EMPLOYMENT TRIBUNALS

Claimant: **Mr T Smikle**

Respondent: **BCP Council**

Heard at: **Southampton (in person)** **On:** **6, 7, 8 February 2023**

Before: **Employment Judge Mrs Metcalf, Mr Knight**

Appearances
For the Claimant: **In person**
For the Respondent: **Ms Bantan , Counsel**

REASONS

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Introduction

1. By a claim form presented on 1 December 2021, the claimant presented claims of discrimination on the grounds of sex and race and victimisation.

2. By way of a brief summary, the claimant has worked for the respondent from 2015; in 2017 he started working as the Special Educational Needs and Disabilities (SEND) contracts officer within the Access to Resources team. In 2021 he unsuccessfully applied for a role as SEND Placement Manager and asserts that he was not given that role either because of his sex or his race or because he was victimised as a result of complaints which he made in relation to an earlier selection process in 2017.

Issues

3. The case came before Employment Judge Self for a preliminary hearing on 14 October 2022 when the issues were identified as follows:

1.0 Direct Race and / or Sex Discrimination (Equality Act 2010 section 13)

The Claimant describes himself as "Black" within his Claim Form.

1.1 Did the Respondent do the following things:

1.1.1 Ms Langdale withdrew the opportunity to become SEC Placement Manager on or around 1 July 2021.

1.1.2 All three individual Respondents scored the Claimant too low to be deemed appointable on or around 24 June 2021.

1.1.3 Ms Langdale not appoint him to the SEC Placement Manager role despite his qualifications and experience on or around 1 July 2021.

1.2 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant says he was treated worse than Anna Melland-Davies and/or a hypothetical comparator.

1.3 If so, was it because of race?

1.4 Is the Respondent able to prove a reason for the

2. Victimisation

2.1 Did the Claimant do a protected act when he sent an email to Mr Farrant on 9 December in relation to allegedly unfair recruitment process wherein scores were changed to ensure a Spanish male was not appointed to a role and a white British female was appointed.

2.2 Did the Respondent do the following things:

2.2.1 The Claimant relies on the same treatment as is set out at paragraphs 1.1.1 to 1.1.3 inclusive

2.3 By doing so, did the Respondent subject the Claimant to detriment?

2.4 If so, was it because the Claimant had done the protected acts?

3. Time limits

3.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

3.2 Were the discrimination and victimisation complaints made within the time limit in section 123 Equality Act 2010. The Tribunal will decide:

3.2.1 Were the claims made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

3.2.2 If not, was there conduct extending over a period?

3.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

3.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

3.2.5 Why were the complaints not made to the Tribunal in time? In any event, is it just and equitable in all the circumstances to extend time?

4. At this hearing respondent confirmed it was no longer taking any point on time.

5. At a preliminary hearing on 23 November 2022, the claim was amended and the issues varied so that the protected acts relied upon by the claimant were as follows

   a. an email sent to Rachel Gravett on the 2nd January 2018

b. at a meeting with Sarah Langdale on 9 January 2018

c. an email dated 9th February 2021 to the Chief Executive Officer Graham Farrant

6. The respondent does not admit that the alleged actions were protected because it does not accept that allegations were made about a breach of the Equality Act 2010.

The Hearing

7. We heard from the claimant and his witness, Dr Johnson, Policy & Performance Manager for Bournemouth, Christchurch and Poole Council and the Policy Lead for Equality and Diversity and we were also provided with witness statements from Mr Sibley, Mr Manning and Mr Bradley. We did not hear from the latter 3 witnesses and therefore were unable to attach significant weight to their statements when they have not been cross-examined. For the respondent we heard from Ms Pearse, Access to Resources (ART) Alternative Provision Contracts Officer, who was involved in the interviews in 2017, Sarah Langdale, Head of Children's Commissioning and Access to Resources Team Manager , who had involvement both in 2017 and 2021, Kim Ward, children's commissioning manager who interviewed claimant in 2021 and Kate Cuthbertson, Practice Educator and Social Worker within the Adult Social Care Department who also interviewed claimant in 2021.

8. We received a bundle running to 299 pages and except where stated references below to page numbers are to that bundle.

9. A timetable had been agreed for the hearing at the case management hearing before Employment Judge Self the parties stuck to the timetable as agreed. At the request of the claimant the tribunal finished early at the end of the first day but he was still able to finish his questions within the agreed timings.

The law

10. The following are relevant sections from the Equality Act 2010.

13 Direct discrimination

1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

136 Burden of proof

(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.

Causation

11. In considering questions of causation, in Nagarajan [1999] IRLR 572, the House of Lords held that that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case was, 'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

12. In Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425 it was held at para 12: "Both sections use the term "because"/"because of". This replaces the terminology of the predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in Nagarajan v London Regional Transport [2000] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, Nagarajan, at p. 513B."

The Burden of Proof and drawing of inferences

13. In Madarassy v Nomura International plc [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

> "The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. 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.
> 57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the

tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

14. In Laing v Manchester City Council [2006] IRLR 748 Elias P observed as follows:

"71. We would add this. There still seems to be much confusion created by the decision in *Igen v Wong*. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.
72. The courts have long recognised, at least since the decision of Lord Justice Neill in the *King* case to which we have referred, that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate explanation. *Igen v Wong* confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination, whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has been achieved as a result of the burden of proof directive, as Peter Gibson LJ recognised in Igen.
73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865 (at para 17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.'

15. In Nagarajan Lord Nicholls pointed out "In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign. For instance, he may have believed that the applicant would not fit in, or that other employees might make the applicant's life a misery. If racial grounds were the reason for the less favourable treatment, direct discrimination… is established", he went on "Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he B acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn"

16. In Bahl v The Law Society [2004] IRLR 799, the Court of Appeal held

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…

It has been suggested, not least by Mr de Mello in the present case, that Sedley LJ was there placing an important gloss on Zafar to the effect that it is open to a tribunal to infer discrimination from unreasonable treatment, at least if the alleged discriminator does not show by evidence that equally unreasonable treatment would have been applied to a white person or a man.

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In our judgment, the answer to this submission is that contained in the judgment of Elias J in the present case. It is correct, as Sedley LJ said, that racial or sex discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it. However, the final words in the passage which we have quoted from Anya are not to be construed in the manner that Mr de Mello submits. That would be inconsistent with Zafar. It is not the case that an alleged discriminator can only avoid an adverse inference by proving that he behaves equally unreasonably to everybody. As Elias J observed (paragraph 97):

'Were it so, the employer could never do so where the situation he was dealing with was a novel one, as in this case.'

Accordingly, proof of equally unreasonable treatment of all is merely one way of avoiding an inference of unlawful discrimination. It is not the only way. He added (ibid):

'The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason

which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason.'

We entirely agree with that impressive analysis. As we shall see, it resonates in this appeal

Findings of Fact

17. In 2017 the respondent carried out a selection and recruitment process for a contracts assistant role. Interviewees were assessed by a panel comprised of the claimant as panel chair, Ms Pearse and Ms Wojcik.

18. Interviews took place on 14 December 2017 when the panel interviewed four candidates including Juan Alberto and Victoria Kerr. The interview process is not largely disputed, a prearranged structure was implemented. There were 9 pre-agreed questions which were asked in turn by the 3 interviewing members of the panel. Each member of the panel would score the candidates individually. Thereafter the 3 panel members discussed matters and an agreed score was reached.

19. According to the score sheets, which appear at pages 70 – 73, the claimant, Ms Wojcik and Ms Pearse scored Victoria 27, 33 and 27 respectively giving a total of 87 points. They scored Mr Alberto 28, 33 and 29 respectively giving a total of 90 points. On this occasion the scores were awarded so that the highest scoring candidate was the best candidate.

20. At the end of that process, therefore, Mr Alberto had been awarded 3 points more than Ms Kerr and was the most successful candidate.

21. The agreed scores, after discussion, were 30 overall for Ms Kerr and 31 overall for Mr Alberto.

22. The same day of the interviews, both Ms Wojcik and Ms Pearse approached Ms Langdale and raised concerns about the process.

23. Ms Langdale says that both wanted to change their individual scores. Ms Langdale’s evidence in that respect is slightly different to the evidence from Ms Pearse who told us that she approached Ms Langdale not because she wanted to change her score but because she felt unhappy with the interview process and felt that the claimant had disregarded her views of the candidates, she felt intimidated throughout the discussion and she did not feel comfortable putting across her opinion. As result, she says, she did not feel that the agreed scores reflected her opinion as to who was best suited for the role.

24. We have heard evidence from Ms Pearse and she was subjected to robust cross-examination by the claimant. She maintained her evidence and denied having spoken to Ms Wojcik before she spoke to Ms Langdale.

25. We accept the evidence of Ms Pearse, had she not felt unhappy about the process, there would have been no reason for her to approach Ms Langdale. She was able to give some examples as to why she felt the process was unsatisfactory, she felt that it was too rigid and described being unable to say hello to the candidates or ask them how their journey had been to put them at their ease.

26. Ms Langdale told us that she then approached HR and asked whether it was possible for the scores to be amended by members of the interviewing panel and was told that it was possible if, upon reflection, those who had been doing the scoring felt that their scores were wrong. It is likely that advice was given and we do not see anything wrong with it. It is more important that the correct scores are given than that everything is resolved finally on the day of the interview. Interviewers can change their minds following reflection and as long as they do so in good faith we do not think there is anything wrong with doing so.

27. Ms Langdale communicated that information to Ms Pearse and Ms Wojcik but Ms Langdale did not, in the event, change her score.

28. From the score sheets which appear at pages 74 to 75 it is apparent that Ms Wojcik increased her overall score for Ms Kerr from 33 to 35. Doing so meant that, in total, Mr Alberto had now scored 90 points but Ms Kerr had scored 89 points. On that basis Mr Alberto was still the most successful candidate. Nevertheless the agreed scores were amended to give 32 points to Ms Kerr but only 31 points to Mr Alberto.

29. None of the respondent's witnesses were able to explain to us why, in circumstances where the individual scores still placed Mr Alberto higher, the agreed scores were changed to favour Ms Kerr. We were not told who had changed the agreed scores. We accept the evidence of the claimant (which is not in dispute) that no one discussed the changes with him and therefore he cannot have been party to any change to the agreed scores. We find that the fact that the claimant was not consulted was surprising in circumstances where the claimant was the chair of the interview panel.

30. On 29th of December 2017 Ms Langdale wrote to the 3 members of the panel stating "I have now received all the interview scores, following overnight contemplation revised scores were received from Sabina and Emily which meant that the post was offered to Victoria. HR are currently completing the necessary paperwork and a verbal offer subject to satisfactory references has been made.… Tony as Emily is on annual leave next week and Sabina will be busy with placements please can you phone the candidates and inform them of the outcome and provide any feedback they may request." (Page 76).

31. On 2 January 2018, the claimant forwarded that email to Ms Gravett, Service Director and Ms Langdale's line manager at the time, stating that he was

extremely concerned that following the formal process, that was scored independently and agreed collectively, the person who came 2nd had been offered the post. He stated that the concept of overnight contemplation and revision of scores was not the correct way to address the issue and pointed out that the discussion excluded him and he would have strongly resisted. He pointed out that both he and Ms Pearse had scored Mr Alberto above Ms Kerr that he did not believe that the score change was in line with council policy or recruitment and selection guidance and that the decision was unfair to the successful candidate (page 76). He did not mention discrimination or the Equality Act 2010.

32. The involvement of Ms Langdale at that stage was, we find, initially receiving the complaints of Ms Pearse and Ms Wojick and approaching HR for advice. However, she accepted in evidence that it also must have been her who authorised the job being offered to Ms Kerr rather than Mr Alberto. She told us that at that stage she saw the agreed scores and understood that as a result of changes made by Ms Wojcik and Ms Pearse, the correct person to offer the job to was Ms Kerr. That is to say she believed Ms Kerr had scored the highest. However she was unable to give us any real detail as to precisely what had happened at the time. We do not find that lack of recollection to be particularly surprising given that she was not asked to recall the events until mid 2021 and the respondent has a policy of destroying records in relation to interviews after six months. There is no evidence that Ms Langdale was instrumental in seeking to change who was offered the role, we find, having heard her evidence that she understood that the change in scores was legitimate and was what had caused the job to be offered to Ms Kerr.

33. The claimant then had a meeting on 9 January 2018 with Ms Langdale, Ms Wojcik and Ms Pearse. In his witness statement, Mr Smikle states that Ms Langdale suggested that changing the scores was authorised by HR as it was felt that “the white female would fit in the team better than the Spanish male”. He confirmed in cross-examination that those words were not used by Ms Langdale and that was his interpretation of what was said. However, we have not been told by Ms Smikle what was said which made him interpret the words in that way. According to his witness statement he said that he believed the change was unlawful and that he would not be associated with such behaviour, that although he had chaired the panel he had not been consulted. He goes on to explain that as a resolution Ms Langdale offered to create a 2nd post so that both Mr Alberto and Ms Kerr were offered the same post within the ART team.

34. Ms Langdale’s version of events in respect of that meeting is that in early January 18 she had received confirmation of additional funding for a 2nd Contracts Assistant position so Bournemouth Borough Council (as it then was) was able to recruit 2 of the candidates who applied. She says that the meeting on 9 January 2018 was to clear the air, that Ms Wojcik and Ms Pearse explained why they had decided to amend their scores and that she explained that they had been allowed to do that following HR advice. She says that after that the claimant never raised matters with her again. She told us in respect of the allegation that she suggested or implied that Ms Kerr was a better fit for the

team "I don't believe I used the words "better fit" but it was a long time ago, it was about skills and experience."

35. There are no notes of the meeting, and it is well known that witness' recollections change over time, particularly if the witnesses are involved in legal proceedings and are subjected to the processes involved in those proceedings such as compiling claim forms and responses, considering documents for disclosure and writing witness statements.

36. Doing the best we can on very limited evidence, we think that if Ms Langdale had said words to the effect contended for by the claimant he would not have been prepared to leave it at that. The claimant is an assertive person with a significant history in race relations. According to his witness statement, from April 2007 to June 2013 he was a leadership tutor and independent diversity consultant delivering courses to the police, he has taken on roles within the National Black Police Association and Police Diversity Trainers Network, in 2015 he joined Bournemouth Borough Council as the Equality and Diversity coordinator. Given the email which he wrote to Ms Gravett on 2 January 2018, if Ms Langdale had then gone on to explain to him that a white female would fit in the team better than a Spanish male (regardless of the precise words used), we think that Mr Smikle would have raised that, at least, with Ms Gravett. We also think it likely that he would have raised it when he spoke to the CEO about the situation in 2021 as we set out below. Thus we do not find, on the balance of probabilities, that Ms Langdale suggested that the scores were authorised by HR as it was felt that the white female would fit in the team better than the Spanish male.

37. To the extent that it was implied by the claimant that a 2nd job was created to avoid the consequences of appointing Ms Kerr in favour of Mr Alberto, we also do not accept that proposition, we were told by Ms Pearse (and it was not disputed by the claimant) that the respondent was looking for funding for an additional post anyway.

38. We find, however, that it is likely that the claimant mentioned discrimination in the meeting of 9 January 2018. It is not in dispute that at around that time he had been to speak to Dr Johnson who was the Policy Lead for Equality and Diversity. It is unlikely he would have been speak to him unless he was concerned about matters of discrimination and having spoken to Dr Johnson it is likely that he would have raised his concerns within the meeting.

39. We have considered the extent to which we should reach a conclusion as to whether or not the respondent discriminated against Mr Alberto on the grounds of his race or sex. The allegation is an important part of the claimant's case since, at least in part, his case is that if, in 2017, the respondent preferred a white female over a Spanish male, we can conclude that when the claimant was not given a promotion in 2021 that, likewise, was because of his race and sex.

40. As we understood the respondent's submissions, it accepted that if we were to reach a conclusion as to whether or not the respondent discriminated against

Mr Alberto on the grounds of race or sex, we should do so using the shifting burden of proof.

41. The position is that a Spanish male was scored more highly for the job but the position was to be offered to a less well scoring white English woman. That took place in circumstances where the agreed scores were wrongly changed to show that the female candidate had scored more highly than the male candidate. We consider that is evidence from which we could conclude, in the absence of an explanation from the respondent, that the change was because of the sex or nationality of the better candidate. Even if we were to accept the suggestion by the respondent that in the interview Ms Pearse and Ms Wojcik had not been able to contribute to the extent they wished to because of feeling intimidated, and even if we were to accept the validity of Ms Wojcik changing her score to reflect what she really felt, that could not explain why Mr Alberto was not offered the role because he still scored higher, even after Ms Wojick's change in scores. The respondent has provided us with no explanation as to why that happened.

42. We find, on the evidence which we have received, that in 2017 Mr Alberto was not offered the job because the respondent preferred to employ a white female. There is no other explanation as to why he was not offered the role. Going forward, however, that finding must also be considered alongside our acceptance that when funding was available for two roles, Mr Alberto was appointed.

43. According to everyone's evidence the situation was not raised again until February 2021 when there was a question and answer session with Mr Farrant, the chief executive of the respondent. The claimant says, and the respondent has not disputed, that he was in a meeting with Mr Farrant when Mr Farrant was talking about fairness in recruiting and selection and the claimant said that he had had an example of when something did not go in line with fairness. Mr Farrant had asked him to send "a copy".

44. At page 78 of the bundle is a copy of the email sent by the claimant to Mr Farrant on 9 February 2021 which shows an attachment of documents described as a copy of the 2017 scores and a forwarded email with the subject "Interviews for the post of contracts assistant". The latter appears to be a copy of the email sent by the claimant to Ms Gravett on 2 January 2018. Again, that email does not refer to the Equality Act or to discrimination.

45. It is not suggested by either party that anything further happened at that time.

46. In the meantime in August 2020 there was a recruitment process for a SEND Placement Manager. The claimant applied for that role and was interviewed. The tribunal has not been told what the claimant scored in the interview, Ms Langdale points out that policy requires that scores are only kept for 6 months and she no longer has her scores. She says that of the 3 candidates interviewed the claimant scored the worst.

47. In his witness statement, the claimant accepts that he was notified that he had been unsuccessful in the interview process and he accepts that he had not

focused sufficiently on the legislation to be offered the post (see paragraph 18 of his witness statement). It was put to him in cross-examination that he did not take up the offer of being given full feedback. In his answers he sought to make a distinction between accepting verbal feedback and seeking full feedback. The claimant stated that the feedback he received verbally was that he had not referred to legislation. It is apparent that the claimant did not seek written feedback and he did not deny that he had been offered that feedback. It was put to him that if he had taken up the offer of feedback he may have made a better presentation during the 2021 interview. He disputed that, he said that the questions in the 2021 interview with the same, he knew what they were, he researched and prepared for them and did very well, in his opinion.

48. The job was offered to Anna Melland–Davies who did the role for approximately 6 months. The claimant's case is that Ms Melland–Davies had not been a contracts officer for long and had no background or proven competency in the SEND arena. He said that in subsequent conversations and emails it was clear that she had no idea what she was doing or possessed the basic skills to deal with routine enquiries. It was put to him that she left because of a need to relocate to another part of the country and the claimant was not able to dispute that but did assert that she stopped doing the role approximately one month before she left the council.

49. Ms Langdale asserts that Ms Melland–Davies had extensive knowledge of the SEND arena, had previously been employed by Dorset Council in the Department of SEND and evidenced a rounded and robust understanding of the vision that the respondent was trying to create with the role. She states that her answers to questions and examples given were comprehensive and relevant to current needs and legislation (pages 144 – 146).

50. When the claimant was challenged in cross-examination as to how he would know whether Ms Melland–Davies had knowledge of the SEND arena, he stated he was basing his view on her application form and the time that she had spent in those spaces

51. Ms Melland–Davies' application form suggests significant experience of SEND as an Assistant Contracts Officer (page 122) and in her notes of the interview with Ms Melland–Davies, Ms Langdale has made notes referring to SEN team in Dorset.

52. Having considered the interview notes of Ms Langdale as well as the application form of Ms Melland–Davies, we are not satisfied that the claimant's criticisms of her appointment are well made and we prefer the respondent's evidence in this respect. Even if it were the case that subsequent conversations and emails revealed that Ms Melland–Davies did not have the relevant skills (and we have not heard from Ms Melland–Davies as to what she would say about that allegation) that does not mean that those who were interviewing the claimant did not believe that she had the skills.

53. At this hearing the claimant started to put his case on a different basis in respect of this application and started to suggest that he was not given the role because of his race or sex (rather than because he did not sufficiently refer to the

legislation). The claimant suggested that additional documents had come into his possession, although we did not see those documents. We have been presented with no evidence that the interviewing panel appointed Ms Melland–Davies in preference to the claimant because of the claimant's sex or race.

54. It is perhaps useful for us to remind ourselves and the parties that we must determine the case on the basis of the evidence which has been presented to us. The claimant did not explore with the respondent's witnesses or present any evidence to suggest that any preference which existed in 2017 to prefer the appointment of English white women over others still existed in 2020. There was no exploration by the claimant as to the make-up of the team to which Ms Melland–Davies was appointed and, as we have indicated, up to the date of the hearing, the claimant's own case had been that he was not appointed because he did not refer to the legislation. Even taking account of our finding in relation to 2017, we do not believe that there is evidence from which we conclude that the appointment of Ms Melland–Davies or the non-appointment of the claimant was because of race or sex.

55. Ms Melland–Davies subsequently left the respondent and the role which she had been doing was re-advertised. The claimant applied for the role along with another female applicant, who was white. Both were invited for interview.

56. The scoring criteria for the interview were laid down in advance, as were the questions to be asked. The questions were identical to those asked at the previous recruitment rounds. A person was given a score of 1 if the answer they gave in interview entirely met the criteria, a score of 2 if it almost met the criteria, a score of 3 if it was unclear whether the criteria was met and a score of 4 if it did not meet the criteria. Therefore, unlike in 2017 and, perhaps, somewhat counterintuitively, the person who scored the lowest was the most suitable candidate for the role.

57. Interviews took place on 24 June 2021 in respect of both candidates but we were told by Ms Cuthbertson (and it was not challenged) that the interviews were not back-to-back.

58. The interviewing panel consisted of Ms Langdale, Ms Cuthbertson and Ms Ward. Ms Ward had not been employed by the respondent in 2018 and asserted that she had no knowledge of the incidents from that time, the claimant did not challenge that and there is no evidence to suggest that her statement was not true. We accept that evidence. Ms Cuthbertson stated that she was not aware that the claimant had previously raised issues regarding the process in 2017 and, at that time, she was working at Westminster Council. Again that was not challenged and there is no evidence to suggest that her statement is untrue. Again, we accept that evidence. Ms Langdale was obviously aware of the position in 2017 and 2018 but told us that she had been unaware that the claimant had emailed the chief executive in 2021. There is no evidence to contradict that statement and we accept her evidence.

59. The claimant cross-examined Ms Langdale, Ms Cuthbertson and Ms Ward but did not suggest to any of them that they had discriminated against him on the grounds of his race or sex. We do not suggest that because he did not put to

the witnesses that they were motivated by those things that his claim cannot succeed but we were not taken to any contemporaneous evidence which supports the allegation of discrimination. The claimant's cross-examination in respect of the interview in 2021 was primarily directed at establishing that some of scores which he was given were unreasonable.

60. The claimant challenged Ms Langdale in respect of the scores for 2 of the questions being question 2 and question 9.

61. In respect of question 2, Ms Langdale's notes and scores appear at page 193. The claimant challenged the score given as being inappropriate. Ms Langdale gave a detailed explanation that what she had been seeking by way of an ideal answer was evidence of taking somebody through capability type procedures or evidence of policy application, evidence of supervision, evidence of dealing with a challenging situation in terms of long-term absence or capability. She was not looking for statements that somebody had done "this or that". The notes which Ms Langdale took in relation to that answer are thorough and contain her comments (which it was not suggested were not contemporaneous) that more detail was required in terms of the statements made. She awarded a score of 2. A score of 2 is a score which suggests that the candidate had almost met the criteria and was considered appointable to the post but may need support. We see nothing wrong with the score which was given by Ms Langdale.

62. The other score of Ms Langdale's which the claimant challenged was in relation to question 9. The claimant was required to give an example of a piece of work that he had undertaken "one that went well, or one that went not so well. What did you learn that helped you to improve?". Ms Langdale gave the claimant a score of 3 in this respect. Her notes again are detailed and record there had been no reflection on learning, she noted "limited, without detail". She has also made the note "separate answer in respect of internal practice rather than answer to question.".

63. It became apparent during cross-examination of Ms Langdale that the claimant expected her to use her knowledge of him from practice in scoring him, whilst Ms Langdale was adamant that she was only scoring on what the claimant said in the interview. In particular in relation to question 7, the claimant felt that Ms Langdale should have corrected a view held by Ms Ward about whether the claimant had contributed to a report or was a producer of it. Ms Langdale's answer was that to do so would have put the claimant at an unfair advantage.

64. We think that Ms Langdale's approach was correct. For the claimant to be scored on the basis of what the respondent's interviewers knew about him would have placed him at an unfair advantage to the other candidate who was not working for the respondent.

65. Against that background, we see nothing inappropriate in the score of 3 which Ms Langdale gave in relation to question number 9.

66. Even taking into account our conclusions about what happened in 2017, there is no evidence from which we could conclude that the scores which Ms Langdale gave were influenced either by the sex or race of the claimant or by

the complaint he had made in 2018. We note that Ms Langdale scored the claimant considerably more favourably than the other candidate who was a white woman. There is no evidence from which could conclude that a white woman who gave the same answers as the claimant in interview would have been scored more favourably.

67. We turn then to the claimant's criticisms of Ms Cuthbertson. It is right, as the claimant points out, that Ms Cuthbertson recorded her scores for the claimant on the sheet at page 181 but did not record her scores for the other candidate in the same way. She said that she considered her scores for the other candidate at the end of the interview and emailed them separately. The email no longer exists because she changed roles and when she changed roles her email account was deleted. She pointed out that the interviews were not held back to back and at that time she was being required to carry out back-to-back meetings which meant that she would have done other things between the 2 interviews.

68. Although the change in the method of recording her scores is surprising, it is difficult to see anything sinister in that change. If Ms Cuthbertson was seeking to do the claimant down then she did not need to have a different method of recording her scores in order to do that. The claimant was unable to establish any inappropriate motive for the change in scoring method. There is no basis on which we could conclude that the way in which the scores were recorded was detrimental to the claimant or that the method of recording the scores would have been different if the claimant were a white woman. The claimant suggested that his scores may have been altered after they were submitted, he did not explore that and we were presented with no evidence as to who might have changed scores or why they would have done so.

69. Ms Cuthbertson, as set out in paragraph 12 of her witness statement, was critical of some of the claimant's answers because he talked almost exclusively about his policing career when being asked about supervisory experience. She states that experience was out of date and that he had not held direct staff management responsibility within the last 4 years. The claimant's contention is that it was unfair of Ms Cuthbertson to adopt that approach, that she had put in an additional criteria of recency, when there was no cut-off date which had been agreed with the panel for previous experience.

70. The approach of Ms Cuthbertson had led to the claimant only being given a mark of 3 by her in relation to question number 2. That was the only score which was criticised by the claimant. The claimant did not suggest that any of the other 8 questions had been scored unfairly by her.

71. We can well understand the claimant's sense of grievance in this respect. He had not been told that older examples would not be considered compelling and "recency" does appear to be an additional criteria which had been brought in by Ms Cuthbertson.

72. It was not suggested to Ms Cuthbertson that she scored the claimant in that way because he was a black man or that there was a culture of seeking to

appoint white women or that she had deliberately scored the claimant down because of his sex or race.

73. We must ask ourselves whether there are any facts which would suggest that a white woman would have been treated more favourably than the claimant, if the white woman had given the same answers as the claimant. Having heard Ms Cuthbertson we find that she genuinely believed that more recent experience was better than older experience. We find that it was for that reason she scored the claimant a 3, reflecting that it was unclear to her whether the criteria for question 2 had been met. There is nothing from which we could conclude that a white woman would have been scored in a different way to the claimant.

74. We turn then to the scores given by Ms Ward.

75. Ms Ward told us that there had been a discussion before interviewing started that a successful candidate would be expected to score 1s and 2s with perhaps the odd 3. Although the claimant criticised that because there was no minimum score set down in any policy, having regard to the job which was to be filled, we think it is obvious that a person who scored mainly 3 or 4 and therefore whose answers showed the candidate either to be somebody who did not meet the criteria or had not shown whether they met the criteria, would not be appointed to the job.

76. The claimant also criticised Ms Ward for saying in her witness statement that the claimant had not held a management role within the last 4 years. He suggested the requirement for management experience was not necessary. Ms Ward pointed to paragraph 11 of the key responsibilities for the role (page 153) which states that the successful candidate will be required to manage a specialist team with the same or a similar area of work. We find that it was reasonable for Ms Ward to consider the claimant's experience of a management role. The claimant also criticised the respondent for requiring somebody with SEND management experience, on the basis that it would reduce the scope for appointees. Ms Ward agreed that requiring such experience would reduce the number of satisfactory appointees but pointed out that this was a specialist area and in a managerial role within a specialism you would expect the candidate to have experience of SEND. We accept that was Ms Ward's genuine belief which we consider to have been reasonable.

77. The claimant criticised 2 of the scores given by Ms Ward. Firstly he criticised the score given to question number 7. The question was: "A key responsibility of the role is producing management reports which shall include collating and summarising statistical information. Please provide an example of reports you have previously produced".

78. Ms Ward gave the claimant a score of 4 in that respect, stating that in relation to the claimant's example of producing an annual SEN Monitoring Report he was the contributor to the reports not the producer. There was a long exchange between the claimant and Ms Ward in this respect and Ms Ward's position was that she had designed the template which the claimant populated with figures and she would have to articulate to the monitoring meeting the data which was

in the report. Thus, the claimant only contributed to the reports. The claimant's position was that the spreadsheet had thousands of lines of data which was updated in columns, the claimant had to get the data from the original reports and produce a composite report. The claimant points out that Ms Langdale accepted that he had produced the report.

79. Regardless of precisely who is correct on whether it can properly be said that the claimant produced the report (and we tend to favour the claimant in this respect) it is very difficult to see how Ms Ward could justifiably score a 4 on the basis that the claimant was a " contributor to the reports not a producer". Even if he was a contributor we would have thought a score of 3 was warranted given that the question refers to collating and summarising statistical information. We consider that Ms Ward was being unduly pedantic in this respect.

80. The other score which the claimant criticises is in relation to question 9, requiring an example of a piece of work that had been undertaken. The claimant referred to a programme he had put together which he received a Shining Star award for. Ms Ward, with some justification, points out that he did not say that in the interview. However, the reason which she gave for scoring claimant 4 was because the claimant had not shown that he reflected on what had happened and how he would improve. The tribunal accepts, particularly taking account of the experience of the members, that a culture of reflection is particularly important in children's services and we understand, therefore, why Ms Ward is so focused on reflection. We also note that Ms Langdale also picked up on the lack of reflection in relation to this question. However, again, we find it difficult to see how a score of 4 was warranted when only part of question 9 was "what did you learn that helped you to improve?". We do not consider that a score of 4 was justified or appropriate. At worst the claimant should have been given a score of 3.

81. Ms Ward pointed out that she had scored the other candidate badly as well as the claimant. The claimant suggested he was better than the other candidate because, at least, she had no experience of SEND, however that is incorrect when one considers the other candidate's application form.

82. We accept that Ms Ward is a harsh scorer as is borne out by the scores at page 179. She scored the other candidate 30 and the claimant 33. Those scores are higher than those given by Ms Cuthbertson of 25 and 24 respectively but there is no significant disparity between the relative way she scored candidate one and the claimant compared to the way Ms Cuthbertson scored candidate one and the claimant (particularly when one takes account of the fact that Ms Cuthbertson did not give a score for question 9 which would have increased her score of the claimant).

83. At paragraph 11 of Ms Ward's statement she states that during the interviews she felt both candidates failed to answer the questions adequately and neither demonstrated that they could perform the role. She describes the position as requiring somebody with the necessary skills and experience of working with partnerships, building relationships and developing policies and procedures to support the SEND service. It was her view that neither candidate was equipped to do that.

84. Again we must consider whether there is evidence that Ms Ward would have scored the claimant more favourably if he had been white or a woman. We must take into account the unreasonable scores which we consider were awarded in relation to questions 2 and 9 but we accept, ultimately, that Ms Ward has given an explanation for those scores, namely that she is a harsh marker and believed that the claimant (as well as the other candidate) could not fulfil the role. We did not find her evidence to be untrue in this respect despite fairly prolonged and robust cross-examination by the claimant. The unreasonable scores, in the light of the explanation given, do not amount to facts from which we could conclude that a white woman would have been scored better than the claimant.

85. After the interviews had taken place, all of the interviewers took the view that neither candidate was suitable for the job. Although each interviewer had scored the candidates separately and Ms Langdale had been more generous in respect of both candidates than either Ms Ward or Ms Cuthbertson, none had given a majority of ones or twos without many threes.

86. We accept the evidence of Ms Langdale that, in those circumstances, she wanted to reflect on whether there was something in the advertisement which meant that the recruitment was not inviting the correct calibre of applicants and so decided not to proceed further. That evidence is consistent with the interviewers notes, the scores that had been given and the fact that neither candidate was progressed (including a white female candidate).

Conclusions

87. We give our conclusions by reference to the list of issues.

88. In respect of issue 1.1, we find that the respondent to do things alleged to have been done, namely

    a. withdrawing the opportunity to become SEND [not SEC which it is agreed was a typo] Placement Manager on or around 1 July 2021,

    b. scoring the claimant too low to be deemed appointable on or around 24 June 2021 and

    c. not appointing him to the SEND Manager Role despite his qualifications and experience on around 1 July 2021.

89. In respect of issue 1.2, we do not consider that Ms Melland–Davies is an appropriate comparator. She did not give the same answers to questions in the interview as the claimant did and her experience was different to the claimant's. Whilst the evidence which has been adduced in relation to her position is of assistance in considering how a hypothetical comparator would have been treated, we do not consider that she is an appropriate comparator.

90. In respect of a hypothetical comparator we have not found any facts from which we could conclude that a person of a different race or different sex would, in 2021, have been treated differently to the claimant. Even if we had found such facts, we accept the respondent's explanations as to why the claimant was scored as he was even though we have been critical of 2 of the scores which

he has been given. That explanation is not connected to the claimant's sex or race.

91. Those conclusions deal with issues 1.3 and 1.4.

92. In respect of the claim of victimisation, the protected acts are now those identified at paragraphs 11 and 12 of the case management order of Employment Judge Rayner.

93. Whilst we accept that the emails of 2 January 2018 and 9 January 2021 were sent, we do not find that either of them amounted to protected acts because neither of them bring proceedings under the Equality Act 2010, give evidence or information in connection with proceedings under the Act, or do any other thing for the purposes of or in connection with the Act or make an allegation (whether or not express) that a person has contravened the Equality Act 2010.

94. Our view is otherwise in relation to the meeting on 9 January 2018 when we accept that the claimant did make an express or implicit allegation that there had been a breach of the Equality Act 2010.

95. Turning back the issues identified by Judge Self, in respect of issue 2.2 we accept that the alleged treatment occurred and, in respect of issue 2.3 we accept that thereby the respondent subjected the claimant to a detriment.

96. In respect of issue 2.4, we do not conclude that the respondent subjected the claimant to the detriments because he had done the protected act we have found proved. On our findings, the only person who was aware of the protected act was Ms Langdale and we are satisfied that scores she gave to the claimant were reasonable and so was the decision not to proceed with the appointment. We have not found any facts from which we could conclude that she was motivated by the meeting of January 2018, particularly given the passage of time and the fact that the claimant had not raised matters with her since then (and vice versa). Even if she was still conscious of the meeting, the decisions she made were not influenced by that meeting (certainly not in more than a trivial way). She was influenced by the answers which the claimant gave in the interview and the subsequent scores awarded to him.

97. In conclusion, therefore the claims fail and must be dismissed.

98. We wish to pay tribute to the claimant for the careful and calm way in which he presented his claim to the tribunal and express our thanks to him and to counsel for the respondent to their helpful approach to the case.

Employment Judge Dawson
Date: 03 March 2023

Reasons sent to the Parties: 20 March 2023

FOR THE TRIBUNAL OFFICE