



EMPLOYMENT TRIBUNALS

Claimant: Mr D Ireland

Respondent: University College London

Heard at: London Central Employment Tribunal
(Remotely by CVP)

On: 23 – 25 March 2021

Before: Employment Judge Brown

Members: Mr D Kendall
Mr R Baber

Appearances

For the claimant: In person
For the respondent: Ms M Tutin, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

- 1. The Respondent did not discriminate against the Claimant because of race.**

REASONS

Preliminary

1. By a claim form presented on 6 October 2019 the Claimant brought a claim of race discrimination against the Respondent. The dates for ACAS Early Conciliation were 18 August 2019 to 10 September 2019.
2. The Claimant applied for a post with the Respondent. A conditional offer was made and subsequently withdrawn. The Claimant says the withdrawal was because of his race. The Respondent admits making an offer to the Claimant which was withdrawn. It asserts that the withdrawal was justified and that – in any event – the decision was not influenced by race.
3. The issues between the parties were identified at a Telephone Preliminary Hearing on 6 May 2020 as follows:

Time limits / limitation issues

3.1. Were all of the claimant's complaints presented within the time limits set out in sections 123 of the Equality Act 2010 ("EQA")?

EQA, section 13: direct discrimination because of race (which the Claimant describes, for purposes of this claim, as "white")

3.2. Did the respondent subject the claimant to the following treatment:

3.2.1. On 24 June 2019, withdrawing a conditional offer.

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

3.4. If so, was this because of the claimant's race.

Remedy

3.5. If the claimant succeeds, in whole or part, the Tribunal will 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.

4. At the start of the hearing the Claimant said that he had made a number of applications which the Tribunal had yet to deal with. The Respondent said that all applications had already been decided, save the Claimant's application for a witness order.
5. EJ Brown asked the Claimant to list his outstanding applications. The Claimant had made an application for reconsideration of a decision made earlier in the case. EJ Brown explained that the reconsideration application would need to be dealt with by the Judge who had made that decision.
6. The Claimant said that he had applied for specific disclosure of 3 categories of document. Ms M Tutin for the Respondent explained the Respondent's position on each:
 - 6.1. Documents relating to the decision made by HR documents, showing the reasons for rejecting the Claimant's travel expenses. The Respondent said that all documents relevant to the decision to reject the Claimant's travel expenses had already been disclosed.
 - 6.2. Documents recording the race of the other 2 candidates for the job; documents recording the race of the Claimant's prospective immediate line manager who was not chosen to be on the selection panel. The Respondent said that its witness would give evidence about this and the Claimant could cross examine her.
 - 6.3. Documents relating to the appointment of the 3rd panel member. The Respondent said that all these documents had already been disclosed.
7. The Tribunal ordered the Respondent to disclose any records it held of the 2 other candidates' race/ethnicity and the race/ethnicity of the Claimant's prospective manager who did not sit on the interview panel. These documents were relevant.

It would be quicker and easier to address the issue of these people's race by disclosing relevant records than cross examination on the subject.

8. The Respondent then disclosed these records, before the Claimant gave his evidence.
9. The Tribunal did not make any order regarding the other documents the Claimant sought. The Respondent had said that all such documents had already been disclosed. The Tribunal would not make an order where it was futile to do so. If it later appeared that the Respondent had failed to disclose relevant documents that would be a serious matter.
10. The Claimant asked the Tribunal to call a member of the Respondent's HR department, of the Tribunal's own motion, rather than on his application, so that the Claimant could cross examine them. He said that the Respondent had made assertions in its Response for which there was no evidence. The Claimant wanted to cross examine a Respondent HR witness, to prove that the assertions were incorrect. The Tribunal said that, if there was no evidence to support some of the Respondent's contentions, then the Claimant could make submissions about that. It was not necessary for a fair hearing for a witness to be called, and cross examined, to prove that lack of evidence. It would not be in accordance with the overriding objective to order a witness to attend to prove an absence of evidence – this would increase the length of the hearing and costs, and would not alter the state of the evidence.
11. The Tribunal heard evidence from the Claimant and from Loleta Fahad, the Respondent's Research Operations Manager at the relevant time.
12. There was a Bundle of Documents and a Claimant's Additional Bundle of Documents. Both parties made submissions.
13. During submissions, the Respondent asked the Tribunal to take into account that the Claimant had allegedly accused the Respondent and/or its representatives of misleading the Tribunal and/or fabricating evidence, without substantiating such serious allegations and had used unpleasant and sometimes abusive language in correspondence regularly. The Respondent's written submissions provided page references for relevant correspondence. The parties had not drawn this correspondence to the Tribunal's attention during evidence and the Claimant had not been cross examined on it. The Tribunal indicated that, in making its decision on liability, it would not take into account documents it had not already seen, or heard any evidence about. This would not be a fair way to proceed.

The Facts

14. Loleta Fahad, the Respondent's Research Operations Manager, commenced a recruitment exercise for two Research Operations Administrators in May 2019.
15. Shortly afterwards, a Project Administrator post also became vacant and, instead of advertising that role separately, Ms Fahad decided to recruit a third Research Operations Administrator.

16. The Research Operations Administrators roles were advertised on a 6 month fixed-term basis. The Claimant told the Tribunal that the relevant job advert “used BME positive action.” He said he was not alleging that the Respondent had acted wrongly in doing so.
17. The Claimant applied for the Research Operations Administrator posts. He named three referees on his application form, Laura Groves - University of Oxford (five months employment in 2018, most recent employer), Pompimon Adams - Mahidol University Thailand (seven months employment in 2016-17) and Emma Montgomery - Plymouth University (four months employment in 2016).
18. After the closing date for applications, the Respondent’s HR department sent Ms Fahad anonymised versions of the candidates' applications. Ellora Khan, who would be the line manager of at least one of the anticipated appointments and who had familiarity with the vacancy, assisted Ms Fahad to shortlist individuals for interview.
19. The anonymised applications displayed the candidates' employment history, qualifications and their supporting statement. The candidates' ethnicities were not provided on the anonymised applications.
20. Ms Fahad told the Tribunal that she considered that the application which she now knows to be the Claimant’s, p 311 – 317, was strong, in that it showed that he had had a variety of fixed term research administration experience, from a range of universities. His experience of working with a wide range of funders, and the fact that he had worked abroad, suggested that he could work well with different people. The tasks and responsibilities he had undertaken in these previous roles largely matched what was required of a Research Operations Administrator. The Claimant did not challenge Ms Fahad’s on her evidence that she thought that his application was strong.
21. The Respondent's Recruitment and Selection Policy in place at the time stated that "all interviews must be conducted by a panel", p155. The panel must "consist of a minimum of three people including the immediate line manager of the vacant post, a colleague who is familiar with the area of work and a third person, preferably from outside the department to balance the panel's perspective", p156. The Policy also stated that the panel must reflect an ethnicity balance wherever possible, p156. It stated that "single sex panels must be avoided", p 156, and that panel members must have "received training in fair recruitment", p156. The Policy also advised “Consider if the appointment is to a department providing services to the rest of the university, inviting an end user of these services to join the panel.” P156
22. The Respondent’s Fair Recruitment Specialist Initiative Document, issued by the Office of the President and Provost, says, “... diverse recruitment panels are regarded as a significant element in fair and effective recruitment. It adds a variety of perspectives to decision-making, helps mitigate against 'cloning' and the perpetuation of current profiles, reduces the possibility of stereotyping, can improve candidate performance by reducing 'stereotype threat' and is a visible demonstration of UCL's commitment to diversity and inclusion.” p470.

23. Ms Fahad told the Tribunal that she was due to sit on the interview panel as the Hiring Manager who was familiar with the area of work. She said that Ellora Khan, as an immediate line manager for the Research Operations Administrator role, also joined the interview panel. Both Ms Fahad and Ellora Khan identify as BAME.
24. The Claimant cross examined Ms Fahad about why Gill Eaton, who is white, and was to be the Claimant's line manager, was not chosen for the interview panel. Ms Fahad said that there had already been 2 recruitment rounds for these posts, which had failed to appoint to the posts. The 3 potential posts were going to be managed by Gill Eaton and Ellora Khan. Ms Eaton and Khan therefore shared the relevant workload. In the last recruitment round, Ms Eaton had been on the recruitment panel. She had a heavy workload and it was not fair for her to have to take time out of her diary again so soon, to be on another recruitment panel. In any event, Ms Fahad said that it was only decided after the interviews which candidate would be allocated to which manager. After the interviews, the managers looked at the Claimant's skills and experience and decided that the department Ms Eaton was managing would be a good fit for him.
25. The Tribunal considered that Ms Fahad's evidence on this was very credible. She explained the history of the recruitment processes and why it was not appropriate for Ms Eaton, who had other managerial tasks, to be required to sit on this interview panel. The Tribunal accepted her evidence.
26. Having identified 2 panel members from within the relevant department, Ms Fahad was required to find a further panel member from outside the department. As the Policy stated that "single sex panels must be avoided", p 15, and Ms Khan and Ms Fahad identify as female, Ms Fahad said that the priority was securing a third panel member who identified as male. Panel members also needed to have "received training in fair recruitment", p156.
27. The Tribunal noted that the Respondent's Policy was explicit that it was a mandatory requirement that a panel should not be single sex, and that it was also a requirement that panel members must be trained. It accepted Ms Fahad's evidence that her priority was to comply with these mandatory policy requirements.
28. Ms Fahad told the Tribunal that she initially considered Nick Mulliss, Head of Faculty IT for the Institute of Education, and who is white, as the third panel member. She said, however, that Mr Mulliss was on annual leave over the interview period. The Claimant cross examined Ms Fahad about Mr Mulliss' ethnicity and his lack of availability. The Claimant had not sought a record of Mr Mulliss' ethnicity. Ms Fahad said, "Everyone knows Nick Mulliss is white". She told the Tribunal that, when she had started typing an email to Mr Mulliss on Outlook, the programme automatically showed his "out of office" message, which stated that he was on leave at the relevant time.
29. The Tribunal accepted Ms Fahad's evidence on this, and that Mr Mulliss' ethnicity is white. There was no reason to disbelieve what she said in this regard.
30. Ms Fahad then contacted two colleagues, Chris Routh (Short Course Coordinator) and Richard Palmer (Programme Services Coordinator), by email, to see if they

were available, p 487 – 490. Ms Fahad had sat on interview panels with both in the past and considered that they were reliable colleagues, who would give genuine feedback.

31. Both Messrs Routh and Palmer were unavailable on the date the interviews were initially scheduled, Thursday 6 June 2019. Ms Fahad moved the interviews to Friday 7 June 2019, when Mr Palmer was available. Mr Palmer is BAME. Mr Routh is white.
32. The Claimant cross examined Ms Fahad about her moving the interviews to Friday 7 June, but not establishing whether Mr Routh was available that day. The Claimant put to her that she had gone straight to Mr Palmer as a panel member for 7 June. Ms Fahad responded that she had set aside that week for interviews when she had advertised the roles. She said that, when Mr Palmer had replied to her email, he had offered Friday 7 June as an alternative. She said that Mr Routh was already interviewing all day on Thursday 6 June; and he was a line manager with other work to do.
33. In Mr Routh's email of 28 May 2019, replying to Ms Fahad's enquiry about interviewing on 6 June, Mr Routh said, "I've checked my availability that day and I am sorry to say that I cannot be on an interview panel with you because I'm on an interview panel for a post in this office! I'm sorry I cannot help you this time." P487.
34. When Mr Palmer replied also on 28 May 2019, p489, he said, "I've got interim Exam Boards next Thursday and so won't be able to help out this time - sorry! I'm free all day next Friday, if that's any use."
35. The Tribunal observed that Mr Palmer's email made an offer to assist on 7 June. Mr Routh's response had an air of finality regarding his inability to assist. The Tribunal therefore believed Ms Fahad's evidence that she accepted Mr Palmer's offer to interview on 7 June. That was the sensible and logical response to the emails from Messrs Routh and Palmer.
36. The Claimant contended that Ms Fahad could have approached a service recipient - in this case, a researcher - of which the Respondent would have hundreds, and many of whom would be white males. The Claimant told the Tribunal that, in his view, Ms Fahad had made a token effort to include a white colleague on the panel.
37. Ms Fahad told the Tribunal that it would not have been appropriate to ask a researcher to be on the panel. Panel members needed to understand the work the team did, and how it was prioritised and executed. She said that she had wanted panel members with a line manager background. She said that she was happy with the panel members; she considered that they were fair and understood the work of the team.
38. The Claimant cross examined Ms Fahad about the fact that all panel members were BAME. Ms Fahad told the Tribunal that she was not concerned that the interview panel would consist of three BAME individuals, as she was confident that all were committed to recruiting the best candidates, irrespective of their own race and the race of any candidates they would be interviewing.

39. The Tribunal was satisfied that, when Ms Fahad was trying to appoint a 3rd panel member, she tried 3 managers, 2 of whom were white and one of whom was BAME. The only reason that the BAME 3rd panel member was eventually selected was that he had made himself available to attend an interview panel in the relevant week.
40. Initially, there were 4 candidates due to be interviewed for the role of Research Operations Administrator. One dropped out, so only 3 were interviewed.
41. On 30 May 2019, as required by the Respondent's interview travel expenses policy, the Claimant requested pre-approval of a train fare from his home in Yeovil to the interview. This request was declined on 5 June 2019 via email from the Respondent's HR coordinator, p357. The Claimant did not immediately challenge this.
42. The interviews for the Research Operations Administrator posts were conducted on Friday 7 June 2019. The interview panel scored the candidates against the criteria for the role, using an interview grid, p75.
43. The Claimant was Candidate A. Candidate B was an internal candidate and Candidate C was external.
44. Ms Fahad told the Tribunal that Candidate B appeared eager to learn more about research administration, and performed well in the interview, scoring 17 out of 27. Candidate C struggled during the interview, scoring 11 out of 27, p75.
45. Ms Fahad gave evidence that the Claimant performed best out of the 3 candidates at interview. He gave clear examples when answering questions and presented in a very professional manner. He scored 18 out of 27, p75.
46. The panel decided that both the Claimant and Candidate B would be made conditional job offers, but that Candidate C would be rejected, based on their interview performance, pp 73 and 76.
47. Ms Fahad told the Tribunal that, during the interview, she perceived both the Claimant and Candidate B to be white, and she perceived Candidate C to be BAME.
48. The ethnicity records disclosed by the Respondent recorded that Candidate C was BAME, but that Candidate B had withheld their ethnicity. The Claimant contended that the Respondent could have produced some other evidence of Candidate B's ethnicity like their Identity Badge. Ms Tutin, for the Respondent, said that an ID badge would not be proof of someone's ethnicity.
49. The Tribunal observed that the Claimant did not challenge the fact that Ms Fahad viewed herself as BAME, Ms Khan as BAME and Ms Eaton as white. There was no reason for the Tribunal to disbelieve what Ms Fahad said about candidate B's ethnicity.

50. On 11 June 2019 Ms Fahad telephoned both successful candidates to tell them, informally, that they had been offered the post, subject to the receipt of satisfactory references.
51. The Claimant told her that he wished to start as soon as possible and, on the same day, Ms Fahad wrote to Grace Jackson-Cole, Recruitment and Payments Coordinator, saying, "Dominic ... confirmed that he is available to start as early as next week! Can you please take this forward and request references, etc.? As Dominic is available and keen to start as soon as possible, I would be grateful if his reference requests could be sent out as soon as possible.", p73.
52. Ms Fahad told the Tribunal that she wanted the Claimant to start as soon as possible. The Tribunal considered that her email to Ms Jackson-Cole on 11 June 2019 reflected that wish.
53. Ms Fahad told the Tribunal that, if Candidate C had performed better at interview, it was highly likely that they would have been offered a post as well, because of the intensity of the workload within the team at the time.
54. On 12 June 2019 the Respondent sent the Claimant a formal offer of employment. The offer letter stated that "this offer will be subject to the receipt of satisfactory references and completion of UCL pre-employment checks", p79. A follow up offer was sent, at an increased salary, on 18 June 2019, subject to receipt of satisfactory references as before, p81.
55. On 19 June 2019, Grace Jackson-Cole emailed the Claimant's 3 referees, asking for a reference, p88. She said,
- "The above-named is being considered for the position of Research Operations Administrator and has indicated that you would be willing to provide a reference. Please find the job description attached.
I would be grateful if you would confirm:
- Title and service dates at your organisation:
 - Employment relationship to you as a referee:
 - Sickiness/absence record over the last 24 months:
 - Whether there any current formal disciplinary warnings:
 - Reason(s) for leaving your employ (where applicable):
 - Comments regarding suitability for the post:
- May I take this opportunity of thanking you in advance for any help you are able to give; your prompt reply would be much appreciated."
56. Ms Fahad told the Tribunal that the process of contacting referees and managing the references was an HR function, and Ms Fahad was not involved in communicating with the referees.
57. Responses were received in respect of the Claimant from Referees 1 and 2.
58. No response was received from Referee 3. Ms Fahad told the Tribunal that there was no "out-of-office" reply from that referee, either.

59. Ms Jackson-Cole sent a follow-up email to referee 3 on Monday 24 June 2019, at 14.36, saying, "Apologies for chasing you, I am sure that you are busy." P91.
60. The Claimant told the Tribunal that referee 3 was, in fact, on maternity leave and that she must have had her "out- of-office" response activated at the time.
61. The Tribunal noted that, when Ms Jackson-Cole emailed Ms Fahad at 15.02 on 24 June, enclosing the referee 1 and 2's references, she said that referee 3's reference was "pending". She did not mention that she had received any out-of-office response. If an out-of-office response had been sent that day, she would have received it almost immediately, and before she emailed Ms Fahad.
62. There was no out-of-office response, in the documents in the Bundle, to either of the emails Ms Jackson-Cole sent to referee 3.
63. The Tribunal accepted Ms Fahad's evidence that no out-of-office was received from Referee 3. There was none on the bundle. Ms Jackson-Cole, who was collecting the references, sent emails which appeared to indicate that she was still expecting a response from referee 3, rather than she had received an out-of-office response indicating that referee 3 was on maternity leave and therefore would not be in a position to provide a reference.
64. Ms Jackson-Cole emailed Ms Fahad and Sam Reid, Human Resources Business Partner on 24 June 2019 at 15.02, attaching the two references for the Claimant and asking how they wished to proceed in light of the responses, p95.
65. Ms Reid is Ms Fahad's senior HR contact for the Research Operations department.
66. Referee 2 had emailed briefly, on 19 June 2019, saying, "I decline to provide a reference for this candidate. Please accept my apologies for any inconvenience." p88. Referee 2 did not give a reason for failing to give a reference.
67. Referee 1 had replied, on 24 June at 14.46, " Apologies delay (sic), I am actually relocating from Plymouth to York at the end of this week, so it's been pretty manic. Dominic was only with this team for a short while, he didn't finish his probation period and it would have been unlikely that he would have successfully completed this probation.... Dominic was not in post long enough for me to be able to give a full assessment of suitability, there were a number of areas of weakness". P89.
68. Ms Fahad replied to Ms Jackson-Cole on 24 June at 15.10 saying, "In light of the emails received so far, I am not prepared to proceed with the appointment and would like to withdraw the offer. Referee 3 is the last place of employment, but even if they came back with a very strong reference, Referee 2 and Referee 1 employed Dominic prior to this and we have one refusal and the other is not favourable." P94.
69. Ms Reid replied at 15.14 the same day saying, "I would consider these unsatisfactory references." P 94.

70. Candidate B had already passed external referencing in 2016, when they first obtained a job at UCL. As a result, they needed one internal reference.
71. Candidate B's reference from their line manager stated, p103: "Comments regarding suitability for the post: [Candidate B] has been working at grade 6 level for the last 3 years and has been helping with research finance over the last year. [Candidate B] enjoys the research finance side and this secondment will give [them] opportunity (sic) to work fully in research finance administration."
72. There were no negative comments about Candidate B in their referee's response.
73. The Claimant pointed out to the Tribunal that Ms Fahad's email of 24 June 2019 at 15.10, p94, was sent within only 8 minutes of Ms Jackson-Cole sending her the referee responses update email, p95. He said that Ms Fahad decided to 'withdraw the offer' as a negative snap judgement, rather than a carefully considered review of options. He said that she did not seek input from the panel, or advice from HR, or inform the Claimant that references from his two most recent employers had not been received. He said that she had not sought clarification from the Claimant and did not appear to have conscientiously considered her options with an open mind. The Claimant said that all this bore the hallmarks of unconscious bias.
74. The Claimant told the Tribunal that in such situations, it is common practice in other UK universities to have policies advising that assumptions should not be made by recruiting staff and that further enquiries with the referee and/or the candidate should take place, in order to obtain objective facts and mitigate bias risk.
75. He drew the Tribunal's attention to policies from other Russell Group universities, including a policy used by both the Universities of Cambridge and Warwick, p243, and University of Warwick p390, states:

"If a reference is received that questions the suitability of the individual to be appointed, guidance should be sought from the relevant H R Business Manager/Adviser before any action is taken (e.g. a decision is made to withdraw an offer).

Important points to consider:

- Many organisations outside of higher education have a policy of providing only factual confirmation of an individual's employment (e. g. dates of employment, job title). Applicants should not be disadvantaged by such a standard corporate reference being provided; this will normally be no reflection upon them.
- If a reference contains negative factual information, the recruiter should consider whether or not this information is relevant (e.g. whether the previous employment is similar to the vacancy in question), and if so whether it is sufficient to render the individual unsuitable for the employment in question. It should be remembered that the fact that someone had a problem in his or her previous employment does not necessarily mean that he or she will be unsuitable for a new or different post.
- If a reference contains negative or adverse comments about a prospective recruit that are based on opinion rather than fact, the recruiter should not automatically assume that this information is accurate. The information may

have been given as a result of bias or personal dislike, or may be based on a misunderstanding or something outside the individual 's control.

- Where the references obtained do not provide sufficient or satisfactory information, the recruiter should consider seeking further information, for example, by telephoning the referee to ask for clarification or requesting additional references from alternative sources (with the applicants consent).
- The recruiter should also give the applicant the opportunity to provide an explanation for any discrepancies between the information that he or she provided and the information disclosed in the reference. ”

76. UCL does not have such a policy in relation to references.

77. Ms Fahad was cross examined about her apparently rapid decision to withdraw the Claimant's conditional offer.

78. Ms Fahad's evidence was that she believes that it is not appropriate to confirm an appointment without satisfactory references being received. She said that the responsibility for identifying suitable referees and providing their contact details lies with the job applicant.

79. Ms Fahad told the Tribunal that the reference from referee 1 was clearly not a satisfactory reference. It did not support what the Claimant had written on his application form or said in his interview, nor did it confirm his suitability for the role of Research Operations Administrator. Ms Fahad said that she considered the references from Referees 1 and 2 to be unsatisfactory and, even though Referee 3 was the Claimant's most recent employer, her view was that it did not matter what they might say. Ms Fahad said that she had sufficient doubt about the Claimant's suitability for the role based on the reference received from Referee 1 and the refusal to provide a reference from Referee 2 to make a decision to withdraw the Claimant's offer.

80. Ms Fahad agreed that she would and should interview candidates, according to a Non bias commitment in the Respondent's Policy which said, “ I will treat them all fairly and objectively. I will not stereotype or make assumptions about them. I will treat them as an individual.”

81. She agreed that panel discussions would mitigate any risks of bias in the interview process.

82. However, she did not agree that the interview panel would also be involved in discussing references which were received. She said that it was the team with whom the candidates would work who would make a decision on references.

83. Ms Fahad denied that she had made a peremptory decision within a few minutes of Ms Jackson-Cole's email enclosing the references. She told the Tribunal that she had been telephoning Ms Jackson-Cole to see what was happening with the references, particularly because the Claimant was available to start as soon as possible and the team wanted the Claimant in post. She said that she had also spoken to Ms Khan and Eaton, to let them know that the references were not

what the team were expecting. She denied that she had made decision by herself. She said that Ms Khan sat in the office 2 desks away and she kept her informed of process and what was happening.

84. Ms Fahad agreed, in cross-examination, that she had not spoken to the original panel before making her decision, but said that she had discussed the decision with the line managers, Ms Khan and Ms Eaton.
85. Ms Fahad was cross examined about making assumptions and bias. She said that "the alternative to making assumptions is gathering facts". She said, "I look for references which confirm what the candidate has said in their application and interview. If a reference does not confirm the strengths and qualities of candidate then it is not satisfactory. I have never had an instance like this before where I have not had at least one strong reference for an individual."
86. The Tribunal accepted Ms Fahad's evidence that she had been following up the references with Ms Jackson-Cole by telephone, before Ms Jackson-Cole's email on 24 June. Given that there had been two failed recruitment processes and the Claimant had performed best in interview and was available to start quickly, it was entirely credible that Ms Fahad was chasing his references, with a view to the Claimant commencing in post as soon as possible.
87. The Tribunal also accepted that Ms Fahad discussed the Claimant's references with Ms Khan and Ms Eaton. They had clearly all been discussing the Claimant commencing in post, as they had already decided to allocate the Claimant to Ms Eaton's team, after the interview. It was likely, given that they worked in close proximity to each other, that Ms Fahad did consult with them as she described. It was also highly likely that Ms Fahad consulted Ms Eaton about the Claimant's references, given that he had been allocated to Ms Eaton's team.
88. From the email chain between Ms Reid, Ms Fahad and Ms Jackson-Cole, Ms Reid also agreed with the decision to withdraw the offer. She advised Ms Jackson-Cole as to the wording to use when telling the Claimant that the offer had been withdrawn, p92a.
89. Ms Jackson-Cole emailed the Claimant on 24 June 2019 saying that: "I regret to inform you that due to receipt of unsatisfactory references, we will not be proceeding with the appointment, and are withdrawing our offer of employment'. P99.
90. On the same day, the Claimant emailed Ms Fahad asking, "What has happened here, particularly due to Grace's use of the plural "receipt of unsatisfactory references", p99.
91. Ms Fahad consulted with Ms Reid as to how to respond, p97 - 98. On 26 June she replied to the Claimant saying, p101, 'Of the three referees put forward in your application form; one declined to provide a reference, another indicated that you left during your probationary period, and the third we did not receive. On this basis, the requirement of satisfactory references has not been met. The appointment was subject to this condition being met, so on that basis, we are withdrawing the offer'.

92. The Claimant questioned the decision further and said he wished to raise a formal complaint. He received responses from Chloe Milano, Head of HR for the Institute of Education and from Peter Warwick, Director of Employee Relations. Ms Fahad was not involved with those communications.
93. Candidate C, the unsuccessful BAME candidate, was not offered a role when the Claimant's offer was withdrawn. A further recruitment round to fill the vacant role did not take place.
94. The Claimant later contacted his referee 2, asking if she had been asked to provide a reference. Referee 2 replied, on 16 July 2019, saying "No, I have not been contacted. Please ask them to contact HR for work reference." p322. Referee 2 appears to have misled the Claimant in her reply, as she had been contacted and had been declined to provide a reference. She had not directed Ms Jackson-Cole to Referee's HR department for the relevant reference.

Travel expenses

95. The Respondent's 2016 Race Equality Charter Mark application form says, "In 2013 we introduced anonymised recruitment for all Professional Services posts. The online system now automatically removes candidates' names and addresses from the application form so it is much more difficult to infer a candidates ethnicity. We consider anonymisation an important tool in fair recruitment and it gives us more confidence that bias may be less of a feature in shortlisting." p9, Additional Bundle.
96. Before the interviews, Ms Jackson-Cole emailed Ms Fahad on 3 June 2019 to notify her that a candidate had asked whether their train fare of £64.20 could be reimbursed, p356. She did not say which candidate this related to.
97. Ms Fahad had not been asked to authorise interview travel expenses before, and spoke with HR regarding UCL'S policy on travel expenses. She was advised that interview expenses are at the discretion of the department, who have the right to decline any expenses deemed to be unreasonable.
98. Ms Fahad responded to Ms Jackson-Cole saying, "Although in principal I'm happy to cover interview travel expenses, that's quite a lot of money. I assume the person is travelling from their permanent residence, but do you know where they're located?" p355.
99. Ms Jackson-Cole notified Ms Fahad that the candidate was travelling from Yeovil, page 355. Ms Fahad responded, "For a number of reasons I'm not prepared to cover the travel costs. I don't know the personal circumstances but I find it strange that somebody based in Yeovil wishes to travel to London to interview for a Grade 6 job", p355.
100. Ms Fahad told the Tribunal that she had ultimately decided that it was not reasonable for the department to pay the expenses of a return train ticket from

Yeovil because the fare was high, and candidates rarely claim expenses in any event, p 357.

101. It was not in dispute that Ms Fahad was unaware throughout this exchange, that it was the Claimant who had asked for his travel expenses to be covered.
102. The Claimant contended that Ms Fahad would have known, from the fact he was travelling Yeovil, that he was likely to be white. He relied on the Respondent's 2016 Race Equality Charter Mark application form in saying that it has been acknowledged that his address could reveal his ethnicity.
103. Ms Fahad said in evidence that, in hindsight, she should simply have agreed to pay for the expenses. In cross examination, however, she said that she would have made the same decision in relation to a candidate who lived in Leicester.
104. The Claimant later challenged the decision and his expenses were paid on 31 October 2019.
105. The Tribunal accepted Ms Fahad's explanation that she had declined to pay the expenses because candidates rarely sought expenses and this expense was high. She clearly did not know that it was the Claimant who was seeking his expenses. As Ms Fahad stated at the time, the expense request appeared strange, in that an employee earning £30,000 a year would not be likely to be able to pay £64.20 daily commuting costs. These were objectively reasonable grounds for questioning the expenses claim.
106. In June 2020, in a message from the Dean regarding Black Lives Matter, the Respondent said that its research had shown racial bias against colleagues in recruitment practices, additional bundle, p7. The Claimant told the Tribunal that he had requested these findings under a Freedom of Information request, but had been told by the Respondent that it does not have any such information, p5, Additional Bundle].

Relevant Law

Direct Race Discrimination

107. By s39(2)(d) Equality Act 2010, an employer must not discriminate against an employee by subjecting him to a detriment.
108. Direct discrimination is defined in s13(1) EqA 2010:
“(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.”
109. Race is a protected characteristic, s4 EqA 2010.
110. In case of direct discrimination, on the comparison made between the employee and others, “there must be no material difference relating to each case,” s23 Eq A 2010.

111. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].
112. If the Tribunal is satisfied that the protected characteristic/act is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong*, *Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.
113. The shifting burden of proof applies to claims under the Equality Act 2010, s136 EqA 2010.
114. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.
115. In *Madarassy v Nomura International plc*. Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, and confirmed that the burden of proof does not simply shift where M proves a difference in race and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para [56 – 58] Mummery LJ.

Decision

116. The Tribunal took into account all its findings of fact, and the relevant law, when reaching its decision.
117. On the facts, Ms Fahad withdrew the Claimant's conditional offer in the circumstances that, of all the references requested, one had failed to reply, one had declined to provide any reference and one had provided an unfavourable reference.
118. The Tribunal concluded that Ms Fahad would not have treated a BAME comparator differently to the way in which she treated the Claimant. It decided that, in those circumstances, she would also have withdrawn an offer made to a BAME candidate.
119. It decided this for the following reasons:
120. Candidate B, who the Tribunal found was also white, but who received a positive reference, was appointed to the same post. Candidate C, who was BAME, and who performed worse than the Claimant at interview, was not offered a post

by the panel (which included Ms Fahad). Candidate C was not offered a post, even when the Claimant's offer was withdrawn, and even though the department was keen to appoint to the posts. This strongly indicated that the Respondent's, and Ms Fahad's, decision making was based on performance - and not on race.

121. The contemporaneous email exchange between Ms Fahad, Ms Jackson-Cole and Ms Reid recorded that Ms Fahad decided to withdraw the offer because of the references received for the Claimant.

122. On the facts, the Respondent did not receive any positive references for the Claimant.

122.1. Referee 2 had declined to provide a reference at all; she had not suggested that her HR department might provide one.

122.2. Referee 1's reference was not good. It specifically said that the Claimant did not finish his probation period and he had a number of areas of weakness, p89.

122.3. There had been no response from referee 3, despite a chasing email. There was no out-of-office reply from referee 3's email system to the reference request.

This was a clearly unsatisfactory set of references and/or responses.

123. The panel, which included Ms Fahad, had given the Claimant the highest score of all candidates interviewed and had offered the role to him. Ms Fahad was keen to appoint the Claimant and encouraged Ms Jackson-Cole to obtain his references quickly, so that he could start in the role. Her enthusiasm about the Claimant commencing in the role only changed when the reference responses were received. This strongly indicated that it was the unsatisfactory references, and nothing else, which led to the decision to withdraw the offer of employment.

124. The Tribunal accepted Ms Fahad's evidence that she discussed the decision to withdraw the offer with Ms Eaton and Ms Khan. There was documentary evidence that Ms Reid agreed that the references were unsatisfactory. The decision was not taken by Ms Fahad alone, without consultation, as the Claimant has alleged.

125. The Respondent does not have guidance indicating that further enquiries should be made in the event of unsatisfactory references. Ms Fahad therefore acted in accordance with the Respondent's policies, even if other institutions have different procedures. There was no evidence, therefore, that Ms Fahad would have treated a non white candidate differently.

126. The Tribunal rejected the Claimant's contention that Ms Fahad had made assumptions and had displayed bias when she decided that the references were unsatisfactory and did not undertake further investigations into them. The Tribunal noted Ms Fahad's assertion that "the alternative to making assumptions is gathering facts". It accepted her evidence that, "I look for references which confirm what the candidate has said in their application and interview. If a reference does not confirm the strengths and qualities of candidate then it is not satisfactory. I have never had an instance like this before where I have not had at least one strong reference for an individual." Ms Fahad had gathered facts by collecting the

references. The references were unsatisfactory. This was not an assumption, it was a fact.

127. The Tribunal rejected the Claimant's contention that Ms Fahad made insufficient efforts to select a white person as the third member of the panel. The Tribunal decided that the entirely BAME composition of the panel did not indicate bias, unconscious or otherwise, by Ms Fahad. The Tribunal accepted Ms Fahad's evidence that Ms Eaton had a heavy workload and it was not fair for her to have to take time out of her diary again so soon, to be on another recruitment panel. It found that, when Ms Fahad was trying to appoint a 3rd panel member, she tried 3 managers, 2 of whom were white and one of whom was BAME. The only reason that the BAME 3rd panel member was eventually selected was that he had made himself available to attend an interview panel in the relevant week. This was nothing to do with race. Ms Fahad also gave a cogent, non discriminatory, reason as to why it would have been inappropriate to ask a researcher to be on the panel. Panel members needed to understand the work the team did, and how it was prioritised and executed.

128. In any event, the entirely BAME panel, of which Ms Fahad was a member, scored the Claimant top of the candidates, including a BAME candidate.

129. The Tribunal rejected the Claimant's contention that Ms Fahad sought to discourage the Claimant from attending the interview on the basis that she knew he lived in an area with an apparently very low population of BAME individuals. The Tribunal accepted Ms Fahad's explanation that she had declined to pay the expenses because candidates rarely sought expenses and this expense was high. She clearly did not know that it was the Claimant who was seeking his expenses. As Ms Fahad stated at the time, the expense request appeared strange, in that an employee earning around £30,000 gross a year would not be likely to be able to pay £64.20 daily commuting costs. These were objectively reasonable, non discriminatory, grounds for questioning the expenses claim.

130. On all the evidence, the Tribunal accepted Ms Fahad's evidence that she decided to withdraw the Claimant's offer because of the lack of satisfactory references. This was nothing to do with race.

131. The Claimant's claim fails.

25 March 2021
Employment Judge Brown

Sent to the parties on:

25th March 2021.

For the Tribunal: