CASE NO: 2600440/18

EMPLOYMENT TRIBUNALS

Claimant: Ms S Cole

Respondent: Derbyshire County Council

Heard at: Nottingham

On: Monday 21, Tuesday 22, Wednesday 23, Thursday 24 January 2019

Before: Employment Judge Brewer
Members: Mr J Akhtar
Mr C Goldson

Representation
Claimant: Mr P Starcevic of Counsel
Respondent: Mr C Breem of Counsel

JUDGMENT

The claims of discrimination because of race and victimisation are dismissed.

REASONS

Introduction

1. Ms Cole brings claims of direct race discrimination and victimisation against her employer, Derbyshire County Council. Both parties were represented by Counsel. We heard evidence from the Claimant and for the Respondent from Ms T Druce, Mr B McKeown, Ms L Morris and Ms L Ratcliffe. We had an agreed bundle of documents running to two lever arch files and an agreed list of issues (see below).

2. Prior to the start of the oral evidence, the tribunal read the witness statements, which were therefore taken as evidence-in-chief, and some of the documents. Each of the witnesses took an oath, they were cross-examined and asked questions by the tribunal.

3. What follows is the tribunal's unanimous decision on the Claimant's claims.

Application to amend

4. Prior to the commencement of the evidence, Mr Starcevic on behalf of the Claimant made an application to amend the Claimant's claims to include a claim of direct race discrimination in relation to one of the matters already pleaded as victimisation. That application was opposed by Mr Breem. He pointed out that the Claimant has had legal representation for some time, there has been no prior warning of the application, the claim for direct discrimination is not the mere relabelling of the existing victimisation claim. He rightly pointed out that the discrimination claim would require evidence of comparators and the case would certainly need to be adjourned if the application was to be accepted. This would cause financial expenditure and wasted costs.

5. The tribunal adjourned to consider the matter and determined for the reasons given by Mr Breem not to accept the amendment and the case therefore continued.

Issues

6. The parties agreed the following list of issues:
   - 6.1. Did the Respondent treat the Claimant less favourably in October 2017 by:
     - 6.1.1. failing to inform her that the chosen candidate for the position of Lead – Troubled Families had declined to take up the position; and
     - 6.1.2. subsequently failing to appoint her to this position.
   - 6.2. Did the Respondent treat the Claimant less favourably than it treated or would have treated the comparators?
   - 6.3. If so, are there facts from which the tribunal could properly conclude that the difference in treatment was because of the Claimant's race?
   - 6.4. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

   Victimisation

   - 6.5. The Claimant relies on bringing previous proceedings before the employment tribunal as her protected act. The alleged acts of victimisation are:

     6.5.1. That the Respondent failed to shortlist her for interview for the role of Senior Practitioner based at Ripley in March 2018;

     6.5.2. That in October 2017, the Respondent failed to inform the Claimant that the chosen candidate for the position of Lead – Troubled Families had declined to take up the position; and

     6.5.3. That in October 2017, the Respondent failed to appoint the Claimant to the Lead – Troubled Families position.

The law

Direct discriminastion

7. The Claimant's claim is for direct discrimination contrary to section 13 Equality Act 2010. This states:

> "***13 Direct discrimination***
>
> *(1) 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*."

Victimisation

8. The claim for victimisation is brought pursuant to section 27 of the Equality Act 2010. This requires that A subjects B to a detriment because B, in this case, has made a protected act. The protected act in this case relied on by the Claimant is employment tribunal proceedings she brought in 2017 which culminated in a hearing in October 2017 with the decision being delivered to the parties in March 2018.

9. The claim under section 13 requires less favourable treatment and therefore the identification of a real or hypothetic comparator. The claim for victimisation does not require a comparator, it merely requires that there is a detriment. However, in both cases the tribunal will be concerned with the reason why the alleged discriminatory behaviour or alleged victimisation took place. In the latter case, the Claimant is clear that the reason is the protected act although she also references, in relation to Mr McKeown, a question she asked at a previous interview with him on diversity.

10. In relation to the section 13 claim, we are mindful that discrimination can be conscious or subconscious. We have considered the following case law:

- ***Martin v Lancehawk Ltd (t/a European Telecom Solutions) UKEAT/0525/03;***
- ***Igen Ltd v Wong [2005] IRLR 258, CA***
- ***Nagarajan v London Regional Transport [1999] IRLR 572***
- ***King v Great Britain – China Centre [1991] IRLR 513***

11. The above cases are concerned with identifying the reason why in relation to the claim for direct discrimination. In relation to subconscious discrimination, we have considered ***Nagarajan*** (above) along with:

- ***Glasgow City Council v Zafar [1998] IRLR 36***
- ***IPC Media Ltd v Millar [2013] IRLR 707***
- ***CLFIS (UK) Ltd v Reynolds [2915] EWCA Civ 439***

These cases are relevant to a number of matters but in particular whether race played a significant part in the reason for the treatment and also it is noted that

if more than one person is involved in the decision, the tribunal must consider the motivation of all of those involved.

12. Finally, in relation to the shifting burden of proof, we note that it is rarely sufficient to show a difference in treatment and a difference in race and the Claimant must show more than that (see ***Madarassy v Nomura International plc [2007] ECWA Civ 33***.

We make the following findings of fact

13. The Claimant is employed by the Respondent in the role of Family Support (Core) Education Welfare Lead in the Early Help Section of the Children's Services Department of the County Council.

14. The Claimant started employment with the Respondent on 1 September 1988. She is currently a grade 8. The Claimant has applied for various jobs within the Children's Services Department but has to date been unsuccessful.

15. In June 2017, Ms T Druce, Multi-Agency Team Manager for the Staveley Brimington area, asked for authority to recruit someone into the role of Troubled Families Lead in the Chesterfield locality. The reason for this recruitment was that there is a reform programme at national level for troubled families. The programme is based in local authorities and is based on payment by results. Essentially, the Respondent is paid when it identifies a troubled family and paid again when it achieves the outcomes set out in an action plan for that family.

16. Ms Druce noted that her counterpart in Bolsover was also recruiting to such a post and they agreed that it made sense to run one process.

17. The job was advertised and applications were received, including one from the Claimant. Four employees were shortlisted for interview, including the Claimant. In the event, one candidate withdrew leaving three for interview. The Claimant attended for interview on 27 June 2017.

18. Ms Druce and her counterpart in Bolsover, Ms Towse, undertook both shortlisting and interviews. Of the three candidates, the Claimant scored 23 out of 40 in her interview. The other candidates scored 29 and 30.

19. Key to this role was that the successful candidate should understand the national troubled families' agenda because the role was to embed that agenda within the community through the relevant local authority team. Given that the post was for an initial fixed term of 6 months, the successful candidate needed to "*hit the ground running*". From that we understood that there would be no time for somebody to develop and learn on the job. Ms Druce and Ms Towse needed to recruit managers who could simply get on with it.

20. Looking at the interview sheets for the candidates, it is noted that on 7 of the 8 questions asked, the Claimant scores slightly less than the other two candidates, by one point per question on average. On one question however, whereas the successful candidates scored highly, the Claimant scored only one mark. This question was about how the candidate would keep up to date with the national

troubled families' agenda. That is particularly significant because it would be necessary for the job holder to understand what was going on at a national level in order to be able to embed the policy effectively in the community.

21. The Claimant does not complain in her Claim Form, or indeed in her witness statement, about the score she received at interview. However, when she was being cross-examined about the process that had been followed in this recruitment, she did say that she now believed that the score she was given was discriminatory. We have considered that in the round and note that this is a view that the Claimant has come to rather late in the day and her evidence on this was not convincing.

22. Following the interviews, Ms Druce's evidence was that she and Ms Towse did not consider that the Claimant was appointable to the role and the other two candidates were offered the positions.

23. The successful candidate offered the role by Ms Towse accepted. The candidate offered the role by Ms Druce initially accepted but tried to negotiate a higher rate of pay and when that was not agreed, she withdrew. This left Ms Druce without a troubled families' lead for this particular job.

24. The Respondent can recruit internally using two methods. The first and most common is as described above, that is a job is put out for interview on the Respondent's intranet, applications are received, a shortlisting is undertaken followed by an interview and, in some cases, by some other form of assessment. There is also a shorter process called an 'expression of interest', although since that involves an email to staff advising them about the role, an application and an interview it is difficult to see that there is much difference between the two processes. We were told, and we accept, that the expression of interest route is quicker than the more common advertisement route.

25. Having been turned down by the successful candidate, Ms Druce consulted with Human Resources on how to proceed and whether she was able to use the expression of interest route. It was agreed that she could, and on 30 August 2017, she sent an email to all of the Heads of Service setting out the job advertisement asking the Heads of Service to cascade the email to everyone in their teams. The closing date for the recruitment was 15 September 2017.

26. For the Claimant's locality, South Derbyshire and South Dales, the email referred to above was sent to Deborah Bailey. Ms Bailey's evidence (which we accepted) was that she was out of the office on 30 and 31 August and then on holiday from 1 to 8 September. Upon her return she prioritised her work and her many emails, and she did not pick up the email of 30 August 2017 either before she went on holiday or on her return. Indeed, she said in evidence that she had searched her inbox for the email and was not able to find it and she said that the most logical explanation is that she bulk deleted a number of emails and that was one of them.

27. The result of this error was that no one in the South Derbyshire and South Dales locality received notification that the Troubled Families Lead post was being re-circulated. This of course included the Claimant.

28. In the event, one Lisa Briddon was appointed to the post with effect from 20 September 2017.

29. On 28 February 2018 the Claimant applied for the post of Senior Family Support Practitioner, grade 11, at Ripley. She was not shortlisted for this post.

30. The Claimant raised a grievance on 27 March 2018 concerning the above posts. This was investigated by Lena Ratcliffe who concluded that the Claimant had not been treated less favourably than others because of her race. The Claimant appealed against the outcome of the grievance but that appeal was unsuccessful. The Claimant then commenced employment tribunal proceedings.

31. Those then are the facts around what took place. We now turn to Claimant's complaints in detail and our findings on those matters.

Discussion

32. We deal first with the issue of credibility. On balance, we found the Respondent's witnesses to be credible. They answered all of the questions put to them, their evidence was consistent with the contemporaneous documentation and indeed internally consistent. We found no basis on which to find that they were being less than honest in the answers they gave. Having said that, we accept Mr Starcevic's submission that in a direct discrimination claim, the issue is what operates on the mind of the decision maker and, given that discrimination may be subconscious, the fact that a witness is credible does not mean that they have not subconsciously discriminated.

33. The position is somewhat different in relation to victimisation. The Claimant's case is that Ms Druce had discriminated against her in not giving her the Troubled Families Lead post when the successful candidate withdrew and that this was an act of victimisation. She also asserts that Mr McKeown victimised her by not shortlisting her for what we will call simply the senior practitioner role. The Claimant says that her protected act was a previous employment tribunal claim in which she alleged race discrimination. Neither Mr McKeown or Ms Druce were witnesses to or a party to those proceedings. The Claimant's assertion is that because a number of the witnesses in the previous case are also managers at the same level of seniority as Mr McKeown and Ms Druce, it follows that Ms Druce and Mr McKeown must have known about the tribunal proceedings. Both Ms Druce and Mr McKeown were cross-examined about this. They were given the names of various witnesses in the previous tribunal proceedings who were witnesses and some of them were rarely seen by Mr McKeown and Ms Druce, others were seen more frequently. However, both Ms Druce and Mr McKeown were unequivocal in their evidence that they did not know that the Claimant had brought a previous claim for race discrimination and we accept that. It follows that whatever was done by Mr McKeown and Ms Druce it was not because the Claimant had made a protected act, it was not because of the previous tribunal proceedings, it was not related to or connected with those proceedings.

34. At this juncture, we should also deal with one other point raised by the Claimant. In her evidence, the Claimant asserts that at a previous recruitment, during her interview with Mr McKeown, she asked him a question about diversity. She

asserts in her evidence that Mr McKeown was "holding this against me" (see paragraph 49 of her witness statement). Under cross-examination, the Claimant could not explain this assertion further. She said that Mr McKeown "took against her". We accept Mr McKeown's evidence that he recalls being asked a question about diversity and that he responded to it. He did say that he was rather surprised by the question, not because it was a question about diversity, with which he said he was very comfortable, but rather because at the end of the interview, the panel asked the Claimant whether she had any questions to ask them and she asked the panel five questions the last of which was the diversity question. What was surprising to the panel was that none of the questions had been about the job the Claimant was applying for and that in itself was a matter of concern. Any attitude he exhibited was about the fact that the Claimant did not ask questions about the role, not that she did ask questions about diversity. In his submissions, Mr Starcevic, confirmed that the Claimant's case on victimisation related solely to the protected act being the Claimant's previous employment tribunal claim. Given our findings about that, nothing turns on the evidence around Mr McKeown's response to the Claimant's diversity question at a previous interview.

35. We turn then to the remaining live issue, which is the recruitment to the Troubled Families Lead role.

36. We have first considered the Respondent's recruitment procedure which was in place at the material time. That policy is the 2001 policy which appears from pages 683 to 740 of the bundle. In analysing the policy and the way it is implemented, we have taken into account both the terms of the policy itself and the evidence we had and read in the bundle from various witnesses. Taking all of that into account, we find as follows.

37. The term "appointable" about which we heard a good deal of evidence does not appear anywhere in the policy. There is nothing in the policy to indicate that any candidate who scores more than 50% at interview is "appointable" as the Claimant asserted. Whether a candidate is appointable is a matter of discretion each time a recruitment exercise is undertaken.

38. In our judgement, the Claimant has conflated the concept of being "appointable" with a right to be appointed. We do not criticise the Claimant for having this view, albeit that we do not consider that the evidence suggests she was correct. The Respondent's 2001 policy could have been clearer.

39. In essence, the recruitment process was as follows: A job was advertised, an application was submitted on a form, that form was then matched against the job profile (job description and person specification) and then a shortlist of candidates for interview was drawn up. Candidates would then be interviewed and scored against various questions and then from that, one or more appointments were made. On selecting the successful candidate, the 2001 policy simply states that interviewers must only consider facts relevant to the job when making their selection.

40. We note that in her management statement of case which Lena Ratcliffe prepared following the Claimant's appeal against the outcome of the grievance,

Ms Ratcliffe asserts that "*the recruiting managers both agreed that 50% was appointable so in that case that would be a score of 25 plus*" (see page 750). However, in the same document Ms Ratcliffe also asserts that the interview consisted of 10 questions.

41. Both of these points are surprising. We know that in fact only 8 questions were asked of each candidate in the interviews and we also note that in Ms Ratcliffe's investigation interview with Ms Druce for the original grievance, Ms Druce is very clear that "*We had two appointable candidates and offered them the roles*". There is no reference to 50% and no reference to the Claimant being appointable.

42. As we know, the Claimant scored a mark of 23 at interview and it appears, for reasons which remain unclear, that the recruiting managers, Ms Druce and Mr Towse, and the investigating manager, Ms Ratcliffe, simply presumed that ten questions had been asked, answered and scored and that therefore when the Claimant scored 23, she had in fact scored less than 50% of the total marks. We again reiterate that nowhere in Ms Druce's grievance interview, nor indeed anywhere else, does it say that at this recruitment she and Ms Towse agreed that a score of more than 50% made a candidate appointable.

43. In her evidence to the tribunal, Ms Druce said that an appointable candidate was somebody who was assessed as being able to fulfil the role. She agreed that 50% was a benchmark but she was clear that the recruiting managers look at responses to key questions at interview and she stated that in this case the Claimant's answers meant that she was not appointable. This was consistent with her grievance interview. Ms Druce said "*A score is a guide*". In this case, the key to the Troubled Families Lead role was the candidate's ability to embed the national troubled families' agenda into the community. Ms Druce said that the candidate could obtain a score at interview of more than 50% and still not be appointable. This is consistent with the evidence she gave to Ms Ratcliffe and is in line with the flexibility in the 2001 policy.

44. This explains why, when the successful candidate withdrew, the Claimant was not simply offered the post as, as it were, first reserve. Simply put, she did not do well enough at interview to get the post.

45. On behalf of the Claimant Mr Starcevic asserted that as people are subject to bias, to minimise the effect of bias objectivity is brought into a recruitment through the application of process. The tribunal rejects this assertion. A recruitment process which involves people assessing an application form and interview responses is undertaking a process which is inevitably subjective in nature with all the risk of bias that entails. One key submission made by Mr Starcevic was that the interview the Claimant had for the role was **not** tainted with discrimination. That being the case, the Claimant does not dispute that she was the least successful applicant. We have dealt with the Claimant's assertion during cross-examination that she does now assert that she was given a low score because of discrimination but there is no evidence that she has brought or pointed to, to support that assertion and we consider that she did so because she felt she had to in responding to cross-examination questions. It has never formed part of her case previously.

46. Given that the Claimant does not accuse Deborah Bailey of discriminating against her in not cascading the expression of interest, the only issue in relation to the Troubled Families Lead recruitment is whether Ms Druce should have decided not to recirculate the post but should instead have offered it to the Claimant. This then gets us back to the key question of whether Ms Druce and Ms Towse considered that the Claimant was or was not able to fulfil the role as they had assessed her.

47. The Claimant says it was "*normal*" practice that any applicant who scored more than 50% was appointable. Not only is there no evidence of this assertion, there was evidence to the contrary. For example, Mr McKeown said he always uses a score of 56% as his benchmark for what we might term 'appointability'. Whilst it may be that some managers have the view that 50% was an appointable score, there is no evidence of this being the norm. As we have said above, it does not appear in the policy and indeed the policy allows different weight to be given to various criteria, even at shortlisting stage.

48. The Claimant says that as she had been appointable to similar roles in previous recruitments, it follows that she was appointable to this role. We reject that assertion. As we have pointed out, the evidence is that receiving a certain score overall does not mean a candidate can succeed in the key parts of a particular role. That is significant in this case as the role was for a short fixed term and was for very specific purpose, it was not one of the more general Troubled Families Lead appointments.

49. The Claimant also points to the fact that the successful candidate, Lisa Briddon, was a grade 5 who had been appointed to a grade 11 role, which the Claimant says was unprecedented. Although unsaid, it seems to the tribunal that the Claimant's inference is that Ms Briddon, being a grade 5, was not capable of undertaking the role of a grade 11 employee but that the Claimant was. We note that Lisa Briddon is white. We accept Ms Druce's evidence on this point. Lisa Briddon had applied for and had been assessed against the role and appointed after interview. There is no evidence that she is not suited to the role and we also accept the general principle that a person's particular job and grade does not reflect the fact that they cannot do any more senior and more complex roles. It does not follow that because a person has chosen to take a grade 5 role, they cannot step up to a much more senior position.

50. Mr Starcevic pointed out that in the bundle there were no records justifying the decision to appoint Lisa Briddon, there was no expression of interest, no application form, no interview notes. We pointed out that we had before us an agreed bundle, that is the documents that the parties agreed were relevant to the matters in issue and his submission that we should somehow draw an adverse inference because there was a lack of documentation about the appointment of Lisa Briddon was put rather late in the day. It has never been part of this case. In any event, it seems to the tribunal that the key issue is not why Lisa Briddon was appointed but why the Claimant was not.

51. The next point made by the Claimant was that "*there are no black managers within the South Derbyshire Children's Services team*". The evidence of the

Head of Service, Ms Ratcliffe, was that there are black managers in the Service and indeed that some of the highest paid staff in the Service are black.

52. The final point the Claimant relies upon is in effect inviting the tribunal to draw an adverse inference from the fact that she consistently has been shortlisted but not appointed to the more senior roles. We have not been in a position to examine every role the Claimant has applied for and indeed she has not asserted before this tribunal that she has not previously been appointed because she is black. Even if we did have sufficient documentation before us about those roles, we do not see how a tribunal could put itself in the position of a recruiting manager having to make a decision about who was the most appropriate candidate to appoint to a specific role for a specific purpose. We do note the evidence of Mr McKeown that when he did not shortlist the Claimant for the Senior Practitioner post in Ripley, in part that was because the Claimant's application form was from his perspective merely a duplicate of a previous application form she had used, and the Claimant seemed to have cut and pasted the previous application, including the typing mistakes, in that. In other words, she had not tailored her application to the specific role. We cannot say if this has generally been the case but it would be at least one explanation as to why the Claimant may not have been successful in comparison to others, who may be doing a better job of putting themselves forward.

53. In conclusion, we note that it is not sufficient for the Claimant to show merely a difference in treatment and a difference in status. There is not, without more, sufficient material from which the tribunal could conclude that, on the balance of probabilities, the Respondent committed an unlawful act of discrimination. It seems to us that the Claimant's case rests on the fact that she was not slotted into the Troubled Families Lead post and she asserts that this is because she is black. Reference to the appointment of Lisa Briddon, a white employee, is in our view a red herring. That appointment was made at a point when for reasons set out above the Claimant was not an applicant for the post. Lisa Briddon was not compared and preferred to the Claimant. The reason why the Claimant was not slotted into the post was that neither Ms Druce nor Mrs Towse considered her appointable, notwithstanding that her score of 23 was more than 50%.

54. Leaving aside the Respondent's case, we have asked therefore whether the Claimant has proved facts from which we could conclude that the Respondent directly discriminated against her in not slotting her into the Troubled Families Lead role after the successful candidate withdrew. In our view, this is a mere assertion not supported by any evidence. The Claimant does not complain about the selection or the interview and she does not complain about her score (again noting that she changed her mind in cross-examination about that but we do not accept her evidence on this point). Put simply, the Claimant's view is that because she scored more than 20 out of 40 points at interview, she should have been appointed but there is no evidence that this was normal practice and it is not contained in the applicable policy.

55. For those reasons, we say that the burden of proof has not shifted to the Respondent in this case.

56. However, we would add that even if the Respondent had the burden of proof of showing the reason why the Claimant was not offered the Troubled Families' Lead post by Ms Druce, they have done so on the basis of her non-appointability and not for any reason which is tainted with discrimination.

57. Given all of the above findings, the Claimant's claims of direct discrimination and victimisation fail and are dismissed.

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Employment Judge Brewer

Date: 7 March 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE