



EMPLOYMENT TRIBUNALS

Claimant: Mr I Sodola

Respondent: London Ambulance Service NHS Trust

Heard at: London South Employment Tribunal (hybrid) on 12 December 2022
By CVP on 13,14 (am),15 December (pm)
14 December (pm) and 15 December 2022 (in chambers)

Before: Employment Judge Braganza KC
Members : Mr J Havard
Mr C Wilby

Appearances

For the claimant: Mr C Ezike, Solicitor
For the respondent: Ms J Twomey, Counsel

JUDGMENT

The Judgment of the Tribunal is that:-

1. The complaint that the Claimant was not promoted on grounds of his race to the Team Manager post is dismissed.
2. The complaint that the Respondent delayed providing him with written feedback because of his race is well-founded and succeeds.
3. The issue of remedy is adjourned to 27 February 2023.

REASONS

Introduction

1. This is the unanimous decision of the Tribunal. The Tribunal gave its decision and reasons at the end of the hearing, following which the Respondent asked for written reasons.
2. The Claimant is employed by the Respondent as a Health Advisor/ Pathway trainer. He started on 21 January 2013 and his employment continues. The Claimant describes himself as a black African man. By a claim form presented on 16 December 2020 he brought a claim for race discrimination and other payments.

Issues

3. By the time of the hearing the Claimant's claims had been significantly narrowed. His claim of race discrimination was based on the Respondent not appointing him to a Team Manager post after his interview on 26 May 2020 and delaying providing him with written feedback on his performance at interview not until 23 August 2020.
4. We were provided with an agreed list of issues [397 of the hearing bundle]. The parties agreed that the time point fell away.

Unlawful deduction claim

5. At the outset of the hearing, the Claimant also relied on a claim for unlawful deduction of wages, arising from 30 minute unpaid breaks for the period between 29 March 2018 and 25 May 2020 . At the previous Preliminary Hearing on 8 June 2022 before EJ Cheetham KC, the Claimant had been allowed to proceed with this claim only on the basis that he provide further particulars as his claim appeared to be ongoing and continuing beyond 25 May 2020. The particulars subsequently provided by the Claimant specified that the last unlawful deduction of wages he relied on was, in fact, on 25 May 2020. There were three relevant deductions, amounting to £24.30 in total [156]. The Claimant applied for time to be extended as he was not aware that the deductions were not ongoing.
6. Having heard the parties' submissions, the Tribunal gave its decision that this claim would not be allowed to proceed. It was out of time, and it was clear from the previous Preliminary Hearing and the judgment sent on 18 July 2022 that in the absence of any further evidence, the Tribunal was not satisfied that it was not reasonably practicable for the Claimant to have brought this claim in time.

Race discrimination

7. That left two claims of direct race discrimination for the Tribunal to decide:

- a. Was the Claimant's unsuccessful application for the Team Manager post following his interview on 26 May 2020 less favourable treatment because of his race?
 - b. Was the Respondent's failure to provide the Claimant with written feedback in his interview not until 23 August 2020 less favourable treatment because of his race?
8. The Claimant relied on his white colleagues who were successful in the appointment to the Team Manager post: They were LP, AMA, HA and CL¹.

Hearing

9. On Friday, 9 December 2022, the Respondent applied to the Tribunal for the hearing on 12 December 2022, which had been listed as a face to face hearing, to be converted to a remote hearing by CVP, due to the planned rail strikes and strikes by their own staff. The Tribunal directed the parties to attend in person on Monday, 12 December, and that going forward the form of the hearing would be discussed. On Day 1, Ms Twomey, Counsel for the Respondent, attended via CVP due to being snowed in and difficulties getting the tube. Due to the train strikes and with the parties' agreement, the Tribunal proceeded with the hearing by CVP on Days 2, 3 and 4. The Tribunal spent part of Day 3 and 4 deliberating, and gave its decision and reasons at the end of Day 4.

Documents

10. The Tribunal was provided with a bundle of 401 pages and witness statements from the Claimant and, on behalf of the Respondent, from Mrs Robinson. References in square brackets in the judgment are to the PDF pages within that bundle. On Day 3 of the hearing we were provided with a further 16 pages of evidence, which we refer to below. We were not provided with any written submissions, skeleton arguments or authorities from either party.

Late evidence

11. The evidence was concluded at the end of Day 2 on 13 December 2022. After the conclusion, the Claimant sent the Tribunal ten further documents and certain email correspondence, some of which he had raised at the outset of the hearing and during his evidence. The hearing was resumed for that reason on the morning of 14 December 2022, Day 3, for the parties to address the Tribunal on the documents. At that stage the Claimant relied on only four attachments with the first e-mail and two documents in respect to the second. The Claimant submitted that these were relevant to his assertions as to how his right to work had been handled by the Respondent. Mr Ezike, on behalf of the Claimant, also relied on a word version, as opposed to the PDF version included in the bundle, of the Team Manager interview scoring sheet, which was completed by the

¹ We have anonymised the names of all the candidates as they were not part of the decision making process and may not know about the proceedings.

Respondent marking the Claimant's performance at interview. The Tribunal was invited to carry out its own investigations and look into the file properties of the word document and treat this as evidence of when the document was created. The Claimant did not produce evidence as to the properties of the document and in the absence of such evidence, it is not for the Tribunal to carry out such investigations.

12. Ms Twomey objected to the admission of the documents based on their late production and that the right to work documents were not relevant to the issues. We considered the nature of the documents and the timing of their production. We decided to admit the documents and attach such weight as we saw fit.
13. The word document of the Team Manager interview score sheet was the same as that contained in the bundle, albeit that was in PDF form. There was no prejudice to the Respondent in admitting this document as the Tribunal had no evidence as to its properties. The email chain was relevant as it referred to there being no recording of the Team Manager interview with the Claimant. Mr Ezike had referred to an email from Chris Randall during the hearing about the existence of a recording. Mrs Robinson gave evidence as to her understanding that there was no longer a recording. The Respondent submitted that its witness, Mrs Robinson, was not asked about the late documents but we considered that the interview score sheet as a word document was completed by Ms Wallen, who had not attended as a witness, and not Mrs Robinson. In any event, the Tribunal had already been provided with the PDF version of this.
14. As to the right to work documents, at the outset of the hearing on the morning of 12 December, Mr Ezike had raised that there were documents on this that he had asked the Respondent to add to the bundle and then agreed to provide these. It appears that there was some delay in the emails being forwarded on to the Tribunal. In any event, the Respondent's only witness, Mrs Robinson, had not dealt with the right to work issue and so could not give evidence on this.

Witnesses

15. We heard evidence from the Claimant and from Mrs Robinson, Team Manager, on behalf of the Respondent.

Submissions

16. Both parties made oral submissions. These have been taken into account.

Background and Findings of fact

17. The Claimant has been employed by the Respondent since 2013. It was accepted that prior to the relevant Team Manager recruitment exercise in April/ May 2020 that we are concerned with, the Claimant had applied about 5 times previously for the same role. On the evidence before us, his application in April 2020 was the fourth time he had applied, and been rejected.

Previous applications

18. The Claimant's first application for the role of Team Manager was in mid-2015. The Claimant considered himself to be, in his words, "*highly qualified*" for the role, having 2 Masters Degrees, whereas the role only required an Undergraduate Degree or equivalent experience. The Claimant explained that he was told he been unsuccessful and given generic feedback stating that he was a very strong candidate but others were more qualified and suitable for the role. The Claimant says that he later found out that those who had obtained the role were less qualified than him and had less experience. The successful candidates were all white British.
19. In late 2015 and 2016 the Claimant applied for the same role and received similar feedback, which he claims did not match his performance during the interview process. That was not challenged. He was assigned the role of a Pathway Trainer in May 2019. As a Pathway Trainer, he was required to deliver training to new employees.

Right to work

20. In or around September 2019, the Claimant was asked for his original documentation evidencing his current right to work in the UK, in accordance with Home Office guidance. Because the Claimant did not provide this, he was suspended from 9 September 2019 pending an investigation into his right to work status. By letter of 9 October his suspension was lifted, as he had provided the relevant documentation. He returned to work on 12 October 2019 and was paid for the period of suspension. It is important to highlight that the treatment of him around the documentation in respect of his right to work, which dated back to 2019, was not a claim in this case. In terms of background, it is not in dispute that he was asked for this documentation, suspended on investigation of its production and then returned to work. Mr Ezike relied on this sequence of events as evidence of what he described as structural or systemic discrimination. In submissions, Mr Ezike also set out that the less favourable treatment complained of in respect of the Team Manager role was not an isolated incident. He said there were a myriad of issues leading to the Team Manager promotion and why there was institutional racism against the Claimant. He explained that the failure to appoint the Claimant was the "*straw that broke the camel's back*". If the Team Manager interview had been a complaint on its own, Mr Ezike submitted there may not have been a claim, but in the context of the background, the refusal to promote the Claimant was because of his race.
21. On 29 March 2020, during the Covid-19 pandemic, the Respondent requested that the Claimant work as a trainer in ad hoc training of Covid-19 call handlers. He was supported by a Team Manager at the Respondent's headquarters at the Waterloo office from 29 March 2020 to 14 June 2020. We accept that he was training about 140 Covid-19 call handlers at that time. We were taken to a number of emails [281-284], which showed the Claimant contacting the relevant Team Manager on the performance and attendance of certain of the call handlers that he was training.

Team Manager application in April 2020

22. On 30 April 2020 the Claimant applied again for the post of Team Manager. Within his Expression of Interest [266] he detailed that he had worked as the initial point of contact for the NHS111 Service as a Health Advisor over the last 8 years, his personal development, that he had an in-depth understanding of the NHS111 now Integrated Urgent Care (IUC) services and, the pathways triage tool and the Directory of Services (DOS). He referred to his experience as a Pathways Trainer, his Master's degree in management, his experience managing calls, and people engagement and management skills. He detailed his work as a pathways trainer in the IUC, Peer Educator Trainer with UNICEF in the past and Clinical Skill Peer Tutor (London South Bank University). He referred to the response to the Covid-19 pandemic, training over 120 Covid call handlers. Post training, he said he still supported the Covid-19 hub as a Health Advisor and was more like an acting Team Manager, through daily call audits and providing support to the clinical and service leads. He referred to working with senior management on strategies to improve staff performance.
23. The Job Description [267] we were told was an old version. It referred to NHS Direct, which was disbanded in 2013. It also referred to the location at Beckenham, Mrs Robinson said that this should have read Croydon. The Person Specification [272] was divided into 4 sections: values and behaviours; education; knowledge and experience; and skills and capabilities. Mrs Robinson confirmed that this criteria was to be met either by the application form, signified on the Person Specification by an ("A"), or in the Claimant's case by his Expression of Interest; by the answers at interview ("I") or a combination of both.

Recruitment Policy

24. The Respondent's Recruitment and Selection Policy and Procedure [173] set out at paragraph 8.1 that "*All Recruitment Panels must have at least two members. One of the members will act as the Chair and will be responsible for ensuring that the Recruitment and Selection Policy and Procedure have been complied with, including being aware of any strategic or other recruitment objectives or targets. Preferably all members of the Recruitment Panel will have received appropriate training in recruitment and selection, including relevant elements of equality, diversity and employment legislation; in circumstances where this is not possible the Chair must have received this training. It is not a requirement that HR should be represented on all Recruitment Panels.*"
25. Mrs Robinson told the Tribunal that she had had training on recruitment when she started her job. She started in 2005 and transferred to the London Ambulance Service in 2013, when she also became a Team Manager, which is when she said she received training. She assumed Ms Wallen had undertaken the same training some 5 years earlier, when Ms Wallen started.
26. Paragraph 8.2 of the Policy required that "*recruitment panels should, as far as is reasonable, be mixed in regards to gender, ethnicity etc*". This recruitment panel was made up of two women: Mrs Robinson, who is white, and Ms Wallen, who is black.

27. As to the interviews and other assessments, paragraph 17.1 set out that *“Recruitment Panels will interview candidates in order to ask questions designed to test their knowledge, skills, attitudes and experience, and to clarify or assess evidence presented on their application form.”*
28. Paragraph 17.2 required that *“Interviews will usually be conducted by the Recruitment Panel convened to assess the other stages of selection and will always be more than one person. The areas for questioning must be established prior to the interview and must be based on the person specification. Each candidate must be interviewed using the same set of base questions. Where supplementary questions are asked they must be recorded during the interview to ensure fairness throughout the process.”* Paragraph 17.3 set out that *“Reasons for selection and rejection will be recorded and made available to candidates if requested”*.
29. Paragraph 17.4 set out that *“All candidates should be advised of the outcome of their interview in writing, regardless of whether they are also advised verbally by the interviewers.”* 17.5 provided *“If a candidate is deemed suitable for appointment but a stronger candidate is appointed to the vacancy, then he or she can be placed on a reserve list in case a similar vacancy becomes available. The list will be kept for 12 months as will other documentation relating to unsuccessful candidates.”*
30. Paragraph 17.6 set out that *“All interview notes together with all other recruitment documentation must be returned to the Recruitment Department (either in hard copy or scanned and emailed) and will be maintained in line with TP/030 Records Management Retention and Disposal Procedure.”*
31. On feedback 35.1 set out *“All internal staff who have undergone a recruitment exercise may request feedback. The purpose of feedback is to advise the candidate, in broad terms, on the relative strengths and weaknesses of their application.”* Paragraph 36.1 provided *“Candidates requesting a recruitment decision be reviewed should do so by writing to the Recruitment Manager within 28 days, setting out the reasons why they believe that they have been treated unfairly.”*
32. The Claimant in his evidence said that he did not ask for a review of the recruitment decision as he was not provided with written feedback until 23 August 2020.
33. Paragraph 36.3 set out that *“For internal candidates - if, further to employees receiving feedback either by the panel or recruitment manager and they remain dissatisfied by the response, then they may request a further review by the next level of management. No further review/appeal is allowed under this or any other LAS policy.”*

Shortlisting

34. The Claimant was shortlisted for interview along with six colleagues. We accept the evidence from Mrs Robinson that all those who were shortlisted met the application criteria for the role of Team Manager. Mrs Robinson was asked by

the Tribunal whether the final recruitment decision was solely based on the performance at interview and she responded: “ *It was, because the shortlisting showed that each of the shortlisted candidates had the ability to potentially be a Team Manager on what was written so the panel were just looking at the interview.*”

35. There were two streams of Team Manager recruitment happening at that time. Mrs Robinson and Ms Wallen made up the shortlisting panel for the Team Manager role that the Claimant applied for.
36. Of the seven short listed candidates, two were black internal employees, of whom one was the Claimant, and the remaining five were white candidates. All the white candidates were internal candidates, one had been working for the Respondent on an agency basis. All the candidates were therefore known to the recruitment panel.
37. We accept the Claimant’s evidence, which is not disputed, that at the time of this selection process all the current Team Managers were white, as were all the successful candidates for the exercise he took part in. It is accepted that some time afterwards, the Team Managers had a more diverse profile. The Claimant says this was a result of his raising his general complaints about recruitment and the lack of diversity and inclusion within management.

Interview

38. The Claimant was interviewed by telephone on 26 May 2020. The interview panel was made up of the two senior management, Mrs Robinson and Ms Wallen, who shortlisted the candidates. Only Mrs Robinson attended the hearing to give evidence. We note that Ms Wallen, the chair of the recruitment panel and the more senior manager of the two, is still employed by the Respondent. She was not put forward by the Respondent as a witness and we were not provided with any explanation for this. The Tribunal would have found her attendance as a witness helpful.
39. It is not clear whether the interview was recorded. The Claimant and Mrs Robinson gave evidence that they believed it was recorded. Mrs Robinson explained that her understanding was that the recording would have been retained by the tele-conferencing system and later deleted from the server but she was not sure how long after the recording this would have been. The Claimant believed that all telephone calls within the respondent were recorded as a matter of course. At the conclusion of the hearing the Claimant produced an e-mail from Chris Randall of HR of 16 June 2021 [415] stating that the interview had not been recorded. In any event we have no more than the interview scoresheets to reflect what occurred during the interview with the Claimant. We note that the e-mail from Mr Randall was written over a year after the interview. Given the timing of its production, we attach little weight to it in any event.

Interview score sheets

40. We were provided with a score sheet for each of the seven candidates completed by each of the interviewers. The interview score sheets for six of the candidates, including the Claimant are all dated 26 May 2020. The interview sheet for one of the unsuccessful candidates, who is black, is the only one dated another date, 2 June 2020.
41. We were told by Mrs Robinson that the forms were completed contemporaneously at the time of the interview by each panel member with the scores being determined in discussion by the panel members after each interview. Mrs Robinson in her evidence explained that the panel had a wash up session to discuss the candidates and after that discussion, they both scored each of them. We note that all the candidates, apart from one, were scored identically on each of the questions by each of the panel. There were three questions. The design of each question was in two parts: the first was to ask the question in general terms and the second to ask for an example. The questions asked about (1) management and leadership style; (2) motivating your team; and (3) dealing with a challenging employee. The evidence of Mrs Robinson was that if an individual answered the first part but did not provide an example, the candidate was then not prompted to provide an example. She explained this was because the role required listening skills so that whilst a candidate could ask for the question to be repeated, if they did not provide the example, they would not be assisted by the panel.
42. At the top of each score sheet completed by Ms Wallen, she had inserted a "Yes" next to the box asking "*Is the candidate appointable?*". This included the score sheet for the Claimant, even though he was not appointed. All the score sheets completed by Mrs. Robinson had this question answered "Yes/No". There was only one exception to this. The unsuccessful candidate, interviewed on a different date, 2 June, had her box left blank.
43. Ms Wallen did not attend as a witness to explain why she said that the Claimant was appointable. Mrs Robinson said in evidence that the "Yes" in the score sheet was a "*regrettable mistake*". It was not addressed within the witness statement of Mrs Robinson or any other evidence, until Mrs Robinson was asked about it in cross-examination. Mrs Robinson apologised for the error and said it may be that a previously completed form was "*cleaned*", that is saved and re-used, "*and then re-filled with details*" of the next candidate, as it was a Word document. She could not "*vouch for it*" but believed this might be the reason.
44. We were concerned about this approach to completing the interview score sheet, the explanation for the wrong answer and that it had not been addressed previously. We find however that because all the forms by Ms Wallen on the 26 May were completed in the same way, including that of BN who was also unsuccessful and scored 6/15 [297], and all those completed by Mrs Robinson answered "Yes/No" that Ms Wallen's entry was an error, albeit a serious and unfortunate one, on the part of the Respondent. The score sheets were relatively short, requiring marks out of five on only three questions. Whether a candidate was to be appointed was obviously a key question. In addition to BN also having a "Yes" in answer to this question on his score sheet with the low score of 6, we are also reinforced in our conclusion by considering the scores

more generally to attain a pass mark for the role and the evidence on this by Mrs Robinson.

45. Mrs Robinson in her evidence explained that a pass mark was set but she could not recall exactly what the pass mark was. AMA scored 9 and was offered the role so Mrs Robinson believed it would have been 9. She said that AMA would not have been offered the role, if she had not passed. The scoring matrix set out at the front of each score sheet describes “(1) Very limited response; (2) Limited response; (3) Satisfactory response; (4) Thoughtful, detailed response and (5) A well-structured, comprehensive, thoughtful response [290]. Mrs Robinson's evidence that 9 was the pass mark matches the average score of 3 for each question qualifying as a satisfactory response.
46. A number of the other candidates had fairly full notes, though not all, whilst the Claimant's notes appeared quite sparse. The Claimant in his evidence claimed that the notes on his sheets did not reflect his full answers at interviews. He said that if that were the case the interview would have lasted no longer than about 5 minutes and he recalled the interview lasting about 20 minutes. There was no dispute about the length of the interview.
47. There was a dispute as to when the notes were prepared, whether at the time or afterwards. Mrs Robinson in her evidence explained she typed them at the time and described the Claimant at interview speaking in the same way that he had spoken in giving his oral evidence to the Tribunal. The Claimant often gave lengthy answers in questions before the Tribunal. We find on the balance of probabilities that it is more likely that the Claimant gave more detail than is set out within the interview sheets. We noted that LP, a white, successful candidate, scoring 13/15 was described in her score sheet as giving “*very detailed answers*” [307] but the notes themselves were not dissimilar from those of the Claimant's in length.
48. The notes did not always show any obvious correlation between the content of the notes and the score that was given. An example of this was the score sheet of LP by Ms Wallen [304, 305]. LP scored 4/5 on Question 1 and 2, compared to the Claimant, who scored 2/5 for both. Yet the short form notes are similar in length for both. Another example is that Mrs Robinson in her style and content wrote out far more detail within the interview score sheet for LP [309] than she did for the Claimant [294].
49. In contrast, Mrs Robinson gave AMA, a white, successful candidate, a low mark of 2/5 on Question 3, on an answer with some detail, including an example of how she demonstrated meeting the question asked [319], compared with the Claimant, who scored a 3/5 on what appeared a more sparse answer with no example. The Tribunal raised its concerns with the parties: the score sheet for one of the successful, white candidates, who scored 10/15 included 3/5 on Question 1 with no apparent example in the notes [321]. The same candidate scored a high mark of 4/5 on Question 3, with again no example at all. Mrs Robinson's criticism of the Claimant was that he had scored 2s and a 3 as he gave no examples. That did not reconcile with the successful candidate, who had scored a 4/5, also with no example given.

50. Another candidate scored 2/5, yet appeared to give an example in answer to Question 3. Mrs Robinson's evidence on this was that that example was marked down because it had previously been given. That is not something that emerges from a reading of the notes. The other unsuccessful, black candidate only scored 3/5 on Question 1, yet the notes refer to an example that was given in answer to the question.

The Claimant's interview score sheet

51. Whilst the Claimant disputed the content of his notes more generally and questioned the timing of their preparation, he was unable to provide the Tribunal with any further detail that he said was either missing from the interview notes or wrongly recorded within the notes. He was unable to point to any example he had given in answer to the questions, which he said was not considered by the panel. We do not have any other evidence to conclude that the score notes were not prepared contemporaneously. We find they were prepared during the interview and accept the evidence of Mrs Robinson on this.
52. The Claimant's main criticism of the notes was their lack of detail. The main criticism of the Claimant's answers within the feedback on the notes and the evidence of Mrs Robinson was that the Claimant had not answered the second part of each question, as he had not provided any examples that he met the criteria, even though he would have had examples to give. As set out, the Claimant was unable to assist in expanding on his answers as recorded.
53. The only specific point of dispute by the Claimant was that he said he had not described his style as "*autocratic*" as recorded in answer to Question 1. He explained that he had said that on occasions, a manager making decisions may appear autocratic but that is in the nature of management, that some decisions are communicated in that way. It was put to the Claimant that both interviewers used the identical wording of "*may seem autocratic but gets the job done*"[290, 294]. The Claimant responded that he had said he had a mixed approach, a laissez-faire approach and went on to give an example where a Team Manager may have to give instructions. He accepted that he used the words "*autocratic gets the job done*" but not that he described this as his management style. There is little in the difference between the notes and the Claimant's recollection but in so far as there is any difference, the Tribunal accepted the Claimant's recollection of this as more accurate.
54. The score sheet completed by Ms Wallen on 26 May 2020 gave feedback about the Claimant: "*good candidate ... interview skills have definitely improved. Immanuel answered question three well, but lacked depth on question one and two (no examples). Immanuel would benefit from attending on-site interview skills workshop, I feel this would help him to keep him focused on the question being asked.*" We find that this is evidence that Ms Wallen was noting an improvement and recommending how he could improve for future interviews.
55. The Claimant was unsuccessful and scored a total of 7/15. The successful white candidates were scored identically by each panel member: LP scored 13/15; AMA 9/15; CL 10/15; HA, 14/15.

56. The unsuccessful candidates were ZB, a black candidate with a score of 8/15; BN, a white candidate, scored 6/15 and 7/15, who was the agency worker but had worked for the Respondent; and the Claimant scored 7/15.
57. Mrs Robinson was asked whether the Claimant raised in the interview his experience of training 140 call handlers during the pandemic. In reply, she said that would have been a *“very good example as he would have been able to express ways he supported and coached the staff in that environment”*. She also said that she had *“never seen Mr Sodola coaching staff side by side as I have seen the others, AM, L, C, H”*. She added that she did not just know this first hand, but that they had explained this in interview.
58. The Claimant in his evidence did not dispute either the scores or the interview notes of the other candidates. He said he could not comment, some of them were *“very well constructed”* and he had no reason to doubt how they were marked.
59. In any event, the Claimant does not rely on any additional information that he gave in interview as not included within the notes, he does not assert that he was wrongly scored or should have been given a higher score, although this may be said to be implicit in his claim. He does not dispute the answers the successful candidates gave nor does he dispute their scores, all of which passed the pass mark of 9.
60. For completeness, we make no further finding as to the treatment of the Claimant in respect of his right to work documents, as that is not a claim that is before the Tribunal. The Order of 8 June 2022 referred to it as background, which is how we have treated it.

Verbal feedback

61. In early June 2020, Claimant received a call from Mrs Robinson that he had been unsuccessful and had not obtained the role. He says that he was given the usual vague feedback: *“you are a strong candidate, but other candidates are more qualified and experienced”*. At the time, he had been employed for 7 years and 5 months.
62. In an email of 23 August 2020 from Mrs Robinson to the Claimant, Mrs Robinson referred to this verbal feedback and set out that she advised that the Claimant came across as very confident but did not answer questions effectively and that she recommended he attend a workshop. We find that this very much reflects the Claimant’s evidence on the generality of the verbal feedback and accept this was all he was told. We also accept Mrs Robinson's evidence that he was recommended to attend an interview workshop.
63. On 7 June the Claimant wrote to the interview panel to request written feedback [346]. On the same date, 7 June 2020 [388], the Claimant wrote to Ann Jones, 111 Centre Operations Manager, and copied in Mrs Robinson with the subject heading *“BME representation in management roles”* *“Importance high”*. He requested an audience with her about Black and Minority Ethnic representation in management roles and career progression for frontline/entry level BME staff.

He set out that the aim of the meeting was to discuss their observations and seek clarification.

64. On 8 June 2020 Ms Jones replied, copying in Mrs Robinson, that before they arranged to meet she wanted to ensure that *“those included have received feedback on either their expression of interest submission or interview”*. She said *“It is important that you have the opportunity to discuss this on an individual basis. This will inform future discussions as well as your observations. I will speak to Lisa, Deborah, Gina and Sabina to ensure these meetings are put in place. Once your feedback has been completed we can arrange to meet.”* [384]
65. On 9 June at 7.14am [384/385] Ms Jones emailed Debbie Hudson, Deputy Site Lead 111, that she believed Ms Wallen was already in contact with the Claimant. On 9 June 2020 Deborah Hudson 7.36am replied that she would *“write to them now offering a meeting - I will ask to respond by next Monday ... would I need to invite Immanuel to a meeting? BN has already asked for feedback so not sure if Lisa and Gina have already emailed this to him.”* [385]
66. On 9 June 2020 [346] Ms Wallen replied to the Claimant and Mrs Robinson that the *“The interview notes have been stored away safely and Gina [Mrs Robinson] has the key. She is back on the 22nd June so will e-mail you then”*.
67. We find this was an unhelpful response. Ms Wallen was the chair of the panel and the most senior of the two, and the Claimant wrote to both of them. It is also contrary to what the Respondent’s policy requires at paragraph 17.6 [181] that all *“interview notes together with all other recruitment documentation must be returned to the Recruitment Department (either in hard copy or scanned and emailed) and will be maintained in line with TP/030 Records”*. The Tribunal accepts that the Claimant may have taken from this, a reluctance to engage with him. He made a reasonable request. Ms Wallen in her score sheet had set out he was much improved and needed to improve his skills, which he could do with some training. We were not provided with any reason as to why Ms Wallen could not have provided her feedback or why she did not explain that Mrs Robinson would provide hers on her return, adding to Ms Wallen’s feedback.
68. The Claimant did not receive anything further and on 25 June officially raised a complaint about *“Procedural misconduct in recruitment into team manager roles at LAS”*. His email was addressed to Ms Lynch, Head of recruitment, and he copied in a number of others. The email was written to express *“BAME staff members’ dissatisfaction at the level of procedural misconduct on the last team manager recruitment exercise”* which he was a part of [347]. The Claimant complained that *“Interview records were neither maintained nor stored as recorded by the procedure and this made it impossible to get a timely feedback for inclusion in complaint to even challenge the process.”*
69. More widely, the Claimant questioned the quality of feedback, the selection process, career progression and requested an investigation and review of the Team Manager recruitment exercise. He also requested *“future internal career progression recruitment exercises be conducted by non-local management team or at least have an external moderator present.”*

70. Ms Lynch replied the following day on 26 June 2020 acknowledging the email [351]. On 6 July she emailed the Claimant that an investigation would be led by Jon Goldie, Interim Deputy Director Integrated Patient Care, within the Trust's Grievance procedure. Mr Goldie would "*assign an independent investigating manager from Ambulance Services or EPRR.*" [351]
71. By letter of 3 August 2020 to the Claimant, Mr Goldie referred to a meeting between the Claimant and Paul Cook, Head of 111 IUC delivery, on 15 July to discuss his concerns in more detail. [353] The same day, 3 August 2020, the Claimant emailed Ms Lynch that had not heard from the investigator [349/350] and that BAME staff felt "*the management is not interested actively addressing this unacceptable practise.*"
72. There was a meeting on 18 August 2020 attended by the Claimant, Mr Goldie and a number of others. We were provided with two sets of notes [355, 359]. At the meeting the Claimant raised that he had been repeatedly unsuccessful in his applications for Team Manager, including in his most recent application, and that there was a wider issue as to the promotion of Black, Asian and Minority Ethnic staff. He raised breaches of policy on written feedback, asked for a review of past selection and that there should be transparency going forward. He raised that it had been impossible for BAME staff members to proceed to senior management roles because all mid-line management roles were continuously filled with white British colleagues, some of whom are less qualified and less experienced. He set out that this significantly contributed to the toxicity [362] in the workplace. He also queried the reason other applicants received written feedback when he did not and that an interviewer had locked away the interview records and taken annual leave for weeks, knowing the policy only allows 28 days to request an administrative review. He had still not received his written feedback even though the panel member had been back for more than 8 weeks. He asked for an urgent review of the immediate past team manager recruitment exercise. By email of 18 August 2020 he again set out his requested outcomes, including a review of recruitment and assignment of BAME staff to management. [358]

Written feedback

73. Finally, on 23 August 2020, some 3 months after the interview, the Claimant received his written feedback by email, which was very brief, from Mrs Robinson stating "*you came across as very confident - however did not answer the questions effectively - I recommend that you attend a workshop for interviewees which the Trust offer.*"[364] Mrs Robinson apologised for the delay and said that she seemed to be having problems with her emails as she thought she had responded.
74. Within the score sheets themselves on feedback, Ms Wallen had written the Claimant's "*interview skills have definitely improved. Immanuel answered question three well, but lacked depth on question one and two (no examples).*" She added that he would benefit from further training [293].
75. Mrs Robinson's feedback on her score sheet was one line "*Needs to remember to include examples in answer.*" [295]

76. We find the feedback given to the Claimant in Mrs Robinson's email was an inadequate reply. The key point repeated in the score sheets and in Mrs Robinson's evidence was that he did not give examples, yet the feedback to him does not refer to this. He was not given the information set out in the score sheets. Mrs Robinson did not look back to Ms Wallen's comments, which she could have included to give the Claimant more detail.

Timing on feedback

77. The interview took place on 26 May 2020. The verbal feedback was provided in the first week of June. The Claimant was told on 7 June that Mrs Robinson was away until 22 June 2020. The eventual written feedback was on 23 August 2020, 2 months later. Mrs Robinson's explanation to the Tribunal was that she was away and not around very much but we accept her evidence that she worked around 22 shifts in the 3 months of June, July and August, which included her 14 days leave. We accept this would have been a very busy period due to the pandemic. She said she thought she sent the email and that it was in her draft box. In the email of 23 August 2020 she referred to thinking, she had already responded. She accepted there was a delay and explained the written feedback was the same as the verbal feedback. The Claimant would have been no wiser following receipt of the written feedback, as it added nothing to the verbal feedback.
78. On 23 August 2020, the same day, the Claimant emailed in reply [363]. He was clearly upset by the lack of detail and raised again the issue of structural racism.
79. There then followed a series of emails between 6 September to 11 November 2020 about scheduling a further meeting to discuss the wider grievance [365-372]. Eventually the Claimant referred his claim to ACAS, which he informed the Respondent of on 11 November 2020.
80. On 18 November 2020 Mr Goldie wrote to the Claimant explaining that due to annual leave and structural changes within the team, they had been unable to secure a suitable date to re-arrange a further meeting until then. He responded to the Claimant's concerns but the Claimant did not accept the content of the letter. The letter referred to a number of actions on advertising, short-listing offers, internal pre-employment checks and feedback [378].

Law

81. Section 4 of the Equality Act 2010 provides that race is a protected characteristic. Section 9(1) sets out that race includes colour, nationality and ethnic or national origins.
82. Section 39(2) of the Equality Act 2010 prohibits an employer from discriminating against one of its employees by subjecting the employee to a detriment.
83. Section 13 of the Equality Act 2010 provides: -
Direct Discrimination

'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'.

84. Section 23(1) provides that where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.
85. Section 136(2) provides
- (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 a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
86. That means that the burden is on the claimant to establish, on the balance of probabilities, primary facts that, in the absence of an adequate explanation from the respondent, show he has been subjected to less favourable treatment because of his race. If he succeeds, the burden passes to the respondent to prove otherwise. The standard of proof is again on the balance of probabilities. In order to discharge the burden of proof, the Respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the claimant's race.
87. The Court of Appeal in *Madarassy v Nomura International PLC* [2007] IRLR 246, approving guidance in *Igen v Wong* [2005] ICR 931 stated:
- 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'* (56)
88. This approach was approved in *Hewage v Grampian Health Board* [2012] UKSC 37 and in *Royal Mail Group Ltd v Efofi* [2021] ICR 1263.
89. In *Deman v Commission for Equality and Human Rights Commission & others* [2010] EWCA Civ 1279, Sedley LJ held:
- We agree with both counsel that the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.*
90. Thus where there is a difference of treatment and a difference of status it does not take much more to shift the burden of proof.

91. In *Efobi* the Supreme Court emphasised the reminder in *Hewage* by Lord Hope that on s136:
“It is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.”
92. The respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory. Bad treatment in itself is not discriminatory; what needs to be shown is worse treatment than that given to a comparator, *Bahl v Law Society* [2004] IRLR 799. Unreasonable behaviour alone cannot found an inference of discrimination, but if there is no explanation for the unreasonableness, the absence of explanation may give rise to this inference of discrimination.
93. Direct evidence of discrimination is rare. Discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions *Nagarajan v London Regional Transport* [1999] IRLR 572. For this and other reasons, establishing discrimination is usually difficult and tribunals should be prepared, where appropriate, to draw inferences of discrimination from the surrounding circumstances or any other appropriate matter *Amnesty International v Ahmed* [2009] ICR 1450.
94. To find discrimination has occurred, there must be some evidential basis on which the Tribunal can infer that the claimant’s protected characteristic is the cause of the less favourable treatment. The Tribunal can take into account a number of factors including an examination of circumstantial evidence.
95. It may be appropriate on occasion, for the Tribunal to take into account the respondents’ explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. *Laing v Manchester CCC & others* [2006] IRLR 748; *Madarassy*. It may also be appropriate for the Tribunal to go straight to the second stage, where for example the respondent assert that it has a non-discriminatory explanation for the alleged discrimination.
96. Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 held that sometimes the less favourable treatment issue cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.
97. The essential question in a direct discrimination case is: what is the reason (or reasons) for the treatment complained of?

Conclusion and analysis

98. Having considered our findings of fact, the parties' submissions and the relevant law, we have reached the following conclusions on the agreed issues.

Rejection of Team Manager post

99. The Claimant compares himself with his white colleagues, who were successful. All had passed the shortlist process, took part in the same interview exercise by the same panel and were asked the same questions. All those who had been shortlisted to interview were accepted by Mrs Robinson as able to do the job.
100. The Claimant has not queried that any of the candidates were not qualified but asserts he was more qualified. There was no issue taken as to the comparators or dispute that they were not suitable as comparators or that their circumstances were materially different. Three were named in the agreed list of issues: LP, AMA, and HA. During the hearing CL was also relied on.
101. We accept those candidates as comparators for the purposes of the selection process. Of the seven candidates, four were ranked above the Claimant. The Claimant suffered a detriment in not being appointed to the role.
102. Of all those interviewed, only the white candidates were successful. One white candidate, from an agency but known to the panel, was also unsuccessful, but the other unsuccessful candidates were black. The only two black candidates of the group were therefore both rejected.
103. Further, all Team Managers at that time were white, which was accepted by the Respondent. We were not provided with any statistics by the Respondent of the racial profile of those in lower roles and senior management.
104. Mrs Robinson said that those shortlisted had the potential to be Team Managers. That meant they all interviewed from the same start line. Mrs Robinson also accepted that the Claimant's experience of training Covid call-handlers would have been a *"very good example"* to show how *"he supported and coached the staff in that environment. I have never see Mr Sodola coaching staff side by side as I have seen the others..."*.
105. The Claimant had applied a number of times before. He was known to the recruitment panel. All of the candidates were known to the panel. He had been in his post for nearly 8 years and met the shortlisting criteria. The verbal feedback given to him was very poor and the written feedback simply repeated the same. By the time of the written feedback it was well known how disgruntled he was with the process and that he was raising concerns about wider structural discrimination and yet the written feedback provided no further detail, not even the minimal feedback that Ms Wallen and Mrs Robinson had entered on their interview score sheets.
106. As set out this was against the background that the Claimant had raised that there was a systemic issue of Black and Minority Ethnic staff not being promoted

and that he had been a victim of this in his latest application. This was also against the background that at the time of the written feedback there had already been considerable delay in getting this to him.

107. We conclude that in the absence of explanation from the Respondent, there is a prima facie case that the Claimant was treated less favourably in not having been appointed to the Team Manager position. That means the burden shifts to the Respondent to discharge.
108. We considered whether the Respondent provided cogent evidence to demonstrate that the decision not to appoint the Claimant had nothing whatsoever to do with his race.
109. The Respondent's evidence was that having passed the shortlisting stage, the candidates were assessed entirely on their performance at interview. The explanation is therefore that he failed due to the answers he gave at interview. We did not have any evidence that there was anything missing from the notes of how the Claimant performed at interview. Further, whilst the notes were very brief, the Claimant himself could not point to any further detail that he had given at interview that was not recorded. We accept the evidence of the interview record that there were no examples offered by the Claimant to demonstrate his competencies. The Claimant was very open and honest when he very properly in his evidence said that he could not remember whether he gave any examples but that he was not in a position to assist the Tribunal with this.
110. The Claimant did not question the scores of the other candidates. Neither did he question his own scores. We find the notes of his interview are problematic in their brevity but equally the notes of all the candidates, successful or otherwise varied in the level of their detail. It was unhelpful that Ms Wallen did not attend. We noted also that the wash up discussion occurred before each individual interviewer's scores were set, which explains why they are identical apart from on one single question of one of the other candidates. The scores were therefore not compiled independently of each other.
111. We come back to the point that no issue was taken on the scores of the successful candidates. We were concerned that Mrs Robinson said that she had seen the candidates coaching side by side but we accept her evidence that this was also raised at interview.
112. We find that on the balance of probabilities and after considerable thought, the rejection of the Claimant was based solely on the interview scores. We accept, as did the Claimant, that the scores of the successful candidates reflected their performance at interview and that those who scored 9/15 or above were appointed. We found that on balance the Respondent had discharged the burden of proof in its explanation that the Claimant did not perform to a satisfactory standard on his scores of 2/2/3, albeit he had improved on his previous performance. There were no examples on his form and he could not point to having given any examples. On that basis there is a correlation between the notes, albeit they are brief, and the scores. That is also borne out by the verbal and written feedback, which again were brief but in line with the scores.

Although Ms Wallen did not attend as a witness and it was clear to us that the notes could have been more detailed, we find the Claimant was not discriminated against because of his race.

113. We find that had the Claimant been prompted for examples, he would have been able to provide these. That ties in with Mrs Robinson's evidence about him having the relevant experience. However, we also accept the Respondent's evidence that if examples were not provided, the candidates would not be prompted to give an example. Whilst we found this an unhelpful and rigid approach to the interview process, it was not less favourable treatment. The verbal feedback as reflected in the written feedback failed to set out that the Claimant did not give examples, when this would have been the most obvious and constructive feedback to give. We found this surprising given both interviewers noted the lack of examples given by the Claimant and therefore, had they limited their feedback to the notes alone, the Claimant would have been better informed to understand why he was not appointed and how to improve on his future interview technique.

Delay on feedback

114. On the second issue, which is whether the delay in providing feedback was because of the Claimant's race, the Claimant does not point to an actual comparator and we considered whether a hypothetical, white comparator would have had their written feedback delayed. There was clearly poor practice in the significant delay of some 3 months from the time of the interview, but was this because of his race?
115. We considered whether, in the absence of an explanation for the delay, there was a prima facie case of less favourable treatment on grounds of race. We found that the delay was poor, the verbal feedback was bare, the response from Ms Wallen inadequate, as she could have provided some detail, and we find that when eventually provided, the very brief, written feedback gave no additional or meaningful detail. We also note that this was against the background that the Claimant had repeatedly applied before for the same role and repeatedly been unsuccessful. Constructive prompt feedback was of particular importance to him.
116. This was also against the background that after the selection process, the Claimant, and the Respondent, knew that he as a black man did not get the job, four white people were appointed to a position that at that time was filled with only other white staff. He was given bare verbal feedback and, in the meantime, repeatedly raised issues of the lack of recruitment of BAME staff more widely; the lack of diversity in management; the lack of career progression for his BAME colleagues, including for himself; the lack of written feedback to him; and the failure of the Respondent to comply with its own policies on storing its records.
117. Mrs Robinson worked 22 shifts in the period the Claimant was asking for his feedback, which, when it eventually arrived, was minimal. So there was considerable time for her to have produced the notes, even after her return from leave in June, albeit we accept that this would have been a busy time due to the

pandemic. Ms Wallen opted out, by deferring a reply on written feedback to Mrs Robinson, even though Ms Wallen was the chair of the panel. There is no explanation as to why she could not simply have provided her own feedback. In addition, the panel did not follow the procedure in its own policy as to the storing of the notes. Neither were the notes sent to HR.

118. We considered whether to draw adverse inferences from our primary findings of fact that in the absence of an explanation, the Claimant was treated less favourably because of his race. We find for the reasons set out above, including that the Respondent avoided giving feedback, that there is a prima facie case to answer. The burden of proof therefore shifts to the Respondent and we considered the explanation. We find that the explanation given is that Mrs Robinson was initially away, then delayed due to the pressures of the pandemic and, in the meantime, the papers were locked away. Mrs Robinson did apologise for the delay and explain that she thought she had responded. There is no explanation for how Ms Wallen chose to reply to the Claimant.
119. Has the Respondent discharged the burden of proof? We find that against the serious grievance brought by the Claimant, which featured in the background and concerned the lack of career progression for Black and Minority Ethnic staff, and which was triggered by the Claimant not being appointed on this last round, there was a shying away from engaging with the Claimant on his feedback. He was not even given the interview notes or the content of the feedback within the notes, including that he had not provided examples in answer to the questions, until after he brought these proceedings.
120. The Respondent knew that the Claimant had been asking for feedback from the time he was told that he had been unsuccessful. Both the panel that interviewed him and those dealing with his official complaint were aware of his repeated requests for feedback. In her email of 8 June 2020, Ms Jones specifically referred to not meeting the Claimant until he received his feedback. Mrs Robinson was copied into this email [383].
121. The Respondent was aware that the Claimant had raised that there was a wider systemic issue in the lack of diversity in management. It initiated an investigation into this. Only white candidates were recruited on the latest selection exercise. The written feedback, in identical terms to the verbal feedback, was within Ms Wallen and Mrs Robinson's possession from the outset. Ms Wallen could have dealt with this but refused to. Mrs Robinson relied on delays in general terms and thinking she had sent it. When the feedback was provided, there was no change to it from the verbal feedback. It described in general terms that the Claimant "*did not answer the questions effectively*" without stating he did not give examples. That gave the Claimant no further understanding on why he had not been appointed. It demonstrated an unhelpful approach and undermined the explanation for the delay of 3 months in replying to him.
122. For those reasons, we find the Respondent has failed to adduce cogent reasons for the delay. We do not accept that the explanation was in no way because of the Claimant's race. The Respondent had the feedback from the day of the interview on 26 May 2020 and even though the Claimant was clearly concerned

about receiving this, the Respondent delayed providing what was eventually of minimal value, as it simply repeated the initial verbal feedback.

123. We therefore dismiss the race discrimination claim on the decision not to appoint the Claimant to the Team Manager role.
124. We uphold the claim that the delay in not providing written feedback to the Claimant until 23 August 2020 amounted to less favourable treatment on grounds of his race.
125. This will be set down for a remedy hearing, unless the parties can agree, in view of the fact that the Claimant remains employed by the Respondent.

Employment Judge Braganza KC
Date: 19 January 2023

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