



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Tashmatova
Respondent: Essex County Council
Heard at: East London Hearing Centre
On: 13, 14, 15, 19, 20 and 21 July 2022
Before: Employment Judge Russell
Members: Ms J Land
Dr J Ukemenam

Representation
Claimant: In person
Respondent: Mr T Perry (council)

JUDGMENT

1. The claim of direct discrimination because of religion and/or belief succeeds in respect of not shortlisting the Claimant for interview for the position of Assistant Accountant on 29 April 2020.
2. It is just and equitable to extend time in respect of that single act of direct discrimination.
3. All other claims of direct discrimination because of religion and belief fail and are dismissed.
4. All claims of direct discrimination because of race fail and are dismissed.
5. All claims of pregnancy and maternity discrimination are dismissed on withdrawal by the Claimant.

REASONS

1 By claim form presented on the 26 August 2020, the Claimant brings complaints of direct discrimination because of race, direct discrimination because of religion and or belief, pregnancy and maternity discrimination. The Respondent resists all claims.

2 The list of issues was agreed at a case management hearing before Employment Judge Allen KC, on the 21 December 2020. At the outset of this hearing, the Claimant confirmed that she was withdrawing the complaint of pregnancy and maternity discrimination in its entirety. She also withdrew as acts of direct race discrimination and direct religious discrimination the complaint that she was not recruited for an assistant accountant position in July 2018. She also confirmed that the job in June 2019 was a role in the corporate and strategic partnership team. During the course of the hearing, the Tribunal agreed that the Claimant could also rely on Ms Greenwood and Ms Cheung as comparators for the Assistant Accountant vacancy in April 2020. There was no prejudice to the Respondent in doing so as all relevant documents were already in the bundle, both short listing managers were giving evidence and would have an opportunity to deal fully with the additional comparator's circumstances. The Tribunal indicated that it would deal with liability only at this hearing.

3 The final list of issues to be decided is therefore as follows.

Direct Race Discrimination

- 3.1 Did the Respondent subject the Claimant to the following treatment?
- a. Hiring the Claimant on a fixed-term contract in April 2018;
 - b. Not shortlisting the Claimant for interview for the position of Assistant Account in July 2018;
 - c. Not offering the Claimant a permanent job as Accounting Technician in August 2018;
 - d. Not being offered a permanent job as Accounting Technician in January 2019;
 - e. Not shortlisting the Claimant for interview for the position of Assistant Accountant in April 2019;
 - f. Not responding to the Claimant's job application in June 2019;
 - g. Not renewing the Claimant's contract as Accounting Technician in the Adults Social Care Team in June 2019;
 - h. Not offering the Claimant a role in the Corporate and Strategic Partnership Team in June 2019;
 - i. Not shortlisting the Claimant for interview for the position of Assistant Accountant in November 2019;
 - j. Not shortlisting the Claimant for interview for the position of Accounting Technician in January 2020;
 - k. Not allowing the Claimant to apply for an Accounting Technician role in February 2020; and
 - l. Not shortlisting the Claimant for interview for the position of Assistant Accountant on 29 April 2020.
- 3.2 If so, did the Respondent treat the Claimant less favourably than it treated or would have treated others? The Claimant relies on the following comparators:
- a. In relation to treatment (a), Isaac McHugh, Rebecca Lawson, Robert Riches and Samuel Fitzpatrick, white English colleagues;
 - b. In relation to treatment (b), Jack Gibbard, a white English candidate;
 - c. In relation to treatment (c), Rose Golding and Suzanne Watling, white English candidates;

- d. In relation to treatment (d), Chanda Maipose, Kai Lau, Deborah Hole and Nga Dinh, [comparators' race not identified];
- e. In relation to treatment (e), Matthew Patterson, [white English];
- f. In relation to treatment (f), Jessica Salter [white English];
- g. In relation to treatment (g), [no comparator identified];
- h. In relation to treatment (h), Jessica Salter [white English];
- i. In relation to treatment (i), Clare Alexander, a white candidate;
- j. In relation to treatment (j), Matt Shelley, Yegor Kolobov and Suzanne Watling, white colleagues;
- k. In relation to treatment (k), Isaac McHugh, Rebecca Lawson and Robert Riches, white English colleagues;
- l. In relation to treatment (l), Nicola Calver, Ms Cheung and Ms Greenwood; and/or
- m. In relation to all of the above, a hypothetical non-Central Asian colleague or candidate.

3.3 Can the Respondent show that it had a non-discriminatory reason for the treatment?

3.4 Was the treatment because the Claimant is Central Asian?

Direct Religious Discrimination

3.5 Did the Respondent subject the Claimant to the following treatment?

- a. Hiring the Claimant on a fixed-term contract in April 2018;
- b. Not shortlisting the Claimant for interview for the position of Assistant Account in July 2018;
- c. Not offering the Claimant a permanent job as Accounting Technician in August 2018;
- d. Not being offered a permanent job as Accounting Technician in January 2019;
- e. Not shortlisting the Claimant for interview for the position of Assistant Accountant in April 2019;
- f. Not responding to the Claimant's job application in June 2019;
- g. Not renewing the Claimant's contract as Accounting Technician in the Adults Social Care Team in June 2019;
- h. Not offering the Claimant a role in the Corporate and Strategic Partnership Team in June 2019;
- i. Not shortlisting the Claimant for interview for the position of Assistant Accountant in November 2019;
- j. Not shortlisting the Claimant for interview for the position of Accounting Technician in January 2020;
- k. Not allowing the Claimant to apply for an Accounting Technician role in February 2020; and
- l. Not shortlisting the Claimant for interview for the position of Assistant Accountant on 29 April 2020.

3.6 If so, did the Respondent treat the Claimant less favourably than it treated or would have treated others? The Claimant relies on the following comparators:

- a. In relation to treatment (a), Isaac McHugh, Rebecca Lawson, Robert Riches and Samuel Fitzpatrick, [non-Muslim];
- b. In relation to treatment (b), Jack Gibbard, [non-Muslim];
- c. In relation to treatment (c), Rose Golding and Suzanne Watling, [non-Muslims];
- d. In relation to treatment (d), Chanda Maipose, Kai Lau, Deborah Hole and Nga Dinh, non-Muslim candidates;
- e. In relation to treatment (e), Matthew Patterson, a non-Muslim candidate;
- f. In relation to treatment (f), Jessica Salter [non-Muslim];
- g. In relation to treatment (g), [no comparator identified];
- h. In relation to treatment (h), Jessica Salter [non-Muslim];
- i. In relation to treatment (i), Clare Alexander, [non-Muslim];
- j. In relation to treatment (j), Matt Shelley, Yegor Kolobov and Suzanne Watling, [non-Muslims];
- k. In relation to treatment (k), Isaac McHugh, Rebecca Lawson and Robert Riches, [non-Muslims];
- l. In relation to treatment (l), Nicola Calver, Ms Cheung, Ms Greenwood [non-Muslim] ; and/or
- m. In relation to all of the above, a hypothetical non-Muslim colleague or candidate.

3.7 Can the Respondent show that it had a non-discriminatory reason for the treatment?

3.8 Was the treatment because of the Claimant's religion of Islam?

Jurisdiction

3.9 Were proceedings brought within 3 months of the date of the act to which the complaint relates, taking into account the time spent in Early Conciliation?

3.10 The Respondent's current position is that any act of discrimination before 29 April 2020 is out of time but this may be subject to revision.

3.11 Was there conduct extending over a period?

3.12 Alternatively, is it just and equitable to extend this time limit?

4 We heard evidence from the Claimant on her own behalf. For the Respondent we heard evidence from:

- Ms Sarah Broadly (Management Accountant)
- Ms Helen Gisby (Finance Systems and Processes Manager)
- Ms Pamela Stack (Assistant Accountant)
- Ms Sian Bird (Finance Business Partner)
- Ms Tina French (Head of Finance)
- Ms Stephanie Mitchener (Director of Finance)
- Ms Helen Chittock (Financial Controller)
- Mr Phillip King (Deputy Chief Accountant)
- Ms Lisa Stobbie (Management Accountant)
- Mr Yannick Stupples-Whyley (Senior Finance Business Partner)

- Mr Peter Shakespear (Head of Finance)
- Ms Lynne Main (Assistant Accountant)

5 Statements were provided for Ms Connie Simpson, Mr Gareth Rott, Mr Stephen Heath and Ms Sarah Morrish, these witnesses did not attend to give evidence, their statements were unsigned and therefore the Tribunal did not read them or take them into account.

6 We were provided with an agreed bundle with some additional documents being provided as the hearing progressed. We read those pages to which we were taken in the course of evidence. The Tribunal has made findings of facts on only those disputes necessary to decide the issues in the case.

Findings of fact

7 The Respondent is a local authority providing services to residents within its geographic area. To support the delivery of its services, it has a Finance Hub team which comprises employees with financial expertise at differing levels of seniority. The most junior position is Accounting Officer, this is typically an entry level post and suitable for people studying for the Association of Accounting Technician qualification. The Respondent offers a study scheme to enable permanent Accounting Officers to obtain the AAT qualification which is itself a first step into accounting. The other jobs, in ascending order of seniority, are: Accounting Technician, Assistant Accountant and Accountant. The Tribunal accepts the evidence of Mr Shakespear that the move from Accounting Technician to Assistant Accountant is significant. The role of the Accounting Technician is about providing accurate information and data whereas the role of Assistant Accountant involves greater depth including the analysis of the meaning and importance of information and data, as well as providing advice for how it may best be used. For that reason, the Respondent requires greater depth and breadth of knowledge and experience when appointing to the Assistant Accountant role.

8 The Claimant is originally from Uzbekistan and is a practising Muslim who chooses to wear the headscarf. Whilst on a student visa, in 2014 she completed a degree in Business Studies and a Masters' degree in Marketing and Innovation. In 2018, she became an affiliate member of the Association of Chartered Certified Accountants. ACCA is a more advanced accounting qualification than AAT. The Claimant was unable to gain the necessary work experience to qualify as a full ACCA member as she only received a full work visa in 2017. The Claimant is professionally ambitious and took steps to ensure that she gained accounting experience as a volunteer with organisations such as Basildon Mind in 2010 and her ongoing work for the Iqra Learning Centre, an independent Muslim Saturday school.

9 The Claimant applied for a role as an Accounting Officer in the Finance Hub team. Ms Gisby and Ms Main interviewed her on 29 March 2018. They also interviewed Mr McHugh, Mr Riches and Mr Fitzpatrick. There were three roles available, two were permanent, one was fixed term. Mr McHugh and Mr Fitzpatrick were already permanent employees of the Respondent. Mr Riches was an external candidate seeking to join the AAT study scheme. Ms Gisby and Ms Main decided to offer the two permanent roles to Mr McHugh and Mr Riches. As the Claimant was a stronger candidate than Mr Fitzpatrick, they offered her the fixed term role which was intended to cover maternity leave. Ms Gisby and Ms Main believed that the Claimant had interviewed well, they were happy to appoint her and looked forward to her starting with the team. They had no

concerns that she may not be a good team fit or potentially have different values and believed that although over-qualified on paper, this entry level job would enable the Claimant to gain the practical experience she lacked.

10 The Tribunal accept as plausible and credible the Respondent's evidence that the Claimant was offered the fixed term role for two reasons. First, she did not need to access the AAT study scheme as she was already ACCA part qualified so did not need to be permanent. Second, Mr McHugh was already a permanent employee and Ms Gisby and Ms Main believed that he would not have given up his secure employment to accept a 9-month fixed term contract.

11 On the Claimant's first day of employment, 11 June 2018, Ms Broadley and Ms Bird offered the Claimant the more senior role of Accounting Technician in the Adult Social Care finance team on a fixed term basis, to provide maternity cover. Ms Gisby supported the Claimant's temporary promotion. The Tribunal find that this was an excellent opportunity for the Claimant to gain experience at a more senior level in order to complete her ACCA membership. There was an exchange of emails as to whether the Claimant should be paid at the higher rate for a qualified Accounting Technician or at the lower rate for an unqualified. The decision was taken to treat the voluntary experience gained by the Claimant as sufficient to meet the "qualified" status for pay purposes.

12 The Claimant's move to the more senior Adult Social Care job meant that her original fixed term contract as an Accounting Officer needed filling. Mr Fitzpatrick, the next highest scoring candidate at interview, was offered the job. He was already a permanent employee who was on the AAT study scheme. Ms Lawson was also appointed as an Accounting Officer in the Finance Hub team at about the same time but as part of an entirely separate recruitment exercise. The Claimant relies on the fact that neither had accountancy qualifications or experience and yet both were appointed to permanent positions, whereas she had the qualifications and the Respondent would not need to incur the cost of her training. This misunderstands the entry level nature of the Accounting Officer job which is intended to enable unqualified employees with potential to gain the qualification and experience to progress to more senior roles. The benefit to the Respondent of investing in the study scheme is to create a future pipeline of talent for more senior posts. The Claimant's case also misunderstands that to benefit from the financial cost of investing in training, the Respondent required those on the AAT study scheme to be permanent employees. The Tribunal finds that this is the reason why Mr Fitzpatrick and later Ms Lawson were offered permanent positions.

13 It appears that the Claimant progressed well in her acting up role but understandably was keen to gain a more senior job and on a permanent basis as part of her career advancement. On 21 July 2018, the Claimant applied for the vacancy of Assistant Accountant. By this date she had worked as an Accounting Technician, even if deemed qualified, for only six weeks or so and having joined the Respondent knowing that she needed to gain relevant experience to gain full ACCA membership.

14 The advertisement for the Assistant Accountant role required the candidate to have full AAT qualification or equivalent, plus one years' experience as an Accounting Technician. There were 27 applications and a short-listing exercise was required. The Tribunal accept as credible and plausible that in deciding who to short-list, Ms Broadley was looking for candidates with at least a year of management accounting experience and a range of customer facing experience as well as being suitably qualified. Ms Broadley

did not shortlist the Claimant for interview, giving as her reason the Claimant's lack of one years' experience as an Accounting Technician and her lack of customer or budget experience. Ms Broadley did short-list Mr Gibbard, despite the fact that would not graduate from his AAT course until September 2018 and therefore was not sufficiently academically qualified. On balance, the Tribunal accepts that Ms Broadley short-listed Mr Gibbard in error and, when she realised, she contacted him and explained that he would not be able to be offered the role even if he performed well at interview although she was prepared to allow him to be interviewed as a way of development exercise to improve his interviewing skills for future applications. Mr Gibbard was interviewed but was not appointed, the successful candidate being Ms Stack.

15 In August 2018 the Claimant applied for the role of Accounting Technician. The advertisement was for two permanent vacancies; one in Financial Accounting and one in Adult Social Care. There were 22 applicants and Ms Bird shortlisted 8 people for interview, including the Claimant. Each applicant was scored against set interview criteria. Four applicants were considered appointable, in order of scores: Ms Squibb (43), Ms Watling (39), the Claimant (36) and Ms Golding (36). Rather than just reject the Claimant and Ms Golding, Ms Bird confirmed to the recruitment agency that she was asking around to see if any other teams had vacancies. She hoped to make offers of employment in the expectation that there would be staff turnover leading to further vacancies which they could fill. On 4 September 2018, Ms Bird confirmed that Ms Watling had been offered a job in Financial Accounting, Ms Squibb and Ms Golding were offered permanent roles and the Claimant was offered an extension of her fixed term contract to the end of 2019. It is clear from this contemporaneous email that Ms Golding was already a permanent employee of the Respondent.

16 The Claimant's case is that the difference in treatment could not be justified by her lower scores at interview because her scores were very similar to the successful candidates, the scoring was not objective and failure to acknowledge possible bias against her tainted the process such that her worse marks were because of her protected characteristics. The Claimant specifically challenged Ms Watling's score for her answer to the fifth question – an example of improving customer understanding and engagement. The Tribunal reviewed the contemporaneous notes taken by each of the three people on the interview panel for each of Ms Watling and the Claimant. On question 5, the Claimant scored an average of 5.66 and Ms Watling scored an average of 6.33 – a difference of two thirds of a mark when the overall score difference was three marks. Having looked at the interview scores, the Tribunal finds that the Claimant gave a weak answer to question 3 (experience in a matrix managed environment), providing very little detail at all about the challenges she might face and how she would ensure that her contributions were valuable.

17 On balance, the Tribunal finds that the Claimant gave a weaker interview than her comparators and the successful candidates did perform better than her. This is consistent with a contemporaneous email from one of the hiring managers: **“good interview, but difference came down to depth of response; suggest taking time to relate skills/experience to requirements of role to enable fuller answers/examples to be given.”** Ms Bird confirmed that she would give similar feedback but made clear that she was happy to support an opportunity for the Claimant to get more practical experience. The Tribunal find that the scoring was fair and entirely unrelated to her race or her religion.

18 The Claimant accepted the fixed term contract. In an email dated 7 September 2018, Ms Bird confirmed that Ms Squibb had accepted the offer of a permanent post in Adult Social Care.

19 Throughout November 2018, Ms Chittock and Ms Broadley contacted other parts of the broad finance team to try and arrange the necessary experience for the Claimant to complete her ACCA qualification.

20 On 20 December 2018, the Respondent advertised a further three Accounting Technician vacancies in Adult Social Care, the Finance Hub and the Place team. There were 26 applicants, a mixture of internal and external, and 12 people including the Claimant were shortlisted for interview by Ms Main, Ms Stack and Ms Morrish. The Claimant clearly met the person specification as she was doing the job. Ms Broadley offered the Claimant a mock interview with a view to improving her interview skills and optimising her chance of appointment. Contemporaneous emails show that Ms Broadley also gave the Claimant interview prompts and feedback on her proposed answers, including an example of a difficult customer. Ms Broadley and Ms Bird gave the Claimant useful feedback after she performed poorly in the mock interview. The Tribunal find that Ms Broadley and Ms Bird were supportive of the Claimant and clearly wanted her to secure a permanent appointment.

21 On 15 January 2019, Ms Nicholls, a Management Accountant, informed Ms Gisby that one of her permanent employees, Mr Lau, was looking to move from Place into a different team in order to gain broader experience. Ms Gisby replied that all applicants would be treated the same. In other words, would be subject to the interview process. Ms Bird suggested instead that Mr Lau could participate in the rotation screen, in other words to move him into one of the three vacancies and fill his existing post with a successful applicant in the current recruitment exercise. In other words, there would now be two vacancies in Place as well as the Hub and Adult Social Care vacancies.

22 In the end, 11 applicants were interviewed as one person dropped out. The order of scores were: Mr Lau (104), Ms Dinh (88), Ms Hole (86), Ms Maipose (75), Mr Quereshi and Ms Laderas (69), Claimant and Ms Marais (67), Ms O'Keefe (62) and Ms Mateyko (56). In other words, the Claimant came joint seventh.

23 Although not part of the Claimant's pleaded case that there was discrimination in the scoring, in cross examination she did challenge some of the scores awarded. Her evidence was that Mr Lau was unduly highly scored on question 5 as he received scores of 9 from Ms Morrish and seven from Ms Main. The Tribunal accepts that Ms Morrish was generous in her scores on that question, but the Claimant consistently scored lower on all questions by comparison to Mr Lau and there was a 37 mark difference between them. Having reviewed the notes of Mr Lau's interview and compared them with the notes of the Claimant's interview, we are satisfied that his was a significantly better performance.

24 The Claimant also challenged Ms Maipose's scores for question 3, saying that she gave a more full answer and yet Ms Maipose had scored higher. The Tribunal considered the interview notes and scores for Ms Maipose – on question 3 she was given scores of 5 by Ms Morrish and initially 6/7 by Ms Main. On Ms Main's notes the 7 has been crossed out, reducing her score on this question to 6. The Tribunal see nothing sinister in this change and regard it as a normal part of the moderation process after interview by a panel. In any event, it worked to Ms Maipose's disadvantage contrary to the Claimant's

case that Ms Maipose was being unfairly benefited. For her part, the Claimant received a score of 4 from each of Ms Morrish and Ms Main for question 3. The Tribunal finds that the notes of the answers given by the Claimant and Ms Maipose are very similar in terms of the level of their response. However, the Tribunal accepts Ms Stack's evidence that the information provided by the Claimant had required a great deal of prompting which Ms Maipose had not required. As a result, the Tribunal finds on balance that the difference in score was justified by factors entirely unrelated to race or religion.

25 In her witness statement, the Claimant's complaint about scoring in this recruitment exercise was that Ms Mateyko's score was reduced in order to make sure that Ms Maipose kept her role, relying on the fact that different coloured pens were used and that there are no scores shown against the questions on Ms Main's notes, just on the cover assessment sheet. It is clear that Ms Morrish's scores for Ms Mateyko were reduced on all but two questions, an overall reduction of 6 marks. It is also clear that Ms Main gave far lower scores to Ms Mateyko. For example, on question 6, Ms Morrish initially scored her 7 (which she reduced to 6) and Ms Main scored her 3. Consistent with the reduction in Ms Maipose's scores, the Tribunal finds that this was part of the normal moderation process after interview which clearly applied to all applicants. The changes to the scores for Ms Mateyko and Ms Maipose scores are not material from which we can safely infer that the Claimant was herself scored in a manner tainted by race or religion. The Claimant did not challenge her scores at the time and even now, with the benefit of hindsight and the notes for all applicants, the Claimant did not show that there were any material inconsistencies or inaccuracies in the scoring.

26 After the interviewers had scored and ranked the applicants in order of performance, there was a meeting of senior managers to decide which of the top four would be allocated to which vacancy. The meeting was attended by Ms Stack but her involvement was limited to presenting the scores from the interviews. The Claimant sees something untoward in this process suggesting that the managers were selecting who should be appointed. The Tribunal does not agree. The successful candidates were recommended by the interviewers based on who had the highest interview scores, this management meeting was about deciding which of them went into which team. This is consistent with the Claimant's chat message exchange with Ms Bird on 1 February 2019 after she found out that she had been unsuccessful.

27 In April 2019, the Respondent advertised for two Assistant Accountants. Ms Broadley contacted Ms French, the recruiting manager, to inform her that the Claimant was interested. Ms Broadley praised the Claimant, saying that she would be great at the job, worked hard and was proactive, and made clear that she would love the Claimant to get a permanent role. As part of her attempts to support the Claimant, Ms Broadley asked for sample interview questions for the Claimant to practice and improve her interview performance. Ms French replied that she did not have any questions before adding "I think there have been other recent recruitment at this level in other teams? Did Adults have one recently?". The Tribunal finds on balance that this was a reference to the possibility that sample questions may be available from the other recent recruitment exercises and not, as the Claimant suggested, a reference to her performance, ability or likelihood of appointment.

28 The Claimant asked Ms Broadley to review her CV prior to applying. In her email, the Claimant seems to believe that because she is an internal candidate she will get an interview anyway. This shows a fundamental misunderstanding of the recruitment

process – being internal or even meeting the minimum qualification requirements does not guarantee an interview as there will need to be short listing of stronger candidates if there are a lot of applicants for the role. The Claimant's CV and on-line application lack specific detail about her work experience but her covering letter was more detailed about the work she did at Iqra Learning Centre (with two specific examples: financial analysis leading to cutting expenses and raising additional income, introduction of a school uniform to reduce pupil withdrawal rates) and in the Adult Social Care team (producing staffing forecasts, identify, discuss and adjust for forecast variances, general knowledge of grants from her own training).

29 There were 37 candidates for the two vacancies. Ms French decided not to shortlist the Claimant for interview, her reasons were: **"Some [local government] experience but recently interviewed and deemed not suitable. Lack of clear examples and experience."** Another applicant, Mr Biggs, was not short listed for the single reason that he had been recently tested at Accounting Technician level and deemed not appointable. The Tribunal finds that Ms French's assessment of the Claimant lack of examples and experience was properly open to her based upon the contents of the Claimant's application, even with the additional detail in the covering letter, and the fact that the Claimant had only worked for the Respondent as an Accounting Technician for 10 months by this time. By comparison, one successful candidate, Mr Patterson, had worked as an Accounting Technician for 2 years and 4 months and had been an Accounting Officer for a year before that and gave specific examples of relevant experience (work on volatile projects and challenging budget holders, delivering training in new financial systems, participation in a group addressing the results of an internal survey). Objectively considered, Mr Patterson's was a far stronger application with greater experience both in terms of length of service and detailed examples. The other successful candidate, Ms Cowlin, also had a far stronger application form. The Tribunal found Ms French a straightforward witness and her evidence about the lack of experience in the Claimant's application is consistent with the Tribunal's findings above.

30 In May 2019, there was a further vacancy for an Accounting Technician in the corporate and strategic partnership team. Ms Salter had recently been unsuccessful in an application to join the Respondent's graduate training scheme but Ms Mitchener was keen to employ her. The external recruiter at Capita suggested that Ms Salter could be considered for the Accounting Technician vacancy based upon the fact that she had just completed the very thorough recruitment process for the graduate training scheme. Ms Mitchener reviewed Ms Salter's application for the graduate role and asked whether she would be regarded as qualified or unqualified for pay purposes. By email sent on 15 May 2019, Ms Mitchener confirmed to Capita that they wanted to offer Ms Salter the qualified Accounting Technician post without the need for it being advertised. Ms Salter was not interviewed before her appointment.

31 At about the same time, Ms Mitchener was informed by another manager that the Claimant had applied for the role of Capital Programme Officer. Ms Mitchener's response was: **'I think she has been on a fixed term contract supporting adults. I think Helen C in the team have struggled with her. I can ask what specific if it is helpful.'** The other manager thanked Ms Mitchener for her help, saying that it had been borderline as to whether or not to interview the Claimant and suggesting that she regarded the non-extension of the Claimant's contract as not positive given the staffing pressures in the team. The Tribunal finds that whereas Ms Broadley had made positive comments to Ms French to try and secure her an

interview for a vacancy, here Ms Mitchener's negative comments about the Claimant led to the decision not to interview her for this vacancy.

32 Ms Mitchener's evidence was that she understood the "struggle" with the Claimant to relate to a disagreement she had had with a budget holder who had then complained about the Claimant. In fact, the Tribunal finds that the concern of the budget holder was about the tone of the Claimant's communication and her email suggested that this was a development need rather than a complaint. Nothing in the budget holder's email supported any suggestion that Ms Chittock and her team had struggled with the Claimant. Ms Mitchener's negative comment about the Claimant was unfair and should not have been made. However, there is nothing in the comment to suggest any conscious or subconscious link to race or religion, rather it was an ill-informed misunderstanding of an issue which had arisen.

33 On 15 May 2019, Ms Davis-Hughes (Head of Finance in Adult Social Care) invited expressions of interest in secondments in other areas of finance. The Claimant replied that her contract was due to expire but she would be interested in gaining some experience in auditing. Ms Davis-Hughes contacted the internal Audit Manager to see if there were any junior roles available and advised the Claimant that there was an ongoing recruitment exercise for an Audit Trainee, suggesting that she would find out if the advertisement could be re-opened to enable the Claimant to apply. In fact, the Claimant had already applied. The Tribunal finds that this was an example of flexibility in the recruitment process operating to the advantage of the Claimant as an internal candidate. It is not consistent with her case that the Respondent did not want her to get a permanent role.

34 In her email sent on 16 May 2019 to Ms Davis-Hughes expressed her appreciation of the support she was being given. In her email, she said: 'as you know I am very bad when it comes to interviews.' Ms Davis-Hughes replied to offer coaching and interview tips, the Claimant replied again stating that she is bad at interviews, suggesting that the Respondent's recruitment policies were strange for not including an internal candidate's work performance and confirming that Ms Broadley had been extremely helpful and supportive. This was a reference to the further support Ms Broadley gave the Claimant in preparation for her interview for the Audit Trainee vacancy, including constructive and supportive comments on the Claimant's draft interview answers. The Claimant was not successful in this application.

35 The Claimant's fixed term contract as an Accounting Technician was extended from 12 April 2019 until August 2019 to cover the maternity leave of another employee, Menfes. Contemporaneous emails between Ms Bird and Ms Broadley on 24 May 2019 show that they believed at the time that Menfes intended to resign and take a career break, thereby creating a substantive vacancy rather than simply a period of cover. The vacancy for Accounting Technician was advertised with two requisition numbers: 23863 (qualified) and 23813 (unqualified). The Capita email sent on 1 July 2019 gives the total number of applications for each vacancy (12 qualified, 30 unqualified). The Tribunal finds that 23863 was Menfes' job.

36 The Claimant applied on 26 June 2019 for the qualified Accounting Technician vacancy; she did not apply for the unqualified vacancy. On the same day, she was appointed to a permanent contract as a Finance Officer in the corporate and customer

team. She was due to start the job on 23 July 2019 but this was delayed until August 2019 as she was still covering Menfes' maternity leave.

37 Contemporaneous emails on 2 July 2019 show that Menfes subsequently changed her mind about a career break and withdrew her resignation. As a result, there was no need to recruit to the qualified vacancy as it no longer existed. The Respondent outsources its recruitment process to Capita who are responsible for handling the administration side of the process, receiving applications, reviewing and passing them to the hiring managers for shortlisting, arranging interview times and notifying the candidates of the outcome of their application. There are many emails in the bundle relating to the earlier vacancies which confirm the nature of their role and, in the chat on 1 February 2019 about the Accounting Technician vacancy, Ms Bird expressly told the Claimant that it was Capita who notified candidates of the results. The Claimant was notified that the vacancy anticipated to replace Menfes had been withdrawn.

38 The Claimant's case is that there was a second vacancy created either by the resignation of another employee, Ms Dinh, or even a third vacancy created when Ms Squibb did not take up her post as anticipated. In an interview in the Claimant's subsequent grievance, Lisa Nicolls stated that Ms Dinh was not replaced as they decided they needed a more senior role. Instead Ms Dinh's duties were subsumed into Nadia Cowlin's job but with a review every six to twelve months of whether additional support and therefore recruitment to the vacant Accounting Technician post was required. The Claimant relies on monthly reports which appear to show two vacancies, although this is dated August 2019 after Ms Salter had been appointed. The Tribunal accepts as plausible that a vacancy shown on the monthly report is not the same as a post which is budgeted and where approval to recruit has been given, for example the continued presence of Ms Dinh's former job pending a decision as to whether it should be filled.

39 The Claimant's next application was for the role of Assistant Accountant in November 2019. There were 32 applicants for one post, 28 of whom met the minimum qualifications and experience in the job specification. There was clearly a need to shortlist applicants for interview and Ms Chittock and Mr Shakespeare produced a shortlist of seven people, which did not include the Claimant. The reasons she was not short listed on this occasion were in part that her application was not as strong and partly her previous unsuccessful application for Accounting Technician. The Claimant had submitted the same covering letter for two different jobs, rather than tailoring her application to the needs of each specific post and was using essentially the same application which had previously been insufficient to be short listed. It is not surprising that the same application was again found to be insufficient again.

40 The Claimant was very disappointed not to be shortlisted and, on 5 December 2019, emailed Ms Wood (Executive Director of Finance and Technology) to say that she had sought feedback but wondered whether her lack of success was because she was part-time. She concluded by stating: **'I am sure you can change the recruitment policies to accommodate provision of internal candidates based on their job performance as well, not only their interviewing skills. I am very bad at interviews but see myself as a well-performing employee when it comes to doing the job, for example.'** Ms Wood asked Mr Shakespeare to give the Claimant some individual feedback.

41 The Claimant and Mr Shakespeare met in December 2019 and a transcript of the recording of their discussion was provided to the Tribunal. The Tribunal finds that Mr

Shakespeare provided helpful feedback trying to give the Claimant a lot of hints and tips to improve her performance at interview. The feedback given to the Claimant is consistent with the reasons for not shortlisting her for interview: she had insufficient evidence of depth of experience in particular at using data rather than simply producing it and consisted almost entirely of dealing with staffing budgets.

42 The Claimant disagrees with the feedback provided, her case is that Mr Shakespeare could not have read her CV and reached the conclusion that she insufficient evidence of depth of experience. The Tribunal disagrees. From her cross-examination of Mr Shakespeare, it is clear that many of the examples of relevant experience which the Claimant relies upon now are not set out explicitly in her CV but rely on an assumption that a person would infer such experience from the more limited information provided. A strong applicant will show that they have relevant and extensive experience, it is not enough to rely on a job title (Accounting Technician) as sufficient evidence of experience. It is for the applicant to make his or her strengths and experience clear in their application. Furthermore, the Tribunal misrepresents in her witness statement the advice given to her by Mr Shakespeare. He did not, as she suggests, tell her that she was required to have two years' experience as an Accounting Technician to be considered. What he did tell her was that further work as an Accounting Technician would give her more examples of relevant experience to strengthen any future application. This is a material difference.

43 The successful applicant, Ms Alexander, had extensive experience working with pension funds and had been in post as an Accounting Technician for approximately two and a half years, having previously worked as a senior Accounting Technician. Ms Alexander gave good examples of analysis, rather than mere production of data, for example, how she had helped the deputy chief accountant to establish an improved, new, frontend grant process. Objectively considered, Ms Alexander's application form set out far more in depth experience with specific examples than that of the Claimant. This is why Ms Alexander was short listed and the Claimant was not. There were no facts from which the Tribunal could conclude that discrimination played any part in the Claimant's failure to be shortlisted.

44 In January 2020, the Claimant again applied for a permanent role as an Accounting Technician which was advertised for management accounting. By email sent on 29 January 2020, the Claimant was told that she had not been short listed for interview because she had no relevant accounting experience. The Claimant's feedback from the hiring manager was that her experience was in finance and was not as current or extensive of those of other candidates.

45 The Claimant's evidence was that her application provided adequate examples of experience to merit an interview. The Tribunal had the benefit of being provided with copies of the Claimant's CV and covering letter in the bundle. Whilst the covering letter was more tailored than on previous occasions, with some focus on financial management experience, four of the six examples of responsibilities in her previous job as an Accounting Technician set out in the CV related to staffing.

46 The Claimant was not the only applicant not short-listed. One applicant was removed from the provisional shortlist because he had been interviewed for the role in 2018 and there had been concerns about his interpersonal skills such that he was not appointed (not Mr Biggs, this was a further example of a previous unsuccessful application being used as a criterion).

47 A peculiarity of this recruitment exercise was that although it advertised for a somebody with management accounting experience, it then decided to appoint somebody on the basis of financial accounting experience. This was because the initial management accounting Technician vacancy had been filled by Ms Watling in a lateral move. The hiring manager, Mr King, decided that rather than re-advertise the correct vacancy, he would look at the existing applicants but disregard their covering letters and assess them solely on the basis of their CV.

48 The Tribunal finds that this was unfair – it was a significant change in requirement mid-way through the process when applicants had tailored their covering letters to the advertised vacancy. However, it was unfair to all candidates, irrespective of race or religion - one applicant (not the Claimant) was rejected because their experience was purely in management accounting which was, of course, the job that they had applied for. Perhaps unsurprisingly in the circumstances, the recruitment process did not identify an appointable applicant. Mr Kobolov, an experienced Accounting Technician already permanently employed by the Respondent, was appointed following a recommendation by a senior finance manager outside of the competitive recruitment process.

49 On 6 February 2020, Ms Purdy sent an email to the 'All Financial Services' group email address which covered all of the finance team advising of an Accounting Technician opportunity in the Place and Public Health team. The Claimant was not included in the group email as she had moved to P2P and therefore did not receive the email.

50 On 11 February 2020, Mr Shakespear sent an email to the same group address to advise of a further opportunity for an Accounting Technician in the Corporate and Strategic Partnership team. The deadline for applying for either role was 5pm on 14 February 2020. Within two minutes of receiving Mr Shakespear's email on 11 February 2020, Ms Maipose forwarded it to the Claimant. As a former colleague, Ms Maipose was aware that the Claimant was keen to secure a permanent Accounting Technician job. The Claimant did not contact Mr Shakespear or Ms Purdy until 26 February 2020. In her email of that date, the Claimant said that she had assumed that they were internal transfers between existing Accounting Technicians and had only now heard that there had been interviews and that Accounting Officers were also being considered. The Claimant asked if was too late now to apply; Mr Shakespear replied to say that it was, stating that some of the roles would potentially be an internal transfer and **'the role on this occasion was ringfenced to finance.'**

51 The Claimant's evidence was that she was waiting to see the job advertised on the internal website and only found out later that Accounting Officers from her former team were being interviewed. This is not consistent with her contemporaneous email that she had assumed that it was internal lateral transfers only. All of the Respondent's witnesses gave evidence that they had not previously come across the concept of ringfencing. In the Claimant's subsequent grievance, the hiring manager said that the role should have been advertised. However, does not mean that Mr Shakespear believed Claimant would not be eligible to apply. To the contrary, the Tribunal accepted Mr Shakespear's evidence that he intended the role to be an opportunity for career progression for employees in the Hub but he assumed that this would include the Claimant, as she was in the buyer Hub team. The Tribunal found Mr Shakespear to be a credible witness, he wanted to help the Claimant hence his feedback in December 2019 and we have heard no evidence to suggest that his view had changed within two months. There is also no reason why the

Claimant could not have contacted Mr Shakespear sooner as the email from Ms Maipose was clearly sent to enable the Claimant to apply. As a matter of fact, the Tribunal does not accept that the Claimant was not allowed to apply for the role within the advertised deadline; the only reason that she was not allowed subsequently to apply was because the deadline had passed and interviews had already taken place. This had nothing to do with her race or religion.

52 The Claimant raised a grievance about her repeated failure to be appointed in competitive exercises. The relevant evidence of the hiring managers is set out above in connection with the relevant vacancy. Ms Gisby was also interviewed and said of the Claimant: **'it is about getting experience in finance, her qualifications are good, but it is about getting financial experience which she may not have in two years. It took me 6 years. She might be lacking from experience in the organisation. I did hear that sometimes she can be a little difficult. I heard that from the team but heard nothing further. I wonder if it is just a little bit more experience required.'** The investigation of the Claimant's grievance was put on hold in March 2020 due to the effect of the COVID-19 pandemic. Ultimately, the Claimant's grievance was not upheld.

53 In April 2020, the Respondent advertised for the role of part-time Assistant Accountant in Schools Finance. Mr Stupples-Whyley and Ms Stobbie were the shortlisting managers. It is clear from the advertisement that the Respondent was looking for school's experience, including providing advice to Head Teachers. There were 24 applicants and Ms Stobbie and Mr Stupples-Whyley separately considered each. Ms Stobbie did not shortlist the Claimant because she lacked school's experience and, in oral evidence, because the Claimant's application provided insufficient evidence of being a "critical friend". Mr Stupples-Whyley did not shortlist the Claimant because she was lacking in three area of experience, the cut off for his shortlisting decision being two areas of deficit. In his view, the Claimant lacked experience in the criteria of "train, advise and support", "knowledge of school finance" and "multidisciplinary teams". Neither Ms Stobbie nor Mr Stupples-Whyley referred to the Claimant's experience working for the Iqra Learning Centre.

54 In fact, very few candidates had any school experience. Ms Cheung had been an accounts administrator at St. Edmond's College: Ms Stobbie recognised this as schools experience but Mr Stupples-Whyley deemed her lacking in knowledge of school finance. Ms Tolley had been a payroll officer at a secondary school and Ms Greenwood had been voluntary treasurer for a primary school parents' association, each was marked by both Mr Stupples-Whyley and Ms Stobbie as having relevant school experience. Ms Cheung and Ms Greenwood were shortlisted but Ms Tolley was not. Ms Calver did not have schools experience at all. Ms Stobbie's short listing note regarded her as possibly over-qualified as she had previously held the post of Senior Accountant. Mr Stupples-Whyley marked her down for experience of schools finance and large organisations but otherwise regarded her as a strong candidate.

55 The Tribunal looked at Ms Cheung's CV and covering letter. It is not comprehensive: it is just as hard to see any evidence as to why Ms Cheung should get a tick for training advising and supporting where the Claimant did not. The Tribunal finds that Ms Cheung and the Claimant had materially comparable applications for the vacancy. The same is not true of Ms Calver and Ms Greenwood. Ms Calver's CV showed evidence of considerable experience at senior levels in finance, including examples of providing strategic advice for a range of clients and dealing with compliance issues. Whilst the Claimant may have been able to do the same, her application did not show that she had

been operating at such a senior level. Similarly, the Tribunal finds that Ms Greenwood's application was also far stronger than that of the Claimant.

56 St. Edmond's is an independent Catholic school. Iqra Learning centre is an independent Muslim school. Mr Stupples-Whyley searched online about information about Iqra but not St. Edmond's. Ms Stobbie did not seek further information about Iqra Learning Centre.

57 The Claimant's case is that in considering her repeated lack of success in being appointed to either a permanent Accounting Technician or Assistant Accountant role, and often failure even to be shortlisted, the Tribunal can draw inferences in support of her case. The facts relied upon by the Claimant are the unfairness in the different recruitment processes, the number of unsuccessful applications, the English sounding names of successful candidates, the fact that she is the only Muslim person in Finance and the contents of two reports, Quest and Radar.

58 In March 2020, the diversity profile of the accounting team within Finance was: 69.2% female, 71.1% white British, 10.9% BME and 3% Asian. In terms of religious diversity, the team was: 28.9% Christian, 4% other faiths, 26.4% "no religion", 4.5% "prefer not to say" and "unknown" 36.3%. However, the accounting team is not the entirety of the finance department and the Claimant accepted that some individuals were missing from the data, for example Ms Maipose and Ms Kowe both of whom would not be identified as white British. The Claimant did not adduce any evidence as to the religion of any of her comparators beyond asserting that they were not Muslim.

59 The Quest report considered the entirety of the Adult Social Care team, not simply its finance function, and its conclusions were based upon information provided by seven volunteers. It included a finding that diversity on interview panels needed to improve and that: **"BAME colleagues felt that there was a lack of cultural awareness in ASC therefore, hence they are less likely to be understood when expressing themselves during interviews."** The Claimant's case is not that her race or religion caused her not to be understood at interview or even that it was the reason for her poor interview skills. Her case is that she was directly discriminated against by reference to the named and/or a hypothetical comparator, for example being marked overly harshly or having experience disregarded on short listing decisions. In any event, the Tribunal does not find that it is statistically significant or material from which we could safely draw an inference in respect of Finance broadly, especially as so many of the vacancies were not in Adult Social Care and the Claimant was clearly supported and encouraged by Ms Main and Ms Bird within that team.

60 The Radar report was produced in February 2021 and covered the whole council, with a statistically significant sample size of 619 employees. It gave the Respondent an overall diversity rating of "implementing" – the middle of five categories (pioneering, leading, implementing, initiating and planning). The report found that hiring managers did not receive formal training on inclusive recruitment and mitigating bias in recruitment practices. The report also analysed individual functions within the local authority, including Finance and Technology, which it found comprised 22% diverse talent. Its definition of diverse talent included those with the protected characteristics of disability, sexual orientation and ethnicity and the comparator groups were "straight white men" and "straight white women". In assessing the demographic profile by function, the report included the following caveat: **'when breaking samples within function by demographic representation, the certain demographics (namely ethnicity and LGB+) were too small to achieve**

statistical relevance". On balance, the Tribunal did not find the report sufficiently safe for any inference to be drawn specifically in relation to race or religion given that ethnicity was too small for statistical relevance and the combination of multiple different characteristics which are not applicable in this case (particularly disability) to the comparator group.

Law

61 Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Disability is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that the protected characteristic had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

62 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

63 The explanation for any less favourable treatment relied upon by the Respondent does not need to be reasonable. The mere fact of unreasonableness or unfairness is insufficient to establish facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination, see **London Borough of Islington v Ladele** [2009] IRLR 154.

64 Where the Claimant relies on a hypothetical comparator, she must still prove primary facts from which the Tribunal could find or infer that such a person would have been treated more favourably in the same circumstances, **Balamoody v UK Central Council for Nursing Midwifery and Health Visitors** [2002] IRLR 288.

Conclusions

65 The Tribunal started by considering individually each of the issues identified in the List of Issues before stepping back to look at the case overall.

66 The first issue is that the Claimant was hired on a fixed term contract in April 2018 whereas Mr McHugh, Ms Lawson, Mr Riches and Mr Fitzpatrick were appointed on permanent contracts. The Tribunal has found as a fact that the Claimant was not initially appointed to a permanent post for two reasons: she did not need to study for AAT and she was not already permanent. Whether or not fair and whether or not it would have saved the Respondent money, neither reason has anything to do with race or religion. The Tribunal concludes that an external white English candidate who was already part ACCA

qualified but who lacked practical experience would have also been appointed to the fixed term role rather than a permanent role in the same circumstances.

67 The Claimant's case is that her immediate promotion to provide maternity cover as an Accounting Technician shows that she was deemed overqualified for the Accounting Officer role but not qualified enough to merit a permanent contract. The Tribunal does not accept that this is a valid criticism. The Claimant clearly was academically overqualified for the Accounting officer role, that is the reason why she was given the opportunity on her first day to cover the more senior Accounting Technician role. Her level of qualification, however, had nothing to do with why she was offered a fixed term contract initially for reasons set out above.

68 This immediate promotion to maternity cover Accounting Technician and discretion exercised in her favour to pay at the higher rate is entirely inconsistent with the Claimant's case that the Respondent regarded her less favourably in some way because of her religion or race. The Tribunal finds that, to the contrary, the Respondent was keen to enable the Claimant to advance and was actively supporting her career progression in offering her this opportunity in the hope that she would progress to more senior roles commensurate with her ability and qualifications.

69 Mr Fitzpatrick and Ms Lawson were not offered any of the three vacancies at the time that the Claimant was appointed. Their offers came later: Mr Fitzpatrick to cover the vacancy left by the Claimant and Ms Lawson as part of a separate recruitment exercise. Both required access to the AAT study scheme as they lacked an accounting qualification. Mr Fitzpatrick was already a permanent employee of the Respondent.

70 The Claimant has made much in her evidence with detailed critique of alternative actions that the Respondent could have taken. But the Tribunal does not accept that there is any material from which the Tribunal could draw an inference of discrimination due to religion or belief in the initial appointment on a fixed term contract. Indeed, at the time, the Claimant appeared grateful to have been offered the opportunity to gain the very work experience that would enable her to fully qualify as an ACCA and potentially progress even further.

71 The second issue is the failure to shortlist the Claimant for the Assistant Accounting role in July 2018, by comparison with Mr Gibbard who was shortlisted but ultimately not appointed. The Claimant's case is that if the Respondent was able to exercise its discretion in her favour by regarding her for pay purposes as a qualified Accounting Technician, then it was equally able to do so when deciding whether she met the minimum requirements for the more senior Assistant Accountant role. Further, her case is that if discretion was exercised to waive the qualification requirement for Mr Gibbard, then the experience requirement should have been equally relaxed for her. Based on our findings of fact, both the Claimant and Mr Gibbard did not meet the requirements for the role. The Claimant was treated less favourably as Mr Gibbard was interviewed when she was not. The burden of proof therefore passes to the Respondent.

72 The Tribunal have accepted Ms Broadley's explanation that the decision to short list Mr Gibbard was an error and that he was permitted to interview as part of his self-development but on the express understanding that he would not be appointable even if he performed well at interview. Whilst this may seem unfair, it was not in any sense

whatsoever due to race, religion or belief but due to Ms Broadley's genuine error about Mr Gibbard's graduation date and academic qualification.

73 As for the failure to appoint the Claimant to a permanent Accounting Technician vacancy in August 2018, her comparators are Ms Golding and Ms Watling. The Tribunal has not accepted the Claimant's challenge to the scoring process as developed in her case to this Tribunal. Rather, we have found that the Claimant did give a weaker interview than her comparators and Ms Golding and Ms Squibb did perform more strongly than did the Claimant at interview. The scoring was fair and entirely unrelated to race or religion; each was selected for a permanent post on merit and nothing else. It is a matter for the Respondent to decide to appoint based upon interview performance rather than existing job performance. Whether or not the Respondent or indeed the Claimant could have chosen a different method is immaterial. This had nothing to do with the Claimant religion or belief. Even though there were two vacancies and the Claimant came joint third, the Respondent did not just reject her. It genuinely sought to find a vacancy for her in the hope that staff turnover would leave to further opportunities to progress. This is not consistent with the Claimant's case that the Respondent did not want to appoint her because she was not a good fit.

74 Ms Golding was also joint third in this recruitment exercise. As with the Claimant, she was not rejected but offered a role in anticipation of future need due to staff turnover. Ms Golding was offered a permanent contract only because she was already a permanent employee whereas the Claimant was already a fixed term employee. This was a material difference in their circumstances and was also entirely the reason for the difference in the nature of the contract offered. Whether or not fair, it had nothing to do with religion or belief.

75 It is not in dispute that the Claimant was not successfully appointed to one of the Accounting Technician vacancies in January 2019, whereas Ms Maipose, Mr Lau, Ms Hole and Ms Dinh were. No doubt this was very disappointing for the Claimant who had been doing the job, apparently well, for over seven months and had been deemed appointable in August 2018. The Tribunal has found that the Claimant performed poorly in the interview, coming joint 7th out of 11. She seems to have accepted at the time that she did not perform well at interviews. This was despite the very considerable support and assistance provided to her by Ms Broadley and Ms Bird who wanted her to secure a permanent appointment. Mr Lau was not simply "slotted in" to a role without interview or appointed regardless of performance at interview as the Claimant submits. Ms Gisby made clear that all applicants would have to be interviewed, Mr Lau was interviewed and performed very strongly as shown by his notes of interview. His involvement in the competitive process simply had the effect of increasing the vacancies from three to four.

76 The reference to actual job performance in her subsequent email to Ms Davis-Hughes is consistent with the way in which the Claimant put her case to the Tribunal – she should not have been assessed solely on performance at interview but also the fact that she was good at her job and was ACCA qualified (saving the Respondent money on training her). These are potentially valid points to make, however, the Respondent interview process of selection process was based upon performance at interview.

77 There is simply no evidence to support the Claimant's submission that the interview panel made no attempt to take account of the potential bias that they may have against minority candidates. It was not in dispute that Ms Maipose, Mr Lau and Ms Dinh were not

white British; they were ethnically diverse and yet were still appointed. Nor is there any evidence as to their religion. The Claimant's case is that inconsistency in the scoring permits us to draw the inference. The Tribunal has not accepted as a fact, however, that there was any such inconsistency. For these reasons, the Tribunal concludes that the sole reason for the Claimant's lack of success was her own interview performance, despite the support and preparation afforded to her by her managers. Neither race nor religion played any part in the decision at all.

78 The Claimant's next application was for the more senior role of Assistant Accountant in April 2019. She was not shortlisted whereas her comparator, Mr Patterson, was. The Tribunal has accepted the Respondent's evidence about the greater analysis required in this more senior role. The Claimant's application was weak, with a lack of clear examples of the required experience. Insofar as her recent failure to obtain the Accounting Technician job was taken into account, the Claimant was treated in the same way as Mr Biggs. In contrast to the Claimant, Mr Patterson's made a far stronger application both in terms of length of service and detailed examples. The Tribunal has accepted that the reasons for not shortlisting her were genuine, objectively justified and entirely unrelated to race or religion.

79 The Claimant relies on Ms Salter as a comparator in the issues about not responding to her job application and not offering her a role in the Corporate and Strategic Partnership team in June 2019. There is no doubt that Ms Mitchener was prepared to demonstrate flexibility in favour of Ms Salter in suggesting her appointment to the vacancy without a further interview. There was also flexibility shown to the Claimant at about the same time when it was suggested that the Audit Trainee recruitment exercise could be reopened for her if she had not already applied. In the circumstances, the Tribunal conclude that it is not safe to draw any adverse inference from flexibility shown to Ms Salter.

80 The Claimant's case is that roles had been found for internal and external candidates when the Respondent wanted to employ them, citing Ms Maipose and Ms Salter as examples, and therefore they could have renewed her contract or found her a permanent role if they had wanted to. However, as we have found, Ms Maipose was appointed to the Accounting Technician role on merit after a competitive recruitment process and Ms Salter had been through the graduate trainee scheme recruitment process. Neither woman was somebody who had been deemed not appointable after interview as was the Claimant after January 2019. It is of note that when deemed appointable in 2018, a fixed term position was created for the Claimant in the anticipation of further vacancies for which she could apply. The critical difference between Ms Maipose and Ms Salter and the Claimant, was that the latter was not appointable in January 2019, coming joint 7th out of 11 applicants for four jobs.

81 Finally, on these issues, the Claimant applied for the qualified Accounting Technician vacancy which was intended to replace Menfes when it was believed that she had resigned to take a career break. Once Menfes retracted her resignation, the vacancy no longer existed. Communication with applicants for vacancies was handled by external recruiters, Capita such that any failure to respond to the Claimant's application was a failure by Capita and not the Respondent. In any event, the Tribunal has found that the Claimant was notified that the vacancy anticipated to replace Menfes had been withdrawn. The Tribunal has not accepted the Claimant's case that there was a second or even a

third vacancy. Ms Dinh's duties were subsumed into Ms Cowlin's job and she was not replaced. None of this had anything to do with race or religion.

82 Next, the Claimant applied but was not short listed for the Assistant Accountant vacancy in November 2019. Objectively considered, Ms Alexander's application form set out far more in depth experience with specific examples than did the Claimant's application. Meeting the minimum criteria is not sufficient to guarantee an interview, the short listing process inevitably involves selecting a smaller number of candidates from the long list of those meeting the minimum criteria. The strength of Ms Alexander's application, and the weakness of the Claimant's, was the reason why the former was short listed and the latter was not. The Claimant has not proved facts from which the Tribunal could conclude that race or religion played any part in her failure to be shortlisted.

83 As for the application for Accounting Technician in January 2020, the vacancy advertised for management accounting but then changed part way through to look for financial accounting experience. The Claimant's CV was weaker than her covering letter as it focused to a very large extent on staffing rather than financial management experience. Her covering letter was stronger with some tailored examples, but the Respondent chose to disregard the covering letters of all applicant's due to the change in the experience being required. This was undoubtedly unfair and worked to the disadvantage of the Claimant, however, it was unfair to all applicants equally irrespective of race and religion – another applicant being rejected as they had shown experience purely in management accounting which was, of course, the job that they had applied for.

84 None of the comparators – Ms Shelley, Mr Kolobov or Ms Watling – had applied for the vacancy as had the Claimant. To this extent they are not statutory comparators. Mr Kobolov was not an applicant in the recruitment exercise but was an existing Accounting Technician already permanently employed by the Respondent, appointed following a recommendation by a senior finance manager when the recruitment process did not deliver a suitable candidate. Moreover, just as with the Claimant and earlier Mr Biggs, another applicant was not interviewed because he had been previously deemed unappointable. Again, whether or not fair, it was evidence of the same treatment irrespective of religion or race. The Tribunal concludes that a hypothetical comparator who had applied for the management accounting Accounting Technician vacancy would have been treated in exactly the same way as was the Claimant. Whilst the Tribunal understands the Claimant's criticism of a process lacking transparency, we prefer the Respondent's submissions and conclude that it was in no way related to race or religion or belief.

85 It is not in dispute that the Claimant was told by Mr Shakespear that she could not apply for the Accounting Technician role in February 2020, whereas her comparators were permitted to apply. The material difference in their circumstances, however, was the Claimant only sought to apply after the deadline had passed and interviews had been conducted. Whilst the vacancy was intended to be a career progression opportunity for employees in the finance Hub, the Tribunal has accepted that Mr Shakespear believed that this would include the Claimant. The Claimant had been made aware of the vacancies in good time by Ms Maipose, clearly anticipating that she would apply. The only reason that the Claimant was ultimately not permitted to apply was because the deadline had passed. Race and religion or belief played no part at all.

86 The final vacancy for which the Claimant applied was, again, the more senior role of Assistant Accountant in April 2020. Based on our findings of fact, the Tribunal concludes that school's experience was a very significant factor in selection but not the only relevant factor. An otherwise very strong candidate without schools experience would still be considered, for example Ms Calver.

87 Ms Cheung and the Claimant had materially comparable applications in terms of examples of experience. There was a clear difference in the treatment of Ms Cheung's school experience and that of the Claimant, both of whom relied on experience in a non-grant maintained school. The Tribunal concludes that the Claimant has proved primary facts from which we could find that there had been less favourable treatment because of religion or belief. The burden of proof passes to the Respondent. The same is not, however, true for race (in fairness the Claimant's submissions rely only on her protected characteristic of being a Muslim).

88 Ms Stobbie could give no reason for overlooking the Claimant's experience with the Muslim Iqra Learning Centre whilst taking into account Ms Cheung's experience as accounts administrator at the Catholic St. Edmond's College. Mr Perry suggested in submission that it may have been because Iqra did not include the word "school" or "college" in its title. However, neither Mr Stupples-Whyley nor Ms Stobbie advanced this as a possible explanation in evidence. However, the fact is that Iqra Learning Centre is a Muslim school and St. Edmond's has a Christian sounding name. We find that religion was a material factor, albeit subconscious.

89 Having considered each vacancy individually, the Tribunal considered the Claimant's case holistically. The Claimant is clearly ambitious, which is something to be commended. However, throughout her case, the Claimant demonstrated a lack of understanding of the need to provide examples of practical experience in her applications. She tended to over rely on her part ACCA qualification, suggesting that this alone placed her ahead of AAT candidates. With regard to shortlisting, the Claimant appeared not to understand that it is not enough to meet the minimum requirement for a job. It is standard process in recruitment exercise where there are a large number of applicants for a small number of posts to shortlist the stronger candidates. This does not mean that those not shortlisted did not meet the minimum requirements, simply that there were other stronger candidates who provided better examples.

90 The Tribunal accepts the submissions of Mr Perry that the Claimant's actual practical experience was very limited. With the exception of Iqra Learning Centre, prior to joining the Respondent her periods of employment had been short and were almost a decade earlier. Indeed, the Claimant accepted that she had a lack of experience at the point of her initial appointment, hence her happiness to obtain an entry level finance job for which she was academically overqualified. Undoubtedly, the Claimant's work for Iqra Learning Centre was important and she achieved some successes in terms of the tuck shop and reducing pupil withdrawals but it must be seen in context – the Claimant's work was for a school operating for only one day a week and, on her own evidence, was largely related to year end tasks. Moreover, the information about Iqra Learning Centre provided by the Claimant in her many application forms and covering letters was limited.

91 The single act of discrimination which has been shown was the failure to shortlist on the 29 April 2020. The claim was presented on 26 August 2020. In her closing submissions, the Claimant accepts that it was presented late (even if the second ACAS

certificate were taken into account). The Tribunal considered whether or not it would be just and equitable to extend time. The Claimant first contacted ACAS to start early conciliation on 29 February 2020 and her first certificate was issued on 17 March 2020. The Claimant did not present an ET1 at that point because of her grievance had not concluded, at the Respondent's request, due to the pressures of the Covid-19 pandemic.

92 The successful act of discrimination occurred on 29 April 2020 after the date of the first certificate. The grievance was rejected on 1 June 2020 and the subsequent appeal rejected on 27 July 2020. The Claimant believed that she required a new ACAS early conciliation certificate. She contacted ACAS again on 28 July 2020 and the second certificate was issued on 12 August 2020. The claim was presented a fortnight later.

93 It has been made clear by the Employment Appeal Tribunal that where multiple ACAS certificates are issued in relation to same matter, it is only the first in time which is relevant when considering time limits. However, the Tribunal accepts that a litigant in person may not be as familiar with the EAT case law and intricacies of ACAS early conciliation as those who are legally qualified. In considering what is just and equitable, it is relevant to take into account the Claimant's genuine if mistaken belief that a new rejection and the outstanding grievance process meant that a second certificate would be required. Also relevant is the fact that the Claimant gave birth on 28 June 2020 – in other words when the first certificate was issued she was heavily pregnant and when the primary time limit expired on 28 July 2020 she had a four-week old baby. The Respondent was aware very swiftly that a claim was presented (the delay was in fact only a month), there was no evidential prejudice caused by that delay and, in all of the circumstances, it is just and equitable to extend time.

94 For this reason, the discrimination on grounds of religion and belief claim succeeds in respect of the failure to short list the Claimant for interview for the final vacancy, part-time Assistant Accountant. The Tribunal will no doubt hear further submissions on remedy but we consider that it may be helpful that it is likely to focus on the loss of the chance to be appointed (as well as injury to feelings). The Tribunal notes that Ms Calver was a very strong candidate and given the Claimant's previous history of underperformance and relative lack of experience, her prospects of being successfully appointed given her scant experience may be low. In respect of the remedy hearing, the parties must:

- (i) exchange documents relevant to remedy (including medical evidence or documents relevant to loss of earnings/mitigation) - 8 weeks before;
- (ii) agree a joint bundle of documents - 6 weeks before;
- (iii) exchange witness statements - 4 weeks before.

**Employment Judge Russell
Dated: 9 December 2022**