



EMPLOYMENT TRIBUNALS

Claimant

Ms J Yousaf

Respondents

AND

- (1) Ministry of Housing Communities and Local Government
- (2) Tom Preest
- (3) Erin Cowburn
- (4) John Isserlis

London Central

On: 28-30 September 2021

Before: Employment Judge Glennie
Ms S Went
Ms E Ali

Representation:

Claimant: In person
Respondent: Mr T Brown, of Counsel.

JUDGMENT

The unanimous judgment of the Tribunal is that the complaints of direct discrimination because of race and sex are dismissed.

REASONS

1. By her claim to the Tribunal the Claimant, Ms Yousaf, makes complaints of direct discrimination because of race and sex. The Respondents, of whom there are four, dispute that complaint.

2. The Tribunal is unanimous in the reasons that follow.
3. The issues in the case were defined by Employment Judge Palca at a Case Management Hearing in the following terms.
 1. The Claimant is a black British woman of Afro-Caribbean origin.
 2. The First Respondent accepts that it treated the Claimant less favourably than it treated others in materially similar circumstances by not offering her an advisor role following the Claimant's interview, which took place on 20 March 2020.
 3. If so, was this because of the Claimant's race or sex and/or because of the protected characteristics of race and/or sex more generally.
 4. Can the Claimant show primary facts from which the Tribunal could conclude in the absence of any other explanation that she was not offered the advisor role by the First Respondent because of her race and/or sex.
 5. If so, can the First Respondent show a non-discriminatory explanation.
4. We should say that although the references and the issues are to the First Respondent, these are also applicable to the Second, Third and Fourth Respondents who were the individuals who conducted the interview for the advisor role which is the subject matter of the case.

Evidence and Findings of Fact

5. The Tribunal heard evidence from the following witnesses:
 1. Ms Yousaf, the Claimant
 2. Ms Tessa Kirby
 3. Mr Tom Preest
 4. Mr John Isserlis
 5. Ms Erin Cowburn

There was an agreed of documents and page numbers in these reasons refer to that bundle.

6. The background to the claim is that the First Respondent, which we will refer to as "the Department", has responsibility for a number of matters of government, including in particular government policy on people who are sleeping rough. Ms Yousaf has considerable experience of working with and in connection with rough sleepers. In 2019 she applied for a Senior Executive Officer (SEO) role with the Department. Her application on that occasion was unsuccessful, but the feedback that she received was encouraging, and that encouragement played a role in her applying for a Grade 7 post with the Department on 30 January 2020. That post was as a Rough Sleeping Advisor and Grade 7, it is common ground, is effectively one step up from an SEO role.
7. The way in which the Department ran the recruitment exercise was as follows. After the closing date for the advertisement a shortlist for interview was created by sifting

the candidates by reference to their written answers to a question that was part of the application process. There were over 150 applicants for the post. At the sifting stage it was not possible for those carrying out the sift to detect the protected characteristics of race or sex of the candidates, which are in issue in this case.

8. The outcome of the sifting process was that 16 candidates were shortlisted, and one of these was Ms Yousaf. Ultimately, 14 out of those were interviewed, again including Ms Yusuf. Ms Yousaf's analysis of the shortlisting data that she has received has led her to conclude that she was the top scorer at the sift stage. Ms Cowburn thought that in fact Ms Yousaf might have been the third highest scoring candidate at that point, but whichever it may be, it is clear that she was at or near the top of the selection process at the sift stage.

9. The evidence from the Respondents, which the Tribunal accepts, is that the interview stage operated independently of the sift. The sift had no influence beyond that preliminary stage on who was appointed; that depended entirely on the outcome of the interviews.

10. Of the 14 individuals who were interviewed, 10 were male and 4 were female. Eleven were white: according to Mr Preest there were 3 candidates who were black; Mr Isserlis identified those candidates somewhat differently in that he identified Ms Yousaf as being black and two other candidates as being Asian British. But what is clear is that there were eleven candidates who identified as being white.

11. In the event there were four posts available to be filled from the interview process. The interviews were conducted by Mr Preest, who was the Chair of the panel, Mr Isserlis and Ms Cowburn. The format used was that there was a script in standard form to be used in each of the interviews. This took each candidate through a presentation which was intended to last 5 minutes, with another 5 minutes for questions on it from the panel. This was followed by 4 questions which had addressed the competencies or behaviours that were being sought. These were headed "Working Together", "Communicating and Influencing", "Changing and Improving" and "Making Effective Decisions". There was then a final question seeking a short response which was directed to the candidate demonstrating the quality of resilience. The interviews were intended to last around 45 minutes each, and in Ms Yousaf's case it took about that time.

12. Each panel member marked the presentation and the first 4 questions out of 5 for each item and the final one out of 4, meaning that there was a theoretical maximum of 29 marks available to be achieved. Once all the interviews had been held the panel then discussed the scores that they had individually reached and came to a consensus about a final moderated score for each candidate against each question. They then added up the moderated scores and offers were to be made to the top 4 scoring candidates.

13. Ms Yousaf's interview took place on 6 March 2020 (not all of the interviews took place on the same day). As we have said, the panel consisted of Mr Preest, Ms Cowburn and Mr Isserlis, and there was administrative support from Ms Kirby.

14. There is a degree of dispute between the parties about note-taking at the interview. The Respondents' evidence is that all 3 panel members took notes, Mr Preest and Ms Cowburn doing so on laptops, and Mr Isserlis doing so on paper. The latter said that

his typing speed was not up to the task and that subsequently he transcribed his hand written notes to a typed version and threw away the originals. Ms Yousaf agreed that Mr Preest took notes on a laptop: her evidence was that she did not see Ms Cowburn using a laptop, but she accepted that Ms Cowburn and Mr Isserlis might have, as she put it, scribbled some notes on the interview sheet. Substantially, however, Ms Yousaf disputed that Ms Cowburn and Mr Isserlis were taking notes in the course of the interview.

15. There is no doubt that Mr Preest was taking notes and at pages 372-376 we have copies of his notes, which he identified. There was another set of notes at pages 392-396, and these were clearly notes of Ms Yousaf's interview taken by someone. Mr Isserlis was taken to these in re-examination and said that it appeared to him that these were his notes typed up. In addition to this at page 390 there were emails from Mr Isserlis and Ms Cowburn from June 2020 in which they said that they were attaching and sending to Mr Preest copies of the notes that they had taken in the course of Ms Yousaf's interview. Ms Kirby in her evidence said that subsequently for the purposes of preparing feedback to the candidates, she had referred to the notes from all of the panel members.

16. The Tribunal finds as a matter of probability that all 3 panel members took notes in some form or another. That would be the natural thing to do if conducting interviews of 14 individuals, and there is as we have said the supporting evidence of the emails that suggest that at the time there were notes of evidence that were sent to Mr Preest. Ultimately, we were not convinced that Mr Isserlis was necessarily right in identifying the notes that he was taken to as his. He did not appear to be particularly familiar with them and it seemed to the Tribunal that he might have been looking at them for the first time in the context of this litigation. It is possible that they are his notes, but also possible that they are in fact Ms Cowburn's notes. Our finding, however, as we have said is that all 3 of them made notes in some form or another.

17. A further point on which Ms Yousaf placed considerable reliance in relation to notes was to say that the notes (here referring to those taken by Mr Preest) were not an adequate reflection of what she had said in the course of her interview. Mr Preest when asked about this accepted, and indeed it was obvious, that the notes were not anything like a verbatim record of a 45 minute interview. His evidence was that he took them in the form of an aide-memoire rather than as a transcript of what was being said. The Tribunal considered that this was a realistic approach by a panel member making notes in an interview of this sort.

18. Beyond this, the parties both sought to draw comparisons with the notes of other candidates' interviews, as compared to those of Ms Yousaf's interview. Ms Yousaf pointed to the notes for candidate number one, who was one of the successful 4 candidates, these appearing at pages 150-154. The Tribunal has not carried out a word count or a scientific study of the two sets of notes, but ultimately the notes for candidate number one appear to be about the same length as those for Ms Yousaf. Very roughly Ms Yousaf's notes covered about 41 lines of writing and candidate one's about 39 lines of writing (we emphasise that we have not made a detailed study, it is more a matter of impression). What also emerges however, as a matter of impression from those notes, is that especially in relation to the presentation, Mr Preest's comments and notes are evidently more enthusiastic about candidate number one's than Ms Yousaf's presentation.

19. Mr Preest noted in relation to candidate one that a particular response to a question was “strong”, another was “very good”, and another was “brilliant”, and he used large numbers of exclamation marks apparently to emphasise the points that he was making. Those features were not to be found in his record of Ms Yousaf’s presentation. As a matter of comment, the Tribunal observes that when making notes of an interview it is bound to be the case that the note taker’s impression and view of the responses given is going to be recorded, and therefore if someone is more impressed with one candidate with another, then that is likely to come out in the notes.

20. Mr Brown took the Tribunal to the notes for candidate number four, who was a white male who was one of those who were unsuccessful. These were at page 164 onwards. The Tribunal notes in this connection that, so far as the length of the notes is concerned, they seemed to be about three quarters of the length of those taken of Ms Yousaf’s interview. Without going into detail, what was said in them reflected a candidate who was evidently on the face of the notes less impressive, or made less of a good impression on Mr Preest.

21. As we will explain, there was an internal complaint and investigation conducted by the Department, and one of the observations in the outcome of that complaint was that the note taking was regarded as below the standard that would have been expected. To the extent that it is material to this case, the Tribunal endorses that conclusion by the internal investigator. However, there was ultimately, we found, nothing to suggest that the notes that were taken were not a fair reflection of Ms Yousaf’s interview. As Mr Brown pointed out, Ms Yousaf was not able to say that there was something specific that she had said, or that was relevant, and had been omitted from the notes.

22. The outcome of the interviews was that the top four scoring candidates obtained scores of 21, 20, 20 and 19 respectively; two scored 18; and Ms Yousaf scored 15, meaning that of the 14 interviewed she was the seventh highest scorer. Offers were made to the top four candidates. One of them declined the offer and so an offer was then made to one of those who had scored 18. The interviewing panel noted (and all three witnesses referred to this) that all four of the successful candidates in the first instance were white. Mr Isserlis was identified as the person who had spotted this and raised it. This having been raised, the panel then went back and checked their scoring to ensure that they were content with the result that they had reached. They concluded that they were. It is also the case that three out of the original four successful candidates were women, and the Tribunal infers that the individual who declined the offer was a woman, because the ultimate outcome was that of the four people appointed, two were women.

23. The outcomes were communicated in the following way. On 20 March 2020 the Department’s Resourcing Hub sent out a generic email to all of the candidates at page 222 saying that the process would now be proceeding more slowly than was anticipated because of the pandemic, which had taken hold at that point. Confusingly perhaps for the candidates involved, and certainly for Ms Yousaf, on the same day an email was sent out to the interviewees (Ms Yousaf’s being at page 213) by Mr Preest giving an informal statement of the outcome of their application. Mr Preest’s evidence, which the Tribunal accepts, was that he sent that out to all candidates and that he did so because the deliberations had been concluded, the panel had made its decisions, and he considered that it was fairest to let the candidates know the outcome. Additionally, he

was concerned in case the successful candidates might accept job offers elsewhere if there were a delay. In this way, on the same day as being told that the process would be delayed, all of the candidates were notified of the outcome.

24. Ms Yousaf at page 214 asked for feedback on her application. On 5 May 2020 she received a formal notification from the Resourcing Hub that her application had been unsuccessful, and this was accompanied by feedback about the interview at page 343. It is the case that there were about two or three sentences given by way of feedback in relation to each question. Ms Yousaf raised a complaint to the Department about the outcome of her application. That complaint is not in itself an issue in the claim, but it is relevant to record that it was considered by Ms Labret who responded on 19 June 2020 at page 386. In summary Ms Labret made the following points in response to Ms Yousaf's complaint:

1. She explained the communications on 20 March and said in effect that Mr Preest should not have sent out an informal notification of the outcome, while stating that he had in fact done so in relation to all candidates.
2. Ms Labret said that more than one panel member had been taking notes during the interviews, but that there had been a delay in giving the outcome and feedback to the candidates.
3. It was said that the feedback could have been more constructive and more comprehensive, but that it was the same or similar for all candidates. That indeed is demonstrated by the contents of the bundle where the anonymised feedback for all the interviewees has been provided.
4. Ms Labret said that the wording in the formal outcome that "you were one of our highest scorers" could cause confusion and that it would no longer be included.
5. Concerned a point that does not really arise in the present case about the SEO campaign.
6. In relation to a point that Ms Yousaf had made that protected characteristics of race and gender would have become apparent at the interview, which they would, Ms Labret responded that the panel had found a clear merit order amongst the candidates at interview.

The applicable law and conclusions

25. Section 13 of the Equality Act provides in sub section 1 that 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. As we have said in relation to the issues that were identified, it is accepted by the Respondents that there was less favourable treatment because Ms Yousaf was not offered a post whereas other candidates were. The Tribunal's concern, therefore, is with the reason why Ms Yousaf was treated less favourably. Her case in this regard is not one of conscious discrimination against her, but of unconscious discrimination.

26. The Tribunal has had in mind the provisions of s.136 of the Equality Act about the burden of proof. Sub section 2 provides that if there are facts from which the Court could decide in the absence of any other explanation that a person has contravened the provision concerned, the Court must hold that the contravention occurred. Sub section 3 provides that sub section 2 does not apply if (A) shows that (A) did not contravene the provision.

27. In the well-known cases of **Igen v Wong** and **Madarassy v Nomura** the Court of Appeal held in relation to the earlier anti-discrimination legislation (but still applicable to the Equality Act) that Tribunals would often apply a two stage test when considering the burden of proof. At the first stage the Tribunal would make its primary findings of fact and would ask itself whether those findings, in the absence of an explanation from the Respondents, could provide a proper basis for a finding that discrimination had occurred. In **Madarassy** the Court of Appeal emphasised that there had to be a proper basis for such a provisional finding. It would not be sufficient for a Claimant to be able to demonstrate a difference in treatment and a difference in protected characteristic or characteristics. There would have to be something more, which might not in itself be very significant, that could provide a proper foundation for a finding of discrimination. If that something more were present, then the burden would be on the Respondents to show that they did not discriminate against the Claimant.

28. The Tribunal has therefore asked itself what in the present case might amount to the “something more” that is required at the first stage of that test. As accepted on behalf of the Respondents, there were flaws in the recruitment process. We have already described those in relation to the response to the internal complaint. None of these, in the Tribunal’s judgment, would provide a proper basis in the absence of an explanation for a finding of discrimination because of race and/or sex.

29. Primarily, this is because all of these shortcomings applied to all of the candidates, whether successful or unsuccessful, and regardless of their protected characteristics. As we have said, Ms Yousaf also relied on points about who took notes and about the quality of the note taking itself. But our findings on these points, which we have already given, meant that they could not provide a foundation for a finding of discrimination. There was nothing to suggest that anything that could be said about the note taking was in any way connected with the race or sex of the candidates, or of Ms Yousaf in particular.

30. Like the members of the panel, the Tribunal found that we were given cause for thought by the fact that all four selected candidates in the first instance were white. That is something that is potentially relevant to the complaint of race discrimination; the same point does not arise in relation to sex discrimination.

31. On reflection, however, the Tribunal concluded that it was perhaps not surprising that this outcome occurred given that 11 out of the 14 individuals interviewed were white. Had there been a different distribution of ethnic origin amongst the candidates than this might have amounted to the “something more” that is required under the first stage of the test, but ultimately we concluded that it did not provide that because the outcome of 4 white candidates out of 11 being successful and none of the 3 non-white candidates being successful was statistically or arithmetically something unexpected or out of the ordinary.

32. Alternatively, if we are wrong about that and this element does provide the necessary “something more” than we would find that the Respondents have shown that discrimination did not take place. We have accepted the evidence that the panel was alert or alerted to this particular point and went back to recheck the scores and to satisfy themselves that they had indeed selected the best scoring candidates according to the criteria laid down. We find, if it is necessary, that is a sufficient explanation to show that discrimination did not occur in this case.

33. In conclusion, the Tribunal can understand Ms Yousaf’s disappointment at the outcome of her application. She was evidently a strong candidate who performed well in both stages of the process. More than that, she had learned of flaws in the process, and we have set out in summary what those were. None of those however, as we find, means that discrimination had taken place in this case. The complaints of discrimination because of race and sex are both therefore unsuccessful.

Employment Judge Glennie

14 November 2021

Sent to the parties on:

16/11/2021

For the Tribunal: