EMPLOYMENT TRIBUNALS

Claimant:	**Ms S. Akan**
Respondent:	**London Borough of Hackney Children and Families Services**
Heard at:	**East London Hearing Centre (by CVP)**
On:	**22-24 July 2020**
Before:	**Employment Judge Massarella**
Members:	**Miss M. Daniels** **Mr L. O'Callaghan**

Representation

Claimant:	In person
Respondent:	Ms C. MacLaren (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the claims of direct race discrimination in relation to issues (B) and (C) are not well-founded and are dismissed;**

2. **the Tribunal lacks jurisdiction in relation to the remaining claims of direct race and age discrimination, because they were presented outside the applicable time limits, and it is not just and equitable to extend time.**

REASONS

This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was V (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.

Procedural history

1. The claim was originally presented on 19 May 2019, after an ACAS early conciliation period between 11 and 26 April 2019. It was initially rejected because the name of the employer on the ACAS certificate and the name on the claim form did not match. The Claimant, Ms Semra Akan, resubmitted her claim on 23 May 2019. On 22 August 2019 the case was listed for final hearing, and case management directions were give. A preliminary hearing took place on 2 September 2019.

2. On 30 June 2020, a telephone preliminary hearing took place to establish whether the case was suitable for hearing by CVP; it was decided that it was.

The hearing

3. We had an agreed bundle running to 380 pages. The Claimant had also submitted some additional documents in separate files, which were collated into a supplementary bundle.

4. We heard evidence from the Claimant. For the Respondent, we heard from Dr Laura Smith (Head of Clinical Practice).

5. There was an agreed list of issues, which is appended to this judgment. The Respondent raised issues of limitation. As the Claimant had not addressed the question of why she did not issue proceedings earlier in her witness statement, the Tribunal asked supplementary questions to elicit her explanation.

Privacy issues

6. The Tribunal raised with the parties the question of whether the names of the other candidates in the recruitment selection exercises, which were the subject of two of the Claimant's allegations, might be anonymised. The Respondent was in favour of the approach: Ms MacLaren argued that it was difficult to see what public interest there might be in their names, as opposed to their protected characteristics, being made public. While anonymisation would only provide limited protection, because they might still be identifiable by those characteristics, nonetheless it would be proportionate to do so, having regard to their right to privacy. The Claimant did not oppose the anonymisation of other candidates, either at the hearing, or in her submissions by email, referred to below.

7. The Tribunal accepts Ms MacLaren's submission. The candidates have a right to respect for their private life. The Tribunal must balance that right against the principle of open justice. The candidates had a legitimate expectation of privacy when they applied for the roles. No allegations are made against them

in these proceedings, in which they have taken no part. Their names are irrelevant to the determination of the issues before us. Nor is there any general, public interest in publishing their names, such as to justify an infringement of their right to privacy. The anonymisation of their names is a limited derogation from the principle of open justice. In our judgment, it is proportionate and, accordingly, we have referred to them by numbers, candidate C1 etc.

8. Immediately before closing submissions, the Claimant asked whether she herself could be anonymised in the judgment. The Tribunal gave her permission to make a written application after the hearing, should she choose to do so, and gave the Respondent seven days to lodge a response. The Claimant wrote to the Tribunal on 27 July 2020, applying for anonymity, on the following main grounds:

    8.1. she did not know that the judgment would be made public after the hearing, and did not consider the possible impact of this for her in the future;

    8.2. she was concerned that the fact that she had brought proceedings may prejudice a future job application;

    8.3. she was concerned that the publication of the judgment may create misunderstandings and confusion regarding her ability to provide a good quality professional service.

9. The Respondent did not respond to the application.

10. Dealing with the first ground advanced by the Claimant, in a Record of a Preliminary Hearing, sent to the parties on 2 September 2019, REJ Taylor reminded the parties (at paragraph 14) that:

> ‘all judgments and reasons for the judgments are published, in full, online […] shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.’

11. As for the second ground, any person reading the judgment, and in particular paragraph 85 below, will appreciate that no criticism is made of the professional service provided by the Claimant; on the contrary, the Respondent has emphasised the regard in which she is held within the organisation. Moreover, a claimant in Tribunal proceedings is protected from being subjected to detriment, because they have brought proceedings alleging unlawful discrimination, whether by current or potential employers, by the victimisation provisions in the Equality Act 2010.

12. The Claimant’s identity is inseparable from the issues in the case. Having regard to the importance of open justice, the Tribunal is not satisfied that there is clear and cogent evidence that harm will be done by reporting her name. Her application for anonymisation is refused.

Findings of fact

13. The Tribunal makes the following, unanimous findings of fact.

14. The Respondent's clinical service comprises clinicians from a number of different professional backgrounds: clinical psychology, family therapy, mental health nursing, and child psychotherapy.

15. There are five clinicians in management posts, known as clinical supervisors. In addition, during 2019 there was an additional 0.9 whole-time equivalent ('WTE') management post of systemic lead, who was responsible for leading on systemic practice development, and delivering Years 1 and 2 of in-house, postgraduate systemic training. Systemic therapy is a type of family therapy, in which the practitioner consider the family as a wider system, and treat it as a whole.

16. The clinical supervisors line managed, and provided clinical supervision to, twenty-three specialist clinical practitioners, who were in frontline posts. Among other duties, the specialist clinical practitioners provided direct clinical assessment and therapeutic interventions to children and families; they provided clinical consultation to social workers, and to other colleagues within the Respondent's Children and Families Service; they facilitated therapeutic group work and clinics; and they provided clinical supervision to trainee clinicians. They had no formal line management responsibility for staff.

17. The Claimant is Turkish. She was born on 25 February 1963, and was fifty-five years old at the material time. She is a qualified systemic psychotherapist. She was initially employed by the Respondent as a family therapist in 2006. She was assimilated into the role of specialist clinical practitioner on 1 November 2013, as part of a reorganisation of the service. She remains in the Respondent's employment.

18. Her original grade was PO4; as a result of the restructuring exercise, her role was regraded to PO6, which was her grade at the material time.

19. The breakdown of the clinical service team by age and race was as follows.

    19.1. Race: thirteen white-British; two white-Irish; eleven 'any other white background', including Turkish, Greek, Greek Cypriot, Orthodox Jewish, South African, Australian, and New Zealander; two black-Caribbean; two black-African; and one Asian/Asian-British.

    19.2. Age: the age-range of team was from 25 to 62 years old.

<u>The recruitment round for clinical supervisors in August 2018 (Issues (A) and (C))</u>

20. In summer 2018, the Respondent advertised for a 0.9 WTE clinical supervisor post at grade PO8. The role was for an interim period of three months. The role could be taken up by one or more part-time candidates. The Claimant applied on 25 July 2018.

21. The Claimant agreed in cross-examination that the clinical supervisor role involved the formal supervision of specialist clinical practitioners. This would have been a move into management, and it would have been a significant promotion for her, from grade PO6 to PO8.

22. Interviews were conducted on 21 August 2018. There were five candidates, including the Claimant. The name, race and score of each candidate was as follows (unsuccessful candidates are shown in italics):

Candidate	**Age**	**Race**	**Score**
C1	62	Black African/British (female)	12/16
C2	32	White, Greek Cypriot (female)	12/16
C3	37	White British (male)	10/16
Claimant	*55*	*Turkish/British*	*7/16*
C4	*36*	*White, Orthodox Jewish (female)*	*Score unknown*

23. The same panel member asked the same question to each of the candidates, in the same order. The panel had been provided with guidance as to what was being looked for in the answers. The questions were designed to assess competencies related to the role and related to the job description and person specification. Candidates were permitted to take notes during the interview, if they wished to do so.

24. Each panel member scored the candidates individually, then agreed a mark, 1 being the lowest, 4 being the highest on each question. The three candidates who scored the highest (C1, C2 and C3) were appointed to the role.

25. By the first question, the candidates were asked to tell the panel about their professional journey up to that point, and how it had led to their applying for the post. Ms Smith explained that the Claimant gave an overview of her practice and experience to date, but did not link these to her aspiration to take on a leadership role; nor did she give sufficiently specific examples of when she had demonstrated the relevant skills and competencies. She scored 2/4.

26. Ms Smith explained that the panel did not ask the second question, because it overlapped with other questions. The Claimant contended that she was disadvantaged by the question not being asked, because she would have scored well, given her experience. The Claimant was not treated less favourably than the other candidates; moreover, there was no evidence that the decision to omit the question was taken with her in mind. We find that it is a natural part of an interview process for a panel to review which questions it is necessary to ask in the time available.

27. By question three, the candidates were asked to tell the panel about a challenge which they had encountered, and how they had responded to it. Ms Smith explained that the Claimant chose to give an example of a situation where there had been a poor clinical outcome: the service-user had disengaged from family therapy. Moreover, the panel had concerns about the setup of the family therapy clinic she described. The panel concluded that the answer gave a negative impression of her skill set as a clinical supervisor. She scored 1/4.

28. By the fourth question, candidates were asked to describe the theoretical ideas, research and models, which informed their practice as a clinical supervisor. Ms Smith explained that the Claimant gave an overview of clinical theories and best practice guidance. However, she did not give examples of relevant theory or models of clinical supervision, or how she would apply them in a supervisory role. She scored 2/4.

29. The fifth question invited candidates to explain how, as a line manager in the role, they would ensure high standards of practice by supervisors, and how they would address performance-related issues. Ms Smith explained that the Claimant's answer focused on day-to-day management and supervisory oversight processes. Her answer lacked information about her approach to managing performance issues, and the requirement to follow organisation processes. She scored 2/4.

30. The panel chair, Ms Susan Wright, later recorded her own summary of the Claimant's performance as part of an interview during the later investigation of the Claimant's grievance. In it she noted that, from her own notes and recollection, she had concluded that the Claimant had shown in the interview that she could supervise practice well, but struggled to demonstrate how she would be a good leader and perform managerial tasks to a high standard. That is broadly consistent with Dr Smith's assessment.

31. The questions, and the contemporaneous notes of the candidates' answers, were explored in considerable detail in cross-examination, both by the Claimant and by Ms MacLaren. The Claimant made some valid points. By way of example, the notes suggested that she had not been prompted to elaborate on her answers, when others had been. The Tribunal would not have expected her to be prompted in relation to her answer to question three, where she had volunteered an example which simply did not show her to advantage. By contrast, by reference to question five, we might have expected the panel to ask her to refocus her answer on wider governance issues and line management.

32. We also noted that the notes indicated that candidate C1 was commended for her enthusiasm and 'smileyness'. This troubled the Claimant; she regarded it as inappropriate. On the face of it, there was no scope within the marking scheme to reward presentational skills; in any event this particular observation appeared more related to personality than presentation. However, that is to subject quickly-taken, contemporaneous notes to a degree of forensic examination, which they were never intended to withstand. The reality of an interview situation is that panel members may well jot down observations as an aide-memoire, which then play no part in their final assessment.

33. The Tribunal records that the benchmarking documents provided to panel members were not available for the first round; they had not been retained, as the Respondent had no indication that they would be needed, either for the purposes of dealing with a grievance, or defending Tribunal proceedings.

34. Notwithstanding these minor criticisms, we find that the evidence suggests that the process conducted by the panel was rigorous and fair. Further, it is difficult to reconcile the outcome with a suggestion that race or age played a factor in the penal's thinking, given that the three highest scoring candidates

came from diverse backgrounds, and a range of ages: black African/British (62); white/Greek Cypriot (32); and white/British (37).

35. The successful candidates were each offered a 0.3 WTE post, which represented around 1.5 days per week each. They remained in their substantive specialist clinical practitioner roles for the rest of the time.

Feedback after the first recruitment round

36. The Claimant had a feedback session with Dr Smith on 26 September 2018. Dr Smith sent her an email summarising that discussion on 12 October 2018. In that meeting, the Claimant said that she was the best placed candidate, because of her experience. She shared concerns that the process might have been discriminatory. Dr Smith described the recruitment process to her in some detail. They discussed the Claimant's scores, although the Claimant asked that they not go into detail at that meeting. Dr Smith told her that they were lower than those of the candidates who were appointed. She observed that the Claimant's interview technique had been good, but that the scores reflected the content of her answers. It was agreed that a separate meeting would be arranged with the interview panel chair, Ms Sarah Wright, to go through her answers and scoring in more detail. Dr Smith pointed out that there would be a further recruitment round for substantive clinical supervisor posts within the next three to six months, and that it was likely that there would be another competitive process.

37. The Claimant had a further feedback session with Ms Wright on 15 November 2018, at which she was given her scores from the August interview.

38. In December 2018 the Respondent agreed to fund six hours of coaching for the Claimant by way of continuing professional development to assist her with career progression at a cost of £600. This was approved by Dr Smith.

The Claimant allegations in relation to broader career development (Issues (D) and (E))

39. The Claimant complained that she had not been given career development opportunities during the academic year 2018/2019, including teaching opportunities. The decisions as to who should, and should not, carry out additional teaching responsibilities were taken at the beginning of the academic year, before November 2018 at the latest.

40. In the course of her employment, the Claimant had been given a number of career progression opportunities: she has led a family therapy clinic, which included a teaching component; she had supervised a reflective practice group for children's rights officers; and she had led on systemic induction workshops, which are compulsory for all new social workers.

41. On 7 November 2018, Dr Smith wrote to her, saying that her line manager (Dr Schmidt) and she were wondering if the Claimant might take on the role of link clinician for the disabled children's service unit. She wrote:

> 'There is some room and need for service development there, both in terms of systemic social work practice and closer links to CIN going

> forward, and to work out how we link up better with Disability CAMHS, as currently we don't have a triage route between our two services. They have a family therapist in their team […] So there might even be an option of some joined up work.'

42. On 16 November 2018 the Claimant replied:

> 'I think that I do not have capacity to take on this role at present as I find myself been very busy in CIN with different kind of assessments, casework, duty and family therapy clinic, along with constant demands of daily consultations. I hope that one of the newly appointed clinicians might be able to offer support there.'

43. The Claimant complained that she was not involved in in-house teaching of Year 2 trainees. Dr Smith's evidence was that this was mainly done by the systemic leads, Dr Schmidt and Ms Heleni Andreadi; they only brought in other psychotherapists when their specialist was relevant to the specific training. The Claimant accepted in cross-examination that this 'might be the case'.

44. Dr Smith's evidence was that, across the academic year 2018/2019, there were only two sessions when other practitioners were brought in to co-facilitate training: one was when Ms Strzedulla was asked to join a teaching session on attachment theory in systemic practice, because she was trained in dyadic developmental psychotherapy, and was dual-qualified as a social worker, as well as a family therapist; the other was when Ms Mensah was asked to co-facilitate a teaching session on parental conflict, because she has a specialist qualification in psychosexual therapy with couples, which was particularly relevant in the context. The Tribunal accepts Dr Smith's evidence on this issue.

45. The Claimant also complained that she was not involved in teaching the Year 1 systemic training course in Merton in the academic year 2018/2019, which was undertaken by Dr Schmidt and Ms Karen Gaughen. Dr Smith explained that Ms Gaughen was asked to do this teaching because she had capacity to do so, whereas the Claimant had other commitments, including a key role leading the in-house family therapy clinic for Year 2 trainees. Again, we accept that evidence, noting that the Claimant had turned down a request to take on additional duties because of pressure of work.

<u>The recruitment round for clinical supervisors in January 2019 (Issues (B) and (C))</u>

46. Clinical supervisor posts were advertised again in late November 2018, when funding was confirmed on a longer-term basis: one WTE post was available, on a fixed-term basis until March 2020. Further, a senior clinical psychologist was going on maternity leave, which gave rise to a 0.6 WTE post, to be backfilled until December 2019.

47. Interviews took place on 18 and 25 January 2019. Five shortlisted candidates were interviewed, four of whom (including the Claimant) had been involved in the previous round. Their scores were as follows (candidate numbers from the previous round have been retained).

C1	62	Black African/British (female)	11/12
C5	41	White British (male)	10.5/12
C3	37	White British (male)	8/12
C2	32	White, Greek Cypriot (female)	7.5/12
Claimant	*57*	*Turkish/British*	*6.5/12*

48. In addition to the formal interview, the Claimant completed a written exercise. The Tribunal had the scores for the other candidates in this exercise, but not for the Claimant. Ms Smith accepted that the Claimant's answer was a good one. The Claimant also met with a group of young people, who were also service users. We find that the scores arising from that part of the exercise were not weighted at all in the final result; it would not be surprising for an appointment to a senior position to be decided on the basis of subjective assessment by service users. We find that the interview scores were the determining factor in the final decision.

49. Again, this was a competency interview, structured around the person specification in the job description. The panel asked four questions, which were similar to those asked in the August 2018 round. The panel shared their separate scores for each question, and then agreed an overall score.

50. Dr Smith explained that the main focus was on the supervision of staff and how best practice could be maintained. In her witness statement (at paragraph 33), she explained that the Claimant's answers had strengths and weaknesses: she was strong on commitment and enthusiasm for supporting trainees; she highlighted the support she had given to systemic service development and the wider service; however, she gave weaker, less reflective, answers in relation to clinical knowledge and skills, clinical governance, and qualities as a supervisor, giving fewer examples of relevant clinical competencies.

51. In relation to the first question, which concerned clinical supervision and line management, the claimant scored 2/3. That was a good score; she was prevented from scoring more highly because the panel considered that she did not demonstrate sufficient reflection on the journey she had made up to the point of her application, and she demonstrated insufficient evidence of making good judgments.

52. In relation to the second question, part of this required her to explain how she would support and supervise a clinician managing significant professional anxiety, conflict or issues with risk. The panel considered that the example she gave was insufficiently specific, and she focused on how she conducted one meeting rather than how she managed the situation overall; she was awarded a lower score of 1.5/3.

53. The third question concerned clinical governance and ensuring clinical staff adhered to service expectations and best practice. Dr Smith explained that the claimant gave a very long answer, which lacked structure, and which did not focus sufficiently on performance management; she scored 1.5/3.

54. The last question focused on the candidates' qualities as a clinical supervisor and practitioner. Dr Smith's evidence was that the answer focused insufficiently on clinical governance mechanisms. The Claimant agreed in cross-examination that, although she gave examples, they were perhaps not sufficient; she scored 1.5/3.

55. Candidates C1 and C3 were offered 0.5 WTE posts, as interim positions until March 2020. Candidate C5 was offered the 0.6 WTE maternity cover, but declined to take it up, because he and his husband decided to adopt, and he took extended sabbatical leave. Candidate C2 was offered that post, as the next highest scoring candidate.

56. In the course of the hearing, the Claimant alleged that candidate C1, who is Black British and older than her, was appointed in order to defeat her potential Tribunal claim. The Tribunal rejects that suggestion as fanciful; there was no evidence whatsoever to support it.

<u>The Claimant's grievance</u>

57. On 6 March 2019 the Claimant submitted a grievance to Ms Anne Canning. Although the letter begins by referring to 'discrimination in relation to the characteristic of race, age and withholding career progress', there are then no further references in the document to the Claimant's age or race as factors in the treatment complained of; rather, the Claimant refers several times to being treated 'unfairly'.

58. The outcome of the grievance was sent to the Claimant on 11 October 2019 by the decision maker, Mr Gareth Wall (Head of Commissioning for Adult Services). Mr Wall interviewed Ms Wright, Dr Smith and Dr Schmidt. In dismissing the grievance, Mr Wall noted that the applicants came from a range of ethnic backgrounds and ages; the Claimant was not the only candidate from a minority ethnic background; the Claimant was not the oldest candidate; the candidate who emerged highest in both rounds (C1) was from a minority ethnic background and older than the Claimant.

59. The Claimant did not appeal that decision.

<u>The alleged reference to the Claimant's English</u>

60. Towards the end of her cross examination of Dr Smith, the Claimant put to her that, on one occasion, at a discussion when the Claimant was complaining about the fact that she had been allocated parenting assessment manual system assessments, Dr Smith had said to her (three times, allegedly): 'English is your second language, maybe report writing is difficult for you'. The Claimant put to Dr Smith that this showed 'some kind of bias' by reference to her Turkish nationality. Dr Smith vigorously denied making the remarks. She said that she would not do so, because she does not hold that belief. She made the point that the Claimant was one of a number of people within the team for whom English was a second language, or who had more than one

language, and that this was a positive asset to the team, given the diversity of its service-users. At least one of the successful candidates (C2) had English as a second language. Moreover, she was aware of the Claimant's extensive experience in writing reports.

61. This was not an allegation made by the Claimant in her internal grievance, in her pleaded case, in her witness statement, or in the list of issues. Nor was it an allegation that the Claimant made in the course of her own oral evidence. Consequently, there was no evidence before the Tribunal that these remarks were made. We have no hesitation in finding that they were not. We have no doubt that, if they had been, the Claimant would have raised them much earlier. We find that the allegation was put by the Claimant in cross-examination, in the hope that it would bolster her case on discrimination.

The Claimant's evidence as to time limits

62. The Claimant had some experience of Tribunal proceedings as, in the past, she had brought a claim of constructive dismissal (we assume, against a previous employer). She could not recall whether those proceedings also included a claim of unlawful discrimination. In any event, she accepted that she was aware that she could complain to a Tribunal about discrimination, she had access to advice from her trade union (UNISON) in around September 2018, and was aware that there was a three-month time limit for issuing proceedings.

63. She explained that she did not bring a claim earlier because she did not find out about the low scoring of her first interview until the feedback meeting with Ms Wright in November 2018. She did not explain why she did not issue proceedings at that point. However, in cross-examination, Ms MacLaren pointed out to the Claimant that Dr Smith's record of her earlier meeting with the Claimant in September 2018 contains a reference to the fact that the Claimant 'shared concerns that there might have been a discriminatory recruitment process'.

The law to be applied

Time Limits

64. S.123(1)(a) Equality Act 2020 ('EqA') provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates.

65. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated and ending with the day of the early conciliation certificate does not count (s.140B(3) EqA). If the time limit would have expired during early conciliation or within a month of its end, then the time limit is extended so that it expires one month after early conciliation ends (s.140B(4) EqA).

66. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a

period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

67. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so. That is a very broad discretion. In exercising that discretion, the Tribunal should have regard to all the relevant circumstances. They will usually include: the reason for the delay; whether the Claimant was aware of her rights to claim and/or of the time limits; whether she acted promptly when she became aware of her rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

68. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. There are statutory time limits, which will shut out an otherwise valid claim unless the Claimant can displace them. Whether a Claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 *per* Sedley LJ at [31-32]).

69. Failure to provide a good excuse for the delay in bringing the relevant claim will not inevitably result in an extension of time being refused (*Morgan* at [25]). There is no requirement for exceptional circumstances to justify an extension (*Pathan v South London Islamic Centre,* UKEAT/0312/13/DM at [17]).

70. Awaiting the outcome of an internal grievance procedure before making a complaint is a matter which may be taken into account by the Tribunal, although it is not determinative (*Apelogun-Gabriels v Lambeth London Borough Council* [2002] ICR 713 CA at 719).

71. In the context of discrimination cases, the importance of recalling not only what is done but the thought processes involved make it all the more difficult, and more likely that memory fade will have an impact on the cogency of the evidence (*Redhead v London Borough of Hounslow* UKEAT/0086/13/LA *per* Simler J at [70]).

<u>The burden of proof</u>

72. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

73. The effect of these provisions was conveniently summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
> >
> > **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
>
> > **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**
>
> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

74. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 at [2, 9, 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts. The Tribunal should consider indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by unlawful factors.

75. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

<u>Direct discrimination because of race/age</u>

76. S.13(1) EqA provides:

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

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

> **(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.**

77. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [2000] ICR 501, *per* Lord Nicholls at 511). Lord Nicholls considered the distinction between the 'reason why' question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at [29]:

> **'Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**

78. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan per* Lord Nicholls at 513).

79. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 at [36], the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic.

80. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

81. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [11-12], Lord Nicholls questioned the need for a two-stage approach, particularly in cases where no actual comparator was identified:

> **'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.**
>
> **The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'**

82. Since *Shamoon*, the appellate courts have encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in *Martin v Devonshire's Solicitors* [2011] ICR 352 at [30]:

> **'Elias J (President) in *Islington London Borough Council v Ladele (Liberty intervening)* [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, eg, *D'Silva v NATFHE [2008] IRLR 412*, para 30 and *City of Edinburgh v Dickson (unreported*), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'**

Submissions

83. The Claimant made oral submissions. She argued that she was treated unfavourably/less favourably during both interviews. She challenged the fact that she received low scores, despite being the most experienced candidate. She alleged that the panel listened to her answers with 'negative views and prejudice' and that their thinking was informed by biases. She argued that there was circumstantial evidence that her race and age were factors in the decisions: she belongs to a different ethnic background, and she is over forty-five. If C1 is taken out of the equation, all the other candidates were younger than she.

84. Ms MacLaren for the Respondent produced a helpful opening note, which she supplemented with oral submissions. She confirmed that, in relation to the claim of direct age discrimination, the Respondent does not rely on a defence of justification.

85. Ms MacLaren made a point of saying in her closing submissions that it was no part of the Respondent's case that the Claimant was a poor candidate in either of the selection exercises. It was expressly acknowledged that she is very good at her job, and a much-valued member of the team. Nonetheless, clinical supervisor roles are highly sought-after, and competition was fierce: it was no disgrace to the Claimant that she was unsuccessful, but the decisions were not discriminatory. There was a thorough and careful recruitment exercise on both occasions.

Conclusion: time limits

86. The cut-off point for limitation purposes was 12 January 2019. The second interview was six days later, and the claim in relation to that matter is in time.

87. All the other allegations are out of time (subject to arguments about conduct extending over a period and the just and equitable extension of time). The claim in relation to the decision not to appoint the Claimant to the role of Clinical Supervisor in late August 2018 is nearly 6 months out of time. The decisions as to who should/should not be asked to teach during the 2018/2019 academic year were taken before November 2018, and the claim was presented over three and a half months' out of time.

88. Because we have concluded (see below) that there was no evidence from which we could reasonably conclude that there was unlawful discrimination in relation to the January 2019 exercise, there cannot be 'conduct extending over a period' up to and including that exercise.

89. Accordingly, if the Tribunal is to accept jurisdiction in relation to the earlier complaints, the Claimant requires an extension of time.

90. The Claimant had access to trade union advice and was aware throughout the material period of her right to bring a discrimination claim before the Tribunal, and of the relevant time limits. The delay in presenting the claims was substantial. The Claimant's only explanation for it was that she did not learn her scores in relation to the first exercise until November 2018. That does not account for the fact that she did not issue proceedings then. The Claimant said that she was 'stressed'. That is unsurprising, if the Claimant believed she had been discriminated against, but it does not explain a failure to act on her part.

91. Turning to the question of the balance of prejudice, if time is not extended the Claimant is prejudiced by not being able to pursue the earlier claims. However, the Tribunal finds that the Respondent would also be prejudiced, if time were extended: some documentary evidence was no longer available (see reference to the benchmarking document above at para 33). Moreover, the Tribunal concludes that there is inevitable memory fade in dealing with old allegations. It is difficult for witnesses to deal with forensic questions on, for example, manuscript notes of interviews, conducted many months earlier. Moreover, we conclude that delay affects the memories of the employer and the employee unequally in these circumstances. While a complaint may remain the focus of attention, and discontent, to the individual, managers who move on to other activities may remember the same events less well, as they deal with new things.

92. Weighing in balance the length of the delay, the absence of a good explanation for it, and our conclusions as to the balance of prejudice, the Tribunal concludes that it is not just and equitable to extend time in relation to the complaints which predate the second recruitment round.

Conclusion: age and race discrimination in relation to the January 2019 recruitment round (Issues (B) and (C))

93. It is not in dispute that the Claimant was not appointed in the January 2019 recruitment round. To that extent she was treated less favourably than the other candidates. The Claimant can point to a difference of race (none of the other candidates were Turkish); and a difference of age, in relation to all the candidates apart from C1.

94. Arguments might well arise as to whether she and her comparators were in materially the same circumstances; the difference in their scores may mean that she was not. However, for reasons we go to explain, it is not necessary to resolve that issue.

95. We then considered whether there was evidence from which we could reasonably conclude that the decision not to appoint the Claimant in January 2019 was materially influenced by considerations of race and or age, so as to shift the burden of proof to the Respondent, and require a non-discriminatory

explanation from it: can the Claimant point to 'something more' than a mere difference of race/age, together with a difference of treatment?

96. The Claimant accepted that there was nothing in the contemporaneous documents relating to the January 2019 recruitment round to suggest that race or age were a factor in the decisions taken.

97. The Tribunal was struck by the fact that there was almost no explanation in the Claimant's witness statement as to why she believed these decisions were tainted by considerations of race or age. Even in a passage such as that at paragraph 25 of her witness statement, where she states that some members of staff were favoured over others in terms of their career progression, she does not link this with their age or their race.

98. The Claimant advanced no evidence at all, from which the Tribunal might reasonably infer that any of the decision-makers had a bias, whether conscious or unconscious, against Turkish people, or against older people.

99. The only specific matter which she raised, in the course of the whole proceedings, as an indicator that any of the decision-makers might have been influenced by her race, was her allegation (made at the eleventh hour in cross-examination) that Dr Smith had made comments about the fact that English was her second language. The Tribunal has already found that that did not occur.

100. There was no allegation, equivalent to the 'second-language' allegation, in relation to the Claimant's complaint that age was a factor in the decision.

101. We also had regard to the fact that there are indicators which strongly suggest that the candidates' race played no part in the panel's decision-making. The racial diversity of the candidate group is very striking. The highest-scoring candidate in both rounds (C1) was Black British; another candidate who succeeded on both occasions (C2) was Greek Cypriot, and had English as a second language. We also note the diversity of the clinical service team, in terms of race and age, as set out above at paragraph 19.

102. Moreover, the fact that candidate C1, who came top on both occasions, is older than the Claimant undermines the suggestion that the Claimant's age was a factor in her non-appointment.

103. We conclude that the Claimant has failed to discharge the burden on her to prove facts from which the Tribunal could reasonably conclude that the decision not to appoint her in January 2019 was tainted by considerations of race or age. Accordingly, the burden does not pass to the Respondent to prove a non-discriminatory explanation, and her claims of direct discrimination fail at this stage.

<u>The Respondent's explanation</u>

104. For the avoidance of doubt, had the burden shifted to the Respondent, the Tribunal was satisfied that the sole reason why the Claimant was not appointed in January 2019 was because she scored less well than all the other candidates. We were satisfied, having been taken to the contemporaneous notes and considered the oral and witness evidence of Dr

Smith, that the scores reflected the panel's genuine view that the other candidates in the recruitment round demonstrated stronger evidence of the required competencies. In the Tribunal's judgment, the Respondent conducted a fair and rigorous recruitment process, in which the Claimant's age and race played no part whatsoever.

105. It was clear to the Tribunal that the Claimant was aggrieved, in part at least, because she regarded herself as more senior/more experienced than some of the other candidates, who were selected over her. However, we observe that, in a competency-based recruitment exercise, which this was, those factors do not guarantee success. That is achieved by demonstrating the competencies through relevant, persuasive examples. In any event, the Claimant accepted in cross-examination that all the candidates shortlisted for interview must have had sufficient experience to be considered for the roles; otherwise they would not have survived the shortlisting process. The Claimant accepted that no extra marks were awarded for length of service.

Conclusion

106. The Claimant's claims are dismissed, either because the Tribunal lacks jurisdiction to determine them, or because they are not well-founded.

Employment Judge Massarella
Date: 12 November 2020

APPENDIX: AGREED LIST OF ISSUES

Direct race discrimination: s.13 EqA 2010

1. Did the Respondent subject the Claimant to less favourable treatment by:

   a) Laura Smith & Sarah Wright interviewing her for, but failing to appoint her to, the post of Clinical Supervisor on 25 August 2018;

   b) Laura Smith, Robert Koglek & Nick Corker interviewing her for, but failing to appoint her to, the post of Clinical Supervisor on the 18 January 2019;

   c) Laura Smith & Sarah Wright not supporting her career development in relation to the Systemic Clinical Supervisor role on 25 August 2018 and 18 January 2019;

   d) Laura Smith not allowing the Claimant to work on the Service Development Project in 2018 & 2019: Systemic Theory and Practice Development Activities, Reflective Group Activities, Teaching in Hackney and out of Hackney, such as Merton Year 1 Training;

   e) Laura Smith not allowing the Claimant to take on in-house teaching responsibilities in 2018 & 2019?

Direct age discrimination: s13 EqA 2010

2. The Claimant relies on the same alleged acts of less favourable treatment set out above. The claimant compares herself with others between the ages of twenty-five and forty-five.

Time limits

3. Which of the acts or omissions complained of occurred within the 3 month time limit?

4. In respect of those acts or omissions which fall outside the time limit, can they be said to form 'conduct extending over a period' so as to bring them within the time limit?

5. To the extent that any of the acts or omissions fall outside the time limit, would it be just and equitable to extend time?

Remedy

6. If the Claimant's claims of direct race and age discrimination succeed, what compensation is she entitled to?