



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs R Croker

v

Secretary of State for Justice

Heard at: London Central

On: 7, 8, 9 July and 10 August 2021

Before: Employment Judge A James
Ms S Aslett
Ms G Gillman

Representation

For the Claimant: Mr T Sheppard, counsel

For the Respondent: Mr J Duffy, counsel

JUDGMENT

(1) The claim for direct discrimination (s.13 Equality Act 2010) is not upheld and is dismissed.

REASONS

The Employment Tribunal proceedings

- 1 The claims are for direct discrimination in relation to the claimant's non-appointment following an interview in March 2020 for the post of Judge's Clerk in HMCTS recruitment exercise 31459, the aim of which was to recruit up to 30 Judges' Clerks.
- 2 The issues are set out in Annex A. There is a dispute as to how the question of the comparators should be put. Both versions are set out in Annex A. We set out in our conclusions which version we prefer and why.
- 3 Acas Early Conciliation started on 10 June 2020 and ended on 10 July 2020. The claim form was presented on 5 August 2020. The response form was submitted on 22 October 2020.

- 4 Standard case management directions were made on 24 September 2020 and the case was listed for final hearing on the above dates in July.

The hearing

- 5 It was agreed at the outset of the hearing that we would deal with liability only and that if the claimant was successful, we would then set a further date for a remedy hearing.
- 6 Also at the outset of the hearing, Mr Duffy made an application to admit a further set of interview notes, in relation to candidate 5. The candidate number comes from a document in the tribunal bundle, setting out an anonymised list of the candidates in this recruitment exercise, their dates of birth, and whether they succeeded or not at interview. That application was not agreed by Mr Sheppard, who requested that the tribunal allow further time to consider the contents of that document with the claimant. He also submitted that if that document was to be admitted, then the respondent should provide the interview notes for all the other successful candidates, if available. He submitted that it should be an all or nothing basis, i.e. that either all of the interview notes ought to be made available and put before the tribunal, if they were available, or none of them, including that for candidate 5.
- 7 The panel took the position that in principle, all of the interview notes should be made available, so that the parties could consider them, and decide which were going to be put in evidence to any of the witnesses. We agreed to make a start on the evidence of the claimant that day, on the basis that we would adjourn at a convenient point in the afternoon, to allow the claimant, her counsel and instructing solicitors to consider the documents.
- 8 In the event, all of the interview notes were disclosed. Mr Sheppard and the claimant were able to consider them, albeit at the end of day two. Five sets of notes were ultimately put to the witnesses, regarding candidates 1, 5, 7, 11 and 15. The panel has carefully considered the content of those notes as part of its deliberations.
- 9 It is unfortunate that the documents were not specifically requested or disclosed earlier. Despite the difficulties that created for both parties, we considered that the introduction of this evidence at such a late stage did not, on the basis of the time given to the parties to consider them with their representatives, result in any disadvantage to either party. Further, because of their potential impact on either party's case, we agreed that they be admitted in evidence.
- 10 On the third day of the hearing, the respondent produced the Civil Service Commission Recruitment Principles. Mr Sheppard did not object to them being admitted and we agreed to that.
- 11 The respondent also produced a document headed 'Success profiles – classifying evaluating and scoring candidates'. Having considered the matter further, the respondent agreed not to pursue an application to admit that document. We were all agreed that the document did not take the case any further forward on the way it was put.
- 12 Finally, the respondent applied to admit a copy of the script read out at the beginning of interview. This is referred to in witness evidence but had not previously been disclosed. At this point, we were in the middle of the cross

examination of the final witness Mr Worker. The document had not been put to the claimant and it would have been necessary for her to be given the opportunity to comment on it. The tribunal panel concluded that it would be unfair to the claimant to allow the document to be produced at this late stage. The fact that it complicated matters is evidenced by the fact that we had to ask Mr Worker to leave the virtual hearing room whilst we discussed the application. Potentially, the other witnesses of the respondent would also have had to have been given the opportunity to comment. For these reasons, we decided not to allow it to be admitted in evidence.

- 13 During the hearing, we heard live evidence from the claimant. For the respondent we heard from Ms N Ford, Judge's Clerk and currently Deputy Private Secretary to the Senior Presiding Judge of England & Wales; Mr R Worker, Clerk to the President of the Queen's Bench Division and Queen's Bench Judges' Clerks Line Manager; and Ms E Yates who at the time of the matters before us, was Deputy Private Secretary to the President of the Queen's Bench Division.
- 14 The hearing took place over four days. Evidence and submissions on liability were dealt with on the first three days. It was arranged that on the remainder of the third day, the tribunal would deliberate and a further date was set for deliberations on 10 August during which the tribunal was able to conclude its decision-making. Judgment was reserved.

Findings of Fact

The claimant's career

- 15 The claimant began her legal career as a legal secretary. She later became a Fellow of the Institute of Legal Executives. She was briefly a cashier in Barclays and then became a Judges Clerk in August 2005. The claimant was based at the Royal Courts of Justice (RCJ). She held this role until April 2018. The purpose of the role is to provide first line support to a Lord or Lady Justice of Appeal or High Court Judge. This helps to ensure the best use of the judge's time, by enabling them to concentrate more of their working day on the delivery of justice.
- 16 The claimant was initially assigned to the Court of Appeal. She subsequently transferred to the Employment Appeal Tribunal to work for the then President of the EAT. At the conclusion of his three year term of office, the judge was appointed to the High Court and the claimant transferred back to the RCJ with him. When the judge was elevated to the Court of Appeal, the claimant worked in that section again. During this period, the claimant gained experience in all three divisions of the Court of Appeal, Civil, Crime, and Administrative law.

The claimant's resignation – April 2018

- 17 Unfortunately, the claimant's husband became ill, in or about 2018. The claimant subsequently resigned from her post, in order to care for him. Her last day of employment was 23 April 2018.
- 18 Fortunately, the claimant's husband's health improved and she started looking for work again. In about October 2019 the claimant approached former

colleagues still working for the respondent because she had heard of a forthcoming recruitment round for Judge's Clerks.

- 19 The claimant had previously been successful in her role as Judge's clerk. There is no dispute about that whatsoever. This case is not however about the claimant's performance in her previous role as a Judge's Clerk. It is about her application in recruitment exercise 31459 to recommence employment in that role.
- 20 The claimant submitted her application towards the end of January 2020.

The assessment process

- 21 Some years ago it was decided that HMCTS assessments tended to favour candidates from within the civil service. A revised method of selection, using Success Profiles, was therefore devised. Part of the rationale for using Success Profiles was to enable the civil service to recruit more widely, during a period when it needs to replace high numbers of experienced members of staff who are moving on or retiring from the service.
- 22 Success Profiles were therefore developed with the help of external consultants. Mr Worker was part of the team at HMCTS who helped to tailor the Success Profiles matrix to HMCTS recruitment in 2018. It was initially championed by his line manager's predecessor. As part of that exercise, Mr Worker consulted with HR and existing clerks to create a profile of the 'ultimate clerk'. The intention being to base that profile on strengths and behaviours which can be demonstrated by people of all ages and backgrounds, enabling external applicants a more level playing field on which to compete with existing civil servants.

Success Profiles

- 23 Recruitment exercise 31459 used the Success Profiles matrix. Candidates were provided with a Hyperlink to pages containing more information about the Success Profiles assessment method. There was also a link to a document headed 'Band D Clerks Info Sheet'. The document sent to candidates reads:

Success Profiles: Success Profiles will enable a fairer and more inclusive method of recruitment by enabling us to assess the range of experiences, abilities, strengths, behaviours and technical/professional skills required for different roles. This flexible approach to recruitment focuses more on finding the right candidate for the specific role. To find out more about Success Profiles to support your application please click here for further guidance (<https://www.gov.uk/government/publications/success-profiles>).

- 24 The pack included the Judge's Clerk Success Profile. This includes under the heading 'Behaviours', communicating and influencing, making effective decisions, delivering at pace, and managing a quality service. Under the heading 'Strengths', it lists 'organiser', 'adaptable', and 'service focused'. Under the heading 'Ability', it lists typing (35 WPM), English (spoken, written, and comprehension) and physical capability. Finally, under the heading 'Experience', it requires use of IT.
- 25 The questions for this recruitment exercise were agreed in advance and were based on this Success Profile. A Template was used to make notes of the

candidate's answers. The template included follow-up questions the interviewers could use if a candidate was having trouble thinking of an answer.

- 26 We accept the evidence of Mr Worker that at the beginning of the interview, the panel chair read out a pre-prepared script, explaining the focus of the questions. Candidates were told that the assessment style was different to what they may have experienced before, because the panel were looking for the right "strengths" and "behaviours". Candidates were not however told which specific behaviours they will be asked about. For example, when the panel ask candidates to give an example of a time when they have had to influence a challenging individual, what they're really interested in is finding out whether a candidate is good at communicating and influencing, a required Behaviour.

The Recruitment Principles

- 27 The principle that selection for appointment to the Civil Service is to be on merit on the basis of fair and open competition is a long standing requirement. It used to be contained in the Civil Service Order in Council, made under prerogative powers. Since the Constitutional Reform and Governance Act 2010, section 10 came into force, the requirement has been put on a statutory footing. The Principles include the following matters:

5. Fair means there must be no bias in the assessment of candidates. Selection processes must be objective, impartial and applied consistently.

6. Open competition means that appointment opportunities must be advertised publicly. Potential candidates must be given reasonable access to information about the role and its requirements, and about the selection process. In open competitions anyone who wishes must be allowed to apply.

7. Departments are responsible for designing and delivering selection processes which meet the statutory requirement to select for appointment on the basis of fair and open competition.

11. The panel must ensure that candidates are impartially assessed against the published selection criteria at each stage of the process where assessment occurs and must take the final decision on which candidate or candidates are the most meritorious.

12. Panel members must declare any conflict of interest including prior knowledge of any applicant. It is for the appointing Department to decide, in accordance with its own rules of conduct, how to proceed where it appears that an actual or perceived conflict of interest may arise. A record must be kept of how any such conflicts were dealt with.

13. The Chair of the panel has the overall responsibility for ensuring that the selection process is compliant with the Recruitment Principles. Before a competition may proceed to advertising, the Chair must therefore approve the selection criteria, role description, panel membership, process to be followed, timetable, remuneration and other terms, and the advertising strategy, including how best to attract a strong and diverse field of applicants.

14. *At the end of the process the Chair must produce a record which should briefly describe the outcome, the assessment stages and on what evidence the assessment of merit was made, the order of merit, and confirm that the selection process was conducted in accordance with the Recruitment Principles. The Chair may also wish to comment on the strength and diversity of the field of candidates.*

16. *Departments must provide all potential applicants with information about the nature and level of the role (including information about, or a link to, the Civil Service Code), the criteria against which they will be assessed, details of the selection process and the total remuneration available (salary, bonus, allowances etc).*

24. *Selection processes must be objective, impartial and applied consistently. While this often involves an interview, it does not have to do so.*

25. *Each candidate must be assessed against the same advertised criteria. The evidence collected to assess candidates must be broadly equivalent in substance and depth, accepting that there may be some differences in the type of evidence available for internal and external candidates.*

27. *Candidates must be assessed on merit, and they should not be treated more or less advantageously because of their previous or current activities, affiliations, or the employment of their friends, partner or family members.*

Anonymity in the application process

28 HMCTS uses an online system for managing recruitment processes called Oleeo. Applicants upload their applications for vacancies through an interface. Before they send their completed application, they are required to tick a box that confirms the application contains no identifying personal data.

29 Applications go through an initial sift to decide which candidates go through to the practical skills test. Candidates who pass that test are then usually invited for interview on a separate date. The interview is the final part of the selection process.

30 We accept the evidence of Mr Worker that interviewers only know the name of a candidate before they arrive for their pre-booked interview appointment. They are not given copies of their CVs, or details of their employment history. Those who have access to Oleeo can view candidates' applications and CVs, but they will usually see a document that has been redacted to protect the identity of the applicant. CVs are only used following a successful interview. The CVs are given to the judges, as part of the process of matching a successful candidate with a judge.

The skills test

31 The claimant's application passed the initial sift and so on 4 February 2020 an email was sent informing her that her application had been received and she had been progressed to the next stage of the process.

32 On 5 February 2020 the claimant received an email from the respondent asking her to book an 'interview slot'. The claimant booked a slot for 12 February 2020.

- 33 On 7 and 10 February 2020 there was an email exchange between the claimant and employees of the respondent about the 'interview slot'. The claimant pointed out that 'the interview' appeared to be a typing test. The claimant further pointed out that she had worked as a Judge's Clerk for 13 years and held an RSA Stage III Advanced certificate for typing. She enquired if she could rely on that, in order to avoid the time and expense (about £100) of a six-hour round trip to London and back.
- 34 On 11 February 2020, Derek Gill of the respondent informed the claimant that she would not be required to take the typing test but needed to do the third part known as written comprehension. Mr Gill's email informed the claimant that she was no longer required to attend on 12 February 2020 but she was not to cancel the interview slot. She would be marked as succeeding on parts 1 and 2. Part 3 was to be assessed before her main interview.

Invitation to Interview

- 35 On 24 February 2020 the claimant received an email inviting her to attend a selection event. In the same email the claimant was told that, contrary to what she had been led to believe previously, the principles of fair and open competition meant she still had to undertake all of the parts of the skills test, before she could be interviewed.
- 36 The Claimant subsequently booked onto the selection event for interview which was to take place on 12 March 2020, between 13.30 and 14.25.
- 37 On 4 March 2020, Mr Gill emailed the claimant asking her to arrive at 10.45 am at the main desk. The claimant queried that suggestion in a reply sent on 8 March. In his response on 9 March, Mr Gill informed the claimant it was so she could undertake the necessary skills test prior to interview and that would take about 1.5 hours. The claimant was the only candidate who took their skills test and underwent the interview process on the same day.

Composition of the interview panel

- 38 In this recruitment exercise, the intention was that there would be three people on the interview panel, two of whom were Judge's Clerks, and one from another role. For the vast majority of interviews, those interviewing were Mr Worker, Ms Ford, (in their capacity as Clerks) and Kate Arrowsmith.
- 39 Since Mr Worker and Ms Arrowsmith had both previously worked with the claimant, Mr Worker felt uncomfortable keeping the same panel for the claimant. Mr Worker therefore emailed his line manager Nina Heddericks. In his email, he stated that two of the panel members (he and Kate Arrowsmith) were both uncomfortable being part of the same panel, because they had worked with the Claimant. Mr Worker had shared an office with the claimant when they were both clerks in the Court of Appeal, around six years ago. Mr Worker knew that the claimant had resigned in 2018 but did not know the reason why.
- 40 Mr Worker proposed to Ms Heddericks that Ms Arrowsmith should be replaced by Esme Yates, of the Judicial Office, and that the panel should be chaired by Natalie Ford, not him. Ms Heddericks agreed to that suggestion. Mr Worker chose to remain on the panel to ensure that it represented greater diversity, in that he was the only male.

- 41 Ms Yates subsequently agreed to sit on the panel. We accept Ms Yates' evidence that she did not know anything about the claimant other than the fact that she had worked as a Judge's Clerk before. Ms Yates did not know how long the claimant had been in that role, nor why she left. Nor did she know the claimant's age. Ms Yates did not sit on any of the other interview panels for any of the other 34 candidates interviewed as part of this recruitment exercise. She was brought in for this panel alone, due to Ms Arrowsmith having previously worked with the claimant.
- 42 The claimant worked in the same area as Ms Ford as well, when they both worked in the Criminal Division. We accept Ms Ford's evidence however that whilst she did not dispute the claimant's evidence that they had previously met, she could not recall meeting the claimant. Further, we accept that Ms Ford did not recognise the claimant when she walked into the interview room.

The Skills Test

- 43 On 12 March 2020, the claimant attended and took the Skills Test. The Test was passed. That is not in dispute. Indeed, had she not passed that test, the claimant would not have proceeded to the interview stage later that day. A former colleague, Sheila Glasgow, was present as invigilator during the claimant's Skills Test. Ms Glasgow did not invigilate for any other candidates. Following her successful completion of the Skills Test, the claimant had over an hour to wait before her interview commenced.

The interview process

- 44 The claimant was not collected for interview until about 13.40, ten minutes after the interview was due to commence. She had, incorrectly, been told to wait in the Main Hall. The claimant was concerned that this might have given the wrong impression to the panel members. As a result, the claimant felt rushed during the interview. Whilst we accept the claimant's perception in this regard, we also find that it was not because of anything said or done by the panel members during the interview process. The claimant's interview was relatively short compared to those of other candidates, but that was because the claimant's answers were relatively short.
- 45 At the commencement of the interview, Ms Ford read out the standard script. As noted above, the respondent applied for permission to adduce that document in evidence on the third day of the hearing, but for the reasons given above, the tribunal refused that application. We have not taken the content of the document into account during the decision-making process. Any evidence about what was said during the interview is taken from the witness evidence, together with the contents of the interview notes.
- 46 During each interview, the panel members took turns to ask the set questions. The person asking the question would try and maintain eye contact with the candidate during their reply, and so their notes of the answer would be less complete, for the answer given, than the notes of the other two members of the panel. The panel as a whole did not award marks to the candidate for each question during the interview itself. Instead, marks were awarded following a panel discussion, once the candidate had left the interview room.
- 47 The interview commenced with two 'warm-up' questions being asked. All of the candidates were asked those questions, but they were not marked as part of the selection process. The questions are designed to put candidates at

their ease, at the commencement of the interview. Unfortunately, the claimant gained the impression that Ms Ford was bored by the answer she gave in response to the first question as to what her favourite things were to do in her spare time. That answer being, gardening, and her grandchildren.

48 In relation to the next question as to the achievement she was most proud of in her life, the claimant said her children. The claimant says that Ms Ford reacted negatively to that answer. We accept that was the impression the claimant gained. However, we also accept Ms Ford's evidence that were she to be asked that question at interview, she would give the same answer, as her three children are her greatest achievement too.

49 Having asked the warm-up questions, the panel then moved on to the set of questions on which candidates were marked – under the headings 'Strengths', 'Behaviours' and 'IT'.

Strengths

50 There were three questions asked related to Strengths. The respondent's evidence, which we accept, is that the claimant received a score of nine, out of a total of twelve possible marks for this area. Had the claimant been scored similarly for the next set of questions, she would have succeeded at interview. It was her answers to questions in relation to the other areas of the Success Profile that led to her application being unsuccessful. We find that the marks given for the questions in relation to Strengths were fair and reasonable, and that since it was not the marks for those matters that led to the claimant's non-appointment, it is not proportionate, in our findings of fact, to deal with those questions in any further detail.

51 We turn next to the questions asked in relation to Behaviours.

Behaviours – Communicating and Influencing

52 In relation to the behaviour of communicating and influence, the claimant was asked to describe a time when she had to influence a challenging individual. We accept the evidence of the respondent's witnesses that the claimant commenced by giving a generic answer initially, and had to be prompted to give a more specific example. The claimant then provided two separate examples, one about when she worked in the solicitors office, and was made by a client of the firm to phone a prison; and the other about a resident of Springfield Hospital who sadly ended up committing suicide. The interview notes state:

'One lad in Springfield Hospital, took own life in the end. Out with friends drinking, friend fell in river and drowned. I had to visit and take statement from him as he was blamed. Reminded of value of telling the truth to counsel, tried to help the barrister. Keep talking to them, not over them and on their level. Try to emphasise and not be condescending'.

53 The claimant was awarded a mark of 3 out of 7 for her answer – an assessment that the answer evidenced a 'Moderate Demonstration' of this Behaviour.

54 We have compared the answer the claimant is noted as having given to the question, to that given by Candidate 5, who was 24 years old at the time of their interview. Her answer was along the lines of:

'New team member - not used to team working. Helping them to understand it was a team effort. Ensuring everyone knew extra guidance/help would be needed. Few meetings W/managers. Work great together now.'

Candidate 5 was also awarded a mark of 3/7 for her answer.

55 As for candidate 15, aged 28 at the date of their interview, her answer is recorded as being:

'Scout in the unit. Difficult home life, disengaged. Meant to be there because of mum, didn't want to be there. In brother's shadow. Took a year to slowly engage, speak to him, building rapport, remember what he said before. Gave him opp to come out of brother's shadow, speak to his mother the end of each session. He's done well. Would email mum with any concerns. Moved into a diff unit at certain age, but he settled there and is doing well.'

Candidate 15 was given a score of 6/7 for that answer.

Behaviours – Managing a Quality Service

56 In relation to the Behaviour of 'Managing a quality service', the claimant was asked to describe a time when she went the extra mile to meet someone else's needs in her professional or personal life, the claimant answered:

'I took a homeless man home and made him scrambled egg. Husband not happy as shed burgled and air rifle stolen'

The claimant was awarded a score of 2/7 for her answer.

57 Candidate 5, is recorded as giving an answer along the following lines:

'Stay eviction - woman had a next day eviction she was late into court. I was covering on desk and although not my role - I took it upon myself to approach the judge and see if I could get this heard. Put the workload to one side and spoke to Judge in my lunchtime.'

Candidate 5 was given a score of 5/7 for this answer.

Behaviours – Delivering at Pace

58 in relation to the behaviour of delivering at pace, the claimant gave the following example:

'Typing for McFarlane LJ - baby in press - [name redacted]. Five tapes. All have to be done as v urgent. Card and bunch of flowers from judge as I stayed all day and late. Didn't have time to think about it, knew how important it was to people outside.'

The claimant was awarded a mark of 4/7 for this answer.

59 Candidate 5 gave the following answer:

Judicial support section - allocated 36 orders. Urgent injunctions. You wouldn't be able to complete allocated work. Worried make mistakes as complaints and more work correcting orders. Asked manager to split work amongst team. They agreed and work was completed. Could have gone to manager a little earlier but wanted to try and complete it myself.

Candidate 5 also received a mark of 4/7 for that answer.

Behaviour - Making effective decisions

60 In relation to the behaviour of making effective decisions, the claimant was awarded 5/7 for her answer . Again, that was a good score, and marks at that level would have meant that the claimant would have been appointed. We therefore do not make any further findings of fact in relation to that behaviour.

Use of IT

61 The final question relates to the Use of IT. Candidates were asked to describe their experience of using IT in their personal or work life. The Success Profile states in relation to Use of IT

You have used IT in your personal or work life and show some experience and confidence working with computers and using applications such as Word, Excel and Outlook.

62 The claimant is recorded as saying:

IT - was awful - Dragon. Between us we coped. Got the hang of it in the end. Comfortable with systems and apps.

The claimant did not say which systems and apps she used. She was given a score of 2/7 for use of IT.

63 In her evidence before us, the claimant stated in relation to Dragon, that the lead judge was very enthusiastic, but the claimant thought it was rubbish if the person was indistinct when dictating and twice as much work was then needed to correct the document, which the claimant had to go back through and check. The comment 'got the hang of it in the end', related to the introduction of e-judiciary. That had just been introduced, and some judges were not using it.

