EMPLOYMENT TRIBUNALS

Claimant: Mr P D Cooper

Respondent: Your Housing Group Limited

HELD AT: Liverpool **ON:** 12 and 13 November 2020

BEFORE: Employment Judge Aspinall
Mr A Murphy
Mr R Cunningham

REPRESENTATION:

Claimant: Mr Raftree
Respondent: Mr Weiss

JUDGMENT having been sent to the parties on 23 November 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By a claim form dated 20 July 2018 and having entered early conciliation on 19 June 2018 and achieved an ACAS Certificate on 11 July 2018 the claimant brought claims for direct age and disability discrimination. He was a solicitor advocate aged 54 with a disability when he applied for a job with the respondent as a court officer. He complained that the process was a sham to avoid employing him because of his age or his disability.

2. The respondent defended the claim and the matter came to a case management hearing before Employment Judge Horne on 28 September 2018. Employment Judge Horne made Case Management Orders to prepare the case for final hearing, which was listed to take place on 21 and 22 March 2019. The respondent disclosed the interview notes and scoring matrices for the candidates, and the respondent conceded that the claimant was disabled.

3. The March 2019 hearing was then postponed and relisted for a hearing on 9 and 10 March 2020. The matter came to a case management hearing again, this time before Employment Judge Shotter, by telephone on 25 February 2020, and it was agreed that the 9 and 10 March hearing would be postponed, on that occasion due to Ms Ingram's ill health, and it was relisted, following the coronavirus pandemic, for our hearing this week.

The hearing

4. The hearing took place in person. The parties agreed that they were all comfortable with the social distancing and sanitising arrangements in place for health and safety during the coronavirus pandemic.

5. The parties had prepared an agreed bundle of documents of 426 pages together with a small file of witness statements. Mr Weiss for the respondent submitted a Skeleton Argument.

6. There was an introductory discussion about timetabling the case, the List of Issues, and the need for the claimant to take a realistic view of value in this claim should he be successful. It was agreed that the claimant would be cross examined as to liability and remedy, and the representatives' attention was drawn to the need to focus on the percentage chance of the claimant being appointed in any event.

7. The tribunal heard evidence from the claimant. He gave frank answers about his own health, accepting that he was suffering from stress and depression prior to his application for the job with the respondent.

8. The claimant was evasive in responding to questions about the quality of his answers to the interview questions and the quality of the answers given by the successful candidate. The claimant persisted in saying that it was clear that his answers were as good if not better than those of the successful candidate. Even when taken to an example where his answer was better than that of the successful candidate, where he scored a 3 and the successful candidate scored only a 2, he argued that he should have been scored 4 or more. He said this was because he was a solicitor advocate and must therefore have the competence needed for this court officer role.

9. The tribunal heard evidence from Ms Ingram. She gave her evidence in a straightforward and helpful way. She listened carefully to the question and took care to answer accurately. For example, in relation to the question about a 30 mile travel rule and application of expenses policy to the successful candidate she was careful to preface her answer by saying that she had not dealt with this for some time and that she might therefore be vague in her response.

10. There was evidence in chief from Ms Kelly, who swore to the accuracy of her statement. The claimant's representative chose not to cross examine Ms Kelly.

11. The parties agreed a List of Issues.

<u>List of Issues</u>

1. Is part of the claimant's claim out of time? Has there been a continuing series of events and all is it just and equitable to extend the time limit for bringing claim?

2. Has the claimant identified an appropriate hypothetical comparator whose circumstances were not materially different to the claimant's circumstances for his disability claim?

3. Did the respondent treat the claimant less favourably in the following alleged ways because of his disability:

    a. the initial decision not to shortlist the claimant for interview, communicated to the claimant on 22 March 2018

    b. conducting a sham telephone interview on 27 March 2018

    c. conducting a sham face to face interview on 29 March 2018 and

    d. deciding not to select the claimant for the role ?

4. If so, why was the claimant treated in that way? Was it because of his disability or was it wholly for other reasons?

5. Has the claimant identified an appropriate hypothetical comparator whose circumstances were not materially different to the claimant circumstances in his age discrimination claim ?

6. Did the respondent treat the claimant less favourably in the following alleged ways because of his age:

    a. the initial decision not to shortlist the claimant for interview

    b. conducting a sham telephone interview on 27 March 2018

    c. conducting a sham face to face interview on 29 March 2018 and

    d. deciding not to select the claimant for the role ?

7. If so, why was the claimant treated that way? Was it because of his age was it wholly other reasons?

8. If the claimant is successful in any of the heads of claim, is he entitled to any remedy

9. if the respondent treated the claimant less favourably because of age and/or disability in the absence of any discrimination was there any quantifiable chance that the claimant would have been offered the role? If so, what was that chance in percentage terms ?

10. Is the claimant is entitled to the compensation that he claims?

11. Is it just and equitable to award any compensation for discrimination?

The Facts

12. The claimant is a solicitor advocate who has suffered with health problems. Most of his working life has been spent in legal practice. Managing his health problems and the stressful working life of a solicitor became too much for him and he decided, in spring 2018, to apply for a less stressful role.

13. In November 2017 the respondent had completed a restructure which resulted in the development of a new role of court officer. The role was designed to manage legal action and enforcement, including field based activity for more complex high level arrears cases. The court officer would work with the respondent's Income Collection team to progress rent arrears and increase income collection. Six court officer roles were created, one of which was to be in the Staffordshire area. Ms Ingram was to lead the recruitment process. A role profile was prepared and key competencies identified. The role profile provided:

> *"The key competencies were:*
>
> *(1) Flexibility and resilience;*
>
> *(2) Meeting customer needs;*
>
> *(3) Interpersonal understanding;*
>
> *(4) Personal learning and growth. (This did not become one of the question areas at final interview. The competencies at final interview were reduced to the other seven for all candidates)*
>
> *(5) Commercial focus;*
>
> *(6) Results focus;*
>
> *(7) Building relationships;*
>
> *(8) Problem solving and decision making."*

14. The role profile also identified 11 key responsibilities, and provided a list of essential knowledge, skills and experience. The first essential knowledge, skills and experience entry was:

> *"Demonstrable experience of delivering customer service excellence and knowledge of the benefits system including Housing Benefit and Universal Credit."*

15. One of the essential key relationship criteria was that the court officer would be the key operational contact for the respondent, working with residents in regard to their rent and service charge accounts, liaising with property management and Your Response Teams, Housing Benefit, Department for Work and Pensions, County Court and other third party agencies.

16. The role was a 21 hours per week role and a 5R tier on the respondent's tier system.

17. Ordinarily, the respondent's roles are advertised internally for two weeks before being put out to external candidates. The respondent's Recruitment Guidelines provided:

> *Vacancies will normally be advertised internally in the first instance. Where there is a need for skills knowledge that is not believed to be currently available within the organisation, vacancies may also be externally advertised concurrently with the internal vacancy*

On this occasion it was agreed the role would go directly to internal and external open recruitment at the same time. The job was advertised. Under "who we are looking for" it says:

> "*You will have experience of providing representation at court and have a social housing background*."

18. The role was advertised on or around 26 February 2018. The claimant saw the advertisement and applied for the online role. The application asked the applicant to briefly summarise how the applicant believed he met the requirements for the role. The claimant replied:

> *"I have a long legal career covering the areas relevant to the position…."*

19. The claimant also attached his CV. It showed a history of employment in the legal profession and no employment or direct experience in a social housing background.

20. Ms Ingram screened the applications and shortlisted a range of individuals to come to interview at some point before 16 March 2018. The claimant was not shortlisted.

21. On 22 March the claimant complained. He said:

> *"I applied for the position of court officer, I have a great deal of experience in the relevant areas and have a disability and as such expected in line with your guidelines an interview so please explain why I did not receive an invitation for interview as you suggested I question if this amounts to discrimination."*

22. The guaranteed interview scheme at page 40 of the bundle provided:

> *"Your Housing Group operates a guaranteed interview scheme for applicants with a disability and the residents of Your Housing Group. This means that applicants who declare that they have a disability or are a resident, and meet the minimum requirements for the role as set out in the role profile as essential criteria, will be guaranteed an interview."*

23. Karen Dyke dealt with the claimant's complaint. She referred it to Ms Ingram who had done the shortlisting. Ms Ingram replied:

> *"The first of the essential criteria attached to the role is demonstrable experience of delivering customer service excellence and knowledge of the benefits system including Housing Benefit and Universal Credit."*

She went on to say*:*

> *"There is no evidence from the application or the CV that Paul has this and he was not selected on this basis."*

24. The claimant came back to the respondent in email dated 23 March 2018 at 17:20 with a subject line to the email that said, "Complaint re discrimination". He said:

> *"Dear Sir,*
>
> *Thank you for your response but benefits has been an area of law that I've done for many years and I point of fact I was the one lawyer in Staffordshire the Law Society referred clients to and I must have done hundreds of benefit claims over the years including taking measures to appeal with a great deal of success I might add. As such I would ask you look further into my complaint as I would not have wasted my time if I didn't think match the criteria. As such repeat my concerns await further information before taking matters further"*
>
> *……"*

25. In response to that email Karen Dyke again emailed Ms Ingram and said:

> *"I haven't read Mr Cooper's CV in detail and compared it with the role profile, but if there is any chance he meets the minimum criteria and he hasn't showcased this in his application, whilst we have a guaranteed interview scheme this doesn't necessarily mean a face to face interview, so it would be worth telephone interview Mr Cooper and explore this further. Please do not offer the role following today's interviews until the above has been completed just in case Mr Cooper's telephone interview results in a face to face interview and he does have the experience he has failed to demonstrate to you."*

26. On 23 March Ms Ingram and her colleague, Ms Kelly, had interviewed a number of candidates for the role. Each candidate was asked the same seven standardised questions as part of a competency based interview process. Both Ms Ingram and Ms Kelly recorded the answers and scored the answers using indicators with a marks range of 1 for a poor answer to 5 for an answer that constantly exceeded requirements. They made contemporaneous notes during each interview and added to those notes at the conclusion of each interview. They compared their scores at the end of the day and produced a rank order. Candidate AB was the highest scoring candidate.

27. During the course of that day Karen Dyke had been dealing with the claimant's complaint. Ms Ingram then saw Ms Dyke's emails and held off making an offer to the highest scoring candidate.

28. Ms Ingram then conducted a telephone screening discussion with the claimant. She used a template document to conduct the telephone screening. It set out a range of standardised questions to structure the discussion. Ms Ingram made a note of the claimant's responses to the questions. The claimant said that he had had relevant previous experience and transferable strengths in that he had managed possession cases, represented parties in court proceedings and dealt with debt recovery. He claimed to have assisted clients with tenancy matters as part of his last role. He said what he liked about his job was assisting clients face to face and variety in the role. Ms Ingram concluded the telephone screening discussion saying that the claimant would be invited to interview.

29. The claimant came to interview on 29 March 2018. He was asked the same seven questions that had been put to the candidates on 23 March 2018. He was interviewed by Ms Ingram and Ms Kelly using the same scoring matrix of 1 to 5. The verbal descriptors for the scoring matrix 1 to 5 were:

(1) no evidence or fails to meet requirements

(2) some evidence shown but gaps or further development needed

(3) evidence meets requirements

(4) sometimes exceeds requirements

(5) constantly exceeds requirements

30. The seven questions related to the core competencies listed in the advertisement, but they were tested in a different order and one of the eight in the advert (personal growth) was not tested at interview.

31. Question 1 related to the key competence of flexibility and resilience. The claimant was asked, “Do you have an example where you had to change your approach when dealing with a difficult customer”. The claimant gave an example which Ms Ingram scored 2. She commented that his answer gave no real detailed content. Ms Kelly scored this answer 2 and also recorded no detail given regarding change of approach.

32. Question 2 related to the key competence of interpersonal understanding. The claimant was asked can you describe the action you would take if during a visit you became concerned that the customer’s welfare. The claimant’s answer was scored 2 by Ms Ingram her notes recorded that the claimant had failed to identify what triggers he would be looking for and where he would get help. The claimant’s answer referred to “speak to someone higher up” and or “phone the police. Ms Kelly also scored him a 2.

33. Question 3 related to the key competence of results focus. Ms Ingram scored the claimant 1 and commented that he has not referred to hard targets in his answer and that he had only a vague strategy for dealing with the target. Ms Kelly scored the claimant 2 but commented that no examples of targets or processors to ensure they are achieved were given.

34. Question 4 related to the key competence of commercial focus. The claimant was asked to give an example of when you have considered the wider business implications of your decision-making. The claimant's answers focused on his legal practice experience and gearing marketing strategies to bring in clients and to charge less than other solicitors so as to get work in. Ms Ingram scored the claimant 1 and commented that no example or content was given. Ms Kelly also scored the claimant 1 and commented that he doesn't answer the question

35. Question 5 related to the key competence of meeting customer needs. The claimant was asked to give an example of a situation where you had to take ownership of the customer problem that involved departments outside of your own. Ms Ingram scored the claimant 1 again commenting that the answer lacked detail. The claimant's answer identified working with local authorities, translators and other staff members. Ms Kelly scored the claimant 2 and commented that he gave a basic example with detail behind his thought process.

36. Question 6 related to the key competence of building relationships. The claimant was asked to give an example of where you've developed a strong external relationship and used it to your advantage. On this occasion the claimant described working with the local authority colleague and an external legal team so as to avoid litigation by negotiating outcomes direct. Ms Ingram scored the claimant a 3. Ms Kelly also scored the claimant a 3 for this example and noticed that he had avoided court applications and costs by sourcing support through his own connections.

37. Question 7 related to the key competence of problem-solving and decision-making. The claimant was asked have you identified either an improvement or new process which has benefited your team or the wider business. The claimant described steps he had taken to set up a department and develop a department and trained staff. Ms Ingram scored him a 3. Ms Kelly also scored him a 3 for this competence

38. Ms Ingram and Ms Kelly scored the claimant as below on each of the questions. The successful candidates scores are also shown.

	Claimant's score Ms Ingram	Claimant's score Ms Kelly	AB score Ms Ingram	AB score Ms Kelly
1 Flexibility and resilience	2	2	3	3
2 Interpersonal understanding	2	2	3	3
3	1	2	3	3

Results focus				
4 Commercial focus	1	1	2	2
5 Meeting customers needs	1	2	3	3
6 Building relationships	3	3	3	3
7 Problem solving and decision making	3	3	2	2
	13	15	20	19
		28		**39**

39. Ms Ingram and Ms Kelly made contemporaneous notes of his responses during the interview. At the end of the interview Ms Ingram and Ms Kelly compiled their scores for the claimant. Ms Ingram scored him a 13 overall and Ms Kelly scored him a 15, giving him a total score of 28. Ms Ingram and Ms Kelly then compared the score with the rank order they had compiled on 23 March.

40. They saw that the claimant's score was below that of the lead candidate AB who had scored 39, though they recorded it in error as 38, and below that of each of the other candidates.

41. There were four candidates in total and their scores were AB:39 (recorded as 38), CD:32, DE:29 and then the claimant:28.

42. The candidates also completed a scenario test which was designed to be used as a tiebreaker situation if there were two equal scoring candidates. There was no tiebreak: AB was clearly the lead candidate. The tie breaker formed no part of the decision to appoint.

43. A decision was made by Ms Dyke based on the scoring of Ms Ingram and Ms Kelly to offer the role to the lead candidate AB.

44. On 5 April 2018 in response to an enquiry made by AB, Ms Ingram emailed Ms Dyke to ask a question about the boundary for AB's operational area. This had implications for claiming expenses. Ms Ingram wanted to know if he could claim full expenses for a 60 – 70 mile journey to work. Ms Dyke replied that she wasn't sure but that she didn't think he could claim door to door travel expenses.

45. The claimant was informed by telephone on 16 April 2018 that he had not been successful.

46. The claimant entered early conciliation and brought his claim. From around June 2018 the claimant has had physical and psychological health problems which mean he has remained unfit for work to date.

The Relevant Law

47. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable …**
>
> **(2) …**
>
> **(3) For the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it".**

48. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96 considered the circumstances in which there will be an act extending over a period.

> "The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing

situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

49. Section 39 of the Equality Act 2010 provides:

> **An employer (A) must not discriminate against a person (B) –**
> **(a) in the arrangements A makes for deciding to whom to offer employment**
> **(b) as to the terms on which A offers B employment**
> **(c) by not offering B employment**

50. Section 13 Equality Act 2010 provides:

> **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.**

51. Section 23 provides:

> **"(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**
>
> **(2) The circumstances relating to a case include a person's abilities if—**
> **(a) on a comparison for the purposes of section 13, the protected characteristic is disability;"**

The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including Amnesty International v Ahmed [2009] IRLR 884, in most cases where the conduct in question is not overtly related to disability, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

52. The burden of proof in a discrimination case is addressed in section 136 of the Equality Act 2010, and subsection (2) thereof. It says:

> **"If there are facts from which the court could decide in the absence of any other explanation that the respondent contravened the provision concerned, then the court must hold that the contravention occurred."**
>
> **"Subsection (2) does not apply if the respondent can show that it did not contravene the provision."**

53. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, (this is referred to as the test at stage one) the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment (referred to as the test at stage two).

54. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 and was supplemented in Madarassy v Nomura International PLC [2007] ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

55. The Court of Appeal in Royal Mail Group Limited v Efobi [2019] EWCA Civ 18 (under appeal to the Supreme Court) considered the two stage test and the burden of proof at stage one.

56. At para 56 :

> *"when the claimant fails to establish a prima facie case the necessary inference is that there is in all probability an innocent non-discriminatory explanation of what occurred. The claim is then little more than an assertion and the employer should not then be required to provide any further explanation."*

And at para 57:

> *"it is a somewhat artificial exercise to consider stage two as though a prima facie case had been established when in fact it has not. However, where the burden on the claimant has been discharged with respect to any particular post, the explanation given by the employer at the second stage must be an explanation of why the claimant was rejected. It is well established that the reason must be that of the actual decision-maker see e.g. Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11."*

57. If in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Submissions

Respondent's Submissions

58. The respondent's submissions were set out in the Skeleton Argument that had been submitted on the first morning of the case, and Mr Weiss spoke to those submissions in closing. On the time point he helpfully provided a summary of the relevant dates.

59. The claimant learned that he was not shortlisted on 22 March 2018. There is no date in evidence as to the date on which that decision not to shortlist was made

but it probably, it was agreed, occurred before 16 March 2018. The claimant had his telephone interview on 27 March 2018 and his face to face interview on 29 March 2018, and he found out that he had not been successful in the job on 16 April 2018. He entered early conciliation on 19 June and achieved a certificate on 11 July 2018 and commenced proceedings on 20 July 2018.

60. The respondent indicated that it would not oppose an argument, if the claimant had put that argument, that the alleged acts of discrimination form part of a continuing course of conduct extending over a period of time which began with the decision on the date unknown but prior to 16 March not to shortlist the claimant for interview, and continued with the sham telephone screening on 27 March and the face to face interview on 29 March, and culminated in the decision not to appoint communicated on 16 April. The respondent accepts that events after 22 March 2018 are in time.

61. The respondent's overarching submission was that the burden of proof at the first stage in this case is not met by the claimant, and in the alternative that the respondent had a non discriminatory reason for any treatment complained of.

Claimant's Submissions

62. The claimant made oral closing submissions. First: the policy submission the claimant referred us to the respondent's equality and diversity standards and submitted that the respondent had failed to meet its own standards.

63. Second: the discriminatory motive, open advertisement submission. The claimant submitted that Ms Ingram's desire to avoid advertising the post internally first and to go instead to direct open external recruitment showed a discriminatory motive.

64. Third: the interview notes submission. The claimant submitted that the interview notes had not been taken contemporaneously. At this point the employment judge intervened to point out that this had not been put to the respondent's witnesses in cross examination. Mr Raftree apologised and said that this was because it has only been brought to his attention "last night". It was agreed that this submission would be recorded and that it would be a matter for the Tribunal as to how much weight, if any, to attach to this point given that it was not contained in the claimant's witness evidence nor put to the respondent's witnesses. Mr Raftree agreed that that was an appropriate way to proceed.

65. Fourth: the discriminatory motive, Ms Dyke email submission . The claimant submitted that Ms Dyke telling Ms Ingram by email to explore the claimant's level of benefits experience and then Ms Ingram failing to do this was also evidence of Ms Dyke's discriminatory motive. Mr Raftree also pointed out that this was a critical failing on the part of the respondent because, in his submission, the job stood or fell by the level of the claimant's benefit experience.

66. Fifth: the discriminatory motive, curt tone submission. Mr Raftree submits that the evidence of the claimant as to the curt tone and the language used by Ms Ingram, "I'll suppose I'll have to interview you as you meet the criteria" at the end of the telephone screening discussion, is also evidence of discriminatory motive. He

says that the tribunal should prefer the evidence of the claimant on this point to that of the respondent. He points to the claimant's credibility and asks the tribunal to draw an inference from the fact that Ms Ingram used the exact same words that Karen Dyke had used in the email. Mr Raftree submits that this is a point of integrity and that the claimant's integrity is to be preferred on this point to that of Ms Ingram.

67. Sixth: the discriminatory motive, tick box exercise submission. Mr Raftree submitted that the interview process was a tick box exercise in which Ms Ingram and Ms Kelly colluded in completing the interview template documents so as to show due process. This was part of the claimant's overarching submission that the process was a sham.

68. Seventh: the discriminatory motive, championing AB submission. Mr Raftree submitted that Ms Ingram's email about mileage expenses for the successful candidate shows that she was campaigning for him, championing him, and that the tribunal can infer from it that she had been determined to give the job to the successful candidate from the outset, and that this therefore was evidence of discriminatory motivation.

69. Eighth: the discriminatory motive, disregarding the claimant's experience submission. Mr Raftree submitted that the claimant was giving benefits expert advice right up to the point at which he was interviewed for the job, and that was not challenged. Mr Raftree at this point submitted and wished to bring into evidence a document showing the entry for the Law Society and/or Solicitors Regulatory Authority system attesting to the claimant's specialism. At this the employment judge intervened to say that it was her understanding that the respondent did not dispute that the claimant had benefit and welfare law expertise, and Mr Weiss confirmed this to be the case. The employment judge then disclosed that on this point the tribunal would be bringing some of its own knowledge into its decision making in this area, in that the tribunal understood that entries onto the Law Society and SRA systems indicating specialism are made by the solicitor him or herself and do not mean that the Law Society or SRA has itself determined the particular solicitor to be a specialist in that area. The document was not brought into evidence and it was agreed that the claimant considers himself to be a benefit and welfare specialist.

70. Ninth: the time point, "crystallisation" submission. On the out of time point, Mr Raftree submitted that the discrimination "crystallised" when the claimant received a phone call on 16 April 2018 telling him he had not been successful. Mr Raftree did not make an explicit submission that the decision not to appoint communicated on 16 April was the final act in a course of conduct extending over a period of time from the initial decision not to shortlist, bringing those earlier acts into time. I explained that argument and Mr Raftree agreed that that was how the claimant wished to put his case and that was what was meant by "crystallisation" that it included what had gone before. Mr Weiss had understood this to be the claimant's case and did not oppose the course of conduct argument.

71. Tenth: burden of proof submission. On the burden of proof, Mr Raftree submitted that the claimant meets his burden and it is for the respondent to adduce cogent evidence to discharge its burden of proof. Mr Raftree submitted that the Tribunal must carefully examine the respondent's explanation and find that it was

motivated to discriminate against the claimant and therefore the Tribunal must find that the respondent does not discharge its burden of proof.

Submissions on remedy

72. Both parties made submissions as to quantum. The respondent submitted that on the evidence of the claimant himself he was still working in his legal role in April 2018 when he was not appointed to the respondent role and may have worked beyond that date until he was unfit for work from June 2018 and remains unfit to date. Any losses the respondent said must be very low, and any award must be at the lower end of the low Vento band.

73. Mr Raftree submitted that the claimant would and should have got the job with the respondent and would have worked there for at least a seven year period so his future losses are significant. His award for injury to feelings, given (i) the profound effect failing to get this job has had on his life, and (ii) the fact that the discriminatory scoring had made him “look like a moron” and (iii) had shattered the claimant's confidence with catastrophic consequences for his health, meant that any award for injury to feelings must be in the upper Vento band.

Application of Law to Facts

The time point (question 1 on the List of Issues)

74. The claimant entered early conciliation on 19 June 2018. This was within three months of the date of the last act of discrimination complained of on 16 April 2018. He brought his tribunal claim on within three months plus the ACAS early conciliation time. The failure to appoint claim was therefore in time.

75. Mr Weiss did not oppose the argument that the earlier acts (the initial decision not to shortlist the claimant for interview, communicated to the claimant on 22 March 2018, conducting a sham telephone interview on 27 March 2018, conducting a sham face to face interview on 29 March 2018) formed part of a course of conduct extending over a period and were brought into time by the later act.

76. The time issue is a jurisdictional point and agreement, or concession, between the parties will not suffice to establish jurisdiction. The Court of Appeal in Hendricks approved as a course of conduct extending over a period of time an *ongoing situation or continuing state of affairs* in which the claimant was treated less favourably. The claimant contended that the whole process was a sham, that a decision had been made to appoint AB early in the process, and that a discriminatory motive operated throughout. The tribunal considered that the recruitment process from the date of the claimant’s application to the date of failure to appoint formed part of a course of conduct extending over a period of time because it was an ongoing situation in which (it was alleged) the claimant was treated less favourably than a younger, non disabled applicant would have been.

The comparator (questions 2 and 5 on the List of Issues)

77. Section 23 of the Equality Act 2010 provides that there must be no material difference between the circumstances of the claimant and the comparator. Mr

Raftree, although it had been agreed at case management hearing that the appropriate comparator was a hypothetical comparator, submitted that the claimant should have been appointed as the better qualified candidate than AB. It was implicit throughout his cross examination and submissions that he used AB as a comparator.

78. There is a material difference between the claimant and AB in terms of skills, experience and qualification, in terms of the information provided in their initial applications, and in the fact that the claimant was an external candidate and the successful candidate AB was an internal candidate. The successful candidate AB is therefore not an appropriate comparator in this case. Further, it was not established that AB was younger than the claimant or that AB was not disabled. We heard very little in this case at all about disability or age. The claimant's focus was that as he was more qualified than AB he should have been offered the job not AB. Apart from the comparator problem with this argument, it also overlooked the fact that there were two other candidates, CD and EF, who scored higher than the claimant.

79. The appropriate comparator is a hypothetical comparator who does not share the claimant's disability, who was younger than the claimant and who has the same performance at each stage of the selection process; initial application, telephone screening interview and face to face interview, as the claimant in the selection process.

Did the respondent treat the claimant less favourably because of his age or disability in the initial **decision not to shortlist** the claimant for interview? (Questions 3a and 6a, 4 and 7)

80. Not being shortlisted falls within section 39(1)(a). Section 13 requires the tribunal to consider was he not shortlisted *because* of his age or disability. Section 136 requires the tribunal to ask are there facts from which it could conclude that a contravention of Sections 39 and 13 has occurred ?

81. The claimant's application did not include experience of delivering customer service excellence nor knowledge of the benefits system, specifically Housing Benefit and Universal Credit. The hypothetical comparator, with the same application as the claimant, would not have met the criteria for shortlisting. The claimant does not establish facts from which the tribunal can conclude that his age or disability were a factor in the decision not to shortlist. On the shortlisting point the claimant does not meet the first stage test.

82. Even if he had established a prima facie case the tribunal accept Ms Ingram's evidence, when comparing the application to the essential criteria and competences, that she has a non discriminatory reason for not shortlisting the claimant. He did not meet the criteria. Ms Ingram would have screened a younger and/or a nondisabled person, that is to say the appropriate hypothetical comparator, in exactly the same way.

83. It was the claimant's case that it was implicit somehow in the fact that he was a solicitor advocate, which could be gleaned from his CV, that he must meet the criteria. That argument is rejected. The respondent had twin aims in its recruitment. It stated those aims in its advertisement

> "You will have experience of providing representation at court and have a social housing background."

The respondent was looking for someone with a social housing background; someone to support tenants in getting the right benefits so that the rent could be paid and the arrears avoided and the need for debt recovery and court action avoided. Someone who, where it could not be avoided, would then pursue the debts through court and even to repossession. The claimant's application did not demonstrate the housing background and the supporting people to get the benefits right part of the role. His claim that the initial failure to shortlist him for age or disability related reasons is mere assertion.

84. The closing date for this selection process was 9 March 2018 but on 23 March 2018 in response to the claimant's complaint Karen Dyke instructed Ms Ingram to consider the claimant. Ms Dyke's email accepts that the claimant had failed to demonstrate at application stage the essential criteria required to be shortlisted. Far from being treated less favourably than other applicants the claimant, at this point, got a second bite at the cherry.

85. The additional information that the claimant included was to say that he had done benefits law for many years and was someone to whom the Law Society referred clients on benefits law. Ms Dyke felt this was enough to instruct Ms Ingram to consider the claimant. This was a generous interpretation by Ms Dyke. Having been a benefits lawyer acting for clients is not necessarily the same skillset as someone with a housing background supporting tenants to achieve the benefits to which they are entitled and thereby avoid arrears for the employing organisation.

Was the claimant treated less favourably because of his age or disability by Ms Ingram in conducting a **sham telephone interview** on 27 March 2018? (Questions 3b and 6b, 4 and 7)

86. The claimant fails to meet the first stage test of establishing a prima facie case of discrimination in relation to the telephone interview. He was not treated less favourably as an outcome of that interview. He was offered a face to face interview. Ms Ingram used the telephone screening template and she asked the claimant questions on the template and completed the boxes, giving credit for his answers. It was the same template that she used for other candidates. She recorded his answers faithfully and given that he had now mentioned what *might be* relevant experience she invited him to interview. This was again a generous interpretation. Ms Ingram would have conducted a telephone interview in exactly the same way for the hypothetical comparator.

87. The claimant's position in relation to this being a sham telephone interview did not make sense. If it was a sham, why would Ms Ingram have invited him to interview? She could simply have not recorded what he said or not been so generous in interpreting what he said as meeting the criteria, or recorded it in a way that did not match the criteria, and then readily justified not giving him an interview. She did not do this: she gave him credit and the benefit of any doubt for what was said and she offered him an interview. His argument that she was motivated against him from the outset would require us to believe that at this point, despite not wanting

to shortlist or interview the claimant because of his age and/or disability, and despite (in his submissions) being motivated to appoint AB from the outset, she now shot herself in the foot by generously interpreting what he said, accurately recording what he said and offering him a face to face interview. His contention that this was a sham was just not plausible.

88. The claimant said that Ms Ingram's tone in inviting him to interview was curt. He felt she had offered him the interview begrudgingly. The tribunal finds she did not offer the interview begrudgingly. She was not curt or short with him. Even if she had been that would not be sufficient to establish a prima facie case of age or disability discrimination. The outcome of that conversation was that he was offered an interview. This part of the claimant's claim must fail because he fails to establish any less favourable treatment.

Was the claimant treated less favourably in the respondent conducting a **sham face to face interview** on 29 March 2018 ? (Questions 3c and 6c, 4 and 7)

89. The claimant fails to show facts from which the tribunal can conclude that the face to face interview was a sham. The respondent used a competency based interview approach. It had seven standardised question areas relating to the competencies for the role. Each candidate was asked the questions and given equal opportunity to access the scores. There were positive indicators for the scoring matrix. Two people conducted the interview and did independent scoring so as to reduce the potential for bias. The tribunal looked at the answers given by each of the candidates and the scores attached to them by each of the scorers and compared the answers and their scores for the claimant and each of the other candidates to each other.

90. Notably, the scores for the claimant from each of the scorers did not always match. On question 3 Ms Kelly scored the claimant higher than Ms Ingram scored him. Again on question 5 Ms Kelly scored the claimant higher than Ms Ingram scored him. They both scored him a 3 in relation to each of the questions, 6 and 7.

91. The tribunal accepts the evidence of Ms Ingram that whilst a scoring process is necessarily subjective she used the positive indicators and the competency based question template to ensure that the scoring was done as objectively, independently and consistently in terms of, for example, a 3 for this candidate being the same as a 3 for another candidate, or a 3 given by Ms Ingram being given for the same evidence as a 3 by Ms Kelly, as possible.

92. The tribunal accepts the evidence of Ms Kelly, which went unchallenged by the claimant, as to her role and her independence in the scoring process. The tribunal also had the benefit of seeing the notes of the interviews and the scoring templates themselves.

93. The tribunal scrutinised the examples given in response to the competency based questions at interview/in the interview notes, made by both Ms Ingram and Ms Kelly for the claimant and the other candidates having particular regard to the notes for the successful candidate. Ms Ingram's and Ms Kelly's notes of the interviews were significantly similar for the tribunal to be satisfied as to the content of the claimant's and the other candidates' responses to the questions, and for it to be

satisfied that each of the interviewers tried their best to fully capture what had been said by each candidate.

94. There were differences in the scorer's notes which also made them ring true. If there had been a sham, collusion, as the claimant suggested, the tribunal would have expected to see a higher degree of similarity in both the scores and the notes of the interview and the comments made by the scorers and / or a higher degree of divergence between the claimant's scores and AB's, CD and EF's scores, creating a more stark impression of one candidate being superior to the others.

95. The tribunal considered the claimant's late submission, not tested in cross-examination evidence, that the notes of interview and scores were not made contemporaneously and were the product of collusion against the claimant. The tribunal accepts the evidence at paragraph 59 of Ms Ingram's witness statement that "during the interview" she and Mrs Kelly "each made notes". This paragraph refers to another candidate but the tribunal finds it more plausible, given the detail in the notes and the differences between Ms Ingram's notes and Ms Kelly's notes and the similarities in the flow of the notes that the interview notes for each of the candidates and the claimant were made contemporaneously, that is to say during, and possibly supplemented immediately after, each interview.

96. The scoring would have been the same for a hypothetical comparator, that is to say that neither age nor disability played any part in the scoring process.

97. Further the tribunal can see that the claimant's answers were neither as full nor as detailed as the answers of the successful candidate. That is not to say AB is an appropriate comparator, or that the tribunal substitutes its decision on scoring for that of the respondent, but that undertaking this comparison may assist the claimant to understand what happened at interview and why he scored less than AB and was not offered the job, despite his solicitor background. From the point at which the interview notes were disclosed it should have been apparent to the claimant why his responses achieved lower scores overall but on occasion a higher score than the responses of other candidates and in particular of the successful candidate.

98. For example, competence 5 "meeting customer needs". At competence 5 the claimant was asked to give example of a situation where he had to take ownership of a customer problem that involved departments outside of his own. Supplemental questions put to him and to the other candidates were: how did you approach this, and what was the outcome for the customer? Ms Ingram's notes record his response as follows (she scored him a 1):

> *"He referred to his previous role in which he dealt with Local Authorities and asylum seekers needing accommodation. He needed to source translators, he dealt with Local Authorities in Stoke. This was challenging as service users would be quite irate as wanted to get housed immediately. The claimant utilised other staff members."*

99. Ms Kelly's notes of that same response record (she scored him a 2):

> *"I carried out housing work and needed to interact with other agencies. I offer/ needed translation services to communicate with my clients. They are*

obviously in need of housing and I needed to manage that the firm already had translation services. We also had solicitors."

100. These were rough handwritten notes. The successful candidate AB's response recorded by Ms Ingram was as follows:

"I was asked to look at a stage zero complaint regarding a refund. It wasn't clear at first sight how serious it was. There was a large Housing Benefit back date caused £1,500 worth of credit for 4-6 weeks prior. The customer had made a Housing Benefit appeal. Paid on rent in the meantime. She'd made it clear in the notes that she had two disabled children. She was under financial strain, receiving monetary help from family. The agent that initially managed the refund decided to retain one month credit. I decided the original decision didn't feel right in these circumstances. I arranged a refund of all but one week's credit and managed the refund process to ensure it went through in the same week. The tenant was very happy and emailed her thanks. I liaised with her, with the rent team and with the DCM."

101. The successful candidate's response provides details of a particular scenario. It sets out the problem, it shows the candidate identifying the service user's personal circumstances, makes reference to her disabled children, it shows that he showed empathy for the circumstances of the tenant, it shows that the candidate made a decision and took steps to achieve a refund for the tenant, that he prioritised it as something that needed to be done urgently and that he got it done within one week, it shows him meeting the needs of that customer at that particular time, having diagnosed the problem, decided on the solution, work to achieve that solution, liaise with other departments outside of his own to do it (he names the rent team and the DCM), and he explicitly states the outcome for the customer was that she was very happy. The successful candidate dealt explicitly with the particular question and the supplemental questions that were put to him. He set out exactly what he did and what the outcome was.

Was the claimant treated less favourably by the respondent in **deciding not to select the claimant for the role** (Questions 3d and 6d, 4 and 7)

102. The claimant was not selected for the role because he was not the lead candidate. Not being selected falls within Section 39 and Section13 but it must be on the grounds of age or disability. Ms Dyke in making the decision relied on the scores of Ms Kelly and Ms Ingram. She decided to appoint the candidate AB because he achieved the highest score. The claimant does not establish less favourable treatment in failure to appoint because of the protected characteristic of either his age or disability. It is not enough for the claimant to say I was better qualified than him and so my not being appointed must be because of my age or my disability. The claimant has to do more than that to show a prima facie case of discrimination. The burden of proof test at stage one is not met.

103. The claimant alleged that the process was a sham throughout, that there was a discriminatory motive from the outset. The tribunal finds no evidence of any discriminatory motive. On the contrary, the oral evidence of Ms Ingram and the written evidence of Ms Kelly and the the contemporaneous interview notes show the

non discriminatory motive for the decision not to appoint the claimant. If the claimant had established facts at stage one of the test, which he did not, then the respondent would in any event have satisfied us of its adequate non discriminatory reason for the treatment of the claimant at stage two of the test. What follows is our response to each of the submissions about the sham process which the claimant said led to the decision not to select him:

104. *Submission 1: breach of equality and diversity standards* There was no evidence from which we could find there had been any breach of the respondent's own standards or policy. Save that, the respondent, rather generously and to the claimant's benefit, invited him to a telephone screening interview in response to his complaint when he had not met the criteria for shortlisting.

105. *Submission 2: the open advertisement* The tribunal finds no evidence of discriminatory motive in the respondent's decision to go straight to open interview on this occasion. It was open to the respondent to do so. The Recruitment Guidelines say "normally" expressly preserving a discretion to the respondent. It exercised that discretion in this case. The claimant fails to adduce any evidence from which any facts could be found to substantiate an allegation of discrimination in the exercise of that discretion. Further, this contention undermines the claimant's submission elsewhere that the respondent was motivated from the outset to appoint AB. AB was an internal candidate. If the respondent had been motivated to rig the process to secure his appointment then it would have been unlikely to open the field to external candidates.

106. *Submission 3; the interview notes*. If the claimant's case is to be accepted the tribunal would have to believe that Ms Ingram and Ms Kelly colluded together to falsify the interview notes. The Tribunal noted the timings of the interviews. Candidates AB, CD and EF were interviewed *before* Ms Ingram and Ms Kelly knew that the claimant would be offered telephone screening, let alone a face to face interview. This submission would require them to have gone back and falsified the notes for AB, CD and EF. This not only seemed wholly implausible to us based on our assessment of Ms Ingram under cross examination, but the tribunal's view that this was implausible was corroborated by scrutiny of the interview notes themselves.

107. The notes revealed, for example, that in relation to question 7, for the key competence of problem solving and decision making, Ms Ingram scored the successful candidate lower than she scored the claimant. Ms Kelly also scored the successful candidate lower than she scored the claimant. The claimant got 3s and the successful candidate got 2s from both scorers. The tribunal looked at the text of the interview notes. Question 7 asked "how you identified either an improvement or a new process which has benefitted your team or the wider business". Supplemental questions were: what was the improvement process you identified? Why was it necessary to make the changes? What was the change? The successful candidate talked about a scenario in which an organisation signed up for accreditation. He described the steps he took, telling the interviewers what he did in supporting the accreditation process. He says he suggested an improved process. He said:

> *"I highlighted issues in the process, went around the business, met with stakeholders within the process of the department to gain their insight and presented my suggested changes. The business implemented this."*

108. Ms Ingram and Ms Kelly scored him a 2, and Ms Kelly commented that he did not go into detail about what the changes were.

109. By contrast on this occasion the claimant's response provided greater detail than that of the successful candidate as to how he set up the department, recruited and trained staff which meant they were able to help more clients. He said there was not a process in place within the firm to manage civil cases so he built a structure and made connections with the council as well as building a client base. The claimant was scored 3 for this competence.

110. The fact that Ms Ingram and Ms Kelly gave the claimant credit when he gave a better answer than the successful candidate further corroborated their evidence that there was no discriminatory motive at play here. It persuaded the tribunal that there was no collusion, no "sham" but a fair scoring process.

111. *Submission 4: Ms Dyke email*. The claimant's arguments about a sham process included a submission that because Ms Dyke invited Ms Ingram to explore the claimant's level of benefits experience and he felt that Ms Ingram had not done that, there must have been a discriminatory motive. The tribunal rejects that submission. Ms Dyke and Ms Ingram were operating within the respondent's selection process which was an agreed competency based process. She was not instructing Ms Ingram to step outside the process, to have done so would have compromised the equality of access to opportunity to demonstrate competence, that was at the heart of the competency, situational based questioning at telephone and face to face interview. The claimant was given opportunity at telephone interview to talk about his experience and the outcome of that interview was that he was offered face to face interview. The tribunal finds no evidence of a discriminatory motive in that instruction or the action that flowed from it.

112. *Submission 5 the curt tone* This is addressed at paragraph 88 above.

113. *Submission 6 the tick box exercise* This is addressed at paragraphs 89 – 101 above.

114. *Submission 7 championing AB* The submission was that Ms Ingram by making enquiries about mileage claims for the successful candidate by email on 5 April to Karen Dyke was therefore campaigning for him or championing him, and that this amounted to evidence of a discriminatory motive in relation to the claimant. The tribunal finds this argument wholly unsubstantiated. The email exchange relates to the application of the respondent's policies on mileage claims to and from work for its employees. It is part of an internal, *post decision* but pre written offer discussion about contract terms and the application of a policy on mileage expense. The discussion is not part of the scoring process. The content and tone of the email exchange did not reveal any "championing" by Ms Ingram.

115. The claimant submitted that as he lived within the 30 mile radius allowed for expenses he would have made a better candidate for the role than the successful

candidate who lived further away, possibly outside the allowed expenses range. This submission misses the point. Giving an example of why the claimant might have been an attractive candidate, (outwith the selection criteria) even more attractive than the successful candidate, because of a spurious, potential saving to the respondent on mileage claims, does not establish discriminatory motive. The claimant's submission that the 5 April email exchange showed evidence of discriminatory motive in the recruitment and selection process is rejected.

116. *Submission 8 disregarding the claimant's experience* It was for the claimant to demonstrate his experience explicitly in his responses at telephone interview and in face to face interview. The notes of telephone screening and face to face interview show that where he did this, he was given credit for it. At telephone interview, generously, this was interpreted as being sufficient to take him to face to face interview. In the face to face interview there is an example of the claimant scoring higher than the successful candidate when he used his experience explicitly to answer the question. His experience was not disregarded.

117. *Submission 9* related to the course of conduct extending over a period of time and was dealt with above.

118. *Submission 10* related to the burden of proof. The decision not to appoint was made by Ms Dyke in reliance on the scores of Ms Ingram and Kelly. The tribunal did not hear from Ms Dyke in evidence. In Efobi the Court of Appeal commented that it will not always be the case that the actual party making the decision must always be called for an employer to discharge its burden….other evidence such as notes of the decision or discussions between managers may well provide a sufficient evidential basis on which a Tribunal can rely to conclude that the burden has been discharged. The burden at stage two was discharged by the evidence in chief of Ms Ingram and Ms Kelly and the oral evidence of Ms Ingram and the documents from the selection process, particularly the face to face interview notes and scores for each of the candidates.

119. The respondent's submission that the claimant did not meet the burden of proof at the first stage of the test is accepted and further, the respondent's submission, had the claimant met the test, that it had a non discriminatory reason for any treatment complained of is accepted.

Conclusion

120. For the reasons set out above the claimant's claims for age and disability discrimination must fail. Questions 8,9,10 and 11 relating to remedy on the List of Issues are no longer relevant.

121. Following this hearing there was a hearing for case management and the matter has been listed for a costs hearing.

Employment Judge Aspinall
Date: 5 March 2021

REASONS SENT TO THE PARTIES ON

8 March 2021

FOR THE TRIBUNAL OFFICE