EMPLOYMENT TRIBUNALS

Claimant: Mr J Alton

Respondent: Carnival plc t/a Carnival UK

Heard at: Southampton **On:** 1, 2, 3 March 2023

Before: Employment Judge Leverton
Mr P English
Mr R Spry-Shute

Representation

Claimant: Miss F Tulloch (Lay Representative)
Respondent: Mr N Moore (Consultant)

RESERVED JUDGMENT

The Tribunal has jurisdiction under the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011 to determine the claims in these proceedings in so far as they relate to the Claimant's prospective employment on board the Iona or on one of the Britannia's Mediterranean cruises.

The claims for direct disability discrimination under section 13 of the Equality Act 2010 and victimisation under section 27 of the 2010 Act are not well-founded and are dismissed.

REASONS

Claims and issues

1. The Claimant brings claims under the Equality Act 2010 (EqA) for direct disability discrimination and victimisation.

2. The issues were agreed by the parties at a case management hearing on 17 November 2022. They are set out in a case management order of the

same date by Employment Judge ('EJ') Gray. In summary, they are expressed as follows:

a. **Jurisdiction:** does the Tribunal have jurisdiction to hear the claims? The Respondent argues that the position for which the Claimant applied was on a foreign-registered ship outside United Kingdom waters, and that the Claimant was excluded from the right to being a claim by section 81 EqA and the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011.

b. **Direct disability discrimination:** did the Respondent dismiss the Claimant or withdraw an offer of employment; was that less favourable treatment; if so, was it because of disability; and is the Respondent able to show that the treatment occurred for a non-discriminatory reason not connected to disability? The Claimant has bipolar disorder and the Respondent accepts that he is disabled for the purposes of the EqA.

c. **Victimisation:** did the Claimant bring proceedings under the EqA against another cruise line (the 'protected act'); did the Respondent dismiss the Claimant or withdraw an offer of employment; by doing so, did the Respondent subject the Claimant to a detriment; and, if so, was it because the Claimant had done the protected act?

3. The list of issues in the case management order, as set out above, required us to consider whether the Respondent had either dismissed the Claimant or withdrawn an offer of employment. However, the crux of his complaint was that he did not obtain the position for which he applied, and we were concerned that the effect of the wording in the list of issues would be to prevent him from arguing his case in that way. If we found that there had been no job offer, his claims of discrimination and victimisation would necessarily fail. We raised this concern with the parties on the first day of the hearing. We gave them both the opportunity to address us on this issue, and we considered the Court of Appeal's guidance in **Parekh v London Borough of Brent** 2012 EWCA Civ 1630.

4. If a list of issues is agreed, that will generally limit the issues at the substantive hearing to those in the list. However, the Tribunal is *'not required slavishly to follow the list presented to it'* where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and evidence – **Price v Surrey County Council and anor** EAT 0450/10. A list of issues is not to be construed as if it were a formal contract, pleading or statute; it is merely a tool to enable the Tribunal to focus on the central disputes between the parties. Departure from an agreed list of issues may be justified, in particular, where a party's lack of legal representation gives rise to legitimate misunderstanding as to what the list of issues covers. We also had regard to rule 29 of the Tribunal Rules 2013, which gives employment tribunals the power to vary, suspend or set aside an earlier case management order where this is necessary in the interests of justice.

5. We concluded that we were not bound by the agreed list of issues and that it was just for us to modify it in order to address the Claimant's core

argument that he did not get the job. In reaching that decision, we took into account that the Claimant's representative was not legally qualified. We considered that the Respondent would not be unduly prejudiced by our decision to expand the list of issues in this way. No additional evidence would be required; the relevant issues were addressed in the Respondent's witness statements and its witnesses were present at the hearing to give oral evidence.

6. For these reasons, we widened the list of issues to allow the Claimant to argue that, if there was no job offer, the Respondent's failure to make such an offer was itself directly discriminatory and/or amounted to victimisation. Paragraphs 3.2.1 and 4.2.1 of the case management order were amended to read as follows: 'Did the Respondent do the following things: dismiss the Claimant/withdraw an offer of employment/*fail to make an offer of employment?*' (our emphasis).

7. In addition to his claims under the EqA, the Claimant had brought an unfair dismissal claim under section 94 of the Employment Rights Act 1996. That claim was struck out by EJ Midgley on 21 September 2022 on the basis that the Claimant did not have the necessary two years' qualifying service.

8. In December 2022, the Claimant applied to amend his ET1 claim form to include wide-ranging allegations of discrimination dating back to 2017. These new allegations were based on 284 internal emails and over 300 pages of documents that had recently come to the Claimant's attention via a subject access request. Twenty individuals employed by the Respondent and associated companies were implicated. In a judgment dated 7 February 2023, EJ Cuthbert refused the amendment application. He explained, however, that reliance on these earlier matters was permissible in so far as they were relevant to the reason for the Claimant's treatment by the Respondent in 2022.

Evidence and procedure

9. The Tribunal hearing and deliberations took place over three days in March 2023. The Claimant was represented by Miss Tulloch, a lay representative. He provided a witness statement and gave oral evidence. There was also a witness statement from the Claimant's mother, Mrs Theresa Alton. She was sworn in but the Respondent did not wish to cross-examine her. We have taken into account the contents of her witness statement in so far as they are relevant to the matters that we have to decide.

10. The Respondent was represented by Mr Moore, a legally qualified consultant. The Respondent's witnesses were Mrs Jade Weeks (Resourcing & Onboarding Consultant, Guest Experience), Miss Holly Makin (Resourcing & Onboarding Manager, Guest Experience) and Ms Ali Greenaway (Employee Relations Manager). All three provided witness statements and gave oral evidence.

11. There was a joint file of documents of 340 pages (the 'main bundle') prepared by the Respondent. There was a dispute about its contents: Miss Tulloch said she had provided Mr Moore with relevant documents dating back to 2017 but he had failed to include them. Mr Moore accepted that he

had omitted certain documents that he considered to be irrelevant; this was done to keep within the page limit set by the Tribunal. After some discussion about the procedural history of the case, we allowed Miss Tulloch to prepare and hand up an additional file of 45 pages.

12. At the start of the hearing, we asked whether anyone present required reasonable adjustments. The Claimant asked us to take account of his bipolar disorder, dyslexia and dyspraxia. On the second day of the hearing, Miss Tulloch indicated that she also had a disability for which she required adjustments. We offered both the Claimant and Miss Tulloch additional breaks to compose themselves; invited the Claimant to alert us if at any point he was having difficulty following the proceedings (which he did); attempted to use plain language; and helped Miss Tulloch to formulate some of the questions she wished to put to the Respondent's witnesses in cross-examination. The hearing took longer than anticipated because we wanted to ensure that the Claimant was not placed at a disadvantage by the way in which the proceedings were conducted. We therefore amended the indicative timetable set by EJ Gray by allowing extra time for evidence and closing submissions, and we reserved judgment instead of giving oral reasons.

13. Both representatives made closing submissions, and the Claimant provided a document setting out a legal argument relating to territorial jurisdiction. We have taken the parties' submissions fully into account even if we do not specifically refer to all their points in our judgment.

Findings of fact

14. We make the following findings of fact on the balance of probabilities.

Background

15. The Respondent, Carnival plc, is incorporated in the United Kingdom with its operational headquarters in Southampton. Carnival Corporation is incorporated in Panama with its operational headquarters in the city of Doral, Florida, USA. These two companies are together referred to as Carnival Group.

16. Carnival Group operates cruise ships trading under various brand names, including Cunard and P&O Cruises. The ships operating under these two brands are all owned and operated by Carnival UK ('CUK'), the trading name of Carnival plc. Their management and operation is undertaken in the United Kingdom, from Carnival House in Southampton, where CUK currently employs approximately 1,700 shore staff, covering all aspects of the ships' operations and providing onshore support services.

17. In spring 2022 there were three cruise ships operating under the Cunard brand, all registered as belonging to the port of Hamilton in Bermuda. There were seven cruise ships operating under the P&O Cruises brand: five of these were registered at the port of Hamilton, Bermuda; and the other two (the Iona and the Britannia) were registered in the UK as belonging to the port of Southampton. The Iona cruised within the Mediterranean and the Norwegian Fjords, sailing in and out of

Southampton. The Britannia sometimes sailed in and out of Southampton and around the Mediterranean; at other times, it sailed around the Caribbean and passengers were flown out to join the vessel.

18. Cunard and P&O Cruises are the only brands for which CUK is the owning and operating company. For all other Carnival Group brands, the ships are owned and operated by separate Carnival Group companies, all headquartered outside the UK and having their own operational management.

19. Around 15,000 seafarers are required to crew the ships that operate under the Cunard and P&O Cruises brands. However, CUK does not directly employ any seafarers. Instead, all British- and EEA-resident crew members are employed by Fleet Maritime Services (Bermuda) Limited ('FMSB'), a Carnival Group company established offshore and situated outside the UK and European Economic Area. FMSB is incorporated in Bermuda, with an administrative office in Mumbai. This offshore arrangement is usual within the cruise ship industry and saves the significant cost of an employer's National Insurance contributions.

20. In terms of the recruitment process for seafarers, CUK's role is to identify suitable candidates and recommend them to FMSB. It interviews and evaluates job applicants and, if they are considered suitable, normally contacts them by telephone to say that it would like to put them forward for employment. If they confirm that they want the job, CUK sends FMSB a recommendation. The final decision whether to employ the individual as a crew member is reserved to FMSB. If FMSB decides to accept the recommendation, it issues a formal offer setting out details such as the person's job title, pay and working arrangements, and enters into a Seafarers Employment Agreement ('SEA') with that person. The standard fixed-term SEA is suitable for service on both UK- and Bermudian-flagged vessels. It is normally sent out by an outsourced business partner in India at least 45 days before the start of the rotation (i.e. a period working on board a vessel).

21. Before the appointment can begin, references are taken up and there are a lot of formal details to work through – for example, the Seaman's Discharge Book, any necessary visas, and medical certification. CUK's main role is to manage the crew member by creating rotations and undertaking the onboarding process. The period between the verbal job offer and starting onboard a ship is generally eight weeks, even if the individual is available immediately, but it can be as long as three months.

22. There are mutual agreements in place between CUK and FMSB governing offshore employment. Under the Ship Crewing Agreement, CUK appoints FMSB to supply officers and crew for the ships it operates. FMSB employs the crew and pays their wages. Operative decisions relating to what are known as 'key employer obligations' are reserved to FMSB. These include recruitment, remuneration, terms and conditions, discipline, grievances and termination of employment.

23. Under the Crew Administration Services Agreement, FMSB appoints CUK to undertake day-to-day crew administration not extending to the key

employer obligations. These duties include HR and payroll matters such as sourcing and interviewing candidates; performing vetting and referencing checks; managing crew conduct and performance; recommending disciplinary action; creating crew rotations; administering FMSB's pension schemes; providing payroll information to FMSB; and calculating bonuses.

The 2022 recruitment exercise

24. In February 2022, the Respondent advertised vacancies for an Entertainment Host. This is the most junior rank in the onboard entertainment team. The advertisements were placed online and were managed though an online portal, Jobtrain. Successful job applicants who passed the pre-employment checks would have been engaged to serve for one rotation on either a Cunard or a P&O Cruises vessel under a fixed-term SEA with FMSB. They might subsequently have been offered further fixed-term appointments but this was not guaranteed.

25. The Claimant has applied for several jobs in the cruise industry over the last few years, mainly with the Respondent, and has reached various stages of the recruitment process. He applied for the Entertainment Host position on 28 February 2022. The process involved filling out an online application form and uploading a CV. The application form asked the Claimant whether he had any disabilities, and he stated on the form that he had bipolar disorder.

26. We accept Ms Greenaway's evidence that bipolar disorder is not necessarily a bar to seagoing employment on one of the Respondent's cruise ships. Every candidate is assessed on their merits. However, an individual's mental health might become relevant when they take the statutory 'ENG1' medical examination to establish fitness to serve at sea. The ENG1 examination is undertaken independently by an examiner on a panel approved by the Maritime and Coastguard Agency. All seafarers require medical approval, and if they are accepted for employment, that is always subject to passing the ENG1 examination.

27. The Respondent has taken steps to address mental health issues among staff working on board its vessels. It encourages staff to become mental health champions; members of the senior management team and operations teams have attended a mental health awareness course; and human resources managers on board ships have completed a mental health trainers' course to enable them to deliver awareness training for colleagues.

28. The Claimant was shortlisted for the post, and on 18 March 2022, Jordan Watkins (Resourcing & Onboarding Consultant, Guest Experience) invited him to a final stage interview, referred to as a 'casting day'. The Claimant replied by email on 18 March thanking Ms Watkins for the invitation and confirming his attendance. He referred in his email to his bipolar disorder and to an ongoing employment tribunal claim that he was bringing against a competitor of the Respondent, Royal Caribbean Cruise Line. He said that Royal Caribbean had flown him to Australia to board a cruise ship but, on discovering his medical condition, had terminated his engagement and

flown him back to the UK. He added, *'Please don't do the same and discriminate against me because I have bipolar.'*

29. Ms Watkins replied by email on 31 March as follows: *'Thanks for your email, I'm so sorry this happened to you! This would never impact our decision and is only ever based on capabilities and competence to do the role.'* She did not disclose any information about the Claimant's disability or his tribunal claim to the selection panel; this was to avoid the possibility of unconscious discrimination. It was part of the Claimant's case that she did, and that her delay in responding to his email of 18 March was because she was discussing the matters he had disclosed with her colleagues, but we found no evidence to support that. Mrs Weeks clearly and unequivocally stated that she knew nothing about the Claimant's medical condition or his tribunal claim until she interviewed him for the post.

30. Before the casting day, Ms Watkins passed the CVs of all shortlisted candidates to Neil Kelly (Manager, Guest Experience Product & Operations), who assessed which brand he felt would be the best fit for each candidate. The Respondent regards Cunard as its premium brand, with an older and more international clientele, whereas P&O Cruises is more UK- and family-orientated. A candidate who would be more suited to work on P&O Cruises might typically have a background working in holiday camps, whereas entertainers assigned to the Cunard brand would be more likely to be professionally trained performers. On the basis of the Claimant's application form, Mr Kelly formed the provisional view that the Claimant would be a better fit for P&O Cruises and assigned him to a team undertaking selection for service on that brand.

31. The casting day took place in London on 4 April 2022. Assessments were conducted by six employees of the Respondent working in pairs, and there were 16 shortlisted candidates. The Claimant's assessors were Neil Oliver (Entertainment Director) and Mrs Weeks. The latter had taken over Ms Watkins' role and had only been in post for a week.

32. On the morning of the casting day, the candidates undertook a series of practical tasks designed to assess their suitability, including a presentation and dancing. Two of them were asked to leave at lunchtime. The 14 others were judged to have performed adequately in the morning, and they were interviewed in the afternoon. Mrs Weeks had some concerns about the Claimant's performance in the morning. She felt that his microphone technique was not particularly proficient; he over-projected his voice and came across as quite 'shouty'. He danced enthusiastically but did not appear to be familiar with the movements. Nevertheless, his overall performance on the morning's tasks was judged to be adequate and he progressed to the interview stage.

33. Mrs Weeks typed notes into a pro forma record as the interview with the Claimant progressed. Her interview record indicates that the Claimant performed poorly on two out of the three 'culture essentials' questions. He received a score of four out of five on 'communicate' but lower scores on 'empower' and 'listen and learn'. Under the heading 'empower', the Claimant was asked to tell the interviewers about a time when he had supported a colleague. He recounted an occasion when a colleague was

unable to make it to work and he covered for them. This was not felt to be a particularly strong example. The Claimant received an overall score on that criterion of 2.5 out of five. Under the heading 'listen and learn', he was asked to tell the interviewers about a time when he received feedback that was helpful to his development. He was unable to provide a specific example, although he did indicate a willingness to learn. His answer led the interviewers to question his self-awareness and his ability to hear, accept and act on constructive feedback. His score for that criterion was two out of five. The Respondent's expectation was that candidates should be rated at least adequately against all the culture essentials in order to be offered employment.

