Case No: 2302083/2022

EMPLOYMENT TRIBUNALS

Claimant: **S Lasdas**

Respondent: **Keoghs LLP**

Heard at: **London South Employment Tribunals by video**

On: **26 and 27 March 2024**

Before: **Employment Judge Burge**
Ms N Styles
Dr N Westwood

Representation
Claimant: **In person**
Respondent: **Ms G Nicholls, Counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The Claimant's application for anonymity is refused; and

2. The Claimant's complaints of direct discrimination, indirect discrimination and victimisation fail and are dismissed.

REASONS

Introduction

1. The Claimant has brought a claim for race discrimination and victimisation against the Respondent who had offered him a fixed term IT role and subsequently withdrawn it after an "onboarding" meeting. Ms Liza Hill said that the Claimant was rude and difficult during the call, the Claimant says that she pressed him unreasonably about evidence of his right to live and work in the UK, and hence that this decision was an act of race

discrimination.

Preliminary Issues

2. On 11 March 2024 the Respondent applied for an Unless Order as the Claimant had not provided his witness statement and was therefore in breach of a Tribunal Order. The Claimant objected saying that:

> *"either to allow me to send my written statement 8 days before the hearing which as I wrote to him is going to be practically the same as my oral statement at the preliminary as I am unable to deal with this matter now OR to accept request for a postponment and to allow me to seek some psycological evaluation by the NHS if you need a proof why I need this now."*

3. On 19 March 2024 the Respondent made an application for a postponement as sadly a colleague of the Respondent's witnesses had passed away.

4. On 21 March 2024 the Claimant wrote that he was sorry to hear of the loss, he had already requested a postponement himself but he would also not oppose their application. However, although the Claimant had made references to wanting a postponement in correspondence, he had not made an express application to the Tribunal that sought the Respondent's comments.

5. On 21 March 2024 Acting Regional Judge Khalil wrote:

> "The Hearing listed 26 and 27 March 2024 will remain listed. The applications to postpone and/or to Strike out the claim will be addressed at the outset of the Hearing.

6. A number of emails were sent between the parties.

7. On 21 March 2024 the Respondent wrote to the Claimant:

> *"If the strike out application is not successful and the renewed application to postpone fails, then I accept that the hearing will go ahead and we will need to manage the availability of witnesses*."

8. On a fair reading of this email, the Respondent was saying that if their own strike out application or their application to postpone were rejected by the Tribunal they would accept that the final hearing would go ahead. The Tribunal rejects the Claimant's submission to the Tribunal that this was the Respondent assuring him that "he was going to support his application for postponement, if his strike out application is denied". It is saying that the Respondent was prepared that the hearing would go ahead if their applications failed.

9. On 21 March 2024 the Respondent sent the Claimant the passwords to their witness statements so that he could access them.

10. The Claimant told the Tribunal that he wanted more time to finish his witness statement. He objected to the Respondent's witness statements because

they were different to the contemporaneous ones that had been prepared in 2022. He also did not want to accept the additional disclosure provided from the Respondent. He thought that the Respondent had been saying in 2022 that the reason why they needed the additional checks was for the Right to Work but it appeared to him that they had changed their defence and that they were now saying that it was the DBS that required these documents. He emailed the Respondent on 21 March 2021:

> *"I now have every ethical right to withdraw my support to your application for a postponment. I will only support the one I made, if that will be denied, I will ask the hearing to proceed as it was scheduled."*

11. By the time of the hearing the Claimant said that his witness statement was over 30 pages but he did not provide it to the Respondent nor the Tribunal.

12. Ms Nicholls provided an Opening note which stated that the Respondent's Postponement application was no longer pursued but that they still wished to strike out the Claimant's claim because he still had not done his witness statement.

13. The Respondent had made an application for strike out on the basis that in breach of Tribunal Orders the Claimant had not provided a witness statement. The Claimant agreed that he had not provided a witness statement. He was therefore in breach of a Tribunal Order. He told the Tribunal that the main reason why he had not been ready with his witness statement was that he had another final Employment Tribunal hearing earlier in March and that he had to prepare and attend that one. He also said that he had personal issues but when the Tribunal asked if he had any evidence of the personal issues and why they meant he could not send his witness statement he said that he did not. The Claimant said that the Respondent had provided late disclosure during the period 1 - 6 March 2024 and he still had not read those documents. He wanted those documents to be excluded from the hearing bundle. However, a vast number of these documents were documents he had already seen (for example, correspondence with the Tribunal, his CV), and the others were not long or onerous to read. The Claimant was concerned that the Respondent was changing their story.

14. The Claimant wanted the case to be postponed. In addition to his other Employment Tribunal final hearing, he said that he had lost a previous phone that had documents on it. He also referred to personal problems but had no medical or other evidence to say why these issues meant the hearing could not go ahead. The Claimant did not want the late disclosure admitted, did not agree to the updated bundle and said that he had not sent anyone his witness statement and so the hearing could not go ahead. At the Tribunal's request, he re-read box 8.2 and said that it remained his case about what he was saying happened to him, although he said it was a summary.

15. The Tribunal decided that it was a rare case that would be struck out at the final hearing and this was not one of them as a fair trial was still possible. The claim was therefore not struck out. The Claimant could use box 8.2 as his witness statement and the Respondent could cross examine him on it. Having another employment Tribunal was not a good enough reason not to

read the disclosure sent at the beginning of March. It was provided late but there is an ongoing duty of disclosure and the Claimant had time to read it before the hearing. There was no good reason for him having not read it, some of the documents he already had and the remainder were not long or onerous. The parties had been given 2 days for the final hearing of this case back in September 2023, they were narrow issues and a fair trial could still occur within this time. The Tribunal decided that we would break until after lunch (giving the Claimant 2 ½ hours) to review the documents and have a break before the final hearing was to begin.

16. When the parties were told of the preliminary decisions at 11.15 the Claimant requested that he be permitted to provide a 30 page witness statement to the Tribunal and the parties. This was refused on the basis that the Respondent would be prejudiced and the hearing would not be fair. He should have provided this to the Respondent prior to the hearing. The Claimant would have a witness statement, in the form of the content of box 8.2 of his claim form. Anything that he disagreed with in the Respondent's witness statements or response he could ask of the Respondent's witnesses. He had just had another final hearing, he knew what happened in Tribunal proceedings. He could submit written submissions detailing any arguments he wished to make and the Tribunal would read these prior to oral submissions being given.

17. The Claimant was not happy with this decision and sought to re-argue it, the Tribunal took his submissions as an application for reconsideration and refused it as he was re-arguing submissions already made and it was not in the interests of justice for the decision to be reconsidered, there was no reasonable prospect of the original decision being varied or revoked.

18. The Claimant then had 2 hours and 10 minutes to review the documents and prepare for the evidence to start at 2pm. However at 2pm the Claimant would not accept that evidence should begin. He sought to reargue preliminary issues that had already been decided upon. The Tribunal said that either party could submit written closing submissions by 9am the following day including about the application for anonymisation which the Claimant felt he had not enough time to make oral submissions on earlier that day. However, the decision not to strike out and for the hearing not to be postponed stood.

19. The Claimant wanted more Tribunal time than two days. The Tribunal refused this. It had been listed as two days by EJ Fowell at a Preliminary Hearing on 14 September 2023 where both parties were present. The listing was on the basis of the Claimant giving evidence and the Respondent calling three witnesses, yet the Respondent now only intended to call two. This claim is about the withdrawal of a job offer because of what had happened at an on-boarding meeting/pre-employment checks. The view of this Tribunal was that two days was a proportionate amount of Tribunal time. The Tribunal has limited resources and there are many other claims waiting to be heard. It was in accordance with the Overriding Objective, Rule 2 in dealing with the case fairly and justly.

20. The Claimant was encouraged to focus on his claim.

The Evidence

21. The Claimant gave evidence on his own behalf. Lesley Essery (who carried out the initial interview, decided to offer the provisional offer and then decided to withdraw it) and Liza Hill (who held the onboarding meeting) gave evidence on behalf of the Respondent.

22. The Tribunal was referred during the hearing to documents in a hearing bundle of 236 pages. There was a dispute between the parties about whether the additional disclosure should be included, the Tribunal decided it could be, see above.

23. Ms Nicholls provided an opening note. Both the Claimant and Ms Nicholls provided the Tribunal with written and oral closing submissions.

24. The Claimant's witness statement was the information he provided at box 8.2 of his claim form because he had failed to provide a witness statement, see above. He was also permitted to speak about his evidence that the DBS process and the Right to Work process were not the same and his view that the Respondent had changed their defence before cross examination began.

25. The Claimant repeatedly interrupted and spoke over the Judge and Counsel for the Respondent and the Judge repeatedly had to caution the Claimant for this. At first the Claimant refused to answer the Respondent's counsel's questions because he had not been allowed to give an oral statement. Breaks were given to allow the Claimant to compose himself and he did start to answer the questions. However, the answers he gave were lengthy and so cross examination took 1 ½ hours, instead of the 1 hour allocated. The Claimant was then given 1 ½ hours to cross examine each of the Respondent's witnesses. As the hearing progressed the Tribunal repeatedly had to mute the Claimant as he would talk over both the Tribunal, Counsel and the witnesses.

Issues for the Tribunal to Decide

26. After discussion with the parties at the Preliminary Hearing on 14 September 2023 EJ Fowell provided the List of Issues to be decided. At the start of the final hearing both parties agreed they were still the issues to be decided:

    1. Direct discrimination (under section 13 Equality Act 2010) on grounds of his race (based on his Greek ethnicity)

        a. The sole issue is whether the Respondent, in withdrawing the job offer, treated him less favourably than it treated or would have treated someone else in the same circumstances apart from his race.

        NB. He also makes the factual allegation that he asked whether he could use his own laptop for work and Ms Hill asked him if that was because he would be working from Greece.

