



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100184/2020 (V)

5

Held via Cloud Video Platform (CVP) on 1-3 June 2021

**Employment Judge Sangster
Tribunal Member Brown
Tribunal Member Burnett**

10

Mr J Haria

**Claimant
In person**

15

The Scottish Ministers

**Respondent
Represented by:
Mr Turnbull
Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's claim of indirect discrimination does not succeed and is dismissed.

REASONS

25 Introduction

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face-to-face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.
- 30 2. The claimant presented a complaint of indirect discrimination.
3. The claimant gave evidence on his own behalf.
4. The respondent led evidence from David Patel, Deputy Director for People Services – Resourcing for the Scottish Government.

5. Evidence in chief was taken by reference to witness statements, which had been exchanged in advance and were taken as read.

6. A joint set of productions was lodged, extending to 183 pages. A further two documents were lodged, with consent, at the commencement of the hearing.

Issues to be determined

7. An agreed list of issues was included in the joint set of productions. The issues to be determined, were as follows:

Indirect discrimination under s.19 of the Equality Act 2010 (“the 2010 Act”)

1. *Has the Respondent discriminated against the Claimant in terms of s. 19 of the 2010 Act? In particular:*

(a) *Does the PCP put persons of the Claimant’s protected characteristic (his racial group) at a particular disadvantage when compared to other persons who do not share that particular protected characteristic for the purpose of s.19(2)(b) of the 2010 Act?*

(b) *If so, does the PCP put (or would it put) the Claimant at that disadvantage for the purpose of s.19(2)(c) of the 2010 Act?*

(c) *If so, can the Respondent show the PCP to be a proportionate means of achieving a legitimate aim for the purpose of s. 19(2)(d) of the 2010 Act?*

Time bar/jurisdiction

2. *Has the claim been presented after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Tribunal thinks just and equitable (s. 123 of the Equality Act 2010 (“the 2010 Act”))?*

Remedy

3. *In so far as the Claimant was subject to any discrimination attributable to the Respondent:*

5

(a) Should the Employment Tribunal make any recommendations?

(b) What, if any, loss has the Claimant been caused a result of such treatment?

(c) To what, if any, compensation is the Claimant entitled?

10

8. The list of issues contained an additional section entitled 'Interpretation' which stated as follows

15

'The PCP is as set out at paragraph 16 of the paper apart to the response form ET3 and contained within the eligibility declaration which candidates wishing to be considered for the post required to make on the application form, before their application could be processed, namely I am currently a civil servant or employed by an accredited Non-Departmental Public Body (NDPB) who is eligible to apply for Scottish Government vacancies.

20

The respondent accepts that it applied this PCP to the claimant in the course of recruiting for the relevant appointment. His application was not considered as he did not satisfy the PCP.

25

The protected characteristic relied upon is race, with the claimant describing himself as a person of Black Minority Ethnic (BME) origin, or, more specifically of Indian Origin.

30

The pool relied upon by the claimant is 'all people of working age (16/65) in Scotland' or, alternatively, 'all people of working age (16/65) in the UK'.

The disadvantage relied upon is being barred from consideration of the vacancy of Race Employment Team Leader.'

9. The parties confirmed at the outset of the hearing that the list of issues was agreed and accurately reflected the issues to be determined by the Tribunal, subject to the following points:
- a. The claimant confirmed that he was seeking an award for injury to feelings only, not compensation for loss of earnings; and
 - b. The claimant confirmed that he was not seeking a recommendation, if successful in his claim.

Findings in Fact

10. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
11. The respondent is the legal entity which enters into contracts for, and which employs staff who may be assigned to, the Scottish Government.
12. The Civil Service Recruitment Framework, which was introduced in 2017, outlines the approach available to any civil service organisation in England, Wales, Scotland or Northern Ireland that has a vacancy that they need to fill. It also applies to approximately 75 Non-Departmental Public Bodies (**NDPBs**), based throughout the UK, who are accredited by the Civil Service Commission under the Cabinet Office sponsored NDPB Accreditation Scheme (the **Accredited NDPBs**).
13. The Framework sets out 3 options for advertising civil service vacancies:
- a. external to the Civil Service (the default for posts in the Senior Civil Service (**SCS**))
 - b. level moves or promotion across government, which is stated to be the main approach used by departments for roles outside SCS; and
 - c. internal within a department.
14. In 2018 the Scottish Government introduced '*Recruiting Managers Guidance*' (*the **Guidance***). This states that '*We expect almost all of our vacancies to be advertised only to internal and other government department (OGD) staff in the*

first instance. This is established Scottish Government policy and gives our existing staff the opportunity to develop and grow within the organisation. Where a business area considers it is unlikely to get any or enough candidates from the internal or OGD market, recruiting managers can consider moving straight to advertising externally. If you, as the recruiting manager decide that you wish to move straight to advertising externally, you must ensure that your vacancy is supported by a business case detailing the reasons why. This business case will then be submitted by HR resourcing to the Council of Scottish Government Unions. This allows our partner trade unions to comment on the recruiting business's proposal but does not delay the processing of the request.'

15. The other government departments referred to in the Guidance includes the Accredited NDPBs.

16. The Guidance confirms that the use of simultaneous advertising (advertising vacancies to internal/OGD and external market at the same time) is being discontinued. Under the hearing '*Recruitment options – permanent posts*' the Guidance confirms that '*Vacancies that can't be met from existing resources should be filled by internal recruitment across the Scottish Government and other government departments (OGD). However, you should also consider whether managed moves or Modern Apprentices (for entry-level posts at A3 grade) could meet your needs...Only in exceptional circumstances – and when you have exhausted all other routes – can you recruit externally to fill a permanent post.*'

17. The Guidance applies to all vacancies with the Scottish Government, including those for at SCS grades.

18. The Guidance also states '*Our resourcing policy has been agreed with the CSGU. Failure to consult CSGU in the above situations is a breach of the Partnership Agreement and will be referred to the Director of People.*'

19. The practice of generally recruiting internally first is based on the Scottish Government's assessment of what best helps meet a range of organisational needs: the provision and availability of opportunity for staff to develop and advance, which encourages staff retention and recruitment and thereby the means for the organisation to benefit from employee experience and investment in training and development; for efficiency reasons, saving taxpayers money; adhering to policies on no compulsory redundancies; and to adhere to trade union agreements.
20. External recruitment can occur where the Scottish Government has vacancies in specific specialist areas, such as legal and analytical posts. Centralised external campaigns in relation to vacancies of this nature are run on a regular basis.
21. In 2019 a new post of Race Employment Team Leader was created within the Scottish Government. The recruiting manager for the role was the Head of Workforce Equalities Team. She determined that the post should be advertised to the internal market in the first instance.
22. From 8 – 22 August 2019, the vacancy for the role of Race Employment Team Leader was advertised on the respondent's intranet, as well as the shared platform with other civil service/government departments (OGD). It was not advertised externally.
23. The main duties of the role were set out in the advert. These were:
- a. Working closely with internal colleagues (including the equality unit and analytical colleagues) and external partners (e.g. the Fair Work Convention and equality groups) to ensure the successful implementation of Ministerial commitments relating to tackling discrimination and improving the experiences of minority ethnic people in the labour market.
 - b. Building and nurturing a team who can lead the development and delivery of policy in this area, as part of the broader fair work agenda.

- c. Providing Ministers with high quality support on issues relating to supporting and promoting a diverse and inclusive workforce, including supporting their engagement with stakeholders.
- d. Manage relationships with race equality stakeholder groups, including the BME Employability Steering Group and New Scots 2 Programme Board.
- e. Act as a key member of Division's Management Team, applying and championing programme management approaches to our work, providing support and coaching to all staff.

5

10

24. The essential criteria for the vacancy were also set out in the advert. These were:

- a. Experience of leading and delivering a long-term programme of change.
- b. Ability to build effective relationships within the organisation and with senior external partners.
- c. Well-developed collaborative leadership skills, with the ability to motivate and develop a highly skilled team.
- d. A track record of working effectively with others to shape policy development and delivery.

15

20

25. The competencies were:

- a. People Management
- b. Leading Others
- c. Communications and Engagement
- d. Improving Performance

25

26. The claimant has significant experience in relation to race equality issues, having worked in this area for over 35 years. He is the Executive Director of the Coalition for Racial Equality and Rights, a strategic social policy anti-racism charity. In August 2019, the claimant was sent a link to the advert by an acquaintance who is a civil servant. The claimant was able to access the link

30

and, having reviewed the details, felt that he met the essential criteria for the role and had the requisite competencies. He decided to apply for the role.

- 5 27. When the claimant tried to complete the online application process, he discovered that there was a tick-box eligibility declaration that required completion before he could proceed with the application. One of the boxes that required confirmation stated: *'I am currently a civil servant or employed by an accredited Non-Departmental Public Body who is eligible to apply for Scottish Government vacancies'*. This was a requirement to be considered for the role.
- 10 As the claimant could not tick this particular box, he found that he could not proceed with the on-line application process.
- 15 28. The job advert stated *'For information on this post please contact Harry Brickell'* whose contact details were then provided.
- 20 29. On 16 August 2019, the claimant emailed Mr Brickell, highlighting the eligibility declaration and that this seemed to rule him out from applying. He asked if Mr Brickell was able to shed any light of this. Mr Brickell replied saying *'I'm afraid this vacancy is open only to internal candidates, hence declaration you have highlighted below. If you're not currently a civil servant I'm afraid you would be ineligible.'*
- 25 30. On 19 August 2019, the claimant replied saying: *'I assume there is no way around this?'*
- 30 31. On 22 August 2019, Mr Brickell replied saying: *'I'm afraid you're right unfortunately there's no way around this here. Generally speaking posts are advertised internally in the first instance and then opened more widely if a suitable candidate is not found although this not always the case.'*
32. The closing date for the vacancy was 22 August 2019. The claimant was not able to apply, given the eligibility criterion. The vacancy was filled by an internal candidate who met the eligibility requirements.

33. Early conciliation took place from 20 November to 20 December 2019. The claimant lodged his claim on 15 January 2020.
34. In February 2021, the Scottish Government published a Race Recruitment and Retention Plan (the **Plan**). Within the Plan it was stated that *'At 2.4% of our overall workforce, our proportion of minority ethnic staff is still far short of our ambition to be representative of the Scottish population, where visible minority ethnic groups make up 5%. We know that at our current rate of growth we will fall short of our 2025 ambition'*. The Plan defined *'minority ethnic'* as *'people who identify as from a black, Asian, mixed or multiple ethnicity or an ethnicity other than white.'*
35. According to statistics published in March 2021, in the quarter to end December 2020, 2.5% of staff directly employed by the Scottish Government who identified as 'Ethnic Minority' ('Ethnic Minority' being stated to include 'African, Caribbean or Black; Asian, Asian Scottish or Asian British; Mixed or Multiple Ethnic Group; Other Ethnic Group.'). 79.6% identified as 'White' and the remaining 17.9% fell into the categories of 'Prefer not to say/unknown'.
36. The 2.5% of directly employed staff who identified as 'Ethnic Minority' amounted 191 employees. 73 of those employees identified as 'Asian (Pakistani, Indian, Chinese, Other)'.
37. The 2011 Census stated that there were 3,488,730 people of working age (16/65) in Scotland, 103,435 of which were of Asian origin. Figures from NOMIS confirm that there are 43,120 civil servants in Scotland, 340 of which are of Asian origin.
38. The 2011 Census stated that there were 36,273,707 people of working age (16/65) in England & Wales, 2,916,963 of which were of Asian origin. Figures from NOMIS confirm that there are 375,980 civil servants in England & Wales, 19,970 of which are of Asian origin.

Submissions

Respondent's submissions

39. Mr Turnbull for the respondent lodged a written submission, extending to 25 pages, which he spoke to. In summary, his position was as follows:

- 5
- a. The respondent's evidence should be preferred over the claimant's where there is a conflict;
- b. The Tribunal have no jurisdiction to hear the claim, as it was lodged outwith the requisite time limits. The act complained of occurred no later than 16 August 2019, when the claimant was informed that he was not eligible to apply for the role. It was not conduct extending over a period. It is not just and equitable to extend the relevant time limits.
- 10
- c. The claim of indirect discrimination should fail as the claimant has not demonstrated group disadvantage as a result of the PCP being applied. The onus is on him to do so. The pool for comparison identified by the claimant is too wide. The correct pool would be those with the relevant skills and experience for the position of Race Employment Team Leader, and those who were interested in applying. ***University of Manchester v Jones*** [1993] ICR 474 (CA), ***Coker and Osamor v Lord Chancellor and Lord Chancellor's Department*** [2002] IRLR 80, ***Price v Civil Service Commission and another*** [1977] IRLR 291 and ***Pearce v City of Bradford Metropolitan Council*** [1988] IRLR 379 were relied upon.
- 15
- d. Failing which, the PCP was objectively justified. It was a proportionate means of achieving the stated legitimate aims.
- e. The respondent accepts that they applied the PCP and that the application of the PCP placed the claimant at a particular disadvantage.
- 25
- f. If remedy is considered, no injury to feelings award should be made given the very limited evidence on this point and the unintentional nature of any established discrimination.

Claimant's submissions

40. The claimant gave an oral submission. In summary, his position was as follows:

a. He was prevented from applying for the position as a result of the PCP. He suffered particular disadvantage as a result.

5 b. People of Black Minority Ethnic origin/Asian origin are under-represented in the Scottish Government. Accordingly, people from the claimant's racial group also suffered a particular disadvantage, as a result of the application of the PCP

10 c. The respondent cannot demonstrate objective justification. The onus is on them to do so. The respondent has not shown that the application of the PCP was both appropriate and necessary. The legitimate aims relied upon do not stand up to scrutiny and the application of the PCP is not a proportionate means of achieving the stated aims.

15 d. Time started to run from 22 August 2019, which was the closing date for the role and also the date the claimant was advised that he could definitely not apply for the role. In the alternative, there was a continuing act. Failing which, it is just and equitable to extend time. The respondent has not asserted there would be any prejudice to them in doing so.

Relevant Law

20 41. Section 19 of the Equality Act 2010 (**EqA**) states:

(1) 'A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ('PCP') which is discriminatory in relation to a relevant protected characteristic of B's.

25 *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
a. A applies, or would apply, it to persons with whom B does not share the characteristic,

- b. *it puts or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
- c. *it puts, or would put, B at that disadvantage, and*
- 5 d. *A cannot show it to be a proportionate means of achieving a legitimate aim.'*

42. S23 EqA states:

10 *'On a comparison of cases for the purposes of section...19 there must be no material difference between the circumstances relating to each case.'*

43. Lady Hale in the Supreme Court gave the following guidance in **R (On the application of E) v Governing Body of JFS** [2010] IRLR 136

15 *'Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.'*

20 44. In the case of **Essop v Home Office; Naeem v Secretary of State for Justice** [2017] IRLR 558 SC, at [25] Lady Hale stated:

25 *'Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.'*

30 45. The provision, criterion or practice applied by the employer requires to be specified. It is not defined in EqA. In case law in relation to the predecessor provisions of EqA, the courts made clear that it should be widely construed. In **Hampson v Department of Education and Science** [1989] ICR 179 it was

held that any test or yardstick applied by the employer was included in the definition, for example.

46. The Equality and Human Rights Commission Code of Practice on Employment (the **EHRC Code**) at paragraph 4. 5 states as follows:

'The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future - such as a policy or criterion that has not yet been applied - as well as a 'one-off' or discretionary decision.'

47. 'Particular disadvantage' essentially means something more than minor or trivial. That was determined in **R. (on the application of Taylor) v Secretary of State for Justice** [2015] EWHC 3245 (Admin) where the following comments were made:

'The term 'substantial' is defined in section 212(1) to mean 'more than minor or trivial'. I do not perceive any significant difference between the phrase 'substantial disadvantage' and the phrase 'particular disadvantage' used in section 19 of the Act.'

48. Paragraph 4.17 and 4.18 of the EHRC Code state

'The people used in the comparative exercise are usually referred to as the 'pool for comparison'. In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively. In most situations, there is likely to be only one appropriate pool, but there may be circumstances where there is more than one. If this is the case, the employment should be no will decide which of the pools to consider.'

49. The burden is on the respondent to prove objective justification. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (**Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601).

5 *Burden of Proof*

50. Section 136 EqA states:

'If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.'

10

51. There is accordingly a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of **Igen v Wong** [2005] IRLR 258, and **Madarassy v Nomura International Plc** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish prima facie case of discrimination by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the Tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached.

15

20

Time Limits

52. S123(1) EqA, states:

'[Subject to section 140A and 140B] proceedings on a complaint within section 120 may not be brought after the end of—

25

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) such other period as the employment tribunal thinks just and equitable.'*

53. S123(3) EqA states:

'For the purposes of this section-

(a) Conduct extending over a period is to be treated as done at the end of the period;

5 *(b) Failure to do something is to be treated as occurring when the person in question decided on it.'*

54. What is just and equitable, for the purposes of extension of time limits, depends on all the circumstances. The burden of proof is on the claimant as explained in **Robertson v Bexley Community Centre** [2003] IRLR 434, in which the
10 Court of Appeal also said, at para 25:

*"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise
15 the discretion. Quite the reverse. A tribunal cannot and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."*

55. In **British Coal Corporation v Keeble** [1997] IRLR 336 the EAT held that the Tribunal's discretion is as wide as that in the civil courts under s.33 of the
20 Limitation Act 1980. That section requires the courts to consider factors relevant to the prejudice which each party would suffer as the result of the decision to be made, including:

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

25 (c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and

(e) the steps taken by the claimant to obtain appropriate professional advice
30 once he or she knew of the possibility of taking action.

56. In ***Southwark London Borough Council v Afolabi*** [2003] ICR 800 the Court of Appeal confirmed that, whilst that checklist provides a useful guide for Tribunals, it does not require to be followed slavishly. It added however that there are normally two factors which are almost always relevant – (i) the length of and reasons for the delay and (ii) whether the delay has prejudiced the respondents, such as by preventing or inhibiting it from fully investigating a claim while matters are fresh.

57. In ***Rathakrishnan v Pizza Express (Restaurants) Ltd*** [2016] IRLR 278, the EAT confirmed that the exercise of the Tribunal's wide discretion involves a multi-factoral approach, with no single factor being determinative.

Discussion & Decision

58. The Tribunal noted that the respondent accepted that:

a. They applied the PCP relied upon by the claimant, namely a requirement in the application process for the position of Race Employment Team Leader that individuals confirm that they are '*currently a civil servant or employed by an accredited Non-Departmental Public Body (NDPB) who is eligible to apply for Scottish Government vacancies*'; and

b. The claimant suffered a particular disadvantage as a result of being unable to apply for the role of Race Employment Team Leader.

59. The remaining issues for the Tribunal to determine were accordingly:

a. Was group disadvantage established?

b. If so, has the respondent demonstrated objective justification?

c. If group disadvantage is established, but not objective justification, was the claim lodged within the requisite time limits?

60. The Tribunal considered in the first instances whether the claimant had established group disadvantage, the onus being upon him to do so (***Nelson v***

Carillion Services Limited [2003] IRLR 428). The group disadvantage established must be the same as that relied upon by the claimant. In this case it was agreed that the group disadvantage asserted was *'being barred from consideration of the vacancy of Race Employment Team Leader'*.

5

61. The claimant asserted that the appropriate pool for comparison was either all people of working age in Scotland or, alternatively, all people of working age in the UK. The respondent asserted that the pool identified by the claimant was too wide: the appropriate pool should include only those with the necessary experience and qualifications to undertake the role.

10

62. In determining this matter, the Tribunal noted that, in establishing whether a PCP places persons of a protected characteristic at a particular disadvantage, the starting point is to look at the impact on people within a defined 'pool for comparison'. S23(1) EqA confirms that there must be no material difference between the circumstances of each case when making such a comparison. This means that the comparison must be with those who, apart from the particular protected characteristic, are in circumstances which are the same or not materially different.

15

20

63. In accordance with the terms of paragraphs 4.17 & 4.18 of the EHRC Code, whilst the pool for comparison should include those who are affected, positively or negatively, by the PCP, it should also exclude those who are not affected by it, either positively or negatively.

25

64. The Tribunal noted that both the PCP and the particular disadvantage relied upon referenced the particular role of Race Employment Team Leader. The claimant was clear, in identifying the PCP and the disadvantage relied upon, as well as in his evidence and submission to the Tribunal, that his claim was restricted to his application for that particular role, and that the group disadvantage was others being prevented from applying for that particular role also, rather than the broader policy of 'internal first' recruitment.

30

65. The Tribunal accepted that it was well established through case law that the pool for comparison should be confined to those who would be eligible to apply

35

for the job, but for the criterion in question i.e. those with the necessary skills and experience for the role, as asserted by the respondent. As stated in **Pearce v City of Bradford Metropolitan Council** [1988] IRLR 379 at 381, '*Not to look at those qualified to apply when considering what selection to make for the purposes of comparison in relation to a requirement or condition biting upon an application for a post requiring particular qualifications would be irrational and might have startling results.*'

5

10

15

20

66. In light of these points, the Tribunal determined that the appropriate pool for comparison, in this case, was all individuals with the appropriate skills and experience to apply for the role of Race Employment Team Leader, not all people of working age in Scotland or, alternatively, all people of working age in the UK, as asserted by the claimant. The pool for comparison identified by the claimant included individuals who would not have the skills or experience necessary to undertake the role of Employment Race Team Leader. They were accordingly not impacted, positively or negatively, by the PCP, namely the requirement to meet the eligibility criterion to apply for the particular role of Employment Race Team Leader, as they would not have been in a position to apply for the position of Employment Race Team Leader. It was accordingly not appropriate to include these individuals in the pool for comparison.

25

67. Having established the appropriate pool for comparison, the Tribunal turned to consider the evidence of group disadvantage presented to us. The comparison is between members of the pool who are of Black Minority Ethnic origin, or more specifically of Indian Origin, and those who are not. The question is whether it has been established that the former suffered a particular disadvantage as a result of the application of the PCP.

30

68. No evidence was led in relation to the impact of the PCP on those within the appropriate pool for comparison.

69. The claimant relied upon figures from the 2011 Census and from NOMIS, which were not disputed by the respondent. These figures demonstrated the number of people of working age in Scotland, the number of civil servants employed in

Scotland and the number of Asian civil servants employed in Scotland. These figures did not address the number of people who could apply for the post, which could include individuals employed in Accredited NDPBs and civil servants in England. The figures included people who would not fall within the appropriate pool, namely those who did not have the requisite skills or experience to apply for the role of Employment Race Team Leader. Further, the figures identified individuals who are Asian, rather than the protected characteristic relied upon by the claimant: people of Black Minority Ethnic (BME) origin, or more specifically of Indian origin. The Tribunal found that the statistics presented did not establish that, within the appropriate pool for comparison, individuals of Black Minority Ethnic origin, or more specifically of Indian origin, suffered a particular disadvantage as a result of the application of the PCP.

70. In the alternative, the claimant relied upon figures, which were again not disputed by the respondent, in relation to the total working age population of England and Wales, the total number of civil servants in England and Wales and the number of civil servants who are Asian. These figures, even if taken with those for Scotland to provide UK totals, include people who would not fall within the appropriate pool, namely those who did not have the requisite skills or experience to apply for the role of Employment Race Team Leader. Further, the figures identify individuals who are Asian rather than the protected characteristic relied upon by the claimant: people of Black Minority Ethnic (BME) origin, or more specifically of Indian origin. The Tribunal found that the statistics presented did not establish that, within the appropriate pool for comparison, individuals of Black Minority Ethnic origin, or more specifically of Indian origin, suffered a particular disadvantage as a result of the application of the PCP.

71. The claimant also relied upon the terms of the Scottish Government Race Recruitment and Retention Plan, published in February 2021, and statistics, to demonstrate that:

- a. the proportion of minority ethnic staff within the Scottish Government was either 2.4 or 2.5% of the overall workforce; and
- b. that this figure was not representative of the Scottish population, '*where visible ethnic minority groups make up 5%*'.

5

72. Whilst that may be the case that minority ethnic staff are under-represented in the Scottish Government, when compared with the Scottish population as a whole, that does not demonstrate that within the appropriate pool for comparison, individuals of Black Minority Ethnic origin, or more specifically of Indian origin, suffered a particular disadvantage as a result of the application of the PCP.

10

73. Given that the claimant has not established group disadvantage, the claim of indirect discrimination does not succeed and is dismissed.

15

Employment Judge: Mel Sangster
Date of Judgment: 17 June 2021
Entered in register: 23 June 2021
and copied to parties

20