EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4113130/2019

Held in Glasgow on 20 and 21 August 2020 via CVP

Members Meeting Friday 8 January 2021 (V)

Employment Judge: Rory McPherson
Members Elizabeth Farrell
Martha McAllister

Ms Jennifer Burton	**Claimant** **In Person**
Lifelink	**Respondents** **Represented by:** **Mr S Harte** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that,

1. The claimant's complaint of direct race discrimination, under section 13 Equality Act 2010 (EA 2010) does not succeed; and

2. The claimant's complaint of indirect race discrimination, under section 19 EA 2010 does not succeed.

REASONS

Introduction

Preliminary Procedure

2. This claimant, Ms. Burton who is a citizen of the USA (otherwise referred to as an American) presented her claim to the Tribunal on Tuesday 19 November 2019 following her non recruitment in October 2019 to a Counselling Role with Lifelink, having commenced Early Conciliation on Saturday 19 October 2019 and the ACAS certificate having been issued on Tuesday 19 November 2019, and in respect of which, it was understood that she asserted complaints including claims for race discrimination. The claimant had secured relevant qualifications from body in the USA.

3. The respondent (Lifelink) asserts that the reason for non-recruitment was in summary that the claimant was not accredited with British Association for Counselling and Psychology (BACP).

4. At **Preliminary Hearing** on **26 March 2020** the claimant was directed to provided further particulars including specification of the claims and any additional facts to be relied on with the respondent being directed to respond if so advised. The concept of indirect discrimination was explained by the Judge at the preliminary hearing and in the subsequent note dated 27 March 2020.

5. The claimant provided **Further and Better Particulars** as directed by the Tribunal were and set out:

6. Alleged instances of **direct race discrimination** (s 13 of EA 2010) were

    1. The claimant was specifically told that having a foreign degree was the reason that her application was not advanced.

    2. The claimant was told that the sufficiently of a foreign degree would need to be verified with an additional credential instead of by reference to its course structure and content.

3. The claimant asserted that there was practice of not requesting supplemental information on non-UK credential when it would be necessary to properly assess their application.

4. The claimants asserted that she was told that people with non-UK credentials are expected to provide supplemental material at the time of their application, when the application form specifically stated that no supplemental information should be submitted with applications.

7. Alleged instances of **indirect race discrimination** (s 19 of EA 2010) were

1. Instructions on the application form stated that no supplemental information should be submitted treated people with non-UK credentials (mostly immigrants such as the claimant) less favourable, as it denied the opportunity for someone with a background unfamiliar to the company the chance to provide information which the company *"clearly feels is essential to the evaluation of the application".*

8. The respondent provided responsive **Further and Better Particulars** on **Tuesday 14 May 2020** setting out that the respondent maintained its position denying that the it discriminated against the claimant as asserted, given further description of what it said were essential criteria for the Counselling Role.

9. At **Preliminary Hearing on 21 May 2020,** it was noted for the claimant that the asserted failure on the part of the respondent to evaluate non-UK qualifications together with the requirement to register with BACP was said to form evidence of race discrimination. For the respondents it was argued that the claimant did not meet the essential criteria for their post which were unrelated to the claimant's nationality. The respondent denied having discriminated against the claimant at all.

Issues for the Tribunal

Race Discrimination:

10. The heads of claim raised in terms of the EA 2010 include **s13 (direct discrimination)** and **s19 (indirect race discrimination).**

11. **EA 2010, section 13: direct discrimination because of race:**

    a. It is not in dispute that the respondent did not recruit the claimant.

    b. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

    c. The Tribunal was not directed to comparator's hypothetical or otherwise.

    d. If so, was this because of the claimant race and/or because of the protected characteristic of race more generally?

12. **EA 2010, section 19: indirect race discrimination**

    1. A "PCP" is a "provision, criterion or practice". Did the respondent have or apply the following PCP(s): the application form stated that no supplemental information should be submitted treated people with non-UK credentials (mostly immigrants such as the claimant) less favourable, as it denied the opportunity for someone with a background unfamiliar to the company the chance to provide information which the company *"clearly feels is essential to the evaluation of the application".*

    2. Did the respondent apply the PCP(s) to the claimant at any relevant time?

    3. Did the respondent apply (or would the respondent have applied) the PCP(s) to *persons with whom the claimant does not share the characteristic, e.g. "race"*?

    4. Did the PCP(s) put [*persons with whom the claimant shares the characteristic, e.g. race*"] at one or more particular disadvantages when compared with [*persons with whom the claimant does not share the characteristic, e.g. "UK based employees"*], in that….

    5. Did the PCP(s) put the claimant at that/those disadvantage(s) at any relevant time?

6. If so, has the respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim?

Remedy

13. If the claimant succeeded, in whole or part, the Tribunal would be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded, what reduction, if any, should be made to any award as a result?

14. The ET1 additional to compensation at p12 sought recommendation in terms s124(2)(c) and s124(3) EA 2010.

Evidence

15. The Tribunal had evidence from the claimant's husband Mr Julian Burton via witness statement dated 6 August 2020 together with evidence from Mrs. Jennifer Burton her evidence in chief being provided via witness statement and oral cross examination. Witness evidence behalf of Lifelink was provided by Heather Dickson Deputy Chief Executive of Lifelink, via written statement dated 6 August 2020 supplemented by cross examination.

16. The Tribunal found the evidence Ms. Dickson straightforward. Ms. Burton broadly gave honest evidence reflecting her views of Lifelink. The claimant's husband's evidence was accepted also reflecting his wife's view of Lifelink.

17. The Tribunal was also referred to a Joint Bundle

18. Both the claimant and respondent's representatives provided written closing submissions after the evidential part of the hearing which parties were directed to exchange and thereafter provide with the opportunity to provide supplementary written submissions reflecting matters raised in their opponent's submissions.

Findings in fact

19. The claimant Ms Burton's national origin is the USA. She has worked in various capacities in the area of mental health over the preceding 5 years and achieved a Masters Degree in Counselling Psychology at Delaware Valley University in USA in May 2019. While completing her supervised clinical placements in the USA she was a member of the American Counselling Association. At the material time the claimant was not a member of the British Association for Counselling and Psychotherapy (BACP). At the time of the hearing the claimant had become a member of BACP and operates a private practice in Edinburgh.

20. Lifelink is a charitable organisation based in Glasgow which provides stress counselling to individuals in Glasgow and the surrounding areas under service contracts with organisations including NHS bodies and Scottish Local Authority Councils. Lifelink have a staff of around 60 employees, of which the majority are frontline staff delivering service to individuals. Lifelink does not have a significant HR resource, the majority of administration staff having as their role administration rather than any specific HR responsibility. It is a requirement of the arrangements with NHS bodies and Scottish Local Authority Councils that stress counselling provided by Lifelink is provided by members of BACP or equivalent body.

21. In or around July/August the respondents advertised Counsellor vacancies on its website as a Job Advertisement (the July/August 2019 Job Advertisement) with interview to begin **Monday "*18th October 2019 - more dates to follow"*.** Those posts were advertised on that basis that they would initially be short term. The Person Specification (PS) set out both Essential and Desirable Criteria. The job role options were set out as Group therapy (open and closed) with adults, Adult counselling, youth counselling in schools (age 11+), telephone assessments and tele-counselling and digital counselling. There were around 60 such posts with counsellors being recruited on a rolling basis with immediate availability**.** No final date for applications was intimated on the July/August 2019 Job Advertisement, application could be e-mailed or handed direct to the respondent's offices in Glasgow. The description of the rolling interviews identified interviews would

be arranged begin on Monday 18 October 2019, more dates were to follow. It would have been open to any candidate to request clarification of any final date for application relative to a later or last date of the rolling interviews**.**

22. **Essential Criteria** (EC) included holding a recognised Post Graduate Diploma in Counselling having a valid driving licence and access to own vehicle (although it was noted that this could be waived for limited roles). Experience of counselling young people in a school environment was described as highly advantageous. It was further set out that ideally the person would have experience of delivering time limited, solution focused approaches (SSW;4:8 model), demonstrable experience of working with a range of client types and presenting issues and experience of recording comprehensive client progresses and improvement data, *"preferably using CORE measurement tools and processes".*

23. The **Person Specialisation** which was not set out in the Job Advertisement contained both Essential and Desirable Criteria for the Job Description of Counsellor, and included as Essential:

1. Qualification and Training: a minimum of Diploma in Counselling and (being a) registered member of BACP (**British Association for Counselling and Psychotherapy**) BABCP or equivalent and BACP Accredited or committed to an agreed plan for achieving it within 3 years of qualifying and evidence of Continuous Professional Development.

2. Competences and Skills: Awareness of recent policy documents and current frameworks relating to mental health and wider deprivation.

24. The respondent identified BACP membership or equivalent for 4 reasons;

1. The respondent has Organisational Membership of BACP and accordingly requires its counsellors to have Individual Membership of BACP.

2. Individual Membership of BACP in effect provides the respondent with assurance that it's counsellors that maintain a level of standards and ethics including by signing up to a BACP **Ethical Framework for Counselling Professions**, have an evidence base of minimum levels of clinical supervision and meet minimum levels of Continuous Professional Development (CPD) including by reference to BACP Register's CPD audit procedure**,** undertake that professional conduct details will be disclosed to relevant parties where deemed necessary or obligatory, and further if the individual was removed from the BACP's Register that would be published and further it may be appropriate for the Disclosure and Barring Services and Disclosure Scotland and /or other relevant authorities and employer, if appropriate, to be notified.

3. Individuals, with international qualifications, who apply for membership of BACP require to submit documentation to BACP who as a membership UK organisation maintaining a register of members, with a focus on the area of counselling and psychotherapy, have a level of experience to assess such documentation and ensure that the person has appropriate qualifications to merit BACP membership. BACP offers different categories of membership including Individual Member status available to those who have either graduated from either a BACP accredited course or a counselling or psychotherapy training course that meets BACP's entry criteria.

25. The claimant submitted an Application Form on **Friday 4 October 2019** (the 4 October 2019 Application). The Application Form set out "*You must complete the application form ain full as we do not consider information in CV's cover letter or any other attached documentation as part of the shortlisting process*."

1. The 4 October Application set out at **Part A** that she did not have a valid UK driving licence.

2. The 4 October Application set out at **Part B** in relation Qualification Achieved set out that she had Counselling Psychology MA GPA 3.97 (first

class honour equivalent) it did not describe where that qualification was obtained from. In particular it did not describe that the qualification was obtained from the USA or otherwise outwith the UK.

3. The 4 October Application set out at **Part B** in relation to Membership of Professional or Regulatory Bodies was wholly silent. It did not describe members of any Professional or Regulatory Body in the UK or in any other part of the world.

4. The 4 October Application set out at **Part C** in relation to present (or more recent post) that her present role which had commenced in July 2019 was a sales assistant with a clothing retail business and set out that her reason for leaving was "*Seeking position in my professional field"*. In the section setting out her previous employment history, she set out 13 previous employers from June 2009 to July 2019, of which recognisable locations included Philadelphia and Milan, with job titles including Intern Clinician, Case manager/Recovery Coach, Barista, Violin Instructor, Therapeutic Staff support, Cell Phone Repair Technician, Intern, Student Blogger, Intern in Medical Billing and Associate Barista.

5. The 4 October Application **Part C** Referees; the claimant was invited to set out a First Referee as "*the person in your organisation who is authorised to confirm your employment and the details given in your application*" and a second referee as someone "*who may have a closer knowledge of your skills, knowledge and abilities and who may offer opinion on your suitability for this post".* It set out that these should not be family members or friends and that respondents pre-employment screening also included, where appropriate Protection Vulnerable Group Scheme / Disclosure checks and professional registration. It further confirmed that references would only be taken up for selected candidates following interview and only after permission had been sought.

6. The First Referee detailed was JD who was designed as Clinical Director at a postal address in the USA. That address did not identify the First

Referee as being based at a University, Hospital or equivalent Medical facility.

7. The Second Referee detailed was MM who was designed as Interim Head of Graduate Counselling Psychology with a postal address in the USA with an e-mail address which did not provide clarification as to the status of the workplace of the First Referee That address did not identify the Second Referee as being based at a University, Hospital or equivalent Medical facility, while an e-mail was provided the Tribunal accepts that the respondent did not recognise or otherwise identify the Second Referee as being based at a University, Hospital or equivalent Medical facility.

8. The 4 October Application **Part D** Statement in Support of the Application (Statement in Support) directed applicants "*Please use the person specification and remit to provide us with examples of how you meet the essential and desired criteria for the role. You should ensure you tell us how your personal qualities, skills and attributes and any major achievements match those required to deliver the roles and responsibilities in the job remit and tell us why you want to work for Lifelink"*

9. The claimant's response to the Statement in Support included that the claimant had "*only recently moved to the UK, I have not been able to get accredited with the BACP yet. I am presently working on familiarising myself with important differences in ethical codes that apply to counsellors through extensive reading and CPD trainings, and I intend to work towards BACP accreditation and COSCA*" (which the Tribunal understands is a separate Scottish based body) "*membership as soon as possible. In particular I have been focusing on the codes of ethics for BACP, COSCA and HCPC* (Health and Care Professions Council who the Tribunal understand regulate a number of health and care professions though not counselling), *as well as the ICO* (information Commissioner Office) *guide to GDPR* (General Data Protection Registrar) *and Scots law pertaining to vulnerable groups and children."*

26. The respondent replied on **Tuesday 8 October 2019** (the respondent's Tuesday 8 October 2019 email) by e-mail at 12.04 noon thanking the claimant for interest in a role with Lifelink and setting out that: *"Unfortunately, we are unable to progress your application at this time as we do not have enough information to be able to verify that your course structure and content is in line with our recruitment requirements. Please note that this is purely due to the facts that the course completion was overseas and not in any way a reflection of your professional training or qualifications in themselves. We understand you are undertaking registration with BACP and would recommend that you resubmit your application to us once that process is concluded as this will provide sufficient verification for us to re-assess. Should you have any queries in the meantime please don't hesitate to get in touch".* The respondent's Tuesday 8 October 2019 email was issued around 10 calendar days before the date of the first of the interview dates in the rolling interview process. The context of the BACP registration was the claimant's express statement that she was applying for same.

27. The claimant responded to the Tuesday 8 October 2019 reply, by e-mail on **Wednesday 9 October 2019** (the claimant's Wednesday 9 October 2019 email) at 8.23 pm setting out that she was "*disappointed at the decision, of course, but particular concerned about the reasons given**. I understand that interpreting unfamiliar qualifications can take some effort,** but to reject a candidate out of hand because their degrees were earned outside the UK is discriminatory… If asked, I could easily provide copies of course syllabi, assessments, or anything else you might request to document the relevance of my qualifications, and I am in the process of getting full official documentation of equivalent UK qualifications from NARIC"* (which the Tribunal understands to refer to the National Information Centre for the UK), "which *I would be happy to provide upon completion. I would have entirely understood the need to further clarify my background, but cannot understand the logic in failing to make any effort to do so. Asking me to have BACP membership in place in order to be considered fairly is unreasonable as BACP membership is its own qualification which is not required of other candidates. To deny me an interview and to state explicitly that your reason*

is solely that I was educated outside the UK is clear discrimination on the basis of a national origin, a protected category under the Equality Act 2010 (as outlined in the legislation's definition of race). It also contributes to the increasingly hostile environment for immigrants in the UK right now… I would like to believe there was no ill intent here, and that you do not wish to discriminate against immigrants in your recruitment process. If that is the case, I ask that you provided me with details of the particulars points of my qualifications that you have been unable to assess for equivalent to UK credentials; I will happily furnish any relevant information to respond to your specific concerns once I know what they are, and I am I quite sure my background is more than equivalent to your requirements... Hopefully we can then move forward with the process in a positive manner. However, I must be clear that I believe that your currently stated position is in direct violation of the law, and I am willing to take the matter to an employment tribunal if needed to protect my rights and those of future applicants."

28. The respondent responded by e-mail on **Wednesday 16 October 2019** (the respondent's Wednesday 16 October 2019 email) email at 11.57 am setting out that it was *"disappointed that you are of the opinion that our company has behaved in a discriminatory way and by way of clarification we can confirm that your application was not "rejected out of hand" merely by reason of your degree being earned outside of the UK. Our person specification clearly indicates that practitioners are BACP accredited or in a position to be achieve this within 3 to 5 years of qualification. In order to become accredited with BACP you must first be a registrant member and at this time you are not a member of BACP**, **hence our suggestion that you re-apply when you had become a registrant member of BACP**. We did not specify that you needed to achieve accreditation. Our recruitment processes take a wide range of factors into account when assessing applications. We are fortunate to have a number of high quality applicants who wish to work with us. While it would absolutely be possible for us to make further enquiries in order to establish further information about non-UK qualifications, we are a small organisation with limited administrative resources, and therefore we assess applications based on the information that applicants proactively provide to*

us at that time. In your case there was no further information provided to enable us to make these checks and with a wide range of candidates to assess who had provided all necessary information your application was therefore not progressed any further ***at this time****"*

29. The Tribunal was not provided with the said full official documentation of equivalent UK qualifications from **NARIC** which the claimant in her e-mail of **Wednesday 16 October 2019** indicated she was in the process of obtaining. The claimant did not provide such documentation to the respondent**.** As above the Tribunal understands that the National Information Centre for the UK is the UK's designated National Academic Recognition Information Centre and which other EU and EEA states operate to provide a method of comparing academic qualifications in different states as part of what is known as the Bologna Process operating across a number of European Countries. No submissions were provided to the Tribunal addressing the Tribunal on same in relation to this matter.