2. Indirect discrimination (under section 19 Equality Act 2010)

    a. The Claimant says that the Respondent carried out excessive checks on whether applicants have the right to work in the UK. There is relevant Home Office guidance on this subject, available at:

    https://www.gov.uk/government/publications/right-to-work-checks-employers-guide/an-employers-guide-to-right-to-work-checks-6-april-2022-accessible-version

    b. This sets out a process for online checks and for manual checks. The Claimant's case is that employers should carry out online checks or manual checks, but not both. He says that he had completed the online checks, including providing his passport details and a copy of the cover and photograph page but that Ms Hill insisted on him then providing a copy of the first two pages of his passport separately. This insistence of additional checks is the provision, criterion or practice in question.

    NB. He says that he questioned this practice and that this led to the disagreement.

    c. If so, did this practice put foreign nationals at a particular disadvantage compared with British Citizens?

    d. If so, did it put the Claimant at that disadvantage in that he had to go to extra lengths to prove that he was entitled to work in the UK.

    e. Can the Respondent show that this provision, criterion or practice was a proportionate means of achieving a legitimate aim? No case on proportionality has been set out, but may be in the Amended Response.

3. Victimisation (under section 27 Equality Act 2010).

    a. Did the Claimant, in questioning why the Respondent was not following the relevant Home Office guidance, make a complaint about discrimination or about a breach of the Equality Act? This is known as carrying out a "protected act"?

    b. Alternatively, did the Respondent believe that he had?

    c. If there was a protected act, did the company withdraw the offer of employment as a result.

4. Remedies

    a. If the Claimant wins his claim for discrimination he may be entitled to
    i) compensation for loss of earnings and/or
    ii) compensation for injury to feelings
    iii) interest and/or
    iv) a declaration or recommendation.

Findings of fact

27. The Tribunal finds the following facts on the balance of probabilities.

28. The Respondent has a recruitment policy:

> *"Successful Candidates will be asked by HR to complete the following:*
> *• Pre-Employment Declaration form*
> *• Reference Authorisation Form*
> *• Online DBS Disclosure Form (for which three forms of ID are required)*
> *• Financial and Residency Check Form*
> *• Onboarding Form"*

29. The Tribunal accepts that the Respondent has a set of (five) values driving decision-making, attitudes, behaviours and working practices within the Respondent. Three of the values were:

    a. *We listen, are down-to-earth and supportive*
    b. *We work together towards a common goal*
    c. *We're friendly with a can-do attitude*

30. On 10 February 2022 the Respondent received the Claimant's CV from a recruitment agency as part of a recruitment exercise for a fixed term IT role for the period 2 March 2022 to 23 June 2022.

31. On 14 February 2022 the Respondent shortlisted the Claimant for interview.

32. On 15 February 2022 the Claimant was interviewed by Ms Essery, the Respondent's People Lead for Software Development and Mr Carlow, an Application Architect employed by the Respondent. Following the interview Ms Essery and Mr Carlow decided to make a provisional offer to the Claimant via the recruitment agency.

33. On 16 February 2022 the Respondent made a provisional offer to the Claimant. Ms Hill, Talent Acquisition Business Partner, wrote to the recruitment agency:

> *"As a legal firm we need to collect all ID docs to ensure they have the right to work in the uk etc*
>
> *I need the documents sent to me and then I need to do a video teams call to see the originals at the side of the candidates*
>
> *Documents I need are below*
>
> *Checks we complete are DBS, Financial check, SRA check etc*
>
> *ID Docs*
> *·* ***Passport – Current (we need the front and back cover of the passport, also the first double page that has a serial***

number on it, also the double page with all details and the photo) *or Full Birth Certificate with proof of National Insurance number*

· 2 x proof of address dated within the last 3 months (or driving licence and Council tax bill)

· All documents need to be in the same name and address – if not then you need to supply marriage certificate or change of name deed poll proof"

[Tribunal's emphasis]

34. The Claimant provided the recruitment agency with a code so that the Respondent could access his right to work proof and he also provided them with two bank statements and photo of the passport page and the passport cover page.

35. On 17 February 2022 Ms Hill conducted a virtual on-boarding meeting with the Claimant. The purpose was to carry out identification checks, to discuss working methods and equipment and other arrangements for the commencement of the role. The Tribunal accepts Ms Hill's evidence that on-boarding meetings are usually happy meetings, as both parties are keen for the individual to start work. However, this meeting went very differently.

36. The Tribunal accepts Ms Hill's evidence that as part of verifying documents she needed to make sure that the documents being provided belonged to the person. One of the passport pages that had been supplied by the Claimant was blurry. Ms Hill requested the additional first two pages of the Claimant's passport and also the signature page. The Claimant gave evidence that he was reluctant to send her the signature page as he was worried about fraud. The Claimant also did not want to provide the additional documentation as he did not think he needed to. He had his Right to Work Code, already had a recent DBS certificate and knew that he could quickly obtain another one on-line.

37. Ms Hill had a list of identity documents that she needed to obtain from a prospective employee, a list that she had been given by Human Resources. She believed that once this ID verification was done the Right to Work, DBS, Financial and Solicitors Regulation Authority checks could be done. She had not checked any source documents herself and did not know if what she was asking for was mandated by any regulations. She said in a contemporaneous note that:

> *"LH - asked to see further proof of RTW which was the front cover and pages 1 and 2 of the passport and the full page with the photograph and the signature on. The original screenshot taken of the candidate was blurry which is why LH asked to see it again."*

38. However, the parties now agree that all that was needed for the Right to work check was the share code, which the Claimant had already provided. In the same contemporaneous note:

> *"- LH reassured the candidate that this a legal requirement and it was Keoghs company process and policy as Keoghs are a law firm and are governed by the SRA and as a legal company Keoghs have to*

gather these documents. LH also advised that everyone we receives an offer of employment has to provide these documents

- Candidate was not happy about giving a copy of the page with his signature on and seemed agitated and at this point was being rude."

39. Ms Hill then goes on to talk about DBS requirements:

*"- LH **moved onto** the requirements for the DBS checks, which was also required for the candidate's proof of ID, along with 2 proofs of address.*
- Candidate did not want to provide these and said he already has a DBS certificate so he doesn't need to have another one taken.
- LH advised that as a legal company Keogh's have to gather their own DBS checks whether the candidate already has one or not.
[Tribunal's emphasis]

40. The Tribunal finds that Ms Hill did not know why pages 1 and 2 of the passport and the photograph and the signature page was a requirement, but also finds that it was a policy of the Respondent that this was required as part of their identity checks as this was what she had been told by HR and what she had requested of the recruitment agency in her email of 16 February 2022.

41. The Claimant also asked if he could use his own laptop. The Claimant submitted to the Tribunal that he wanted to use his own laptop as one of the things that HMRC look for to determine whether a contractor should be paid "outside of IR35" is whether or not the contractor uses their own equipment. Ms Essery gave evidence, that is accepted, that all staff at the Respondent had to use the Respondent's laptops and no one was permitted to use their own, the Respondent had contractors using the Respondent's laptops and they still considered them to be "outside IR35".

42. Also at the onboarding meeting, they spoke about the start date of the contract, Ms Hill explained the start date would be in 2 weeks as it would take that time for the processes and laptop to be configured. The Claimant told Ms Hill that he believed the credit check was a fast online process and that he could apply online to the DBS and provide the certificate to her within a few hours. He also said that he should be able to use his own laptop.

43. The Tribunal finds, on the balance of probabilities, that the Claimant was frustrated with the responses of Ms Hill. He did not agree that she needed extra pages of his passport for any of the checks, he had provided the Right to Work share code, he could have obtained a DBS check himself in a matter of hours rather than waiting for the Respondent to do it and he did not see why he had to use the Respondent's laptop when he had a previous job where he could access sensitive information from his own laptop. Ms Hill gave evidence that the way the Claimant spoke to her was rude, uncooperative, aggressive, high-handed and patronizing. This is accepted because the Respondent's contemporaneous note states:

"Liza Hill contacted the recruitment agency, Reed, via telephone to explain that the candidate was not happy with what was being asked

of him and that his behaviour was rude and aggressive and Keoghs had therefore decided to withdraw the offer."

44. Also, that "*Candidate still wasn't happy about it and was still being rude, aggressive and argumentative."*

45. The Tribunal accepts the Respondent's evidence that Ms Hill conveyed her experience of the meeting with the Claimant to Ms Essery. Ms Essery decided that the offer of the role should be withdrawn because of the Claimant's conduct during the on-boarding meeting. Ms Hill's contemporaneous note stated:

> *"- The offer was withdrawn due to the candidate refusing to show the right to work documentation that Keoghs require as part of onboarding. The candidate also questioned the length of time we advise for gaining DBS checks and said that he already had one and didn't need another one and why was it taking Keoghs 2 weeks. The candidate also refused to use a Keoghs laptop and wanted to use his own. The candidate's behaviour was inappropriate, argumentative, rude and aggressive and he questioned everything that LH said.*
>
> *- It was deemed by the hiring manager that his behaviour was inappropriate and did not align with the behaviours of Keoghs values and that she therefore wanted to withdraw the offer."*

46. The Respondent withdrew the offer of employment on 17 February 2022 and contacted the Claimant's recruitment agency who reported to the Claimant on 18 February 2022:

> *"They have withdrawn your offer unfortunately*
>
> *[Ms Hill] gave me a call after she had a meeting with you on Teams and said you were rude, speaking over her and refusing to show your passport and also agree to the fact that you will need to use the laptop provided*
>
> *For that reason they won't be going ahead with you"*

47. The Tribunal finds that this reason given from/to the recruitment agency is the reason why the Claimant's offer was withdrawn - because the Claimant was rude, speaking over Ms Hill, refusing to show his passport and because he did not agree to using the Respondent's laptop. The Tribunal also accepts Ms Essery's evidence to the Tribunal that this behaviour did not align with the Respondent's values.

48. To his recruitment agent the Claimant wrote

> "*..I only asked her when she told me to send her in addition to the page of my passport having my photo and all my details (which I had sent already in high resolution), the page with my signature, and I asked her why is that needed since the other page has all the needed information and in general I am reluctant to share my signature too along with my id information for obvious security reasons.."*

49. At the Preliminary Hearing on 14 September 2023 the Claimant says that Ms Hill asked him if he wanted to work from Greece. Ms Hill denies that she asked this. On balance the Tribunal finds that she did not because had she done so it would have been likely to have been mentioned in contemporaneous documentation.

50. Further, to the Tribunal Ms Hill said that the Claimant had sworn during the on-boarding meeting. On balance, the Tribunal rejects this as if he had done so it is likely to have been mentioned in the contemporaneous documentation.

51. It is accepted by the Tribunal that Ms Hill carried out 99 such on-boarding meetings during the period from 1 May 2021 to 30 June 2022 and that the Claimant was the only person whose offer of employment was withdrawn as a result of their conduct during an on-boarding meeting.

52. On 21 February 2022, Ms Robertson, Head of Talent Acquisition wrote to the Claimant indicating that without the proof of Right to Work in the UK the Respondent was unable to confirm and proceed with any offer, which is why Ms Hill had been asking for the documentation.

53. The Claimant asked:

> *"Can you please answer my very specific question (the one in my previous emails) what government document gives you the right to demand from me, in addition of the photo page and cover page of my passport, also the inner first pages and the page with my signature?"*

54. On 22 February 2022 the Respondent replied:

> *"... I do appreciate that you sent a link to your proof of right to work to the agency. Our decision to withdraw your offer was not based alone on this. We felt that the behaviour you have demonstrated is not in line with our values or the behaviour we expect from our employees.*
>
> *The decision has been made to withdraw your offer and we stand by this."*

The Law

Anonymity

55. Rule 50 provides:

> *"Privacy and restrictions on disclosure*
>
> *50.—(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.*

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include—

(a)an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(b)an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;

(c)an order for measures preventing witnesses at a public hearing being identifiable by members of the public;

(d)a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.

…

(6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998."

56. The Human Rights Act 1998 incorporates the European Convention on Human Rights into British Law. Article 6 concerns the right to a fair trial, Article 8 concerns the right to respect for private and family life and Article 10 concerns freedom of expression.

57. Open justice is a fundamental principle. Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. The burden of establishing any derogation from the general principle lies on the person seeking it. Any application must be supported by evidence establishing that the derogation is necessary and that the restriction is no more than is strictly required (*BBC v Roden* [2015] ICR 985*).*

58. In *A v B X Y & The Times* [2018] EAT 1607 Soole J, considered the claimants' appeal against the making of a RRO and an appeal by a high-profile individual respondent, against the refusal of an anonymity order. He confirmed the EJ's decision that the high-profile status of the second respondent was not a reason for granting anonymity because of the principle that all are equal before the law.

59. In *A v Burke & Hare* EA-2020-SCO-0000067-DT) A had worked as a stripper and did not wish her name to be published in any judgment dealing with her claim for holiday pay arising from her work as a stripper. It was held that the principle of open justice required her name to be published. While there was evidence that strippers were stigmatised, that alone did not justify an anonymity order. The EAT accepted that more serious harms such as verbal abuse and the threat of assault would have justified an order but on the evidence it had not been established that these were her concerns.

60. In *Ameyaw v Pricewaterhousecoopers Services Ltd* [2019] ICR 976 it was held that it had to be established by clear and cogent evidence that harm would be done by the matter in question being reported without restriction:

"(i) the burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation;

(ii) it must be established by clear and cogent evidence that harm will be done by reporting to the privacy rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice;

(iii) where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, the ET should credit the public with the ability to understand that unproven allegations are no more than that; and

(iv) where such a case proceeds to judgment, the ET can mitigate the risk of misunderstanding by making clear it has not adjudicated on the truth or otherwise of the damaging allegations."

61. In *F v J* [2023] EAT 92 the Claimant had a hidden disability which he said was not obvious to people unless they were told about it and the Claimant believed that his employability would be destroyed without anonymity and he said that there was no public interest in his name being in the public domain. The issuing of proceedings did not put the matter into the public domain. Further, HHJ Auerbach pointed out, the approach should be as follows:

> "*as the Court of Appeal has pointed out in Millicom, more precisely the first question is whether the public disclosure of the information in the proceedings in question would entail an interference with their Article 8 rights. If so, the second question is whether that interference would be justified in accordance with Article 8(2).*"

Race Discrimination

62. Section 4 of the Equality Act 2010 ("EqA") provides that race is a protected characteristic. Section 9(1) sets out that race includes colour, nationality and ethnic or national origins.

63. S.39(1) EqA provides:

> "(1) An employer (A) must not discriminate against a person (B)—
> (a)in the arrangements A makes for deciding to whom to offer employment;
> (b)as to the terms on which A offers B employment;
> (c)by not offering B employment."

64. S.136 of the EqA sets out the burden of proof:

> *"…(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…"*

65. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have

nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another (*Hewage v Grampian Health Board* [2012] IRLR 870, SC).

66. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents 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. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

67. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

68. This approach was approved in *Hewage v Grampian Health Board* [2012] UKSC 37 and in *Royal Mail Group Ltd v Efobi* [2021] ICR 1263.

69. Where there is a difference of treatment and a difference of status it does not take much more to shift the burden of proof. In *Deman v Commission for Equality and Human Rights Commission & others* [2010] EWCA Civ 1279, Sedley LJ held:

> *"We agree with both counsel that the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."*

70. Case law recognises that very little discrimination today is overt or even deliberate. Witnesses can be unconsciously prejudiced.

Direct Discrimination

71. Under s.13(1) of the EqA read with s.9 direct discrimination takes place where a person treats the claimant less favourably because of race/nationality than that person treats or would treat others. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

72. It is often appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However in some cases, for example where there is only a hypothetical

comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as he was (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).

73. In *London Borough of Islington v Ladele (Liberty intervening)* 2009 ICR 387, EAT, Mr Justice Elias (then President) confirmed the principal in *Shamoon* and said that a strict reliance on the comparator test can be positively misleading where the protected characteristic contributes to, but is not the sole or principal reason for, the employer's act or decision.

74. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out (*Nagarajan v London Regional Transport* [1999] IRLR 572, HL.

Indirect Discrimination

75. Section 19 of the EqA provides:

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> > (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> >
> > (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> >
> > (c) it puts, or would put, B at that disadvantage, and
> >
> > (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

76. In *Essop v Home Office; Naeem v Secretary of State for Justice* [2017] UKSC 27, [2017] IRLR 558: the following "salient features" of indirect discrimination were set out:

> > *"25. A second salient feature is the contrast between the definitions of direct and indirect discrimination. "Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve*

equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot.

26. A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various (Mr Sean Jones QC for Mr Naeem called them "context factors"). They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between "women's jobs" and "men's jobs" or the practice of starting at the bottom of an incremental pay scale. They could be another PCP, working in combination with the one at issue, as in Homer v Chief Constable of West Yorkshire [2012] UKSC 15; [2012] ICR 704, where the requirement of a law degree operated in combination with normal retirement age to produce the disadvantage suffered by Mr Homer and others in his age group. These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem.

27. A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. The fact that some BME or older candidates could pass the test is neither here nor there. The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test requirement would be a proxy for race or age).

28. A fifth salient feature is that it is commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. That was obvious from the way in which the concept was expressed in the 1975 and 1976 Acts: indeed it might be difficult to establish that the proportion of women who could comply with the requirement was smaller than the proportion of men unless there was statistical evidence to that effect. Recital (15) to the Race Directive recognised that indirect discrimination might be proved on the basis of statistical evidence, while at the same time introducing the new definition. It cannot have been contemplated that the "particular disadvantage" might not be capable of being proved by statistical evidence. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.

29. A final salient feature is that it is always open to the respondent to show that his PCP is justified - in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular CSA test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question - fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the EAT in Essop, a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result."

Victimisation

77. Section 27 EqA provides:

"(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."

Behaviour in the courtroom

78. The case of *Mr I Laing v Bury & Bolton Citizens Advice* [2022] EAT 85 cautions the Tribunal about jumping to the conclusion that how a party behaves before the Tribunal is necessarily how they behaved in the workplace:

"114. … in cases where an individual is accused of having behaved in a certain way in the workplace, and appears to the tribunal to have behaved in the very same way in front of its eyes, it is not necessarily always wrong to take any account of this at all when adjudicating the substantive issues. But great care and caution is required, particularly where what is being referred to is the conduct of a party as their own representative. How a party behaves as a representative is not itself evidence of how they behaved in the workplace. Further, as the Equal Treatment Bench Book puts it (Chapter 1, para.16), a litigant in person may "lack objectivity and emotional distance from their case." So, we observe, it may be unsafe to assume that how they behave as their own representative

in a hearing gives a reliable picture of how they behaved in the workplace."

Analysis and Conclusions

Anonymity

79. Rule 50 of the Tribunal Rules provides that Orders can be made for privacy and restrictions from disclosure, including an order for anonymisation.

80. Rule 50(2) provides that in considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression. Departing from this principle of open justice is therefore the exception rather than the rule and it is for the Claimant to show why the exception should be granted in this case. The Tribunal must take account of the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) and the right to a fair and public hearing under Article 6 of the ECHR as well as the competing right to privacy under Article 8.

81. The Claimant said that he had a job withdrawn because an employer had seen he had brought a case against a previous employer. He had made a written application and gave oral submissions during the first morning. However, he later said that he did not think he had enough time. The Tribunal encouraged him to include anything further he wanted to say in his written submissions and that he could give oral submissions as part of closing submissions. However, he did not do so. He said that he did not think he had enough time to say why it was that he should be an exception to the principle of open justice. He was given 5 minutes to make those oral submissions and he did so.

82. In this case the Claimant made an application for his name to be replaced with his initials because his name is unique in England and it is rare even in Greece, "even a simple Google search can uniquely identify me as the "S Lasdas" person behind any ET claims of mine which are published by the ET". He said that he had lost a job because a prospective employer identified him as the claimant in a different Employment Tribunal Claim. The Claimant said that the prospective employer had not even asked him if he was the name "S Lasdas", he was already certain. The Claimant says it is the fact that his name is on the claims he has brought that interferes with his private life. The oral submissions the Claimant gave to the Tribunal were also in accordance with this – he said that he had lost a potential job because his name is unique and a prospective employer had seen Employment Tribunal Judgments online, he was not currently working and he wanted this case to be anonymous so that future employers would not refuse to employ him. The Respondent opposed the application and said that this is not good reason to derogate from the principles of open justice and that there was no way of knowing whether the prospective employer did not want to employ him because his previous claims had been struck out as being unmeritorious or because of the fact he had brought them.

83. Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public. Every claimant,

apart from the exceptional few who are granted privacy orders, runs the risk that future employers see that they have brought a claim. One would hope that those future employers would not be so short sighted as to refuse to employ anyone who had brought a claim, and of course if they did so then the claimant would be protected by the Equality Act 2010.

84. However, this in itself is not a reason to derogate from the principle of open justice. The Claimant said that he was different because his name was unique. There is no doubt that those with more unusual names are more likely to be identifiable than those with more generic names. Often those who have not participated in proceedings but where derogatory references have been made to them are protected by privacy orders. However, that is not the case here. The Claimant has chosen to bring this claim against the Respondent. He has been involved throughout the proceedings. We do not think that his unusual name and the fact that he has brought a claim is an interference with his Article 8 rights to a private and family life. Otherwise, anyone with an unusual name who chooses to bring a claim would fall into this category.

85. If we are wrong about that, and the Claimant's Article 8 rights would be engaged then our task is to decide whether that interference would be justified in accordance with Article 8(2). Open justice is a fundamental principle. Article 10 provides the right to freedom of expression and Article 6 provides the right to a fair and public hearing - it is important that people are able to bring/defend claims where they have been wronged and for the process and outcome to be subject to public scrutiny. We therefore conclude that in the event that the Claimant's Article 8 rights are engaged by his name and the fact that he has brought a claim, the interference would be justified.

86. The Claimant's application under Rule 50 therefore fails.

Courtroom behaviour

87. The Claimant repeatedly interrupted and spoke over the Tribunal, Counsel for the Respondent and witnesses to the extent that the Tribunal repeatedly had to caution and then mute the Claimant so that a fair trial was possible. Ms Hill described the way that the Claimant was conducting the hearing as being very similar to the way he had been in the meeting – constantly talking over people and being "rude". The Claimant described his own speech as talking very quickly. The Tribunal did consider whether the Claimant's demeanor at this hearing meant that he had necessarily behaved as described by Ms Hill but concluded that while it was an indicator that he was capable of speaking in a domineering way, it was important to remember that he was representing himself, felt strongly about his claim and we concluded that more important evidence was Ms Hill's contemporaneous evidence describing the conversation and the feedback given to the recruitment agency. (*Mr I Laing v Bury & Bolton Citizens Advice* [2022] EAT 85 considered).

Discrimination and Victimisation

88. Ms Hill's contemporaneous note says that the reason for having to provide pages 1 and 2 of the passport and the full page with the photograph and the signature on was because of "a legal requirement and it was Keoghs company process and policy as Keoghs are a law firm and are governed by the SRA and as a legal company Keoghs have to gather these documents". However, in its Response the Respondent said that "thorough approach to the checks required to ensure that its employees and workers are entitled to work in the UK.". In its Amended Response the Respondent said it had a duty under the Immigration, Asylum and Nationality Act 2006, the Immigration Act 2014 and the Immigration Act 2016 to prevent illegal working, that the Claimant did not have to go to any extra lengths to prove his entitlement to work in the UK than a British comparator "the Claimant had provided photographs of his passport which were blurred which is why Liza Hill had asked to see it again." The request for additional pages of the passport, including the signature page, was not mentioned. In Ms Hill's witness statement she said that at the time there were additional DBS requirements due to covid and conducting the checks remotely and that the front page, the first two pages, the photo and signature page were required at that time. However, the document she cited in support of this, does not support what she says. The Tribunal is sympathetic to the Claimant's submission that the Respondent appeared to be changing its defence.

89. The Tribunal concludes that it is unclear why the policy was in place but the Tribunal accepted Ms Hill's evidence that everyone who was going to work for the Respondent, whether as an employee or a consultant, was required to provide pages 1 and 2 of the passport and the photograph and the signature page as it was part of their identity checks.

90. The Claimant, by contrast, was very well versed on the requirements of the right to work and the DBS check. The Tribunal accepts that he had experience of using both of these systems and knew better what options the Respondent had available to it to conduct these checks. Instead, Ms Hill was following the requirements that had been given to her, and that was for certain documents to be required for identity check and for the Respondent to obtain its own DBS for prospective staff.

91. Before the onboarding meeting, Ms Hill had written to the Claimant's recruitment consultant saying that the passport pages required for ID documents were "*the front and back cover of the passport, also the first double page that has a serial number on it, also the double page with all details and the photo"*. It was therefore clear what was required. As part of verifying documents Ms Hill needed to make sure that the documents being provided belonged to the Claimant. One of the passport pages that had been supplied by the Claimant was blurry. Ms Hill requested the additional first two pages of the Claimant's passport and also the signature page. The Tribunal has found that it was the Respondent's policy to request them for ID verification. The Claimant did not think that these documents were needed for the Right to Work and the DBS check and the Tribunal concludes that he was likely to be correct about that. The Claimant was worried about fraud if he gave the Respondent his signature page. He had his Right to Work Code, already had a recent DBS certificate and knew that he could quickly obtain another one on-line. However, it was the Respondent's policy that they would be the ones to apply for the DBS certificate. The Claimant

was rude to Ms Hill, he spoke over her, refused to show his passport and he also would not agree to use the Respondent's laptop. It was his view that it would be better for IR35 purposes if he used his own, he had done so previously and simply would not accept that it was the Respondent's policy that no one could use their own laptop.

92. Ms Hill came off the call and was very upset. She spoke to Ms Essery who decided to withdraw the job offer. Neither Ms Hill nor Ms Essery looked up the ID check requirements to see if what the Claimant was saying was correct. The Claimant has taken one line of Ms Robertson's email as supporting his analysis that the job offer was withdrawn for not providing proof of Right to Work. However, this ignores her subsequent clarification:

> "..*I do appreciate that you sent a link to your proof of right to work to the agency. Our decision to withdraw your offer was not based alone on this. We felt that the behaviour you have demonstrated is not in line with our values or the behaviour we expect from our employees.*

93. Further, it also ignores the feedback that was given to the recruitment agency who passed it on to the Claimant at the time:

> *"[Ms Hill] gave me a call after she had a meeting with you on Teams and said you were rude, speaking over her and refusing to show your passport and also agree to the fact that you will need to use the laptop provided*
>
> *For that reason they won't be going ahead with you"*

94. The Tribunal concludes that the reason why the Claimant's job offer was withdrawn was because the Claimant was rude, speaking over Ms Hill, refusing to show his passport and because he did not agree to using the Respondent's laptop. His behaviour did not align with the Respondent's values.

Direct discrimination (under section 13 Equality Act 2010)

95. All candidates were required to provide ID documentation. Ms Hill did not ask him if that was because he would be working from Greece. It does not make sense that Ms Essery would decide to make a provisional job offer and then decide to withdraw it because of his Greek nationality. Ms Essery thought that in the call to Ms Hill, the Claimant had been rude, had spoken over her and refused to show his passport or agree to use the Respondent's laptop. This behaviour was not in line with the Respondent's values. She had therefore decided to withdraw the offer.

96. The burden has not shifted to the Respondent. In withdrawing the job offer, the Respondent has not treated the Claimant less favourably than it treated or would have treated someone else in the same circumstances apart from his race. The Claimant's complaint of direct discrimination therefore fails.

Indirect discrimination (under section 19 Equality Act 2010)

97. The Claimant says that the Respondent carried out excessive checks on

whether applicants have the right to work in the UK. Home Office guidance suggests that candidates should not be discriminated against when providing online or manual checks.

98. The Tribunal has found that there was a policy of in addition to providing his passport details and a copy of the cover and photograph page, of having to provide the first two pages of a passport and signature page. This was one of the requirements that the Claimant became agitated about. The evidence does not support the Claimant's contention that he was required to carry out both online and manual checks to demonstrate his Right to Work.

99. The requirement to provide the first two pages of a passport and signature page did not put the Claimant, or other Greek nationals (or foreign nationals) at a disadvantage. He had provided his share code to demonstrate his Right to Work, this was an ID check applied to all. The Claimant put forward no reason why it was harder for him to comply with this requirement. The Claimant's complaint of indirect discrimination therefore fails.

100. In the Claimant's closing submissions, he also says that not allowing candidates to apply for DBS checks themselves is a discriminatory PCP. This was not cited as an Issue in the List of Issues. However, even if it had been, the Claimant has not shown why this policy, which is applied to all, would be harder to comply with for those of Greek nationality, or why those of Greek nationality would be disadvantaged. Had this complaint been brought, it would also therefore have failed.

Victimisation (under section 27 Equality Act 2010).

101. The Claimant says that, in questioning why the Respondent was not following the relevant Home Office guidance, he made a complaint about discrimination or about a breach of the Equality Act and that this was a "protected act". However, this is rejected as the evidence given by the Claimant was that he did not want to provide the additional ID information because he was concerned about fraud. The Tribunal concludes that there was no "protected act" - the Claimant did not raise bringing proceedings, giving evidence or information in connection with proceedings under the EqA, doing any other thing for the purposes of or in connection with the EqA or made an allegation that the EqA was being contravened.

102. In any event it was Ms Essery who had decided to make the provisional offer and then it had been her who decided to withdraw it based on how upset Ms Hill had been following the meeting. The reason why Ms Essery had decided to withdraw the provisional job offer was not because of a protected act but was because the Claimant in the call to Ms Hill, had been rude, had spoken over her and refused to show his passport or agree to use the Respondent's laptop. This behaviour was not in line with the Respondent's values.

103. The complaint of victimisation therefore fails.

Case No: 2302083/2022

Employment Judge **Burge**
Date: 10 April 2024