



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Singh

**Respondent:** Harrogate Specsavers Hearcare Limited

**Heard at:** Southampton

**On:** 3 & 4 June 2025

**Before:** Employment Judge Oldroyd  
Mr D Jenkins

### Appearances

**For the Claimant:** In person

**For the Respondent:** Mr Pipkin (Solicitor)

## WRITTEN REASONS

### Introduction

1. The Claimant is an audiologist who applied to the Respondent for employment. The application was rejected without interview.
2. The Claimant now brings a claim alleging direct discrimination and says that the only reason he was not employed was because of his race.
3. The Respondent denies discrimination. It asserts that the Claimant's application was rejected owing to concerns over the Claimant's integrity. This was revealed by a caution that was placed on the Claimant's professional record by his regulator.

### Preliminary matters

4. The Claimant produced a witness statement and gave oral evidence. The Respondent's directors, Mrs Ollis and Mr Lowrie produced witness evidence and gave oral evidence.
5. The Tribunal had regard to an agreed bundle running to some 97 pages.



### **Tribunal constitution**

6. The claim was listed to be heard before an Employment Judge and two lay members. One of the lay members was poorly on the first morning of the hearing an unable to attend the hearing.
7. Pursuant to Section 4(9) Employment Tribunal Act 1996 the parties gave their consent in writing for the hearing to proceed before an Employment Judge and one lay member.

### **Issues**

8. At the outset of the hearing the parties agreed that the fundamental issue in dispute between the parties was the reason for the Claimant's application being refused:
  - a. The Claimant contends it was because of his race, and that an application made by a white person with an Anglo Saxon name (such as John Smith) but subject to a regulatory caution would have been progressed.
  - b. The Respondent says that it rejected the application only because of the caution and more specifically the concerns it revealed in respect of the Claimant's integrity.

### **Facts**

10. The Respondent is an independent audiology business that trades as a franchise partner with Specsavers UK Holdings Limited (**Specsavers UK**).
11. The Respondent has two directors, Emma Ollis and Tom Lowie both of whom are white (**Directors**).
12. The Claimant describes himself as a non-white person of Sikh heritage, a fact that the Claimant also says is appreciable from his surname.
13. The Claimant qualified as a hearing aid dispenser (**HAD**) in 2015 and he was authorised to practice as such by the relevant regulator, the Health and Care Professionals Council (**the HCPC**).
14. During the period 2016 and 2019, the Claimant was employed as a HAD by a number of employers. Notably, between 27 June 2016 and 10 June 2019, the Claimant was employed by a Specsavers branch in Stockton on Tees.



15. Whilst employed in this way and on 9 May 2019, a co-worker alleged that the Claimant had accessed their personal e-mail account on two separate occasions without authorisation.
16. As a consequence of the allegation, the Claimant reported himself to his regulatory body, the HCPC on 10 May 2019.
17. The HCPC carried out an investigation and this was to lead to a hearing that took place 3 years later on 26 May 2022. The purpose of the hearing was to establish whether the Claimant had accessed his co-worker's personal e-mails on two separate occasions (as alleged) and whether that amounted to a breach of the HCPC's regulatory rules and thereby misconduct. In the event of a finding of misconduct, the HCPC was required to determine an appropriate sanction.
18. The Claimant represented himself at the hearing at which he denied having accessed his co-worker's personal e mails (at least deliberately).
19. The HCPC found against the Claimant. Relying on metadata, the HCPC was satisfied that the Claimant had deliberately accessed his co-worker's personal e mail on one occasion (but not two occasions as alleged) without authorisation. (We should make it clear that we make no findings in respect of the correctness of the findings made by the HCPC).
20. The HCPC considered that the Claimant's actions amounted to misconduct albeit "*at the lower end of the scale*". The misconduct was characterised as a "*serious departure from that standards expected from a HAD*". In reaching this conclusion, the HCPC had regard to its regulatory rules, which were set out in a document called "*HCPC Standards of Conduct, Performance & Ethics*". Standard 9 requires HADs to be honest and trustworthy with a view to maintaining public trust and confidence. The HCPC was satisfied that the Claimant had not behaved in an honest and trustworthy manner.
21. In terms of sanction, the HCPC resolved to issue the Claimant with a caution for a period of 1 year (with effect from 23 June 2023) (the **Caution**). This was considered to be appropriate for misconduct which, among other things, was relatively minor in nature with a low risk of repetition. In reaching this sanction, the HCPC noted that the Claimant had demonstrated limited insight into the impact and effect of his misconduct.
22. As part of its decision making process, the HCPC was obliged to consider whether its finding of misconduct impaired the Claimant's fitness to practice. The HCPC was satisfied that the misconduct that had been proven did not affect the Claimant's clinical competence. However, the HCPC was satisfied that the misconduct did impact upon public confidence. Consequently, it decided that "*a finding of impairment is required to maintain public confidence in the profession and its regulatory body*".



23. It is to be noted that the Caution did not affect the Claimant's ability to practice on an unrestricted basis.
24. The effect of the HCPC's decision was that the Claimant's regulatory record was annotated with details of the Caution for a period of 12 months, and so during the period 23 June 2022 to 23 June 2023.
25. The detailed findings of the HCPC (running to some 20 or so pages) were also published on the HCPC's website (the **Detailed Findings**).
26. Returning to the Claimant's employment history, after June 2019, it appears that the Claimant worked ceased working for Specsavers in Stockton on Tees and he began a sustained period of locum work.
27. The Claimant worked on occasions as a locum for Specsavers in Maidenhead between 29 November 2021 and 28 November 2022 (which relates to the time during which he was under investigation by the HCPC and subject to the Caution). The Claimant says that the directors of Specsavers in Maidenhead, described as "*non-white*", were made aware by him of the Caution and that they were unconcerned by it. The Respondent did not dispute this evidence. Indeed, there is documentary evidence that Specsavers in Maidenhead was aware of the Caution (it being set out in an e-mail dated 31 August 2022 from Specsavers UK to the directors of Specsavers in Maidenhead).
28. Specsavers in Maidenhead plainly viewed the Claimant as good employee, notwithstanding the Caution. Hence, it produced a reference for the Claimant on 10 February 2023. That reference describes the Claimant's performance as a HAD as "*very good*" in respect of 7 criteria (including professional standards). The reference includes the following comment:
- "Mr Singh is a great audiologist operating at the highest National standards".*
29. Mr Singh also worked for two other branches of Specsavers after the date of the Caution. Mr Singh worked in High Wycombe as a locum in or about November 2022 and also in Sunderland in February 2023. In respect of these two branches, the Claimant makes three observations that the Respondent again did not dispute:
- 29.1 The directors of these branches were also "*non-white*".
- 29.2 The directors of these branches were aware of the Caution. To this end, the Claimant says that he revealed the Caution to them but in any event, the HPCJ register would sensibly have been reviewed



prior to the Claimant being retained as a locum and that would have revealed it.

- 29.3 The Claimant was a valued employee and obtained positive feedback.
30. On or about 2 November 2022, the Claimant applied for a non-locum HAD role with the Respondent. The post was advertised on the website of Specsavers UK. The Respondent accepts that the advert did not in any way dissuade applications from HADs who were the subject of regulatory a caution. By the same token, it was accepted by both the Claimant and the Respondent that the successful applicant would need to be registered and certified as able to practice by the HCPC.
31. The application was processed, initially, by Specsavers Recruitment Services, being part of Specsavers UK (**SRS**).
32. On 19 December 2022, SRS provided details of the Claimant's application and his CV to the Directors. There was one other applicant whose details were provided at the same time.
33. The Directors accept that the decision as to whom to employ was their joint decision. Having heard evidence from both Directors, we consider their evidence to be consistent in all material respects.
34. The Directors acknowledge that, given the Claimant's surname, they were at least subconsciously aware that he was from an ethnic minority.
35. The Directors say that they discussed reviewed both applications on a rolling basis and "*over a couple of days*". The Directors were not in possession of the Claimant's references at this time, but they seem to have been initially impressed with the Claimant's credentials in the sense that, given his employment history with Specsavers, he had knowledge of its products.
36. However, before any concluded views had been reached, the Directors say that they checked each applicant's regulatory standing on the HCPC website. The primary reason for doing this was to confirm that both applicants were certified to practice. To this end, all HADs are required to be regulated by the HCPC, a point confirmed by Specsaver's own website:
- "All of our [HADs] are registered with [HCPC]"*
37. The Claimant goes so far as to suggest that this website entry suggests that it was a formal policy of Specsavers UK (and by inference the Respondent) to employ any HAD who was registered by the HCPC regardless of whether that registration was subject, for example, to a caution. For the avoidance of doubt, we do not consider that the contents of the website amount to a policy of the sort contended for by the Claimant. The website statement, even if was



a policy, did not set out, in any way to be meaningful, the impact that a caution might have on a HAD or would be HAD's employment status.

38. In the case of the Claimant, the search against his regulatory record revealed the fact of the Caution, albeit not immediately the Detailed Findings.

39. The Directors say that the fact of the Caution did not cause them to immediately reject the Claimant's application. In this regard, the Respondent accepts that neither it (nor Specsavers UK) has any blanket prohibition on the employment of individuals who are subject to a regulatory caution but otherwise able to practice.

40. Instead, the Directors obtained the Detailed Findings (which were available elsewhere on the HCPC's website) and they considered them together.

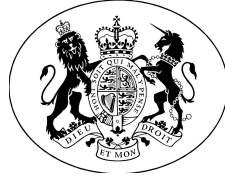
41. The Directors say that the Detailed Findings, that explained the circumstances behind the Caution, caused them to reach the view that the Claimant's application should not proceed. The precise reasons for this were as follows:

41.1 In her witness statement, Mrs Ollis explained that prior to her and Mr Lowrie's involvement in the Respondent it had faced "*audit issues*" and to overcome these it was necessary to have complete faith in future employees.

41.2 Mr Lowrie said in his oral evidence that the fact that the Caution related to a finding of misconduct based upon a lack of integrity and a finding of impairment to practice was a cause of very great concern. Mr Lowrie explained that he and Mrs Ollis were only prepared to recruit employees with the utmost of integrity in light of the historical audit issues that the Respondent had faced. Further, Mr Lowrie explained that whomever they employed was likely to be their sole representative in other Specsaver stores that they supplied services to. This, in the Directors' view, meant that employing a trustworthy employee to represent the Respondent was essential.

41.3 Mr Lowrie summarized the position by saying that the Respondent "*could not take the risk*" of employing an individual whom the HCPC had found lacked integrity in the circumstances set out on the Detailed Findings.

42. The Directors accept that the Caution did not prevent the Claimant from practicing or indicate he was not clinically competent to practice. Instead, the Directors say that their decision not to progress the application was a choice



they independently made because of their concerns over the Claimant's that were revealed by the Caution.

43. It was put to the Directors, by the Claimant in cross examination, that he was treated unfavourably compared to his chosen hypothetical comparator (being a white person with an Anglo Saxon name (such as John Smith) but subject to a caution) and that such a comparator would at least have been invited to interview. The Directors rejected this suggestion very firmly in their oral evidence.
44. In support of their position that their decision making processes was not influenced by race, the Respondents pointed to the fact that, in recent times, they have employed two people from ethnic minority backgrounds.
45. Having made their decision, the Directors, by e mail dated 21 December 2022, confirmed to SRS that they did not propose to proceed with the Claimant's application. The e mail, sent by Mr Lowrie, referenced his review of the Detailed Findings, stated:

*"....after chatting further about [the Claimant] and also being able to read up about his case, I feel it best for the business that we give him a miss at this time".*

46. By e-mail dated 4 January 2023 and in response to a query from SRS, Mrs Ollis further confirmed to SRS that:

*"I had a discussion with [Mr Lowrie] about [the Claimant], We agreed that the HCPC case against him is a concern and we would be best not to proceed at this time".*

47. On 6 January 2023, SRS communicated the decision of the Respondent not to employ him to the Claimant. The Claimant was advised:

*"In completing their own due diligence, they came across the HCPC Ftp records which are in the public domain. Due to the fact that you have a live HCPC record and remain under caution they have decided not to proceed with your application at this time".*

## **The Law**

48. Race is a protected characteristic under Section 9 of the Equality Act 2010 (**Act**).
49. The Act prohibits forms of discrimination on grounds of race and among those afforded protection are job applicants under Sections 39(1)(b) and 40(1)(b).



50. Section 13 of the Act specifically prohibits direct discrimination. Direct discrimination occurs, in this context, where a prospective employer treats a prospective employee less favorably because of their race. The Act provides that:

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

51. In considering whether an individual has been treated less favourably, regard may be had to either an actual or a hypothetical comparator. Either way, there should be no material difference between the circumstances of the comparator and the claimant (Section 23 of the Act).

52. The Tribunal ought to particularly consider the alleged mental processes of the alleged discriminator and there by their motivation (*Nagarajan v London Regional Transport* [1999] IRLR 572). Hence, it is important to identify the decision maker and to protect innocent decision makers from liability (*CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439).

53. It is to be acknowledged that discrimination may be subconscious. In *Nagarajan* it was held:

*“All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. .... Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination.”*

54. Further, it need not be the case that the protected characteristic is the only reason for the less favourable treatment or even the main reason. It is sufficient that the decision being impugned is a significant factor (in the sense that it was more than trivial).

55. Section 136 of the Act contains burden of proof provisions that are relevant to direct discrimination pursuant to Section 13. It provides:

*“2. If there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold that the contravention occurred.*

*3. But subsection (2) does not apply if A shows that A did not contravene that provision”*





56. Guidelines on the application of the burden of proof provisions were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142. There is a two stage approach.
57. At stage 1, the burden of proof is initially upon a claimant to establish primary facts from which the Tribunal could decide on the balance of probabilities, in the absence of any other explanation, that discrimination took place (*Madarassy v Nomura International Plc* [2007] EWCA Civ 33). Any explanation by a respondent is disregarded at this stage (though that is not to say the factual matrix it might argue for is irrelevant).
58. In terms of establishing primary facts, it is not sufficient for a claimant to establish a difference in his protected characteristic relative to others or unfair treatment. “*Something more*” is required before an inference of discrimination can be made. (*Madarassy*). The “*something more*” might be direct evidence. Such evidence often does not exist so it could also be something more nuanced such as statistical evidence, record keeping, unreasonable behaviour or an inconsistent explanation.
59. If primary facts are established, then the burden then shifts to the respondent to prove that the alleged unfair treatment was not, on the balance of probabilities, because of the protected characteristic relied upon.
60. *Igen* confirms that the employer must prove that the unfavourable treatment was “*in no sense whatsoever*” because of the protected characteristic and “*cogent evidence*” should be provided by a respondent to prove its position.
61. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is unusual, and that Tribunals frequently have to infer discrimination from all the material facts. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.
62. There is no need, of course, for a respondent to establish that it acted reasonably or indeed fairly. The issue at hand is whether the respondent treated a claimant unfavourably because of a protected characteristic.

### **Analysis**

63. The central issue in this case is whether the Claimant’s application was rejected because of his race or because of the Caution.
64. The first stage of any analysis involves the Claimant establishing primary facts from which discrimination might be inferred.
65. The Claimant agreed, during his closing arguments, that there were 6 primary facts or else sets of circumstances that he relies upon.



66. We address each set of primary facts in turn.
67. The most persuasive fact that the Claimant was able to identify was that he was employed by three Specsavers' branches, each controlled by non-white directors, who were aware of the Caution. The branches in question were those in Maidenhead, High Wycombe and Sunderland.
68. This does suggest that the Caution, even read alongside the Detailed Findings, could reasonably be regarded as having little impact upon a decision whether to recruit the Claimant. In our Judgment, this does lead to an inference that the decision could have been motivated by race.
69. We are satisfied that this, of itself, is "*something more*" that serves to shift to burden of proof on to the Respondent to demonstrate a non-discriminatory reason for their decision making.
70. We found the other 5 primary facts relied upon by the Claimant to be very unpersuasive. Viewed in isolation or collectively, we are satisfied that they did not meet the threshold required to enable us to reach a view that discriminatory behaviour might be inferred from them. These points are summarized as follows (though we take the first three points together):
- 70.1 The Claimant points to the fact that Respondent accepts that it had no policy, written or otherwise, that restricted the employment of individuals who were the subject of regulatory cautions. In support of this, the Claimant notes that, in advertising for the post, the Respondent did not suggest that the existence of a caution was a bar to employment. Instead, the Claimant suggests that policy of Specsavers UK (and by implication the Respondent) had a policy of recruiting any person who remained registered with the HCPC regardless of whether that registration was subject to a caution or not. In respect of these points:
- a. We do not accept that the absence of a policy in respect of how cautions were to be treated can in any way support the suggestion that a decision not to recruit a person with a caution is therefore discriminatory. There is no causal link between the absence of a policy and discriminatory conduct.
  - b. We have already held that Specsavers UK did not have a policy of recruiting individuals regardless of the existence of a caution.
- 70.2 The Claimant says that the Caution had no impact on his competence and, in that sense, his ability to practice remained unfettered by the caution (which is correct). The Claimant thus suggests that there can be no plausible reason for not employing



him, or at least inviting him to an interview, other than the fact of his race. This argument ignores the fact that there could be a whole host of reasons why the Claimant may not have been employed and there is nothing particular that leads to an interference that a decision was taken because of race.

70.3 Finally, the Claimant argues that Respondent's grounds of resistance suggest that his application was rejected because of the Caution whereas, the Directors both accepted that it was their consideration of the Detailed Findings that led to them rejecting the application. We do not consider that this comes close to hinting at discriminatory conduct for the simple reason that there is no sensible distinction that can be made between the Caution and the Detailed Findings in the sense that the former were the product of the latter.

71. The effect of our findings is that, whilst we have found 5 of the 6 primary facts put forward by the Claimant to be unpersuasive, we have accepted that the fact that the Respondent was employed by other non-white directors of Specsaver branches with knowledge of the Caution is sufficient to shift the burden onto the Respondent to prove, a non-discriminatory reason for their decision to not recruit the Claimant.

72. Having considered matters carefully, and also considering the totality of the points relied upon by the Claimant, we are satisfied that Respondent is able to establish, on the balance of probabilities, that race formed no part of the Directors' decision making process.

73. The starting point is that the Directors were clear in their evidence, tested firmly by the Claimant, that race formed no part in their decision making process. We are alive to the possibility that the Directors' evidence might be self-serving or even be ignorant of their own sub-conscious prejudices. However, we found their evidence to be consistent and for that reason reliable. Moreover, this evidence was supported by these additional factors:

73.1 It is very understandable as to why the Caution would be of concern to a reasonable employer. It evidences a lack of integrity as well as lack of insight into findings of misconduct. Even though the Caution relates to historic events it does not surprise us that these events would cause a reasonable employer to have concerns. We found the explanations of the Directors as to why integrity was of paramount importance to them, given the Respondent's recent history and the fact that any employee would, at times, be unsupervised, to be equally understandable.

Of course, it is accepted that other employers demonstrated less concern over the Caution. That does not, though, mean that these



Directors did not have legitimate concerns that caused them not to employ the Claimant or even him offer an interview.

It may be, of course, that by not offering the Claimant an interview was unreasonable or unfair on the Claimant. That may or may not be the case. Either way, though, this claim is not about fairness, It is about whether the motivation of the Directors was influenced by race.

73.2 We note that the Claimant accepts that the Respondent did not reject his application immediately after the discovering the Caution, but only after reviewing the Detailed Findings. The Detailed Findings reveal nothing new about the Claimant's race but only the circumstances of the Caution. This supports the Directors position that it was the finding of lack of integrity that was the driver behind their decision.

73.3 The Directors, more or less contemporaneously set out the reasons for rejecting the Claimant's application in their immediate exchanges with SRS (which were passed onto the Claimant). The explanation was unprompted (in the case of Mr Lowrie referring as he does about having "*read up about [the Claimant's case]*"). This contemporaneous documentation supports the evidence of both Directors that their decision was made as a result of concerns relating to the Caution as opposed to race.

74. In light of our finding that the rejection of the Claimant's application was solely attributable to the Caution, we dismiss the Claimant's claim.

**Employment Judge Oldroyd**

Dated: 10 June 2024

Sent to the parties on

02 July 2024 By Mr J McCormick

For the Tribunal