



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr C Palmer

AIMS Markets Limited

Heard at: London Central (By CVP)

On: 4 – 6 July 2022
In chambers: 8 July 2022

Before: Employment Judge Lewis
Ms G Carpenter
Mr R Miller

Representation

For the Claimant: Representing himself

For the Respondent: Mr E Hammer, Branch Austin

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is that the claims for race and sex discrimination are not upheld.

REASONS

Claim

1. The claimant claims that the reason he was not selected for the position of People Lead with the respondent was direct race and/or sex discrimination, being discrimination against him as a white person and / or as a man.
2. It was decided at the preliminary hearing that no list of issues was necessary

Procedure

3. The tribunal heard from the claimant and his three witnesses, Christopher Mainstone, Matthew Butler and Nathan Fairhurst. For the respondent, we heard from Michael Jones, Andrew Clover, Kathryn Willis, Elizabeth Brauer and Victoria Hopper. There was an agreed trial bundle of 410 pages, a supplementary bundle of 8 pages from the claimant, plus a few additional documents which we labelled C1, R1 and R2.
4. Some witnesses and Mr Hammer worked from hard copy bundles, whereas other witnesses and the tribunal had electronic bundles. Unfortunately the numbering was not aligned, which slowed us down because it required searching every time a page reference was made. The page numbers referred to in the witness statements are hard copy numbers.

Fact findings

5. The respondent is the digital capital markets division of the AIMS group, a provider of financial services. It was founded in early 2017 by the CEO, Andrew Clover. It started to grow more rapidly in 2020, although it was still small, and by mid 2021 it was decided that it needed to recruit a full-time person to deal with HR matters at every level. At that point, there were only 12 employees and no internal HR post.
6. Mike Jones (Managing Director) and Victoria Hopper, an external HR Consultant, were asked to carry out the administration side of the process. Miss Hopper had only just started working with the respondent.
7. Mr Jones and Miss Hopper discussed the nature of the role and whether it needed a strategic senior level candidate or whether it was a more hands-on operational role. It was decided that the respondent needed someone who could take on the full range of HR responsibilities including, eg handling grievances. A person at senior HR level may not be prepared to do that. On this basis, the Mr Jones and Miss Hopper finalised the job description, modifying the company's first draft.
8. The budgeted salary was around £80,000.
9. The position was advertised on the respondent's Linked-In account as 'People Lead (HR)'.
10. The respondent's interview process has several stages. Candidates were sifted on their CVs and those identified as suitable were invited to a 'pre-screening interview' – this is an interview, where the company screens out applicants who it does not wish to go on to a further interview. In these Reasons, we will refer to this interview by its technical name, 'pre-screening interview', although some of the witnesses called it the first interview.

11. That was followed by a full interview to assess competence. Again we will refer to this interview by its technical name under the process, ie 'first interview' (although some witnesses, confusingly, called it the second interview).
12. Finally there was a group interview to assess 'team / culture fit'.
13. The respondent did not have formal selection criteria.
14. The respondent received many applications, and the claimant was amongst the few selected for a pre-screening interview. It was clear from his application that he was a man.
15. The pre-screening interview with the claimant took place on 13 July 2021 over video link. It was carried out by Mr Jones and Miss Hopper. Miss Hopper joined the call shortly after it started and had to leave a little early. She took notes.
16. Mr Jones had contacted the claimant on 13 July and asked if he could carry out the pre-screening interview on the spot. The claimant was on holiday with some friends and they had just checked out of their hostel. However, he agreed to carry out the interview, which he conducted from the hostel lobby. His friends (Mr Mainstone, Mr Butler and Professor Fairhurst listened in (unseen) to most or all of the interview.
17. Mr Jones asked the claimant to talk through his CV and experience. Mr Jones told the claimant about the history of the company and that people were at the heart of the business. He said, 'the company is nothing without our people'. Mr Jones said that the company was looking to hire another 5 – 10 employees before the end of the year, and he said that it was fundamental for the People Lead to be hands-on.
18. Mr Jones told the claimant that the respondent had an objective of building and creating diversity. He mentioned the ethnicity and sex of various existing employees. According to the claimant and his friends, Mr Jones referred to the company's wish, desire or intention (they do not agree on the verb) to hire 'fewer white men'. The claimant in his witness statement said at paragraph 14 that Mr Jones 'openly stated it was the intention of the company to hire "fewer white men"'. This is the phrase he put into the ET1. At paragraph 18 of his witness statement, the claimant said '...had convinced me that his statement that the Respondent wished to hire fewer white men". Mr Butler said, 'wished to hire "fewer white men"'. Mr Mainstone said, 'There was a desire to "hire fewer white men"'. Professor Fairhurst said, 'Using the phrase we want to hire "fewer white men"' he proceeded to list a series of positions within the company and the ethnic minority employees that filled them'.
19. Mr Jones cannot remember exactly what he said, but denies he put it like that and says his words have been misconstrued. Miss Hopper, who missed the end of the interview, but was present when Mr Jones mentioned the

objective of building and creating diversity, says she did not hear him say anything about not wanting to hire white men or that the company wanted to hire *fewer* white men. Miss Hopper also says she did not hear Mr Jones go through the ethnicity and sex of various existing employees. We will come back to our fact-finding on what Mr Jones said.

20. During the interview, Mr Jones asked the claimant what he would be expecting as salary. The claimant suggested £100,000. Mr Jones visibly showed his surprise. Mr Mainstone remembers that Mr Jones was 'slightly taken aback'. Mr Jones said that was higher than they had been thinking, but he would not rule it out for the right person. The claimant said he would be happy to negotiate around a wider remuneration package.
21. The claimant and his friends discussed the interview afterwards, and particularly the alleged discriminatory remark about 'fewer white men', and have discussed those matters many times since. Moreover, Mr Butler, who is a solicitor who engages in discrimination claims as part of his practice, has informally advised the claimant on his case.
22. Mr Jones and Miss Hopper generally thought the claimant was a serious candidate who should progress to the first interview, although they had a couple of reservations. Mr Jones emailed Miss Hopper on 13 July 2021 to say 'Chris's expectations were high. We could probably accommodate him if we wanted to, but want to touch base with you before taking any further steps'. Miss Hopper replied, 'I thought his would be ... I've updated the spreadsheet with my feedback...I feel like we need to continue with the pre-screens and speak to someone whose package details are in the current ballpark and then decide what level we need at this stage, if you are in agreement?'
23. Miss Hopper noted on the interview spreadsheet '...Strategic experience – need to question operational, hands-on?' Mr Jones noted on the interview spreadsheet 'Very interesting CV. Excellent industry experience ... Very broad range of HR experience, agree with VH – need to test appetite to be individual contributor.' Although it is hard to be sure, these comments appear to have been noted on the basis of the written application and prior to the pre-screening interview.
24. Following the pre-screening interview, Mr Jones noted on the spreadsheet that Miss Hopper was not able to attend the whole interview but she felt the claimant came across very well. 'Main question at this stage would be package – is expectation going to be too high? Expectations will be in the 120k mark'.
25. The first interview was carried out on 3 August 2021 with Mr Clover, Mr Jones and Miss Hopper. The respondent makes the point that Miss Hopper was being paid for her time, so it would hardly have put the claimant through as a charade.
26. The claimant initially alleged in his tribunal proceedings that the first interview was 'going through the motions'. After he saw the respondent's

disclosure in preparing for this case, he believed that that interview was not going through the motions, and that the discrimination must therefore have happened later on in the process.

