Case No. 2307824/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr R Soares

Respondent: Civil Aviation Authority

Heard at: London South (By CVP)

On: 13,14 and 15 March 2023

Before: Employment Judge Self
Mrs S MacDonald
Mr G Henderson

Appearances

For the Claimant: In Person (with the assistance of a Portuguese interpreter)

For the Respondent: Miss J Laxton – Counsel

JUDGMENT

1. The Claim of direct race discrimination is not well founded and is dismissed.
2. The Claim of victimisation is not well founded and is dismissed.
3. The Respondent's application for costs is granted and the Claimant shall pay the Respondent the sum of **£3,000** within 14 days of the date of this Judgment.

WRITTEN REASONS

1. By a Claim Form dated 27 November 2020 the Claimant asserted that he had been rejected for a job role with the Respondent and that was either an act of direct race discrimination or an act of victimisation or both. The rejection had

taken place on 18 November 2020 and the Claimant had entered Early Conciliation on the same day and that process came to an end on 24 November 2020. The Claim has been lodged within the statutory time limit.

2. The Particulars of Claim read as follows:

> ***"My ex-employer Ofgem burnt me out to other government agencies. I applied to a role at the (Respondent). Ofgem (my ex-employer) is not even on my CV as I am taking them to court for race discrimination, bullying and harassment. During the interview process the HR of the (Respondent) mentioned the name of my ex-employer. I was really shocked my candidature to the point of Sharepoint Developer was refused because of this. AGAIN OFGEM IS NOT EVEN MENTIONED ON MY CV I GOT SHOCKED!! AGAIN I WAS DISCRIMINATED ON THE GROUNDS OF MY NATIONALITY AND FOR RAISING GRIEVANCES AND EMPLOYMENT TRIBUNAL CASE AGAINST OFGEM!! THIS IS ABSOLUTELY NOT ACCEPTABLE IF YOU DO NOT WANT FOREIGN PEOPLE HERE CLOSE 100% YOUR BORDER AND REMOVE EVERYBODY FROM HERE!!! I WAS AGAIN DISCRIMINATED AGAINST IN MY FACE!!!"***

3. On 3 March 2021 the Respondent lodged a detailed Response denying that they discriminated against or victimised the Claimant as he had alleged.

4. There was delay in getting the matter through the system with postponements of listed Case Management Hearings in June 2021 (insufficient Judicial resource) and in November 2021 (no interpreter). The matter finally came on before Employment Judge Burge who listed this final hearing and set down directions for it. She also refused an application to join Ofgem. There is an ongoing appeal in relation to that Order. The Employment Appeal Tribunal have rejected the appeal both on the sift and following hearing oral representations and the Claimant has appealed to the Court of Appeal.

5. The issues were identified as being a direct discrimination claim based upon the Claimant's Brazilian nationality and that his actual comparator was the person who got the role who was confirmed to be a British national. The detriment for the victimisation claim was the same as the alleged less favourable treatment i.e., the failure to appoint the Claimant as a Sharepoint Developer. The protected act for the victimisation claim was that the Claimant had brought a discrimination claim against his former employer Ofgem. The Claimant had brought a race discrimination claim against Ofgem at the London East Tribunal. It was accepted that that was a protected act.

6. It is clear that the Claimant holds strong views about the treatment he asserts he was subjected to. He has described the Respondent and their solicitor as being ***"racist criminals"*** in correspondence and has also asserted that a fraud is being

perpetrated by the Respondent and/or their solicitors in that they have lied about an individual being appointed to the role and that they have tampered and or created documents and have not been truthful about whether there is a recorded copy of his interview available to transcribe. The Claimant has made various complaints in correspondence about one Judge who made an interlocutory decision and asserted that justice is being obstructed and that his case will end up in the ***"Human Rights Court in Strasbourg."***

7. On 31 January 2023 EJ Dyal wrote to the Claimant as follows:

> ***The Claimant has indicated in his correspondence that he prefers to join the final hearing by CVP (i.e., video-link). I am content to agree that and since the Respondent's witnesses are already due to join the hearing by video-link I convert the final hearing to a fully remote hearing (i.e., a hearing entirely by video-link).***
>
> ***I note the Claimant's correspondence about recording the final hearing and the case law he has referred to (Kumar v MES Environmental Limited). In the employment tribunal there are some hearing centres where the proceedings are recorded by HMCTS. In such hearing centres, transcripts of the recordings can be made available - as Kumar says. However, at the moment in most employment tribunal hearing centres HMCTS do not record the proceedings. The official record of the proceedings is the judge's note of the hearing. There is no recording and there is accordingly no transcript. London South Employment tribunal falls into this category. Proceedings at London South Employment tribunal are not recorded by HMCTS.***
>
> ***I note that in his email of 13 January 2023, the Claimant states he will record the proceedings. He should be aware that, by s.9(1) of the Contempt of Court Act 1981, it is a contempt of court for someone to make their own recording of court or tribunal proceedings without permission to do so. You do not currently have permission to do so and therefore you must not do so unless you are given permission. Contempt of court is a serious matter that can result in a fine or imprisonment.***
>
> ***If you want permission to record the hearing then you need to make an application for permission to do so. If you make such an application, please: - - State why you want to record the proceedings;***
> ***- State how you propose to record the proceedings (there is no record function on the video-hearing platform the tribunal uses (CVP) to the best of my knowledge and understanding);***
> ***- State what you propose to do with the recording.***

8. The Claimant wrote an email on 1 February 2023 to say that he would need 21 days to access all the documents that he required to support his desire to have

the hearing recorded but indicated that ***"The recorded hearing will go to the court of appeal or even to Strasbourg if necessary if you do not apply the law and continue to help the respondent to hide crimes!"*** From that it would appear that the Claimant's rationale was that he required a transcript in case he subsequently formed an adverse view of the Tribunal's Judgment in this matter and then wanted to appeal.

9. On 15 February 2023 the Claimant sent a lengthy email that ran to some six pages and was headed, ***"HERE IS THE EMAIL TO SUPPORT THE REASON TO RECORDING THE FINAL HEARINGS 13 TO 15 MARCH 2022!"*** wherein he reiterated the need to send the transcript to other courts. The opening part of the email reads as follows:

> ***"Read all the atrocities your "judge" Mr Right allowed in the case. Is this individual a judge?. Read my bundles and statements sent to EAT (attached) Below another complaint to the court of appeal, grounds of appeal attached in this email with the skeleton of arguments! Is this Mr Wright a judge? This Mr Wright made this case move across the whole HM and tribunals services from EAT(Employment Appeal Tribunal) to the Court of Appeal and it is just one step to the court of Strasbourg because this Mr Wright allowed crimes in the case, allowed crimes of employment law, race discrimination and Equality Act 2010 be put aside to favour a criminal called Peter Olszewski. This court allowed crimes to be committed to me!! Please read what your court "allows". Your court allows crimes, dishonesty, tapering of evidence, forged documents, false allegations without a single document to prove it. Your court allows the breaches of SRA principles and code of conduct for solicitors. Your court ignore even the police and their directions! Is South London Employment Tribunals a court?".***

10. The email continued in a similar vein railing at the perceived criminality of the Respondent and the perceived incompetence of those who had previously had dealings with his claim at the Tribunal even asserting at one point that a judge had been bribed to postpone a case.

11. The Claimant went on to say ***"YOU CAN DISCHARGE ALL THEIR WITNESSES! I WILL NOT CROSS EXAMINE THEM AT ALL. I WILL ONLY BE DISCUSSING THE CRIMES OF (the Respondent's solicitor) AND WHY YOUR MR WRIGHT ALLOWED AND SUPPORTED THE CRIMES OF PETER OLSZEWSKI!***" and stated that he intended to record the hearing.

12. At the start of the hearing the Claimant was asked to make it clear any applications that he wished to make. That was necessary as the Claimant is a regular correspondent with the Employment Tribunal with many of those emails being in a similarly discursive mode as that outlined above. The Claimant did

raise certain issues at the outset but did not renew his application for the hearing to be recorded and, indeed, did not raise recording at all. Accordingly, that application was not dealt with.

13. The issue of recording was first raised by the Respondent in the afternoon and the Claimant immediately indicated that he had been recording the hearing up to that point and confirmed, when asked to stop recording, that he had done so. Whether he did or not is not known, but the Claimant was taken at his word. The Claimant was informed that the fact that the hearing was recorded could be deemed to be a contempt of court and that the facts would be reported to the Regional Judge and a process would follow from there. On Day 2 the Claimant alleged that he had been threatened with contempt of court. The Tribunal are satisfied that upon the Claimant's admission the Claimant was told what the next step would be and that such a course of action was a reasonable one to take in the circumstances so that the Claimant was fully informed.

14. The Tribunal were satisfied that the Claimant knew that he needed to get permission but recorded the hearing anyway because that was what he wanted to do.

15. It should be said that there were certain difficulties with documents at the start of this claim. The Tribunal had been supplied with a number of the Claimant's emails on Friday afternoon but were not supplied a bundle or witness statements and the pleadings were not on the electronic file. That was requested on Friday afternoon from the Tribunal administration but was not forthcoming. A request was made from the parties at the outset of the hearing itself and they were sent through but were initially not accessible and only became so sometime later in the morning. Just as the Claimant began to give his evidence he announced that he also had a bundle that he wanted to use and there was a further delay whilst that was provided.

16. Ultimately the Tribunal took into account the written witness statements of the Claimant, and Miss Summerfield, Mr Kruger and Mr de la Pole from the Respondent. There was a bundle from the Respondent in excess of 400 pages and the Claimant produced his own bundle of just under 150 pages, but most of the documents we were referred to therein were also in the Respondent's bundle. There were also documents submitted during the course of the hearing and we have taken account all documents to which our attention has been drawn by the parties.

17. Evidentially this case has taken an unusual course. The Claimant was cross examined for approximately 30 minutes before he announced that he believed that the issues and determination of his claims were so obvious he felt that the questioning of him was pointless and he was not prepared to answer any more

questions. It was pointed out to the Claimant that the questions asked had been up to that point relevant, in our view, and that if he refused to answer valid questions then the Tribunal would have to consider that refusal when taking into account its findings of fact. We noted that the Claimant had already expressed the view that the outcome was so obvious and the bad conduct of the respondent and their representatives was so clear and had been so appalling that the outcome of the case was obvious and therefore he had no intention of asking any of the Respondent's witnesses any questions. We were satisfied that the decision not to answer any questions was therefore consistent with what he had already communicated and we respected the decision that he had made having told him the consequence of his action. We are satisfied that had the Respondent continued putting their case to the Claimant he would have made no response to each question and we must therefore draw whatever conclusions are appropriate from his refusal to engage.

18. The decision not to ask any questions of the Respondent's witnesses meant that their evidence effectively went unchallenged. The Claimant was told that too. Ultimately it is a question for the Claimant how he wishes to conduct his case and so that decision was also respected. In reality due to the circumstances that pertained throughout the case which will be outlined below it is highly unlikely that the Claimant would have changed his mind even if directed to do so.

19. The Claimant's view was that his case was obvious and clearly set out in a number of emails which he had sent to the tribunal in the month or so leading up to the hearing on 15 February, 28 February, 6 March and 8 March 2023. Those emails criticised the Respondent's solicitors and the Respondent for a number of misdeeds. He told the Tribunal on a number of occasions that they were all that we needed to read. We explained to him the process that would need to be followed which was evidence on oath which could then be challenged by cross examination following which the parties would provide submissions and we would make a decision on all that we had read and heard. We were quite clear with the Claimant that the evidence we read and heard was what we would base our decision on.

20. It is not straightforward to summarise those emails but in broad terms they criticise the Respondent and the Respondent's solicitor for various "crimes" which include a failure to make proper disclosure, falsely stating that the Teams interview was not recorded, committing "fraud" and producing forged and inaccurate documents. The points made by the Claimant therein were repeated on a regular basis during the course of the hearing. From that, states the Claimant, it is clear to see why his claim should succeed and why there was no necessity to waste time by him asking any questions of the witnesses.

21. Throughout the hearing the Claimant was angry and hostile. This matter was dealt with by way of CVP and the Claimant spent a lot of the hearing very close to the screen gesticulating aggressively and raising his voice. The Claimant had

requested and had been provided with an interpreter (Portuguese) whom the Tribunal would like to thank very much for her attendance and ability in what was quite often difficult circumstances. At all times the interpreter was used according to the Claimant's wishes. By and large the interpreter would interpret from what the Employment Judge said and in 95% of the occasions the Claimant would respond in perfectly good understandable English. When it came to the limited cross examination the Claimant elected to listen and to answer in English with the understanding that the interpreter was available to assist. Closing submissions were conducted in English with the agreement of the Claimant. The Tribunal are quite satisfied that the hearing was conducted in a manner which the Claimant fully understood and could fully participate in.

22. The Tribunal are very aware of the stresses and strains that a litigant in person dealing with issues very close to their heart will have during a hearing. We have seen it play out on many occasions and often hearings are passionate and emotional. The Claimant's conduct, however, during the course of the hearing was unsatisfactory even taking that into account. In particular the Claimant appeared to have scant regard for direction given by the Tribunal and it appeared that his view of the tribunal system previously led him to be hostile to this Tribunal from the outset. In particular the Claimant constantly interrupted the person who was speaking as soon as he heard something with which he disagreed and would then speak animatedly at length not listening to direction from the tribunal that he would be able to have his say in due course. This was exacerbated by the use of the interpreter as the Employment Judge would pause so that the interpreter could interpret in bite size pieces at which point the Claimant would launch into a lengthy speech in opposition to the fraction that had been spoken. It should be said that most of the time he did not even wait for the translation.

23. The Claimant was told on numerous occasions that he would have his turn to respond to any point that he disagreed with but he was wholly unable to control himself and interrupted and spoke over individuals in a rude and disrespectful fashion consistently. At points when the Employment Judge was able to quieten the Claimant and when he was told that all would get a turn to speak their piece the Claimant's reaction was generally a rolling of the eyes and /or a theatrical wave of the arms. It was clear that the Claimant formed the view that it was for him to determine the process and that he had little or no regard for the Tribunal. This is also reflected in his decision to record the proceedings although he had been warned not to and when he knew that permission had not been given. On the second morning the Claimant's disregard for the Tribunal was such that he was placed on mute on a number of occasions because his behaviour was so disruptive. The hearing ended up being a constant battle to ensure that due process and a fair hearing was conducted.

24. Even making allowances for the pressures upon a litigant in person the Claimant was consistently rude and discourteous and his conduct of the hearing was scandalous and unreasonable.

25. In addition, an email exchange was brought to our attention that had taken place on the morning of the hearing. The Claimant had been sent a link for the hearing and replied asking what time the hearing was to start. The Respondent's solicitor was copied in. We are satisfied that in order to assist the Claimant and mindful that the Tribunal would be unlikely to reply by return to an email sent to the general London South address the Respondent's solicitor emailed the Claimant the start time and stated the Tribunal guidance for parties to be there 20 minutes in advance so they can be checked in.

26. The Claimant's response was to tell the Respondent's solicitor that he had said that he did not want to hear from him in the past and followed up by calling the solicitor a ***"son of a prostitute"*** and expressing the hope that either the solicitor or one of his family would get cancer. The Tribunal considered this again to be scandalous / abusive / unreasonable behaviour on the part of the Claimant in the extreme. There is absolutely no justification for such an offensive email to be sent. The Claimant was warned about his behaviour by the Tribunal and informed that such conduct could result in his Claim or part of it being struck-out and /or there being a costs order made against him. The Claimant made no attempt to apologise and showed no remorse and indeed in his closing sought to justify his conduct.

27. Reprehensible though the Claimant's email was the tribunal were satisfied that of itself it would not be grounds to strike out the Claim which needed to be heard on its merits. This email and the Claimant's conduct during the hearing did lead to the Claimant being warned about his behaviour and the ramifications of it. Fortunately, the Claimant's own decisions to cut short his cross examination and not to ask questions himself meant that the hearing was very short in terms of the evidence.

28. We now move on to our findings of fact and we remind ourselves before we do that notwithstanding the Claimant's egregious conduct at this hearing he still may have been the victim of race discrimination and / or victimisation which needs to be determined on the evidence before us.

29. The Facts

On 16 October 2020 the Respondent advertised internally and externally for a Developer to be part of their Software Engineering Team. The role was advertised externally as being up to £50,000 per annum plus benefits.

30. The Claimant applied for the role and submitted his CV. He identified himself on that document as Italian and the holder of an EU passport. He identified that he had been working since November 2018 for Microexcel and from a lay perspective it would appear that the Claimant had good experience in the area for which he was being recruited. His CV was not correct in that he had not been

working since November 2018 for Microexcel as he had been working for Ofgem from November 2019 until August 2020. He had deliberately left that out of his CV.

31. On 19 October 2020 the Claimant was shortlisted for an interview by Miss Summerfield upon reviewing the Claimant's CV against the job specification. That was reviewed by Mr Kruger who, on 23 October, also marked the Claimant to be shortlisted for a first stage interview.

32. On 27 October 2020 Miss Summerfield contacted the Claimant by email to inform him that the Respondent would like to hold a remote interview with the Claimant and left it to him to book an appropriate slot via the career portal. The Claimant enquired as to the salary and upon being reminded of it suggested that he would be prepared to have a call at 11 am the following day. Miss Summerfield stated that the Claimant would need to go through the portal to book the interview and that interviews would take place after next week as Mr Kruger was on leave. She offered to chat with the Claimant but made it clear that she was not technically minded.

33. On booking the interview and establishing that it would probably be a two stage process the Claimant wrote back as follows:

> ***"I will have to be honest it must be a quick turnaround I am planning to leave the country at the end of November if I do not find work. I would expect an offer by Friday 13 October. If it's not possible better cancel the interview"***

34. This email led Miss Summerfield to contact the Claimant by telephone. Pausing there we note that the Claimant's nationality had been set out as being Italian with an EU Passport. We are unable to detect any hostility directed towards the Claimant on account of the fact that he is a non-British national and despite knowing that the Respondent was still keen to interview somebody who appeared on paper at least to be experienced in the area they were looking to recruit into. (199-203).

35. Ms Summerfield states at paragraph 18 of her statement that:

> ***"At this time, I was working from home, as was my husband. My husband works in recruitment. On a work call I mentioned the Claimant's name which my husband over heard and afterwards my husband asked me if it was the same person who was working at Ofgem. I told my husband that I did not think it was the same person as a previous role with Ofgem was not mentioned on the Claimant's CV. After this I did not discuss the Claimant and / or Ofgem with my husband again."***

That is her explanation as to how the Claimant's former employment with Ofgem or the possibility that he had worked with Ofgem came to her attention. That evidence was not challenged in cross examination.

36. On 30 October 2020 Miss Summerfield sent an email to the Claimant asking if he could give her a call at 1430 that day (209). He did not respond and so she called him and he took the call. There is a level of agreement about what took place on the call. It is agreed that they discussed the Claimant potentially going back to Brazil and that he would need an offer by 13 November 2020 and it is further agreed that because of this Miss Summerfield undertook to see whether Mr Kruger could facilitate an earlier interview.

37. Miss Summerfield states that at that meeting that she:

> ***".. asked the Claimant if he had previously worked for Ofgem as I was curious about it and because I thought his past experience may be good given the Respondent's function as a regulator. The claimant seemed a little taken aback by me mentioning Ofgem as it was not on his CV though he did not confirm that he had previously worked for Ofgem or raise any complaint with me mentioning Ofgem. I consider that my husband had been thinking of another person when he mentioned someone with the same name as the Claimant having worked at Ofgem and therefore the Claimant and I simply moved on in our conversation."***

38. Just after the conversation Mr Kruger invited the Claimant to a first interview on that day and said that he fast tracked it because the Claimant appeared to be a good candidate on paper and he did not wish to lose the opportunity to interview the Claimant.

39. The Claimant was interviewed and notes were kept of the interview. We have received no evidence upon which we could infer that these notes are not true and accurate notes of Mr Kruger's assessment. The interview outcome was described as follows:

> ***"This is a retrospective summary. Rodolfo has a good knowledge about the SharePoint on Prem and SharePoint online platform. Rodolfo has developed solutions using PowerApps and PowerAutomate and has an overall good knowledge. Rodolfo lacks interpersonal skills when it comes to customer and with other people interactions. Rodolfo showed disinterest about the CAA in general and didn't ask any questions about the organisation. Despite that I would recommend moving Rodolfo forward to the Second stage interview."***

40. Miss Summerfield was asked by Mr Kruger to arrange a second stage interview with the Claimant and she did so for 10 November. She says that she did so in the knowledge that from the information she had received he needed to have an

answer by 13 November. There is no evidence to suggest her thought process was anything other than a genuine one. The other candidates were interviewed in the meantime.

41. The Claimant asserts that there was a further phone call between 2 and 4 November where the interview was confirmed. The Claimant's position is that Miss Summerfield said ***that "she found out that I worked for Ofgem and it could be good as they are a regulator government agency and (the Claimant) would know how it works"***. The Claimant states that he was ***"shocked, furious and devastated after the call***" and was unwell. The Claimant asserts that he got onto Ofgem straight away.

42. In fact, despite the difference in date when each party states that the call was made re Ofgem there seems to be agreement as to what was said i.e., that such experience was likely to be useful for the Claimant as opposed to a detriment because of the Regulator angle.

43. The interview took place on 10 November and again there was a written interview plan and all candidates were asked the same questions. Mr de la Pole's summary reads as follows:

> ***"R showed an overall good knowledge of SharePoint 2013 and SharePoint online. However, there was a lack in some areas where he needs to improve upon. R has no knowledge about two key questions SP 2013 search architecture and search implementation. Argued the question and did not admit his wrong answer. There also seems to be a discrepancy about technologies listed in his CV and his knowledge about them. When asked about the C# questions his answer was that he is a SharePoint developer and therefore has no knowledge about the subject although C# technologies are mentioned on his CV. R has a lack of stakeholder interaction and personal skills that are required and essential for this role. R did not reach the standard required for the role"***

44. Mr Kruger noted that in the course of the interview an issue arose where there was a disagreement about a certain technical issue and the Claimant was deemed to be argumentative and would not admit he was wrong. It was noted that there were elements where the Claimant did not meet the basic expectations, was unable to give any examples of stakeholder interactions and at times the Claimant showed signs of agitation and raised his voice from time to time.

45. From the Claimant's witness statement we note that the Claimant indicates that he accepts that there was a difference of opinion on a technical point and the Claimant is somewhat scathing of Mr Kruger's knowledge (para 7.3). This seems to tie in with the Respondent's account of the interview. For our purposes it does not matter who was right and who was wrong about the issue but it is clear that

the Respondent formed the view that the way the Claimant dealt with the issue in the interview was inappropriate. In any event the accounts of Mr de la Pole and Mr Kruger have not been challenged in cross examination at the Claimant's own election. Mr de la Pole sets out in some detail the deficiencies in the Claimant's performance at paragraph 15.1 to 15.12 of his statement and provides clear and cogent reasons why in his opinion the Claimant was not suitable summarised at paragraph 17 as ***"not demonstrating the necessary skillset competently and lacking the interpersonal skills essential for the role on account of the high level of stakeholder interaction required"***.

46. Mr Kruger reported back to Miss Summerfield negatively about the Claimant's candidature but no final decision at that point was made on account of other interviews being conducted. By 17 November however Mr Kruger was able to confirm that the Claimant could be notified of his rejection as he had seen other candidates which he could assess as already being better suited and Miss Summerfield wrote an email of rejection at 0913 on that day. At 1034 the Claimant responded:

> ***"Again you knew about Ofgem you told me that over the phone I got shocked. Ofgem is not even on my CV. I was bullied harassed and discriminated there. I know this because of Ofgem. Ofgem is not even mentioned on my CV and you knew I worked there. I will take this to employment tribunal. I was discriminated wide open there."***

47. At 1334 Miss Summerfield responded simply stating that the Claimant was not successful as he did not meet the hiring manager's criteria for the role. The Claimant replied:

> "***you will have to say that to the employment tribunals. I even did a demo and demonstrated a full presentation on Office 365 products. Your manager did not even know that hybrid search does not exist in SharePoint 2013. It's from 2013 onwards. I'm sorry you mentioned Ofgem it was not in my CV we will resolve it at employment tribunals I am opening a case this afternoon"***.

48. By return Miss Summerfield states that she is sorry that the Claimant felt that way but Ofgem has nothing to do with the decision to reject and it was how the Claimant had come across in interview. That did not assuage the Claimant's concerns.

49. On 18 November Mr Kruger wrote to the Claimant stating that he was aware how busy recruitment were and so was informing him that he had not been successful. Later that day the Claimant alleged to him that ***"based on what you heard of my ex-employer you discriminated against me"***. We note that the immediate allegations made by the Claimant were not that his rejection was race related but are all related to his belief that Ofgem had somehow tipped the

Respondent off and so that he had been victimised. Although his evidence to this Tribunal was brief that was very much his focus in his evidence.

50. The Claimant is forceful in his assessment within his statement describing Mr Kruger and others at the Respondent as being ***"criminals, bare faced liars and racists***" suggesting that they were perpetrating a ***"fraud and the obstruction of justice and that they should be jailed."***

51. Mr Kruger explained in his witness statement that until the Claimant told him that he had previously worked with Ofgem he was not aware of that fact. He explained that if he had have been aware that the Claimant had worked for another regulator then that would have been a positive and not a negative. We remind ourselves that the Claimant had left that employment out of his CV.

52. Similarly, Mr de la Pole states that he had no knowledge of the Claimant's previous employment with Ofgem and it follows that neither, on their evidence, had any knowledge that the Claimant had brought discrimination proceedings against Ofgem previously. Indeed there is no direct evidence before the Tribunal that Miss Summerfield would have known anything about such proceedings being issued.

53. The Respondent gave evidence that there were eleven candidates for the role of which ten were external candidates. The applicants were, apart from the Claimant, either from India or the UK. Miss Summerfield indicated that the CAA employs individuals from approximately 37 different nationalities, including Italian. She did not provide any information about whether any others with Brazilian heritage were employed and we will take it that there are none.

54. The strongest candidate ultimately elected to take another role and the next two candidates were unable to take up the role on account of work permit issues and the next candidate also withdrew from the process. Finally it was decided that the internal candidate who was more junior but had been doing well on the project, all be it at a lower level, was appointable and so they appointed him as a mid- level SharePoint Developer. Subsequently that individual left the business and the role had to be readvertised in 2021.

55. The Respondent takes issue with this and is very clear that all of the above is fabricated and nobody was appointed to any role. The Claimant considers that more documentation should have been provided by the Respondent to evidence the candidate who was successful. This is part of the fraud the Claimant states exists. He also prays in aid the fact that at the Case Management Hearing the Respondent's solicitor was not able to identify the nationality and identity of the successful candidate. There was an Order to provide the nationality of the successful candidate within 21 days (107). That information was provided on 4 February 2022 (British national).

56. The Claimant wanted the contract of employment, letter of hire and payslips of that individual because he was suspicious that information was not included in the Grounds of Resistance and because the job was readvertised not long afterwards. The Respondent was asked to comment on the Claimant's request for confirmation of the new hire and provided information which the Claimant still considered unsatisfactory along with an extract from the candidate's CV. A redacted offer letter was sent stating that the Developer would start in early January. That letter does not specifically state that it flows from this recruitment exercise but the Claimant did not ask any questions about the same and challenge the Respondent's witnesses on the document.

57. The Law

The relevant statutory provisions in the Equality Act 2010 are section 13, section 27 and section 136 and they read as follows (so far as relevant to this case):

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.

27 Victimisation

(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.

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.

58. For the direct discrimination claim the Claimant seeks to use the British national who got the job as his comparator. Of course, that rather runs against his primary case that nobody was given the job and that any suggestion that anybody did get the job is false and evidence of duplicitousness on the part of the Respondent and/or their solicitor. We will also consider whether a hypothetical comparator would have been treated less favourably.

59. Guidance on the burden of proof was given by the Court of Appeal **in Igen v Wong [2005] ICR 931**. This guidance has subsequently been approved by the Court of Appeal in **Madarassay v Nomura International plc [2007] ICR 867** and by the Supreme Court in **Hewage v Grampian Health Board [2012] ICR 1054**.

60. In a claim where there is no room for doubt, the burden of proof has nothing to offer where the employment tribunal is in a position to make positive findings on the evidence one way or the other.

61. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that the Claimant's treatment was because he was of Italian / Brazilian nationality

62. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference in status and detrimental treatment (see Madarassay at paragraph 54). In **Network Rail Infrastructure v Griffiths-Henry [2006] IRLR 865**, Elias J at paragraph 15 said that the mere fact that an unsuccessful candidate was a black woman and successful candidates were white men would be insufficient to be capable of leading to an inference of discrimination in the absence of a satisfactory non-discriminatory explanation. To shift the burden of proof a claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between the protected characteristic of the Claimant's ethnicity and the detrimental treatment, in the absence of a non-discriminatory explanation.

63. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the decision to reject the Claimant's application.

64. The burden of proof provisions also applies to the victimisation claim as well as the direct discrimination claim. In this Claim it has been agreed that the Claimant has done a protected act and did so when he lodged a Claim against Ofgem at the London East Employment Tribunal. That Claim was lodged on 2 July 2020 and the Response entered on 4 September 2020.

65. The Claimant will be successful in this claim if he demonstrates that he was subjected to the detriment of not being offered the role because he had raised an employment tribunal claim against Ofgem or the Respondent believed that he had raised an employment tribunal claim against them for discrimination. He would have to offer sufficient in order to move the burden of proof over to the Respondent and at that point it would be for them to demonstrate that the decision was for a non-discriminatory reason.

66. The Tribunal is obliged to consider the conscious or subconscious motivation of the decision makers not to offer him the role. It will require an examination of the decision maker's mental processes and if the necessary link between the detriment suffered and the protected act is established then the victimisation claim will succeed. There is no need to establish that the detriment was visited upon the Claimant solely because of the protected act, it must simply have a significant influence on the employer's decision making. Significant in this context means ***"an influence that is more than trivial".***

67. Conclusions

We start with the direct discrimination claim. The evidence is that we have an Italian / Brazilian national being rejected from a role and the Respondent asserting that a British national got the job. Following the Network Rail Infrastructure case above and the dicta of Elias J that would be insufficient (of itself) to shift the burden of proof. What other evidence has the Claimant provided or that we have had laid before us that is sufficient to shift the burden. The simple answer is that we have nothing other than the Claimant's assertion that it is so and in fact it is quite clear from everything he has said and written in this case that his primary contention is that he was rejected because of the Ofgem discrimination and he was victimised because of that.

68. The Respondent have produced their Equal Opportunities Policy which whilst laudable would not of itself prevent individuals from making decisions based on race. We accept that the Respondent employs a substantial range of nationalities including Italian but again whilst showing a multi-cultural workforce, that means little if a specific individual who is recruiting is determined to exclude a certain nationality or favours British candidates. Clearly the Respondent were keen to fill the role but required somebody who would meet the basic specifications having been considered at interview. It would have been open to the Respondent, who knew at all material times, of the Claimant's nationality to reject him at the initial stage if Miss Summerfield was holding any anti-Italian

views consciously or sub consciously. She did not reject him and we note that in actual fact it was she who drove the Claimant's application towards an interview by following up his initial interest, contacting him by telephone when he did not reply to her email and amending the timetable for his interview when he announced that he had a deadline before he was considering going back to Brazil. Had Miss Summerfield not contacted Mr Kruger in order to expedite the interview then the process would have come to an end. There was clearly an easy "out" for Miss Summerfield had she not wanted to put the claimant forward for the job and she did not take it. We consider this to be highly relevant evidence in support of the Respondent's case that they did not discriminate on racial grounds. It was the same for Mr Kruger. He had the CV and decided, notwithstanding the Claimant not being a British national, to progress his application to a first stage interview and indeed despite having some reservations putting him forward for a second stage interview. We have been offered no explanation as to why Mr Kruger would have acted in that way if he had either a conscious or a subconscious bias against an Italian / Brazilian / non-British individual. We find that Mr Kruger needed the post filled and was prepared to give the Claimant a chance to show whether the potential that appeared on his CV (along with his nationality) would be realised in interview.

69. The Claimant only permitted himself to be cross examined for a short period and eventually did confirm that there was no language used during the whole process that gave him any indication that his rejection was linked to his nationality. Indeed, his answer was that they "found out that I was prosecuting Ofgem" and that was why they did not offer him the role. That answer supports the point we made earlier about the Claimant whilst making an allegation of race discrimination actually focussed exclusively upon the victimisation claim. Eventually the Claimant stated that he was refusing to answer any more questions as it was useless and just burning up his time. The Claimant was told that inferences could be drawn from his refusal to be subjected to cross examination and that the Respondent's case would be taken as fully put and he would be recorded as refusing to answer that case. The Claimant was quite sure that cross examination of him was a waste of time because his case was so obviously correct.

70. We have not been able to find in the evidence in the statements or the bundle anything that would suggest that race played any part in the decision to not hire the Claimant. We have carefully considered the Claimant's statement and save for bald assertions of racism he provides no information as to why race would be a motivating factor for his rejection. In fact, the manner in which the application was handled would seem clear evidence that it was not. We unhesitatingly reject the Claimant's direct discrimination claim.

71. The victimisation claim is slightly different and we are able to understand why the Claimant might, at the very least, have a suspicion that he had been victimised.

Let us start with trying to establish the evidential building blocks that the Claimant would need to have to have at his disposal to establish his claim.

72. The Claimant's evidence is that Miss Summerfield between the first and second interview ***"said that she found out that I worked for Ofgem and it could be good as they are a regulator government agency"*** (Para 6.1 of Claimant's statement). Miss Summerfield states that she asked the Claimant on 30 October before the first interview had been arranged if he worked for Ofgem as her husband had overheard her talking about the Claimant and had asked her that question. Miss Summerfield said she doubted it as it was not on the Claimant's CV.

73. The Claimant refused to be challenged on his version of events and declined to challenge Miss Summerfield's account. We prefer the account of Miss Summerfield as to when this conversation took place and what was said. The Claimant stated that he was shocked and feeling unwell and had a panic attack following Ofgem being mentioned. The context is that he had applied for a job with a CV which had airbrushed Ofgem from his work history. More than that he was asserting that he had worked for another Company since November 2018 when in fact he had not. It is at least arguable that his panic / shock (if that is what he suffered) arose on account of the realisation that his CV was not wholly true and there was at least a prospect of that being discovered.

74. All the Claimant has, even on his own case, is that Miss Summerfield stated that she knew he had been working at Ofgem. There was no indication over the telephone that she was aware that he had brought a discrimination claim against Ofgem which is what would be required for her to be aware of the protected act.

75. Both parties agree that on the phone call Miss Summerfield put it forward as a positive thing for the Claimant's application as he would show experience working for a UK Regulator. We accept the evidence of Miss Summerfield, both because it was unchallenged but also because we accept that if she saw Ofgem as a negative thing and a reason not to hire the Claimant she would not have mentioned it at all to the Claimant.

76. We accept that Miss Summerfield found out that the Claimant may have worked for Ofgem from her husband by chance and was not informed that he had lodged a discrimination claim against Ofgem . Further

    a) We have no evidence that her husband knew anything about a discrimination claim having been lodged.
    b) Even if we did, Miss Summerfield's evidence is that she did not know or was not told that he had lodged a claim against Ofgem (we note there would be no public record of that fact at that time).
    c) We have seen a letter from Ofgem (provided during this litigation) in which they assert that they at no time communicated with the Respondent about

the Claimant at the material time. The author of that letter has not been called to give evidence on behalf of the Respondent but note that the Claimant elected not to cross examine anybody anyway. The Claimant did not apply for a witness order in any event.

77. Further we are satisfied that Miss Summerfield did what she could to further the Claimants application even after Ofgem had been mentioned by her husband. In any event she was not the decision maker. The passage of events would have to be as follows:

    a) Miss Summerfield's husband or Miss Summerfield by her own enquiry would have had to know or discover that the Claimant had brought a discrimination claim against Ofgem (no evidence).
    b) Miss Summerfield would have had to communicate that fact to Mr Kruger and Mr De la Pole (Denied by each of them and no evidence to support).
    c) Mr Kruger and Mr De la Pole would have had to be influenced by that fact when it came to rejecting the Claimant (Denied and no evidence to support).

78. The Respondent have provided clear and cogent reasons why they considered that despite some areas where the Claimant did meet their required specification there were substantial areas where he did not. There is substantial documentation about the interview process and the Claimant could not point to any specific failing in relation to the Respondent's policy. Whilst we were not referred to it by the parties we have borne in mind the relevant sections in The Code of Practice on Employment (2011) and consider that this recruitment exercise was reasonably and fairly conducted.

79. Messrs Kruger and de la Pole formed a view on the Claimant for the reasons they have exhaustively set out in their statement. These are clear and cogent account of why the Claimant did not meet the specifications required and was not subjected to any challenge.

80. We can only go on the evidence that we have been provided with and make our assessment on that. We do not consider that the evidence which has been provided by the Claimant is sufficient to pass the burden over to the Respondent in this case. In deference to the Respondent we will deal with the general points he makes:

    a) The Claimant points out that not all information now relied upon was in the Response. That is not unusual as the Response is taken at the start of the process and more information comes to hand as time goes on and we are unable to draw the adverse inferences from that which the Claimant requests.

    b) Whilst we would have expected the Respondent's solicitor to have known details about the appointed person for the role at the Case Management Hearing we understand that clients are not always at such hearings and the

taking of instructions is an imprecise art. The information was furnished soon afterwards as ordered and we are unable to agree with the Claimant that the same is nefarious in any way.

c) We accept that there was an appointment to the role, from the evidence of Mr Kruger which we accept and was not challenged in cross examination. The recruitment process did not yield an acceptable quality candidate for the Senior role and so there was a compromise with an individual going in at a more junior level on promotion. We acknowledge that this individual was less experienced and also accept that the part of his CV disclosed takes matters little further but we do not need to see his contract of employment and pay slips to prove his appointment. Mr Kruger has given a clear and cogent statement which has not been challenged in cross examination as to the difficulties and compromises that had to be made and we can find nothing to support the Claimant's position by the fact that the individual left shortly afterwards and the position was advertised again. That does not seem to be an unusual circumstance and certainly not proof as the Claimant suggests that nobody was hired.

d) We do not accept that there is any evidence that documents have not been disclosed. The Claimant's interview itself would have been of limited assistance to us as we would not have had the technical expertise to understand one way or the other as to the credibility of the Claimant's answers.

e) We reiterate that there is no evidence to support the Claimant's assertion that Miss Summerfield or her husband knew about the East London Tribunal at the material time.

f) We are unable to find any malpractice on the part of the Respondent or their solicitors. We do not accept that we have any evidence from which we could form a view that any documents have been forged or hidden. The Claimant asserts fraud and obstruction of justice and calls any individual who he considers has wronged him a criminal and a racist. With respect just because the Claimant asserts it does not mean it is so. We do not accept that a letter headed without prejudice save as to costs is an unreasonable position to take in litigation nor do we think it unreasonable for the Respondent to make clear the issues that might arise if permission to give evidence from a foreign state are not complied with.

g) The Claimant has made a steady stream of allegations against the tribunal and in particular the Employment Judge. The Claimant has alleged that he has been threatened with contempt of court proceedings. He has not. He has, however, been informed that, following his admission that he had recorded the proceedings without permission when there had been a warning

not to do so by EJ Dyal, he would be reported to the Regional Judge for that act. Matters will proceed from there.

h) The Claimant before his closing described the Tribunal as a ***"Chamber of crimes"*** and described the Tribunal as being ***"cowardly and shameless"***. He has also accused the Employment Judge of being racist on more than one occasion without explaining the basis for that view. The Tribunal have simply gone about their business in an even-handed way, seeking at all times to comply with the overriding objective in difficult circumstances brought about by the Claimant's conduct.

i) The Claimant has expressed the view that he will look forward to prosecuting the Employment Judge in Strasbourg and that he intends to bring a civil claim against the Tribunal. He is, of course, free to take such steps as he deems appropriate.

81. In conclusion we are satisfied that the burden does not shift on either ground of claim but if it does the Respondent has amply demonstrated a non-discriminatory reason for not appointing the Claimant. These claims are not well-founded and are dismissed.

82. The preceding paragraphs were, subject to relatively minor changes when perfecting these written reasons, read to the parties as an Oral Judgment. Mr Soares upon hearing the Judgment immediately indicated that he was going to appeal, that the Judgment was ridiculous and the Tribunal were ***"hiding crimes"***. Those are the key points of what can only be described as a repetitive rant. The Tribunal took the indication that the Claimant wished to appeal as being a request for written reasons.

83. The Respondent indicated that it wished to make an application for costs pursuant to Rule 76 (1) (a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations, Schedule 1 which reads as follows:

76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) ***a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted***.

84. The Respondent asserted that the Claimant had acted in a disruptive, abusive and an unreasonable manner in his conduct of all or some or all of the proceedings. The Respondent prayed in their aid various findings that the Tribunal have recorded earlier in this Judgment above and pointed out that towards the end of the hearing the Employment Judge had to resort to muting the

Claimant when he failed to listen to requests from the Tribunal not to interrupt and to allow others to speak. The Claimant had to be muted whilst Judgment was being given because, despite being requested to make comments / representations at the end of the Judgment at the first point of disagreement the Claimant started to speak and was therefore placed on mute. It was considered that that was the only way that Judgment, which was important to all parties could be delivered in a manner that could be understood and a note made. The Respondent also referred to the offensive email sent to the Respondent's solicitor expressing the desire for harm to come to him and/or his family for which no apology had been tendered.

85. The Claimant was given an opportunity to respond and at the outset I indicated that before he made any representations about the application for costs it may be helpful for him to tell the Tribunal something about his means as under the Rules which governed such applications (Rule 84), the Tribunal may take into account his means and ability to pay when deciding whether to make a costs order. This was by way of a simple reminder as it was considered the Claimant would not be aware of that provision.

86. The Claimant was able to tell the Tribunal that he was not in work and that he owned no property but then angrily told the Employment Judge whilst gesticulating at the screen:

"I don't give a fuck. You can fuck off. You are the son of a prostitute. I don't care. Go to hell and fuck off."

That is the note of the words used on the Employment Judge's notes and whilst accurate in themselves do not necessarily record every use of the word ***"fuck"*** uttered at that point in time.

87. The Claimant was muted at that point and after a short break when it was hoped, if not expected, that the Claimant would calm down, he was asked if he had any further representations to make in opposition to the costs application and he responded again angrily that the Employment Judge or the Tribunal as a whole had directly discriminated against him and he indicated that he considered that the Employment Judge was a ***"criminal racist"*** and that he had proved it.

88. Consideration of a costs order is a two-stage process. The first is a consideration of whether or not the threshold for a costs order is met and then the second involves a further consideration as to whether notwithstanding the threshold being met should costs still be ordered. We are also conscious that costs in this particular jurisdiction is the exception not the rule.

89. For the reasons set out within this order we do consider that the Claimant's conduct has been disruptive, unreasonable and abusive. We have made many findings of his conduct at this hearing and consider that with those findings the

threshold is met. There are occasions in other cases where individuals step over the mark and/or their conduct falls below an acceptable standard for a relatively short period but the Claimant consistently refused to take instruction, interrupted consistently and was rude and offensive. His conduct was such that the threshold was clearly passed.

90. The Tribunal have considered whether we should exercise our discretion so as to still not order costs. The Claimant's expletive laden representations as to why we should exercise our discretion in his favour served to confirm our belief that such behaviour in the Tribunal is wholly unacceptable and is completely at odds with the overriding objective and is required to be identified and dealt with according to the Rules available.

91. Although we have not been asked to do so by the Claimant we have taken into account the stress of running one's own case and the disappointment when a different outcome is arrived at to the one held by a party, but in reality that does nothing to mitigate the effect of the Claimant's conduct during this hearing which as we have said did not serve the overriding objective at all. We are satisfied that it is entirely proper for us to exercise our discretion to make an award of costs and we consider that the Respondent's suggestion of an award of £3,000 is a reasonable sum to award to mark the Claimant's behaviour in light of the potential earnings the Claimant could make.

92. We have noted that the Claimant states that he has no funds at the current time but we note that he was was seeking a £50,000 per annum role and that is the potential he could earn as and when he gains other work. In any event we consider that this is a case where the Claimant's conduct has been so egregious that a costs award should still be made and that the sum of £3,000 is, in fact, relatively modest.

93. Perhaps unsurprisingly once told of the costs order against him the Claimant placed himself again close to the camera, made an offensive gesture with his middle finger and stated, **"Fuck You, you son of a prostitute…."**. Whilst it was clear that the Claimant had more to say the Employment Judge formed the view that as proceedings had ended and it was unlikely that the Claimant was going to do anything other than abuse him / the tribunal a decision was taken to disconnect the Claimant and after thanking the interpreter for her efforts the hearing was concluded. In the period since the Respondent has continued to send highly offensive emails to the Tribunal.

Employment Judge Self
20 April 2023