Case Number: 2500794/20(V)

EMPLOYMENT TRIBUNALS

Claimant — Mr M. C. Adjei-Mensah

Respondent — South Tyneside Homes Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at Newcastle by CVP **ON 1 March 2021**
EMPLOYMENT JUDGE GARNON **MEMBERS: Ms J. Maughan and Mr R. Greig**

Appearances
For the Claimant: in person
For the Respondent: Mr H Menon of Counsel

JUDGMENT

The unanimous decision of the Tribunal is claim of race discrimination is well founded. We award compensation of £9292.66 plus interest of £708.94.

REASONS (bold print is our emphasis, italics are quotations and numbers in brackets pages in the trial bundle)

1 Introduction and Issues .

1.1. The respondent made an offer of employment to the claimant conditional upon certain matters including checks with the Disclosure and Barring Service (DBS). The DBS certificate showed convictions between 1985 and 2005. After a meeting at which they were discussed, the respondent withdrew its offer because of the convictions and his inability to demonstrate the conduct which resulted in them would not recur. The claimant's case is by withdrawing the offer the respondent treated him less favourably because of race than it would have a white candidate.

1.2. For direct discrimination the issues are
(a) Has the claimant proved primary facts from which the Tribunal could properly infer the withdrawal of the offer of employment was, at least in part, because of race?
(b) If so, does the respondent provide a non discriminatory explanation?
(c) If not, what remedy should be awarded ?

2. Findings of Fact

2.1. We heard the claimant and, for the respondent Mr Gary Kirsop, Director of Operations. Ms Suzanne Bell, an HR officer, could not attend but we read her statement. We had an agreed bundle.

2.2. The claimant, born 29 April 1964, is British and black. His home town is Watford. He has lived in the North for several years and is employed with Home Group Limited which he joined on 16 January 2016 as a Housing Management Coordinator. He gained a promotion and became a Client Service Manager/Housing Manager from on 19 October 2020 showing that employer does not view him as a safeguarding concern or unsatisfactory for the position.

2.3. His convictions are (i) 29 August 1985, possession of cannabis, fine £40, (ii) 16 January 1991 possession of a controlled drug, fine £75 (iii) 25 April 1991, shoplifting, fine £100 (iv) 17 May 1991 attempted theft from a person, Probation Order, (v) 11 October 1991 theft , breach of probation and failure to surrender to bail, 6 months imprisonment (vi) 20 May 1995 possession of cannabis fine £100 (vii) 19 January 2005, drink driving, fine £300 and banned from driving for 12 months reduced by three months on completion of a rehabilitation course.

2.4. He went to Leeds Metropolitan University in 1996, left in 1998 with an Honours Degree in Public Relations and, he says, has never looked back since. He worked for Yorkshire and Humberside TECs as a Public Relations/Marketing Assistant. After working for TVM2 Advertising and Marketing Limited as a Print Production Assistant he knew he wanted to do something more meaningful, so after a short stint with Jasper Media Company as a Sales Executive, gained a Housing Traineeship with Home Group. He acquired a Post/Graduate Diploma in Housing Policy and Management, a Masters Degree in Housing Policy & Management, and a HND in Business Finance. He has been employed in housing management for nearly 20 years. Pages in the bundle show his CV skills, experience and employment history. Significantly, it shows five years with Newcastle City Council 2008-2013 in a role dealing with vulnerable tenants.

2.5. He cites documents including one published 19 Nov 2015 "*Is Britain Fairer? Race in Britain*". We are well aware race can and does play a part, consciously or sub consciously, in some decisions to appoint and promote, but we must decide this case on its evidence. Many facts are undisputed.

2.6. He first applied for a position of Neighbourhood Officer with the respondent in May 2019. On 20 June 2019 he received a letter saying he had been shortlisted for interview. At the interview he fell short by a point and did not gain the position. He applied again for the same post and on 22 November 2019, received a letter he had been shortlisted again. He was interviewed on 3 December 2019, presented well but again fell short by one point. The area manager stated she was impressed with him. The respondent had a policy, because he was very good, he would not have to interview for the position again. The other candidate accepted the offer, but then had to decline due to a family illness. As the claimant was second highest ranked, he was offered the job on 15 January 2020 (148-150) conditional upon matters set out on page 149, including satisfactory references, proof of qualifications and a DBS check. He contacted an administrator, Mrs Wakefield, to complete the online application form for his DBS check. The DBS certificate was issued on 24 January 2020 (151-154), and sent to the claimant, who then provided the respondent with a copy.

2.7. The “Recruitment of Ex-Offenders Policy” (126-130) says it is illegal to rely on “spent” convictions as a reason not to appoint but some posts are “exempt”, and previous convictions can be considered, whether spent or not (127). The Policy sets out what should be considered when assessing the suitability of a candidate for an exempt post (129), and provides a **discussion** should take place with the candidate. A **discussion** always takes place and the wording of the policy is positive about giving people with a criminal record recognition of successful attempts to “*go straight”.* Mrs Wakefield contacted Ms Bell to arrange a meeting for such a discussion.

2.8. The “Disclosure & Barring Service Policy” (108-125) sets out the way in which DBS checks are to be undertaken (110-111), what posts are “exempt” and how previous convictions should be considered (111-112). The role of Neighbourhood Officer is one which the respondent has designated as “exempt” one, given the job will inevitably involve working with young people and vulnerable adults, many of whom require assistance in complying with the terms of their tenancies, managing their finances, and running their households. Often residents who need help from Neighbourhood Officers have difficulties such as dependencies on alcohol or drugs.

2.9. Section 1 paragraph five (109), says : *South Tyneside Homes is committed to the fair treatment of its staff, potential staff or users of its services, regardless of race, gender, religion, sexual orientation, responsibilities of dependents, age physical/mental disability or offending background. We undertake not to discriminate unfairly against any subject of a DBS check on the basis of a conviction or other information revealed.* Page 111 paragraph 6 "*Considering the relevance of previous convictions"* reads*: When an applicant or an existing employee receives a DBS Disclosure containing details of a criminal record, an objective assessment must be made as to their suitability for the post. We ensure that* ***an open and measured discussion takes place*** *on the subject of any offences or other matter that might be relevant to the position. Failure to reveal information that is directly relevant to the position sought could lead to withdrawal of an offer of employment.*

2.10. Page 112 paragraph 2 reads:
The outcome of the meeting must be documented and signed on the Record of Decision Regarding DBS Check. This form must then be ratified by the appropriate Director and copy retained by HR&OD.
The decision will be based only on the nature and seriousness of the crime and the position applied for. In cases of rejection on the grounds of criminal record, or other information contained in a disclosure, applicants will be offered the opportunity to discuss the reason for rejection. A copy of the policy on recruitment of ex-offenders will be shared with the applicant.
We ensure that all those we employ who are involved in the recruitment process have been suitably trained ***to identify and assess*** *the relevance and circumstances of offences. We also ensure that they have received appropriate guidance and training in the relevant legislation relating to the employment of ex-offenders, e.g. the Rehabilitation of Offenders Act 1974.*

Later it says: "*The Chairperson must arrange to meet with the individual to discuss the matter and* ***request*** *a full explanation. A representative from HR&OD may be present at the meeting and the following must be considered in reaching a decision on how to proceed:*

Does the post involve one to one contact with children, young people and/or vulnerable adults?
What level of supervision will the postholder receive?
Does the post involve direct contact with the public?
Does the post involve any direct responsibility for finance or items of value?
Will the nature of the job present any opportunities for the post holder to reoffend in the workplace?
The seriousness of the offence(s) ***and its relevance to the safety of other staff, customers, clients and property.***
The length of time since the offence(s) occurred.
Any relevant information offered by the individual about the circumstance which led to the offence being committed, for example the influence of domestic or financial difficulties.
Whether the offence was a one-off, or part of a history of offending.
Whether the individual's circumstances have changed since the offence was committed, making reoffending less likely.
The country in which the offence was committed i.e. some activities are offences in Scotland and not in England and Wales, and vice versa.
Whether the offence has since been decriminalised by Parliament.
The degree of remorse has since, or otherwise, expressed by the individual and their motivation to change.
This is not exhaustive and other matters may be taken into consideration.

2.11. Suzanne Bell advises and assists in recruitment exercises undertaken by the respondent. The job for which the claimant applied involves working unsupervised in particular neighbourhoods, and providing a wide range of support, advice and assistance to residents, be they Council tenants or not. This is set fully out in the Job Description (103-105). Ms Bell's first direct involvement was on 4 February 2020 when Mrs Wakefield notified her the DBS certificate contained previous convictions, which she knew would require a meeting to take place. She made arrangements for Mr Kirsop to meet with the claimant. As is usual, she was to be in attendance too. At the time, Mr Kirsop was also the Chair of the Safeguarding Group, which meets monthly to address any safeguarding concerns

about residents,children or employees. The Policy requires the assessment to be approved by the Chair of the Safeguarding Group, but it is practice for the Chair to undertake the assessment rather than approve one carried out by someone else. **The effect of this practice is that the claimant's appointment depends on an exercise of discretion by a single person – Mr Kirsop**.

2.12. On Tuesday 11 February 2020 the respondent wrote asking the claimant to a meeting on 13 February 2020. Shortly before the meeting at 9am, Ms Bell met Mr Kirsop and recalls providing him with an A3 sized copy of DBS certificate (151-154). She believes this was the first time Mr Kirsop had seen it. While he was reading it, she telephoned the claimant at around 8.45am to check he was coming to the meeting because she had not had a reply to her emails of 11and12 February (157). He said he could not attend as he was at work, and had not received any email. He used three email addresses, which he said would account for him not picking up the email. She said the meeting would be rearranged. She told Mr Kirsop who gave back the DBS certificate. The meeting was re-arranged for 21 February. The respondent submits this shows a casual approach by the claimant to the whole exercise. We disagree. It is common for people to have a private email address and work ones and on working days not to check private emails.

2.13. On 21 February 2020 the claimant met with Ms Bell and Mr Kirsop, who both describe the claimant as unprepared for the meeting. Mr Kirsop used a checklist Ms Bell provided him which he had used before (165). Mr Kirsop followed it to the letter asking the claimant to " *talk us through what happened and discuss the circumstances around the conviction – when, what happened etc* ". The claimant had not brought his own copy so the A3 copy of the DBS certificate was turned around so he could read it. There was not the least indication given that Mr Kirsop needs a candidate to talk about why and how he had mended his ways. Mr Kirsop had not seen the CV or any other information made available to the people who interviewed the claimant , and in our judgment most candidates would assume he had. Mr Kirsop told us he was focussed on the convictions themselves in the absence of anything else.

2.14. The first conviction was in 1985. The claimant left his parental home at about 20 years old and got involved with a group of black friends who looked after him, as he had nowhere else to go. He started to smoke cannabis regularly. He has never sold drugs. The groups he joined partied a lot, and went to clubs in London. He lived with his friends for about ten years. He was stopped and searched regularly, and convicted for possession of a small amounts of cannabis.

2.15. He got involved with a girl whom he thought he got pregnant, but she finished with him and he said he "*went off the rails*". He got caught again in possession of cannabis in 1991. He left Watford, and went to live in St. Albans. He had some mental health issues and saw a GP who prescribed Temazepam and Diazepam. One day he was so "high" on them he walked out of a shop with a pair of Levi Jeans was arrested,charged and convicted of theft in April 1991.

2.16. When in a large group of black men in London one Saturday afternoon about eight were arrested because one had attempted to "dip" a lady's handbag and steal her purse. The claimant was found guilty by association. He was given a probation order on 17 May 1991. He was then arrested for shoplifting again. This incident broke his probation and he was sentenced to 6 months in prison in October 1991. He found it difficult to explain clearly each conviction in detail. There were no discussions or meaningful exchanges with Ms Bell or Mr Kirsop.

2.17. In 1995 he was convicted of possession of 0.7 grammes of cannabis and fined £100 at Watford Magistrates Court. The next year he started at University. His last conviction was in 2005 where he attended a Chartered Institute of Housing Award Dinner and on the way back was breathalysed and found to be over the limit. We can tell from the sentence he cannot have been far over the limit. This conviction was in Newcastle Magistrates.

2.18. Ms Bell and Mr Kirsop say he explained the first conviction arose because he "*got in with the wrong crowd*" and started smoking cannabis. He gave a similar explanation about the second conviction, not specifying the drug involved. He said he had been "*out of control*", but then turned his life around. He said the third conviction, for shoplifting, came about because he had been prescribed Temazepam and because of its effects, had taken jeans out of a shop without paying.

2.19. Mr Kirsop then turned over the A3 sheet to show the information on the other side. He and Ms Bell say the claimant appeared *"surprised"*, which we cannot accept because he had sent them the DBS certificate so knew what it contained. He said the fourth conviction, for attempted theft, came about again because of the people he was mixing with. He was with a group of friends, and one of them had attempted to pickpocket someone, and he had been arrested because none of the group wanted to identify who committed the offence, and be a "grass". Ms Bell does not remember him going into any great detail about the offences of shoplifting, breach of probation order, and failing to surrender to bail. Again he said at that time he was in a bad place, but then turned his life around. She does not recall him providing any detailed information about the sixth entry, but in relation to the last one, he said he had been arrested on the forecourt of a petrol station having been at a **training course**, and over lunch had a pint of lager and a glass of wine. We do not accept he would have told them he was at a training course, where, as he says alcohol is not provided, and he freely told us, and them, he had **two** pints of lager. One pint and a glass of wine with lunch would probably not have taken him over the limit. We do not imply Mr Kirsop or Ms Bell are lying, but as Sedley LJ said in Anya(see below) a witness may be honest but mistaken. Not a single note was made throughout a meeting which lasted nearly half an hour by either of them.

2.20. When he had finished explaining his convictions Mr Kirsop shook his hand and Ms Bell showed him out of the building. He felt he had done all the talking. There was no discussion, Ms Bell did not take any notes, and did not contribute to the meeting.

2.21. Ms Bell has attended at least 9 interviews with candidates who have entries on their DBS certificates. She says all the others attended **prepared** not only to talk in detail about their convictions, but expressed remorse, accepted responsibility for their previous behaviour and were at pains to explain why it would not happen again. She says the claimant appeared willing to provide only the minimum amount of information, and at no stage expressed remorse or provided any information about why Mr Kirsop could be confident his previous offending would not recur. He did not mention anything he had been doing since his last offence, his current employment, or anything that had changed which had the effect of altering his behaviour. Mr Kirsop asked at the end if he wanted to say anything else or had any questions, but he did not. Mr Kirsop explained a decision would be made, and he would receive a letter to confirm the decision. Mr Kirsop also explained the DBS certificate itself would be destroyed after 12 weeks. This is a key point of the evidence, to which we will return in our conclusions . It must have been as plain as day to Mr Kirsop and Ms Bell the claimant was not giving them the information about his rehabilitation that they needed to hear. We cannot accept he was the only candidiate who failed to do so, because the question Mr Kirsop read out from his checklist did not ask for that. As an HR professional Ms Bell, and Mr Kirsop as a senior officer must have realised what was needed was an open " prompt" something like " *Can you tell us what changes you have made in your life since your convictions*?". None were given. The question is would they have been to a white candidate in the same or similar circumstances.

2.22. After the claimant left, Ms Bell remained with Mr Kirsop as he considered the information provided. He referred to page 5 of the DBS policy (**112**), and considered each of the bullet points he was required to take into account. Having worked through all 13 ,he told Ms Bell he did not feel able to approve the appointment .She asked him to complete the usual form, a "Record of Decision"

(160), which he did. It gives no explanation for his decision. She prepared a very short typed file note to be retained with the documentation relating to the application (161). After the meeting, she arranged for a letter to be sent to the claimant confirming Mr Kirsop's decision (162-164).

2.23. The file note (161) reads: *Michael Adjei-Mensah attended a rearranged meeting on 21 February 2020. I did not make notes of the discussion. The decision is made following the meeting so the detail of what was said does not need to be referred back to as it is recalled immediately from memory. I am aware DBS certificates are destroyed after a 12 week period including all information relating to the offences. The data is to be held only as long as necessary*.

2.24.Her email of 24 February to HR Admin reads: *Dear both, Following a DBS meeting on Friday 21.2.20 Gary has taken the decision to decline the job offer to the above. Please can you withdraw his offer and send a letter to say he has failed his pre-employment screening (template attached) can you also advise the hiring manager Michael will not be starting work and to review if they have another candidate to offer? Thanks Suzanne.*

2.25. A letter was sent on 24 February 2020 saying everything he had provided was satisfactory but the outcome of the DBS meeting was not, and as a result they could not offer him the job. Again,it gives no explanation for his decision

2.26. It is Mr Kirsop's thought processes we must examine. He has been Director of Operations since 1 September 2014 having worked for the respondent since 4 September 1988. It is an "Arms Length Management Organisation", and undertakes the maintenance and management of South Tyneside Council's housing stock. At the time of the meeting he was Chair of the Safeguarding Group made up of representatives from several operational areas, which meets monthly to promote the safety of residents and staff. The Group often considers reports made by employees carrying out work in tenants' homes, in circumstances where they may have concerns about the welfare of children or vulnerable adults. It addresses concerns about certain tenants, and recommends in certain circumstances no lone visits are made by employees to certain properties. The job conditionally offered to the claimantinvolves working closely with residents, including Council tenants as well as issuing fixed penalty notices in circumstances where Anti-social behaviour is found (103 -105). The job was designated as involving "regulated activity", in accordance with the Safeguarding Vulnerable Groups Act 2006, as amended by the Protection of Freedoms Act 2012.

2.27. On 13 February 2020, he read the DBS certificate while he waited for Ms Bell to check the claimant was coming to the meeting. He remembers it contained references to a number of convictions, but the information about them **did not indicate** the claimant was unsuitable for the job. His decision would hinge on what he had to say about the convictions when they met. He does not recall seeing a DBS certificate with so many convictions. He confirms everything Ms Bell says about the meeting, which is not significantly different to what the claimant says (i) in 1985, he was involved in the "wrong crowd", and started smoking cannabis (ii) in January 1991, having moved around a bit, he had again fallen in with the "wrong crowd"(iii) in April having been prescribed Temazepam the "*next thing he knew*" was he had taken a pair of jeans (iv) as for attempted theft from a person in May 1991 he was one of a group involved . The three convictions , in October 1991, for shoplifting, breaching a probation order, and failing to surrender to custody **were his first and last taste of prison.** Again he said he turned his life around.

2.28. The sixth conviction was in 1996, for possession of cannabis at Watford Magistrates and the amount of cannabis is recorded as 0.7 grammes resulting in a fine of £100. The final conviction, in 2005, was for driving with excess alcohol. The fine was £300 and the ban 12 months reduced by

three on completion of a rehabilitation course. **This is significant. It shows the claimant cannot have been far over the drink/drive limit.**

2.29. Mr Kirsop considered in particular page 5 of the DBS Guidelines & Operating Procedure (112), on which thirteen points are listed. The post involved one to one contact with children, young people and/or vulnerable adults. As for the amount of supervision, Neighbourhood Officers, whilst they report to line managers, are required to carry out their jobs without supervision, out and about in the neighbourhoods which they serve. A Neighbourhood Officer could well be responsible, from time to time, for financial matters and items of value. As for whether the role would present any opportunities for the post holder to reoffend, Neighbourhood Officers are, on occasions, required to work closely with residents who have dependencies on either drugs or alcohol. The "wrong crowd" could easily be the residents with whom he would be required to work, so Mr Kirsop concluded the role **would present opportunities to re-offend**.

2.30. The sixth factor was the seriousness of the offences, and their relevance to the safety of staff, customers, clients and property. He considered the offences to be serious involving drug use, theft, and driving with excess alcohol. He felt the seriousness of two of the offences was heightened by the fact they had been repeated. The driving offence was clearly relevant to the safety of others.

2.31. The seventh factor was how long ago the offences were committed. His statement says: "*Whilst the last offence recorded was in 2005, it was **the last in a course of offending** which had lasted some twenty years, and which appeared to have continued in a number of geographical locations*."

2.32. The eighth factor was the influence of domestic or financial difficulties. He had said some convictions arose when he was in the "wrong crowd", and others as a result of the effects of medication. The offence(s) were committed in England and had not been decriminalised. Basically, up to this point. Mr Kirsop was adopting a "tick box approach". Then come the "subjective" judgments which is where stereotypical assumptions and sub -conscious bias may arise.

2.33. The final factor was whether he had expressed any remorse or otherwise, and had explained his motivation to change. He **could not recall** the claimant **expressing** any remorse. The claimant says he did and we accept that. He may not have made a big show of it. Mr Kirsop says he sought to minimise the seriousness of the drink driving offence, by explaining what drinks he had consumed, but at no point did he acknowledge it was unwise to have done what he did, or even say it would not happen again. We cannot accept that. If asked to talk about a conviction, which he was, it is not **minimising** the seriousness of the offence to say he was just over the limit not blind drunk. Mr Kirsop accepts the claimant said he had turned his life around on three occasions, but adds " *the first two attempts appearing to have been unsuccessful*". He recalls thinking he had expected the claimant to have spoken about the length of time that had passed without any further convictions, and to tell him what had changed between the last offence and the present day, but he made no mention of those matters nor did he attempt to say why Mr Kirsop could be confident his offending was a thing of the past. He did not provide any other details about his situation at the material times or explain if or how his situation had changed so as to make it less likely he would offend again. If that occurred to Mr Kirsop at the time, why did he not ask any questions ? We asked him, and his only reply was he followed the checklist and at the end asked if the claimant had anything to add.

2.34. We have emboldened some words from the policies at 2.9 and 2.10 above which clearly show Mr Kirsop was expected to do more than sit in silence if the claimant was not addressing what he thought relevant. He says the claimant "*appeared unwilling to accept any responsibility for his previous actions, or to take ownership of them even on the basis that he was now a changed person*".

We cannot accept this at all. The claimant was answering the question put to him and it must have been patently obvious to Mr Kirsop he was not understanding what was required. When we see a witness giving answers which reveal he or she has misunderstood a question or issue, we do not leave the witness to flounder, we guide them, without leading them, to address what we need to hear. The irony is, we had to do so with Mr Kirsop, who, despite what happened after the meeting , was explaining only what the claimant did "wrong" at the meeting and not how **he differed from others with whom Mr Kirsop had discussed DBS certificates .**

2.35. On reflection after the meeting, the claimant believed the job was taken away because of his race and colour. He had stated during the meeting he had turned his life around and referred to his work history to date. His post with Home Group Limited, involved direct contact with the public, direct responsibility for finance and items of value. Why was he rejected? The claimant wrote on 2 March (166-167). He asks three questions (i) in what way was his DBS meeting unsatisfactory (ii) why was his work history not taken into account and (iii) why was he **discriminated** against. This would put the respondent on notice it needed to gather evidence and give a reply **not only as to why he was rejected but why others with convictions were not**. On 5 March 2020, Ms Bell received a copy in which he referred to the difficulties he had in recalling many of his previous convictions, due to the length of time which had passed. He said many were a result of the stop and search policy used by the Police. He also mentioned his employment history (166). Ms Bell says he had not raised any of these issues at the meeting. She discussed the complaint with Mr Kirsop, and prepared a response, which he approved. It was sent on 13 March 2020 (172-173).

2.36. Mr Kirsop has done a number of DBS meetings, and this offer of employment is the **only** one he has withdrawn. He saw in the letter of complaint the claimant said he was unable accurately to recall some offences and says "*That may well be a reason why he provided such little information when we met, but he did not say that to me at the meeting. The impression I got was that he was reluctant to tell me about the convictions, particularly the fifth one listed*." That was when he went to prison after four offences in a single year 1991. Nearly 30 years later at the meeting, Mr Kirsop talks of his long history of repeat offending when the DBS certificate itself shows a "cluster " of offences in 1991 , leading to imprisonment , an isolated conviction for possession of a small amount of cannabis in 1995, and a single drink driving conviction resulting in a ban in 2005.

2.37. Mr Kirsop recalls a DBS meeting when he asked an applicant to talk about historic offences, one of which was the theft of a car, and the other assault. He says that person was "*at pains*" to convey how ashamed he was of previous behaviour. The offences were committed when in the military over 20 years earlier at the start of a period of leave. He got into a fight when out drinking with friends, and in an effort to get back to the North East, stole a car rather than waiting for a train. He life was very different at that time. Mr Kirsop says the contrast with the claimant's response was stark. **We cannot see that at all.** We asked Mr Kirsop if that was the only one he could remember and he said it was not, but he had not addressed any other one in his statement. He says his decision had nothing whatsoever to do with race, or anything other than the number and nature of previous convictions, and ***his failure to persuade him*** he was suitable for the job. We asked him if all the others had performed well without prompting at their meetings and he said they had. **We cannot accept that is likely. If he asked the same question from the script to each of them it is more likely than not most or all of them would have done as the claimant did and spoken as best they could about the historic convictions, not their path to rehabilitation.**

2.38. The fourth paragraph of the response to his letter gives the reason why the offer was withdrawn, as:*In your complaint letter you state that it was difficult for you to accurately recall many of the previous convictions as they happened a very long time ago. It is recognised the convictions*

span a number of years, starting in August 1985 followed by January 1991, April 1991, May 1991, October 1991, May 1996 and the last one in January 2005. Twice you stated you had turned your life around however you certificate showed further convictions following these times which, as you state yourself, you were unable to accurately recall the detail of them to the satisfaction of Mr Kirsop.

2.39. Frankly, that tells him nothing. The answer to the second question is that the work history was taken into account at the stage of interviewing for the job, it neglects to mention Mr Kirsop knew nothing about it. The third answer says he does not say which protected characteristic he is relying upon but denies any had an influence on the decision. That is evasive and takes no account of the references in his letter to his race and colour.

2.40. Ms Bell was notified the respondent had been contacted by ACAS as part of early conciliation so the documents relating to his DBS check, which would otherwise have been destroyed, were retained in case they were needed. On 27 August 2020, the respondent received a request for information under the Freedom of Information Act 2000. She provided some information to the Information Governance team at South Tyneside Council, who deal with such matters. She has seen the response sent on 18 September 2020 (175- 177) and believes the contents are accurate. She accepts she is not aware of any other offer of employment being withdrawn due to an unsatisfactory DBS meeting. However, none of the other DBS certificates she has seen had so many convictions which spanned a long period of time.

2.41. The reply to his request shows nine candidates including himself with convictions applied for jobs . From the names he thinks they were 8 white males. All 8 were cleared to work, his offer of employment was the only one was withdrawn in a five year period. There were 9 BAME employees employed by the respondent none in managerial roles. The lowest pay band is 1 and the highest 14. The highest banded BAME employee is Band 7. No BAME people sit on any of its boards. The claimant confirmed when we asked he is not saying this shows the respondent as a whole has a culture which shows racial bias, (a point we deal with in our conclusions) but Mr Kirsop's decision in his case fails to explain why he was rejected.

3. Relevant Law

3.1. Race, which is a protected characteristic under the Equality Act 2010(EqA) includes colour and ethnic or national origins and says

(2) In relation to the protected characteristic of race—
(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular racial group;
(b) a reference to persons who share a protected characteristic is a reference to persons of the same racial group.
(3) A racial group is a group of persons defined by reference to race; and a reference to a person's racial group is a reference to a racial group into which the person falls.
(4) That it comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.

3.2 . Section 13 defines direct discrimination thus:

(*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.*

3.3. Direct discrimination can arise where a decision is taken on a ground that is inherently discriminatory or where a decision is taken for a reason which is rendered discriminatory by the 'mental processes' (whether conscious or unconscious) which led the putative discriminator to do the act (see Amnesty International-v-Ahmed). Malicious intent towards the claimant, is not a requirement However, benign motive does not save a respondent from liability where the causation between the " protected characteristic" and the act complained of is established. As explained in Anya-v-University of Oxford, factors which are not " obviously" racial may point to sub-conscious but still direct, discrimination particularly when good equal opportunities practice exist in an employer but are not followed.

3.4. Shamoon-v-Royal Ulster Constabulary held the key question is the" reason why" the treatment was afforded to the claimant. Glasgow City Council-v-Zafar 1998 ICR 120 held unreasonableness of treatment does not show the reason why something was decided ,neither does incompetence of treatment, Quereshi-v- London Borough of Newham . An overview of the general principles is in the EAT decision Law Society –v- Bahl per Elias J as he then was

*93. There is clear authority for the proposition a tribunal is not entitled to draw an inference of discrimination from **the mere fact** that the employer has treated the employee unreasonably. This is the important decision of the House of Lords in Glasgow City Council v Zafar*

99. That is not to say the fact that an employer has acted unreasonably is of no relevance whatsoever. The fundamental question is why the alleged discriminator acted as he did. If what he does is reasonable then the reason is likely to be non-discriminatory. In general a person has good non-discriminatory reasons for doing what is reasonable…

*100. By contrast, where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. **It need not be, because it is possible he is subconsciously influenced by unlawful discriminatory considerations**…*

101. The significance of the fact the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination. But it will depend upon why it has rejected the reason he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest there is such an explanation, then the fact the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself.."

3.5. The law as stated in Bahl was undoubtedly correct before the statutory reversal of the burden of proof in section 136 which says

(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.

3.6. Reversal of the burden of proof was explained in Igen-v- Wong 2005 ICR 931and Madarassy –v- Nomura International. The claimant still needs to show facts from which a Tribunal **could**, in the absence of an explanation, infer discrimination. In Ayodele-v-Citylink the Court of Appeal held the burden is on the claimant to establish a prima facie case of discrimination that would require explanation from the respondent. It is often instructive to go back to pre-reversal of burden cases . In Anya Sedley LJ cited well-known passage from Neill LJ in King-v-Great Britain-China Centre

"From [the] authorities it is possible, I think, to extract the following principles and guidance. (1) It is for the applicant who complains of racial discrimination to make out his or her case. Thus if the applicant does not prove the case on the balance of probabilities he or she will fail. (2) It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption "he or she would not have fitted in." (3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. These inferences can include, in appropriate cases, any inferences it is just and equitable to draw in accordance with section 65(2)(b) of the Act of 1976 ***from an evasive or equivocal reply to a questionnaire****. (4) Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds,* ***a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination****. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory, it will be legitimate for the tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but, as May LJ. put it in North West Thames Regional Health Authority v. Noone 1988 ICR 813, 822, "almost common sense." (5) It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact it is for the complainant to prove his or her case."*

3.7. Sedley L J added " *It should be made clear that when Neill LJ refers under head (4) to discrimination, he means it in its literal, not its objectionable, sense: that is to say, he is referring simply to a choice or a process of selection such as occurred here. It is not unduly onerous, as has sometimes been suggested, to proceed from the simple fact of such a choice, if it is accompanied by difference in race, to a request for an explanation. In the allocation of jobs by any sensibly-run institution, the explanation will be straightforward: the candidates were interviewed by an unbiased panel on an equal footing, using common criteria which contained no obvious or latent elements capable of favouring one racial group over another; and the best one was chosen. By parity of reasoning, evidence that one or more members of the panel were not unbiased, or that equal opportunities procedures were not used when they should have been, may point to the possibility of conscious or unconscious racial bias having entered into the process. It will always be a matter for the Tribunal's conscientious judgment*.

3.8. Reversal of burden was explained in Ladele-v-London Borough of Islington by Elias LJ :

Whilst the basic principles are not difficult to state, there has been extensive case law seeking to assist tribunals in determining whether direct discrimination has occurred. The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:

(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in Nagarajan v London Regional Transport 1999 ICR 877*, "this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.*

(2) If the tribunal is satisfied the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in Nagarajan *(p.886F) as explained by Peter Gibson LJ in* Igen v Wong*,*

(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in Igen v Wong. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:

"Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer."

If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination. (The English law in existence prior to the Burden of Proof Directive reflected these principles save that it laid down that where the prima facie case of discrimination was established it was open to a tribunal to infer that there was discrimination if the employer did not provide a satisfactory non-discriminatory explanation, whereas the Directive requires that such an inference must be made in those circumstances: see the judgment of Neill LJ in the Court of Appeal in King v The Great Britain-China Centre 1991 IRLR 513.)

(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be the employee has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne Wilkinson pointed out in Zafar v Glasgow City Council

"*it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances."*

Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in Bahl v Law Society 2004 IRLR 799, paras 100-101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to

provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test: see the decision of the Court of Appeal in Brown v Croydon LBC 2007 ICR 897 paras.28-39. The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in Anya v University of Oxford 2001 IRLR 377 esp.para.10.

3.9. Evidence several members of a group defined by a protected characteristic are treated better or worse than people outside that group may point to the protected characteristic being a reason for the difference (West Midlands Passenger Transport-v-Singh) In Anya Sedley L J said
The Tribunal in paragraph 5 of its reasons directed itself correctly in law.., with one arguable exception: it concluded the paragraph with this remark:
"If an employer behaves unreasonably towards a black employee it is not to be inferred, without more, that the reason for this is attributable to the employee's colour; the employer might very well behave in a similarly unreasonable fashion to a white employee."
As Neill LJ pointed out in King, such hostility may justify an inference of racial bias if there is nothing else to explain it: whether there is such an explanation as the Tribunal posit here will depend ***not on a theoretical possibility the employer behaves equally badly to employees of all races but on evidence that he does.***

3.10. Where does all this leave us? If an employer treats a person who is the only person in a group to be treated a particular way, has a protected characteristic which none of the others in the group have and, vitally, is in the same or similar circumstances to the others, it may be enough to reverse the burden of proof. The respondent may still show race had nothing whatsoever to do with the less favourable treatment. **There must be some reliable evidence on which to base a finding the claimant was not in the same or similar circumstances to the others who have been taken on despite their convictions.**

3.11. If a claim of discrimination succeeds the Tribunal must decide what compensation to award. First, it must try to assess what the position would have been but for the **dismissal** and attempt to restore the claimant to that position Abbey National plc-v-Chagger 2010 ICR 397.

3.12. Compensation for injured feelings is not meant to punish. What matters is the effect on the claimant. The summary in Prison Service-v-Johnson 1997 IRLR 162 is :
a "Awards for injury to feelings are compensatory. They should be just to both parties. They should compensate fully without punishing the tortfeasor. Feelings of indignation at the tortfeasor's conduct should not be allowed to inflate the award.

b Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could, to use the phrase of Sir Thomas Bingham M.R., be seen as the way to "untaxed riches."

c Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.

d In exercising their discretion in assessing a sum, tribunals should remind themselves of the value in everyday life of the sum they have in mind. This may be done by reference to purchasing power or by reference to earnings.

e Finally, tribunals should bear in mind Sir Thomas Bingham's reference to the need for public respect for the level of awards made"

3.13. Commissioners of the Metropolitan Police-v-Shaw (which reviews earlier authorities) held an ET was wrong in focusing entirely on the seriousness of the respondent's conduct rather than on the impact on the claimant. The reason ET's sometimes appear to focus on the conduct is in a book on Damages for Personal Injury if a person has been injured in a car accident, one does not read a report about how bad the defendant's driving was, but about clinical findings and scans of the injury. Feelings cannot be scanned! If one watches a boxing match and sees a punch landing, one can imagine how much it hurts by drawing on experiences one has had of being struck. One can convey that to a person who has not seen it, by describing the blow. Then one must remind oneself the person being struck may be a professional boxer with a high pain threshold or a frail person who would be hurt far more by the same punch. ET's start by describing the conduct next asking "*how would we feel if that happened to us*?" and finally "*Is this claimant more or less likely than us to feel hurt having regard to all we know about her*"? . Just to listen to how a witness says she has been affected, risks giving greater compensation to better actors.

3.14. Tribunals put awards into bands in respect of which the Presidents of the Employment Tribunal in England & Wales and Scotland have released Guidance. The bands at the time were: a lower band of £900 to £8,800 (less serious cases);a middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and an upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000. Most "one off" incidents fall in the lower band, a very serious one may exceed it.

3.15. Interest is awarded under the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996 where the prescribed rate of interest is 8% and the period for which it is awarded from the acts to trial except in past loss of earnings when it is from the " mid point date.

4 Conclusions

4.1. Our Employment Judge, sitting in Watford in 2001 with members, tried Rihal-v-London Borough of Ealing . The claimant was a Sikh first generation immigrant who had lived in London for over 30 years .He spoke perfect English with a distinct Punjabi accent. In many years service as a surveyor he not been given as many "acting up" opportunities as his white colleagues and had repeatedly failed to secure promotion to higher managerial grades. His claim of two promotions he had been refused was brought within the time limit for issuing such claims which starts from the date of the refusal, but his evidence covered many historic failures to give him the "springboards" for promotion, such as opportunities to "act up" when a senior colleague was off work . The

evidence also showed those promoted the upper tiers of management were mainly white and/or British by birth. One of the respondent's main witnesses spoke of the higher managers needing to have "*ambassadorial qualities* " meaning they had to "look the part" when they went on behalf of the Council to negotiate with Government departments etc. It all pointed to the existence of a subconscious picture of the type of manager the Council wanted creating a "glass ceiling" for people who did not fit with that image. The EAT and Court of Appeal upheld the decision he suffered direct race discrimination even though we said his manager appeared to be a decent and honest person who denied he was motivated by race at all. We also said we had to make allowances for the respondent's inability due to the passage of time and senior managers having left to give as good an explanation for historic failures as they may otherwise have been able to give

4.2. In that case we had features we do not have here. In Ealing people of Asian origin account for a large proportion of the population and of Council employees, so the difference in proportions at senior management level was conspicuous. In South Tyneside the BAME community is small in comparison with the rest of the community, so the statistics in the last sentences of paragraph 2.41 do not provide a basis for inference as they did in Rihal. That is why the claimant was wise not to pursue that argument. Also there is no positive sign of making "stereotypical" assumptions about people which may point to sub-conscious discrimination.

4.3. That said, it is clear of 9 people who had convictions, the only one rejected was black .Mr Menon's submissions were, as usual, impeccable but his argument the claimant was rejected **and was** black , as contrasted with was rejected **because** he was black side stepped the uncontested evidence the claimant was the **only** one of nine ever to be rejected and, both before and at the hearing, the respondents witnesses came nowhere close to showing a material difference of crcumstances. Mr Kirsop's one example was the only one he mentioned. We cannot accept he was unable to recall, even in outline any of the others. The suggestion the claimant did not "sell " his arguments that he had reformed as was as other did being a material difference was not in the least convincing .

4.4. The striking point was Mr Kirsop and Ms Bell described the claimant as unprepared but at the meeting on 21 February he answered the question put to him. Unlike a job interview where the Job Specification tells the candidate what the interview panel are looking for and it is for him to make the effort to present himself as capable of fulfilling it, as the claimant said repeatedly to us, he had never been challenged about his previous convictions before and had no idea how to prepare or deliver what Mr Kirsop wanted to hear. We would be surprised if the others who had been to DBS meetings did any differently. Any employee who had received a conditional offer would attend and answer what he was asked.

4.5. It was plain and obvious to Mr Kirsop and Ms Bell at the meeting the claimant was not saying what they needed to hear. Yet neither said anything to prompt him. Mr Kirsop could not explain why he did nothing and, more importantly why an HR professional like Ms Bell remained silent.

4.6. The explanation for a cluster of convictions in 1991 being, apart from one lapse into smoking cannabis in 1995, the end of his offending other than the drink driving in 2005 is obvious- he had a taste of prison. Yet Mr Kirsop drew no distinction between the types of offence. As we said at 2.33 above, Mr Kirsop accepted the claimant said he had turned his life around on three occasions, but concluded the first two attempts appeared to have been unsuccessful, the claimant had a long history of offending, did not say enough about the length of time that had passed without any further convictions, so he could be confident his offending was a thing of the past . He went on to say if he now, at the age of 55 the claimant had to deal with young men who, as he had when he

was under 30. abused drugs, he would be likely to relapse into drug offences . The logic of that is inexplicable.

4.7. In our judgment the claimant has done more than enough to raise the distinct possibility of stereotypical assumptions being made a person of his race would be more likely to re-offend than the 8 white candidates whose criminal records did not result in revocation of a job offer. We then look in vain for a non discriminatory explanation. Not only in answer to his complaint was there none but to us at this hearing where Mr Kirsop and Ms Bell must have known what was required was a detailed explanation, from memory if no documents still existed, of why the others were able to convince Mr Kirsop and Ms Bell they had reformed, all we had was one example. Even that was not clear as to what was so different.

4.8. The abiding impression was the claimant was viewed as a "lost cause" even before the meeting and at the meeting no effort was made to find out why he thought he was not . None of the positives he had shown at interview, his many years in the housing sector or his qualifications were enough to overcome a record which showed he had committed no offence at all for the last 15 years and none relating to drugs or dishonesty for 24 years. As explained in Zafar, Bahl , King and Anya we are not making a leap from our view or the mere fact the process was unreasonable to a finding of discrimination. We find the distinct lack of explanation for an outcome which defies logical analysis and for sitting in silence while the claimant floundered at the meeting drives us to the distinct possibility the claimant was not wanted in the job by Mr Kirsop due to some stereotypical view of men of colour and/or some sub-conscious bias against them. The respondent has failed to discharge the burden of showing race had no effect on the decision to reject an otherwise suitable candidate while allowing white men with convictions to take up a job offer.

4.9. The losses the claimant incurred as a result are not as high as in his schedule of loss prepared some time ago. His gross salary with Home Group was £19,560pa. The Neighbourhood Officer position had a salary starting at £ 24,797pa. He was promoted on 19 October 2020 to a salary of about £24000 per annum. In **net** terms he would have been £1292.66 better off had he taken up the job with the respondent in mid March for the next seven months. Then the difference would have been eliminated. Interest from the mid point date to this judgment at 8% p.a. is £68.94.

4.10. An award for injury to feelings must reflect his vulnerability to such injury being heightened by his having achieved so much to prove himself worthy of holding a job such as the one he applied for and having his aspirations dashed. That said, it was an isolated incident and he has recovered well so an award close to the top of the lower band of £8000 seems just. Interest for almost exactly one year is £640.

Employment Judge T.M. Garnon
Judgment authorised by the Employment Judge on 2 March 2021