64 Candidate 5 said the following in her answer:

'Degree - Word/PP. All Microsoft - excel. Court programs - case man, family man, PCOL'.

Candidate 5 received a mark of 5/7 for this answer.

65 Candidate 7 gave the following answer:

Never been an issue for me. Worked in city - always been a supervisor. Desktop publishing and graphic design. Microsoft suite – supervisor. Accounting packages. Social media/website. Confident most IT systems.

Candidate 7 received a mark of 7/7 for this answer.

The scoring

66 The pass mark for the interview was 30. Candidates who did not score that level or above were not offered a position. We accept the evidence of Mr Worker that as the claimant scored 2/7 for two of her answers, even if she had scored highly in the others she would not still have been successful at interview, as this demonstrated 'minimal demonstration' in relation to two of the questions. Neither the claimant, nor any of the other candidates, were told about these pass marks prior to interview.

67 The total score for behaviours was 16 out of 35, which, on the evidence before us, was not a 'pass'. The claimant's overall mark was 25/47 which did not in any event reach the overall pass mark.

Conclusion of interview

68 At the end of the interview, the claimant put out her hand to the panel members. We accept that from the claimant's perspective, this led to an awkward moment, because the panel members hesitated before taking her hand. We also accept Ms Ford's evidence that because the interview took place during the early stages of the pandemic, she was not sure at that stage if people should be shaking hands, and so she was a bit taken aback by the claimant's gesture. After a pause, the panel members did shake the claimant's hand.

Decision on application

69 On 16 March 2020 the claimant was told by email that she had not been successful in her application. At some time later, the claimant had a conversation with former colleagues at the RCJ. The claimant was not willing to provide details as to what was said to her, when, or by whom, as she did not want to create any difficulties for them. In any event, we are able to find on the balance of probabilities that as a result of what was said to the claimant, she gained the impression that the successful candidates were far younger than her.

70 We accept the evidence of Ms Ford, as corroborated by the anonymised successful candidate list, that the success rate for candidates in the over-50 age group was 75% (3 out of the 4 candidates over 50 were successful). It was lower in the under 30s and 30-40 age groups. Around two-thirds of the interviewees passed the assessment and were offered jobs. The candidate who scored most highly, was the next oldest candidate to the claimant, and was aged 55 at the date of interview.

Request for Feedback

71 On 17 March 2020, the claimant requested the results of her three typing tests from Sheila Glasgow. The claimant was told that she had passed those tests and hence proceeded direct to interview. None of the other candidates received their mark, they either passed or failed the Skills Test; if they failed, they did not proceed to the next stage.

72 On 25 March 2020 the claimant requested feedback on her application / interview. None was received, so the claimant chased up her feedback request on 1 May 2020. Again a response was not received. The claimant therefore raised a complaint on 13 May 2020. In her email the claimant stated that she wished to raise a formal complaint because she felt that '*the recruitment process has breached the recruitment principles*'.

73 The members of the panel were asked for comments on the feedback request. They were not told by Ms Heddericks that the claimant was complaining about an alleged breach of the Recruitment Principles. The panel members did not see a copy of the Feedback letter before it was sent.

74 On 21 May 2020 the claimant received written feedback from Nina Hedderick, Senior Judge's Clerk Manager. The claimant was told, amongst other things:

On use of information technology: whilst you passed the pre-interview assessments, at interview you failed to demonstrate in your responses your knowledge and experience of common MSOffice applications such as Word or Excel, or other IT packages or applications such as Dragon,

Skype, MS Teams, WhatsApp, etc to give the panel an insight into your familiarity and confidence in using IT.

Overall, your responses in all areas were generalised/based on opinion rather than specific examples demonstrating your knowledge, capability and experience, and the panel therefore were not satisfied that your total score fulfilled the criteria to the standard required to pass.

The Law

75 The applicable law is agreed by counsel for both parties and has been helpfully been summarised in their respective submissions, for which we were grateful.

76 Section 13 EqA 2010 provides:

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

77 Section s.39(1) provides that an employer A must not discriminate against a person, in the arrangements A makes for deciding whom to offer employment, or by not offering that person employment (sub-sections (a) and (c)).

78 In direct discrimination claims, the claimant must show that she has been treated less favourably than a real or hypothetical comparator. Other than possession of the protected characteristic, *'there must be no material difference between the circumstances of B and the comparator'*. s.23(1). *'All the characteristics of the complainant which are relevant to the way his case was dealt with must also be found in the comparator'* - per Lord Hope in MacDonald v MoD [2003] ICR 937, HL.

79 It is not always possible to identify an actual comparator. Where a claimant identifies an actual comparator who shares only some of his or her relevant characteristics, the tribunal can consider that comparator's treatment as evidence as to how a hypothetical comparator would have been treated: Watt (formerly Cater) v Ahsan [2007] UKHL 51.

80 Where the tribunal constructs a hypothetical comparator based on the circumstances of a real comparator, it must ensure that all relevant circumstances are considered in relation to the hypothetical comparator: Croydon Health Services NHS Trust v George UKEAT/0139/15.

81 Where it is established that the claimant was treated less favourably, the tribunal is required to consider the 'reason why'. That must be the focus; the tribunal must avoid becoming distracted by the comparator: Lord Nicholls in Shamoon v Chief Constable of the RUC [2003] UKHL 11.

82 In the case of Stockton on Tees Borough Council v Aylott [2010] ICR 1278, it was held that the decision whether a claimant was treated less favourably than a hypothetical employee is intertwined with identifying the ground on which the claimant was dismissed. If it was on the ground of disability (or as here age), then it is likely that s/he was treated less favourably than the

hypothetical comparator not having the particular disability would have been treated, in the same relevant circumstances. The finding of the reason for the dismissal supplies the answer to the question whether s/he received less favourable treatment.

- 83 Treatment will be held to be because of age if it is based on a criterion that is a direct function of age: Donkor v RBS UKEAT/0162/15.
- 84 Discrimination can be conscious or unconscious. The tribunal must consider the conscious or subconscious mental processes which led to the less favourable treatment, and consider whether the protected characteristic played a significant part in it, or had 'a significant influence on the outcome': Martin v Lancehawk Ltd t/a European Telcom Solutions UKEAT/0525/03 and Nagarajan v London Regional Transport and others [1999] IRLR 572 (HL).
- 85 Section 136 Equality Act 2010 provides that if there are facts from which a tribunal could decide, in the absence of any other explanation, that person A has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.
- 86 Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)
- 87 The Court of Appeal in Madarassy, a case brought under the Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

- 88 Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR 870 at para 32:

They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

- 89 Section 10(2) of the Constitutional Reform and Governance Act 2010 requires the selection of people for appointment to the Civil Service to be 'on merit on the basis of fair and open competition'.

Conclusions

- 90 In relation to the two lists of issues, we have decided to use the claimant's list. This had previously been agreed, and was the basis on which the parties had

prepared for the hearing. In our judgment however, the outcome would have been the same, if we had used the respondent's list of issues instead.

- 91 There are three allegations of less favourable treatment. The respondent does not deny that the treatment alleged happened. We set out our conclusions below under three sub-headings, corresponding to the three allegations of less favourable treatment before us.
- 92 In reaching our conclusions, we have considered the burden of proof provisions under the Equality Act 2010. We were however able to arrive at clear conclusions as to the reason for the treatment alleged. In those circumstances, the burden of proof did not shift.

Allegation (a) – attending skills test and interview on same day

- 93 On 12 March 2020 the Claimant attended a practical Skills Test and an interview for a vacancy as a judge's clerk under recruitment campaign 31459. We have found as a fact that the claimant was the only candidate to attend both the test and the interview on the same day.
- 94 We conclude however that this did not amount to less favourable treatment. The claimant attended the interview and the Skills Test on the same day because of the initial confusion as to whether or not she had to sit the test at all. When it became apparent that the claimant would have to sit all three stages of the Skills Test in order to comply with the Recruitment Principles, she was allowed to sit the Test on the same day as the interview to save her time and expense. This was at the claimant's request and was to her benefit.
- 95 The reason for this treatment had nothing to do with the claimant's age. Further, the claimant passed the Skills Test, so these arrangements, which were to her advantage, had nothing to do with the decision not to appoint her to the role, the next allegation to which we turn.

Allegation (b) - not appointing the claimant to the role of Judge's Clerk

- 96 On 16 March 2020 by email the Respondent informed the Claimant that it was not progressing her application and she had been unsuccessful at interview. We conclude that the claimant was not treated less favourably than an actual or hypothetical comparator. We conclude, on the basis of the facts found above, that the claimant was not appointed because she did not reach the required standard. We conclude that had a 20 to 25-year-old in the same recruitment exercise who performed as the claimant did at interview would not have been appointed either.
- 97 Candidate 5, who is in that age bracket, was appointed. But that is because, as is apparent from the answers she/he gave at interview, some examples of which are set out in our findings of fact above, they performed better at interview than the claimant did, in terms of the strengths, behaviours and IT experience that the respondent was looking for. That was the reason for the non-appointment of the claimant and the appointment of Candidate 5. Again, we conclude it had nothing to do with the claimant's age.
- 98 Due to the central importance of this allegation, we set out below in more detail our reasons for arriving at this conclusion, on the basis of the evidence presented to us.

Interview notes

- 99 In relation to the notes of interview, there is nothing in them from which we could draw any inference of age discrimination, such as age discriminatory comments.

Timing of interview

- 100 We have found as a fact that the claimant felt rushed in her interview. It was put to the claimant in cross examination that she had never previously suggested that she did not have enough time to answer the questions. The claimant replied to the effect that: *'I imagined that as I was going in late I needed to give answers quickly and concisely'*. We accept the evidence of the panel members however that there was no need for the claimant to rush, and there was no suggestion by them that she was late. The panel considered that the claimant's answers were short. They wanted her to give more detail. Whilst we accept that the claimant's genuine perception was that she was rushed, we conclude that her perception did not reflect the reality of the situation.

Prior assumption of knowledge

- 101 It is apparent from answers given by the claimant to questions at the hearing that she had assumed that the knowledge of her previous competence in the role would be known and taken into account. For example, it was put to the claimant in relation to paragraphs 20 to 27 of Mr Worker's witness statement that he had expected the claimant to say more in response to the interview questions. The claimant's answer was to the effect that she *'gave what she thought to be concise answers ... maybe I should have said more, I had been a clerk for so long, I gave what I thought at the time were appropriate answers'*.
- 102 It was also put to the claimant, in relation to the question about the use of IT, that this was the claimant's opportunity to give information about her use of IT in her work or personal life. The claimant's reply was to the effect that she was interviewed by two clerks who knew her, and they would know she was proficient in the use of IT. Later on, the claimant replied that maybe she assumed that because she was emailing HMCTS staff and answering documents, that HMCTS would know she was proficient in the use of IT. Her reply was to the effect of: *'Hindsight is a wonderful thing – I accept I should have gone into greater detail. I gave what I thought were appropriate answers at the time.'*
- 103 We conclude from these examples that the claimant did not go into as much detail in her answers as she was required to do, because she assumed that the prior knowledge of her working as a Judge's Clerk would be taken into account by the Panel in assessing her competence. However, like all the other candidates, the claimant was assessed on the basis of her answers during the interview itself, not on the basis of any prior knowledge. This was in line with the Recruitment Principles; taking into account prior knowledge would not have been.

The interview question scores - general

- 104 Counsel for the respondent put to the claimant during the hearing that the scores she had been taken to reasonably reflected her answers. The claimant

responded initially by stating that she did not know the scores at the time. When the claimant was requested to respond to the actual question put and her reply was to the effect of '*I guess so, the ones taken to so far*'.

105 We conclude that the scores given to the claimant were a reasonable reflection of her answers. Further, whilst we accept that the claimant, in common with all of the other candidates, did not know the scoring system that would be applied, she did know that she would be scored on her answers and that what was said at interview mattered. We illustrate this point below, by looking at some of the answers to specific questions, particularly the ones for which the claimant's scores were low.

106 Finally, the fact that the candidates were marked at the end of the interview, after they had left, and following a panel discussion, is not a matter from which we consider it would be appropriate to draw any inference of discrimination. All candidates were treated in the same way in that respect.

Interview question – Managing a Quality Service

107 As reflected in our findings of fact above, the example given by the claimant in relation to this behaviour was taking a homeless person back home and cooking him scrambled egg. We accept that it is easy to say in retrospect, and no criticism is intended of the claimant, but we conclude that the example given by the claimant was a poor example to illustrate her strengths in relation this behaviour which did not lend itself to the follow-up questions which had been agreed beforehand.

Interview question – Delivering at Pace

108 Mr Worker and Ms Yates gave evidence in relation to this behaviour, for which the claimant received a mark of 4/7. Mr Worker's statements says:

However, once again, we did not get sufficient detail on what the Claimant did to maintain her composure under pressure, how she dealt with setbacks, and whether, on reflection, she might have done something differently. The ability to give that level of detail is what sets apart the strong candidates from the average or weaker ones.

109 Ms Yates statement says at 17:

Her answer did not explain to us how she stayed calm and focussed, or whether she had to deal with setbacks. I thought this answer tended to show more positive indicators than negative indicators. It would have scored more highly if the Claimant had showed us that she had used her initiative and that she was comfortable juggling tasks and working very quickly.'

110 We accept this evidence, and conclude that it demonstrates that in scoring the claimant, the interview panel acted in a fair and consistent manner.

Interview question – Use of IT

111 It is submitted on behalf of the claimant that the mark for IT is irrational. We respectfully disagree. We accept Ms Ford's evidence on this issue, set out at in paragraphs 21 and 22 of her witness statement as follows:

21. The Claimant scored 2 out of 7 for the IT experience question [p. 185]. She did not name any of the IT applications she was familiar with and did not demonstrate she was at ease using basic systems. In her answer, she

demonstrated what we call a “negative indicator”, by emphasising her lack of confidence with IT. She scored poorly for this element of the success profiles, because IT skills were picked up out of necessity rather than being a personal preference. This was a significant weakness with her performance at interview.

22. Other candidates might express themselves differently when answering the IT question. A good candidate would either give examples from their own personal use of or interest in IT and/or their use of social media. They could also speak about how they have improved their skills in previous jobs. I remember the Claimant saying that “we muddled through” and “we got there in the end”. I did not think she was likely to adapt well to possible changes in IT systems, given the apparent lack of confidence she had with IT.

112 The mark reflects the fact that the claimant did not specifically mention any of the packages that she was familiar with, such as Word, Outlook and Excel. The interview panel members (correctly, in our judgment) did not use any previous knowledge of the claimant or knowledge that she had previously worked as a Judge’s Clerk in marking the claimant for this competency. More importantly, the mark reflected the fact that the examples that the claimant gave, in relation to Dragon and e-judiciary, were negative. The claimant talked about the difficulties experienced in relation to those packages/systems, rather than talking about those software packages and systems she was familiar with and was confident in using.

113 It is clear from our findings of fact above that other candidates did specifically mention the programmes they had worked with and were marked higher accordingly. Those candidates also used positive examples, not negative ones.

Knowledge of members of interview panel

114 We do not consider that the fact that the claimant had worked with Mr Worker before, as well as with Ms Ford, impacted in any way on the fairness of the interview. We have found as a fact that Ms Ford, whilst accepting that she may well have met the claimant when she worked as a judge’s clerk, did not remember her. As for Mr Worker, he does accept that he knew the claimant, but we conclude that if anything, that would have worked to the claimant’s advantage, rather than to her disadvantage. Mr Worker was concerned about undue bias or allegations of cronyism in favour of the claimant. That was why he took steps to change the composition of the interview panel.

115 There was no evidence put before us of any previous animosity between the claimant and Mr Worker when she worked as a Judge’s Clerk, which might have adversely influenced Mr Worker’s perception of her. In an ideal world, Mr Worker would not have sat on the interview panel for the claimant at all, because of the impression that may have given that prior knowledge of the claimant was being used in the interview process, rather than her answers at the interview. Whilst the situation was less than perfect however, we consider that the composition of the interview panel was a reasonable and practical compromise in the circumstances. Further, whilst there was no formal record made of a potential conflict of interest, the potential for a conflict of interest was considered and acted upon by Mr Worker, together with his line manager.

Perceived animosity of panel

- 116 We accept that the claimant perceived animosity towards her, particularly from Ms Ford. We conclude however that Ms Ford was not biased against the claimant whether because of her age or for any other reason. Ms Ford's answers before us were clear and consistent. In relation to the answer to the second warmup question, we accept Ms Ford's evidence that if asked that question at interview, she would give the same answer as the claimant, i.e. that her children are her greatest achievement.
- 117 Ms Ford was asked about her witness statement at paragraph 19, in which she states that she felt a bit sorry for the claimant as she wanted her to pass. Ms Ford was asked why that was the case. She answered to the effect that the claimant performed badly in the interview, when Ms Ford wanted her to do well as she was just the sort of person that HMCTS wanted in the role. She was an experienced clerk, and would not have needed a lot of training before she was able to carry out the role. We conclude on the basis of this evidence that the claimant's perception about the feelings of the interview panel towards her did not reflect the reality of the situation.
- 118 We have found as a fact that there was an awkward moment at the end of the interview when the claimant offered to shake hands with the panel members, but we conclude that was because of legitimate concerns at that stage about physical contact, in the early stages of the pandemic. It did not reflect any animosity towards the claimant.

Requirement of Physical Ability

- 119 The tribunal accepts that requirement of Physical Ability in the Skills Profile might be one which some older people, or somebody with a particular disability, could find more difficult to comply with, compared to a younger person/those without particular disabilities. However, in the claimant's case, this had nothing to do with the reason for her not being appointed to the role. In any event, we would anticipate that before rejecting a candidate solely on the basis of Physical Ability, the respondent would consider what adjustments could be made for a candidate who was otherwise suitable for the role.

Late disclosure of documents

- 120 We do not consider that any adverse inference can be drawn from the late disclosure of documents. It was most unfortunate that the interview notes were not provided at an earlier stage. The parties representatives might perhaps reflect on whether this was an oversight on both of their parts, either not to request them, or not to disclose them earlier. We do not consider however that the late disclosure had anything to do with the respondent having something to hide. On the contrary, the interview notes that we were taken to, references to which have been made in our findings of fact and conclusions above, support the respondent's defence of the claim.

Allegation (c) – delayed provision of feedback

- 121 On 21 May 2020, the Respondent wrote to the Claimant to provide the requested feedback in relation to her performance at interview, just less than two months after the feedback was requested. The delay in providing feedback was regrettable. However, we accept the evidence of Ms Yates that the delay was caused by the disruption caused by the pandemic, which

resulted in home working, lack of access to documents, the need to prioritise work and a requirement to adapt at speed to new ways of working.

122 It is submitted on the claimant's behalf that what was said in the feedback letter did not reflect what was said to be in relation to IT. We accept that the claimant did in fact mention Dragon, but as set out above, she did so in a negative way.

123 We accept that the claimant was upset by the delay in providing feedback. However, we conclude that the delay was due to the highly unusual circumstances existing at that time; it was not less favourable treatment and had nothing to do with the claimant's age.

Justification

124 From the respondent's revised list of issues, it appears that a justification defence is not being pursued. In any event, given our conclusions above, it is not proportionate or necessary to consider the justification issue.

Employment Judge A James
London Central Region

Dated 18 August 2021

Sent to the parties on:

18/08/2021

For the Tribunals Office

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ANNEX A – LISTS OF ISSUES

Claimant's list – previously agreed

Claims

1. The Claimant brings the following claim:
 - (a) Direct age discrimination (s.13 of the Equality Act 2010 (“EA 2010”));

Substantive Issues

Direct Age Discrimination (s.13)

2. It is agreed between the parties that the Claimant was subject to the following treatment:
 - (a) On 12 March 2020 the Claimant attended a practical skills test and an interview for a vacancy as a judge's clerk under recruitment campaign 31459;
 - (b) On 16 March 2020 by email the Respondent informed the Claimant that it was not progressing her application and she had been unsuccessful at interview; and
 - (c) On 21 May 2020, the Respondent wrote to the Claimant to provide the requested feedback in relation to her performance at interview.
3. Did any of the above treatment amount to treating the Claimant less favourably than the Respondent did or would have treated an actual or hypothetical comparator aged 20-25 who applied for a vacancy under the same recruitment campaign?
4. If so, was that treatment by reason of the Claimant's age?
5. If so, can the Respondent show that it had a legitimate aim? The Respondent will rely on the legitimate aims: (a) ensuring it recruits those candidates most suited to the role, based on merit and using the principles of fair and open competition; and/or (b) ensuring its application and assessment processes are fair, equitable and effective insofar as they are designed to identify the strongest candidates, regardless of age or background.
6. If so, can the Respondent show that the unfavourable treatment was a proportionate means of achieving one or more of the above legitimate aims?

Remedy

7. Should the Claimant be awarded compensation for losses flowing from any discrimination that she may prove, including but not limited to any award for injury to feelings and aggravated damages, and if so in what amounts?
8. Should the Tribunal make a recommendation if the Claimant is successful with a claim for discrimination?

Respondent's list

Claims

9. The Claimant brings the following claim:

(b) Direct age discrimination (s.13 of the Equality Act 2010 ("EA 2010"));

Substantive Issues

Direct Age Discrimination (s.13)

1. It is agreed between the parties that ~~the Claimant was subject to the following treatment:~~
 - (a) On 12 March 2020 the Claimant attended a practical skills test and an interview for a vacancy as a judge's clerk under recruitment campaign 31459;
 - (b) On 16 March 2020 by email the Respondent informed the Claimant that it was not progressing her application and she had been unsuccessful at interview; and
 - (c) On 21 May 2020, the Respondent wrote to the Claimant to provide the requested feedback in relation to her performance at interview.
2. *By not recruiting the Claimant, did the Respondent treat her less favourably than it did/would have treated a real/hypothetical comparator:*
 - (a) *aged 20-25,*
 - (b) *who applied for a vacancy under the same recruitment campaign,*
 - (c) *who had previous experience as a judge's clerk,*
 - (d) *with previous security clearance, and*
 - (e) *who scored fewer than 30 points at interview [OR] [who performed to the same standard as the Claimant at interview¹.]*
3. *If the answer to question 3 is 'yes', was the Claimant not recruited because of her age?"*
3. ~~Did any of the above treatment amount to treating the Claimant less favourably than the Respondent did or would have treated an actual or hypothetical comparator aged 20-25 who applied for a vacancy under the same recruitment campaign?~~
4. ~~If so, was that treatment by reason of the Claimant's age?~~
5. ~~If so, can the Respondent show that it had a legitimate aim? The Respondent will rely on the legitimate aims: (a) ensuring it recruits those candidates most suited to the role, based on merit and using the principles of fair and open competition; and/or (b) ensuring its application and assessment processes are fair, equitable and effective insofar as they are designed to identify the strongest candidates, regardless of age or background.~~
6. ~~If so, can the Respondent show that the unfavourable treatment was a proportionate means of achieving one or more of the above legitimate aims?~~

¹ This alternative wording is suggested in order to address the Claimant's objection that scoring 30 points was (allegedly) part of the less favourable treatment.