EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104079/2019

Held In Glasgow on 2, 3 and 4 March 2020

Employment Judge: Mrs M Kearns
Tribunal Members: Mrs LM Millar
Ms M McAllister

Mr D Odlgie

Claimant
Represented by:
Mr B Kadlrgolam - Solicitor

Falkirk Council

Respondent
Represented by:
Ms K Graydon - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal was to dismiss the claim.

REASONS

1. The claimant made an unsuccessful job application to the respondent for the post of materials recovery facility officer. He was interviewed for the job on 26 November 2018. On 11 April 2019, having complied with the early conciliation requirements, he presented an application to the Employment Tribunal in which he claimed race discrimination.

Issues

2. The issues for determination at this final hearing were summarized and recorded by the Tribunal in the Note of the Preliminary Hearing on 12 June 2019 as follows:

a. Whether, applying the burden of proof provisions in s.136 Equality Act 2010, the respondent treated the claimant less favourably because of his race (in the sense of colour) when it offered employment to GM rather than the claimant.

b. Whether the claim was presented outside the period set out in s.123(1)(a) Equality Act 2010.

c. If so, whether proceedings were brought within a just and equitable further period in accordance with s.123(1)(b) Equality Act 2010.

d. Remedy (if the claim succeeds). In relation to remedy only, the claimant informed the Tribunal at the Preliminary Hearing that this case is one of six brought by him in the Glasgow Employment Tribunal in relation to unsuccessful job applications. None of the other cases involves the present respondent. Accordingly, if the claimant succeeds in two or more claims there may be a prospect of overlap in compensation or "double recovery" to be addressed.

3. At the outset of the hearing Mr Kadirgolam made an application to amend the ET1 to add a further ground of complaint. This application was unopposed by the respondent and granted by the Tribunal. The amendment added the following issue expressed by Mr Kadirgolam as follows:-

e. Whether the respondent directly discriminated against the claimant because of his race or colour by (a) failing to contact him (with the job application outcome) within the timescale he was advised he would be contacted; and/or (b) when the claimant asked for feedback, failing to provide the feedback within a reasonable time providing that the claimant had been waiting since 12 December 2018 to be contacted by the

respondent in respect of the outcome of the interview and the feedback he had requested.

Evidence

4. The parties produced a joint bundle of documents ("J") and referred to them by page number. The claimant gave evidence on his own behalf. The respondent called the three members of the job interview panel as witnesses: Mr John Kirkhope, waste services co-ordinator; Ms Ceri Hassall, assistant waste strategy co-ordinator; and Ms Mhairi Walker, HR business partner.

Findings in Fact

5. The following material facts were admitted or found to be proved :-

6. The respondent is Falkirk Council. In or about October 2018 the respondent posted a job advertisement for a materials recovery facility officer ("MRF officer") onto an online recruitment system called "Talentlink", which is in turn linked to the Scottish Government's 'My Job Scotland' portal. On 30 October 201 8 the claimant submitted an online application for the post to the respondent via Talentlink. The MRF officer post was based at the respondent's Waste Management facility at Bogton Road, Falkirk. The job involved looking at co-mingled waste brought into the facility for recycling and making sure the quality of segregated material is right. The salary was in the range £20,000 - £30,000. The claimant was one of twelve applicants for the post. The recruiting manager was John Kirkhope, the respondent's waste services co-ordinator. It was Mr Kirkhope who prepared the job description (R93), advertisement (R91) and person specification (R109).

7. The respondent had had some difficulty in filling the MRF officer post previously. This was the fifth time the job had been advertised. An appointment had been made after the fourth advertisement in November

2017, but the person had left in around July 2018 due to personal circumstances.

8. The interview panel for the post was chaired by Mr Kirkhope. The other members of the panel were Ceri Hassall, assistant waste strategy co-ordinator and Mhairi Walker, HR business partner. As stated previously, the respondent received twelve applications for the post. On 14 November, Mr Kirkhope and Ms Walker went through the applications and short-listed five candidates for interview. The short listing involved assessing each application against the essential and desirable criteria in the person specification for the job (R109). Shortlisting analysis forms were produced for each applicant (R111 - 113).

9. The claimant was one of five applicants who met the essential and desirable criteria for the post and all five were invited for interview on 26 November 2018. The invitations for interview went out via Talentlink on 19 November 2018. Two candidates were external to the respondent and three were internal. The external candidates were GM and the claimant.

10. Prior to the date of the interviews Mr Kirkhope circulated question sheets to Ms Walker and Ms Hassall. There were 23 suggested questions on the sheets. Ms Hassall said she thought there were too many questions. The panel met on the morning of the interviews and agreed which questions to ask and who would ask them. The scoring of each answer was to be out of ten. Mr Kirkhope supplied each panel member with a blank interview form for each candidate. These had the questions typed out and then a space to make notes on the candidate's answer.

11. The claimant's application in 2018 was not the first he had made to the respondent. On 11 September 2017 the claimant had applied to the respondent for the post of assistant waste strategy co-ordinator (J33). He had been shortlisted and interviewed by a panel of three chaired by Mr Kirkhope but had been unsuccessful on that occasion.

12. The claimant attended for interview for the MRF post at 11 am (R199) on 26 November 2018. He was the second candidate to be interviewed. When the claimant walked into the interview room Mr Kirkhope and the other panel members stood up to greet him. They shook hands with the claimant and Mr Kirkhope welcomed him to the meeting and commented that he had met the claimant before. The claimant said that he had not met Mr Kirkhope before.

13. The interviews took place on Monday 26 November. Mr Kirkhope was going on annual leave on Friday 30 November until Tuesday 11 December, so each candidate was told at the end of the interview that it was unlikely that the respondent would be able to let them know the outcome until Mr Kirkhope came back from leave on 11 December.

14. Mr Kirkhope's total score for the claimant was 105. His total score for GM, the successful candidate was 123. The day after the interview Ms Hassall and Ms Walker sent their scores for each of the candidates by email to Mr Kirkhope (R197). All three interviewers had independently scored GM substantially higher than the other four candidates. GM was fully qualified for the post and had the relevant experience that the respondent was looking for. His total score was 375. The four unsuccessful candidates' total scores ranged from 309 to 339. When the scores of the three panel members were totalled GM was first on 375 points; an internal candidate was second on 339 points and the claimant was third on 325 points (R199). Mr Kirkhope had scored the claimant's answers a total of 105; Ms Walker had scored them 108 and Ms Hassall had scored them 112. The answers of the second ranking candidate had been scored as follows: Mr Kirkhope 116; Ms Walker 113; Ms Hassall 110. The answers of GM, the successful candidate were scored as follows: Mr Kirkhope 123; Ms Walker 129; Ms Hassall 123 (R201). Once he had received the scores of the other panel members and checked the total scores for each candidate, Mr Kirkhope telephoned the respondent's HR department to confirm that the scoring had been received and that it was his intention to go ahead with the successful candidate.

15. Mr Kirkhope contacted GM's first referee on 28 November 2018 and received the reference back the same day. Mr Kirkhope also sent a reference request to the claimant's first referee on 28 November (R205) because he was unsure if the second placed candidate would take the job if offered and he wanted to leave it open to approach the claimant if both the successful candidate and the second placed candidate refused it. Mr Kirkhope telephoned GM on 29 November 2018 to let him know he had been successful subject to satisfactory references and confirmed the conversation in an email (R208) on the same date. GM indicated he would accept the job (R207 - 10). Mr Kirkhope requested GM's second reference on 29 November and it was received on 4 December while Mr Kirkhope was on annual leave.

16. Before Mr Kirkhope went on holiday he managed to speak to two of the internal candidates to let them know that they had been unsuccessful. He did not manage to speak to the other internal candidate because the candidate was on leave.

17. When Mr Kirkhope returned from his holiday on 11 December GM's second reference was waiting for him and it was positive. At 16:53 on 11 December 2018 Mr Kirkhope emailed GM (J208) confirming that positive references had been received and offering him the job. GM confirmed his acceptance of the job by return email at 17:00 on 11 December 2018 suggesting a start date of 8 January 2019. Mr Kirkhope responded to him on 12 December at 09:53 confirming the start date and making arrangements to meet with him then. Prompted by this exchange of emails confirming that GM would be starting in the post, Mr Kirkhope then went onto Talentlink and at 10:05 he closed the status for the job (J116). While he was on Talentlink, he tried to send a template letter to the claimant through the Talentlink system, to which he attempted to add a paragraph thanking him for applying, saying that he was hopeful there would be more opportunities in the future and encouraging him to apply for them. For some reason - perhaps because he attempted to adapt the template - the email and template did not send and

were not retained on the Talentlink system. At 10:18 am, unbeknown to Mr Kirkhope, someone called 'Catherine Young' then went onto the same Talentlink record and reopened the job in error (J116). Thus, Mr Kirkhope did attempt to send the claimant notification that his application had been unsuccessful and believed that he had done so. However, the notification did not send, and the claimant did not receive it. Mr Kirkhope eventually managed to speak to the third internal candidate individually sometime later to tell him that he had been unsuccessful.

18. Following the Talentlink intervention by Catherine Young, the four unsuccessful candidates were shown erroneously as "in process" (J115) until 2 July 2019 when, the claimant having brought to Mr Kirkhope's attention that the job was still showing as 'open' on Talentlink, Mr Kirkhope changed it back to 'closed' again.

19. On 1 February 2019 the claimant emailed Mr Kirkhope (R258) in the following terms: *"Hi John, I had an interview with you last year November 26th, you promised getting back to me in two weeks since you will be going on holiday, I am yet to hear about the outcome of the interview. What is the outcome?"* Mr Kirkhope emailed the claimant back the same day (R257) in the following terms: *"Hi David, I trust you are well. The feedback was sent through My Job Scotland portal, generally an automated response, however I had added additional text. You can probably guess that you were unsuccessful on this occasion. I understand there may be another opportunity to apply for a position within Falkirk Council now. This is currently advertised through MJS. Kind regards John".*

20. The claimant emailed Mr Kirkhope back again on 1 February stating: "*I would love to have feedback with regard to the interview so as to know my area of weakness."* Mr Kirkhope did not respond. Accordingly, the claimant emailed him again on 14 February 2019 stating: *"Dear John, I sentan email to you on the 1st of February 2019, requesting feedback with regard to my*

interview, I have not gotten any feedback yet. I would really appreciate it, if you would give me feedback with regard to the interview thanks".

21. Mr Kirkhope replied to this email on 25 February 2019 (R257): *"Dear David, can you please provide me with a telephone number, to discuss further. John".* During the month of February 2019 Mr Kirkhope's outlook calendar diary (J289) showed approximately 47 commitments. He also took three days' annual leave from 13 to 15 February inclusive and a half day on the morning of 20 February. A large part of Mr Kirkhope's role is operational and requires him to work outside the office. He did not respond to the claimant sooner because he understood that he was not under any obligation to give feedback; he was very busy at the time with his operational work and he felt that the claimant had waited 6 weeks to request feedback.

22. On 26 February 2019 Mr Kirkhope telephoned the claimant. The claimant made a recording of the call without Mr Kirkhope's knowledge or consent and produced a transcript which was revised and agreed by the respondent for the purpose of this hearing (J285). On the call, after pointing out to the claimant that he was not under an obligation to give him feedback Mr Kirkhope said he would summarise some of the key points that the claimant might want to do a bit more development work on for future applications. During the call, Mr Kirkhope untruthfully told the claimant that the scoring of all the candidates had been extremely close and went as far as to say: *"it's the closest we have ever had, it was very close so, it was quite a tight and heavy discussion we had at the very end about who was kinna* [sic] *suitable for the role."*

23. Mr Kirkhope gave the claimant some feedback about his presentation with which the claimant disagreed and told him that overall, he had had a good interview. He asked him *"You applied for this job once before didn't you?"* The claimant replied that he had applied for a different job and confirmed that it had been the strategy job.

24. Mr Kirkhope then stated in relation to the interview: *"The unfortunate thing for yourself is one of the people who actually applied for this role had extensive experience in commercialisation, extensive experience in MRFs and extensive experience in baling operations."* Mr Kirkhope went on: *"and that, that's yeah unfortunate for yourself. If this person maybe hadn't came for the interview, we may not have been having this conversation. "* The remarks gave the claimant the impression that he had come a very close second, whereas the truth of the matter was that he had come third by a significant margin.

25. Towards the end of the call the claimant stated: *"To me I felt it has been happening regularly and I just felt because I am not a British that's why I wasn't given the job even the first I felt..* Mr Kirkhope replied: *"Because, sorry what, because.."* and the claimant went on: *"it was because of my leave to stay that was why I was not given the job, from my perspective I felt the interview went very well".* Mr Kirkhope responded: *"right ok, we didn't consider that during the second interview. No, that's exactly the reason I have just explained...."*. He asked the claimant whether he was working at that moment. The claimant said he was not, and Mr Kirkhope told him he was sure something would be coming his way soon and that he would get the desired job.

26. The claimant learned that his job application had been unsuccessful on 1 February 2019. In accordance with the requirement to contact ACAS for early conciliation before instituting Employment Tribunal proceedings he notified ACAS on 17 March 2019. The ACAS certificate was issued on 1 April 2019. The ET1 was presented to the Employment Tribunal on 11 April 2019.

Observations on the Evidence

27. Much of the relevant evidence in this case was not in dispute. We set out below the conflicts in the evidence so far as material and how we resolved them.

28. Firstly, there was disagreement about what had been said by Mr Kirkhope to the claimant at the start of the interview on 26 November 2018. The claimant's evidence on this differed from the averments in his ET1.

29. In his ET1, which he had submitted on his own behalf (i.e. before he had Mr Kadirgolam's assistance) the claimant had stated that the interview panel had confused him with someone else they had recently interviewed; that he had repeatedly told them he was not that person and that they had ignored it. In his witness statement (paragraph 17) the claimant stated: *"Mr John and the Human Resources officer continually mistake me to be another person they had interviewed before despite the fact that I told them that the last time I came for an interview was in 2007. Though I was successful, they refused to offer me the job because I told them that I sent my documentation to the home office for renewal. This was confirmed by Mr John Kirkhope during the telephone interview feedback when he said in No 49 "right ok, we didn't consider that during the second interview. No, that exactly the reason I have just explained." This answer was in response to what I said, that I was not offered the Job because I was not a British yet by status."* (Although reference is made in the claimant's witness statement to 2007, we assumed that this was a typographical error and that the claimant had intended to refer to 2017). We did not agree that the sense of Mr Kirkhope's response was that the claimant was not offered the job because he was not a British citizen. The ordinary sense of Mr Kirkhope's transcribed words is that the claimant had not been offered the 2018 job for the reasons Mr Kirkhope had just explained.

30. In addition to the evidence given by the claimant in his witness statement, Mr Kadirgolam asked him some questions orally in chief. In particular, he asked: *"Before the interview did they ask you during interview if you had applied before?"* The claimant replied: *"They told me categorically they'd interviewed me for the same position before. I said no, it was a different position."* Mr Kirkhope was asked about the matter several times in cross examination. He was adamant that he had simply said to the claimant that they had met before and that the claimant had denied this.

31. We preferred Mr Kirkhope's evidence on this point for the following reasons: firstly, because the claimant had changed his position from a clear allegation in his ET1 that the panel had confused him for someone else, that he had repeatedly told them he was not the person and that they ignored it (which, if correct, would be consistent with a denial of having met Mr Kirkhope before); and secondly because Mr Kirkhope's recollection that the claimant had denied that they had met before was corroborated by Ms Hassall and Ms Walker in paragraphs 13 and 16 of their respective witness statements and under cross examination. The respondent's witnesses all confirmed that the claimant had denied meeting Mr Kirkhope at all.

32. A second evidential issue (made material by the claimant's amendment at the outset of the hearing) concerned whether Mr Kirkhope had notified the claimant of the outcome of his application on 12 December or attempted to do so. We could see from the Talentlink record produced (J115 - 6) that on 12 December 2018 at 10:05 am Mr Kirkhope changed the job status on Talentlink to 'closed' (R116). He was therefore, clearly on Talentlink at that point in time. We inferred from the documentary records that Mr Kirkhope's interaction on Talentlink had been prompted by his receipt of GM's references on his return from holiday on 11 December; his formal job offer to GM by email at 16:53 on 11 December (J208); GM's acceptance by return email at 17:00 in which he suggested a start date of 8 January 2019; and Mr Kirkhope's response to him on 12 December at 09:53 confirming the start date and making arrangements to meet then. The Talentlink record then shows the job status being closed by Mr Kirkhope at 10:05. The Tribunal regarded it as consistent with the documentary evidence and more likely than not that Mr Kirkhope did, as he testified, attempt to send a template letter to the claimant through the Talentlink system, to which he attempted to add a paragraph, but for some reason - perhaps because he attempted to adapt the template - it did not send. It appears that someone called 'Catherine Young* was then on the same record at 10:18 am and that she reopened the job in error. We concluded from all of this and from the tenor and content of his later email (J257) to the claimant on 1 February 2019 that

Mr Kirkhope did attempt to send the claimant an outcome via Talentlink on 12 December 2018 and that he believed that he had done so.

33. In assessing Mr Kirkhope's evidence we have taken into account the fact that part of his eventual telephone feedback to the claimant about his interview was disingenuous. Mr Kirkhope conceded that he had exaggerated and he apologised for this. The 'feedback' conversation on 26 February was recorded by the claimant without Mr Kirkhope's knowledge or consent, though its admission into evidence was not objected to by the respondent. On the call, Mr Kirkhope untruthfully told the claimant that the scoring of all the candidates had been extremely close and went as far as to say: *"it's the closest we have ever had, it was very close so, it was quite a tight and heavy discussion we had at the very end about who was kinna* [sic] *suitable for the role."* He misled the claimant into thinking he had come a very close second: *"If this person maybe hadn't come for the interview, we may not have been having this conversation".* The disingenuous nature of Mr Kirkhope's feedback clearly had implications for his credibility generally. However, he was frank about it and otherwise made appropriate concessions. In all the circumstances, we have approached the evidence as forensically as possible and considered the testimony in the light of the documentary records and the rest of the oral evidence.

Applicable law

Direct Discrimination

34. The claimant relies on the protected characteristic of race or colour under Section 9 Equality Act 2010. Section 13 of that Act prohibits direct discrimination in the following terms:

"Direct discrimination

(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/'

35. Section 39 Equality Act 201 0 provides so far as relevant as follows:

"39 *Employees and applicants*

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment "

36. Section 136 of the Equality Act 2010 deals with the burden of proof and provides as follows:-

"136 Burden of Proof

(2) This section applies to any proceedings relating to a contravention of this Act

(3) If there are facts from which the court could decide, in the absence of any other explanation that a person (A) contravened the provision concerned, the court must hold that the contravention occurred;

(4) But sub-section (2) does not apply if A shows that A did not contravene the provision. "

Time Bar

37. Section 1 23 Equality Act 201 0 provides so far as relevant: -

"Time limits

(1) Proceedings on a complaint within section 120 may not be brought 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 employment tribunal thinks just and equitable.

(2) .....

(3) For the purposes of this section -

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

(b) failure to do something is to be treated as occurring when the person in question decided on it:

Discussion and Decision

Time Bar

38. Initially this claim concerned a single recruitment decision taken by the respondent on 29 November 2018 and an issue of potential time bar arose. However, following an amendment which was not objected to by the respondent, the claimant now complains of two additional later alleged acts of race discrimination, raising the prospect of conduct extending over a period with the last act occurring on or around 26 February 2019. The acts now complained of are: whether the respondent directly discriminated against the claimant because of his race or colour by (a) offering employment to his comparator rather than to him on or around 29 November 2018; (b) failing to contact him (with the job application outcome) within the timescale he was advised he would be contacted (i.e. by 12 December 2018); and/or (c) when the claimant asked for feedback, failing to provide the feedback within a reasonable time providing that the claimant had been waiting since 12 December 2018 to be contacted by the respondent in respect of the outcome of the interview and the feedback he had requested. The feedback was ultimately provided on 26 February 2019. The claimant learned that his job application had been unsuccessful on 1 February 2019.

39. As the Tribunal has no jurisdiction if the claim is time barred, we require to satisfy ourselves on the point. Taken as a single act, the limitation period in respect of the recruitment decision would have expired on 28 February 2019, and the claimant would have had to have complied by then with the

requirement to contact ACAS for early conciliation before instituting Employment Tribunal proceedings. The claimant in fact notified ACAS on 17 March 2019. The ACAS certificate was issued on 1 April 2019. The ET1 was presented to the Employment Tribunal on 11 April 2019. Since time would normally begin to run from the date when the decision was taken, rather than when the claimant learned of it, the claim would be out of time. Had we required to address the point, we would have found that it would have been just and equitable to hear the claim though out of time because the claimant did not receive Mr Kirkhope's email of 12 December and was not aware until 1 February 2019 that his application had been unsuccessful. The cogency of the evidence was unaffected by the delay. The claimant acted with reasonable promptness once he became aware of the factual position. The balance of prejudice would have favoured hearing the application though out of time.

40. We concluded in any event that the addition of the further claims by amendment extended the conduct complained of over a period with the last act on or around 26 February 2019 and in these circumstances, the notification to ACAS on 17 March 2019 and presentation of the ET1 on 11 April were in time. We are therefore satisfied that the Tribunal has jurisdiction to determine the claims.

Claim of Direct Discrimination - Sections 13 and 39(1)(a) and (c) Equality Act 2010

41. We turned to consider whether the respondent directly discriminated against the claimant contrary to sections 13 and 39(1)(a) and (c) Equality Act 2010. To succeed with a claim for direct discrimination, the claimant requires to prove on the balance of probabilities (subject to the burden of proof rules set out above) that he was treated less favourably than his comparator was or would have been treated and that this was because of his protected characteristic of race. It is for the claimant in the first instance to prove facts from which the court could decide, in the absence of an adequate explanation that the respondent discriminated. If he is able to do so the burden of proof transfers to the respondent to prove an explanation for that

less favourable treatment. If the burden shifts to the respondent, it must prove on the balance of probabilities that its treatment of the claimant was in no sense whatsoever because of the claimant's protected characteristic.

42. An inference of discrimination may be rebutted in a number of ways, for example, an employer may lead evidence that he treats all employees in a similar way or that the conduct was on the ground of a genuine reason which, although unjustified, was not discriminatory. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason. The Tribunal therefore require to consider what can be inferred from the evidence about the alleged discriminator's mental processes. Once the burden of proof shifts to the respondent then an analysis of the "reason why" the treatment was carried out is necessary in direct discrimination cases.

43. In this case the claimant pointed to three instances of alleged less favourable treatment as follows:

(i) that he was not offered the job of MRF officer in November or December 2018;

(ii) that the respondent failed to contact him (with the job application outcome) within the timescale he was advised he would be contacted; and

(iii) when the claimant asked for feedback, the respondent failed to provide the feedback within a reasonable time providing that the claimant had been waiting since 12 December 2018 to be contacted by the respondent in respect of the outcome of the interview and the feedback he had requested. We consider each in turn. For completeness we refer back to the issues agreed at the Preliminary Hearing and to Mr Kadirgolam's amendment at the outset of this Hearing.

Whether, applying the burden of proof provisions in s.136 Equality Act 2010, the respondent treated the claimant less favourably because of his race (in the sense of colour) when it offered employment to GM rather than the claimant.

44. In relation to (i) above, Mr Kadirgolam said that the claimant's comparator was the successful candidate, GM, who is white, failing whom, a hypothetical comparator. He argued that the claimant had been treated less favourably than his comparator GM in this case. GM was offered the job. The claimant was not. He submitted that the email from Mr Kirkhope to the claimant's first referee in November 2018 was a sign that the claimant had succeeded at interview and that at some point the respondent had changed its mind. He pointed out that Mr Kirkhope had verbally offered the job to GM before he had received his second reference. He pointed out the differences between the feedback Mr Kirkhope had given the claimant and the documentary records.

45. Mr Kadirgolam made a number of criticisms of how Mr Kirkhope had proceeded to appoint the successful candidate, GM. It appeared to be true that he verbally offered GM the job before he had seen his references and we have already discussed the nature of the feedback given to the claimant. However, there are no facts from which the court could decide in this case that the decision not to offer the job to the claimant was because of his protected characteristic of race. The claimant was shortlisted for interview along with four others. All those shortlisted met the essential and desirable criteria for the post. GM was fully qualified for the post and had the relevant experience that the respondent was looking for. Indeed, the claimant accepted in cross examination that GM had more waste experience relevant to the post than he did. With regard to the interviews, all the candidates were asked the same questions and the respondent operated a scoring system in which the three interview panel members independently scored each candidate for each question. When the scores were all added up, the successful candidate's total score was 375; the second candidate's total score was 339 and the claimant's score was 325. The panel members had

independently scored each candidate within a similar range. GM is not an appropriate comparator because the difference between his score and the claimant's was the decisive difference between them. Put another way, the evidence clearly showed that the reason why the respondent offered the post to GM and not to the claimant was because GM scored 50 points more than the claimant at interview and the claimant came third. As Ms Graydon observed, the difference was not marginal. There was no evidence that any of the scores had been marked too low because of the claimant's race.

46. A hypothetical white comparator with the same interview score as the claimant would have been treated in the same way as the claimant and there is no evidence to suggest otherwise. Having carefully considered the documentary and oral evidence, the Tribunal concluded that the reason for the decision had nothing whatsoever to do with the claimant's protected characteristic. It was accepted that the claimant had indeed given a good interview as he had personally assessed it to be. However, the claimant was not in a position to assess the other candidates and compare his performance to theirs.

47. Ms Graydon asked the claimant in cross examination why he thought that the reason he had not been offered the job was because of his race. The claimant replied that Mr Kirkhope had sent an email to his referee asking for a reference. The claimant went on: *"They wanted to give it to me, but they changed their minds because rm black".* In his witness statement (paragraph 17) he referred to the feedback conversation at the end of February 2019 and implied that Mr Kirkhope had admitted that the claimant had not been offered the [2017] job because he had said he had sent his documentation to the Home Office for renewal. We did not agree that the sense of Mr Kirkhope's response was that the claimant was not offered the job because he was *"not a British yef* as he put it. The ordinary sense of Mr Kirkhope's transcribed words *("right ok, we didn't consider that during the second interview. No, that's exactly the reason I have just explained....')* is that the claimant had not been offered the 2018 job for the reasons Mr

Kirkhope had just explained. It is clear from the transcript that Mr Kirkhope is confused ("*Because, sorry what, because…*[1]} by the claimant raising the 2017 job process.

48. We did consider whether Mr Kirkhope's disingenuous feedback was 'something more' from which the court could decide in the absence of any other explanation that the respondent did not offer the job to the claimant because of his race, but it did not seem to have anything to do with race. Once he had received the misleading feedback from Mr Kirkhope, the claimant was understandably under the impression that he had come a very close second. However, giving the claimant the benefit of the doubt on the burden of proof, even if Mr Kirkhope's disingenuous feedback were sufficient to shift the burden of proof, the documentary records and corroborating evidence from Ms Walker and Ms Hassall together with the evidence we accepted from Mr Kirkhope clearly show that the reason for the decision was that the claimant came third in a robust recruitment exercise in which he scored 50 points less than the successful candidate and 14 points less than the second candidate. Thus, even if the burden shifted, the respondent has demonstrated that the claimant's race was in no sense whatsoever the reason for the treatment and this head of claim cannot succeed.

Whether the respondent directly discriminated against the claimant because of his race or colour by (a) failing to contact him (with the job application outcome) within the timescale he was advised he would be contacted; and/or (b) when the claimant asked for feedback, failing to provide the feedback within a reasonable time providing that the claimant had been waiting since 12 December 2018 to be contacted by the respondent in respect of the outcome of the interview and the feedback he had requested.

49. In relation to (a), Mr Kadirgolam submitted that the claimant's comparators were the other white candidates who applied for the job and were unsuccessful. However, he stated that if it was considered material that the other unsuccessful candidates were all internal, then the claimant would

point to a hypothetical comparator. On the facts found, the reason for the delay in advising the claimant of the outcome of his application was that Mr Kirkhope believed that he had notified him on 12 December via Talentlink. Ultimately, this was a question of fact. We approached it by considering the totality of the evidence and looking at the contemporaneous documentation. We could see from the Talentlink record produced (J115 - 6) that on 12 December 2018 at 10:05 am Mr Kirkhope changed the job status on Talentlink to 'closed' (R116). He was therefore, clearly on Talentlink at that point in time. As explained above, we could see from the documentary records that Mr Kirkhope's interaction on Talentlink had been immediately preceded by his formal job offer to GM by email at 16:53 on 11 December (J208); GM's acceptance by return email at 17:00; and Mr Kirkhope's response to him on 12 December at 09:53, a few minutes before he put the job status on Talentlink to 'closed' at 10:05. The Tribunal regarded it as consistent with the documentary evidence and more likely than not that Mr Kirkhope did, as he testified, attempt to send a template letter by email to the claimant through the Talentlink system, which, possibly because he tried to adapt it, did not send. This interpretation is also consistent with the tenor and content of Mr Kirkhope's later email (J257) to the claimant on 1 February 2019.

50. Thus, the reason why the respondent delayed in advising the claimant of the outcome of his application was that Mr Kirkhope had tried to send an email but a technical issue on the Talentlink system prevented the email from sending. Mr Kadirgolam submitted that a hypothetical comparator must have those characteristics the respondent has taken into account in deciding to treat the claimant in the particular way, but must be white. The comparator in this case would be an unsuccessful external candidate to whom Mr Kirkhope had tried and failed to send a notification by email through Talentlink, but who was white. It is obvious that that comparator would also not have received notification of an outcome. The failure to notify the outcome accordingly had nothing whatsoever to do with the claimant's race. With regard to the burden of proof, since there was no evidence that an

actual or hypothetical white comparator would have been treated any differently, this head of claim fails. For completeness, the internal candidates are not appropriate comparators because they were notified of the outcome internally and informally. The fact that they were internal to the respondent was what determined the method by which they were contacted, and their material circumstances are not sufficiently similar. One of them was, in any event notified later than the attempted notification of the claimant. The claimant was the only external unsuccessful candidate.

51. The third act complained of was as follows: *"when the claimant asked for feedback, failing to provide the feedback within a reasonable time providing that the claimant had been waiting since 12 December 2018 to be contacted by the respondent in respect of the outcome of the interview and the feedback he had requested".* Mr Kadirgolam argued that this was less favourable treatment than a hypothetical white comparator would have received and that it was because of the claimant's race.

52. The claimant emailed Mr Kirkhope at 14:39 on 1 February 2019 stating: *"I would love to have feedback with regard to the interview so as to know my area of weakness."* Mr Kirkhope did not respond. Accordingly, the claimant emailed him again on 14 February 2019 stating: *"Dear John, I sentan email to you on the 1st of February 2019, requesting feedback with regard to my interview, I have not gotten any feedback yet. I would really appreciate it, if you would give me feedback with regard to the interview thanks".* Mr Kirkhope replied to this email on 25 February 2019 (R257): *"Dear David, can you please provide me with a telephone number, to discuss further. John".* Mr Kirkhope then called the claimant with the feedback the next day, 26 February 2019. Thus, there was a delay from 1 to 26 February (just over three and a half weeks) in the respondent providing feedback.

53. In relation to feedback generally, Mr Kadirgolam drew our attention to paragraph 16:72 of the ACAS Code of Practice on Employment (2011) which states: *"Having secured a preferred candidate, it is good practice for*

an employer to offer feedback to unsuccessful short-listed candidates if this is requested. By demonstrating objective reasons for the applicant's lack of success, based on the requirements of the Job, an employer can minimise the risk of any claims for unlawful discrimination under the Act." It is important to note that the Code does not impose legal obligations as such. However, it must be taken into account where relevant to any questions arising before us. We did not think this had any material relevance. The respondent did give feedback of a sort once it was requested.

54. The respondent lodged Mr Kirkhope's outlook calendar diary for the month of February 2019 (J289). This showed a very large number of commitments and three and a half days' annual leave. We accepted Mr Kirkhope's evidence that a large part of his role is operational and requires him to work outside the office. This seemed fairly obvious given the nature of the work. He testified, and we accepted that he did not respond to the claimant sooner because he understood that he was not under any obligation to give feedback; he was very busy at the time with his operational work and he felt that the claimant had waited 6 weeks to request feedback. Thus, the hypothetical comparator in this case would be an unsuccessful candidate who requested feedback from Mr Kirkhope six weeks after his interview at a time when Mr Kirkhope was busy, but who was white. There was no evidence before the Tribunal to suggest that such a hypothetical white comparator would have been treated any differently in the circumstances and this head of claim also fails. The claim is accordingly dismissed.

Employment Judge: Mary Kearns
Date of Judgment: 01 May 2020
Entered in register: 04 May 2020
and copied to parties