27. Miss Hopper wrote on her handwritten notes, before she discussed the interview with Mr Clover and Mr Jones, 'Put through to team scenario' This was her personal view before she discussed the matter with Mr Clover and Mr Jones.
28. After discussing the interview together, the three interviewers had doubts. They felt the claimant talked a lot, and they wondered if he would be a good listener. Mr Jones and Miss Hopper felt that the claimant was speaking in a scripted and premeditated way, and Mr Jones felt the conversation did not flow. They were still concerned about his seniority and expectations for the role.
29. Mr Clover noted on the spreadsheet, 'Like him, is there an arrogance we need to tease out.' Mr Jones noted 'Is the role too hands on for him. Is he too senior for us / expectations too high.' Miss Hopper noted 'Is he approachable, need a bit of work to dig deeper. Is he a good listener? Has a lot of opinions, likes to talk a lot.'
30. The claimant secretly recorded the first interview. The transcript of the recording shows that he did indeed talk at length and that he expressed a number of firm opinions, eg on dispensing with probation periods and performance appraisals.
31. On 5 August 2021, Mr Jones, Mr Clover and Miss Hopper amended the job description to clarify it was a more operational role and less senior role.
32. At this point, there were two other candidates, both women, who had on 3 August 2021 also been through the first interview. It was also decided not to go ahead with them (one of them because 'the people piece' was missing)..
33. On 13 August 2021, the claimant emailed Mr Jones to ask if he was intending to conduct any further interviews. Mr Jones answered by return that they were reviewing and getting feedback from stakeholders that week and would be in touch very shortly. On 20 August 2021, Mr Jones emailed the claimant to say that they did not wish to proceed any further with him. He said they had decided after some deliberation to change the remit for the role and downgrade the level of seniority they were aiming for. They did not believe they were ready for someone of his calibre right now.
34. The claimant replied on 21 August asking in what way the job was becoming less senior. Mr Jones was on holiday. He replied on 18 September 2021. He said that the company was not at a point where it needed 'a senior strategic people person'. It needed someone full time to handle nuts and bolts people issues. 'So the role is definitely less senior – not envisaged as part of the leadership team, for example, and our salary budget is in the £80k range'.

35. On 19 November 2021, the claimant wrote to Mr Jones alleging sex discrimination against Mr Jones and/or Mr Clover. He set out his account of events, including his allegation that ‘ you stated that it was yours and the company’s intention to hire “fewer white men”’. He said he had felt through the second interview that Mr Jones and his colleagues were ‘going through the motions’. He had now discovered that a woman had since been appointed. The claimant then set out a series of questions under the heading ‘sex discrimination questionnaire’.
36. The email does not mention race discrimination.
37. Mr Clover provided a substantive answer in an email dated 25 November 2021. He said, ‘The comment you are referring to has been misconstrued. Mike was referring to us being a diverse employer and pointing out that we don’t just hire one type of person, for example just white men, not to say we don’t want to hire white men’. Mr Clover said that the gender or ethnicity of a candidate never had been and never would be a factor in their decision making. If they had decided (unlawfully) not to employ someone of the claimant’s background, he would not have been invited to the first interview, and certainly not to the next one. They would not have invested all the time, energy and money in proceeding through the process with him. Nor would they have continued to interview and hire people of the claimant’s gender and ethnicity. The suggestion that they could only mean they were engaged in some sort of sophisticated charade which was simply not true or tenable.
38. Mr Clover said that the company was mindful of its duty of confidentiality and compliance with GDPR, so could not disclose personally identifiable information of any other candidates.
39. During these proceedings, the respondent provided detailed statistics of employees and recruits by reference to sex as analysed elsewhere in these Reasons. We were also shown candidate spreadsheets with interview notes.
40. The respondent’s employee handbook states ‘we will treat seriously all complaints of discrimination made by employees, clients, suppliers, contractors or other third parties and will take action where appropriate’. Although the tenor of the section envisages complaints made by employees, it does say more generically, ‘If you are accused of unlawful discrimination, we will investigate the matter fully’ and disciplinary action will be taken if the investigation concludes that ‘your actions amount to unlawful discrimination’. No formal investigation took place as a result of the claimant’s letter, and Mr Clover simply spoke to Mr Jones.

Ms Brauer’s appointment

41. Oliver Harding-Fleet, who had worked with Elizabeth Brauer in the past, contacted her on 5 August 2021 via Linked-In about the role at the respondent. Ms Brauer held another job and was not actively looking, but she was interested to explore the opportunity. She spoke informally to Mr Jones to

state her interest and then Mr Jones held a pre-screening interview with her on 17 August 2021.

42. On 20 August 2021, Mr Jones, Mr Clover and Miss Hopper held the first interview with Ms Brauer.
43. On 7 September 2021, there was a final 'team / culture interview'. The respondent holds these when a recruitment decision has been all but made to check no one has any red flags since they are a small team,. The team / culture interview was attended by Miss Hopper, Ms Willis, Mr Harding-Fleet and two others. They were 'positive all round' and a decision was made to make the offer.
44. The comments on the candidates' spreadsheet regarding Ms Brauer are good at every stage with no obvious reservations.
45. Ms Brauer was offered the position of People Lead by letter dated 10 September 2021. Her contract of employment also has 'People Lead' as the job title. The salary was £78,000.
46. There was discussion in the tribunal about whether Ms Brauer is in fact part of the leadership team. She regarded herself as part of the leadership team in the sense that she was head of her department (there being no one else in her department), ie a functional lead, and as such, (to use her words) she 'reported in' to meetings along with other departmental leads. She was not in an executive position and did not attend Board meetings. She was not part of the senior leadership team.

Statistics

47. As at 22 June 2022, the company employed 22 men and 10 women. This comprised a rapid expansion in the number of employees during 2022. At the time the claimant was interviewed, the company employed only 13 employees (9 men, 4 women).
48. The claimant broke down the new hires from the respondent's documents as follows. Since the company started, the respondent has hired 22 men and 10 women. Up to 2 July 2021 when the People Lead job was advertised, the respondent had hired 9 men 3 women; from then until the respondent would have become aware of the claimant's tribunal claim on 21 March 2022, it hired 6 women and 4 men; and thereafter, it hired 9 men and 1 woman. The claimant suggests that at the time the People Lead job was advertised, the respondent had started a process of hiring fewer men, but that was reversed once it became aware of his discrimination claim. This was put to Mr Clover, who found the allegation absurd. He said that with all the various business matters going on, the respondent did not have time to orchestrate its recruitment statistics specifically for the purpose of defending these proceedings.

49. The statistics show that two men were appointed on 14 March 2022 (prior to the date the respondent became aware of the tribunal claim). Appointments following the claimant's written allegation of sex discrimination on 19 November 2021 but before the respondent became aware of the tribunal claim, comprised four men and two women.
50. The tribunal does not have accurate statistics regarding the ethnicity of these hires as the respondent has not been monitoring. We were shown a set of photographs. We do not consider it a reliable way to ascertain the ethnicity of individuals to guess this from a set of photographs.

The podcast

51. The claimant makes much of the podcast with Kathryn Willis in August / September 2021. Ms Willis is Group Head of Compliance and an Executive Director of the respondent. The claimant's theory now is that she influenced the decision not to appoint him.
52. Having looked at the relevant section of the podcast, we can see that the point being made by Ms Willis is that if a company is diverse, it should think about the image it portrays of itself in the media and in job ads. The respondent had in the past always used two white men to do screening calls on recruitment which was not a true reflection of the business.
53. Ms Willis was not involved in any way in the decision whether or not to recruit the claimant. Her only involvement in the process of appointment of a People Lead at all was in the final interview of Ms Brauer. This was the 'culture interview' which the respondent carries out when it has essentially decided to appoint a candidate, just to broaden the number of people who have met the candidate to check there are no red flags.

The 'fewer white men' comment

54. Having listened to all the evidence, we go back to our fact-finding concerning what Mr Jones said at the pre-screening interview about 'fewer white men'. Clearly something was said about this. There was a general discussion about diversity in recruitment, given that the position was Head of HR. We find that Mr Jones indicated the company hoped to achieve a diverse workforce that did not exclusively comprise, for example, white men. Having listened to Mr Jones as a witness, we suspect he did not express this very well. The claimant and his witnesses remember the phrase 'fewer white men'. The context of that phrase and quite how it was put is difficult to pin down. The claimant and his friends had been jointly discussing what was said for a very long time and are likely to have unconsciously influenced each other's recollections. We also note a difference between them – and indeed an inconsistency with the claimant himself – as to whether Mr Jones allegedly said the company 'hoped' or the company 'intended' to recruit 'fewer white men', which creates a different nuance. Given that the claimant put it the two different ways himself in his witness statement, and that his friends all recollected wording closer to 'hoped', we find that was nearer to what Mr

Jones said. On the balance of probabilities, considering also what was set out in the 25 November 2021 email, we find that Mr Jones said something to the effect that the company hoped to achieve a position where there were fewer white men as a proportion of the workforce.

Law

55. Under s13(1) of the Equality Act 2010,
'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.'
56. Both 'race' (including being white) and 'sex' (including being a man) are protected characteristics.
57. Under s23(1)
'On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.'
58. Under Equality Act 2010, s136, if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred unless A can show that A did not contravene the provision.
59. The tribunal must follow the guidelines set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975)
60. The Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246), a case brought under the Sex Discrimination Act 1975, states:

'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. 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. "Could conclude" in s63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint.

Conclusions

Sex discrimination

61. We first considered whether there are facts which from which the tribunal could decide, in the absence of any other explanation, that the respondent's decision not to recruit the claimant was direct sex discrimination.
62. The claimant was qualified for the job. The successful candidate was a woman. This would be insufficient on its own to shift the burden of proof. The claimant placed particular emphasis on Mr Jones' comment at the pre-screening interview about 'fewer white men'; the podcast with Ms Willis in August/September 2021; and the statistical pattern. We considered these separately and together.
63. We do not find it concerning or odd that an employer should discuss with a candidate for a post as Head of HR the issue of diversity in its workforce. Nor do we find it in itself indicative of an intention to discriminate that an employer should aspire to increase diversity in its workforce where there is under-representation. An aim to have an organisation less dominated by white men in areas where traditionally that is the dominant profile, does not mean that there is an intention to achieve that objective by discriminating in recruitment against white men and in favour of women or minority ethnic candidates. That is recognised to be unlawful (with limited occupational requirement exceptions). It is usually understood to denote an aspiration to remove the barriers which have hitherto prevented a more diverse workforce, whether by direct race or sex discrimination against non-white or female candidates or by unjustifiable indirectly discriminatory criteria and practices. We would expect candidates for a Head of HR post to understand these principles and distinctions.
64. As we have said, we doubt that Mr Jones expressed himself fluently on the subject. However, it is accepted that the context of the remarks was a discussion on the topic of diversity in the workforce.
65. Moreover, we are struck by the fact that Mr Jones made his comments to the claimant's face. If it was Mr Jones' intention not to recruit the claimant as a white man, or even just to prefer any other candidates who were not white men – or if he was aware that was the company's intention – why would he have told the claimant words to the effect that the company hoped to employ fewer white men? We find it incredible that Mr Jones would have openly said what he did, if he had in mind that the claimant might not be recruited because he was a white man.
66. We further note that Mr Jones put the claimant through to the full interview stage.
67. We do not find anything indicative of an intention to discriminate against white men in Ms Willis's podcast interview. She was discussing the broader issues around barriers to equal opportunities specifically in FinTec. She made the uncontroversial point that if a company's recruitment procedures have a monolithic face, it may be less likely to attract diverse applicants. She is clearly engaged in diversity issues and has a level of passion about them, but

she made no suggestion of any positive discrimination. We cannot see that it shifts the burden of proof, either alone, or together with Mr Jones' comment, that Ms Willis expressed these views in the podcast.

68. We add that, Ms Willis was not involved in the decision not to appoint the claimant.
69. We viewed the statistics with caution because the overall numbers were so low. We noted that, at the time of the claimant's application, women comprised broadly one third of the total workforce, and that was still the position on 22 June 2022, when the number of employees had gone up from 13 to 32. The claimant argues that the respondent had started a process of hiring more women and fewer men at the time of this application, and that that process was deliberately reversed after the respondent became aware of his tribunal claim. On analysing the statistics, we do not find this convincing. First of all, the numbers are very small, as we have already stated. Further, following the claimant's sex discrimination questionnaire, which we would have thought was a 'warning sign' of possible legal action, two more women were still recruited. In any event, we do not find it credible that a company of this nature would make multiple recruitment decisions regarding the sex (or race) of future employees purely to help defeat an employment tribunal discrimination case.
70. For all these reasons, taken separately and together, we find that the burden of proof does not shift and the claim for sex discrimination therefore fails.
71. We would add that the respondent also decided not to appoint the two female candidates who were interviewed on 3 August 2021.
72. Had we found that the burden of proof did shift, we would have found that the respondent proved to us that the failure to appoint the claimant was in no sense whatsoever due to sex.
73. The respondent did not rule out the claimant at the first opportunity. His sex was apparent on his written application. He was given a pre-screening interview and following that, he was put through to a full first interview.
74. Indeed, having originally thought that the first interview was a 'charade' (because of Mr Jones' comment at the pre-screening interview), the claimant – on seeing the contemporaneous notes - told the tribunal he believed it was a genuine interview but that something must have happened afterwards.
75. Mr Jones and Mr Clover liked the claimant, but they also had reservations. They were concerned that he was too senior, may not like the hands-on aspect of the job, and his salary expectations were too high. It was as a result of concerns of this nature that they subsequently amended the job description to clarify it was a more operational and less senior role.

76. There is evidence that the respondent was concerned about these issues before the claimant had even applied. The original draft job description had been already modified once to clarify it was a fully operational role. The budgeted salary was around £80,000. Mr Mainstone – the claimant’s witness - observed that Mr Jones was ‘slightly taken aback’ when the claimant suggested £100,000.
77. The appointment of Ms Brauer was consistent with this. Her salary was £78,000. On the seniority aspect, the claimant made the point that Ms Brauer was appointed as ‘People Lead’ and that she regarded herself as part of the leadership team, whereas Mr Jones’ explanatory email on 18 September 2021 said the role was ‘not envisaged as part of the leadership team’. We find that the point Mr Jones was essentially trying to make in his email was that the post did not need ‘a senior strategic person’, it was more ‘nuts and bolts’, commensurate with a salary of around £80,000. Ms Brauer’s description to the tribunal of her role was consistent with this – more of a functional role who, in her words ‘reported in’ to meetings with other departmental leads.
78. We do not find it indicative of sex discrimination in the circumstances that the respondent, mid recruitment process, decided to amend the job description to better reflect the level of the role. In our experience, this is something that can happen during a process if it becomes apparent that an advertisement is attracting the wrong level of applicant.
79. Miss Hopper’s initial reaction to the first interview was that the claimant could be put through to the next interview stage. However, after discussing the matter with Mr Jones and Mr Clover, she expressed some reservations which she had. The interviewers’ reservations were noted at the time on the interview spreadsheet, which is before there was any suggestion of a sex discrimination claim. They were concerned about whether the claimant was approachable, whether he was a good listener, whether there was some arrogance. Miss Hopper noted that the claimant had ‘lots of opinions and ‘likes to talk a lot’. We find it plausible that the interviewers genuinely had these concerns because, unknown to them, the claimant had recorded this first interview, and the transcript shows that the claimant did indeed talk at length and express a number of firm opinions on unstraightforward matters such as dispensing with probation periods and performance appraisals.
80. It is clear from the job descriptions that the respondent genuinely did want someone who had a personal touch. They talk about the importance of being empathetic and a great listener.
81. After the 3 August 2021 first interviews, the respondent decided not to appoint the two female candidates (one of them because the ‘people’ aspect was missing). The respondent was uncertain about the claimant for the reasons already stated. The real concern was personal characteristics rather than professional capability.

82. By contrast, we accept the respondent's evidence that there were no reservations about Ms Brauer. This is supported by the notes made at the time on the spreadsheet, again before any complaint by the claimant.
83. It is also not inconsistent with the fact that Mr Harding-Fleet, who had worked with Ms Brauer before, liked her enough to recommend her (although he properly stayed out of the process so as not to bias it).
84. On 5 August 2021, Mr Harding-Fleet had contacted Ms Brauer to ask if she was interested in the job. The respondent did not inform the claimant that he was unsuccessful until 20 August 2021, after Ms Brauer had been through the pre-screening and first interview. The claimant argues that the vague email to him on 13 August 2021 was therefore misleading, in implying that the decision process was still open.
85. That might be so. In our experience, employers often hold back on communicating rejection decisions until they are sure they have found a candidate they are happy with.
86. There is no overt evidence to suggest that Mr Harding-Fleet would not have contacted Ms Brauer if she was a man, or that Ms Brauer would not have been invited for interview. There is no indication that sex was anything to do with it. The respondent's explanation is far more likely. The interviewers had some reservations about the claimant; another possibility was suggested to them by one of their managers (not Ms Willis) who had worked with her in the past; they went through the full interview process with this other candidate and they preferred her.
87. The claimant suggested that Mr Jones and Mr Clover would have put him through to the final team / culture interview, but that they spoke to the management team and Ms Willis persuaded them not to. This is pure speculation. There is no evidence of any such discussion. The respondent denies it. In fact, Ms Willis had no involvement at all in the decision not to appoint the claimant. Her only involvement was as one of the managers in the final team / culture meeting which approved Ms Brauer.
88. For these reasons, the respondent has satisfied us that the reason the claimant was not put through to the next stage and the reason he was not appointed was in no sense whatsoever because he was a man. At the end of the day, this was a small though expanding company. It needed a person who would fit into the team and would get on well with everyone. The interviewers had reservations about aspects of the claimant's manner and personality (which were nothing to do with sex or race), and whether his aspirations for pay and status fit the nuts and bolts aspect of the job. It selected a person on considerably lower pay than the claimant had floated, and who did not cause them any concerns.
89. For completeness, we add that the fact that Mr Clover did not carry out a formal investigation in response to the claimant's letter alleging sex discrimination is not a matter from which we draw any inference in relation to

stage 1 or 2 of the burden of proof. Mr Clover spoke to Mr Jones. He accepted what he said. He knew that the claimant had been put through to the first interview by Mr Jones, and he had himself interviewed the claimant together with Mr Jones and Miss Hopper at that next stage. He had his own views of the claimant and knew what the views of the others were.

Race discrimination

90. Our comments are very similar as regards the race discrimination claim. For the same reasons, we find that the burden of proof did not shift and that, if it had shifted, the respondent proved that the rejection of the claimant was in no sense whatsoever because of race. In fact, there are additional factors which make the race discrimination claim even weaker.
91. The claimant accepts there is less evidence of race discrimination than sex discrimination, and he did not discuss race discrimination much during the hearing.
92. The comment regarding 'fewer white men' obviously covers race discrimination as well as sex discrimination. On the other hand, the candidate who was ultimately selected was a white person.
93. We do not have statistics regarding existing employees and appointments by reference to their ethnicity. At best, we were shown a series of photographs of existing employees which told us very little. We can therefore draw no conclusions from any statistical patterns.
94. We do not draw any inference from the fact that we were not provided with accurate statistics on ethnicity. The respondent is a small company and it had not been monitoring this. It showed willing to provide information by supplying the photographs. While the offer of photographs did show a lack of understanding as to why that was unsuitable, this is not a matter which suggests to us that the respondent was more likely to discriminate against white workers.

Employment Judge Lewis
08/07/2022

Judgment and Reasons sent to the parties on:

11/08/2022

For the Tribunal Office