



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100017/2019 (V)

Held by CVP on 12, 13, 14 August 2020

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**Employment Judge I McFatridge
Tribunal Member P McColl
Tribunal Member W Muir**

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Mr David Odigie

**Claimant
In person**

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North Ayrshire Council

**Respondent
Represented by:
Mr Grier,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The unanimous judgment of the Tribunal is that the respondent did not unlawfully discriminate against the claimant. The claim is dismissed.

REASONS

35 1. The claimant submitted a claim to the Tribunal in which he claimed that he had been directly discriminated against by the respondent. The claimant's case essentially was that he had applied for a post with the respondent and that the respondent had unlawfully discriminated against him by failing to appoint him. The respondent submitted a response in which they accepted

that they had not appointed the claimant to the post but denied that the reason had anything to do with his race. The case was subject to a degree of case management and an application by the claimant to amend his claim so as to include other matters was refused at a preliminary hearing held by
5 Employment Judge Hoey a few days before the final hearing. At the hearing the claimant gave evidence on his own behalf. Evidence was given on behalf of the respondent by Mark McNeil and Wallace Turpie who had both been on the panel which had interviewed the claimant and considered his application and also from Jackie Smillie a senior manager with the
10 respondent's People Services who had investigated the issue following the claimant's initial complaint. A joint bundle of productions was lodged. On the basis of the evidence and the productions the Tribunal found the following factual matters to be proved or agreed.

Findings in fact

- 15 2. The respondent is a local authority. They have various directorates one of which is styled the Place Directorate. Mark McNeil is an Operations Manager within a section of the Place Directorate known as Streetscene. In or about 2019 Mr McNeil identified a need within his department for a post of Service Support Officer within the Place Directorate. Mr McNeil
20 suggested this prospective role to the Head of Service within the Place Directorate and, following the respondent's normal procedures was in due course given authorisation to proceed with the recruitment process for this new role. Mr McNeil then created a role profile for the post. The profile was lodged (p23-26). The purpose of the role in general terms was to assist and
25 support senior management within the Place Directorate with specific responsibility for health and safety initiatives. There were various role specific tasks and responsibilities which were set out in the role profile.
3. When recruiting the respondent generally use an online jobs portal known as myjobscotland. The Council's interaction with myjobscotland is
30 mediated through an online platform called talentlink. The new post was given a number within the talentlink system (NAY03640).
4. The claimant is a graduate with a BSc Honours Degree in Zoology together with a BSc Honours in Environmental Health, an MSc in Environmental

Resource Management, an MSc in Waste with Environmental Management, a NEBOSH Certificate, NEBOSH Diploma, a certificate in Business Analytics, a certificate in Project Management and various other certificates and professional qualifications and membership of professional bodies. He has worked in various capacities as Health, Safety and as Environmental Manager or Adviser across a broad range of industries. The claimant saw the vacancy on the myjobscotland website and he applied. He applied using information which he had previously uploaded to the myjobscotland website in connection with previous applications which he edited so as to bring it up to date. During the editing process the claimant tried to edit the entry in relation to his current employment. On a previous occasion when the claimant had used the myjobscotland website the claimant had been still employed by North Lanarkshire Council. At the time of his application to the present respondent he had ceased to be so employed. The claimant sought to delete the box on the form which indicated that his employment with North Lanarkshire Council was still current. When he did this he was not given the option to put in a leaving date and he did not update the form. The form as submitted indicated that the claimant was still employed by North Lanarkshire Council when in fact he was not. A copy of the application form lodged by the claimant was lodged (p30-39). This takes the form of a candidate pack.

5. In order to assist with the recruitment process Mr McNeil asked Mr Wallace Turpie, a Senior Manager Operations (Waste/Streetscene) with the respondent, to assist him in the short listing and interview process. Mr Turpie has a lead role in health and safety within the Place Directorate and chairs the Directorate Health and Safety Planning Group. He would not have any management or other responsibility for the person appointed to the post on a day to day basis. Both Mr McNeil and Mr Turpie have extensive experience in the council's recruitment process and have received training in those processes including diversity training. The third member of the panel was Kenneth McLeod who was the appointed Health and Safety Adviser for the Place Directorate at that time. Towards the end of May 2018 Mr McNeil met with Wallace Turpie to determine the candidates to be invited for an interview. They used a short listing grid which is a part of the process on the talentlink system. A copy of the grid

was lodged at pages 40-41. It shows that the short listing grid was completed in respect of 29 applicants of which four, including the claimant, were invited for interview.

- 5 6. At the short listing stage Mr Turpie and Mr McNeil had access to all of the candidate pack apart from the Equalities Monitoring Form which would contain information regarding the applicant's gender, ethnicity etc.
7. The short listing grid requires those completing it to give scores to the various applicants. The claimant scored the best out of all the applicants scoring 19. The other three who were invited to interview scored 18.
- 10 8. The claimant and the other three applicants were invited to an interview to take place on 25 June 2018. Prior to the interview Mr McNeil met with Wallace Turpie to consider the manner in which the interview should be conducted. It was decided to ask the candidates to make a presentation on
15 "the implementation of ISO 9001 including the advantages and disadvantages of gaining this accreditation". This was to last 10 minutes and would test the candidates on their knowledge of the area and their understanding of the job and also provide insight into important traits such as communication and organisation skills. The candidates were provided with the presentation topic prior to the interview via the myjobscotland
20 portal. In addition to this the candidates were to be asked seven questions which would be the same for each candidate. The claimant's interview took place at 12:30pm. He was the last of the candidates to be interviewed. Only two of the three others who were invited turned up for the interview.
- 25 9. Mr McNeil collected Mr Odigie and brought him in to interview. Mr Odigie then gave his presentation. Neither Mr Turpie nor Mr McNeil were particularly impressed with the claimant's presentation. The claimant had produced a number of PowerPoint slides which he then proceeded to read verbatim from the screen. They did not feel this demonstrated the kind of communication skills they were looking for. Both Mr McNeil and Mr Turpie
30 felt that although the claimant clearly appeared to know his material about ISO 9001 and had relevant experience his communication skills left a great deal to be desired. Mr McNeil was concerned about this since in his view a large part of the role would involve making presentations to members and

other non-technical staff. Both were also concerned that having been told that he was allowed 10 minutes for the presentation the claimant in fact spoke for 14 minutes. It is possible that during the presentation the claimant was interrupted once or twice by Mr McLeod and asked to repeat something he had said before because Mr McLeod had not heard him the first time. The claimant was not asked any questions during the course of the presentation and Mr McLeod's interruptions would only have added a few seconds.

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10. The claimant was then asked the seven questions and gave answers to them. Mr Turpie's notes in relation to the answers given by the claimant to the seven questions was lodged (p47-48). Mr McNeil's interview notes were also lodged (p46). During the course of the interview the claimant advised that he was no longer working for North Lanarkshire Council. Mr McNeil felt that this was odd since his application form gave the impression that this job was still current. The claimant did not provide any explanation as to why his application didn't show the correct position. Both Mr McNeil and Mr Turpie considered that the answers showed that the claimant was knowledgeable about the subject but both felt the answers also demonstrated that he was not particularly suitable for the role to which they were recruiting. Mr McNeil noted that he referred on various occasions in his answer to "delegating". Mr McNeil was concerned at this since the post was not in any way a management role and there would be no requirement for the claimant to exercise managerial skills in delegating his work. He felt that the claimant was answering some of the questions as if he was a specialist health and safety consultant called in rather than as someone who would be part of the organisation and have a responsibility for getting things done.

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11. As part of the process set out in the council's procedures as mediated by the talentlink process the interviewers required to complete a grid showing the extent to which each candidate met the essential and desirable criteria for the job. This grid requires to be completed according to the Council's guidance for assessing interviews. The guidance was lodged at page 50 and the grid itself is lodged at page 51.

12. Once the interviews were complete the interview panel met to discuss what to do. The talentlink grid was completed in accordance with the council's guidance. They decided not to proceed to consider the application from the candidate who had not turned up to the interview. It was the view of all three interviewers that each of the remaining three candidates had strengths and weaknesses. Their view was that if there was one candidate who had combined the good parts from each of the three candidates then they would have appointed that candidate. As it was however they felt that each candidate was let down by one aspect of their performance.
13. The claimant had scored well in the desirable criteria which includes education and qualifications, experience, specialist knowledge, skills and abilities and "other". He had scored a two on staff values and behaviours which are focus, passion and inspiration. His general score was a three for "quality of responses to questions" on the basis that the interview panel felt that he was technically very good and that his answers showed that he was very knowledgeable about his subject. The claimant unfortunately scored a one in relation to presentation skills. This brought his total score up to 25. The other two applicants were graded 23 and 24. Both of them scored higher than the claimant on presentation skills but lower than the claimant in other aspects.
14. Having discussed the matter the interview panel decided that none of the candidates were really what they were looking for and decided not to make an appointment. This is something which, within the council, interview panels are entitled to do and do from time to time.
15. Mr McNeil was absent from work on leave immediately after the date of the interview but on 4 July when he returned to work he telephoned Mr Odigie and the other candidates to advise them that they were unsuccessful. He told Mr Odigie and the others that a decision had been taken not to appoint any of the candidates interviewed on 25 June. Mr McNeil provided Mr Odigie with feedback praising his technical knowledge but confirming that the panel did not feel any of the candidates had the desired skills sought for the role. The telephone call was fairly short.

16. The day after making this call Mr McNeil became sick and was on sick leave until about October 2018.

17. On or about 10 August 2018 the claimant e-mailed Mr McNeil stating

5 "I had an interview with you and two others of your colleagues for the above position on 25 June 2018. The feedback you gave me was that my interview was very detailed and cannot be faulted but that you decide to give the position to an internal staff who had been doing similar jobs. The same job position has been re-posted on myjobscotland. I am beginning to wonder since I had a very good
10 interview we both knew why was the job not offered to me." (p52)

18. There are two inaccuracies in the claimant's e-mail. The first point is that the Tribunal decided that as a matter of fact Mr McNeil had not told him that the job had been given to an internal candidate. Mr McNeil had told him that the Council had decided not to appoint any of the candidates to the
15 post. The second was that the job had not been re-advertised on myjobscotland. What the claimant had seen on myjobscotland and in fact later applied for was a different role as a Service Support Officer within the Health and Social Care Partnership which, like the earlier role with the Place Directorate, had specific responsibility for health and safety initiatives. The
20 role profile for this post which was advertised under reference NAY03947 was lodged (p27-29). The profile is very similar to the role profile for the earlier role since the person who prepared the role profile used Mr McNeil's role profile as a style. It was however an entirely different job in an entirely different section of the Council.

25 19. Since Mr McNeil was off on sick leave when the e-mail from the claimant arrived the e-mail was passed to an administrator who eventually passed it on to Mr Turpie so that he might respond. Mr Turpie e-mailed the claimant on 23 August stating

30 "You had e-mailed Mark McNeil on 10 August regarding above post. Unfortunately Mark is currently off ill and one of his colleagues forwarded your e-mail on to me yesterday. I will arrange to get the recruitment pack back and will get in touch with you.

For clarification in your e-mail you have said that the post was offered to an internal employee. This is not the case. On 25 June we decided to not offer the post to any of the candidates we interviewed and the post remains vacant. Once I have the pack I will get in touch.” (p53)

- 5 20. Mr Turpie was unable to trace a copy of the claimant’s candidate pack in Mr McNeil’s office and he therefore sent a text message to Mr McNeil asking Mr McNeil if he could tell him where the candidate pack was and send the pack to him. As it happens, Mr McNeil had taken the candidate’s pack for the claimant along with other work home with him in a briefcase. The
10 briefcase was still at his home whilst Mr McNeil was off sick. Mr McNeil did not get the text message from Mr Turpie since at around this time he had had a problem with his phone and had been required to change his mobile telephone number. Mr Turpie’s text had been sent to Mr McNeil’s old telephone number and the matter was not discovered until some time later.
15 In the meantime Mr Turpie did not respond further to the claimant as he was waiting on receiving the candidate pack.
21. In any event, on 6 September 2018 the claimant wrote again to Mr Turpie making a formal complaint in relation to the process. His e-mail was lodged (p54-55). He made it clear that he wished his e-mail to be regarded as an
20 official complaint. Given the circumstances Mr Turpie passed the matter on to Fiona Walker who was the Head of Human Resources and was responsible for dealing with complaints. Mr Turpie believed that since the matter was now formal and he was one of the people complained against that it would not be appropriate for him to take any further part in responding
25 to the claimant.
22. Thereafter, the respondent’s HR department investigated the claimant’s complaint. They issued a decision in which they did not uphold his complaint. Thereafter the claimant escalated the complaint to stage 3 of the Council’s complaints procedure. Fiona Walker the Head of HR
30 delegated the matter to Jackie Smillie a senior manager within People Services to deal with this. Ms Smillie collated the interview pack and the claimant’s correspondence and then discussed the matter with Wallace Turpie and Ken McLeod. Her findings were contained in a letter sent to the claimant dated 17 October 2018 which although signed on behalf of

Ms Walker was compiled by Ms Smillie. This letter was lodged with the tribunal in a supplementary pack.

23. In the meantime the claimant had applied for the position of Service Support Officer within the Health and Social Care Partnership. As noted above this was a separate job to the job he initially applied for within the Place Directorate. On 30 August 2018 the claimant was issued an e-mail inviting him to book an interview slot for this position. This is a standard procedure. Interviews were scheduled for 14 September 2018. In an e-mail to the claimant on 12 September Ms Carlyle reminded the claimant of the impending interviews on 14 September and suggested he book a time slot. Ms Carlyle also telephoned the claimant on 14 September but he did not answer. The claimant failed to book an interview time slot for 14 September and was accordingly not considered for the position within the Health and Social Care Partnership.
24. The role within the Place Directorate was not re-advertised to the public. Given Mr McNeil's absence from the process a different manager was tasked with recruitment. This was Mr Steven Andrews. He made the decision that the post should be advertised internally. An internal applicant applied for and was successful in obtaining the post after interview. The successful candidate started at some point in October 2019.

Matters arising from the evidence

25. We generally found the respondent's witnesses to be credible and reliable witnesses who were genuinely attempting to assist the Tribunal by answering questions honestly. The evidence they gave was consistent with the contemporary documents and with each other's evidence. There were one or two matters where there were minor differences in their evidence which we considered indicated simply that each was recollecting matters as best they could from their own point of view. We felt this enhanced their credibility. For example, Mr Turpie believed that the second time round the role within the Place Directorate had been advertised to the public rather than simply internally. When challenged on this however he confirmed that he had not been personally involved in this and that if the contemporary

documents and Ms Smillie who had specifically investigated the matter said otherwise then he was happy to accept that this was the case.

- 5 26. The tribunal was less happy with the claimant's evidence. The Tribunal felt that the claimant was not seeking to deliberately mislead the Tribunal but it is clear that he feels very strongly that he has been discriminated against and this has coloured his recollection of certain points. There was a conflict between the evidence of the claimant and the evidence of Mr McNeil as to what Mr McNeil told the claimant during the phone call on 4 July. Mr McNeil's position was that he told the claimant the truth which was that the Council decided not to appoint anyone. The claimant's position was that the claimant had told him that the Council had decided to appoint someone internally. We could see no reason for Mr McNeil not to tell the truth to the claimant. Mr McNeil has experience of recruitment within the respondent organisation. He gave evidence that he had been involved in recruiting for over 20 years and he would have been well aware that if he told the claimant that the job had gone to someone else and the job was then immediately re-advertised this was something which was going to come out.
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- 20 27. The claimant was also prone to giving what he termed evidence which was simply his opinion. For example the claimant set out his understanding of what the respondent's recruitment practices were in relation to internal appointments. We did not find any evidence to support this in any of the Council's documented processes. The claimant then sought to indicate that the respondent's redeployment process meant that they would not have advertised the job if there was a suitable internal appointee. This was not justified in any way by the documentation provided. The fact that appointment was eventually made to someone who had not applied for the job the first time round did not in any way change the Tribunal's view on this.
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- 30 28. The claimant also sought to draw inferences from alleged facts which were justified by the evidence. He considered there was something suspicious about the fact that Mr Turpie delayed in responding to him. The Tribunal heard Mr Turpie's explanation of what had occurred during this period and entirely accepted Mr Turpie's evidence. Mr Turpie was only passed the

claimant's e-mail a day before he responded. He was then seeking out the candidate pack which he had not received by the time he received the claimant's second e-mail in which the claimant made clear that he wished the matter treated as an official complaint. Given that Mr Turpie was on the panel and one of the people being complained against he acted entirely properly in referring the matter to HR who then dealt with it appropriately. The claimant appeared to assert that the respondent made changes to the second job description (for job reference NAY03947) retrospectively and changed the directorate from the Place Directorate to the Health and Safety Partnership. The Tribunal accepted Ms Smillie's evidence that this would not have been within the power of anyone within her department. We felt the claimant's strong belief that he had been wronged influenced his evidence to such a degree that we could not place any reliance on it.

Decision

15 *Issue*

29. The sole issue which the Tribunal required to determine was whether or not the respondent had directly discriminated against the claimant by failing to appoint him to the post. The claimant sought to compare his treatment with that of a hypothetical comparator who had the same characteristics as him but was of a different ethnicity and colour.
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30. It should be noted that the claimant did not in fact give any specific evidence as to what his own ethnicity was.

Relevant law

31. The respondent's representative correctly identified the statutory provisions in terms of section 13 of the Equality Act and the relevant case law. This is a case to which the burden of proof provisions contained in section 136 of the Equality Act 2010 applies. We were referred to the approach which Tribunals should take to questions of the burden of proof as set out in the case of *Igen Ltd v Wong [2005] IRLR 258 CA*, and *Barton v Investec Henderson Crosthwaite Securities [2003] IRLR 332*. The EAT set out the guidance in short form in the *Barton* case and the initial steps to be taken by the Tribunal. This is as follows:
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- “1. The initial burden of proof rests on the employee to prove on the balance of probabilities facts from which the Tribunal could conclude that an act of discrimination has occurred.
2. It is unusual to find direct evidence of sex discrimination and it will therefore usually require the Tribunal to draw such inferences from the facts and find that are just and equitable.
3. If the Tribunal draws such inferences the employer must then discharge the burden showing that the act complained about did not occur or that gender played no part in the reason for the act.
4. The Tribunal will usually require cogent evidence from the employer to discharge the burden of proof and will need to examine carefully the explanations for failure to adhere to codes of practice.”

Discussion and Decision

32. It is clear from the above that the initial burden of proof is on the claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude that an act of discrimination has occurred. In this case the Tribunal could frankly find absolutely no facts from which we could conclude or infer that an act of discrimination has occurred. The claimant’s position appears to be that he applied for the job and that he should have got the job. He did not get the job. He contends the reason he did not get the job must be because he was discriminated against. Apart from that bare assertion the claimant has not proved any facts whatsoever which could lead the Tribunal to conclude that this was the case. The claimant, when faced by the respondent’s clear evidence as to why they reached the conclusion they did simply stated that the respondent was wrong. That is not enough.
33. For example, the claimant’s position is that it was not justifiable for Mr McNeil to conclude that there was a question as to the claimant’s integrity from the fact that his application form indicated he was still employed by North Lanarkshire Council when in fact he had not worked for them for about two years. The claimant’s explanation is that Mr McNeil could not have reached that conclusion because the form was only incorrect because the claimant had been unable to put in his leaving date due to a

“glitch” in the software. Whether or not there was a glitch in the software the claimant gave no evidence that he had advised Mr McNeil that this was an issue and to say that because Mr McNeil was wrong in reaching his conclusion then the conclusion must have been motivated by race is
5 unsupported. Similarly, the claimant’s position is that when Mr McNeil describes the claimant as acting more like a consultant than the type of person they had in mind for the job Mr McNeil is accepting that the claimant has good communication skills because consultants are people who generally have good communication skills. The Tribunal was entirely
10 unconvinced by this argument.

34. At the end of the day, we can accept that the claimant was extremely disappointed as a result of not being appointed to the role. On the other hand, there was nothing at all before us to suggest that the respondent was motivated by anything to do with the claimant’s race, ethnicity or colour.
15 The overwhelming evidence was that they simply concluded following an interview process that the claimant was not the right person for the job. They reached the same conclusion in respect of the other two applicants and decided not to appoint. In view of the above the claim fails and is dismissed.

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Employment Judge: I McFatridge
Date of judgment: 03 Sept 2020
Entered in register: 08 Sept 2020
25 and copied to parties