30. The claimant did not respond or otherwise resubmit an application as invited following the respondent's Tuesday 8 October 2019 email which was issued around 10 calendar days before the date of the first of the interview dates in the rolling interview programme. The claimant chose to read it as simple absolute rejection. It was not, despite the claimant not identifying in relation to the Person Specification that

    1. In relation to Qualification and Training; that she was a registered member of BACP (or British Association of Psychotherapy) or equivalent and BACP Accredited or committed to an agreed plan for achieving it within 3 years of qualifying and evidence of Continuous Professional Development, the claimant's response being blank at this section and having not identified that she was a member of either BACP or any equivalent body and BACP Accredited or committed to an agreed plan for achieving it within 3 years of qualifying, although in the separate Statement in Support the claimant described that she intended "*to work towards BACP accreditation and COSCA*" (which

the Tribunal understands is a separate Scottish based body) "*membership as soon as possible"*; and

2. In relation to Competences and Skills: having not set out the basis on which it could be reasonably concluded that the claimant had already acquired a clear awareness of recent policy documents and current frameworks relating to mental health and wider deprivation, the claimant response only describing that she was "*presently working on familiarising myself with important differences in ethical codes that apply to counsellors through extensive reading and CPD trainings "*; and

In relation to the Essential Criteria:

3. that she did not have a valid driving licence and access to own vehicle (although it was noted that this could be waived for limited roles).

31. Despite the position set out above, the respondent had expressly invited as set out in the e-mail Tuesday 8 October 2019 that the claimant resubmits her application once the registration application, which she had notified the respondent of in her application, with BACP was "*concluded as this will provide sufficient verification for us to reassess".* The Tribunal concludes that the respondent operated a practice as of Tuesday 8 October 2019 of considering that it did not have sufficient information to verify a course structure and content in circumstances where a candidate could have could have addressed same by securing membership of BACP. The Tribunal concludes that this practice was a proportionate means of achieving a legitimate aim which includes providing reassurance to the respondent, and those it contracts with and those individuals who are provided with counselling by the respondent's counsellors that those counsellors;

a. maintain a level of standards and ethics including by signing up to an BACP Ethical Framework for Counselling Professions; and

b. have an evidence base of minimum levels of clinical supervision and meet minimum levels of Continuous Professional Development (CPD) including by reference to BACP Register's CPD audit procedure; and

c. undertake that professional conduct details will be disclosed to relevant parties where deemed necessary or obligatory; and

d. if the individual was removed from the BACP's Register that would be published and further it may be appropriate for the Disclosure and Barring Services and Disclosure Scotland and /or other relevant authorities and employer, if appropriate, to be notified; and

e. individuals, with international qualifications whatever their national origins, or individuals who have qualifications which are not otherwise familiar and who apply for membership of BACP require to submit documentation to BACP who as a membership UK organisation maintaining a register of members, with a focus on the area of counselling and psychotherapy, have a level of experience to assess such documentation and ensure that the person has appropriate qualifications to merit BACP membership.

f. BACP offers different categories of membership including Individual Member status referred to by the respondent as (Registrant member) available to those who have either graduated from either a BACP accredited course or a counselling or psychotherapy training course that meets BACP's entry criteria.

32. The Tribunal notes the claimant's acceptance in her Wednesday 9 October 2019 email that she understood *"that interpreting unfamiliar qualifications can take some effort".*

33. The Tribunal accepts the unchallenged evidence of respondent that securing individual membership of BACP was something which could have been achieved before the date of the first interview on 18 October 2020 or otherwise before the conclusion of the rolling interview process. The Tribunal concludes that it was open to the claimant to have advised the respondent

on the status of her individual membership as at the date of her application, and to have progressed same to meet the respondent's essential criteria which included individual membership (as opposed to being a registrant member) of BACP or equivalent.

34. BACP offer different levels of membership including membership which can be acquired as p136 - p137,

35. The claimant contacted ACAS on Saturday 19 October 2019 with the ACAS certificate being issued Tuesday 19 November 2019 and subsequently presented her ET1 on Tuesday 19 November 2019.

Written Submissions

36. The claimant provided written submissions dated Friday 18 September 2020 supplemented by further submissions having reviewed the respondent's submissions Friday 25 September 2020. Tribunal does not consider it necessary to repeat those submissions at length here and the following comments reflect elements of the submissions. The claimant set out that respondent had sought to make the issues complicated and had even tried to suggest that the respondents **e-mail of 8 October 2020** was not a rejection. The claimant set out that the facts were simple, she was given one reason why her application as not being advanced by Lifelink and that was that she held a foreign degree and it did not trust that she had the necessary qualifications for the job. The claimants asserted that the respondent were wrongly seeking to argue that the response was one of delay but that in any event that the **2011 ACAS Code of Practice of Employment** (the 2011 Code of Practice) at **3.5** sets out the minimum threshold for direct discrimination as "*It is enough that the worker can say they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person"* and at **4.9** of the 2011 Code of Practice**,** the minimum threshold for indirect discrimination is described as "*It is enough that the worker can reasonably say that they would have preferred not to be treated differently*" and argued that what is said to be delaying her

