



EMPLOYMENT TRIBUNALS

Claimant

Miss I Alaiyemola

v

Respondent

Kingston Upon Hull City Council

Heard at: Hull in person

On: 8, 9, 10 and 11 July 2024

Before: Employment Judge James
Ms Y Fisher
Ms G M Fleming

Representation

For the Claimant: In person

For the Respondent: Ms R Kight, counsel

JUDGMENT

(1) The claims for direct race discrimination (s.13 Equality Act 2010) are not upheld.

REASONS

The issues

1. The agreed issues which the Tribunal had to determine are set out in Annex A.

The proceedings

2. Acas Early Conciliation took place between 25 April and 6 June 2023. The claim form was issued on 19 June 2023. The claimant makes allegations of direct race discrimination.
3. A preliminary hearing for case management purposes took place on 6 September 2023 before Employment Judge Buckley. The issues were identified, a final hearing was arranged and related case management orders were made.

4. The claimant made an application to amend the claim to include claims regarding interviews that took place in 2014 and 2015. The application was refused by Employment Judge James on 20 October 2023.

The hearing

5. The hearing took place over four days. Evidence and submissions on liability were dealt with on the first three days. It was arranged that on the fourth day, the Tribunal would give its decision and reasons and, if the claimant was successful, would go on to deal with remedy. In the event, that has not been necessary.
6. The Tribunal heard evidence from the claimant; and for the respondent, from Karen Lamb, Group Manager of the Children and Families Disability Team; Alison Dale, HR Resources Manager; David Waltham, HR Officer; Jacqueline Twomey, Former Senior Occupational Therapist; and Sara Laverack, Head of Legal Services. There was an agreed hearing bundle of 520 pages.
7. The claimant applied at the hearing to be allowed to supplement her written witness evidence orally. That application was opposed by Ms Kight. The Tribunal notes that the case management order makes clear the purpose of a witness statement and what needed to be in it. The case management order sent out following the 6 September 2023 Preliminary Hearing states at paragraph 24:

A witness statement is a document containing everything relevant the witness can tell the Tribunal. Witnesses will not be allowed to add to their statements unless the Tribunal agrees.
8. The claimant was reminded of that by Employment Judge Bright by letter on 20 March 2024. The letter sent to the claimant by the Tribunal states:

Employment Judge Bright understands from recent correspondence that you have not yet prepared a witness statement. The Tribunal's Case Management Orders made at the case management hearing on 6 September 2023 explained that you must prepare a witness statement for yourself and exchange your statement with the respondent. The Tribunal's Case Management Orders paragraphs 23 to 26 clearly explained how to prepare the witness statement. You must now prepare your statement and exchange your statement with the respondent on 25 March 2024. If you fail to do so, the hearing may be postponed and/or a Judge may consider whether to strike out your claim.
9. The Tribunal concluded that allowing the claimant to add to her evidence in chief at this stage would give rise to a real risk that the hearing would not be completed in the time available. It would also be unfair to the respondent who would potentially be taken by surprise and who may need to make further enquiries, call other witnesses, or ask for further evidence in chief from their witnesses. For all these reasons we decided that it would not be fair or just to allow the claimant to add to her witness statement in oral evidence at the hearing.
10. The claimant told us she wanted to talk to a number of documents in supplementary oral evidence. The claimant was asked to let the Tribunal know what further documents she wanted the Tribunal to read, in addition to the

ones in the reading list suggested by the respondent and those referred to in the respondent's witnesses' statements. The claimant was also told she could ask relevant questions of the respondent's witnesses arising out of those documents she wanted to refer us to during the hearing. The claimant was also told she was able to comment on those documents in submissions. Save for some documents being put to witnesses, these suggestions were not taken up by the claimant.

11. Recognising that the claimant is a litigant in person, the Judge explained to the claimant at the outset of the hearing how it would proceed, with the tribunal first reading into the case; followed by the claimant giving evidence; then the respondent's witnesses giving evidence; submissions from the parties; decision-making by the tribunal; and delivery of an oral judgement. The Judge reminded the claimant at the beginning and end of each day what to expect. The Judge explained to the claimant on a number of occasions what submissions were. The claimant was offered the opportunity, after Ms Kight had given her submissions, for a break, so she could gather her thoughts; but the claimant was content to give her submissions straight after.

Findings of fact

12. The claimant is Black British. She started work for the respondent on 10 November 2004 in the role of switchboard/clerical operator. From then until 2019, she was employed in a variety of roles:
 - 12.1. Between October 2005 and October 2007, in the role of Neighbourhood Housing Assistant Grade 4.
 - 12.2. Between October 2007 and November 2011, in the role of Housing Officer, Grade 5.
 - 12.3. Between November 2011 and June 2013, in the role of Youth Assistant, Grade 4.
 - 12.4. In addition, between 2011 and 2016, on a casual basis as and when required, as a Grade 6 Family Group Conferencing Convener.
 - 12.5. Between June 2013 and 23 February 2014, in the role of Neighbourhood Housing Assistant Grade 4;
 - 12.6. Between 24 February 2014 and 12 July 2019, in the role of ASB Intervention Officer.
 - 12.7. On 15 July 2019, in the role of Auditor.

ReFresh team applications – 2014/2015

13. In October 2014 the claimant applied for the role of Young People's Treatment Practitioner role in the ReFresh team. The interview took place on 21 October 2014. The claimant was not successful. Page 93 records that the claimant did a good interview and she would have been appointed if a better candidate did not exist. Laura Starkey, who interviewed the claimant, had also noted that she would welcome further applications from the claimant in the future. In fact, other records show that it had been determined that the claimant was not appointable on that occasion.

14. The claimant did not challenge or query the decision at the time. The Tribunal notes that the interview records were available, but the other documents relating to the recruitment exercise are no longer available, having been destroyed in line with the respondent's data retention policy.
15. In February 2015, the claimant again applied for the same role, in the same team. Following interview on 3 March 2015, the claimant was informed she had not been successful for a second time. Feedback was prepared for the claimant by Ms Starkey [72-3, 74-89]. In the overall assessment it was noted that the claimant was a very enthusiastic and passionate practitioner who demonstrated some level of experience but not how key interventions and knowledge should be applied in practice in relation to this role.
16. The interviewers also felt that there was a different ethos needed in a treatment service compared to that in enforcement, which was where the claimant's role was at that time. Some key areas noted to be missing were knowledge of mental health and links to substance misuse; understanding a cycle of change in motivational interviewing; and working with other professionals to safeguard children and young people. The claimant's scoring at the second interview was 23 out of a total of 55. Feedback was prepared by Sarah Turner on 9 March 2015 [69].
17. The claimant subsequently complained about the 2014 and 2015 interviews. On 16 March 2015, the claimant received a response to her complaint from Donna Guy, Employee Services Team Leader. Ms Guy confirmed that having reviewed the scoring for both interviews and spoken to the appointing officer, it was clear that the claimant was not appointable to the role on either occasion. Ms Guy confirmed that she had advised the appointing officer that any feedback given must be honest and constructive. Candidates should not be informed they are appointable, when they are not. She concluded however that the claimant had not been treated unfairly or in an underhand way.

Other roles – 2019

18. The Claim Form refers to the claimant not being appointed to roles in ReFresh (Young People's Substance Misuse Service) in 2019. The respondent has no record of any such applications in 2019 and the claimant does not dispute that. She confirmed she was actually referring to the ReFresh roles that she applied for in 2014/2015 – those are referred to above. As noted above, the claimant's application to amend her claim to include allegations in relation to the roles applied for in 2014/2015 was refused. At the hearing, the claimant told us that the 2019 roles she is referring to were not in ReFresh. However, no evidence has been presented by the claimant regarding any roles she applied for in 2019 and no findings of fact can be made about them.

The Council's recruitment process

19. The Tribunal accepts the unchallenged evidence of Ms Dale that the application form is separated out so that no personal details about the candidate are provided at the shortlisting stage. In contrast, the pack which is sent to the relevant interviewers, before the interviews take place, contains the application form (including the personal details, but not the diversity monitoring form). It also contains the Job Description, an interview question sheet for each interviewee, the person specification, an assessment form for each interviewee with scoring boxes, space for comments/overall assessment, and

agreed candidate feedback and has an overall 'Rating Guide' (i.e. score) at the end. An overall matrix for all interviewees is also sent which must be completed at the end with the agreed scores for each candidate. There are normally three members on interview panels. Sometimes all the interviewers are from the same department; sometimes there is a HR panel member. There is no hard and fast rule.

20. Following the interviews, the interview panel returns the completed interview matrix setting out the scores for each candidate, the assessment paperwork for each individual (which also indicates whether they are appointable), the answers to the questions and details of the appointable candidate(s), in order to commence their onboarding process. Information such as completed application forms are held on Recruit for 12 months and after this period cannot be retrieved from the system. The assessment paperwork of a successful candidate is kept on the individual's personnel file.
21. Information for all candidates who have applied for a vacancy including, interview and assessment forms, are held locally on Hull City Council's Recruitment shared area. As per the Council's retention policy interview records etc are removed after six months. Other than as set out above, recruitment related paperwork would not normally be recoverable/accessible after these timescales.
22. All those taking part in selection panels are required to undergo mandatory training. Refresher training must be taken every three years.

Occupational Therapy Assistant (OTA) role

23. The claimant applied for the role of Occupational Therapy Assistant (OTA) in December 2022. The role sits within the overall line management responsibility of Ms Lamb, as the Group Manager. The Tribunal accepts her evidence that the team is diverse in terms for example of ethnicity, sexual orientation and disability, over different grades.
24. The claimant was shortlisted for interview by Mrs Twomey on 6 January 2023.
25. The Job Description for the role states:

The post holder will be skilled in actively listening and undertaking solution focussed conversations, and able to support people to shape their own lives and have the confidence to sustain independence. ...

The post holder must seek advice and support from Occupational Therapists and Senior Occupational Therapists / other members of multi-disciplinary teams and line manager wherever needed.?
26. The respondent received 24 applications for the role. Mr Waltham advised that due to the number meeting the necessary criteria, they should only interview those scoring 10 and above on the shortlisting exercise. The claimant scored 12, so was one of the applicants invited to interview. Six candidates scored higher than the claimant in the short-listing exercise. 16 were due to be interviewed. Two cancelled and two did not attend, so in the event, 12 candidates were interviewed over two days.

Request for informal discussion

27. The claimant requested an informal discussion about the role, first by telephone and then by email on 12 January 2023, directly to Karen Lamb. The Tribunal accepts Ms Lamb's evidence that she has no recollection of the email or of receiving messages from those who took the calls, to telephone the claimant back for an informal chat about the role. This is regrettable; but the Tribunal accepts that email traffic for Ms Lamb and indeed more generally, has increased since Covid; and that emails can get missed.
28. As for shadowing opportunities, the Tribunal accepts Mrs Twomey's evidence that the team is not able to offer shadowing opportunities due to both staffing levels and the highly confidential and sensitive nature of the clients' complex disabilities. There is also the matter of data protection; and the interviews were equal opportunity interviews. No candidate was offered the chance to shadow.
29. The Tribunal also accepts Mrs Twomey's evidence, provided to Sara Laverack in the grievance as follows:

A couple of people had tried to contact Karen unsuccessfully. One was a [REDACTED] and I happened to know him because I know his mum. I found this out ... because he was trying to ring for feedback from Karen. He managed to get hold of me and I gave him feedback. He had tried to contact KL in advance of interviews unsuccessfully and queried whether it would have helped if he had spoken to her.

This individual is White.

The interview panel members

30. The interview panel included David Waltham. He was a full panel member, with an equal say in the decision. He processed the paperwork after the interviews. He also attended as an independent support to the service as part of his role. He was specifically chosen as Ms Lamb had not been able to complete the mandatory recruitment refresher training.
31. Mrs Twomey was asked by Ms Lamb to sit on the panel due to her specialist knowledge and experience within the Occupational Therapy team.

The interview process

32. The panel members met beforehand to decide who would ask which questions. They agreed they would each score each candidate at the end of each interview. The Tribunal accepts that the notes made about the answers to the questions were completed at the time of an interview, on the form provided; and not, as the claimant suggested, after the interviews had taken place. Other than the claimant's assertion during evidence at this hearing that she thought they were writing on A4 pads during her interview, there was no other evidence to support that assertion. The Tribunal finds the claimant's suggestion that the panel members would have created more work for themselves by making up contrived answers after the interviews and then destroying their original notes to be improbable.
33. At the end of each interview, Mr Waltham and Mrs Twomey scored each applicant individually against five criteria and marked the scores on the assessment form provided. Ms Lamb completed the comments at the end of the assessment form but did not put in a score for the five requirements being assessed. They then had a discussion, in order to arrive at a consensus score

for each of the interviewees, in relation to the five requirements being assessed, together with an overall rating.

34. In addition to discussing the candidates after each interview, there was a discussion and review of all candidates at the end of all the interviews. Ms Lamb filled in the scores on the interview matrix. Mr Waltham later filled in the box on the interview matrix with the reason code for not appointing each candidate.
35. The claimant asserted at this hearing that Ms Lamb influenced the other members of the panel. There was no evidence to support this assertion and the Tribunal rejects it.
36. One of the issues which came out in evidence and caused some confusion, is that candidates were not tested or scored at interview in relation to the following requirements: 'Other, Competencies and Additional Requirements'. The job specification did not require assessment of all these at interview. Nevertheless, Ms Lamb filled in the boxes for those requirements on the Interview Matrix instead of leaving them blank. She used the overall assessment score from, the bottom of each assessment form – the 'Rating Guide'. However, the Tribunal accepts that the candidates' performance was marked out of 10, not 16, as the Matrix suggests.
37. Candidates were given a score of 0, 1 or 2, for each requirement being assessed, corresponding to the requirement being 'not met', 'met' or 'exceeded'. In relation to the three redundant requirements, if a candidate was given an overall Rating Guide of 2, a score of 2 was shown in each of these three redundant categories. Whilst this was clearly an error, the same error was made for all of the candidates and the Tribunal accepts that this scoring did not affect the appointment decisions.

The interview with the claimant

38. The interviews commenced on 1 February 2023. The same panel assessed all of the candidates and the Tribunal accepts the evidence of all three interviewers that the same process, as outlined above, was applied to them all. The claimant was interviewed for the role on 2 February 2023.
39. The claimant asked at the commencement of the interview about Ms Lamb not having got back to her. She also raised some general concerns about Council wide recruitment processes. Ms Lamb apologised to the claimant for not getting back to her.
40. At the outset of the interviews, Mrs Twomey explained that Mr Waltham was from HR and there to support her and Ms Lamb with the interviews to ensure that they were conducted in line with Hull City Council Policy as Ms Lamb had not renewed the safer recruitment training. (The Tribunal notes that the refresher training was completed by Ms Lamb in October 2023).
41. In answer to question one about the experience skills and qualities she had which was relevant to the OTA role, Mrs Twomey noted the following [Page 137]:

'Housing Alterations officer - check if could be adapted, worked with children and families, worked with LD and autistic syndrome. Like to empower people. Varied skills and experience with a diversity of people. Diversity

panel member. Transferable : good self-awareness, good team member, young people relate to me good people skills.

42. By way of comparison, the Tribunal notes that Mrs Twomey noted the following for the successful candidates [see 179 and 334 and 346]. At page 179:

Direct work with paediatrics area (?) with ongoing disabilities and level of cognition giving general support and care. Personal experiences of working with child with complex health and physical disabilities. Good observational skills example. Knowledge of highly specialist equipment, hoists, feeding pumps. Recognises the need for further training and experience.

43. Page 334:

Care Assistant - experience of working with people with various disabilities. Has worked closely with OT's. Knowledge of safeguarding, child development. Organised, on time, level 2 HCA. Lots of training in safeguarding. Awareness of mental health. Experience of working with young people in crisis.

44. Page 346:

Developed career through private company. Swim lessons - experience of working with children with autism ... Mental health needs up to 10 years. Report writing, risk assessments. Experience to adapt clothing or slings to carry child safely. Carries out face-to-face work.

45. In relation to the question on safeguarding, the claimant's answer as noted by Ms Lamb was:

Is all ok - assess on arrival. Is OK with child. Ask parents what happened. If fallen, bruised shin – is that ok if crying holding or limping – would concern. Make note. Talk to OT. Tell family concerned, call police, EHASH ref, medical concern, inform parents of action

The assessment of the claimant's performance at interview

46. The claimant was scored a total of 4 out of 10. Four other candidates who were not appointed, scored more highly than the claimant at interview. Mr Waltham's overall assessment of the claimant was as follows:

Transferable skills were demonstrated and saw what needed to be. Did not display experience for disability. Competent and open and great people skills but not demonstrated skills for the OT role.

He marked her as 0 in the Rating Guide – i.e. not met.

47. Mrs Twomey [152] concluded from the claimant's interview that she was:

'very confident, easy-going, presentable. Excellent communication skills, would relate to families and children well. Little evidence of how to relate her experience, knowledge and skills to the role of OTA'.

She also marked the claimant as 0 - not met/not answered in the Rating Guide section, adding: *'re knowledge and skills'.*

48. The role was offered to the two highest scoring candidates. Their interview notes and assessment sheets are at pages 319-324 and 331-339 and 175-192. One of them declined the role so it was offered to the next highest scoring

candidate whose interview and assessment sheets are at 325-333 and 340-348.

49. The two successful candidates are White British. The Tribunal accepts that they were not known to any of the interview panel members, as colleagues, friends and/or family.

Verbal and written feedback

50. The claimant was informed by Ms Lamb by telephone on 3 February 2023 that she had not been successful at interview. She told the claimant that her response regarding the timescales in which she would respond to a client and her lack of experience with disabled children were two pointers. The claimant told Ms Lamb she was not happy with the outcome. She asked Ms Lamb if she had met the benchmark and was told that she had not. Ms Lamb offered the claimant the opportunity to come and discuss the feedback with her. The claimant emailed Ms Lamb to request written feedback on 5 February 2023.
51. The claimant met with Ms Dale to discuss her concerns on 22 February 2023. She remained dissatisfied following the meeting and submitted a grievance the same day, complaining of race discrimination in recruitment practices at the respondent Council.
52. Written feedback was provided to the claimant by Mr Waltham on 23 February 2023. Mr Waltham responded on behalf of the panel as Ms Lamb was out of the country. At the time this email was sent, he was unaware that the claimant had submitted a grievance.
53. Mr Waltham had to fit the task in around other commitments including strategy meetings and other interview processes. Mr Waltham took time to review all the available interview notes to enable him to give considered but concise feedback to help the claimant in any future recruitment exercise. He also provided an outcome to some of the issues she raised in her email dated 5 February 2023. The feedback states:

Should you wish to consider a future OTA job opportunity you would benefit from building your knowledge in relation to safeguarding, working with children with often complex health needs and the requirements of the Mental Capacity Act. Unfortunately you did not satisfy the requirements in being able to sufficiently demonstrate knowledge in these critical areas of the job role when responding to the questions asked at interview. There are some useful training course you may want to consider to help and support you for example Safeguarding Children (various modules), please take a look via OLM self service and I am sure this will give you options to explore with your manager (I have attached the brochure which I hope is useful). Whilst you demonstrated your willingness to learn and [develop] into an OTA role you unfortunately did not demonstrate a sufficient understanding of the job.

54. The claimant commenced Acas Early Conciliation on 25 April 2023.

The grievance investigation

55. Ms Laverack was appointed to hear the grievance. Although she is employed as Head of Legal services, her role in the grievance was to investigate the grievance in good faith as a Senior Officer, not to defend the respondent from any potential claim. Ms Laverack has had no involvement in the progress of the litigation.

56. On 17 May 2023, Ms Laverack emailed the claimant, inviting her to arrange a grievance meeting and to confirm the scope of the grievance. On the same day, Acas Early Conciliation was concluded.
57. The grievance meeting took place on 6 June 2023. Also present were the claimant's union representative, David Harding, and Nadine Wharam, Assistant Business and Practice Manager. On 9 June 2023, the claimant emailed Ms Laverack, arguing that she had been under-scored for the OTA role.
58. Ms Laverack interviewed each of the panel members independently. During the grievance interview with Ms Lamb, she said, in relation to those candidates that were successful [463]:

The 1st question [delays in adaptation – question 4]

They reflected in support of parent carer in a way they feel heard and supported, active listening, listen to parents concerns, not respond with anger, reassurance and reassurance of processes, provide updates from providers/suppliers, call providers/suppliers whilst on the visit, not let the family feel forgotten, express not letting families feel obstructed, considered parental mental health as impact and possible need to refer, stay calm in their own presentation, let parent express their worries and check if they needed support, explored hospital SW, other agencies to support, additional support from the team, look at options, alternative solutions, offer an explanation of situation, anyone else to support, why there is a delay.

One also offered an example, such as a child struggling to get off a toilet and this increasing the child's stress as the child requires additional help – could a temporary measure be explored around this particular stress i.e identified solution as a raised toilet seat. One explored Human Rights being explored – understanding the right to be listened to. Both those successful also offered the option of talking to other professionals such as OT, line manager and seek consents for additional assessments. One also reflected on if this was impacting on the care of the child to explore an additional intervention to assist in safely caring for the child and support parents on how to support the child in the interim. Let managers know how family is feeling.

2nd question [safeguarding – question 5]

Both successful candidates shared they would see what bruises were like, assess if the child was safe, consider capacity to speak to the child/parents, observe the child, how child presents, not leave, if were able to speak to the child how the child was feeling, would not interrogate parents, would contact line manager, seek additional support, would not leave when a child is at possible risk and seek advice and support from their manager on the safeguarding to ensure child was not left at risk. Considered whether this was a safeguarding, seriousness, and diffusion.

59. During her interview, Mrs Twomey told Ms Laverack [page 447]:

She listed lots of good solution but not how these could be delivered. Lots of other candidates made the same mistake. Solve without reference to their OT. [They] must think on their feet but must be aware of their

limitations. The OT has to sign everything off, it is their registration on the line and so a rogue OTA can lose OT their job.

60. At page 449 it is noted:

Ibi's presentation gave me concerns that this was the right [job fit] for her. She was quite confrontational which gave me concerns about whether she would have the skill set to do the job - i.e. interacting with parents etc. However, hand on heart if she had scored highest on the questions I would have appointed even if I had some concerns about her fit in the role within the team. Other candidates who did have the direct experience didn't bring it out in interview either so they couldn't be appointed as others did better in answering the questions.

61. The claim form was submitted on 19 June 2023.

62. On 4 January 2024, Ms Laverack completed the investigation into the claimant's grievance [465-495]. The outcome was sent to the claimant on 12 January 2024. The claimant appealed against the grievance outcome on the same day.

63. The claimant has been employed in the role of Tenancy Officer on Grade 7 since January 2024. She told the Tribunal that she is content in that role.

Relevant law

Direct discrimination

64. The Equality Act 2010, s.13(1)-(2) provides: *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.*

65. A claimant must show that she was treated less favourably than a real or hypothetical comparator. Other than the protected characteristic, there must be no material difference between the circumstances of a claimant and the comparator (s.23(1)). Where there is an actual comparator who shares some, but not all, of a claimant's relevant characteristics, the tribunal can consider the comparator's treatment as evidence as to how a hypothetical comparator would have been treated.¹

66. If less favourable treatment is established, the tribunal must consider the reason why. If the protected characteristic had a '*significant influence on the less favourable treatment, discrimination would be made out.*² The crucial question however is *why* a claimant received the less favourable treatment – what was the reason why the alleged discriminator acted as they did? What, conscious or unconsciously, was their reason?³

67. An inference of discrimination cannot be drawn simply from the fact that an employer has behaved badly (in industrial relations terms) towards an employee (who happens to be of a particular racial origin): *Zafar v Glasgow City Council [1998] IRLR 36, HL; Bahl v Law Society [2004] IRLR 799, CA;*

¹ *Watt (formerly Cater) v Ahsan [2007] UKHL 51.*

² *Nagajaran v London Regional Transport [1999] IRLR 572.*

³ *Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830.*

(though cf *Anya v University of Oxford* (supra) where it was said that such bad behaviour may, in the absence of explanation or evidence showing that it was general, be the basis for the drawing of an inference); for an example of this, and inferences made on inadequate evidence of less favourable treatment, see *Bradford Hospitals NHS Trust v Al-Shabib* [2003] IRLR 4, EAT.

68. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that person A has contravened the provision concerned, the Tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.
69. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] IRLR 258. The Tribunal can consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy v Nomura International plc* [2007] IRLR 246, CA.)
70. The Court of Appeal in *Madarassy*, a case brought under the Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg rsce) and a difference in treatment. LJ Mummery stated at paragraph 56:

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.'
71. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in *Hewage v Grampian Health Board* [2012] IRLR 870 at para 32:

They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.
72. The relevant time-limit is at section 123(1) Equality Act 2010. The Tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. If the claim is presented outside the primary limitation period, ie the relevant three months, the Tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable.

Conclusions

73. In arriving at the following conclusions on the issues before the Tribunal, the law has been applied to the facts found above. The Tribunal will not repeat every single fact, in order to keep these reasons to a manageable length. The issues are dealt with in turn.
74. In reaching our conclusions, we have carefully considered the burden of proof provisions. For reasons which are set out below however, we have not found that the burden of proof has shifted in this case.
75. We conclude that the evidence regarding the 2014/2015 roles does not provide evidence of discrimination because of race. Different individuals were involved in those selection decisions, in a different department, eight to nine years

before the claimant was interviewed for the OTA role. That recruitment exercise does not throw any light on what happened in the OTA recruitment exercise in 2023.

76. We have considered each alleged incident of discrimination separately and we have also considered them collectively. The sub-headings below refer to the allegations under each date in the ET1.
77. The first issue to consider is whether each of the allegations of detrimental treatment occurred. Second, whether that was less favourable treatment. Third, if so, was it because of race. We have considered these two further issues in relation to each allegation in turn, where the allegation is made out on the facts.

The allegations

(Issue 1.1.1) In relation to the claimant's application for the role of Occupational Therapy Assistant in 2023:

Not offer the claimant the role (Issue 1.1.1.1)

78. The role was not offered to the claimant. As for the less favourable treatment question, the claimant is Black British, whereas the successful candidates are White British. So there is, at least on the face of it, less favourable treatment compared to two actual comparators. We note that does not shift the burden of proof, without more. There must be some other evidence from which the Tribunal could draw an inference of discrimination, before the burden shifts. Subject to any such evidence, the crucial issue in relation to this allegation is the reason why the post was offered to the successful candidates but not to the claimant.
79. Looking at the interview matrix on pages 135-6, we note that of the 12 people interviewed, 6 scored higher than the claimant. Their scores are 10, 10, 9, 7, 5, and 5. All of those were deemed to be appointable. Of the four candidates who were scored 4, which includes the claimant, three of them, including the claimant, were deemed not to have met the overall standard. Only one of those four was deemed to have been appointable. (See the overall rating score, reflected in columns 6, 7 and 8).
80. The Tribunal is satisfied, on the basis of the evidence before us, as explored further below in relation to allegations 3 and 6, that those considered appointable were judged to be so because they were reasonably assessed, bearing in mind their overall performance at interview, to have either met the requirements for the role, or exceeded them. It was nothing to do with the race of any of them; it was down to their performance at interview.
81. The Tribunal must also be satisfied that the claimant was not given a score of 4 because of race. Again for reasons set out below in relation to allegations 3 and 6, we conclude that the score given to the claimant was due to her performance at interview and not because of race.
82. We have also considered whether the decision that the claimant was not appointable, even if, theoretically, she was the highest scoring candidate, was because of race. We are satisfied it was not, again for reasons developed further below. In brief, we have concluded that the panel's decision was based on the reasonable conclusion, based on her response to the interview questions, that she had not demonstrated a sufficient understanding of the

nature of the role. The Tribunal is satisfied that the interview panel had reasonable concerns about whether the claimant would handle safeguarding issues in this role appropriately.

83. For all of these reasons, we conclude that the decision not to offer the role to the claimant was because she was reasonably judged not to have met the requirements of the role. Six people performed better than her; the three highest scoring candidates, demonstrably so.

Not offer the claimant the opportunity of informal discussion despite her requesting this orally by telephone call to reception staff at the Belfield children's centre in early January and by email on 12 January 2023 to Karen Lamb after being offered an interview (Issue 1.1.1.2)

84. This allegation is made out on the facts. We conclude however, on the basis of the facts found above, that the claimant was not treated less favourably than any of the other candidates. A white candidate also left messages for Ms Lamb and was not called back. Further, we are satisfied that this was due to work pressures in any event; it had nothing to do with race.

85. As Ms Laverack concluded in the grievance, not calling applicants back is unsatisfactory. She advised that it was important that the person named as the contact for candidates should be available to answer questions about the role. Based on our conclusions however, the allegation does not succeed.

Deliberately score the claimant down on the scoring matrix (Issue 1.1.1.3)

86. This is considered alongside 1.1.1.6, which raises similar questions.

Ignore the claimant's request for written feedback until she raised a written grievance (1.1.1.4)

87. This allegation fails on the facts. Written feedback was requested on 5 February and was provided on 23 February, the day after the claimant's grievance had been submitted. The delay was not because the request was being ignored. It was due to Ms Lamb being out of the country; and Mr Waltham, who had been asked to respond on behalf of the panel, having other work to juggle and manage; and taking time to gather the details needed to respond. Further, the timing of the written feedback had nothing to do with the grievance being submitted to Ms Dale on 22 February 2023. The Tribunal accepts that Mr Waltham was not aware of the grievance when he provided the feedback. He provided it when he could.

D Waltham gave rushed feedback which did not align with what was said on the telephone (Issue 1.1.1.5)

88. We have not found that the feedback was rushed. It was delayed due to Mr Waltham juggling other commitments. The feedback given by him sets out briefly the key reasons why the claimant did not succeed. Namely, because the answers she gave did not satisfy the requirements in relation to safeguarding, working with children with complex needs or the Mental Capacity Act. Mr Waltham also offered suggestions as to how the claimant might seek to ensure she performed better in future. We accept that the reason given by Ms Lamb was the claimant's response regarding the timescales in which she would respond to a client and her lack of experience with disabled children. The first part of that was not mentioned by Mr Waltham. The Tribunal concludes however that this difference was not because of race but because

Mr Waltham's feedback was presented in a different form, was more detailed, and set out not only why the claimant did not succeed but also provided advice as to how to improve in the areas that she was judged to have under-performed at interview.

89. This is not to say that lessons cannot be learned from the process of providing feedback to unsuccessful candidates. The Tribunal notes the evidence of Ms Laverack at paragraph 20 in which she says:

culturally as an organisation there seems to be tendency to provide broad feedback rather than specific detail to candidates.

90. Further, at paragraph 21 it is noted by Ms Laverack that her Investigation Report includes several recommendations for general improvements in procedures to assist in safeguarding against or identifying potential discriminatory behaviour. The areas identified for improvement are however matters that applied to all staff equally. In fairness to the respondent, the claimant also had the opportunity to meet with Ms Lamb for more detailed feedback, but she declined. This allegation does not succeed.

Deliberately score the claimant down on the scoring matrix (Issue 1.1.1.3) / The panel members lied on the matrix and said that she did not have experience that she did have (Issue 1.1.1.6)

91. We conclude that the scores given to the claimant were not deliberately reduced and that the scores given to the claimant by the panel members were their honest assessment of her performance at interview. The reasons for concluding this follow, in addition to the reasons given above regarding not offering the role to the claimant.

The score for qualifications

92. In relation to qualifications, we note that Mrs Twomey gave the claimant a score of 2 in both the shortlisting exercise, and following interview. The Tribunal is satisfied that Mrs Twomey had nothing before her when shortlisting the claimant, to suggest that the claimant was Black British. Following the interview, she would have been aware of that fact. The fact that Mrs Twomey gave the claimant the same score both at shortlisting and after interview demonstrates that Mrs Twomey was not in any way biased against the claimant, once she knew her race, in relation to qualifications.

93. In the absence of any other evidence from which an inference of discrimination because of race could be drawn, we are satisfied that the consensus score arrived at by the panel on qualifications, had nothing to do with race. As Ms Laverack pointed out (and as the Tribunal members take judicial notice of) there is nothing unusual in different interview panel members giving different scores for the same answer. Mr Waltham gave the claimant a score of 1 for qualifications. As noted in the facts section, Ms Lamb does not appear to have independently scored any of the candidates prior to the discussion taking place. We have however found that there was a discussion about each score and that a consensus was arrived at. In relation to qualifications, the consensus was that a score of 1 was appropriate (meaning the claimant met but did not exceed the qualification) and that was the agreed score inserted on the Interview Matrix.

The safeguarding question

94. In relation to the interview question related to safeguarding, we accept the evidence of Mr Waltham that although the claimant held a safeguarding qualification obtained through the Council, relevant experience in and understanding of safeguarding was not demonstrated at the claimant's interview. This was one of the main requirements of the role and we conclude that Mr Waltham and the other panel members reasonably came to the view that the claimant had not demonstrated sufficiently her understanding and experience of safeguarding issues whilst working with young people with severe disabilities. See paragraph 45 above and Mr Waltham's witness statement, paragraph 5.

95. Mrs Twomey in her witness statement at paragraph 10, explains how the panel were seeking to understand whether the candidates were able to recognise what they don't know and when they would seek further information. She says:

During Ibi's interview it became clear that she was able to discuss her knowledge and skills relating to the questions but her explanation of how she would put them into action in a scenario such as question four (page 137-148 of the bundle) [showed] that she did not recognise her limitations and lack of knowledge in the OT Process and when to seek advice. Ibi did not demonstrate during the interview that she understood the OTA post level of responsibility and the need to feedback to the qualified OT who is ultimately responsible for the case. These two characteristics I feel are the most important for an applicant to demonstrate as the successful candidate would be lone working out in the community and coming across situations where they would need to be able to use their knowledge and skills appropriately and know when they needed to report back to the OT or manager and more importantly have awareness of their limitations. There were several applicants who struggled to demonstrate these characteristics

96. The claimant asks us to conclude that the interview panel were not interested in her as she came across as a strong confident black person. The claimant put that to Mrs Twomey in cross examination:

Q. [You] want a meek yes-person? A. No. About someone who is an active listener, have a considered opinion, discuss things calmly, aware of types of challenges they might face and the need for that team support and comeback and report to a qualified OT and to understand their learning needs.

The Tribunal is satisfied that this answer is consistent with the explanation given in Mrs Twomey's witness statement, other answers during cross examination and our findings of fact.

97. During the cross examination of the claimant, the following question was put:

Q. She says you fell into error by not saying you would refer back to OT when deciding what to do? A. Insidious pedantry. Obvious when working, will refer back. Nit-picking in the interview, you say thank goodness not get the job.

98. The Tribunal is satisfied that this is not a matter of nit-picking or pedantry. Interview panels must assess suitability for appointment on the basis of what is said at interview and the specific requirements of a role. We conclude that it was reasonable, taking into account the answer recorded as given by the claimant, for the panel to reach the conclusions they did.

Comparison with the successful candidates

99. At paragraph 14 of her witness statement, Mrs Twomey sets out her reasoning for offering the post to the two highest scoring candidates:

The candidates were able to demonstrate they could use their existing knowledge and skills within the role of OTA. They both had hands on experience working with children and their answers were very child focused. Both candidates had excellent communications skills which were demonstrated throughout their interviews by the way they answered the questions and how they presented in the interview. Both exceed the requirements of the post in a number of areas. The candidates demonstrated that they had an understanding of the complexity of working with children with disabilities and [were] aware of their limitations and need for further training.

100. At paragraph 16, Mrs Twomey says:

As mentioned above the applicants were of a high standard all had transferable knowledge and skills but sadly at interview several were unable to demonstrate how this related to the OTA role. All had relevant qualifications but again several were unable to demonstrate how they would put their training into practice during the interview. To demonstrate this one of the applicants had undergone her OT training but at interview she was not able to demonstrate how she could put her knowledge and skills into action when answering the questions on safeguarding and clinical scenarios. She was therefore unsuccessful for the same reasons the claimant was not successful. This candidate's demographic was white, young, female.

101. This evidence is consistent with the documents and our findings of fact and reinforces our conclusion that the decisions of the interview panel were based on the relative performance of the interviewees, and not on their race.

In relation to three applications for roles in 2019 for roles in Refresh (Young People's Substance Misuse Service), did not offer the claimant the roles.

102. This allegation fails on the facts. The claimant accepts she did not apply for ReFresh roles in 2019 but in 2014/2015. The claimant was not allowed to amend her claim to include the 2014/2015 roles. No evidence has been presented in relation to any other roles applied for by the claimant in 2019. This allegation fails on the facts.

Time limits

103. Due to our conclusions on the merits of the allegations, it is not necessary to consider this issue.

Employment Judge James

Employment Judge James
North East Region

Dated 22 July 2024

Sent to the parties on:

Date: 25th July 2024

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For the Tribunals Office

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

ANNEX A – AGREED LIST OF ISSUES

1. Direct race discrimination (Equality Act 2010 section 13)

1.1 Did the respondent do the following things:

1.1.1 In relation to the claimant's application for the role of Occupational Therapy Assistant in 2023:

1.1.1.1 Not offer the claimant the role;

1.1.1.2 Not offer the claimant the opportunity of informal discussion despite her requesting this orally by telephone call to reception staff at the Belfield children's centre in early January and by email on 12 January 2023 to Karen Lamb after being offered an interview.

1.1.1.3 Deliberately score the claimant down on the scoring matrix;

1.1.1.4 Ignore the claimant's request for written feedback until she raised a written grievance;

1.1.1.5 D Waltham gave rushed feedback which did not align with what was said on the telephone;

1.1.1.6 The panel members lied on the matrix and said that she did not have experience that she did have.

1.1.2 In relation to three applications for roles in 2019 for roles in Refresh (Young People's Substance Misuse Service), did not offer the claimant the roles.

1.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

1.3 If so, was it because of race?

2. Time limits

2.1 Given the date the claim form was presented and the dates of early conciliation, the respondent asserts that any complaint about something that happened before 24 January 2023 may not have been brought in time.

2.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

2.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

2.2.2 If not, was there conduct extending over a period?

2.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

- 2.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - 2.2.4.1 Why were the complaints not made to the Tribunal in time?
 - 2.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

3. Remedy for discrimination

- 3.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- 3.2 What financial losses has the discrimination caused the claimant?
- 3.3 Has the claimant taken reasonable steps to replace her losses?
- 3.4 If not, for what period of loss should the claimant be compensated?
- 3.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- 3.6 Should interest be awarded? How much?