutory provisions, Employment Tribunals are obliged to take in to account the provisions of the statutory Code of Practice on the Equality Act 2010 produced by the Commission for Equality and Human Rights.

Direct discrimination

76 Direct discrimination is defined in section 13(1) of the EA10 as "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".

77 In the RRA the words "grounds of" were used instead of "because of". However, the guidance issued by the Government in respect of the EA10 stated that this was not intended to change to legal test and commentators have subsequently agreed that it has not done so. This means that the legal principles in respect of direct discrimination remain the same.

78 The application of those principles was summarised by the Employment Appeal Tribunal in London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08, which has since been upheld:

> 78.1 In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was.[2] In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.
>
> 78.2 If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.[3]
>
> 78.3 Direct evidence of discrimination is rare and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a

[1] Barton v Investec [2003] IRLR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA
[2] By reference to Nagarajan v London Regional Transport [1999] IRLR 572 HL
[3] By reference to Nagarajan and also Igen v Wong [2005] IRLR 258 CA

burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage, the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.[4] The wording in s136 of The EA10 has not changed the way the burden of proof operates – the claimant still has to show a prima facie case of discrimination.[5]

78.4 The explanation for the less favourable treatment does not have to be a reasonable one.[6] In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation.[7] If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.

78.5 It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the Employment Tribunal is acting on the assumption that the first hurdle has been crossed by the employee.[8]

78.6 It is incumbent on an Employment Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.[9]

79 It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is, or would be, treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was.[10] However, as the EAT noted (in Ladele) although comparators may be of evidential value in determining the reason why the

[4] By reference to Igen
[5] By reference to Efobi v Royal Mail Group Ltd [2019] EWCA Civ 18
[6] By reference to Zafar v Glasgow City Council [1998] IRLR 36 HL
[7] By reference to Bahl v Law Society [2004] IRLR 799 CA
[8] By reference to Brown v London Borough of Croydon [2007] IRLR 259 CA
[9] By reference to Anya v University of Oxford [2001] IRLR 377 CA
[10] By reference to Shamoon

claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.[11]

80 If the Employment Tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question).[12]

Victimisation

81 Section 27 of the EA 2010 defines victimisation as follows: "A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act."

82 The definition is substantially the same as under the RRA, save that the RRA made reference to less favourable treatment rather than subjecting to detriment. The former definition technically required a comparator, although there was a question as to whether a comparator was necessary.[13]

83 The starting point is that there must be a protected act. That was not in dispute in this case. If there has been a protected act, the Employment Tribunal must then consider whether the claimant was subjected to detriment and, if so, whether that was because of it. It cannot be because of it if the person responsible for the alleged detriment does not know about the protected act.

Conclusions

84 We are going to run through the list of issues, not necessarily in the order they are set out, but covering all the points.

85 In relation to both the direct race discrimination and the victimisation complaints, the question is whether the Claimant was subjected to less favourable or detrimental treatment. There are three allegations.

85.1 Allegation 1. The Respondent decided not to progress the job application that the Claimant made to a second-stage interview.

[11] By reference to Watt (formerly Carter) v Ahsan [2008] ICR 82 EAT
[12] See for example Shamoon and Nagarajan v London Regional Transport[199] IRLR 572 HL
[13] St Helens MBC v Derbyshire [2007] IRLR 540 UKHL

85.2 Allegation 2. The Respondent refused to allow the Claimant to re-apply for the Plant Manager role, and

85.3 Allegation 3. The Respondent turned down the Claimant's offer to work a 3-month trial period.

All of the above are factually correct.

86 Next there is the question of whether the burden of proof has shifted under Section 136 of the Equality Act 2010. This involves determining whether there are facts from which the Court could decide, in the absence of any other explanation, the Respondent has directly racially discriminated against or victimised the Claimant. The list of issues states that the Claimant relies on the admittedly inconsistent approach to the interviews taken by the Respondent as being facts upon which we could find a contravention such that the burden had shifted.

87 Our conclusion is that the burden has not shifted. The Claimant has demonstrated inconsistent or unfair treatment but has not demonstrated that this was because of his race or his previous claim. In submissions the Claimant parties referred Efobi v the Royal Mail Group Ltd [2019] EWCA Civ 18. This establishes that the question is not whether the Employment Tribunal would determine discrimination, but whether there is a prima facie case of discrimination. In addition, it makes it clear that it can be appropriate to move to the second stage, acting on an assumption that the burden may have shifted. That is clearly a correct summary of the law and we are bound by it. It does not assist the Claimant because we do not accept that the burden has shifted and, even if we assumed it had, the Respondent had provided a non-discriminatory (and, in this instance, very cogent) explanation for not offering the role to the Claimant, allowing him to apply again, or offering a 3-month trial period. Furthermore, on our findings, the respondent had no knowledge of the protected act in respect of allegation 1.

88 The other key case referred to in the Respondent's submissions (paragraphs 40 to 43 is Griffiths-Henry v Network Rail Infrastructure Limited [2006] IRLR 865 EAT. This (and numerous earlier authorities) makes it clear that unfairness does not necessarily equate to discrimination. This was a point the Employment Tribunal made during the course of the evidence in relation to the wording of the statutory Code. It may well be that the Respondent acted unreasonably and unfairly, but an employer does not have to establish he acted reasonably or fairly in order to avoid a finding in discrimination. He only has to establish that the true reason was not discriminatory. In our judgement, the Respondent has done so.

89 We are going to turn to the Code briefly and not repeat our findings of fact in that respect but simply rely upon them. The Equality Act 2006 provides for Codes of Practice at Section 14 and at Section 15 which, insofar as it is material, provides: "A failure to comply with provision of a Code shall not of itself make a person liable to criminal or civil proceedings, but a Code (a) shall be admissible in evidence in criminal or civil proceedings and (b) shall be taken into account by a Court or Tribunal in any case in which it appears to the Court or Tribunal to be relevant".

90 As will be clear from our findings of fact, we have considered the relevant paragraphs of the Code, but we do not accept that the breaches relied on by the Claimant would, of themselves, be enough to shift the burden of proof. An obvious example being the Respondent's inadvertent failure to keep a record of the Claimant's technical test.

91 Finally, because reference has been made to the "spirit of the Code" by the Claimant's representative, we should make it clear that the purpose of a statutory Code is to provide guidance to employers about how to avoid discriminating and ending up in an Employment Tribunal or Court. It does not follow that a breach of the Code will mean that the aggrieved individual will succeed with a claim. The Code is very useful best practice guidance. It is not, nor does it purport to be, a definitive and accurate statement of the applicable law.

92 The next issue was who were the appropriate Comparators? For a variety of reasons we did not accept that A to H were appropriate comparators for the Claimant because it could not be said that their circumstances were to same or not materially different. Examples of this are: recent experience in the job; the extent of technical knowledge; and the extent of up-to-date knowledge on the regulatory framework within which the Respondent operates. Comparators A to H were helpful in determining what may have happened for example: if the Claimant was not British/Indian; if somebody with his CV, including 15 years not working in the industry would have performed better, worse or the same as him; if a comparator had accepted (as did the Claimant at the time) that they had not done well in the test; etc. etc. The point is that if the claimant had been of a different racial or ethnic origin the outcome would have been exactly the same. That was apparent from the way comparators A to H were treated. It would have been far better (as the Respondent accepts) if the same process had been followed for all candidates and if the Claimant's test results had been retained. It may have avoided the need for these proceedings. However, we are completely convinced that Mr Danieli acted the way he did because his focus was to find the best person for the job. We concluded that the Claimant's race played no part in that. Furthermore Mr Danieli did not know of the earlier Employment Tribunal claim and so that can have played no part in his evaluation of the Claimant's suitability for the job of Plant Manager. He did have knowledge at the time the Claimant asked for a trial period or a further interview, but this was refused because the Respondent did not want to re-interview unsuccessful candidates.

93 For the above reasons, the victimisation complaint fails on the facts as does the direct race discrimination complaint.

Employment Judge Hughes
21 May 2020