34. At the interview, the Claimant raised the possibility of working in the more senior role of Entertainment Manager. The panel responded that they would always consider the possibility of recruiting at a higher level but they usually promoted internally to the Entertainment Manager role. The Claimant also stated that he would prefer to work on board a Cunard vessel. He told the panel that he had bipolar disorder and repeatedly asked them to confirm that they did not discriminate against applicants with mental health issues. Mrs Weeks and Mr Oliver had not previously been aware of the Claimant's medical condition. They told him that there was no question of rejecting any candidate because of a disability and that the Respondent had support programmes and mental health champions in place. Indeed, another candidate on the same day who also had bipolar disorder was subsequently offered a role. We accept Mrs Weeks's evidence on that point but, because no further evidence was provided about that individual, it is not central to our decision in this case.

35. The Claimant also made repeated references at interview to his tribunal claim against Royal Caribbean Cruise Line. He explained that he needed to be available for the tribunal hearing and would not be ready to start employment onboard the Respondent's vessels for around 12 months. This was the first time Mrs Weeks had heard about the tribunal claim. She saw the Claimant's repeated references to his claim as a thinly veiled threat that he could bring a claim against the Respondent if he was rejected, and this made her feel nervous.

36. The panel's main concern was that the Claimant was not committed to a junior or entry-level role. The Respondent tends to recruit at that level and promote internally, so that individuals work their way up on their merits. Mrs Weeks felt that the Claimant saw himself in a higher role than Entertainment Host and that he would be immediately pushing for a more senior position. She and Mr Oliver were left seriously questioning whether he would work cooperatively at junior or entry level as one of a team of seven or eight Entertainment Hosts and Senior Entertainment Hosts, sharing tasks equally and supportively with his colleagues.

37. Mrs Weeks also judged the Claimant's demeanour at interview to be arrogant and felt that he had the potential to be a disruptive and discordant presence within the team. The onboard working environment is close and pressured, and in her view this made it even more important that the team ran smoothly. The poor examples that the Claimant gave in answer to two of the 'culture essentials' questions reinforced her impression that he

would be a poor team player. These underlying concerns were not recorded in so many words in the interview notes. We are satisfied that this was because Mrs Weeks was typing in haste during the interview while asking questions, and she was somewhat constrained by the tick-box format of the form.

38. Towards the end of the interview, Mrs Weeks told the Claimant she didn't know if she felt his *'passion to come on as an entertainment host'* and asked him to explain what was driving his application. This question was referable to her impression that he saw himself in a more senior position. The Claimant disputes that Mrs Weeks ever said this; he asserts that the interview notes have been doctored to include this comment, and that his scores for the culture essentials were artificially lowered after the event. On this point we prefer Mrs Weeks's evidence. We consider that small inconsistencies in the use of plain and bold fonts on the form are simply a result of Mrs Weeks typing up the notes in haste during the interview. There was no other evidence to support the Claimant's argument that the interview notes were not an accurate record of what took place.

39. The joint decision of Mrs Weeks and Mr Oliver, based on the evidence gathered at interview, was that the Claimant was not suitable for the entry level Entertainment Host role and should not be recommended for employment by FMSB. On final page of the pro forma interview notes, under the heading 'Selection Decision (Delete as appropriate)', there was a box on the left, 'Successful', and a box on the right, 'YES/NO'. An interviewer completing the form would normally have deleted either 'YES' or 'NO'. However, Mrs Weeks typed in place of 'YES/NO': *'Timing not suitable, question marks around motivation for level.'* The word 'Successful' in the left-hand box still appeared on the completed form, and the Claimant says that this indicates he was successful at the casting day. We do not agree. Mrs Weeks was typing in haste, she was new to the job and she was not yet familiar with the Respondent's processes. We find that she overwrote the words 'YES/NO' to record the reasoning behind the panel's decision, and simply omitted to delete the word 'Successful'.

40. During the interview, the Claimant had urged the interviewers to look him up on Google and view online videos of his auditions for *The X Factor* and *Britain's Got Talent*. Mrs Weeks did this after the interview out of curiosity and found them 'cringey'. The results of her Google search also revealed some concerning Twitter feeds about the Claimant. The panel had already decided not to recommend the Claimant for employment, but this reinforced its decision.

41. The Claimant had explained at interview that he would not be available to start work for a year or so because he needed to be available in the UK to pursue his claim against Royal Caribbean. Because of the veiled threat of a tribunal claim if his job application were unsuccessful, Mrs Weeks decided that the easiest course of action was to put his application on hold. She was exceptionally busy; she had just started a new job; and her instinct was to avoid potential conflict with the Claimant and buy herself more time. She told the Tribunal that she had been diagnosed with ADHD at the end of 2022, and that her condition had an impact on both the accuracy of her form-filling at interview and her avoidance of confrontation

with the Claimant. We consider that her failure to delete the word 'Successful' on the interview form, and her decision to put the Claimant on hold, can be adequately explained without the need to rely on her diagnosis of ADHD.

42. On 21 April 2022 Mrs Weeks contacted the Claimant by email. Instead of explaining that he was judged unsuitable for the post, she told him that his long timeframe was not suitable for the Respondent. She added: *'It does not mean you are not eligible to get back in touch next year when you are in a better position to start with us but as it is quite a large cost and resource for us to process you with our compliance team, we would need to pick up the conversation again when you are in a better place to proceed.'*

43. Mrs Weeks frankly acknowledged in evidence that she should have told the Claimant that he was not suitable for the role. She failed to do so because she believed that he would challenge rejection and bring a tribunal claim. This was because he had repeatedly mentioned his claim against Royal Caribbean at the interview and had repeatedly asked whether the Respondent discriminated on grounds of mental health. Mrs Weeks did not mention this in her interview notes, because in her view these matters were not relevant to his suitability for the role. The Claimant's medical condition and the perceived threat of a tribunal claim had no bearing on the decision to reject him. Nevertheless, the fact that he had repeatedly raised these matters made her feel nervous about conveying the panel's decision to him. She wanted to let him down gently. She also needed time to consider how to frame her response, ensure he understood the panel's concerns and prevent the matter from escalating. She was keen to avoid confrontation. It was also relevant that she was under a lot of work pressure; she had just started a new tole, there had been only a three-day handover and she had over 200 job applications to process.

44. The Claimant replied to Mrs Weeks by email on 21 April. He explained that there was a preliminary hearing due to take place on 9 and 10 May 2022 to decide whether his claim against Royal Caribbean was out of time. He said that if the tribunal claim was allowed to proceed and a full hearing was fixed for 2023, he could work for four to six months for the Respondent starting in summer 2022; if the claim was out of time and was not allowed to proceed, he could start sooner. He enquired as to which brand the Respondent wanted him to work for.

45. On 25 April 2022, Mrs Weeks changed the Claimant's application status in Jobtrain to 'candidate on hold'. This was a historic status that was not generally used and has since been deleted from the system. Her administrative action prompted the system to send the Claimant an automated email. Mrs Weeks did not know that this change of status had an autogenerated email attached to it, nor was she aware what the email would say. If she had intended to put the Claimant forward for a position and he had indicated his acceptance, she would have selected 'verbal offer accepted' or 'offer accepted after final interview' in the drop-down menu, but that is not what happened. The automated email was sent in error, and

the Respondent has since taken steps to ensure that this will not happen again.

46. The automated email sent to the Claimant on 25 April was as follows:

> *'Subject: Awaiting Vacancy*
>
> *Our team of recruiters have received your application and are pleased to confirm that we think you'd be a great fit for Carnival UK. At this moment we do not have any permanent full-time positions for this role, but have held your details ready for when we do. We really appreciate the time and effort you have put into your application, and please be [sic] rest assured when we have a position for you, we'll be in touch.'*

47. There were various options listed at the bottom of the email, including unsubscribing from job alerts, withdrawing the job application, or deleting the candidate's profile.

48. The unfortunate effect of this email was to create a false hope for the Claimant. He regarded the automated email as a job offer. He emailed Mrs Weeks on 25 April thanking her and saying he could not wait to start. This came as a surprise to Mrs Weeks and alerted her to fact that an email had been sent via Jobtrain. The Claimant sent many follow-up emails along similar lines. He emailed Mrs Weeks again on 26 April saying, *'Hi Jade hope [you're] well was this email from you?'* She confirmed: *'It was myself, we will catch up later once you have an update from Royal Caribbean.'* The Claimant says this is an acceptance by Mrs Weeks that she had made him a job offer but we disagree: she was merely confirming that she had caused the Jobtrain email of 25 April to be autogenerated.

49. On 4 May 2022 the Claimant emailed Mrs Weeks saying that his employment tribunal hearing on 9 and 10 May would be by video so he would not need to attend in person and could start work for the Respondent as soon as possible. In the event, his tribunal claim against Royal Caribbean was held to be out of time, and on 9 May he advised Mrs Weeks that the case was over and he was available to start work. The Claimant sent many similar emails and WhatsApp messages to Mrs Weeks and Ms Watkins during May and early June 2022. They were slow to respond, and the Claimant persisted. On 13 May, Ms Watkins emailed Mrs Weeks forwarding an email she had received from the Claimant saying he could start as soon as possible. Ms Watkins added, *'I thought James was a no?'* This corroborates Mrs Weeks's evidence that a decision had already been taken that the Claimant was unsuitable for the post.

50. On 16 May 2022, the Claimant emailed Mrs Weeks and Ms Watkins stating that he had contacted Acas and referring to the possibility of an employment tribunal claim against the Respondent. He added that he hoped it would not come to that; he was still keen to start work for the Respondent and was ready to do so from June onwards.

51. The Claimant's mention of a possible tribunal claim prompted Mrs Weeks to refer the matter to Ms Greenaway. Ms Greenaway had not heard the

Claimant's name in any capacity and was not aware of him until Mrs Weeks contacted her. Miss Makin also became involved; similarly, it was the first time that she had been made aware that there was a problem. The three of them met on 24 May to discuss the matter, following which Mrs Weeks collated all relevant documents relating to the Claimant's job application (emails, interview notes, the Jobtrain history and text messages) and sent them to Ms Greenaway.

52. It was agreed that Miss Makin should send the Claimant a response; this was done to insulate Mrs Weeks from further pressure and because it was felt that a reply from Miss Makin might carry more authority. Accordingly, on 9 June 2022 Miss Makin emailed the Claimant as follows:

> *'I am emailing regarding the automated email that you received on 25 April. The email received was sent to you in error however; [sic] I can confirm that the email was not an offer of employment, it was simply us putting your application on hold for the position.*
>
> *We hadn't made a decision on your application following the Casting Day since, at that time, you confirmed you had no availability for the foreseeable future; we suggested to come back to us when you did and we'd pick up the application.*
>
> *We have now reviewed your interview performance against the criteria for the role and can confirm that you have not been successful on this occasion. Whilst the panel felt that you performed strongly in your technical, you scored lower than the other applicants and did not meet the criteria for the role during the face-to-face interview.'*

53. Regrettably, this email was not entirely accurate regarding the timing of the decision not to recommend the Claimant for employment. Miss Makin was not as forthright as she could have been. In an attempt to defuse the situation, she followed the line presented in Mrs Weeks's initial email exchanges with the Claimant: that his application had been put on hold because of his unavailability and that no final decision had been made at the time of the interview. Miss Makin's email also failed to reflect Mrs Weeks's criticisms of the Claimant's performance on the morning of the casting day. We are satisfied that her positive feedback on the Claimant's technical performance was an attempt to let him down gently.

54. In any event, Miss Makin's email contradicted the holding email of 25 April, which suggested that the Claimant had been successful at the casting day. It came as a bitter disappointment to the Claimant; we accept the evidence of his mother, Mrs Alton, in this regard. The Claimant responded to Miss Makin by email on the same day disputing that the email of 25 April was sent in error, asserting that it amounted to an offer of employment that the Respondent was now withdrawing, and stating that he had no choice but to take the Respondent to tribunal for mental health discrimination. Shortly afterwards, the matter was passed to CUK's Employee Relations team.

Conspiracy allegations

55. It is part of the Claimant's case that there was a conspiracy to exclude him from employment on the Respondent's vessels. At one point during his evidence, he referred to it as a 'witchhunt' by the Respondent. In an internal email dated 13 June 2022, Ms Greenaway stated that *'there's already a file set up'* relating to the Claimant. The Claimant relied on this as evidence that there was a conspiracy to block his job application, but we find that Ms Greenaway was merely referring to the electronic folder containing the documents that Mrs Weeks had forwarded to her.

56. At the end of his witness statement, the Claimant listed 19 individuals who he said had been involved to some degree in deterring or blocking his various job applications to P&O and the Respondent. He relies on a string of emails and other documentation dating back to 2017 which are said to be relevant to the outcome of his job application in 2022. It is necessary for us to address those matters as part of our findings of fact.

57. In 2017, the Claimant was briefly employed by Princess Cruises on board a vessel called the Crown Princess. He did not disclose this to the Respondent when he answered the job advertisement in 2022. The Princess Cruises brand is owned and operated by a subsidiary within the Carnival Group, Princess Cruise Lines Limited ('PCLL'). PCLL is incorporated in Bermuda. It has its operational headquarters in Santa Clarita, California, USA, and its management operates entirely independently from CUK. However, there is a team at Carnival House in Southampton operating under the trading name Princess Cruises. The reason for its presence there is historic. It goes back to a time when P&O Cruises and Princess Cruises were brands of P&O Steam Navigation Company. The aspects on which the Princess Cruises team at Southampton work are separate and distinct from the CUK cruise shipping operations, and they take their direction from PCLL management in Santa Clarita.

58. The Claimant joined the Crown Princess on 12 August 2017 and disembarked during his probation period on 29 September 2017 under 'company will', meaning that he was dismissed. There were various documented concerns about him, including his appearance, his timekeeping, and falsification of positive feedback from guests (on this issue, he was given the benefit of doubt). The Claimant received warnings about his performance and was placed on a personal improvement plan. It was alleged that some of the guests had made negative comments about him. In connection with these allegations, the Claimant made a bullying complaint that was held to be unfounded. The documents from 2017 state: *'There is evidence that the [crew member] has an elevated sense of his abilities and feels entitled. There is compelling evidence to indicate James believes the [Junior Assistant Cruise Director] role is beneath him, and he should have been hired for a more senior role.'* This corroborates the impression that Mrs Weeks formed about him at the casting day in 2022. The Claimant's bipolar disorder is mentioned in the documents from 2017; that is because he raised it as a relevant factor at the time and received medication for his condition from the doctor on board the Crown Princess.

59. On 29 September 2017, Sheila Marie Elleso (Crew Manager, Princess Cruises) sent a crew incident report about the Claimant's disembarkation

to various employees at PCLL. She also sent it to two employees at CUK email addresses, Jan Caiels and David Colclough. The Claimant relies on their inclusion among the recipients of the email as evidence that information about him was passed to the Respondent in 2017 by Princess Cruises. However, we accept Ms Greenaway's evidence that these two individuals were senior employees who worked as part of the Princess Cruises team that happened to be based at Carnival House; that is why they had CUK email addresses.

60. On 5 January 2019 the Claimant emailed Mariyam Begum (HR Liaison Officer, Princess Cruises) asking whether could attempt to pass his probation again. Ms Begum responded that, because the Claimant had left at company will (i.e. he had failed his probation), he was ineligible for rehire but that he was eligible to apply to any of Princess Cruise's sister companies from one year after his leaving date. The sourcing and onboarding staff within the Princess Cruises team in Southampton subsequently became redundant following a reorganisation, and Ms Begum was redeployed to CUK for a year before being made redundant in June 2020 in response to the COVID-19 pandemic.

61. In January 2019, the Claimant applied for a role as a P&O Cruises Entertainment Manager. His application was not rejected outright; he was invited to complete a video interview. He alleged that the Respondent was aware of who he was and was just 'playing it crafty' with a view to rejecting him further along the line, but we found no evidence to support that assertion. Jo-Ann Gibbs (Consultant, Resourcing and Onboarding, P&O Cruises) approached Ms Begum (prior to her redeployment and redundancy) for a reference. Ms Begum called Ms Gibbs on 16 January and explained that the Claimant had been dismissed after 49 days because he did not complete his probationary period and was listed as 'do not rehire'. In our view, this was entirely factual and unobjectionable. Because the reference was unsatisfactory, Ms Gibbs advised the Claimant that she was unable to proceed with his application. The Claimant sent numerous emails about his rejection to Ms Begum, Ms Gibbs and Leanne Wells (Manager, Resourcing and Onboarding, P&O Cruises). Ms Gibbs initially engaged with the Claimant, but her notes on 18 January 2019 record that he was very rude and put the phone down on her, which resulted in Emma Woodward from Employee Relations advising that if his behaviour continued *'we should consider blocking his email address through IT'*.

62. Ms Wells then sent an email to Ms Gibbs asking her to get IT to block the Claimant's email address and speak to Jobtrain to stop the Claimant from applying for any more roles with the Respondent. She said she would email the whole team *'to ensure everyone is aware and his application is not accepted for any role both ship and shore'.* On 21 January 2019, Ms Gibbs asked Jobtrain to block the Claimant's account but was advised that this was not possible. She relayed this to Ms Wells, who responded by email on 25 January, *'Not to worry – let's just get IT to block him.'* Ms Gibbs replied, *'I did look to put a flag on this account but he has deleted all the applications so would seem he has the message.'*

63. The Claimant places particular reliance on an email from Ms Wells dated 21 January 2019. It was sent to the resourcing team's group email address and to Miss Makin. The latter's email address was entered separately because she had recently joined the Respondent's organisation and had not yet been added to the relevant email group. The email stated:

> *'Hi all, if you receive an application for any role from James Alton can you please withdraw/regret his application. He applied for an Entertainment Manager role with P&O and was not suitable, so we had to regret his application. He has since then been extremely rude via email and phone calls – and this has now been escalated to ER, who have advised that his email address is blocked by IT. Any questions, or if you already are in talks with him about a role, please let me know.'*

64. The Claimant relies on this email as evidence that Miss Makin was aware that he had been blocked as a potential candidate when she advised on his job application in 2022. However, we accept her evidence that, although she must have seen this email at the time, she did not retain the information and did not make the connection in 2022. Her evidence on this point was clear. A person in her position receives a very large number of emails and it would be entirely unsurprising if she failed to recall a name that had been mentioned in an email more than three years previously. When she became involved in this matter in 2022, Miss Makin was not aware of any arrangement or attempt to deter or block job applications from the Claimant, and her view was that any job application would be considered on its merits.

65. In September 2019 the Claimant applied for a role as Junior Entertainment Host with P&O Cruises. He got through the first stage and was invited to interview but was unsuccessful. He then emailed Helen Chambers (Consultant, Resourcing & Onboarding); he accused her of a bad attitude and said, *'I hope karma gets you.'* Ms Chambers alerted Ms Wells, Ms Gibbs and the Employee Relations team in case the Claimant complained about how his application had been handled. Ms Woodward replied: *'We will keep on file in case anything arises in the future – the tone and wording of his email does certainly not reflect the behaviours we would be looking for in our colleagues.'*

66. Based on the evidence outlined above, we find that attempts were made by the Respondent in 2017 and early 2019 to deter further job applications from the Respondent and/or to prevent him from reapplying for work on board its vessels. In 2019 this was done because of the rude and persistent manner in which the Claimant challenged his rejection. These attempts to block or deter further applications by the Claimant were unsuccessful, as is demonstrated by his subsequent applications in September 2019 and February 2022 and the fact that he progressed beyond the initial shortlisting process. The individuals who were involved in shortlisting the Claimant in 2022, assessing him at the casting day, and dealing with the outcome of his application had no knowledge at the time of any attempt to block or deter applications from him.

67. The Claimant also alleged that two employees of the Respondent (Jess Long and Russell Danks) had created Google alerts about him, which he had discovered after making a subject access request. We found no evidence to support this. An alert that happened to mention the Claimant's discrimination claim against Royal Caribbean had been generated through a request for information using the search term 'Royal Caribbean'. The tribunal claim was mentioned in two out of ten search results that were generated on a particular day in September 2020. The Google alert had been created because Royal Caribbean was a competitor of the Respondent. There was no evidence of any attempt to create Google alerts relating specifically to the Claimant, and we conclude that the mention of his tribunal claim in the results that were generated is purely coincidental.

Legal framework

Jurisdiction – Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011

68. Section 81 EqA excludes the protection of Part 5 EqA (discrimination in work) in relation to work on ships, work on hovercraft and seafarers, except in such circumstances as are prescribed by regulations. For these purposes, *'it does not matter whether employment arises or work is carried out within or outside the United Kingdom'* – section 81(2). 'Seafarer' means *'a person employed or engaged in any capacity on board a ship or hovercraft'* – section 81(5) EqA.

69. The relevant regulations made under section 81 are the Equality Act 2010 (Work on Ships and Hovercraft) Regulations 2011 (SI 2011/1771) ('the 2011 Regulations'). Regulation 3 of the 2011 Regulations covers seafarers working wholly or partly within Great Britain (including UK waters adjacent to Great Britain). Such seafarers are covered by Part 5 EqA if they work on *'a United Kingdom ship and the ship's entry in the register maintained under section 8 of the Merchant Shipping Act 1995 specifies a port in Great Britain as the ship's port of choice'* – regulation 3(1)(a).

70. Regulation 4 covers seafarers working wholly outside British waters. It provides that Part 5 EqA will apply to a seafarer working wholly outside Great Britain and UK waters adjacent to Great Britain if the seafarer is on *'a United Kingdom ship and the ship's entry in the register maintained under section 8 of the Merchant Shipping Act 1995 specifies a port in Great Britain as the ship's port of choice'* – regulation 4(1). Two further conditions apply: *'(a) the seafarer is a British citizen…, and (b) the legal relationship of the seafarer's employment is located within Great Britain or retains a sufficiently close link with Great Britain'* – regulation 4(2).

71. Regulation 2(2) provides:

> *'For the purposes of regulation… 4(2)(b) – (a) the legal relationship of the seafarer's employment is located within Great Britain if the contract under which the seafarer is employed – (i) was entered into in Great Britain; or (ii) takes effect in Great Britain,*

(b) whether the legal relationship of the seafarer's employment retains a sufficiently close link with Great Britain is to be determined by reference to all relevant factors including – (i) where the seafarer is subject to tax; (ii) where the employer or principal is incorporated; (iii) where the employer or principal is established; (iv) where the ship or hovercraft on which the seafarer works is registered.'

72. In **Walker v Wallem Shipmanagement Ltd and anor** 2020 ICR 1103 the EAT held with some misgivings that the 2011 Regulations permitted an offshore employment service-provider to discriminate when recruiting staff within the UK to serve on its clients' foreign-registered ships sailing outside UK waters. The EAT considered it doubtful whether the 2011 Regulations conformed to the EU Equal Treatment Directive (No.2006/54) in this respect; however, the claimant had no remedy against the respondent because it was a private sector employer and not an 'emanation of the state'. The case also confirms that the general exclusion of Part 5 in section 81 EqA applies at the recruitment stage as well as to subsisting employment relationships.

Basis of liability – sections 39 and 55 Equality Act 2010

73. Part 5 EqA deals with the situations in which prohibited conduct (such as direct discrimination or victimisation) is unlawful in a work-related context. The main work-related provision is section 39, which covers discrimination by employers against employees and job applicants. In particular, an employer (A) must not discriminate against or victimise a person (B) by not offering B employment (section 39(1)(c) and (3)(c)); by dismissing B (section 39(2)(c) and (4)(c)); or by subjecting B to any other detriment (section 39(2)(d) and (4)(d)).

74. There are also specific provisions governing 'employment service-providers'. Section 55 EqA provides, in so far as relevant:

'(1) A person (an "employment service-provider") concerned with the provision of an employment service must not discriminate against a person – (a) in the arrangements the service-provider makes for selecting persons to whom to provide, or to whom to offer to provide, the service; (b) as to the terms on which the service-provider offers to provide the service to the person; (c) by not offering to provide the service to the person.

(2) An employment service-provider (A) must not, in relation to the provision of an employment service, discriminate against a person (B) – (a) as to the terms on which A provides the service to B; (b) by not providing the service to B; (c) by terminating the provision of the service to B; (d) by subjecting B to any other detriment.

(4) An employment service-provider (A) must not victimise a person (B) – (a) in the arrangements A makes for selecting persons to whom to provide, or to whom to offer to provide, the service; (b) as to the terms on which A offers to provide the service to B; (c) by not offering to provide the service to B.

> *(5) An employment service-provider (A) must not, in relation to the provision of an employment service, victimise a person (B) – (a) as to the terms on which A provides the service to B; (b) by not providing the service to B; (c) by terminating the provision of the service to B; (d) by subjecting B to any other detriment.'*

75. Section 56(2) provides that for these purposes, the provision of an employment service includes *'(d) the provision of a service for finding employment for persons; (e) the provision of a service for supplying employers with persons to do work'*.

76. Sections 39 and 55 both refer to subjecting a person to a 'detriment'. The Equality and Human Rights Commission's Statutory Code of Practice on Employment (the 'EHRC Employment Code') states: *'Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage'* – paragraph 9.8.

Direct disability discrimination – section 13 Equality Act 2010

77. Section 13(1) EqA defines direct discrimination as follows: *'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.'* Disability is one of the protected characteristics covered by the EqA.

78. There are two elements to the section 13 definition: (1) did A treat B favourably than it treated or would treat others, and (2) was the difference in treatment because of the protected characteristic relied upon? In appropriate cases, it is open to tribunals to approach a direct discrimination claim not by tackling each element of the statutory definition sequentially but by asking a single question: was the claimant, because of a prohibited characteristic, treated less favourably? – **Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337, HL.

79. Section 23(1) provides that there must be *'no material difference between the circumstances relating to each case'* when determining whether the claimant has been treated less favourably than an actual or hypothetical comparator. The one factor that must be left out of account is the protected characteristic itself. In the context of a direct disability discrimination claim, this means that the comparator cannot be disabled.

80. Not only must the comparator be in the same material circumstances as the claimant but, according to section 23(2)(a), those circumstances must include the disabled person's abilities. This is amplified in paragraph 3.29 of the EHRC Employment Code:

> *'The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills*

as the disabled person (regardless of whether those abilities or skills arise from the disability itself).'

81. In **Gould v St John's Downshire Hill** 2021 ICR 1, EAT, Mr Justice Linden stated:

> *'The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision… [and] the influence of the protected characteristic may be conscious or subconscious.'*

82. Lord Nicholls in **Nagarajan v London Regional Transport** 1999 ICR 877, HL, offered further guidance:

> *'Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.'*

83. The EHRC Employment Code notes that *'the [protected] characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause'* – paragraph 3.11. It is sufficient that the protected characteristic is an 'effective cause' – **O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor** 1997 ICR 33, EAT.

Victimisation – section 27 Equality Act 2010

84. Section 27 EqA provides, in so far as relevant:

> *'(1) A person (A) victimises another person (B) if A subjects B to a detriment because – (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act – (a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act.'*

85. The case law endorses a three-stage test for establishing victimisation: did the alleged victimisation arise in any of the prohibited circumstances covered by the EqA (see above); did the employer subject the claimant to a detriment; and was the claimant subjected to that detriment because of

having done a protected act, or because the employer believed that the claimant had done, or might do, a protected act?

86. There is no need to construct an appropriate comparator in victimisation claims. The EHRC Employment Code states: *'The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act'* – paragraph 9.11.

87. When determining whether a detriment was because of a protected act, the principles outlined above in the context of direct disability discrimination apply. The EHRC Employment Code notes at paragraph 9.10: *'Detrimental treatment amounts to victimisation if a "protected act" is one of the reasons for the treatment, but it need not be the only reason.'*

Burden of proof – section 136 Equality Act 2010

88. Section 136 of the Equality Act 2010 provides:

> *'(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the [employment tribunal] 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.'*

89. This provision recognises that discrimination is frequently covert, unintentional or subconscious and therefore can present special problems of proof. Broadly speaking, its effect is that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof shifts to the respondent to prove a non-discriminatory explanation.

90. At the first stage, the claimant has to prove facts from which, in the absence of any other explanation, the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then shifts to the respondent to prove, on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground – **Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases** 2005 ICR 931, CA.

91. There is a distinction between an employer's explanation for allegedly discriminatory treatment (which should be left to the second stage) and 'material facts' adduced by the employer to counter or put into context the claimant's evidence (which it is permissible for the tribunal to consider at the first stage) – **Laing v Manchester City Council and anor** 2006 ICR 1519, EAT. Material facts relevant at the first stage may include evidence

adduced by the employer which rebuts or undermines the claimant's case – **Efobi v Royal Mail Group Ltd** 2021 ICR 1263, SC.

92. Something more than a mere finding of less favourable treatment is required before the burden of proof shifts onto the employer. Lord Justice Mummery in **Madarassy v Nomura International plc** 2007 ICR 867, CA, 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.'*

93. At both the first and second stage of the analysis, it is the mental processes of the alleged discriminator which are in play, not the mental processes of others who may have provided information but did not make the relevant decision – **Reynolds and ors v CLFIS (UK) Ltd** 2015 ICR 1010, CA.

94. In **Martin v Devonshires Solicitors** 2011 ICR 352, EAT, Mr Justice Underhill (then President of the EAT) stressed that while *'the burden of proof provisions in discrimination cases… are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally, that is, facts about the respondent's motivation… they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law'*. This view was endorsed by the Supreme Court in **Hewage v Grampian Health Board** 2012 ICR 1054 and **Efobi v Royal Mail Group Ltd** (above).

Discussion and conclusions

Territorial jurisdiction

95. The first question we must decide is whether the Tribunal has jurisdiction to hear these claims. The Respondent argued that the Claimant was excluded from the right to bring a claim by section 81 EqA and was not able to rely on the 2011 Regulations.

96. The effect of section 81 EqA is to exclude seafarers and other people working on board ships from the scope of the protection afforded by Part 5 EqA. However, some seafarers are then brought back within the scope of that protection by the 2011 Regulations. To rely on regulation 3, a seafarer must be working wholly or partly within Great Britain (including UK territorial waters) on a UK-registered ship. If the seafarer works wholly outside UK waters, regulation 4 may apply. Again, the ship must be UK-registered, but there are two additional conditions that apply for present purposes: the seafarer must be a British citizen or an EEA national (that condition was satisfied in the present case); and the legal relationship of the seafarer's employment must be located within Great Britain or retain a sufficiently close link with Great Britain.

97. The job advertisement to which the Claimant responded could have resulted in appointment to either a Cunard or a P&O Cruises vessel. Mr

Kelly formed the view that the Claimant would be a better fit for P&O Cruises, but that view was only provisional. At the time, there were three cruise ships operating under the Cunard brand, all of which were Bermudian-registered. There were seven cruise ships operating under the P&O Cruises brand: five were Bermudian-registered and two were UK-registered. On that basis, Mr Moore argued that on the balance of probability, had the Claimant been successful, he would have been assigned to a ship that was not registered in the UK. Mr Moore accepted that the Cunard vessels should be left out of the equation on the basis that the Claimant was being assessed for a position on board a P&O Cruises vessel. Even on that basis, the Claimant had at most a two in seven chance of being appointed to a UK-registered vessel. (We note that if both brands were taken into account, contrary to Mr Moore's concession, the Claimant's chances of being appointed to a UK-registered vessel would be even lower.) Mr Moore argued that, in these circumstances, the Claimant was unable to discharge the burden of demonstrating that his appointment would have fallen within the territorial scope of the EqA.

98. An added complication was that one of the two UK-registered P&O Cruises vessels (the Britannia) sometimes sailed around the Caribbean. On those voyages, there was no point at which it entered UK territorial waters. If the Claimant had been successful and had been assigned on a fixed-term contract to one of the Britannia's Caribbean cruises, he would have been working wholly outside UK territorial waters for the duration of his appointment and would have had to rely on regulation 4 rather than regulation 3. This would have entailed showing that the employment relationship was located within Great Britain or retained a sufficiently close link with Great Britain. Mr Moore submitted that the Claimant's employment contract would have been with an offshore company incorporated in Bermuda and would have been governed by the law of Bermuda; in those circumstances, he said that the multifactorial test under regulation 2(2)(b) was not satisfied. The effect of this, he argued, was to reduce still further the Claimant's chances of being able to rely on the 2011 Regulations. On the basis that approximately half of the Britannia's voyages were Caribbean cruises, the Claimant's chance of obtaining an appointment that fell within the scope of the Regulations would be around 1.5 in seven. We do not consider it necessary to reach a conclusion on this point. Even if Mr Moore is correct (and we shall assume for these purposes that he is), it would not deprive us of jurisdiction for the reasons given below.

99. In considering Mr Moore's submissions on territorial jurisdiction, we have taken into account that the underlying purpose of Part 5 EqA is to protect individuals against discrimination in the context of work. We consider that the Act should be given a broad, inclusive interpretation to reflect that underlying objective. Ultimately, we were not persuaded that the 'balance of probabilities' approach was the correct one to take, nor that a 1.5 in seven chance of appointment to a post covered by the 2011 Regulations should lead us to the conclusion that the Regulations did not apply. In short, we do not accept that a job applicant must show that it is more likely than not that, if successful, they would have been appointed to a post that fell within the territorial scope of the EqA.

100. In this case, the Claimant had answered an advertisement that could have resulted in his appointment to serve on any one of seven vessels, assuming he was being assessed for the P&O Cruises brand (or otherwise, on any one of ten vessels across both brands). The fact that most of those appointments would have fallen outside the territorial scope of the EqA does not alter the position that at least one appointment, and possibly two, fell within its scope. In our view, the Claimant's job application should properly be viewed as an application for several available posts as an Entertainment Host. In so far as he was applying for a position on board the Iona or on one of the Britannia's Mediterranean cruises, he was covered by regulation 3 of the 2011 Regulations. That is because, were he to be successful, he would have been working partly within UK territorial waters on a UK-registered ship with its port of choice as Southampton.

101. We conclude that we have jurisdiction to determine the claims of direct disability discrimination and victimisation in so far as they relate to the Claimant's prospective employment on board the Iona or on one of the Britannia's Mediterranean cruises. On that basis, we will go on to determine the substantive claims.

Respondent's potential liability under section 39 or 55

102. We must then consider on what basis the Respondent could be potentially liable under the EqA for the acts of discrimination alleged by the Claimant. We are not deciding at this point whether the Respondent is liable; we are only considering whether the facts alleged by the Claimant are in principle capable of falling within the scope of the EqA.

103. We refer to the list of issues set out in EJ Gray's case management order, subject to the modification discussed under 'Claims and issues' above. The Claimant alleges that the Respondent discriminated against him or victimised him by (a) dismissing him, (b) withdrawing an offer of employment, or (c) failing to offer him a job. This last allegation is expressed in layperson's terms. It might be more aptly expressed as a failure to recommend the Claimant to FMSB for employment, but we take no issue with that: the crux of the Claimant's complaint was that he did not get the position.

104. The difficulty for the Claimant is that the Respondent's normal practice was not to employ crew members directly, but to recommend successful candidates to FMSB, who would decide whether to accept the recommendation. In the normal course of events, FMSB and not the Respondent would be the legal employer. Mr Moore nevertheless accepted that it was possible in principle for the Respondent, contrary to its usual practice, to make an offer of direct employment to the Claimant that was capable of acceptance. The Claimant relied on the automated email of 25 April 2022 as a job offer. On that basis, we conclude that the Claimant can in principle rely on section 39 EqA to argue that the Respondent discriminated against or victimised him by not offering him employment (section 39(1)(c) and (3)(c)); by dismissing him (section 39(2)(c) and (4)(c)); or by subjecting him to the detriment of withdrawing a job offer (section 39(2)(d) and (4)(d)).

105. In the alternative, we consider that the Respondent was acting as an employment service-provider under section 55 EqA in that it was providing the service of finding employment for the Claimant. As such, it potentially discriminated against or victimised the Claimant contrary to section 55(2) and (5) by not providing the service to him; by terminating the provision of the service to him; and/or by subjecting him to the detriment of not recommending him for employment by FMSB. If the Respondent was acting as an employment service-provider and not an employer, these matters are broadly equivalent to dismissal, withdrawal of a job offer, or failure to offer a job.

Direct disability discrimination

106. Turning to the substance of the Claimant's complaints, we consider first whether the Respondent directly discriminated against the Claimant because of his disability contrary to section 13 EqA. The Claimant relies on his diagnosis of bipolar disorder, and the Respondent accepts that this amounts to a disability for the purposes of the EqA.

107. What treatment was the Claimant subjected to for the purposes of his direct discrimination claim? With reference to the general practice adopted within the cruise ship industry, he says the automated email dated 25 April 2022 amounted to a firm job offer which he accepted. He alleges that the Respondent subsequently withdrew that job offer or, alternatively, dismissed him, and is therefore liable by virtue of section 39.

108. We disagree with that analysis. The automated email indicated (incorrectly, as it happened) that the Claimant was suitable but that no job was currently available and he would be contacted in due course. It was a holding email, not a job offer. It might reasonably have led the Claimant to believe that he had been placed in some sort of 'talent pool' pending identification of a suitable rotation, but we reject his submission that he was employed during such a period.

109. It is relevant that the Claimant had not been assigned to a vessel at this point, nor had the requisite pre-employment checks been completed. He was not being paid, and no terms had been supplied or agreed. There was no mention of any of the matters that one would normally expect to see in an offer of employment, such as the name of the vessel, the job title, the start date, the remuneration or the hours of work. Most of the salary details provided by the Claimant in his schedule of loss amounted, by his own admission, to estimates of his likely earnings with the Respondent based on the amounts generally paid within the industry. This reinforces the point that he had not received details of any remuneration package. There were various options given at the foot of the automated email, including the option to withdraw the job application or delete the candidate's profile, and we accept Mr Moore's submission that this is not the sort of information that one would normally expect to see in a job offer. But the crucial point is that the automated email did not contain sufficient details to enable the Claimant to accept the alleged job offer without clarification or negotiation; in fact, it contained no details at all.

110. We note that a formal offer of employment would in practice have come from FMSB, not from the Respondent. In legal terms, it would still have been theoretically possible for the Respondent to issue a job offer that was capable of acceptance by the Claimant, but that is not what happened here: the alleged offer was simply a holding email. In the circumstances, we consider that no job offer was made.

111. The Claimant says that the subsequent email from Miss Makin dated 9 June 2022 amounted to a dismissal. Because we have found there was no job offer, we do not accept that. The Claimant never received a job offer, and therefore there could be no withdrawal of such an offer. He was never employed by the Respondent, and therefore he could not be dismissed. Miss Makin's email informed the Claimant that he had been unsuccessful. This came as a shock to the Claimant because the earlier automated email had led him to believe that his performance at the casting day was judged to be satisfactory, but in legal terms it was not capable of amounting to either a dismissal or the withdrawal of a job offer.

112. With reference to our findings of fact, we consider that the relevant treatment in this case was the Respondent's failure to offer the Claimant a job – or, more accurately, to recommend him for employment with FMSB. In this respect, the Respondent was acting not as an employer under section 39 EqA but as an employment service-provider under section 55. We are satisfied that the Claimant was subjected to the detriment of not being recommended for employment. He might reasonably consider that he was placed at a disadvantage by the Respondent's treatment of him in this respect.

113. In failing to put the Claimant forward for employment, did the Respondent treat him less favourably than it would have treated others? The hypothetical comparator in this case is a person without bipolar disorder who shared the Claimant's abilities and skills, and who performed in a similar way to the Claimant at the casting day – in other words, a person who performed poorly on two out of the three 'culture essentials' questions; who repeatedly pushed for a more senior role; who came across as arrogant; and who was judged to be a potentially discordant and disruptive presence within the team. We conclude that a person without bipolar disorder who exhibited those characteristics would have been subject to the same detriment, and therefore that the Claimant was not treated less favourably. The onboard environment has the potential to become intense and pressurised, so it was appropriate that the Respondent had regard to the team dynamic and the need for harmonious working relationships.

114. A simpler way of approaching section 13, and the approach that Mr Moore advocated, is to ask ourselves whether the Claimant was treated less favourably because of his bipolar disorder. We conclude that he was not. The Claimant referred to his medical condition in the email to Ms Watkins dated 18 March 2022. Ms Watkins confirmed that it would not influence the Respondent's decision, and she did not disclose it to the selection panel. The panel learned of the Claimant's bipolar disorder for the first time when he raised it during the interview; there was no evidence to suggest that he had been in any way blocked or barred at an earlier stage because of his condition. Mrs Weeks has given clear, non-discriminatory reasons

for judging the Claimant to be unsuitable for the role, and we accept that those reasons reflect her genuine thought processes. In short, disability was not an effective cause of the Claimant's rejection.

115. There are features of the selection process that, regrettably, were not handled as they should have been. Instead of informing the Claimant soon after the selection day that he had not been successful, Mrs Weeks seized on the long timeframe he had given and used that as a reason to put his application on hold. She was frank in her evidence on this point, and she fully accepted that she should have done things differently. We have found that she put the Claimant's application on hold and failed to advise him that he had been judged to be unsuitable, not through any discriminatory motivation, but because she wanted to let him down gently and was afraid he would challenge rejection. The persistent nature of the Claimant's follow-up emails gave her an additional reason to be wary.

116. There were further failings on the part of the Respondent. The automated holding email that Mrs Weeks inadvertently caused to be sent to the Claimant on 25 April 2022 conveyed the message that he was considered to be a 'great fit' for the role, when in fact that was far from the case. This was simply a mistake; that email should not have been sent, and Mrs Weeks had no reason to believe that it would be. Miss Makin's rejection email of 9 June compounded the situation by misrepresenting the timing of the decision to reject the Claimant; this was done in an attempt to support Mrs Weeks and provide an account that was consistent with her earlier decision to put the application on hold. The Claimant's job application was handled in a clumsy manner, with delays along the way. Ultimately, however, we are satisfied by the Respondent's explanation, and we find that the Claimant was not discriminated against because he had bipolar disorder.

117. We have considered the possibility that the decision-makers in this case were subconsciously or unconsciously influenced by the Claimant's bipolar disorder. We bear in mind that discrimination of this nature is rarely overt. Because the judgements that were made about the Claimant at the selection interview were necessarily subjective, there was a risk of bias or discrimination creeping in. It is relevant, however, that the Respondent proactively addresses mental health issues through its mental health champions scheme and various training initiatives. In doing so, it seeks to create a positive culture in which staff feel able to talk openly about such issues and are aware of how to access support. The purpose is to remove the stigma of mental ill health and to counteract the type of unconscious discrimination that might otherwise arise. Indeed, Mrs Weeks herself is an accredited mental health champion. Against this backdrop, we do not consider that any of the decision-makers made stereotypical assumptions about people with bipolar disorder or other mental illnesses, nor that they held a negative mindset about such matters. They were not subconsciously or unconsciously influenced by the Claimant's mental health condition.

118. We have also considered the Claimant's argument that the reason for his rejection was inherently discriminatory in so far as it was based on the way he was perceived at the selection interview. He submitted that people with

bipolar disorder come across as arrogant; they have a tendency to 'big themselves up', and this is an intrinsic feature of the condition such that a judgement based on that characteristic necessarily amounts to direct discrimination. We were unable to accept that an arrogant demeanour is intrinsically or indissociably linked to bipolar disorder. There was no evidence to support this as a general observation about people who have the condition, and the Claimant produced no medical evidence as to the specific effects of the condition on him.

119. We have made a positive finding that the Claimant's disability was not a factor in his treatment and that the acts complained of were due to non-discriminatory considerations. This necessarily means that the burden of proof in section 136 EqA – even if it had transferred to the Respondent – has been discharged.

120. If we had approached this case by applying the burden of proof, we would have found that there were certain factual elements which, in the absence of any other explanation, could support an inference of discrimination. These are the statement in the automated email of 25 April 2022 that the Claimant would be a 'great fit' for CUK and that the Respondent would be in touch when a position became available, followed by the email dated 9 June 2022 advising the Claimant that his application had been unsuccessful. We consider that this apparent contradiction called for an explanation and was capable of shifting the burden of proof to the Respondent. We are equally satisfied, for the reasons given above, that the Respondent has provided a fully adequate explanation that has nothing whatsoever to do with the Claimant's bipolar disorder. In those circumstances, the burden of proof has been discharged.

Victimisation

121. Finally, we turn to the claim of victimisation. It is not disputed that the Claimant brought tribunal proceedings under the EqA against the Respondent's competitor, Royal Caribbean Cruise Line. That is the relevant 'protected act' for the purposes of section 27 EqA, as set out in the case management order. For the reasons discussed above in relation to direct disability discrimination, the Respondent did not dismiss the Claimant or withdraw an offer of employment. However, it did fail to offer him a job (or, in technical terms, to put him forward for employment with FMSB). In doing so, it was acting not as an employer under section 39 EqA but as an employment service-provider under section 55.

122. We are satisfied that the Claimant's rejection amounted to a detriment. We refer to the EHRC Code: *'Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage.'* A failure to recommend the Claimant for employment amounted to such a disadvantage.

123. The key question is whether the Claimant was subjected to that detriment because he had brought a claim against Royal Caribbean. The principles outlined above in the context of direct disability discrimination apply equally here. The question in determining the reason for the treatment is: what, consciously or subconsciously, caused the Respondent to subject

the Claimant to the detriment? What was the 'reason why' he received that treatment?

124. We have considered the circumstances in which knowledge of the tribunal claim arose. The Claimant referred to it in his email to Ms Watkins dated 18 March 2022, but Ms Watkins did not disclose this information to the selection panel. At the interview on 4 April, the Claimant made several further references to his ongoing tribunal claim. This was the first time that Mrs Weeks had heard about it, and she felt that the Claimant's repeated references to the claim were a thinly veiled threat that he would bring proceedings against the Respondent if he were unsuccessful. This was an important factor in her decision not to inform the Claimant immediately that he was judged to be unsuitable for the role. It made her cautious in the way in which she handled his rejection; it meant that she was inclined to defer telling him the outcome and instead to inform him that his application was on hold.

125. However, we consider that the decision to reject the Claimant was not caused, consciously or unconsciously, by the tribunal proceedings against Royal Caribbean. The fact that references to his tribunal claim were included among the results of a Google alert about Royal Caribbean in 2020 was purely coincidental; there is no evidence to suggest that the Respondent was monitoring the progress of his claim. Mrs Weeks and Mr Oliver decided that he was unsuitable in 2022 because of his poor performance on two of the 'culture essentials' questions; his pushing for a more senior role; his arrogant demeanour; and their conclusion that he would not be a cooperative and supportive member of the onboard team. We consider that their decision had nothing whatsoever to do with his tribunal claim against a competitor. Alternatively, if the burden of proof shifted to the Respondent as a result of the factors discussed in the context of the direct discrimination claim, we have no hesitation in concluding that the Respondent has discharged it by providing a non-discriminatory explanation.

126. The claims for direct disability discrimination and victimisation therefore fail and are dismissed.

Employment Judge Leverton
Date: 27 March 2023

Judgment & Reasons sent to the Parties: 28 March 2023

FOR THE TRIBUNAL OFFICE