FAIR EMPLOYMENT TRIBUNAL

CASE REF: 113/18FET

CLAIMANT: **Kevin Lappin**

RESPONDENT: **Hermes Parcelnet Limited**

DECISION

The decision of the tribunal is as follows:-

That the claimant's claim of discrimination on the grounds of religious belief is dismissed in its entirety.

Constitution of Tribunal:

Employment Judge: **Ms J Turkington**

Members: **Mr R McKnight**
Mr M McKeown

Appearances:

The claimant appeared and represented himself.

The respondent appeared and was represented by Ms Rachel Best, Barrister-at-Law instructed by DLA Piper, solicitors, LLP.

The Claim

1. The claimant brought a claim of discrimination on the grounds of religious belief in relation to the recruitment by the respondent to the post of Field Manager.

The Issues

2. The agreed issues to be determined by the tribunal in respect of this claim were:-

   Discrimination on the grounds of religious belief

   Did the respondent's decision not to offer the claimant the role of Field Manager (and its subsequent treatment of his complaint) constitute the respondent treating

the claimant less favourably than the respondent treats or would treat an appropriate comparator?

1. Is Curtis Brown an appropriate comparator (ie someone in the same or not materially different circumstances as the claimant save only that he is of a different religious belief to the claimant)?

2. If so, (which the respondent denies) was the respondent's reason for such less favourable treatment on the ground of the claimant's religious belief? The claimant asserts that Mr Brown was offered the role because he was Protestant and alleges that the claimant:-

   2.1 has more management experience than Mr Brown, who the claimant alleges has none;

   2.2 has more courier experience, on the basis that he has been a self-employed courier for 25 years and he has had people working for him the whole time; and

   2.3 owned a sandwich bar for 2 years.

3. If the less favourable treatment was on the ground of the claimant's religious belief (which the respondent denies) is the respondent liable for the acts of its employees, or did the respondent take all reasonable steps to prevent its employees from doing such acts?

Remedy

4. Did the claimant suffer injury to feelings as a result of the alleged discriminatory act of the respondent? If so, what is the appropriate remedy in the circumstances?

5. Did the claimant suffer financial loss as a result of the alleged discriminatory act of the respondent? If so, what is the appropriate remedy in the circumstances?

6. Are the relevant tests as set out in the relevant case law met for compensation to be awarded?

Contentions of the Parties

7. In his submissions, the claimant contended that his comparator was asked many more questions at his interview than the claimant was. He also noted that the respondent does not register with the Equality Commission whilst the claimant believes that the respondent is required to so register. The claimant submitted that the respondent's manager who was watching the original successful candidate during the ice breaker exercise had made notes regarding her performance which were clearly contradictory. He also disputed the respondent's contention that this candidate is Catholic, albeit this dispute had not been put to the respondent's witness. The claimant drew attention to the fact that Heather Gibson, who attended a number of the relevant interviews, was not called to give evidence, particularly in relation to interview notes purportedly recorded by her which appeared to be in different handwriting. Finally, the claimant suggested that his score was bottom of

all the interview scores because the whole process was a sham designed to suit the respondent's narrative.

8. Counsel for the respondent contended that the claimant's claim was out of time and the tribunal should not extend the time limit for the claim and hence the tribunal had no jurisdiction to hear the claim. It was accepted by the respondent that this point had not been raised prior to the hearing. In relation to the substance of the claim, Ms Best noted that the claimant's case centred on the allegation that he was not appointed to the Field Manager role because of his religious belief. However, the successful candidate was Anne Woods who is believed to be of the same religious belief as the claimant. The respondent's position was that the claimant was not appointed to the role as he did not score highest in the recruitment process. It was contended that there was no evidence that religious belief played a role in the process and this was a case where the burden of proof did not shift to the respondent. Counsel invited the tribunal to dismiss the claim. However, in the event that the tribunal found in favour of the claimant, counsel argued that compensation for injury to feelings should fall within the lower of the Vento bands.

Sources of Evidence

9. The tribunal heard oral evidence from the claimant and from Caroline Kennedy and Sharon Donaghey on behalf of the respondent. The tribunal also considered a number of documents submitted by the parties and included in the tribunal bundle.

Jurisdiction of the Tribunal

Facts relevant to jurisdiction

10. The interviews for the role of Field Manager took place on Wednesday 4 July 2018. On Friday 6 July, the claimant received a call from his colleague Curtis Brown who indicated that he was to have a second interview. Since the claimant received no contact about a second interview, he quickly inferred that he had not been successful. Sharon Donaghey telephoned the claimant on Monday 9 July to confirm that he was unsuccessful.

11. In August 2018, the candidate who had scored the highest following the second interview decided not to start in the post and the role was then offered to Curtis Brown who was originally the runner up. The claimant became aware of this on or after 4 September and then sought assistance from the Equality Commission. The claimant wrote to the respondent on 10 October 2018 seeking various pieces of information about the successful candidates and the criteria for the post. He stated he felt that he had received less favourable treatment which may amount to discrimination on the grounds of religious belief or political opinion.

12. The claimant lodged his claim with the tribunal on 4 November 2018.

Law relating to jurisdiction

13. By article 46 of the Fair Employment and Treatment (Northern Ireland) Order 1998 ("FETO"), the tribunal shall not consider a complaint under article 38 unless it is brought before whichever is the earlier of -

(a) The end of the period of 3 months beginning with the day on which the complainant first had knowledge, or might reasonably be expected first to have had knowledge, of the act complained of;

(b) The end of the period of 6 months beginning with the day on which the act was done.

Decision in relation to jurisdiction

14. The claimant's claim was not lodged until more than 3 months after the date when it was confirmed that he was unsuccessful, although it was lodged within the longstop period of 6 months from the date of the alleged unlawful act. The claimant's evidence as to the reasons for the delay was not entirely clear. It appeared to the tribunal that the claimant was not concerned about alleged discrimination until he learned that Curtis Brown, whom he knew to be a Protestant, had been appointed to the post. The claimant became aware of this in early September 2018. It also appeared that the claimant had, to some extent, relied on the Equality Commission in this matter. The Commission did not reach a decision on representation in this case until the day before the first Case Management Discussion.

15. The tribunal considers it is arguable that the claimant was not aware of the basic facts of his claim, that is the appointment of his comparator Curtis Brown, until the beginning of September 2018. The tribunal has a wide discretion to extend time where it considers it just and equitable to do so. The claimant was told on 9 July 2018 by Sharon Donaghey that he was unsuccessful. In the circumstances of this case, even if the date of 9 July is taken as the date when time started to run, then the claim was only approximately 4 weeks late. The tribunal has also taken account of the fact that the claimant only became concerned when he learned of the appointment of Curtis Brown at the beginning of September together with the possible lack of clarity caused by the involvement of the Equality Commission up to the point where they declined to represent the claimant.

16. In light of these facts and the broad discretion open to it, the tribunal has determined that it should exercise its discretion to extend the time for lodging the claim. In summary therefore, the tribunal determined that it did have jurisdiction to hear this claim. Accordingly, the tribunal proceeded to consider the merits of the claim.

Facts of the Case

17. Having considered all the evidence in the case, the tribunal found the following relevant facts to be proven on the balance of probabilities:-

(1) The claimant has worked for the respondent as a courier since 2010. The parcel depot used by the respondent is open for couriers to collect parcels on St Patricks Day but closed on 12 July each year. This parcel depot is operated by a third party contractor which provides services to the respondent. The tribunal therefore accepts that the opening arrangements of the depot are not within the direct control of the respondent.

(2) The respondent is not registered with the Equality Commission and does not monitor the community background of its employees in Northern Ireland on

the basis that it says it has only 9 employees. The claimant disputed this on the grounds that, from time to time, the respondent engages temporary employees which brings the numbers up to the level where registration is required. The respondent has no formal records of the composition of its employed workforce in Northern Ireland. The claimant alleged in his claim form that 90% of the respondent's managers are Protestant, but no evidence was presented to support this contention.

(3) In December 2015, the claimant helped out the respondent by delivering extra parcels on rounds where there was a backlog of deliveries. In 2016, an opportunity arose for the claimant to take on additional rounds. His Field Manager sought permission from the Regional Delivery Manager Caroline Kennedy to allow him to become a multi round holder. Ms Kennedy provided the necessary approval and the claimant took on the additional rounds.

(4) In June 2018, the respondent had a vacancy for a Field Manager role. The post was advertised by the HR department both within the company and on a number of external websites such as Jobsite and Total Jobs. Applicants were required to submit their CV. No equal opportunities monitoring information was required to be submitted.

(5) The job advertisement listed 3 essential qualities for the role, namely:-

1. *Committed to driving a great customer experience*

2. *Prepared to deal with challenging situations*

3. *Adaptable to different styles and behaviours within the team*

(6) A total of 61 candidates applied for the post. Caroline Kennedy decided to automatically shortlist for the role any courier who had applied regardless of qualifications or experience or whether or not they met the criteria. Ms Kennedy had been informed that a personal friend of hers, Raymond Tosh, who is Catholic, had applied for the post. She therefore decided to withdraw from the shortlisting process. The shortlisting was conducted by Sharon Donaghey (Regional Planner), Heather Gibson (Field Manager) and Nancy Creighton (Field Manager). 5 couriers who had applied, including the claimant, were automatically shortlisted. The panel also shortlisted an additional 4 external candidates who included Raymond Tosh and Anne Woods.

(7) The shortlisted candidates were then invited to an interview on 4 July 2018. All candidates were invited that afternoon in 2 groups in slots at 1pm and 3 pm. Sharon Donaghey contacted each of the 9 shortlisted candidates by phone to invite them to interview. She worked her way down the list of candidates with the first few candidates she spoke to being invited to the earlier session. Anne Woods, Curtis Brown and Raymond Tosh attended at 1pm. Another shortlisted candidate did not attend. The claimant attended the 3pm session along with Imelda Rooney, Scott Gibson and Raymond McClure.

(8) At the beginning of each session, the panel ran an "ice breaker" exercise. The evidence of the respondent's witnesses was that this was intended to relax the candidates and make them more comfortable for their interviews, although the tribunal was not convinced that such an exercise was likely to be effective in achieving this objective. During this exercise, the panel members, namely Sharon Donaghey, Heather Gibson, Nancy Creighton and Caroline Kennedy, observed and took notes on the candidates. In the first session, Ms Kennedy's friend Raymond Tosh did not take part actively in the exercise. In the notes made by the manager observing Anne Woods during the "ice breaker" exercise, it is recorded on the one hand that she "*Did try to bring Ray in",* whereas on the other hand it was noted that she *"doesn't engage with Ray".* This "ice breaker" exercise was not used as part of the scoring for this recruitment. However, the respondent's evidence was that it may have been used in the event of a tie break between the highest scoring candidates in the interview process.

(9) After the "ice breaker", candidates were interviewed individually. The interview consisted of 5 questions which were put to each of the candidates. These 5 questions are the standard ones used regularly by the respondent in interviews. The candidates' answers to these questions were each marked out of 5 giving a total overall score out of 25.

(10) The 5 questions were as follows:-

1. *Tell me about yourself*

2. *What do you think makes a good team player?*

3. *What motivates you?*

4. *Give me an example of a time when you offered good customer service?*

5. *Why should I consider giving you this job?*

(11) In the 1.00 pm session, Caroline Kennedy and Heather Gibson interviewed Anne Woods whilst Nancy Creighton and Sharon Donaghey interviewed Curtis Brown. Raymond Tosh declined to be interviewed. In the 3 pm session, Caroline Kennedy and Heather Gibson interviewed the claimant and Imelda Rooney whilst Nancy Creighton and Sharon Donaghey interviewed Raymond McClure.

(12) The claimant's interview was brief, lasting around 15 to 20 minutes. The claimant did not expand on his answers and gave a limited number of real examples to illustrate his qualities. During his interview, the claimant did not refer to his experience of owning a café/sandwich bar to demonstrate his management experience. The tribunal accepts the evidence of Caroline Kennedy that the claimant was invited by the panel to expand or elaborate on his answers, but failed to take the opportunity to do so. By contrast, Anne Woods' interview was around 45 minutes as she elaborated on her answers giving a number of examples. The claimant candidly accepted in cross examination that he was not in a position to dispute the

respondent's evidence about the nature of Ms Woods' interview. He also accepted, when asked by the Employment Judge, that he had not felt rushed or curtailed during his own interview.

(13) Curtis Brown's interview also lasted in the region of 40 to 45 minutes. Like Ms Woods, he also expanded on his answers providing examples to demonstrate his points. The tribunal does not accept that he was asked many more questions than the claimant. Rather, Mr Brown took the opportunity to expand on his answers when invited to do so. Again, the claimant candidly accepted that he was not in a position to dispute the respondent's evidence in relation to the nature of Curtis Brown's interview.

(14) Notes were taken at the interviews by Heather Gibson and Nancy Creighton respectively for each of the panels. These notes are clearly not verbatim notes and are a rough summary only of points made by the candidates together with a few comments noted by the panel, such as that Curtis Brown had "*no management experience".* Ms Gibson took the notes for Anne Woods, the claimant and candidate 1. The notes from the claimant's interview and those of candidate 1 are written in block capitals whilst those from Anne Woods' interview are written in a different style of writing, namely small letters/script. The tribunal was given no explanation for this discrepancy as Ms Gibson was not called to give evidence.

(15) Following the completion of the interviews, the 4 interviewers met together to discuss the outcome of the interviews. The top candidates were agreed to be Anne Woods and Curtis Brown with 25 points and 24 points respectively. The claimant was the lowest scoring candidate with 16 points. The other candidates scored 19, 20 and 21 respectively.

(16) The panel then decided to hold a second interview with the top 2 candidates to ensure that the best candidate was appointed. On 5 July, Sharon Donaghey phoned Anne Woods and Curtis Brown to invite them to this second interview. After this phone call, Mr Brown spoke to the claimant who then inferred that he had not been successful as he had not been invited to a second interview.

(17) The second interviews took place on 9 July 2018 and were conducted by Caroline Kennedy and Sharon Donaghey. During this second interview, Ms Kennedy explored with both candidates whether they might be interested in a temporary role if one became available.

(18) 7 questions were asked in the second interview and responses were scored out of 3 for each question. Ms Woods scored 17 points and Mr Brown scored 13. The panel therefore decided to offer the Field Manager post to Anne Woods. Caroline Kennedy phoned Ms Woods to offer her the permanent post. Initially, Ms Woods accepted the post.

(19) During her telephone conversation with Curtis Brown, Ms Kennedy indicated that every year, the respondent takes on a temporary Field manager to help with the peak Christmas period and there was also likely to be another 6 month position which could provide him with more management

experience. She asked if he would be interested in these temporary roles and he confirmed that he would be.

(20) On the same day that Ms Woods was offered the permanent post, Ms Donaghey telephoned the unsuccessful candidates to inform them of the outcome. Whilst it was her intention to offer to provide feedback to all the candidates, the tribunal accepts the claimant's evidence that her conversation with the claimant was cut short as he had already worked out that he had not got the job and was annoyed.

(21) Caroline Kennedy then received approval from the respondent to fill the temporary 6 month Compliance Manager post and this was offered to Curtis Brown as the next highest scoring candidate.

(22) Ms Woods decided to withdraw her acceptance of the permanent post at a late stage in order to stay in her current job. Ms Kennedy then called Curtis Brown on 4 September to offer him the permanent Field Manager job.

(23) This then left the temporary 6 month Compliance Manager post unfilled and Ms Kennedy also required to fill the temporary peak Field Manager post for the Christmas period. The job advertisement was still active and Ms Kennedy and Ms Donaghey then checked for any further applications received since the previous interviews. It was decided to interview one further external candidate. This applicant performed well at interview scoring 25 points and it was therefore decided to offer them the temporary 6 month Compliance Officer post. The next highest scoring candidate from the interviews in July, namely Scott Gibson, was then offered the temporary Peak Field Manager post.

(24) The respondent heard nothing further from the claimant until his letter of complaint dated 10 October 2018 was received. The respondent replied by letter dated 30 October 2018 indicating that the reason why the claimant was unsuccessful was that he had scored considerably less at interview than the 2 successful candidates. The respondent did not hear further from the claimant until the claim form was lodged with the tribunal.

(25) In the course of preparing for the tribunal hearing, Caroline Kennedy decided to contact Anne Woods to ask if she would be willing to disclose her religion to Ms Kennedy. Generally, the tribunal found Ms Kennedy to be a straightforward witness and the tribunal accepts her evidence that Ms Woods told her that she is Catholic. Whilst the claimant indicated during his closing submissions that he disputes this, he was not in a position to give contradictory evidence, nor did he seek to test this evidence during his cross examination of Ms Kennedy.

(26) Following this recruitment exercise and the lodging of the claim with the tribunal, the claimant has continued to work for the respondent as a courier. The claimant's evidence was that he has been very upset by this experience and that it has made him ill and affected his sleep. However, he accepted during cross examination that he had not made the connection with the alleged discrimination when he had attended with his GP.

(27) The claimant's gross earnings from his work as a courier for June 2018 to June 2019 were £26,679.30. The salary for the permanent Field Manager post was £25,000. Whilst the tribunal fully accepts that the claimant's gross earnings would be reduced by various expenses, the claimant did not present any specific evidence such as tax returns to show the extent of those expenses or deductions. The tribunal is therefore unable to make any determination in respect of the claimant's net earnings from his work as a courier and hence any loss of earnings resulting from the alleged discrimination. In relation to mitigation of loss, the claimant made only one application for alternative employment as a school caretaker and was unsuccessful in that application.

Statement of Law

Relevant legislation

Discrimination on the grounds of religious belief

18. Article 3 (2) of the Fair Employment and Treatment (Northern Ireland) Order 1998 states as follows:-

> "*(2) A person discriminates against another person on the ground of religious belief or political opinion in any circumstances relevant for the purposes of a provision of this Order, … if —*
>
> *(a) on either of those grounds he treats that other less favourably than he treats or would treat other persons".*

Shifting burden of proof

19. Article 52A of the 1997 Order is headed "Burden of proof" and states that:-

> *" ...*
>
> *Where on the hearing of the complaint, the complainant proves facts upon which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent –*
>
> *(a) has committed such an act of discrimination ... against the complainant;*
>
> *(b) is by virtue of Article 32 or 33 to be treated as having committed such an act of discrimination ... against the complainant;*
>
> *the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed that act."*

20. The Northern Ireland Court of Appeal considered the issue of the shifting burden of proof in the case of **Nelson v Newry & Mourne District Council [2009] NICA 3.** The court held:-

"This provision and its English analogue have been considered in a number of authorities. The difficulties which tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear as it might have been. The Court of Appeal in Igen v Wong [2005] 3 ALL ER 812 considered the equivalent English provision and pointed to the need for a tribunal to go through a two-stage decision-making process. The first stage requires the complainant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the tribunal has so concluded, the respondent has to prove that he did not commit the unlawful act of discrimination. In an annex to its judgment, the Court of Appeal modified the guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 333. It stated that in considering what inferences and conclusions can be drawn from the primary facts the tribunal must assume that there is no adequate explanation for those facts. Where the claimant proves facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent. To discharge that onus, the respondent must prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to be adduced to discharge the burden of proof. In McDonagh v Royal Hotel Dungannon [2007] NICA 3 the Court of Appeal in Northern Ireland commended adherence to the Igen guidance."

21. In the case of **Madarassy v Nomura International PLC [2007] IRLR 247**, the English Court of Appeal provided further clarification of the tribunal's task at the first stage of considering whether the claimant has proven facts upon which the tribunal could conclude that the respondent has committed an act of discrimination. The court stated:-

'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient matter from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination; 'could conclude' in Section 63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage, the tribunal needs to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the complainant were of like with like as required by Section 5(3) and available evidence of all the reasons for the differential treatment.'

22. The **Madarassy** case makes it clear that the whole context of the surrounding evidence must be considered in deciding whether the tribunal could properly conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination.

23. **In S Deman v Commission for Equality and Human Rights & Others [2010] EWCA Civ 1279**, the English Court of Appeal again considered the issue of the shifting burden of proof in a discrimination case. The Court referred to the statement in the Judgment in **Madarassy** that a difference in status and a difference in treatment 'without more' was not sufficient to shift the burden of proof. In his judgment, Lord Justice Sedley stated:-

> *"19. We agree with both counsel that the 'more' which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be forwarded by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."*

24. Further clarification was provided in the EAT decision in **Laing v Manchester City Council [2006] IRLR 748**, where the EAT stated:-

> *"(71) There still seems to be much confusion created by the decision in Igen v Wong. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.*
>
> *(72) …*
>
> *(73) analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in Network Road Infrastructure v Griffiths-Henry, it may be legitimate to infer he may have been discriminated against on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.*
>
> *(74) …*
>
> *(75) The focus of the tribunal's analysis must at all times be the question whether they can properly and fairly infer race discrimination. If they are satisfied that the reason given by an employer is a genuine one and does not disclose either conscious or unconscious racial*

discrimination, then that is an end of the matter. It is not improper for a tribunal to say, in effect, 'there is a real question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation … and it has nothing to do with race'.

*(76) Whilst, as we have emphasised, it will usually be desirable for a tribunal to go through the two stages suggested in **Igen**, it is not necessarily an error of law to fail to do so. There is no purpose in compelling Tribunals in every case to go through each stage."*

25. In the case of **London Borough of Islington v Ladele 2009 ICR 387 (EAT)** upheld by the Court of Appeal, the EAT provided guidance to tribunals dealing with claims of direct discrimination (para 40 and following) (emphasis added):-

"*Whilst the basic principles are not difficult to state, there has been extensive case law seeking to assist tribunals in determining whether direct discrimination has occurred. The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:*

(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in Nagarajan v London Regional Transport [1999] ICR 877, 884E – "this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(2) reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in Nagarajan (p.886F) as explained by Peter Gibson LJ in Igen v Wong [2005] ICR 931, para 37.

(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive(97/80/EEC). These are set out in Igen v Wong. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:

> *"Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer."*

If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination. (The English law in existence prior to the Burden of Proof Directive reflected these principles save that it laid down that where the prima facie case of discrimination was established it was open to a tribunal to infer that there was discrimination if the employer did not provide a satisfactory non-discriminatory explanation, whereas the Directive requires that such an inference must be made in those circumstances: see the judgment of Neill LJ in the Court of Appeal in King v The Great Britain-China Centre [1991] IRLR 513.)

(4) *The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne Wilkinson pointed out in Zafar v Glasgow City Council [1998] ICR 120 :*

> *"it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances."*

Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in Bahl v Law Society [2004] IRLR 799, paras 100-101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

(5) *It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test: see the decision of the Court of Appeal in Brown v Croydon LBC [2007] ICR 897 paras.28-39. The employee is not prejudiced by that approach*

because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in Anya v University of Oxford [2001] IRLR 377 esp.para.10.

(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in Watt (formerly Carter) v Ashan [2008] ICR 82, …"

Compensation

26. Where a tribunal finds a complaint under FETO to be well-founded, it shall order the respondent to pay compensation to the claimant in respect of the claimant's injury to feelings. Compensation for injury to feelings is to be determined in accordance with the Vento guidance set out in the case of **Vento v Chief Constable of West Yorkshire Police 2003 IRLR 102 CA**. The Court of Appeal stated:-

"(i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

(ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

(iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case."

27. The sums set out above have been up-dated to allow for inflation with the lower band increased to £900 to £8800, the middle band £8,800 to £26,300 and the higher band £26,300 to £44,000.

Conclusions

28. In this case, the claimant's case was that he was unsuccessful in his application for the post of Field Manager due to direct discrimination on the grounds of his religious

belief. The claimant's comparator was Curtis Brown who the claimant believed was a Protestant. This was not contested by the respondent.

29. The claimant was not appointed to the post of Field Manager following the interviews in July 2018 whereas Curtis Brown was (at least after the post was turned down by Anne Woods). It is obvious that non appointment was less favourable treatment than appointment to the post. Essentially, the real issue for the tribunal to determine in this case, as suggested in the **Ladele and Nagaran** cases, was, what was the reason for the less favourable treatment, namely the claimant's non appointment? In considering this issue, the tribunal also bore in mind the directive set out in the **Madarassay** case that a simple difference in treatment along with a difference in religion is not sufficient to establish discrimination. There must be something more.

30. The relevant factors which the tribunal took into account in determining the reason for the less favourable treatment were as follows –

(a) The claimant was granted additional rounds by the respondent, with the express approval of Caroline Kennedy, in 2016. This is certainly not indicative of a pattern of historic less favourable treatment of the claimant.

(b) Generally, the claimant's identified comparator in this case is Curtis Brown. However, it is clear in this case that the candidate who was originally successful following interview and who was offered the post was Anne Woods. On balance, and since the claimant was unable to challenge the respondent's evidence on this point, the tribunal accepted that the original successful candidate Anne Woods is Catholic. The respondent could not have known or anticipated that Anne Woods would initially accept their job offer, but then change her mind before taking up the post. This factor points fairly strongly against discrimination on the ground of religious belief being the reason for the non appointment of the claimant.

(c) The claimant contended that there were inconsistencies within the notes made by the panel member who was observing Anne Woods during the ice breaker. These were on the one hand that she *"Did try to bring Ray in"* but on the other hand *"doesn't try to engage with Ray"*. The tribunal accepts that this certainly appears to be inconsistent. However, the ice breaker was not scored and the tribunal accepts that it did not form part of the decision making for the appointment. The tribunal therefore does not believe this factor significantly supports the claimant's case that religious belief was the real reason why he was unsuccessful.

(d) The claimant alleged that Curtis Brown had less relevant experience than him, both as a courier and in terms of management experience. In considering this factor, the tribunal noted that the claimant had been a courier for 25 years and that, in his statement to the tribunal, he indicated he had managed people when he ran a café. There was limited evidence before the tribunal of the comparative experience of Curtis Brown, save that there was a comment recorded on the notes of his interview "*no management experience*". Since the respondent, had decided to shortlist for interview any of its couriers who applied, whether or not they had management experience and regardless of the extent or length of their courier experience, the tribunal

has concluded that management experience was not viewed as essential for the role. Further, management experience was not one of the 3 identified criteria for the post as set out at para 17 (5) above. It appears to the tribunal the 3 criteria for the job were more focused on aptitude for management rather than necessarily past experience of management. The tribunal does not find that this factor points towards discrimination being the real reason for the claimant's non appointment.

(e) The claimant alleged that Curtis Brown was asked more questions than him and that his interview lasted longer. The tribunal has also found as a fact that Anne Woods' interview lasted longer than the claimant's. The claimant accepted that he was not rushed or curtailed during his interview. The tribunal accepts that the same 5 basic questions were put to all the candidates. Indeed, the claimant did not challenge this point. Generally, the tribunal considers that the interviews of both Anne Woods and Curtis Brown were longer than the claimant's because they expanded on their answers providing more detail and examples, whereas the claimant's answers were generally shorter and he failed to expand on his answers even where prompted. The tribunal fully accepts that this may not have been a true reflection of the claimant's abilities, but rather may have been due to stressful situation of an interview. Accordingly, the tribunal does not believe that the respective lengths of the interviews points towards religious discrimination. Rather, the tribunal believes this is simply a reflection of how much the respective candidates said during their interviews.

(f) The claimant pointed to the fact that interview notes which purported to have been written by Heather Gibson appeared to be different. The tribunal accepts that it was difficult for the claimant to pursue his point in relation to this as Ms Gibson was not called by the respondent to give evidence. It is certainly evident from the copies of the interview notes in the bundle that the style of writing in the notes of the claimant and candidate 1 is different from that in the notes of Anne Woods. However, taken in the context of all the other evidence in this case, the tribunal does not believe it can draw any inference from this difference in style of writing.

(g) The claimant argued that the whole interview process was a sham with his scores being deliberately low to place him last. On the other hand, the claimant accepts that his interview lasted only 15 minutes or so and he further accepts that he was not rushed or curtailed in any way during the interview. The tribunal generally found Caroline Kennedy and Sharon Donaghey to be straightforward, credible and consistent witnesses. Having heard and carefully considered all of the evidence in this case, the tribunal was not left with any sense of a "smell" of discrimination in this case. Rather, the reason for the claimant's low scores was that he did not perform well at interview providing only short answers which were lacking in details or relevant real life examples.

(h) The claimant argued that the respondent met the threshold for registration with the Equality Commission and should have so registered. This was not accepted by the respondent. The claimant also contended that 90% of the respondent's managers are Protestant. This was not conceded by the respondent or its witnesses and the respondent does not maintain formal

monitoring records of the composition of its employed workforce. The tribunal does not find established facts which could be indicative of a pattern of discriminatory behaviour or failure to comply with legal obligations on the part of the respondent.

31. After analysing and considering each of the factors outlined above in turn, the tribunal took a step back and reviewed the overall picture in this case. Having done so, the tribunal concluded that the claimant had shown nothing other than a difference in outcome and difference in religion between himself and Curtis Brown. There was no other evidence which was suggestive of discrimination on the ground of religious belief or which would provide the required "something more". The tribunal therefore determined that the claimant has not discharged the primary burden of proof in this case and the burden of proof did not shift to the respondent to show that the reason for the treatment was something other than discrimination. The tribunal is satisfied in this case that the real reason for the treatment of the claimant, that is his non appointment to the post of Field Manager, was due to his performance at interview. The claimant's performance at interview was below that of Anne Woods and Curtis Brown. The decision not to appoint the claimant to the post was in no sense due to discrimination on the ground of religious belief.

32. Accordingly, the claimant's claim must be dismissed in its entirety.

Concluding Comments

33. Whilst the tribunal has concluded that the non appointment of the claimant to the post was not due to discrimination on grounds of religious belief, the tribunal nevertheless had serious concerns about some of the recruitment practices and procedures used by the respondent in this case and would make the following comments in this regard:-

(a) The identified conflict of interest which arose when Caroline Kennedy's friend applied for this post was only partially addressed when Ms Kennedy withdrew from shortlisting only. This approach fell short of best practice.

(b) The respondent made no attempt to ensure balance in the recruitment panel. This applied to both gender and community background. All the panel were women and, on the respondent's case, the respondent was not aware of and paid no regard to the religious breakdown of the panel. Again, this fell short of best recruitment practice in Northern Ireland.

(c) The respondent decided to automatically shortlist all couriers who applied for the post. Whilst the tribunal appreciates that the respondent was keen to recognise the loyalty of its couriers, this approach may have disadvantaged external candidates who met the 3 criteria for the post and also risked perpetuating any existing imbalances in the respondent's workforce.

(d) Whilst the tribunal accepted that the "ice breaker" exercise was not scored or used as part of the selection process, the rationale for it and its purpose was far from clear.

(e) The interviews were conducted by 2 separate interview panels. Given the relatively small numbers of candidates who were invited for interview, the tribunal can see no good reason for this.

(f) The approach to be taken to prompts or supplementary questions during interviews was not documented in advance of the interviews.

(g) In relation to the template documents used for notes of interviews, the tribunal noted that very limited space is provided to record candidates' answers ie the boxes were very small.

34. Generally, the tribunal suggests that the respondent should review its recruitment practices in Northern Ireland to bring them into line with the standards set out in applicable Codes of Practice, including the Fair Employment in Northern Ireland Code of Practice.

Employment Judge:

Date and place of hearing: 13 and 14 August 2019, Belfast.

Date decision recorded in register and issued to parties: