



EMPLOYMENT TRIBUNALS

Claimant: Ms S Adan
Respondent: Cardiff County Council
Heard at: Cardiff **On:** 28 and 29 July 2021
Before: Employment Judge P Davies
Members: Ms H Mason
Ms H Hinkin

Representation:
Claimant: In person
Respondent: Ms J Williams (Counsel)

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is

1. The claims for race discrimination are dismissed.

REASONS

1. By a claim received on 14 October 2020 the Claimant Ms Sara Adan complains of direct race discrimination and direct religious discrimination arising from an application the Claimant made via an agency for a position at the Respondents and to which she was not invited for an interview. The Response filed on behalf of the Respondents, Cardiff County Council, on 23 November 2020 accepts that the Claimant was not asked to interview for a role with the Adult Social Services Team in October 2020 but it has categorically denied that this was a result of/connected to the Claimant's

religion, belief or race. It is said that the decision of Ms Lisa Wood, Operational Manager, Social Services not to interview the Claimant was based entirely on her experience of working with the Claimant and the caliber of other applicants.

2. There was a Case Management Discussion held on 19 January 2021 where the issues were set out namely did the Respondent treat the Claimant less favourably by not interviewing her for a position with the Respondent. The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. The Claimant is relying on a hypothetical comparator. And the next question is put in the alternative namely so was it because of her race or was it because of her religion.
3. The Tribunal heard oral evidence from the Claimant Ms Adan, and from Ms Wood, Operational Manager. In addition there were two statements in the nature of character references for the Claimant from Ms Andrea John, who knew the Claimant for some 8 years firstly she was a social work student and subsequently as a qualified worker. Ms John worked as the Acting Team Manager for the Llandough Hospital Social Work Team. There was also a character reference from Ms Michelle Irvine, who worked with the Claimant for 10 years and in her role as Grade 8 Senior Social Worker supervised the Claimant. Both character references describe in very positive terms her work and relationships with other staff and patients.
4. The Claimant qualified as a Social Worker in July 2007. For 8 years the Claimant worked in Llandough Hospital as a Hospital Social Worker with the Respondents. Ms John refers to the Claimant commencing as a qualified Social Worker in her team which she managed.
5. On 1 April 2009 the Claimant completed a new appointment personal file information form. In section (e) of the form headed "classification of employees" the Claimant was required to complete the following sections which included ethnic origin. The Claimant ticked the box of black African. Under their sub heading of black there was an option to tick a box British, Caribbean, African, or any other black background.
6. In mid-2015 Ms Andrea John retired as Team Manager. In or around 15 September 2015 Ms Susan Schelewa (former Operational Manager for the Council) asked Ms Lisa Wood to cover Llandough Hospital as Team Manager. Ms Wood was already managing a Community Social Work Team and staff covering other hospitals namely St David's Hospital, Rookwood Hospital and Velindre Hospital. Ms Wood had been informed that there were concerns about delayed transfers of care statistics relating

to both University Hospital Llandough and University Hospital Wales. There appeared to be a slow response to discharges out of the hospital and health colleagues perceived that the service from the Social Work Team at Llandough was sub-optimal and inefficient. Ms Wood explained that Ms Schelewa was worried about the “bed blocking” and the length of time that many were still in a hospital bed. Ms Wood spoke to a Band 6 nurse in the Vale of Glamorgan who were also co-located in Llandough Hospital. Ms Wood looked at statistics via a desktop which showed very small case loads and not much movement. Ms Wood observed a lot of social interaction during working hours and said she was shocked about what she found.

7. As a consequence Ms Wood convened a meeting with the team which included the Claimant, and she expressed her concerns to the staff as a group. Ms Wood was aware that at the time the Claimant was a Grade 7 Social Worker and that a Senior Social Worker would be Grade 8. Ms Wood described the meeting as resulting in some of the team being unhappy with her opinions for example in relation to staff cliques and social interaction, because she was directly challenging them as professionals. However Ms Wood required weekly reviews from staff on what work they completed and what work remained. Ms Wood took on the supervision of senior staff only, not on a day to day supervision. This would have left it to the Senior Social Workers to supervise and support Social Workers and unqualified Social Work Assistants and teams.
8. Ms Wood had some recall of the Claimant working in the Llandough Hospital team and was aware of the Claimant’s race and her religion. The Claimant describes herself as a woman of colour who wears a hijab. There was no discussion about race or religion directly with the Claimant at the time and Ms Wood does not have any specific recollection of a case referred to by the Claimant when the Claimant was allocated an elderly Muslim patient on the mental health ward. Ms Wood said that she would allocate cases to specific people for a number of reasons at different times. Ms Wood says they do try to accommodate preferences of citizens. This evidence is supported to some extent by the statement of Ms Andrea John who refers to at least one occasion the Claimant’s language skills were requested by hospital Consultants in particular on the stroke unit and although unsure of her ability to help the Claimant responded to the request and did her best to support the patient family and NHS colleagues in the provision of care. The Claimant was also publicly commended at one time by a family for her support of a parent and for the care she set up for safe discharge. The Claimant says that when she was allocated this elderly Muslim patient which was a case of complexity that the Claimant was not provided with any support or guidance by Ms Wood. The Claimant says that at the time her Line Manager, Ms Michelle Irvine, was on sick leave and the Claimant felt that Ms Wood’s intention was to see her fail.

The Claimant felt anxiety and stress but fulfilled all the case requirements to her usual high standards.

9. We accept the evidence of Ms Wood and the Claimant that there was not direct day to day supervision provided in relation to that patient by Ms Wood. It is clear that the Claimant was able to and did discharge her responsibilities without the need for referrals to Ms Wood. There is no evidence that Ms Wood deliberately allocated this case so that the Claimant would fail. The facts do not bear out any intention on the part of Ms Wood to cause the Claimant to fail. Indeed it would not be in the interests of Ms Wood or the organisation for there to be any failures in the work undertaken by the Claimant or other Social Workers as part of a team.
10. The Claimant informed the Respondents that she was intending to resign from her post as Social Worker with effect from 31 December 2015. However before the Claimant left there was a meeting between Ms Wood and the Claimant regarding overpayment of monies for salary for the months 1 June 2015 to 31 December 2015 namely a gross figure of £3,390.95 net figure of £2,155.30. This overpayment arose because of the change in hours from 30 hours worked by the Claimant per week to 22.4 hours per week. On 15 May 2015 Ms Andrea John had written to the Claimant about this change to the working pattern with effect from 1 June 2015. The hours would be 22.2 according to the schedule in that letter but Ms John says your hours of work remains 30 per week. This letter did not accurately set out the change because it still referred to 30 hours being worked.
11. There is an email from Mr Nathan Berrow, Service Delivery Advisor to Leona Small, Pay Centre Assistant, saying that the Claimant had resigned and that he had recently spoken with Lisa Wood and they had both discovered that the Claimant had been getting paid for 30 hours per week but should have been paid for 22 hours per week. The email goes on to say "apparently Lisa was told by Sara that she was getting paid 22 hours per week and so she took that as the truth, even though I have never received any contractual change forms and Sara's salary hasn't changed since April 2015. Lisa doesn't know when this reduction should have happened but it will have a knock on effect to everything regarding her resignation (leave pension P45 etc.). Please could you put a stop payment on with effect from 1 January 2016 until we are able to resolve this issue as both Lisa and Sara are off over the Christmas period". There is an earlier email on 23 December 2015 from the Claimant to HR Peoples Services in Cardiff about her contract of employment and working hours stating "I spoke with an Advisor yesterday regarding my contract of employment. I am due to finish my employment at the end of this month. However my new Manager has brought to light some inconsistencies with

regard to my working hours. I have attached a letter provided in June 2015 by my previous Team Manager stating the change of hours. This letter states that my 23 hours equates to 30 hours with no changes to terms and conditions of my employment. I spoke to HR on a number of occasions regarding my contract and my Team Manager also advised that HR were informed and that this letter was forwarded on. I would appreciate a swift response to this matter as I am due to leave on 31 December”.

12. Mr Berrow on 23 December 2015 sent an email response to the Claimant saying that he was the person from HR who had been discussing the matter with the current Manager Lisa. Mr Berrow says he would like to confirm the letter attached by the Claimant does not confirm a change to your hours but a change to the working pattern. He points out the discrepancies and that only HR can process contractual changes. The previous Manager must not have realised that she still needed to send through a form to reduce the hours. The salary should have changed in June but HR never received notification. That unfortunately means overpayment since 1 June 2015 and under the Respondents terms and conditions they are obliged to reclaim that back. Mr Berrow says we would not attempt to take it in one go but he would contact payroll and ask them to negotiate an appropriate repayment plan with the Claimant.
13. These emails confirm that there was knowledge on the part of Ms Wood about the discrepancies in overpayments and that she discussed the matter with the Claimant. The Claimant says that she did not even notice the overpayment because the payroll was automated and it did not occur to her to check salary payments. Ms Wood says that when she discussed the matter of overpayment with the Claimant in 2015 before the Claimant had left the Claimant stated she would be able to pay this easily. Ms Wood said that the Claimant was unable to explain to her why she had not informed the Authority that she had been overpaid but recalls the Claimant saying that she believed her Manager resolved this and she did not answer any comment that she had been fully aware herself of the overpayment. It was Ms Wood’s belief then and still is the belief that the Claimant was fully aware that her salary had not altered. The Claimant says that she had never disputed over payment or refused to pay it back but she emailed HR herself and informed them about the change over her work hours so they would adjust her salary payment to reflect the change. However the Claimant says she believes that the email sent to HR about the change of work hours has been deliberately withheld to discredit her. She says it was an honest mistake on her part and that if she had been white it would not have been such an issue since she has been repaying part of the overpayment.
14. We accept the evidence of Ms Wood that she believed that the Claimant must have been fully aware that her salary had not altered as a result of

discussions with the Claimant. There is nothing to evidence that the Respondents have deliberately withheld any HR communications at the time and reference has already been made to emails exchanged on 23 December 2015. The email from the Claimant seems to place reliance on Ms John's letter which was clearly contradictory factually in what it set out regarding the Claimant's hours from June 2015. We do not find that there has been any deliberate withholding of any emails at this time in order to discredit the Claimant. We accept the evidence of Ms Wood that the Respondents policy was to ask employees to repay in accordance with the terms and conditions of their employment any overpayments of salary. Although Ms Wood has only dealt with the Claimant in respect of overpayment, and has not had the occasion to deal with other staff in similar circumstances, it is clear from the email sent by Mr Berrow that it is the Respondents policy for payroll to negotiate appropriate repayment plans in the case of overpayments. This has nothing to do with colour or religion. Ms Wood was following the Respondents policy in the discussions that she had with the Claimant regarding repayment. Ms Leona Small wrote to the Claimant on 1 February 2016 regarding the overpayment of salary setting out the calculation of the overpayment and that the County Council would normally expect payment of the invoice within 14 days but see the reverse of the invoice for various options/methods of repayment. Subsequently the Claimant has repaid some of the monies but not all of the monies owed to the Respondents. The Claimant referred to the Council changing its bank and interference with direct debits that she was making.

15. The Claimant raised the issue of working late. Ms Wood said that she had read the cases allocated to the Claimant during the period that they worked together in Llandough and could find no case where recordings were made outside working hours and no records indicate meetings that were at unusual times outside office hours. No specific matters were put to Ms Wood regarding this and we accept the evidence of both the Claimant and Ms Wood that social workers such as the Claimant do receive high levels of stress which can cause anxiety and concern but that Ms Wood was not aware of the Claimant suffering a high level of stress and neither was she informed by any of the other team workers about anything of this nature. The nature of work for a social worker is demanding and it would not be unusual for there to be occasions when social workers feel under pressure. We do not find that the Claimant was discriminated against by Ms Wood at this time because of her religion or race.
16. The Claimant says she left her position as a Social Worker at Llandough Hospital following some life changes and a lack of career progression which led her to resign. The Claimant says that when she informed Ms Wood of her decision to leave Ms Wood appeared supportive of her decision. Ms Wood's recollection is that the Claimant told her that she was

either getting married and/or her new personal position did not require her to work. There does not appear to be a significant dispute between the parties about the conversation regarding the Claimant's personal circumstances being the reason why she left.

Events after December 2015

17. In January 2016 to July 2016 the Claimant worked as a Volunteer Co-ordinator in recruiting volunteers to provide mentoring to vulnerable individuals from the local community. The organisation that she volunteered to work for was called the Mentor Ring, Butetown Community Centre in Cardiff. From July 2017 to April 2018 the Claimant worked as a Social Worker with the Community Mental Health Team for Older People in a neighbouring Authority being the Vale of Glamorgan Social Services (Agency). This involved case management of service users living in the community with complex mental illness and also managing safe discharges of patients in hospital. From September 2018 to May 2019 the Claimant worked as a Social Worker on the Adults Long Term Care Team with the Vale of Glamorgan Social Services (Agency) which involved case management of complex cases in the community in the care homes. Thereafter the Claimant was not working as a Social Worker. This information about the Claimant's work history is set out in a CV prepared by the agency called Hoop, Social Work. This was the CV supplied by the agency to the Respondents regarding an application for work with the Respondents in about October 2020.
18. The Claimant says that in October 2020 after a period of maternity leave she decided to return to work and registered with Hoop Recruitment on 2 October 2020. The Claimant says that a few days later she was put forward for a post in the Review Team on 11 October 2020. The Claimant says on 11 October 2020 she was contacted by her recruitment consultant who informed her that there had been sent over her CV to the Team Manager, Lesley Doody who was happy to interview the Claimant but that Ms Doody was advised by Lisa Wood not to interview the Claimant because Lisa Wood had told Lesley Doody that she was not comfortable having the Claimant working in any of her teams because it was not a happy time for Lisa when she worked with the Claimant at Llandough Hospital.
19. The Claimant did not feel that she had done anything to justify being refused an interview or to justify Lisa's statement to Lesley Doody it was not a happy time for Lisa when she worked with the Claimant at Llandough Hospital. The Claimant's belief was the refusal to interview her and the statement by Lisa Wood was a display of a racial and religious discrimination by Lisa Wood.

20. Ms Wood said that in October 2020 she was advised by the then Assistant Director of Adult Services that funds were available to support employing agency staff to assist in coping with an unprecedented level of demand in complex situations. The position was grave in October 2020 because of a combination of winter and pandemic pressures. The Welsh Government had made the funds available to the Health Board to provide extra capacity in a number of areas and to increase social work numbers. The funding was short term being for 3 months and was sufficient for at the most 3 staff members across the total service area. The staff were to be deployed across the community and the hospitals and the Agency Procurement Service were tasked with using the system to identify potential candidates.
21. We accept the evidence of Ms Wood regarding the background to which there was opportunity to employ agency staff. We also accept the evidence of Ms Wood that the employment process for agency workers is different from those who become permanent council employees. Ms Wood said there was a need for experienced people who could make an immediate impact because of the short term nature of the work. Ms Wood explained that she would consider who was the best placed to meet the need because of location/skills set/experience and looked at the curriculum vitae for relevant information. Ms Wood would also consider if the person has worked for Cardiff in the past or if it is a person that she or colleagues know. There would be an evaluation of whether or not candidate has the skills experience and personal abilities to start the role at pace to require little if any induction or training and consider whether or not the candidate has skills which make recruitment positive for example mental health social work experience.
22. Ms Wood said review jobs had been filled weeks before Ms Wood considered the Claimant's application. Ms Nicki Bartlett was appointed to the review job. Ms Bartlett's CV showed that from April 2020 to the present she was a Social Worker doing long term adult work in the Vale Community Resource Service based in Barry Hospital. Previous to that from January 2020 to March 2020 Ms Bartlett had been working for Cardiff Social Services in the Long Term Team for Adults doing adult duty work on an agency basis. Ms Wood said that the department is bombarded with emails from agencies seeking to place their clients and that there had been the Claimant's name and Michelle Irvine's name and another person called Andrew Jackson as well as Ms Bartlett's details supplied to herself. Ms Wood said she recognised three of the names immediately.
23. Ms Michelle Irvine had lacked social work practice for the previous 5 years and there were concerns whether Ms Irvine would be able to meet expectations. Ms Irvine had resigned her work with the Respondents previously. Ms Bartlett was up to date with the systems set in Cardiff and

had been working consistently and could start without the need for training and support. Mr Jackson had not worked for Cardiff but had considerable mental health social work experience, with skills which were in high demand. There was a role that was vacant linked to a need to offer a mental health overview and this role was funded until March 2022.

24. In respect of Nicki Bartlett there is an email from Lindley Hermance, Administrative Support, Children's Services, to Ms Lesley Doody and Ms Lisa Wood of 12 October 2020 saying "hi both, please see attached CV of Sara Adan. Sara is looking for part-time work and has worked alongside Nicki Bartlett before so this could be a good fit. Lisa also Andrew Jackson is free to interview and time this week." This supports the evidence of Ms Wood which was that Nicki Bartlett was already in post before the Claimant was being considered for any post with the Respondents. As the Claimant accepted Ms Bartlett had already been in the post and the Claimant was put forward for another position.
25. There is also an email from Sarah Leigh of Hoop Recruitment to Lindley Hermance of 12 October 2020 in which there is also reference to the fact that Sara was looking for part-time work and has worked alongside Nicki Bartlett so that could be a good fit.
26. On 12 October Ms Doody emailed Lindley Hermance and Ms Lisa Wood to ask to arrange Teams meetings with Sara and Andrew Jackson with herself and Lisa there to appointing if possible. Ms Wood then emailed to ask "did Sara Adan work in UHL?" to which the response is from Linley Hermance that it is the agency's understanding that she worked in UHL when she worked in Cardiff permanently. It is in response to this email that Ms Wood said the following "yes. It was not a happy experience. I don't think we will interview her". It appears that that information had then been relayed to the agency who informed the Claimant. Ms Wood said in evidence that why she had used the expression it was not a happy experience was because of the difficulty she encountered trying to develop a more efficient and able social work team in 2015. Ms Wood said that she was not confident that some of the staff she had known working in Llandough during that period would have been able to manage in a fast paced and demanding role that they were considering at this time. The roles being considered at that time were not review roles as the Claimant understood that she was being considered for.
27. The position did not rest there because on 13 October 2020 a further email was sent from Lindley Hermance to Ms Lisa Wood and Ms Lesley Doody to say "we've been informed by the agency that Sara Adna was aware of the situation that transpired at UHL but she was not involved in this. She soon left the position to get married. The agency states that she was friends with someone who did have any issues but she was not

- involved. She is aware that she is not being interviewed but if you change your mind on interviewing her please let me know”.
28. Ms Doody emailed Ms Wood to ask what is this about to see the response from Ms Wood who said “she is someone who I remember from my first stint in UHL. She left within a few months of my arrival. I don’t think I would be comfortable to have her in our teams”. Ms Doody emailed back to say that she remembered her but not sure what all the below was about just remember the shi—mess she left behind. Ms Wood replied back to say I think that says all we need to know....
29. It became clear that there was confusion between a person who had worked at UHL and who was considered to have left in circumstances which caused the Respondent some concern. However Ms Wood says that after having that email from Ms Doody that she spoke on the telephone with Ms Doody and they realised that Ms Doody had made a mistake identifying that person as being the Claimant. Ms Wood said that what her concern was by using the word uncomfortable was in respect of overpayment and the way that the Claimant had not been professional in respect of dealing with that matter. Ms Wood said that in her mind she considered that the Claimant had acted dishonestly in respect of the matters in 2015 regarding overpayment. Ms Wood considered that it was the individuals personal responsibility to check the payslips. Ms Wood referred to the Code of Conduct concerning social workers who are under a duty to act with integrity.
30. In her evidence Ms Wood said there were two parts as to why she did not consider that the Claimant should be interviewed. The first part is that in respect of her views about the Claimant arising from the overpayment in 2015. The second part was in respect of the skill set for the assessment role but that was the work that was undertaken by Ms Bartlett. That left a role to be filled described as a point of contact role there was a need to offer mental health overview to some individuals at the moment of entry into social services. It was Mr Jackson who was considered ideal for this role because of his experience and work. Ms Wood considered that the skills that Mr Jackson had for example experience of autism and with a team where there are immediate emergency cases that need attention required a lot of case management and that he had a specific skill set. Ms Wood considered having looked at the CV’s that she had no confidence that the Claimant would meet the requirements and work at speed for example like Ms Bartlett.
31. As part of the disclosure of emails there is an email from Ms Wood of 9 October to Lindley Hermance where Ms Michelle Irvine is put forward and Ms Wood replies “absolutely not Michelle Irvine... I think I actually may have sacked her a few years ago! NO.” There then is a reference to

- looking for Andrew (Jackson) to manage a team with really complex cases and a request to see his CV. In evidence Ms Wood accepted that she did not in fact sack Michelle Irvine because Ms Irvine had resigned. Nevertheless she did not have a good memory of matters. This is an example of Ms Wood using her memory of individuals, whether an accurate memory or not, to sift them out of contention for an interview using very generalised comments such as in the case of the Claimant. There is no suggestion that Ms Irvine was treated in that way because of race or religion or any other protected characteristic. It does however demonstrate the way that Ms Wood was applying herself to choose candidates for interview.
32. On the 14 October 2020 there was an individual rights requests on behalf of the Claimant to the Respondents as follows “I recently applied for a post as a Social Worker for Adult Services. I was refused an interview by Operational Manager Lisa Wood that she stated that I did not leave on a good note in December 2015. I would like information relating to my departure and email exchanges on 12 October from Lisa Wood to Lesley Doody. I would also like anything record in my files as to whether there were any complaints or grievances made against me during my time as a Social Worker.”
33. This request was passed to Ms Wood to answer. Ms Wood replied to say that she did not think this person was being entirely up front here. She did not apply for a job. Her name was proposed by an agency as one of several candidates. Having worked with her previously I was not interested in interviewing her for any post. This was conveyed via Lindley to her agency. When pressed by her agency Lindley indicated that I had worked with her in Llandough when I managed that team and that I was not impressed by her work. On 15 October 2020 Ms Wood sent a further email to clarify some elements of what Ms Wood said was the applicant being disingenuous. Ms Wood says that they are interviewing another candidate who was proposed. Ms Wood repeats that she chose not to interview the Claimant on the basis of her experience of managing her in the past. Ms Wood also makes the point that she is by no means the only person that Ms Wood has rejected for interview recently. Ms Wood said that she does not feel compelled to interview everyone who has an employment agency proposal. She makes a personal decision based on what she knows of an individual when it comes to employment via an agency.
34. On 21 October 2020 the Claimant made an official complaint to the Respondents against Ms Lisa Wood, Operational Manager. In that complaint the Claimant says she believes it is extremely important that employers promote equality and prevent any form of discrimination. In that complaint the Claimant says that she feels that Ms Wood’s statement that

she would be uncomfortable having her work in her teams has damaged the Claimant's credibility with the agency, caused irreversible damage to her reputation and prevented her from working with the Older People's Team in Cardiff. The Claimant says in fact Ms Wood was her Team Manager for only a few months and they had little interaction with each other. Therefore Ms Wood was not in a real position to comment on her suitability for the role and that she believes she would not have made this statement if it had not been a person of colour. The Claimant wishes to have a letter of apology from Ms Wood with a more accurate reference considering the 8 years she worked as part of the Hospital Discharge Team at Llandough Hospital without complaint.

35. On 26 November 2020 the Respondents wrote in response to the complaint. The letter was written by the then Assistant Director of Adult Services, Ms Louise Barry. Ms Barry says that she has interviewed Ms Wood, Ms Doody, and Mr Hermance. There is also reference to the Policy Agency Workers Policy issued 2 November 2016. Ms Barry found no evidence to substantiate the claim that Ms Wood had not wanted to interview the Claimant because of her race. There is reference to the Agency Worker Policy namely paragraph 5.10 which states "the selection of agency workers must be based on merit and suitability to undertake the specified role". Ms Barry says that Ms Wood's decision not to interview the Claimant was based entirely on her experience of working with you in the capacity of Line Manager and the caliber of other applicants. Ms Wood had received a number of CV's had taken a decision based on the policy about not to interview a number of the candidates. Ms Barry says that she understands Ms Wood had been her Line Manager for a period of a number of months before the Claimant left the employment of Cardiff Council and was therefore in a position to comment on her suitability to undertake the role. There had been no request for a reference and having found no evidence of discrimination on the grounds of race there are no compensations payable. It is also noted that Cardiff Adult Services had now engaged the Claimant in an agency social work position within the Learning Disability Team and the contract commenced on 16 November 2020. Therefore there has been no damage to credibility or reputation. The complaint was not upheld.
36. It is correct that on 16 November 2020 the Claimant did take up a position within the Learning Disability Team. However the Claimant was not satisfied with the response received from Ms Barry the Claimant referred to being uneasy working for Cardiff Social Services and feels victimised for continuing with the complaint for example the legal team contacting her agency requesting the reason for her resignation from her Learning Disability agency post on 24 May 2021. In the bundle is an email of 24 May 2021 sent to the Respondent where information has been obtained from the agency who had received an email from the Claimant of 6 May