application on the basis of the claimant's nationality was as unlawful as rejecting it. The claimant criticising what is said to be an attempt to rely on an alleged lack of knowledge of her national origin in circumstances where the issues was her status as an immigrant rather than a citizen of the USA. The claimant argues as discrimination on basis of perceived status may equally be unlawful her actual status is not an issue. The claimant set outs that 2011 Code of Practice at **2.49** that "*Racial groups can be defined by exclusion, for example, those of "non-British" nationality could form a single racial group*". The claimant argues that a common sense reading of the 8 October 2019 email was that the respondent was relying on the fact that the course was completed overseas and while not certain, it was common sense, to conclude on balance of probabilities that the claimant was an immigrant. The claimant further references the 2011 Code of Practice at **16.39** and **3.17** it being argued that the respondent was able to deduce that as the majority of the claimant's work was out with the UK that clearly suggested that she held a protected characteristic of non-British nationality. The claimant further references the 2011 Code of Practice at **3.14** in relation to unconscious bias, **4.26** providing that it for an employer to justify a PCP by where challenged. Further the 2011 Code of Practice at **16.14** which gives as an example that "*Requiring a UK based qualification, when equivalent qualifications obtained aboard would also meet the requirement for that particular level of knowledge or skill**, may** lead to indirect discrimination because of race, **if the requirement cannot be objectively justified**"*. Further the 2011 Code of Practice at **4.5** in relation to definition of a provision, criterion or practice (PCP) and the 2011 Code of Practice at **16.44** setting out in relation to Selection, Assessment and Interview, that "*Employers should also keep records that will allow them to justify each decision and the process by which it was reached and to respond to any complaints of discrimination. If the employer does not keep records of their decisions**, in some circumstances, it could** result in an Employment Tribunal drawing an adverse inference of discrimination"*. Further, the claimant references **Griffiths v Secretary of State for Work and Pensions** [2016] IRLR (**Griffiths**) in regard to unwritten policy, **Wetton v Ahmed** [2011] EWCA Civ

61 [**Wetton**] in reliance upon which the claimant sets out that an absence of contemporaneous documentation where it can be expected to exist should, it is said, impact credibility. Reference to both cases is set out below. The Tribunal has had regard to the 2011 Code of Practice, including the specific elements of the 2011 Code of Practice set out in the submissions.

37. Written submissions dated Wednesday 2 September 2020 were provided for the respondent which were supplemented by Supplementary submissions provided Friday 25 September 2020. The Tribunal does not consider it necessary to set those submissions out at length other than noting that the respondent referenced in relation to the substance of the respondent position **Igen v Wong** [2005] ICR 931 (**Igen)**, and **Laing v Manchester City Council** 2006 ICR 1519 (**Laing**) and in respect of fair notice the EAT decision of **Chandhok v Tirkey** 2014 WL 7254319, referencing para 18. Each of those decisions are referred to below.

Issues in this Tribunal claim

Pleadings

38. The respondent is entitled to fair notice of claim. The Tribunal notes that the Employment Appeal Tribunal observed in **Khetab v AGA Medical Ltd** [2010] 10 WLUK 481 (**Khetab**) that the purpose of pleadings (the written case) *"…is so that the other party and the Employment Tribunal understand the case being advanced by each party so that his opponent has a proper opportunity to meet it",* and further in **Chandhok and Another v Tirkey** [2015] IRLR 195 (**Chandhok**) Langstaff J, commented at para 18 the parties should set out the essence of their respective cases and "*… a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it".*

Variation – Application Delay

Discussion and Decision

39. The Tribunal notes the respondent's supplemental submissions asserting that the claimant sought to introduce a new alternate basis of her claim of discrimination, namely on the basis that the application was delayed rather than rejected. The respondent argues that there was no fair notice in the ET1 and or the Further and Better Particulars, further it is asserted that the claimant led no evidence and was not cross examined on same and that it was not put to the respondent's witness Ms Dickson that if the application was delayed (as opposed to rejected) this was because of the claimant's race.

40. The Tribunal notes the respondent argument, that had the claimant wished to lead evidence around delay it would have been open to the claimant to give fair notice of such a claim. The Tribunal notes that claimant did not in her ET1 or her Further and Better Particulars describe that she understood that her application was delayed. The Tribunal notes that it was the claimant's understanding, her ET1 that her application was "*rejected*". This is not factually the position. The Tribunal notes that the respondent's Further and Better Particulars set out at Para 6 that the claimant sent an e-mail 8 October advising that it was unable to progress her application at that stage as it did not have enough information to be able to verify that her course structure and content was in line with the respondent's recruitment requirements as a result of her qualifications being achieved overseas. Further it was set out that the claimant was advised to resubmit her application once she had registered with BACP.

41. In the circumstances the respondent's objection to what is said to be an expansion of the claimant's complaint beyond "*rejection"* is not wholly accepted. It was the respondents pled position that they had not simply rejected the application, rather they had invited that a modified application be submitted, that was in effect a form of delay, with the explanation for delay that the claimant should reapply with the relevant registration.

Variation - Discriminated Group

42. Further the Tribunal notes that respondent argued that claimant in her submissions seeks to expand from a position that, it is said, that the claimant argued in the ET1 and Further and Better Particulars that the claimant is an *"American",* which was reflected in the discussion at the Preliminary Hearing on 21 May and which is reflected in the Note of the Preliminary Hearing on 21 May 2020. In particular the respondent argues that the claimant, impermissibly, in her submission seeks to argue that the *"claim is about discrimination against immigrants rather than Americans specifically",* on the basis, in summary, that there is no pleading giving fair notice. The respondent further argues that the claimant led no evidence to support a claim that she was discriminated on the basis being an immigrant.

Variation - Discriminated Group

Discussion and Decision

43. The Tribunal notes the respondent's argument; however, the Tribunal is satisfied that the respondent understood that the characteristic issue was not unique to the claimant being a citizen of the USA or indeed other areas such as Canada, but rather a broader criticism that someone who had travelled to the UK, and in particular Scotland, would be treated differently to someone who was of UK origin.

44. The Tribunal notes that the ET3 does not make any reference to the claimant's status as a citizen of the USA (or being "an American"). The respondent's Further and Better Particulars makes one reference to USA within para 1 which sets out that the "*The Claimant's application form references a qualification which appeared to be obtained outside the UK and her employment history referred to one job in the USA and one in Italy"*. The Tribunal are satisfied, in all the circumstances, that that there was fair notice of the issue being of non-UK status, rather than being specific of being of national origin exclusive to being a citizen of the USA.

Issues in Tribunal

45. Section 13 of the Equality Act 2010 ("EA") deals with direct discrimination. It states as follows:

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

46. Section 23 EA 2010 deals with comparators. It states as follows: *"(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*."

47. It is only if the Tribunal is satisfied that there is less favourable treatment when comparing the treatment of the claimant to what would have been received by the actual or hypothetical comparator, that the test of whether an alleged act was direct race discrimination arises and this requires a consideration of the reason for the treatment.

48. The Equality and Human Rights Commission: Code of Practice on Employment 2011 ('the 2011 Code of Practice') sets out helpful guidance for carrying out the comparator exercise. As to the identity of the comparator, paragraph 3.23 of the Code of Practice confirms:

The Act says that, in comparing people for the purposes of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

49. As to the comparison exercise for a hypothetical comparator, paragraph 3.27 of the Code of Practice confirms:

Who could be a hypothetical comparator may also depend on the reason why the employer treated the Claimant as they did. In many cases, it may be more straightforward for the Employment Tribunal to establish the reason for the Claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the

claimant's to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can be found.

50. In **Amnesty International v Ahmed** [2009] IRLR 884 (**Ahmed)** Mr Justice Underhill (at para 34) confirmed that where the act complained of is not inherently discriminatory, it can be rendered discriminatory by motivation. This involves an investigation by the tribunal into the perpetrator's mindset at the time of the act. This is consistent with the line of authorities from **O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School** [1996] IRLR 372 (**O'Nei**ll), the Tribunal should ask what is the '*effective and predominant cause'* or the '*real and efficient cause'* of the act complained about. In **Nagarajan v London Regional Transport** [1999] IRLR 572, HL (**Nagarajan**) it was stated that if the protected characteristic had a *'significant influence'* on the outcome, discrimination would be made out.

51. The crucial question is why the Claimant received the particular treatment of which she/he complains.

52. Paragraph 3.11 of the 2011 Code of Practice confirms:

The characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause.

53. Paragraph 3.13 of the 2011 Code of Practice confirms:

In other cases, the link between the protected characteristic and the treatment will be less clear and it will be necessary to look at why the employer treated the worker less favourably to determine whether this was because of a protected characteristic.

54. The burden of proof provisions in relation to discrimination claims are found in section 136.

S136 (1) to (3) of **EA 2010 (the burden of proof provisions)**

55. The burden of proof provisions are set out in s.136(1)-(3) EA 2010.

"(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. "

56. In **Igen v Wong** [2005] ICR 931 (**Igen)**, to which LIFELINK refers, the Court of Appeal provided the following guidance which, although it refers to the former Sex Discrimination Act 1975, it is considered to apply equally to the EA 2010:

'(1) Pursuant to section 63A of the 1975 Act, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the Claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the Claimant. These are referred to below as "such facts".

(2) If the Claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the

Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

(5) It is important to note the word "could" in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the Claimant has proved facts from which conclusions could be drawn that the employer has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a Tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.'

57. More recently in **Madarassy v Nomura International plc** [2007] IRLR (**Madarassy**) Mummery LJ held at [57] that '*could conclude'* [The EA 2010 uses the words 'could decide', but the meaning is the same] meant: *'[…] that "a reasonable Tribunal could properly conclude" from all the evidence before it.'*

58. However, a simple difference of treatment is not enough to shift the burden of proof, something more is required: **Madarassy** per Mummery LJ at para 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.'*

59. The Court of Appeal in **Anya v University of Oxford** [2001] ICR 847 (at paras 2, 9 and 11) (**Anya**) held that the Tribunal should consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts. Those primary facts may include not only the acts which form the subject matter of the complaint but also other acts alleged to constitute evidence pointing to a prohibited ground for the alleged discriminatory act or decision. The function of the Tribunal is twofold: first, to establish what the facts were on the events alleged by the Claimant; and, secondly, to decide whether the Tribunal might legitimately infer from all

those facts, as well as from all the other circumstances of the case, that there was a prohibited ground for the acts of discrimination complained of. In order to give effect to the legislation, 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.

60. The Tribunal has had regard to the Court of Appeal decision in **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160 (**Griffiths**) which identifies the need for care when framing a PCP. The context in Griffiths was absences and the application of absence management policies. The correct PCP was not the particular absence policy itself, but rather the underlying requirement, reflected in the policy, to "*maintain a certain level of attendance at work so as to avoid disciplinary sanctions".* Elias LJ in **Griffiths** describing that the respondent, in that case, had been in error in its identification of the PCP, set out from para 46

> *"… the relevant PCP was the general policy itself. If that is indeed the correct formulation of the PCP, then the conclusion that the disabled are not disadvantaged by the policy itself is inevitable given the fact that special allowances can be made for them. It may be that this was the PCP relied upon in the Ashton case. But in my view formulating the PCP in that way fails to encapsulate why a sickness absence policy may in certain circumstances adversely affect disabled workers – or at least those whose disability leads to absences from work. Moreover, logically it means that there will be no discrimination even where an employer fails to modify the policy in any particular case. The mere existence of a discretion to modify the policy in the disabled worker's favour would prevent discrimination arising even though the discretion is not in fact exercised and the failure to exercise it has placed the disabled person at a substantial disadvantage.*
>
> *47. In my judgment, the appropriate formulation of the relevant PCP in a case of this kind was in essence how the ET framed it in this case: the employee must maintain a certain level of attendance at work in order*

not to be subject to the risk of disciplinary sanctions. That is the provision breach of which may end in warnings and ultimately dismissal. Once the relevant PCP is formulated in that way, in my judgment it is clear that the minority member was right to say that a disabled employee whose disability increases the likelihood of absence from work on ill health grounds, is disadvantaged in more than a minor or trivial way. Whilst it is no doubt true that both disabled and able bodied alike will, to a greater or lesser extent, suffer stress and anxiety if they are ill in circumstances which may lead to disciplinary sanctions, the risk of this occurring is obviously greater for that group of disabled workers whose disability results in more frequent, and perhaps longer, absences. They will find it more difficult to comply with the requirement relating to absenteeism and therefore will be disadvantaged by it."

61. The Tribunal notes the Court of Appeal decision of **Wetton v Ahmed** [2011] EWCA Civ 61 [**Wetton**] to which the claimant referred, in which it was held that where individuals who were (or acted as equivalent) directors had chosen not to deliver up the company's books and papers to the liquidator it was not open to those individuals to escape liability by asserting that, if the books and papers or other evidence had been available, they would have shown that they were not liable in the amount claimed by the liquidator.

The Statutory provisions

62. s15 (4) of Equality Act 2006 provides that, the EHRC 2011 Statutory Code of Practice of, shall be taken into account wherever it appears relevant to the Tribunal to do so.

63. s13 of EA 2010 provides that

"13 Direct discrimination

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

(2) 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.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

S13 EA 2010

Relevant case law

64. The Tribunal notes that in Burnett v West Birmingham Health Authority [1994] IRLR 7 (**Burnett**) the EAT identified that what amounts to less favourable treatment is an objective one. It is the treatment that must be different and less favourable **Balgobin v Tower Hamlets London Borough Council** [1987] IRLR 401(**Balgobin**). Further in **Watts v High Quality Lifestyles** [2006] IRLR 850 (**Watts**) the EAT identified that the Tribunal had failed to consider whether the employee had in fact been treated less

favourably than an equivalent hypothetical comparator, who should have some attribute which must carry the same risk. **Watts** was subsequently Cited with approval in the Court of Appeal in **Aitken v Commissioners of the Police of the Metropolis** [2012] ICR 78 (**Aitken**).

Indirect Race Discrimination, s19 EA 2010

The Statutory Provisions

65. Section 19 of the Equality Act 2010 provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ('PCP') which is discriminatory in relation to a relevant protected characteristic of B's. Subsection (2) goes on to explain that a PCP is discriminatory in relation to a relevant protected characteristic of B's if—

1. A applies, or would apply it to persons with whom B does not share the characteristic,
2. it puts or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
3. it puts, or would put, B at that disadvantage, and
4. A cannot show it to be a proportionate means of achieving a legitimate aim.

Relevant case law

66. In **Laing v Manchester City Council** [2006] ICR 1519 EAT(**Laing**), to which the respondent refers, the Employment Appeal Tribunal held that the drawing of the inference of *prima facie* discrimination should be drawn by consideration of all the evidence, i.e., looking at the primary facts without regard to whether they emanate from the claimant's or respondent's

evidence. The question is a fundamentally simple one of asking why the employer acted as they did.

67. That interpretation was approved by the Court of Appeal in **Madarassy v Nomura International plc** [2007] ICR 867 CA at paragraph 69 (**Madarassy**). The Court also found at paragraphs 56-58 that *'could conclude'* must mean *'a reasonable tribunal could properly conclude'* from all the evidence before it. That means that the claimant has to '*set up a prima facie case'*. That done, the burden of proof shifts to the respondent (employer) who has to show that he did not commit (or is not to be treated as having committed) the unlawful act, at page 878.

68. The Tribunal has reminded itself that it should be careful not to approach the **Igen** guidelines in too mechanistic a fashion (**Hewage v Grampian Health Board** [2012] ICR 1054 SC (**Hewage**) para 32, **London Borough of Ealing v Rihal** [2004] EWCA Civ 623 (**Rihal**) para 26).

69. The Court of Appeal has confirmed the foregoing approach under the EA 2010 in **Ayodele v Citylink** [2018] IRLR 114 CA(**Ayodele**).

70. The Tribunal has reminded itself that Lady Hale has addressed the key difference between direct and indirect discrimination in a number of judgments of the Supreme Court.

1. In **R (On the application of E) v Governing Body of JFS** [2010] IRLR 136 SC she said at [56]–[57]:

   '*The basic difference between direct and indirect discrimination is plain: see Mummery LJ in* ***R (Elias) v Secretary of State for Defence*** *[2006] EWCA 1293, [2006] 1 WLR 3213, para 119. The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality, or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face*

may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.

Direct and indirect discrimination are mutually exclusive. You cannot have both at once. As Mummery LJ explained in ***Elias*** *at para 117 "the conditions of liability, the available defences to liability and the available defences to remedies differ". The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.'*

2. In **Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601 SC, she said at [17]: '*The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified* '

3. And in the case of **Essop v Home Office; Naeem v Secretary of State for Justice** [2017] IRLR 558 SC, at [25] she held: '*Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.'*

71. In the Supreme Court decision in **Essop and others v Home Office (UK Border Agency); Naeem v Secretary of State for Justice** [2017] IRLR 558

(Naeem), Mr Essop was the lead claimant in a group employed by the Home Office. It was common ground that the relevant *"provision, criterion or practice*" ("PCP") was a requirement to pass a Core Skills Assessment ("CSA") as a pre-requisite to promotion to certain civil service grades. The claimants had failed the CSA and were thus not, at that time, eligible for promotion. A report revealed that black and minority ethnic ("BME") candidates and older candidates had lower pass rates than white and younger candidates, although nobody knew why. Proceedings were launched and it was agreed that a pre-hearing review was required to determine whether the claimants were required for the purposes of s.19(2)(b) and/or (c) to prove what the reason for the lower pass rate was. The tribunal held that they did have to prove the reason. The EAT held that they did not ([2014] IRLR 592). The Court of Appeal held that the claimants had to show why the requirement to pass the CSA put the group at a disadvantage and that he or she had failed the test for that same reason ([2015] IRLR 724).

72. The EAT in **Naeem** at [2014] IRLR 520 had held that the pay scheme was not indirectly discriminatory, as chaplains employed before 2002 should have been excluded from the comparison between the two groups. However, it found that, if it was wrong about that, the pay scheme had not been shown to be a proportionate means of achieving a legitimate aim; there had been various possible ways of modifying the scheme so as to avoid the disadvantage suffered by people such as the claimant, which the tribunal ought to have considered. The Supreme Court, amongst other matters required to consider the impact, in the context of s19 (Indirect Discrimination) the impact of s19(2) (c) A *'cannot show it to be a proportionate means of achieving a legitimate aim*.'.

73. From para 47 the Supreme Court in, **Naeem** described that "*The tribunal had adopted the 'no more than necessary' test of proportionality from the Homer case and can scarcely be criticised by this Court for doing so. But we are here concerned with a system which is in transition. The question was not whether the original pay scheme could be justified but whether the steps being taken to move towards the new system were proportionate. ...*

Where part of the aim is to move towards a system which will reduce or even eliminate the disadvantage suffered by a group sharing a protected characteristic, it is necessary to consider whether there were other ways of proceeding which would eliminate or reduce the disadvantage more quickly. Otherwise it cannot be said that the means used are 'no more than necessary' to meet the employer's need for an orderly transition. This is a particular and perhaps unusual category of case. The burden of proof is on the respondent, although it is clearly incumbent upon the claimant to challenge the assertion that there was nothing else the employer could do. Where alternative means are suggested or are obvious, it is incumbent upon the tribunal to consider them. But this is a question of fact, not of law, and if it was not fully explored before the employment tribunal it is not for the EAT or this Court to do so."

Discussion and Decision

74. The Tribunal has taken into account the EHRC 2011 Statutory Code of Practice and has had regard to the sections of the 2011 Code of Practice to which it has been referred.

75. The Tribunal concludes that the treatment, being the response communicated to the claimant on Tuesday 8 October 2019 and Wednesday 16 October 2019 did not amount to "*less favourable treatment*" within the terms of s13 of the EA 2010, in particular the Tribunal does not conclude that the respondent treated the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances. The Tribunal was not directed to comparators hypothetical or otherwise. The Tribunal concludes that applying a hypothetical comparator of a non-immigrant candidate with a UK qualification with which the respondent was not familiar they would have been expected to demonstrate membership of BACP or equivalent. The Tribunal is not satisfied that this was because of the claimant's race and/or because of the protected characteristic of race more generally, there was no underlying motivation, nor was it the effective cause or predominant cause, and did not have a significant influence.

76. The Tribunal concludes that the respondent's practice as of Tuesday 8 October 2019, of considering that where it did not have sufficient information to verify a course structure and content, in circumstances where a candidate could have addressed same by securing membership of BACP or equivalent was a proportionate means of achieving a legitimate aim within the terms of s19 of EA 2010, including by reference to the provisions of BACP membership providing for of Ethical Framework for Counselling Professions, meeting minimum levels of Continuous Professional Development (CPD), undertaking that professional conduct details will be disclosed to relevant parties where deemed necessary or obligatory and where an individual was removed from the BACP's Register that would be published and further it may be appropriate for the Disclosure and Barring Services and Disclosure Scotland and /or other relevant authorities and employer, if appropriate, to be notified.

77. The Tribunal accepts the unchallenged evidence of respondent that securing individual membership of BACP was something which could have been achieved before the date of the first interview on 18 October 2019 or otherwise before the conclusion of the process of rolling interviews. The Tribunal concludes that it would have be open to the claimant to have advised the respondent of the status of individual membership of BACP in her application, and to have progressed same to meet the respondent's criteria.

78. The Tribunal does not draw any adverse conclusion in relation to non-production of a separate record, to that set out in its e-mails, setting out the decision-making process in relation to the claimant. There was no reason to do so. The respondent e-mails set out an invitation to reapply in circumstances where the claimant had not identified any position in relation to membership of BACP or equivalent. The position outlined in **Wetton** above does not arise.

79. Neither the claimant not the respondent submission proposed any position on recommendation. The Tribunal has reminded itself of the terms of **Lycée Charles de Gaulle v Delambre** 2011 EqLR 948 EAT (**Delambre**), the

Tribunal should only make recommendation that are practicable and while the exercise of the discretion is wide it should not take into account irrelevant considerations and should take into account relevant ones. The Tribunal is not if the view that any recommendation would be merited.

Conclusion

80. Tribunal concludes that the treatment, being the response communicated to the claimant on Tuesday 8 October 2019 and Wednesday 16 October 2019 was not less favourable treatment than the respondent would have treated or would have treated others ("comparators") in not materially different circumstances. The Tribunal was not directed to comparator's hypothetical or otherwise. The Tribunal concludes that applying a hypothetical comparator of a non-immigrant candidate with a UK qualification with which the respondent was not familiar would have been expected to demonstrate membership of BACP or equivalent. The treatment was not because of the claimant's race and/or because of the protected characteristic of race more generally.

81. Neither of the claimants' claims succeed.

82. The Tribunal declines to make any recommendation.

83. The Tribunal in reaching these conclusions has been minded to avoiding a fragmented approach, being conscious of the diminishing the cumulative effect of primary facts and the inferences which may be drawn and considered the totality of the evidence, deciding the reason why the claimant received less favourable treatment. In summary the reason why Ms Burton was not recruited was due to not meeting the essential criteria, for reasons unrelated to her race and or national origin.

84. In coming to this view the Tribunal have applied the relevant case law.

85. If there are further submissions which either party considers it is necessary, in the interests of justice, to address supplemental to their respective existing submissions, they should set out their position in a request for reconsideration in accordance with Rule 71 of the 2013 Rules.

86. The Tribunal apologises to the parties for the delay in this Judgment.

Employment Judge: Rory McPherson

Date of Judgment:8th January 2021

Entered in Register: 22nd January 2021

Copied to Parties