



EMPLOYMENT TRIBUNALS

Claimant:
Mr P Mundy Castle v

Respondent:
Overton Grange School

Heard at: London (South) (via CVP)

On: 7-11 July 2025

Before: Employment Judge Fredericks-Bowyer
Tribunal Member Boyce
Tribunal Member Singh

Appearances

For the claimant: In Person
For the respondent: Mr S Gittins (Counsel)

JUDGMENT

1. The claimant's allegations made subject to a deposit order on 7 February 2025 are struck out following non-payment of the deposits ordered.
2. The claimant's complaints of less favourable treatment because of his race are not well-founded and are dismissed.

WRITTEN REASONS

Introduction

1. These reasons are produced at the claimant's request following oral judgment dismissing his remaining claims, delivered this morning at the start of the 5th day of the trial.
2. The claim is about the claimant's application to become Headteacher at the respondent. He says he was not shortlisted or appointed because he is Black

African. He compares himself to Mr McNabb, the current Headteacher at the respondent, who was appointed in the recruitment process complained of.

3. In short summary, given the apparent interest in the case, we found that the selection panel which did the shortlisting complained of did not know the claimant was Black African when it made its decision. It could not therefore have excluded the claimant because of his race. The claimant did not attend interview and was never in a position where the respondent could decide to appoint him. The allegation that he was not appointed because of his race therefore also had no reasonable prospect of success.
4. We heard no evidence which indicated candidates' race had any bearing on any decision made by the Governors in this recruitment process. This judgment should be read as an exoneration of the respondent in respect of all the claimant's allegations of race discrimination. That said, we do hope the claimant is able to move on from this matter and continue his teaching career on its previous trajectory. It is clear to us that the claimant is a celebrated teacher and it also appears that he has a great deal to offer his profession and his students.
5. I am conscious that the claimant has waited some time for this written judgment. After oral judgment was given, I went immediately into other back-to-back trials, and then I was unexpectedly required to take time away from the Tribunal over the summer period.

The issues

6. On 5 February 2025, Employment Judge Harrington made a deposit order in respect of three of the five allegations the claimant advanced. When doing so, she decided they had little reasonable prospect of success. The claimant did not pay those deposits, and we dealt with the consequences by way of the preliminary issue outlined below.
7. The main issues before us this week were, therefore, as follows:-

7.1. *Direct Race Discrimination (s13 Equality Act 2010)* –

7.1.1. *The claimant is Black African.*

7.1.2. *Did the respondent do the following things with regards to the claimant's application made in November 2023:-*

7.1.2.1. *The members of the selection committee scored the claimant's application in a negative way because of his race; and*

7.1.2.2. *A white man was appointed to the role which the claimant applied for, whom had significantly less experience and fewer qualifications than the claimant.*

7.1.3. *Was that less favourable treatment? The claimant identifies Mr McNabb as his actual comparator.*

7.1.4. *If so, was it because of race?*

The hearing

8. The claimant represented himself at the hearing and gave evidence in support of his claim. We also accepted a witness statement as read from Ms Brown, a former teacher at the respondent. The respondent was represented by Mr Gittins of Counsel, and called on sworn evidence from (1) Ms Cook (Governor at the respondent), (2) Mr Cadle (former Governor at the respondent), (3) Mr Jones (Leadership Appointment Consultant at ASCL PD Ltd), (4) Mr Doubell (Chair of Governors at the respondent, and (5) Mr Sankaran (former Governor at the respondent).
9. We had access to a bundle of documents which ran to 555 pages. Page references in this judgment refer to pages in that bundle. We also had an 18 page supplementary bundle of documents made by the claimant to which the respondent did not object.

Claimant's day 1 applications (the preliminary issues)

Re-instatement of allegation which had unpaid deposit

10. The claimant had advanced three allegations which were made subject to a deposit order. In paragraph 10 of EJ Harrington's order, she explained that the sum to be paid for the allegations was £240, a sum of £80 for each. In making the order, Judge Harrington took account of the claimant's current limited means.
11. Following promulgation of the order, the claimant wrote to the Tribunal and explained that because of his means he wished to understand whether he could pay £80 to have only one of the allegations considered. That query was not responded to within the time allowed for the claimant to pay the deposit ordered. The claimant did not pay any money in respect of the deposit order before the deadline set had expired.
12. The respondent applied for the allegations to be struck out following non-payment of the deposit. The claimant asked again if he could pay £80 for one of the allegations to continue, which he considered he had evidence allowing the allegation to succeed. EJ Harrington wrote in response to the queries in the week prior to the hearing, pointing out that the order made plain that the sum was £80 for each allegation, and £240 in total.
13. When the issue arose at the outset of this hearing, the claimant had not paid any sum in response to the deposit order. Although he told us several times that he had taken legal advice, and was taking legal advice, it did not appear that the claimant had asked his advisers what he could do to withdraw two of the allegations made and pay £80 in respect of the one remaining.
14. The respondent asked for confirmation the allegations were struck out. The claimant asked us to either not strike out the one allegation he wanted to continue with, or to reinstate the allegation if already struck out. It was clear to us that, despite the non-payment of the deposit occurring months prior, the allegations had not been confirmed as struck out.

15. In submissions, the claimant asked us to take account of the following factors:-
- 15.1. That he had better evidence now than he had in the prior hearing;
 - 15.2. That the Tribunal had caused delay and confusion through not responding to his query and then *"only confirming last week"* that £80 could be paid for one allegation; and
 - 15.3. He could not afford to pay £240 and risk legal costs given his present financial means.
16. Rule 40(4) Employment Tribunal Procedure Rules 2024 ("Rules") provides that where a deposit is not paid by the deadline, the Tribunal must strike out the claim or allegations to which the deposit relates. Although subject to the general position that the Tribunal can vary or disapply rules where it is within the interests of justice to do so, the imperative wording of this rule makes clear that there must be exceptionally good reasons to overlook the apparent obligation on the Tribunal to end an allegation which was subject of an unpaid deposit order.
17. We considered the application made by the claimant. We unanimously decided to refuse the application. In our view, the claimant had an opportunity to query the terms of the order in the hearing. It appears he did not do so, and he indicated that he was caught up in the hearing and so unable to do so. Any self representing person has some leeway from the Tribunal in terms of their conduct, but that does not mean that the Tribunal should indulge them each time they miss an opportunity in a hearing. The purpose of the hearing is to decide these matters and have them explained. The claim that there was purportedly better evidence now than at the hearing does not assist in this application because the deposit order was made, and was in force, on the basis of information available when it was made.
18. In addition, the claimant understood that not paying the sum ordered would result in the allegations being struck out. He allowed that deadline to come and go without taking advice or, at worst case, paying the deposit ordered to continue the allegations in order to protect his position. In our judgment, there is no force before us in his submission as to means, because means were assessed by the Judge in making the order. If he did not think that assessment was done fairly, it was for him to appeal that decision. He did not do so. That is not a matter in which we could intervene.
19. We also considered the impact on the trial if the application was to be allowed. The trial could not be heard, because neither party had prepared in evidence or documents for those allegations to be tried. The ensuing delay, in this region, would run to many months and likely at least a year. In circumstances where the claimant could have avoided having to make the application by simply paying the deposit, or using resources available to him to learn that he could indeed pay part of the deposit (as is implied through the wording of the deposit order itself), it is not in the interests of justice to generate that delay.
20. In our judgment, there were no significant factors which could lead us to decide it was in the interests of justice to ignore Rule 40(4). We were unable to make the decision the claimant wished us to make.

21. The morning following our response to this application, the claimant asked a series of questions about the reasoning offered which were clearly designed to bolster an appeal of the decision. The claimant was indulged with answers, with particular emphasis being placed on the emphatic wording of Rule 40(4) and the unfairness of delay on both parties where the deposit could have been paid in full or in part, as was set out in the wording with the order in the first instance.

Application to add claim of indirect race discrimination

22. The claimant applied to amend his claim to add indirect race discrimination complaints about the way in which the recruitment process was run. The respondent resisted the application.

23. There was no written proposed particulars in the application. In discussion, the claimant said that there were practices adopted which put his racial group at a group disadvantage. These were vaguely said to be about the method of assessment and scoring in the shortlisting process. The claimant did not describe those issues in precise terms. He could not explain the group disadvantage caused, and conceded there was no evidence available to us which might demonstrate the group disadvantage which he said was linked to the recruitment process. There was added difficulty in that another with the claimant's protected characteristic did secure shortlisting. Although not fatal to an indirect discrimination claim, this factor does mean that more cogent evidence would be required from the claimant to establish a group disadvantage.

24. Determination of applications to amend claims is a case management decision where the Tribunal has a wide discretion to make a decision on the particular circumstances of the case in front of them, which is rarely interfered with thereafter unless the Tribunal makes a decision which is at odds with the law it self-directs to (Adams v West Sussex County Council [1990] ICR 546; Gayle v Sandwell and West Birmingham NHS Trust [2011] IRLR 810). Powers of case management are conferred by Rule 29 Employment Tribunal Rules of Procedure 2013.

25. The exercise is to assess where the balance of injustice and hardship lies in either accepting or refusing the application to amend (Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650; Selkent Bus Co Ltd v Moore [1996] ICR 836). When doing so, the focus must be on the real practical consequences of one decision or the other on each party in the case which is subject to the application; each represented party should show what injustice and hardship they would suffer if it is to be taken into account (Vaughan v Modality Partnership [2021] UKEAT/147/20).

26. Selkent outlined a range of factors to consider when assessing such an application, and these are helpful in terms of assessing where the balance of injustice and hardship lies. These are the nature of the amendment, the applicability of time limits, and the timing and manner of the application. Although useful, these should not be used as a checklist and they are not an exhaustive list of factors to be taken into account (Abercrombie and others v Aqa Rangemaster Ltd [2014] ICR 209). In this last case, Underhill LJ then emphasised that the Tribunal should also focus on:

“the extent to which the new pleading is likely to involve substantially different lines of inquiry than the old: the greater the difference between

the factual and legal issues raised by the new claim and by the old, the less likely it is to be permitted”.

27. The Tribunal is entitled to consider the merits of the proposed amended claim, so far as that is ascertainable, because that is a factor which might allow insight into where the balance of injustice and hardship lies (Cooper v Chief Constable of West Yorkshire Police [2006] All ER 343). Consideration of time limits similarly allows an analysis of the balance of injustice and hardship. Time limits are relevant but not decisive, although it is important to guard against amendments becoming a mechanism by which statutory time limits can be circumvented (MacFarlane v Commissioner of Police of the Metropolis [2024] ICR 22).
28. An allowed amendment needs to be sufficiently detailed to allow all of the circumstances to be considered to decide where the balance of injustice and hardship lies. In Ladbroke's Racing Ltd v Traynor [UKEATS/67/6/MT], the Employment Tribunal at first instance allowed an amendment to add in an allegation that a dismissal was procedurally unfair. Difficulty arose because there was no more detail proposed than that, with the Tribunal assuming that the respondent would understand the detail based on its prior knowledge of being the other party to the process. This was the wrong approach, because the resulting decision was “*fatally flawed by the lack of there being any articulation of the detail of the amendment that was being proposed*” (Lady Smith in Traynor).
29. We refused the application. This was the final hearing, and the claimant had not previously raised the prospect of this amendment despite engaging in detailed discussions about the claim at a previous case management hearing. The claimant did not explain to us the evidence he said he had which prompted the application. It seems to be based on the scoring outcomes from shortlisting, which we were satisfied he had had in his possession since he queried the shortlisting process before these proceedings were issued. In our view, he could have brought this claim when he issued the ET1. He could also have made this amendment application well in advance of the final hearing.
30. If we were to allow the amendment now, the trial window would be lost with the ensuing significant delay causing prejudice to both parties. That prejudice falls more squarely on the respondent, which would face increased costs for circumstances not of its making. Such a delay following application at final hearing may be justified if the balance of prejudice can otherwise be shown to rest unfairly upon the claimant. In our view, there is no such unfair resting. The claimant had allegations remaining relating to the process undertaken which were ready to be tried. The proposed claim was vague, with no indication that there was evidence available which would make the claim viable. In our view, the amendment could not be adopted at the time of the application because the link between the provision, criterion and practice on the one hand, and the group disadvantage on the other, was not articulated to us. The claimant seemed not to know what to say to us about that essential link. The amendment falls foul of the principles from Traynor.
31. In those circumstances, we were being asked to delay the final hearing for an unarticulated claim to be pieced together in the hope there was evidence to make it good at some point in the future. In our view, it was simply not in accordance with the overriding objective to allow that to happen. The balance of prejudice and

hardship falls plainly upon the respondent if were to allow the application. It followed, applying all of the case law principles outlined above, that the application must be refused. The case was heard with regard to the issues outlined above.

Findings of fact

32. The facts we found on a unanimous basis are outlined below. These facts are found on the balance of probabilities. That is to say, we find them on the basis of what is more likely than not on the evidence available to us. This is an important feature in cases such as this, where a claimant is alleging that things are done at times when they are not present. In these cases, we hear evidence directly from those who made the decisions to which the complaints relate. The person bringing the complaint has no such direct evidence, because they were not present, and so they must rely on asking about their suspicions in the hope that something emerges which casts doubt on the primary evidence heard.
33. The claimant identifies as Black African. The claimant has an impressive work history in the teaching profession, including awards won for teaching practice. His witness statement sets out various experiences and accolades which we do not doubt reflects that he was an effective classroom teacher for the majority of his career. The claimant described his record at the time of applying to the respondent as being *"impeccable and unblemished"*. In our view, that is an inaccurate statement. The claimant was dismissed from his job as the head teacher at Woodcote High School for serious financial mismanagement. This was his most recent significant head teacher role before applying to the respondent.
34. The Woodcote matter garnered significant press attention after this claim was issued because the claimant unsuccessfully sued Woodcote following his dismissal. There was material available to us which showed that. In our view, this is not relevant evidence for the issues in this claim. What is relevant, though, is that (1) the claimant had recently been dismissed for gross misconduct when he applied to the respondent, and (2) although it did not have national press attention at that point, it was known about in the respondent's geographical area and education sphere.
35. The respondent is a secondary school. It is an academy and consequently has more independence of its own affairs than a school operated directly by Government or local authority. From September 2017 to August 2018, Ms Brown worked at the school as an NQT. She is Black Caribbean. She was placed on grade M1. She was told that another NQT who was white was placed on grade M3 and asked the then headteachers about the discrepancy. After some time, she was elevated to grade M3. Ms Brown was subjected to an incident of sex and race discrimination by a student during her work at the respondent, but the student was not sanctioned. Around the same time, a black student was offensive to a white teacher and was excluded for two days. Ms Brown left the school in part because of what she perceived to be a disparity in treatment between black and white races.
36. In the autumn term of 2023, the respondent advertised for the position of Headteacher. The governors engaged with ASCL Professional Development Limited to assist with the recruitment process. Mr Jones was appointed as a consultant to assist the respondent. He is an experienced head teacher by background, before consulting with schools to assist with senior leadership appointments.

37. With Mr Jones, the respondent produced an application pack with job description and person specification (pages 116 to 132). To advertise, an advert was placed in the Times Educational Supplement (pages 132 to 134). A diversity monitoring questionnaire was part of the application pack. Mr Jones says, and we accept, that the intention was to have that document always dealt with separately to the application itself. The respondent accepts that that did not happen in practice.
38. The claimant responded to the advert and applied for the role. His application and personal statement were shown to us at pages 146 to 151. He arranged to visit the respondent on 1 November 2023, but was unable to attend on the day (page 135). Other candidates, ones shortlisted and ones not shortlisted, were able to attend. The parties agree that the claimant had never met any of the respondent witnesses prior to the shortlisting decision.
39. At the close of the application window, the 15 received applications were anonymised and sent to Mr Doubell, the Chair of Governors. Despite the intention to keep the diversity information separate, the diversity forms remained with the completed applications which were sent to Mr Doubell. The claimant contends that this is evidence that Mr Doubell knew about his race moving forward into the shortlisting phase of the process. Mr Doubell's evidence is that he did not pay close attention to the forms attached. He says:-
- 39.1. he noticed that the information was attached;
 - 39.2. he asked the HR manager at the respondent to remove the information and resend the applications, but that was not possible;
 - 39.3. he did not want to send that information out to the rest of the governors who were to take part in the shortlisting process;
 - 39.4. he was on holiday at the time and had limited assistance, but did not think it was appropriate for himself to remove the information;
 - 39.5. he asked his (adult) daughter to remove the pages for him and she did so, then she emailed the applications to the rest of the panel from Mr Doubell's e-mail address (page 137 and 152)
 - 39.6. he never looked at the diversity information beyond initially noticing its presence, and at some point since then he likely deleted all the documents from his system in line with data protection requirements; and
 - 39.7. he did not study the forms in any detail so could not have matched the race of the candidates with their applications (and remembered it) even if he had wanted to (which he did not).
40. Mr Mundy-Castle had many criticisms of this process from a process and data protection point of view, but he could offer no direct evidence that anything Mr Doubell said about the matter was factually incorrect. He pointed to the fact the e-mails went through Mr Doubell's e-mail server, not his daughter's, but that is not inconsistent with Mr Doubell's evidence. On the balance of probabilities, we accept Mr Doubell's evidence about the diversity forms. It is more likely than not his account

is accurate where (1) there is no evidence that anything he said was incorrect, (2) his evidence sounds plausible; and (3) he was candid about his own failures in best practice, showing openness to mistakes or shortfalls in process.

41. This means we also find as relevant facts:

41.1. Mr Doubell did not know the claimant's race despite having received the diversity monitoring information; and

41.2. The rest of the panel did not receive the diversity monitoring information.

42. Prior to the shortlisting stage, Mr Jones sent an e-mail (pages 139 to 140) to the panel to advise about what, in his view, was the best way to approach shortlisting. He also attached a scoring matrix which mapped the person criteria and had space to score each candidate up to 5 under each heading. He advised a three stage process:-

42.1. Read the application forms only to give a picture of the full range of candidates;

42.2. Return to the start and read the personal statements and start to fill in the scoring matrices, and accept there may be adjustments required, but to *"try to differentiate between the candidates, broadly using the 5 point range set out below"*; and

42.3. Take some time out, then return and re-assess, double check the scores to have confidence in the rank order.

43. Mr Jones advised the scores should be given along the lines of:

5	<i>Convincing evidence that the criteria are fully satisfied</i>
4	<i>Reasonable evidence that the criteria are satisfied</i>
3	<i>Moderate evidence that the criteria are being satisfied</i>
2	<i>Some doubt that the criteria are satisfied</i>
1	<i>Little evidence that the criteria are being met</i>
0	<i>No evidence that the criteria are being met"</i>

44. Importantly, we accept the respondent evidence that the scores were a tool to be used to assist with each governor organising their own ranking for who their preferred candidates were. In Mr Jones' words in his instruction e-mail (our underline for emphasis):-

"As long as you can justify your reasons, the actual individual scores are less important, as inevitably some Governors may be more generous than others. This really does not matter, but what is important is your rank order especially your top 5/6 candidates."

45. The plan then was to discuss the ranking at the shortlisting meeting in the following way:-

“At the shortlisting meeting, we will be eliminating a number of applicants. We will do this by (a) proposing rejection of the lowest scoring/ranking candidates first, (b) shortlisting the highest scoring candidates that everyone agrees on, and (c) discussing the remaining candidates in the middle”.

46. All governors on the panel save for Mr Sankaran completed their shortlisting scores. Mr Sankaran did not complete his part of the paper process for lack of time. He read some of the applications in detail but not all ahead of the shortlisting meeting and he did not return any scoring matrix. Although Mr Jones intended to be the only one who knew how the others had ranked the candidates ahead of the meeting, the panel sent their scores to each other in any event.
47. Each party cross examined the other about the claimant's application and how it compared to the others submitted. The claimant considers that he had one of the strongest applications on paper and considers, as fact, that the panel must have suppressed his scoring or ranking because he is Black African. Each panel member explained why they did not rank the claimant in their top 5/6 candidates for serious discussion about shortlisting.
48. Mr Doubell explained that, in his view, the claimant's application was poor compared to others. He said it was muddled and confused, and did not give examples evidencing how the criteria were met. He said the claimant seemed to rely on achievements and qualifications which were not required and did not explain how they evidenced the criteria. The claimant took exception to that and suggested that Mr Doubell should have researched those achievements to understand what it would have required to get them. Importantly, though, this criticism is about the competence of the process. It is not alleging that a decision was made because of race.
49. Ms Cook considered that there was a lack of attention to detail in the claimant's application. Her witness statement had a big list of errors, although when giving evidence she said that she had not noticed all of them at the time. She did, though, say she thought the claimant's written communication was poor and that it needed to be excellent to be a head teacher. More concerningly for Ms Cook, the claimant's application form was not clear about his recent job history, which raised questions for her about his ability to be clear and accurate. Qualitatively, Ms Cook also concluded that the claimant had not evidenced the competencies as well as the other candidates. In evidence, she drew attention to other candidates' examples which were specific and applied to the question, showing the outcome of specific techniques applied to specific events.
50. Mr Cadle considered that the claimant gave a very poor personal statement. His contemporaneous notes (pages 260 to 263) include the wording:-
- “really poor supporting statement – no detail of what he would do, impacts etc sounded great experience – but he didn't back it up?”*
51. The claimant disputed that his application was poor compared to others, and in his evidence he drew our attention to other applications which had errors in or inconsistencies. He repeated, many times, that he was the best candidate or the

strongest candidate on paper, and the simple fact he did not get the job shows race discrimination.

52. The claimant's view is not evidence which goes to the decision making process of the panel. In our judgment, it is assumption and speculation based on, objectively, an apparent inability to understand what had been required of him in a written application where he was to provide specific examples evidencing to specific competencies.
53. We have found as a fact that the panel members who completed the shortlisting did not know the claimant's race when they assessed his application. They did not have any details about the identity of any of the candidates (save for the one unsuccessful internal candidate). Against that background, we can only accept their evidence that they shortlisted to the best of their ability based on their judgement about the strength of the applications against the person specification.
54. On 8 November 2024, the panel attended a shortlisting meeting with Mr Jones. At the meeting, the panel members discussed the applications. Mr Sankaran took part in the discussion even though he had not finished his shortlisting. Mr Cadle had to leave the meeting for a time due to a clash in commitments, but he was there to finalise the decisions made. None of the panel forwarded the claimant as someone who should be shortlisted. We accept the evidence of the panel that the claimant's application was not discussed in much detail beyond reasons why he was not ranked highly for this reason. There was no return to his application and no debate about his candidacy for shortlisting. The members all agreed on this point and there was no evidence at all indicating the contrary. This means that the panel members decided not to shortlist the claimant. All present are clear that Mr Jones did not take part in the decision making about shortlisting.
55. In his evidence, Mr Jones admitted that he had done some background research of the candidates prior to the shortlisting meeting. He had access to non-anonymised applications. He explained that he knew the claimant had applied, and he knew that the claimant had been dismissed from Woodcote High School. When asked, he said he knew by the time of the shortlisting meeting that the claimant was Black, although he stressed that this was not information which he thought was important. He said that he did not mention the claimant's dismissal or identity because the claimant had never made it to a discussion where the panel was seriously considering shortlisting him. He stressed he was there to advise only and did not take an active part in the shortlisting discussion. None of the other panel members mentioned Mr Jones taking an active part in the discussion or decision making in the meeting. All agree he was there to listen and give a steer if they went on to a wrong tangent. The one exception was where Mr Jones felt that a particular candidate was being overlooked and suggested the panel considers them again, but the panel declined to do so. In the absence of any contradicting evidence, we accept the account of Mr Jones and the account of the panel members in respect of Mr Jones.
56. This means, importantly, we also find the following facts:-
- 56.1. Mr Jones knew the claimant's race at the shortlisting meeting, but he did not mention it;

- 56.2. Mr Doubell, Ms Cook, Mr Sankaran, and Mr Cadle made the shortlisting decision, Mr Jones was not involved; and
- 56.3. None of the panel members who made the shortlisting decision knew that the claimant was Black African.
57. The claimant was not shortlisted. Of the shortlisted candidates, one was the ultimately successful candidate Mr McNabb, and another described themselves as Black African.
58. The claimant did not progress to the selection stage, which involved a multiple assessment process and interview. Mr McNabb did progress to that stage. He is white. He was appointed to the role.
59. The claimant requested feedback, and is unhappy with what he considers to be a lack of clarity and inconsistency in what he was told about, or his understanding of, the shortlisting process. Those matters falling after the appointment of Mr McNabb are not relevant in themselves for the issues in this claim. The claimant cross examined the respondent witnesses about them, and so we have taken the questions and answers into account when finding the facts above.

Relevant law

60. Section 13(1) Equality Act 2010 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".

61. This means that the claimant would have suffered from direct discrimination if we find that he was treated less favourably than someone who was not Black African. The person(s) with whom the comparison is made must have *"no material difference in circumstances relating to each case"* to the person bringing the claim (section 23(1) Equality Act 2010). The comparator should, other than in respect of the protected characteristic, *"be a comparator in the same position in all material respects as the victim"* (Shannon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL). There is no requirement for a comparator to be identical, but the greater the differences, the less likely it might be that the difference in treatment was because of discrimination and so more is likely to be required to shift the burden of proof (Virgin Active Ltd v Hughes [2023] EAT 130).
62. If there is no such comparator in reality, then the Tribunal should define and consider how a hypothetical comparator would have been treated if in the same position as the claimant save for the fact that they would not have the protected characteristic relied upon (Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646, CA).
63. The phrase 'because of' is a key element of a direct discrimination claim. In Gould v St John's Downshire Hill [2021] ICR 1 EAT, Mr Justice Linden said, in respect of determining 'because of':-

"It has therefore been coined the 'reason why' question and the test is subjective... For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of. It need not be the sole ground for the decision... the influence of the protected characteristic may be conscious or subconscious."

64. Under section 136(2) Equality Act 2010, the claimant needs to show facts, found on the balance of probabilities, which could lead the Tribunal to properly conclude that the discrimination has occurred before any other explanation is taken into account. If the claimant succeeds with this, then it is for the respondent to show that the contravention has not occurred (section 136(3) Equality Act 2010). The Tribunal must first consider whether the burden does shift to the respondent. The claimant must show more than simply there is a protected characteristic and a difference in treatment (Madarassy v Nomura International Plc [2007] IRLR 246). The operative point is whether the Tribunal could conclude there had actually been discrimination, not simply that there might have been (Hammonds LLP v Mwitta [2010] 0026/10).

Discussion and conclusions

65. The answer to this claim can be given in two trite and obvious sentences, reflecting on the findings of fact above. The shortlisting panel did not know that the claimant was Black African when it decided not to progress his application. It could not, therefore, have treated him less favourably because he is Black African.

66. Applying this to section 136 Equality Act 2010, the claimant cannot establish facts from which we could conclude there was race discrimination where we are not satisfied the panel knew he was Black African. The burden does not shift to the respondent, and so there is no need for the respondent to justify the decisions it did make. Any criticisms about the process cannot found themselves in race discrimination.

67. In submissions, the claimant sought to rely on the written evidence of Ms Brown to show that there is a racist culture at the respondent which may assist in showing facts from which we could conclude there was discrimination. There are two things to say about this:-

67.1. First, Ms Brown was not tested in her evidence, and so we could not understand from her the context behind her evidence, or hear that evidence tested – the evidence does not explicitly state that the pay discrepancy was because of race; and

67.2. Second, and most importantly, the claimant does not reach the stage where we are thinking about that background context because we have found as a fact that those making the decisions to which the complaint relates did not know the claimant was Black African. Where the primary facts mean that the complaint cannot be discrimination, the context is irrelevant.

68. Applying these conclusions to the issues in turn, we conclude:-

68.1. The claimant was not rejected from shortlisting because of his race; and

68.2. The claimant did not fail to gain appointment because of his race. The claimant did not take part in the interview day which led to the appointment offer being extended. Mr McNabb did attend the interview. He is not therefore an appropriate comparator because he was not in materially the same circumstances as the claimant. A hypothetical white comparator in the claimant's situation would also not have been appointed because he was not at the interview stage which would lead to the appointment. It is apparent to us, on that basic analysis, that this part of the claim had no reasonable prospect of success.

Approved by: Employment Judge Fredericks-Bowyer

Dated: 22 September 2025