saying “Hi Sara, I hope you are well. I just wanted to let you know that I will be leaving LDT at the end of June. They are a lovely team but I’ve a few things I need to prioritise. Thanks for everything”. The Claimant says that information was shared without her consent and that it breached her data protection rights she is taking a complaint to the Information Commissioners Office about those matters.

The Law

37. Section 13 of the Equality Act 2010 is headed Direct Discrimination and says as follows, “(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.
38. Section 23 of the Equality Act 2010 is headed Comparison by Reference to Circumstances and says as follows, “(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.”
39. Section 39 of the Equality Act 2010 is headed Employees and Applicants and says as follows, “(1) an employer (A) must not discriminate against a person (B) – (a) in the arrangement A makes for deciding to whom to offer employment (b) as to the terms on which A offers B employment and (c) by not offering B employment.”
40. Section 136 of the Equality Act 2010 is headed Burden of Proof and says as follows, “(1) this section applies to any proceedings relating to a contravention of this Act (2) if there are facts from which the Court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) But sub-section (2) does not apply if A shows that A did not contravene the provision.
41. In the case of ***Royal Mail Group Limited -v- Efobi*** [2021] UKSC 33 the Supreme Court considered the issue of the burden of proof in Employment cases where discrimination is alleged. In respect of the burden of proof issue in paragraph 14 the following appears “the old provisions established a two stage process for analysing complaints of discrimination. At the first stage, they placed the burden on the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that an unlawful act of discrimination (or other prohibited conduct) had been committed. If that burden was not discharged, the claim failed. If such facts were proved, the burden moved to the employer to explain the reason(s) for the alleged discriminatory treatment and satisfy the Tribunal that the protected characteristic played no part in these reasons. Unless the employer discharged that burden, the claim succeeded.” In paragraph

15 there was reference to the dicta of Lord Browne-Wilkinson in ***Glasgow City Council -v- Zaffar*** [1997] 1WLR 1659 at 1664 namely “those who discriminate.... do not in general advertise their prejudices: Indeed they may not even be aware of them”.

42. The Supreme Court noted a number of cases which had dealt with the burden of proof including ***Igen Limited -v- Wong and Madarassi -v- Nomura International PLC*** as well as the Supreme Court case of ***Hewage -v- Grampian Health Board***. Two points emerged namely that although the old provisions required the Tribunal to adopt a two stage process of analysis, it did not require the Tribunal to divide hearings into two parts to correspond to those analytical stages and Tribunals were discouraged from doing so. As Lord Justice Mummery said in ***Madarassi*** “... the Tribunal does not in practice hear the evidence and the argument in two stages. The Employment Tribunal will have heard all the evidence in the case before it embarks on the two stage analysis in order to decide, first, whether the burden of proof is moved to the Respondent and if so secondly whether the Respondent has discharged the burden of proof”. The second point is that the Court’s have held the Tribunal was not prevented from taking account that the first stage of evidence at the first stage of evidence adduced by the Respondent insofar as it was relevant in deciding whether the burden of proof had moved to the Respondent. There was then an analysis of the difference between “facts” and “explanation” as set out in ***Igen Limited -v- Wong***. Mr Justice Elias in the case of ***Laing*** said “.... The obligation for the employer to provide an explanation once the prima facie case had been established, strongly suggests that he is expected to provide a reason for the treatment. An explanation is just that the employer must explain. Why has he done what could be considered to be a racially discriminatory act? It is not the language one would expect to describe facts that he may have adduced a counter or put into context the evidence adduced by the Claimant”. The Supreme Court held that Section 136(2) of the Equality Act requires the Employment Tribunal to consider all the evidence from all sources, not just the Claimant’s evidence, so as to decide whether or not “there are facts etc.”. I agree that this is what Section 136(2) requires. I do not however accept that this has made a substantive change in the law”. In paragraph 28 of the Judgment the following appears “the aspect of Section 136(2) which is the focus of this appeal is not the only respect in which the opportunity was taken to alter the wording of the old provisions so as more clearly to reflect the way in which they had been interpreted by the Courts. The old provisions referred to “an adequate explanation” (or “a reasonable alternative explanation”). Those phrases were also apt to mislead in that they could have given the impression that the explanation had to be one which showed that the employer had acted for a reason which satisfied some objective standard of reasonableness or acceptability. It was, however, established that it did not matter if the employer acted for an

unfair or discreditable reason provided that the reason had nothing to do with the protected characteristics see ***Glasgow City Council -v- Zafar, Baldhi AHL -v- The Law Society, Laing -v- Manchester City Council***. It seems likely that the change of wording to refer to “any other explanation” was intended to make this clearer. In paragraph 40 the Supreme Court said that the first stage the Tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. This is what the legislation requires. Whether the employer has in fact offered an explanation and if so what that explanation is must therefore be left out of account. It follows that as Mummery LJ and Sir Patrick Elias said in the passages quoted above, no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation.

43. In paragraph 41 of the Judgment the Supreme Court said “so far as possible, Tribunals should be free to draw, or to decline to draw inferences on the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person is not giving evidence depends entirely on the context and particular circumstances. Relevant consideration shall naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the points on which the witness could potentially have given relevant evidence, and the significance of those points and the context of the case as a whole. All these matters are inter-related and how these and any other relevant consideration should be assessed cannot be encapsulated in a set of legal rules”.

Submissions

44. Written submissions were handed to the Tribunal by both the Respondent and the Claimant. The Respondent handed to the Tribunal on the first day of the hearing written submissions on behalf of the Respondent. The written submissions on behalf of the Claimant were handed in at the conclusion of the Claimant’s oral submissions.
45. The Respondents also made oral submissions.
46. It is not the intention of the Tribunal to set out in great detail the contents of all the submissions. On behalf of the Claimant it was submitted that Ms Wood had been disproportionate and biased in her treatment and judgment of the Claimant and had singled her out to label her as dishonest setting a higher bench mark than she set for others. Reference was made to a number of individuals with whom comparison could be made. It was stressed that in relation to the overpayment of salary there was no

mention of this in any of the documents or emails including the complaint conclusion. The Claimant says she does not feel that the overpayment of salary had been mentioned at all and that this was brought up by the Legal Department and Ms Wood to discredit her allegations. Ms Wood's evidence that had the Claimant remained in the Council then she would have recommended disciplinary proceedings is disproportionate and her actions and lack of insight that could cause a person of colour in the Claimant's position demonstrates her lack of understanding of how unconscious bias can lead to direct discrimination. And it says black and minority ethnic social workers are more likely than their white counterparts to be reported to the fitness to practice panel. This was no accident but demonstrates the covert/overt structural racism they struggle against every day. Reference was also made to the percentage of the black and ethnic minority workers in the Respondents being low the percentage being 10.3%.

47. On behalf of the Respondents the Claimant had failed to identify facts being the first stage of the burden of proof test. The emails do not demonstrate any evidence of discrimination but the evidence shows that there was a slow pace of discharge in 2015. There has been a failure to identify any comparators reference was made to the case management note of the hypothetical comparator. Other comparators in a totally different position. Ms Wood treated everyone exactly the same. Although the Claimant had stayed and if there had been any disciplinary proceedings about the overpayment there would have been an entitlement to a fair disciplinary investigation and process before any conclusion could be made about dishonesty. However there was clear and cogent evidence for the reasoning behind the offer of no interview which was not related to any race or religion aspect but rather the overpayment in 2015 was in the mind of Ms Wood when decisions were made.

Conclusions

48. It is common ground that there was very little that had changed between the Claimant and Ms Wood in 2015 when for a period of about 3 months the Claimant worked in the team which Ms Wood had been asked to manage. It is also clear that in 2015 that there was a meeting and discussion about the overpayment of salary between the Claimant and Ms Wood. The emails at the time indicate that Ms Wood considered an explanation to be given by the Claimant to be not true about being paid for the 22 hours. We accept the evidence of Ms Wood that she had not come across this situation before and that she did consider applying her own high standards of professionalism that there had been demonstrated a lack of integrity on the part of the Claimant in not drawing the attention of the Respondents to that overpayment at a much earlier stage than when it became clear there had been overpayment in December 2015. The

wording of the emails where there is reference to “but that is not true” indicates that Ms Wood had a poor view of the Claimant in relation to that matter.

49. We accept the Claimant’s evidence about the hard work that she undertook as part of the team in Llandough as evidenced by the character references that were put before the Tribunal. However it is the case that Ms Wood considered that the team was not functioning as it ought to and she made that plain to not just the Claimant but to all the team members. The poor view that Ms Wood had of the team was a view that had been shared with other professionals who were looking at the performance of that team. Indeed this was one of the reasons of the mandate of Ms Wood to go and temporarily manage the team in Llandough, along with other teams.
50. There is nothing in the facts as found by the Tribunal that the Tribunal could conclude that there had been any discrimination shown by Ms Wood. Ms Wood’s attention had been drawn by HR to the overpayment and she had investigated it and spoken to the Claimant. The Respondent’s had dealt with this matter through the HR and payroll and requested repayment of the monies. There is no evidence that this treatment was because of race or religion and that the Claimant had been treated in that way as a comparison with hypothetical comparators to show a different treatment. We do not find that reference to the treatment of a named comparator by the Claimant in her evidence namely how Ms Wood allowed another employee to transfer to a different team after returning from maternity leave with no sanctions or negative references and with support from Ms Wood in comparison there is no material difference between the circumstances. There are significant material differences between that situation and that of the Claimant.
51. Ms Wood said that it was the integrity of the Claimant in relation to overpayment that was in her mind when she made the references in the emails rejecting the Claimant for an interview. Although there is no express reference in the emails to the facts and circumstances of the overpayment, we accept the evidence of Ms Wood that that was uppermost in her mind and what was in her mind to reject the Claimant in part from being interviewed for the post. We accept the evidence also of Ms Wood that the other part was in relation to the skill sets for the particular post which had to be filled and which in the case of Ms Bartlett had already been filled by Ms Bartlett and which were needed to be filled particularly on the point of contact case with Mr Jackson.
52. Ms Wood also gave evidence that she had explained to Ms Barry as part of the investigation process that it was the overpayment figured in her mind for not interviewing the Claimant. It is unfortunate that Ms Barry, who

we were told had left the employment of the Respondents, has not given direct evidence in this case. The Claimant says that the overpayment was not mentioned in the response to her complaint and that itself is evidence that nothing was said by Ms Wood at that time about the overpayment. However it is clear that Ms Wood has a very poor view of the Claimant and expressed the view that she has of the Claimant in strong terms regarding honesty. It may therefore not be surprising that Ms Barry did not include those references in the response because to hold such concluded views would have required a very detailed and careful investigation and explanation considered from the Claimant as to the full circumstances regarding the overpayment matters. It may well be regarded as an unreasonable point of view on the part of Ms Wood to have arrived at such conclusions without such a thorough and fair investigation. The Claimant would be justified in feeling aggrieved that that view was adopted without such an investigation. However this does not mean that Ms Wood did not have those views. It is also clear that there were discussions about the overpayment and they were not dragged out from nowhere in order to cover up or to obscure any discrimination.

53. As set out in part of the Supreme Court Judgment sometimes individuals do not realise that they are biased and discriminate against others, this is sometimes an unconscious bias. However in this case Ms Wood's style of consideration of agency workers, and the rejection of some for interview, such as Michelle Irvine and the Claimant shows no evidence of there being an unconscious or conscious bias because of any protected characteristic. What it does demonstrate is a very preemptory decision without careful deliberation. It may not technically be in breach of any policy but it is likely, as it has in this case, to obscure the true reason for treatment and to lead to assumptions of competence, or incompetence, which are not borne out by the facts. It is not surprising that the Claimant was dissatisfied with the response via her agency from Ms Wood and the description of her work as she perceived it, and also the generalised response to her complaint received from Ms Barry. The Claimant may well have a sense of justified disappointment by the way in which the Respondents have provided explanations to herself for the failure to interview. It is only in this Tribunal case that the real reasons or part of the real reasons become plain.
54. The fact that the Claimant has been treated in this way does not mean to say that the reason for the treatment is discrimination on the protected characteristics of race or belief. We find that this treatment was not on that basis applying carefully the statutory provisions of the burden of proof. In respect of the shifting of the burden to the Respondents we are satisfied that the Respondents have shown the reason for the treatment of not interviewing the Claimant which has nothing to do with her race or belief.

55. We have considered other background information namely the events in 2015, and for example what is in the Response where there is a reference to the Claimant being black African, which the Claimant says is proof of discriminatory behaviour. However the reference in the response to that has come from the form filled in by the Claimant herself as part of the employment process with the Respondents some years ago and it would not be discriminatory for the Respondents to have put that in their Response. Nothing else referred to as part of the background information such as the unfortunate mistaken reference to another person in the emails from Ms Doody indicate any discrimination against the Claimant because of her race or belief. The Claimant's view that during her time and Ms Wood's management at Llandough Hospital she did not receive any supervisions or appraisals or any formal meetings is not something which would be unique to the Claimant bearing in mind the role on a temporary basis that was undertaken by Ms Wood at the hospital. It is also clear that the poor view that Ms Wood had about the team was that exactly namely the team that worked at Llandough Hospital at that time and there is nothing that points to the Claimant being singled out for any criticisms about her work at that time. Indeed there were no criticisms at that time of the work undertaken personally by the Claimant other than a generalised criticism about the way that the team itself had been working.
56. For the avoidance of any doubt we have also considered the submissions that were made that there is some generalised institutional racism in respect of the Respondents as evidenced by the low number of black and ethnic minority workers. These matters were put by the Claimant to Ms Wood who was not in the position to give any figures about that but did indicate that she was aware that ethnic minority workers were employed by the Respondents. There is no evidence of a generalised institutional bias that can properly be determined on the evidence put forward in this case. Whilst we understand the general points made by the Claimant about the difficulties that may face ethnic minority and black members of the community, there is no evidence that this played any part in the treatment that the Claimant received and the lack of being called for an interview on the facts of this case.
57. In the circumstances the claim for direct discrimination because of race and/or because of religion is dismissed.

Employment Judge P Davies
Dated: 7 October 2021

JUDGMENT SENT TO THE PARTIES ON 7 October 2021

.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche