EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Miss S Messi	**v**	Kao (UK) Limited (1) Mr L Joergensen (2)

Heard at: Central London Employment Tribunal (via CVP) On: 17-18 January 2024

Before: Employment Judge Norris, Mr P Alleyne and Mr A Adolphus

Representation:
Claimant – In person (part)
Respondents – Mr K Wilson, Counsel

WRITTEN REASONS

1. Background

The Claimant is a woman of black African ethnicity. Following an interview with the Second Respondent which took place on 2 June 2023, the Respondents informed the Claimant that she had not been appointed to the role of Travel and Expenses Specialist with the First Respondent. The Claimant brings a claim of direct race discrimination or, in the alternative, race-related harassment.

2. The proceedings

2.1 Early Conciliation in this matter took place between 4 and 17 July 2023 and the Claimant submitted a claim on 22 July 2023, with the Respondent lodging its response on 6 September 2023.

2.2 The matter came before Employment Judge Joffe on 9 October 2023 for a Preliminary Hearing (Case Management) (PHCM). She listed the matter for two days, 17 and 18 January 2024, before a full panel, to be conducted by CVP, and made directions to progress to that Hearing. Her written case management summary and orders were sent by email to the parties that afternoon.

3. The Hearing

3.1 <u>The Claimant's applications to postpone</u>

3.1.1 On 16 January 2024, i.e. the day before the Hearing was due to start, the Claimant applied for a postponement of the Hearing on the grounds that the bundle was not agreed and a fair hearing was not possible. That application

was opposed by the Respondents and it was refused by REJ Freer that afternoon.

3.1.2 On 17 January 2024, i.e. the first morning of the full Hearing, the Claimant contacted the tribunal by email to say that she had been having chest pains and a panic attack and further that she had been unable to log on to the online platform. At 09.52, she emailed to say that she had an emergency appointment with her GP at 10:30 AM and that she was still unable to log in.

3.1.3 The panel had already convened in Chambers when the Tribunal Clerk received this email from the Claimant. The Respondents and their representative, Mr Wilson of counsel, were brought into the CVP room to explain that the panel had decided to adjourn the Hearing until 11.30 to give the Claimant time to attend her GP appointment and that at this stage no decision had been made as to what would happen thereafter. The panel had already decided it would require around an hour to read into the papers fully and it proposed to use this adjournment to do so.

3.1.4 At 10.52, the Claimant forwarded to the Clerk a statement of fitness for work, apparently from her GP in Gravesend. The document said that the GP had assessed the Claimant on 17 January 2024 and described her conditions as "panic episode/anxiety attack". The GP had not ticked to say that the Claimant was not fit for work or that she might be fit for work with any of the four options on the form (phased return, altered hours, amended duties or workplace adaptations). He had only written under the heading "Comments", "*Anxiety attack secondary to stress of attending tribunal hearing*". He said that this would be the case for one week and that he would need to assess the Claimant again at the end of that period.

3.1.5 The Claimant's own covering email said that she would be unable to attend the Hearing due to her anxiety attack. The panel directed that the Claimant be instructed to attend the Hearing at 11.30 to make any appropriate application to adjourn the Hearing and so that the Respondent could make any representations it wished in response.

3.1.6 Shortly after 11.30, the Hearing duly reconvened. The Respondents were in full attendance and the Claimant was present by phone. EJ Norris drew the Claimant's attention to the Presidential Guidance on seeking adjournments, also asking the Claimant some questions about the medical condition on which she relied. The Claimant explained that she was not yet back at home and that she was going to fill a prescription which she said had been sent to a chemist half an hour's travel away.

3.1.7 The Claimant repeated that she could not attend the Hearing because she was "not feeling well". She had told her GP that she was not well enough, but she had not been aware that he had to say she was not fit to attend. She said it would take her an hour and a half to get back home because she had to get her prescription and have other tests. The Claimant was asked what other tests she had to have but refused to disclose this, saying it was a personal matter, although she later confirmed she had to have blood tests which were unrelated

to her anxiety condition. The panel accordingly did not take those into account in considering the Claimant's postponement application.

3.1.8 So far as the prescription was concerned, the Claimant said that she had started taking sertraline about a month before the Hearing and that her current dosage was 10 mg per day. The GP had however prescribed a higher dosage, although the Claimant was unable to say what that dosage was.

3.1.9 Mr Wilson for the Respondents objected to the application to postpone the Hearing and indicated that he would have only 15 to 20 minutes' questioning for the Claimant in cross-examination. Both parties had already exchanged and supplied written submissions to the tribunal.

3.1.10 The Hearing was adjourned until 12.35 for the panel to consider the Claimant's application. The panel took into account the Presidential Guidance, the authorities, the Tribunal's own Rules of Procedure and the submissions made by the parties. It refused the Claimant's application for the following reasons:

a) Pursuant to Rule 30A(2)(c), for an application made within seven days of the start of the Hearing, exceptional circumstances have to be shown.

b) The Presidential Guidance gives an example of where a party is unable for medical reasons to attend the Hearing. It observes that all medical certificates and supporting medical evidence should be provided, in addition to an explanation of the nature of the health condition concerned. It notes that where medical evidence is supplied, it should include a statement from the medical practitioner that in their opinion, the party is unfit to attend the Hearing, the prognosis of the condition and an indication of when that state of affairs may cease.

c) In this case, the panel considered that the Claimant had not shown "exceptional circumstances". The medical evidence fell well short of meeting the desired standards set out in the Presidential Guidance. The document provided by the Claimant did not say that she was unfit to attend work, much less to attend, from home, a hearing for which all parties appeared to have prepared. It did not indicate, if the Claimant <u>was</u> unfit to attend, when she would likely be fit to do so. Critically, in the panel's view, it said that the Claimant's anxiety attack was secondary to the stress of attending a tribunal hearing.

d) The Claimant had said that she was unaware of the Presidential Guidance or the requirement to give full medical evidence and had simply attended because she had been told, via the Clerk, to do so if she wished to make an application. It must however be noted that in other Employment Tribunal claims in which the Claimant has again been representing herself, she has previously made applications to postpone hearings, some of which have been final "merits" hearings, while others have been hearings for interim relief. We noted that one such was on 23 November 2021, before EJ McNeill QC sitting at Watford. Her judgment was in the bundle before us. The Claimant had applied for a

postponement in that case too, one of the grounds again being her mental health. EJ McNeill expressly referred, in refusing the postponement, to rule 30A and the need to show "exceptional circumstances", and observed that the Respondents in that case had "*pointed out that the Claimant had provided no medical evidence confirming her state of health or why she could not attend a hearing, contrary to the Presidential Guidance on seeking postponements*".

e) The panel made enquiries during the adjournment and established that the Hearing in this case could not be relisted before the end of March or beginning of April. For reasons to which we return below, we did not consider that the quality of the evidence would be adversely affected to any great extent by such a comparatively short delay. However, of significant concern was the fact that the tribunal could have no confidence at all that the situation would improve if the case was adjourned and relisted.

f) Indeed, the Respondents had also drawn the panel's attention to another case, this one a final hearing heard on 4 March 2021 by the London Central Employment Tribunal (Employment Judge Goodman sitting with Members), brought by the same Claimant against Pret a Manger (Europe) Ltd. That claim was also one of race discrimination following a job interview in which the Claimant was unsuccessful. Again, the judgment, with reasons, was in the bundle before us.

g) The final Hearing of that claim had been delayed from July 2020 by COVID restrictions, but the Claimant had also applied for the Hearing to be postponed on the grounds of her mental health. She had supplied a GP fit note which on that occasion said she was unfit for work by reason of anxiety and depression, but her application to postpone had been refused by Employment Judge James on the basis that while the Claimant might be unfit for work, she might be fit to participate in a Hearing from her own home. Her GP was apparently not prepared to provide a further fit note.

h) On that occasion also the Claimant was invited to join the Hearing to make her postponement application and again, she did so. The Claimant told EJ Goodman that she had sciatica which was a disability and later added that she had depression. She said she had been prescribed sertraline and takes co-codamol for her back pain. She told EJ Goodman that her condition was likely to last until her sick note ran out, which was the end of March 2021. The application to postpone was refused and the Claimant left the Hearing saying to EJ Goodman that she was going to appeal to the Employment Appeal Tribunal. The Hearing proceeded in the Claimant's absence.

i) It seems to us that we were in a remarkably similar situation in this case, although save in relation to the Claimant's applications for postponements, we have been careful not to take into account the

background to or decisions of other tribunals in the other claims brought by this Claimant against different Respondents as they are not relevant to the issues in this case.

j) We accepted that the Claimant was genuine in saying before us that she was experiencing anxiety and stress as a result of the pending Hearing, but we did not accept that it was of an order that would prevent her from participating in it. We were mindful that Article 6 of the ECHR applies to all parties to litigation, not just to claimants, and that in this case there was the additional consideration of the named individual second Respondent. It was his evidence that was critical to the decision we had to make, namely, why he decided not to appoint the Claimant.

k) We did not consider that the Claimant would be unable by reason of her mental health to participate fully in the Hearing before us; and further, we were not persuaded that the situation would be any different if we postponed it by six to eight weeks. The condition itself appears to recur when the Claimant approaches a critical hearing in one of her cases, and, on the evidence, that has often been so whether or not she is taking medication aimed at improving her mental health.

l) If the Claimant has been once again taking sertraline at a low dosage (there was no supporting evidence of that claim) but is not deriving any benefit from it, there was similarly no confirmation before us from a clinician to suggest that that would be improved by an increased dosage. Indeed, depending on the level of the increase, we considered that the Claimant's ability to participate in a future hearing might in fact be impaired, as we are aware from our experience as a Tribunal panel that common side effects of sertraline include dizziness, sickness, headaches and feeling sleepy, tired or weak. Whatever the position was likely to be, the very limited medical evidence was not such as to give us any comfort that it would be improved by a delay in conducting the Hearing.

3.2 <u>Claimant's non-attendance</u>

3.2.1 We gave our decision on the application, to which the Claimant immediately replied that she would not be participating further in the Hearing and intended to appeal our decision. Nonetheless, she was encouraged to continue on the basis that cross-examination of her would be limited to the 15 to 20 minutes indicated previously by Mr Wilson; breaks could be taken during that period if required and a break would be taken after her evidence and before she started cross-examining the Second Respondent.

3.2.2 EJ Norris also invited the Claimant, who said she had prepared cross examination questions for the Second Respondent, to email those to the tribunal if she decided not to attend, so that the Second Respondent could be asked to address them in his oral evidence.

3.2.3 In light of the fact that the Claimant was still not at home, the panel indicated that we would not start the Hearing until 14.00. We were also mindful of the fact that the Claimant had been unable to join the Hearing by CVP in the morning. It was suggested that she should download a different browser such as Safari or Microsoft Edge, i.e. not Google Chrome, and attempt to join using that.

3.2.4 We took an extended lunch break and reconvened at 2 PM. The Claimant had not sent in any emailed questions but had messaged the Clerk to say that she had tried to join using Microsoft Edge and Teams and still could not connect to the CVP platform. She joined once more by phone, though again without video facilities.

3.2.5 EJ Norris explained that there were three possibilities. The first was that the Claimant join by audio only using her phone. The Claimant asked how such a hearing could be fair, given that she would be unable to see the other participants.

3.2.6 EJ Norris then explained further that the other two possibilities were that the Claimant use her phone as a screen so that she could see and be seen by the other participants, or that the Hearing could be reconvened on Microsoft Teams to which the parties would need to be invited. She suggested that the Claimant try first rejoining using the audio and video facilities on her phone rather than her laptop and talked the Claimant through the joining process.

3.2.7 The Claimant claimed that she would not be able to join by Teams because her device automatically records such meetings and she had been warned at the outset of the Hearing that she must not do that. EJ Norris suggested this would be something to do with the device settings and was not automatic, i.e. it could be overridden.

3.2.8 The Claimant left the Hearing at 14:22 hours and messaged the Clerk to say that she had encountered the same problem in joining with her phone as she had with her laptop. She did not, however, rejoin the Hearing thereafter. The panel waited until 14:36 hours to give the Claimant the opportunity to rejoin by phone and the Clerk emailed and phoned her to tell her to do so. The Claimant did not pick up the phone, so the Clerk left a message. There continued to be no response from the Claimant. The Hearing eventually started in her absence at 14:40 hours.

3.2.9 Again for this purpose only, we have had regard to the Claimant's behaviour in previous hearings. At a final hearing on 13 July 2022 before EJ Hyams sitting at Watford, for which the Judgment was in the bundle, the Claimant did not attend but shortly before the start of the Hearing, she emailed the Tribunal to say she was not able to join on her phone. EJ Hyams noted that then, as in the Hearing before us, the Claimant had been encouraged to make attempts to test her connection in advance of the Hearing and had access to the helpline whose phone number is set out in the standard correspondence sent out in connection with remote hearings. We were not persuaded that the Claimant was prevented from attending by difficulties with the technology, rather that she had chosen not to attend once her application to postpone the Hearing had been rejected.

3.2.10 We heard oral evidence from the second Respondent on affirmation. He said he wished to rely on the statement that he had prepared in advance (which the Claimant had seen). He was asked some questions in chief and then by the panel either side of an adjournment, before being briefly re-examined by his Counsel.

3.2.11 The panel heard the Respondents' submissions and then adjourned the hearing until day two when it proposed to give its decision. The parties were informed that they should join at 12.30 so that they could hear the decision and arrangements could be made for a remedy hearing, if the Claimant succeeded in whole or in part.

4. Evidence

4.1 The Tribunal had before it a bundle of 303 pages, in addition to the witness statements from the Claimant and the Second Respondent which totalled ten pages.

4.2 Transcript

4.2.1 One of the items in the bundle was a partial transcript of the Claimant's interview with the Second Respondent on 2 June 2023. This transcript was prepared by a trainee solicitor at the Respondents' representatives' firm who, we were told, had listened to a sound file of a recording made covertly by the Claimant during that interview.

4.2.2 EJ Joffe's directions had included that lists and copy documents were to be exchanged by 20 November 2023 and that the parties were to agree a bundle or file of documents for the Tribunal by 4 December 2023, which the First Respondent was to compile. The parties were also to try to agree the transcript of the covert recording that the Claimant had made of her interview.

4.2.3 Although we had a lot of correspondence between the parties in the Tribunal bundle, we did not have any that related to the transcript. In the Claimant's absence, we asked about this, and Mr Wilson said that there had indeed been correspondence about it, the Claimant having indicated in writing that she did not agree the transcript that been prepared. However, the Respondents had been unable to identify whether the Claimant was arguing that there had been an error (or more than one), or an omission (or more than one) or whether there were things in the transcript that did not appear in the recording. The Claimant has not addressed any specific errors in her witness statement. Therefore we have taken the contents of the transcript into account in our deliberations.

4.3 The interview process

4.3.1 In making her allegations, the Claimant appears to be relying on the feedback she received when she made a data subject access request after being told her application for the role with the First Respondent had been unsuccessful. The witness statements, evidence in the bundle and feedback form for the Claimant show, and we find, that:

a) The First Respondent advertised on 26 April 2023 for a Travel and Expenses Specialist on a nine to twelve-month fixed-term contract.

b) The initial application review was carried out by the Second Respondent, the hiring manager to whom the successful candidate was to report. He is the Director, Digital Transformation Office and Business Services EMEA, based in the Netherlands, and he is a Danish national. His recommendation at that stage was to progress the Claimant's application.

c) The Claimant was then interviewed over the phone by a recruiter, Ms Ellie Firth, whose overall recommendation was a "*Strong Yes*". There then followed the interview with the Second Respondent, at which point his recommendation was "*No*". The Second Respondent also interviewed three other candidates, of whom one was successful.

d) We did not have the full or a precise range of scores that were used to evaluate the candidates, but we were told by the Second Respondent that a score of between one and five is applied, as indicated by a star (five, or "Strong Yes"), a "thumbs up" (four or "Yes"), a dash in a circle (three or "neutral"), or a "thumbs down" (two or "no"). We did not see any score that might have indicated a one, or what the icon might be for that.

e) The "key take aways" from Ms Firth's interview with the Claimant according to the scorecard were that the Claimant scored four out of five for the skill set for the role, her industry/category knowledge, her required spoken language ability, her culture fit with the First Respondent and communication.

f) The "key take aways" from the Second Respondent's interview with the Claimant were that she was a "*Good stable resource, good energy but need a bit of a push in right direction. Together with the two other team members which isn't active at all it wont work* [sic]". His feedback on her experience was again that she is a "*good stable resource*" to which he added "*which is willing to learn. Have relevant experience but lacking more advanced tech like vlookup in excel. Light on process improvement. Based at London office*".

g) He scored her skills as follows:

- Skill set for the role, required IT/System knowledge and required spoken language ability – Thumbs up, or four out of five.
- To the "required spoken language ability" skill he added, "*French accent which might be challenging for non-English native or experienced English speaking people*".
- Industry/category knowledge – Star, or five out of five.

h) He scored her personality traits as follows:

- Communication, teamwork and adaptability – Thumbs up or four out of five.
- Kao culture fit – star or five out of five.
- Leadership – line in circle (neutral) or three out of five. To this he added "*Not a leader, perfect number 2*".

i) The transcript shows that the Second Respondent asked the Claimant in the interview about her experience and what attracted her to the position. In a long answer to the first part of that question, the Claimant said, "*And I also speak French*…". Towards the end of the interview, the Second Respondent appears to have picked up on this, saying, "*And you said English and French, yeah. We have an office in France but it's a relatively small business what we have. We only have 10 people or something in France, but that's limited. Our main market is the UK being one of them and also Germany and the Netherlands is the third biggest country what we have*".

j) Later on the day of the interview, the Second Respondent emailed Ms Firth saying of the Claimant "*I meet with Sandra today, she is a good candidate but wont work with rest of the team (I need someone who can take the lead*)" [sic].

4.4 <u>The successful candidate's application</u>

4.4.1 The scorecard for the successful candidate shows that she was given "thumbs up"/four out of five at each stage of the process. Again, her initial application review and second stage interview were conducted by the Second Respondent while Ms Firth had conducted the first stage interview.

4.4.2 After the initial review, the Second Respondent has written "*like the customer support experience. Not sure if there is any Fleet or Concur experience?*"

4.4.3 Ms Firth scored this candidate as a thumbs up/four out of five for the skill set for the role, her industry/category knowledge, her required spoken language ability and communication – the same score as the Claimant – but for her culture fit with the First Respondent she scored a star or five out of five which is one mark higher than the Claimant.

4.4.4 When the Second Respondent interviewed the successful candidate, he set out the following feedback:

"Good experience in travel, very handson and focus on customer service. Less experience in "back end function" like expense handling and admin task. Looking for opportunity to develop more in analytic and expense area. Interested in improving processes like developing training program for end users. Mixed knowledge of systems, will require some training in systems but knowing complex systems like Sabre and Amadeus it should not be an issue".

4.4.5 He scored her Skills as follows:

- Skill set for the role, industry/category knowledge and required spoken language ability – Thumbs up, or four out of five.
- Required IT/System knowledge - line in circle (neutral) or three out of five).

4.4.6 He scored her personality traits as follows:

- Kao culture fit and teamwork – Thumbs up or four out of five.
- Communication and adaptability – star or five out of five.

4.4.7 The successful candidate was a woman of Chinese Asian background, who is, according to her CV, fluent in English and Mandarin and also has basic Cantonese and Dutch. The Second Respondent did not make any comment about her accent and we do not have any additional feedback given by him or the other recruiter(s) about the successful candidate.

5. The claim and the issues

5.1 The claim is for race discrimination and the issues as identified by EJ Joffe are as follows:

5.1.1 The Claimant says that the decision not to appoint her to the role of travel and expenses specialist was less favourable treatment because of race. She says that this is because when considering whether to appoint the Claimant, the Second Respondent applied a stereotype that French-speaking African people are difficult to understand, and thus did not appoint her. The Claimant says this is less favourable treatment because of race and relies on a hypothetical comparator (in that she has not named a person who was treated more favourably than her). We note however that it seems likely the successful candidate would be an appropriate comparator.

5.1.2 In the alternative the Claimant relies on the decision not to appoint her (and to the alleged application by the Second Respondent of a stereotype about French-speaking African people being difficult to understand) as race-related harassment.

5.1.3 Attempts by the Claimant to amend the issues before the Tribunal were rejected by EJ Joffe at the PHCM and subsequently by EJs Nash and Spencer. The issues above are therefore the issues that we have to determine.

6. Law

6.1 <u>Burden and standard of proof</u>

6.1.1 The provisions of section 136 Equality Act 2010 ("EqA/Act") apply to complaints of discrimination. They state that if there are facts from which the tribunal could decide, in the absence of any other explanation that a person contravened the provision concerned, the court must hold that the contravention occurred, save where the person can show that they did not contravene the provision. This is commonly referred to as the shifting, or reversing, burden of proof: the Claimant has to show facts from which we could decide that the Respondents breached

the Act, and if she does so, the burden moves to the Respondents to show that they did not do so.

6.1.2 Authorities, some pre-dating the coming into force of the Act (e.g. *Igen v Wong*[1], *Laing v Manchester City Council*[2], *Villalba v Merril Lynch*[3], *Madarassy v Nomura International PLC*[4]) and others that post-date it (e.g. *Hewage v Grampian Health Board*[5]) deal with the reversal of the burden of proof.

6.1.3 In *Igen v Wong*, the Court of Appeal (Gibson LJ) set out the revised *Barton*[6] guidance as follows (updated legislative references are in square brackets as appropriate):

"(1) *Pursuant to section [136 Equality Act 2010], it is for the claimant who complains of […] discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part[s 5 or 8…]. These are referred to below as "such facts".*

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of […] discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s.[136(2)]. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) […]

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining,

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[1] [2005] IRLR 258 CA
[2] [2006] IRLR 748 EAT
[3] [2006] IRLR 437 EAT
[4] [2007] 246 CA
[5] [2012] IRLR 870 SC
[6] *Barton v Investec Securities Ltd* [2003] ICR 1205

such facts […]. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably [because of a protected characteristic], then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of [the protected characteristic], since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

6.1.4 In *Hewage*, Hope LJ observed that tribunals can exaggerate the importance of these provisions and that if the Employment Tribunal is in a position to make positive findings, the provisions may even have "*nothing to offer*". However, *Hewage* also confirmed that, absent any other explanation, if a Claimant shows facts that are capable of supporting an inference of unlawful discrimination, it falls to the Respondent to disprove it.

6.1.5 In each complaint, the standard of proof applicable is the balance of probabilities.

6.1.6 In *Igen v Wong*, the Court emphasised that the statutory language needs to be observed. While we did not detail the relevant provisions of the relevant law in our oral reasons, we had regard to the precise wording of the statutes in reaching our decision.

6.2 <u>Direct discrimination</u>

6.2.1 Section 13 of the Act defines direct discrimination as follows:

"…*because of a protected characteristic, A treats B less favourably than A treats or would treat others*".

6.2.2 For these purposes, race – which includes colour, nationality and ethnic or national origins - is a protected characteristic. It is implicit that in considering whether there has been "less favourable" treatment, there must be a comparator, who may be either actual or hypothetical. As we have said above, the appropriate comparator here may be the actual successful candidate, who was in not materially different circumstances from the Claimant save that they do not share a race, or a hypothetical comparator who does not share the Claimant's race but who speaks English with an accent (e.g. a white person from Newcastle, Liverpool, Australia or Ireland).

6.2.3 It is unlawful (at section 39(1)(c)) to discriminate against a person by not offering them employment.

6.3 Harassment

6.3.1 Section 26 EqA 2010 provides:

"(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant characteristic, and
(b) the conduct has the purpose or effect of –
(i) violating B's dignity, or –
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B …

(4) In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

6.3.2 The meaning of '*related to*' is distinct from and broader than the '*because of*' formulation under s.13 EqA. It is not, however, to be reduced to a "but for" test and it is not enough to point to the relevant characteristic as the mere background to the events.

6.3.3 In considering whether a remark that is said to amount to harassment is conduct related to the protected characteristic, the Tribunal has to ask itself whether, objectively, the remark relates to the protected characteristic. The knowledge or perception by the person said to have made the remark of the alleged victim's protected characteristic is relevant to the question of whether the conduct relates to the protected characteristic but is not in any way conclusive. The Tribunal should look at the evidence in the round (per HHJ Richardson in *Hartley v Foreign and Commonwealth Office Services*[7]).

[7] UKEAT/0033/15/LA at [24-2])

6.3.4 In considering whether the conduct is related to the protected characteristic, the Tribunal must focus on the conduct of the individuals concerned and ask whether their conduct is related to the protected characteristic (*Nailard*).

6.3.5 In *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*[8], HHJ Auerbach gave further guidance:

> "21. *Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.*
>
> *24. However…, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. …*
>
> *25. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be*."

6.3.6 In *Weeks v Newham College of Further Education*[9], Langstaff J said at [21]:

> "*An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant*."

[8] [2020] IRLR 495
[9] UKEAT/0630/11/ZT

6.3.7 In *Richmond Pharmacology v Dhaliwal*[10], Underhill J (as he was) said:

> *"15…A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard…. Whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.*
>
> *22…We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…".*

7. Findings

7.1 We had the Claimant's CV in the bundle. The Respondents have made submissions about the fact that its contents are inconsistent with findings made by other Judges in other Tribunal decisions, as to matters such as the Claimant's employment history and whether she was travelling between May 2022 and March 2023 as she says in her CV or whether she was in fact applying for jobs with or working for other companies against whom she later brought claims.

7.2 We do not consider that those points can assist us in deciding whether the Second Respondent's decision not to appoint the Claimant amounted to less favourable treatment because of race, or race-related harassment. At that point, as the Respondents acknowledge, the Second Respondent did not know about those other claims or the Judges' findings. We cannot make findings, in the circumstances, about whether the Claimant was less convincing in interview as a consequence, which was not in any event something the Second Respondent himself suggested.

7.3 We have instead focused on and considered what the Second Respondent said in his written and oral evidence as to the reason for not appointing the Claimant to the role, and whether it is supported by the contemporaneous records including the transcript and feedback forms.

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[10] [2009] IRLR 336

7.4 The first point to note is that at the interview itself, the discussion of the languages the Claimant speaks was extremely limited, as we have set out above. The Claimant indicated that she spoke French and some time later in the interview, the Second Respondent returned to this point in the context of telling her about the French part of the business. There appears to have been no further discussion, on the evidence before us, of language, and no discussion at all of accents. We consider that if the Claimant believed the transcript to be inaccurate it fell to her to comply with EJ Joffe's direction and seek to agree an accurate version. She has not indicated that the transcript is specifically inaccurate in relation to any relevant matter and thus we do not find it of any great assistance to us.

7.5 We find the feedback form/scorecard more helpful. We observe that the Second Respondent was asked about the diversity training he has had and his answer was vague. He told us he had had it, he thought, some years ago and that it had related to unconscious bias, but he was unable to be very specific. He has had no training, he said, at all in interview skills. These factors might be surprising given the size and international scope of the First Respondent. However it has meant that the Second Respondent's reactions to the Claimant are very likely to have been set out without him applying any sort of filter.

7.6 It is important to analyse what the Second Respondent actually said about the Claimant, what we consider he meant by it and what, if any implication, it might have had for his decision-making. He said that the Claimant has a "*French accent which might be challenging for non-English native or experienced English speaking people*". We infer from this that the Second Respondent (who does not himself have English as a first language) means that a person who does not have English as a first language may find the Claimant's accent when speaking English challenging.

7.7 The Second Respondent made no reference to the Claimant's ethnicity. Because we are all first-language English speakers, the panel was unable to find as a fact whether the Second Respondent is correct in considering that the Claimant's accent, which we did not find to be particularly strong but which nonetheless is noticeable, would cause a linguistic difficulty for a person who does not have English as a first language.

7.8 We can say however that we accept the Second Respondent's evidence that had the Claimant been otherwise appointable to the role, there would have been ways to work around any such potential for difficulty or misunderstanding. The Second Respondent explained in an answer to the panel's questions that he has a diverse team of employees who do not necessarily speak English as their first language. The two other team members in the team in which the Claimant was applying to work, for instance, do not. He explained that they use Google Translate and email to communicate, and if there has to be a call where the language difference might create a barrier, they have someone on the call who is fluent in both languages to help out.

7.9 The Claimant has argued that the Second Respondent stereotyped her as a black African person who also speaks French. We see no evidence of that. But in any event, we accept the Second Respondent's submission that what the Claimant appears to be arguing - so far as we can make out - is that the Second Respondent applied a provision criterion or practice that she must have English as a first language and that that put her at a disadvantage and therefore amounted to indirect discrimination. That is not what she has claimed and the evidence would not support such a complaint if she had. The Second Respondent could easily have made the same comment about a white Australian or British person who speaks with a strong regional accent while having English as a first language.

7.10 On that analysis we find that the Second Respondent may have been somewhat clumsy in his use of words but he has been honest. As such there are no facts from which we could conclude that the burden of proof would pass. However we do make the observation that we are pleased to note the First Respondent's HRD was present on the first day of the Hearing and we trust the organisation will have taken on board the paramount importance of adequate training, properly refreshed as necessary, for those carrying out critical roles in recruitment and management.

7.11 In case we are wrong on that however we have looked at the successful candidate. What the Second Respondent told us in evidence about what he was looking for was important because that candidate clearly, from her CV and from the scorecard, has leadership skills in having managed a team of eight or nine and substantial experience in the travel industry. She is a proactive person looking to improve and innovate processes. The Second Respondent explained that this role was originally a team leader's and although they were not looking to replace like for like (in the sense that they were not looking for a people manager) they were looking for someone who had the skills to implement process improvement and new ways of working.

7.12 He addressed the shortcomings, such as they were, in the successful candidate's score. The only place where she scored significantly lower than the Claimant was in her knowledge of their IT systems and specifically the package called Concur. We accept the Second Respondent's evidence that her experience in Sabre and Amadeus, which are more complex applications, indicated to him that she could readily pick up how to use Concur which is a more basic package.

7.13 Thus the key factor for the Second Respondent was the successful candidate's ability to drive change and process improvement, areas in which he perceived the Claimant would perform less well. This is evidenced by the comment on the Claimant's scorecard that she could be a great fit for a more junior level role in the team, i.e. the Second Respondent's analysis that she was "*light on process improvement"* and "*not a leader, perfect number 2*".

7.14 Accordingly we conclude that the reason why the Claimant was not appointed to the role was not because of race but simply because the Respondents had

adequate non-discriminatory reasons for preferring another candidate. The direct discrimination complaint fails.

7.15 As for the allegation of harassment, we have found that the reason for the Claimant's non-appointment was not "related to" race, it was because the Second Respondent preferred another candidate for non-discriminatory reasons. He did not apply a stereotype. We observe for the sake of completeness that we can envisage circumstances in which a person might be offended by derogatory comments made about or other conduct in connection with an accent and that if that accent is linked to nationality, the conduct could thereby be race-related.

7.16 In this case however, clearly, the purpose of the Second Respondent's assessment, in the highly material context of recruiting someone into a team whose members do not have English as a first language, was not to produce the proscribed consequences. Further, the unwanted conduct complained of in this case is not the comment on the score card but the failure to appoint the Claimant to the role. We have no doubt that his decision was not intended to cause offence.

7.17 Finally, even though as we have said a derogatory comment about accent could amount to race-related harassment, in this case we would have found that it would not have been reasonable for the Second Respondent's comment that the Claimant speaks with a French accent – which is objectively true – to have had the effect of violating her dignity or to have created an impermissible environment.

7.18 In the circumstances the Claimant's complaint of harassment is also not well founded.

7.19 In light of our primary findings and conclusions above, we did not consider it necessary to address the Respondents' submissions regarding the questions of whether "race" is synonymous with "accent" (as the Claimant asserts) or whether the Claimant would ultimately have been appointed in any event. The claim is dismissed.

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Employment Judge Norris
Date: 10 February 2024
SENT TO THE PARTIES ON

20 February 2024

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FOR THE TRIBUNAL OFFICE