



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108936/2021

5

Held in Glasgow on 10 and 11 February 2022; 23 and 24 March 2022; and 28 April 2022

10

**Employment Judge L Doherty
Members Ms M Watt and Mr A Ward**

Mr B Cochrane

**Claimant
In Person**

15

The Scottish Police Authority

**Respondent
Represented by:
Ms A Irvine -
Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25

The unanimous judgment of the Employment Tribunal is that the claim under Section 13 of the Equality Act 2010 is not well founded, and is dismissed.

REASONS

30

1. This was a final hearing conducted over 5 days to consider the claimant's claim of disability discrimination under Section 13 of the Equality Act 2013 (the EQA). The claimant represented himself, and the respondents were represented by Ms Irvine, solicitor.

2. It is accepted by the respondents that the claimant is a disabled person in terms of Section 6 of the EQA.

35

3. The issue for the Tribunal was to consider whether the claimant had been directly discriminated against in terms of Section 13 of the EQA, by virtue of the fact that he was not selected for interview following his application for the post of Health and Safety Adviser with the respondents. That involves the

Tribunal in considering whether in rejecting the claimant's application at the sift stage, the respondents treated him less favourably than they would have treated a relevant comparator. In terms of Section 23 of the EQA, there must be no material difference between the claimant's circumstances and those of his comparator.

- 5 4. The claimant's claim as specified in the ET1 is that he was treated less favourably than the job applicants who obtained an interview. The claim therefore identifies the candidates who were selected for interview as comparators, including candidate A, who was selected for the post.
- 10 5. In the event the claim succeeds, the Tribunal will have to consider remedy, which involves an assessment of the claimant's loss of opportunity as a result of his application not proceeding past the sift stage and not being considered for interview.

The Hearing

- 15 6. The claimant gave evidence on its own behalf.
7. For the respondents' evidence was given by Derek Harvey, a Talent Acquisition Officer with the respondents; Amy McCall, a Talent Acquisition Specialist for the respondents; and Stuart Borthwick, a Police Scotland Vetting Officer.
- 20 8. Evidence was given by way of witness statements which were taken as read.
9. The parties produced a joint bundle of documents.
10. There was one preliminary matter in relation to the inclusion in the documents bundle of an Employment Tribunal judgement, from a case in which the claimant had been the applicant. Ms Irving agreed that this document could
25 be removed from the bundle on the basis that the claimant agreed certain factual findings which had been made by the tribunal at paragraphs 14, and 31 of their reasons. The claimant was prepared to do this, and therefore the document was removed.

Findings in fact

11. The claimant's date of birth is 24 December 1970.
12. The claimant has a NEBOSH diploma in health and safety, which required a number of years of study to achieve.
- 5 13. The claimant joined the Institute of Occupational and Safety (IOSH) as an affiliate member, the entry-level, on 21 October 2010. He became a Graduate Member on 17 August 2011. He was able to do this as a result of his NEBOSH diploma, which was regarded by IOSH as equivalent to a University degree. The claimant's membership of IOSH ceased on 23rd of January 2012. The claimant joined as an Affiliate Member on 10 October 2012. He became a Graduate Member on 16 October 2013. His membership lapsed but did not cease on 12 January 2015. The claimant was reinstated on 26 January 2015 as a Graduate Member. His membership ceased on 9 January 2017, (paragraph 14 of earlier ET Judgment -agreed by the Claimant).
- 10
14. The claimant emailed IOSH at some point before 22 January 2021 enquiring about graduate membership. He received an automated reply stating that staff were working from home and that they were experiencing a high volume of emails.
- 15
15. The claimant received an email from the Professional Development Department IOSH on 9 March 2021 which advised that because he had a NEBOSH diploma, he would be able to gain Graduate Membership of IOSH. The email advised that he would need to re-join IOSH as an Affiliate, and then send in his diploma again so they could process the transfer. He was also advised that he would need to start his CPD record by adding a development plan, and the details of how to do this would be in his welcome email, sent after he joined. He was advised that the longest he should have to wait to be transferred, was six weeks after they had received everything they needed.
- 20
- 25
16. At some point prior to 15 June 2021, the claimant's applied to IOSH to transfer category. He received the email dated 15th June from IOSH, advising that he had been provisionally recommended for transfer to the category of Graduate.
- 30

The email also advised that he should contact them if he have not heard from them after six weeks from the date of the email, but should not contact them before about his transfer as it would still be in progress at that stage.

17. The Claimant received a letter with confirmation that he was admitted as a Graduate Member of IOSH on 23 July 2021, and was issued with a certificate stating he was admitted as a Graduate Member of IOSH on the 11 of July 2021.
18. There are levels or grades of Membership of IOSH, starting with Affiliate Member and going up to Chartered Member. Graduate Member sits one level below Chartered Member. Progress from Graduate level to Chartered level is not automatic. Nor is there a requirement on the part of IOSH for a member who is at Graduate level to progress to Chartered Membership. Progress from Graduate Member to Chartered Member of IOSH requires successful completion of IOSH's Initial Professional Development Process (IPD) while maintaining the member s CPD. Members are given 2 years to complete the IPD process (Page 281).
19. The respondents are a large public authority, with responsibility for policing in Scotland. They employ a large civilian workforce.
20. The respondents placed an advertisement for a post of Health and Safety Adviser in Aberdeen (the Post), with a closing date for applications of 2 December 2020.
21. The job advertisement contained the following statement;
- 'You will be educated to NEBOS Diploma level or equivalent. A driving licence is essential for the role.*
- You must have membership of the Institute of Occupational Safety and Health (IOSH) and have chartered membership of IOSH (or actively working towards it)*

22. The respondents Job Description, which accompanied the advertisement provided details of the job purpose, and details of 24 accountabilities and the main responsibilities of the role.
23. It also provided 'Essential' and 'Desirable' criteria for three types of attributes; Educational/ Occupational; Personal Qualities; and Special Aptitudes (page 96/97).
24. For Educational/Occupational under the heading 'Essential' it provided; *A NEBOSH Diploma or equivalent.*
25. For Special Aptitudes under the heading 'Essential' it provided; *Membership of IOSH and Chartered Membership of IOSH (or actively working towards it).*
26. For Personal Qualities under 'Essential' nine personal qualities were listed, reflective of softer skills and in one instance computer skills were listed.
27. An HND or degree status; NEBOSH Fire Safety and Risk Management Certificate; and Professional auditing qualification were listed as Desirable.
28. Candidates were asked to refer to the relevant competencies when completing their application form. The Job description listed six competencies which were used for job selection.
29. Candidates were provided with Guidance Notes for Police Staff Applications for Employment (pages 81/88) (the Guidance).
30. Under the heading 'Education' the Guidance provided that all candidates should provide details of the educational qualifications they have obtained, and any study that they are currently undertaking, including anticipated completion dates and the level of qualifications.
31. The Guidance provides that candidates are required to provide a full employment history in chronological order, to include dates, position held, reason for leaving and dates and the reasons for gaps in employment.
32. Under the heading 'Evidence in support of Application' the Guidance provided that candidates should demonstrate and evidence relevant experience, and

that: *'Your evidence should be in written paragraphs for each of the competencies specified in the Job advert with a maximum of 150 words per competency'*. Candidates were directed towards the Police Staff Recruitment website which provided them with performance indicators associated with each competency.

- 5
33. The job application form which candidate completed if applying directly to the respondents, directed candidates to the Guidance and repeated the direction as to how evidence should be provided in separate paragraphs to reflect each competency, up to a maximum world could.
- 10 34. The application form required candidates to sign a declaration confirming the information they provided was true and complete, and that if false information was provided, or relevant information omitted this may result in disqualification from the selection process, the withdrawal of any offer of employment or disciplinary action up to including dismissal.
- 15 35. The respondents guarantee an interview to any candidate who has a disability in terms of the EQA, and who meets all the essential criteria for the post. The information provided in an application is taken at face value. A candidate disclosing they have a disability on their application is taken at face value, and the respondents take it that the applicant has a disability.
- 20 36. Job applications are vetted at a sift sage by a Talent Acquisition Officer, who selects which candidates should be considered to be put forward for consideration for interview. The hiring manager will decide who to take forward to interview from that group, and ultimately who will be selected for recruitment.
- 25 37. There were two routes for candidates to apply for the Post. Candidates could apply directly to the respondent's recruitment team, or they could apply via recruitment website, Total Jobs, by submitting a CV.
- 30 38. Applications made via Total Jobs and applications made directly to the respondents are sifted on different platforms. The respondent's Talent Acquisition Officers had access to a portal on Total Jobs which allowed them

to review candidates' CVs who had applied via that platform. The CV's of candidates who pass the sift stage are downloaded from the Total Job's website and placed in a folder in the respondents shared drive. Candidates via Total Jobs who do not pass the sift stage are rejected on the Total jobs site and pro forma rejection email.

- 5
39. Mr Harvey was the Talent Acquisition Officer dealing with the Post.
40. Mr Harvey sifted all of the applications for the post against the Essential criteria specified in the job description under Educational /Occupational (i.e.; A NEBOSH Diploma or equivalent) and Special Attributes (i.e. Membership of IOSH and Chartered Membership of IOSH (or actively working towards it).
- 10
41. The claimant made two applications for the post.
42. At the point when he made his applications the claimant was not a Graduate Member of IOSH.
43. The claimant made one application via Total Jobs. The claimant sent his CV in support of this application. His CV indicated that he had a NEBOSH Diploma, but did not state that he was a member of IOSH or chartered member of IOSH, or that he was working towards that.
- 15
44. The claimant did not disclose that he had a disability on this application.
45. This application was rejected as it did not meet the essential criteria against which Mr Harvey sifted the applications. Where candidates are rejected on this basis, their CV is not downloaded onto the respondents shared drive, and the candidate receives a standard notification rejection.
- 20
46. The claimant did not receive this standard notice, but rather, in error he received an email indicating that his application had been rejected on the grounds of inadequate residency in the UK. The rejection email was sent to the claimant at 2.40pm on the 3 of December 2021 .
- 25
47. The claimant also applied directly to the respondents using an application form. The claimant stated on this application that he was a Graduate Member of IOSH, albeit at the time he made his application he was not .

48. The claimant's application met the essential criteria to the extent that he indicated that he had a NEBOSH Diploma, and that he was a member of IOSH.
49. His application did not indicate that he had Chartered IOSH, or that was actively working towards Chartered Membership of IOSH and therefore did not meet that element of the essential criteria.
50. The History of Employment section of the application (which in terms of dates and positions held, was very similar to his CV) contained the following:
- "Current/most recent employer was Roberts Gordon's University from September 2017 to October 2018 undertaking a Bachelor of Nursing.*
- From July 2012 till May 2017 - Full Circle Safety as a self-employed Health and Safety Consultant.*
- From January 16 to March 16- Arnold Clark Ltd - Regional Manager*
- From July 2014 to July 2015- Sister Food Group- Health and Safety Manager.*
- August 2010 to July 2012- British Standards Institution- Client Manager OHS Specialist.*
- June 2007 to August 2010- Empire HR, Aberdeen and Domino Safety - Health and Safety Manager. "*
51. The claimant did not follow the Guidance or the direction on the Job Application form for providing evidence in support of his application in answer to Section 9 of the form. He did not provide separate paragraphs setting out his skills and abilities in respect of each of the relevant competencies. He provided 5 paragraphs with more information about his experience, skills and abilities. This included that he had done work *'..such as carry out Fire Risk Assessments, Emergency Response training and Accident Investigation etc.'*
52. The claimant stated he had NEBOSH Diploma, a NEBOSH certificate and a BH OHSAS 18001:2007 Lead Auditor, under the Training and Development section of the application form.

53. The claimant stated that he had a disability on this application. He stated that he had sustained a back injury in 2012 and that he took a range of painkillers for this but that he could still function as normal. He stated however that his pain levels can be severe if his back goes into spasm and that he was due to undergo surgery in December 2020, which if successful meant he could stop taking medication.
54. The claimant omitted short periods of employment with two employers, Meallmore and Inspire, which he undertook while studying at Roberts Gordon's from his work history. He also omitted a period of employment as a Health and Safety Manger with a company Hydrasun, from January to July 2012.
55. The claimant represented he had worked for Full Circle Safety from July 2012 to May 2017. Full Circle Safety is a limited company, which has not traded since 31 July 2015. It did not file the accounts for the period after 31 July 2016. In the year to 31 July 2016 it had income less than £300.
56. The claimant's application and the applications of 8 other candidates (candidates A, B, C, D E, F, G, H) was vetted by Mr Harvey. He took the information supplied on the application forms and CV's of all of the applicants for the post at face value. Mr Harvey vetted the applications against the essential criteria for 'Educational' and 'Special Attributes' specified in the Police Staff job description. Candidates were also considered against each other, if they all met these essential criteria, or if some or all candidates did not, to achieve a certain number of candidates from which the hiring manager could select interviewees.
57. None of the candidates other than the claimant and candidate A indicated that they had a disability.
58. Mr Harvey did not consider that the claimant had demonstrated that he fulfilled all the essential criteria for the post, as he did not indicate in his application that he had Chartered IOSH or that he was working towards that.

59. As the claimant's applicant did not meet all of the essential criteria, he was not offered an interview under the guaranteed interview scheme.
60. Mr Harvey progressed candidates A, B, C, D and H to the hiring manager for consideration for interview.
- 5 61. Mr Harvey assessed that candidates B, C, D and H met the essential criteria. All had Chartered Membership of IOSH.
62. Candidate B had Chartered IOSH and a NEBOSH diploma. This candidate's application disclosed that he had relevant recent experience as a Health and Safety manager, and over 18 years' experience in health and safety. Mr
10 Harvey considered this candidate met the desirable criteria as they had HND or degree status as they had a Masters in Safety and Risk Management.
63. Candidate C had Chartered IOSH, and a number of qualifications including a Diploma in Health and Safety which Mr Harvey considered to fulfil the 'NEOSH Diploma or equivalent' requirement. Mr Harvey was aware that the
15 hiring manager was particularly interested in candidates with fire safety experience and qualifications. Candidate C's application included that he was a graduate member of the Institute of Fire Engineers and had experience as a Fire Safety Legislation Enforcement Officer. The application disclosed the candidate had worked in Health and Safety for a number of years and held
20 the post of Senior Project QH SSE Advisor from January 2018. Mr Harvey considered this candidate, in addition to meeting the essential criteria had a good skill set and background, and therefore progressed the candidate to the next stage of the recruitment process.
64. Candidate D had Chartered IOSH and a number of qualifications including an
25 NVQ level4 Diploma in Occupational Health and Safety which Mr Harvey considered fulfilled the 'NEBOSH Diploma or equivalent' requirement. Mr Harvey considered this application for this candidate demonstrated good and recent experience in the relevant field of health and safety, and that he had over 10 years specialist experience across a wide range of health and safety
30 roles and disclosed that he held currently held a post as a Health and safety

Advisor and had done so since 2017, having had previous health and safety experience before that.

65. Candidates B, C and d had applied by way of CV, and their applications did not disclose that they had a driving licence.
- 5 66. Candidate H had Chartered IOSH and a NEBOSH diploma. Like the claimant, this candidate had not completed the evidence section of the application in compliance with the Guidance. Mr Harvey however decided to progress his application, as there was a shortage of applicants for the post.
67. Candidate H's application was not taken forward by the hiring manager and he was not called to interview.
- 10
68. There was a shortage of applicants who met all the essential criteria for the Post, as a consequence of which Mr Harvey considered whether any candidates who did not meet all the essential criteria, provided anything which might be of interest to the hiring manager. This involved him in comparing the other applicants with each other to identify the best candidate to put forward past the sift.
- 15
69. As a result of this exercise Mr Harvey progressed candidate A's application beyond the initial sift.
70. Candidate A was an internal candidate for the post. She did not have a NEBOSH diploma, nor was she Graduate IOSH, or working towards Chartered IOSH. She was an IOSH member and had a NEBOSH general certificate, which is lower grade than a Diploma. She had IOSH membership.
- 20
71. Candidate A had indicated on her application that she was disabled. Her redacted application form state's; *'I have a long term (blank) illness that is currently well managed.'* Her application did not progress to the interview stage on the basis of the guaranteed interview scheme, as her application did not meet all the essential criteria.
- 25
72. Mr Harvey considered that her application disclosed that she was already undertaking a health and safety role for the respondent, as at the time of the

application she had been the Unison Health and Safety officer and Representative since 2012. He considered this is demonstrated good relevant experience for the role of Health and Safety Adviser. As candidate A was employed by Unison, the respondents personnel records did not indicate that this was the title of the post she held.

5

73. Candidate A's application detailed that the candidate had undertaken a Fire Safety Coordinator qualification.

74. Mr Harvey considered that while candidate A did not meet all the essential criteria that she had transferable skills as a result of working in a health and safety role since 2012, and that she would have knowledge of the internal procedures, processes and computer systems, which are no external candidate would have. He considered having knowledge of these internal procedures and systems was often a desirable skill set for a hiring manager as it reduces training that would be required if an internal candidate is successful in getting the post.

10

15

75. Mr Harvey also considers that candidate A's internal experience was directly relevant to the Post, as she had completed the Fire Safety Officer Qualification, and he knew the hiring manager was particularly interested in interviewing candidates with fire safety experience and qualifications.

20

76. Further, he considered that Candidate A had complied with the Guidance on the completion of the application form, and had written a paragraph for each competency setting out how she met each competency.

77. Mr Harvey considered that these factors meant that candidate A should be put her forward to the hiring manager for consideration for interview, even though she did not meet all the essential criteria.

25

78. Mr Harvey rejected the claimants application and that of candidates E, F and G at the sift stage.

79. Mr Harvey did not consider that the claimant's application disclosed that he had any recent health and safety experience. He took into account that his most recent position was detailed in a student nurse between September

30

2017/18, and prior to that his most recent health and safety experience was said to have been in May 2017, which Mr Harvey thought was a considerable period prior to his application for the Post.

5 80. Mr Harvey also took into account that the application not been completed in compliance with the Guidance by the claimant, in that he had not followed the Guidance about providing his written evidence in separate paragraph for each job competency in answer to section 9. Mr Harvey was aware that hiring managers often reject candidates who do not complete the application form following this Guidance, and while was not a factor which alone may have
10 prevented him from progressing the application, in the claimant's case he took the view that he had not demonstrated that he met all the essential criteria, and he had no recent health and safety experience, in addition to not completing the form in compliance with the Guidance.

15 81. Mr Harvey considered that candidate E's application was superior to that of the claimants in terms of the pool of candidates for the Post. Candidate E had a Masters of Science in Health, Safety and Risk Management which was in Mr Harvey's view superior to the NEBOSH diploma. This candidate also had the desirable quality of a degree in chemistry. The candidate had membership, and graduate membership of IOSH, but did not satisfy the
20 requirement of being a Chartered Member of IOSH or working towards that. The candidate had recent health and safety experience. They had however not completed section 9 of the application form correctly.

82. In terms of a comparative exercise Mr Harvey considered that the claimant and candidate E were superior to candidates F and G whom he rejected.

25 83. Candidate F had a NEBOSH certificate, and the completed section 9 of the application correctly, but was not a member of IOSH, or held chartered membership or working towards it. Candidate G had relevant work experience, but was otherwise was in the same position in terms of essential criteria and completion of the application form as candidate F. As a result,
30 both of these candidates were not progressed beyond the sift stage by Mr Harvey.

- 5 84. Mr Harvey prepared a Vacancy Shortlisting form, which contains contemporaneous notes from the sifting process. On occasion he prepared this from hand written notes, which he transcribed from a notepad. According to the meta data record produced (page 186d) Mr Harvey created his sift form at 14.43 on 3 December 2021, which was three minutes after the rejection email, signed by an individual by the name of Gavin Ryder, for the claimants Total Jobs application had been sent to him.
- 10 85. The sifting form completed by Mr Harvey includes a column under the heading 'Meets Essential Criteria' with the option of 'yes; no; 'partly'. Candidate A is marked as Yes in this column. This was factually incorrect.
86. The claimant and candidate E are missing from Mr Harvey's Vacancy shortlisting form.
87. The vacancy shortlisting form was sent to the hiring manager together with the applications for the candidates who were recommended for interview.
- 15 88. The hiring manager decided to interview candidates A, B, C and D. He decided not to interview candidate H.
- 20 89. The hiring manager also completed a Vacancy Shortlisting Form. The form he completed is identical to the one completed by Mr Harvey, other than it contained a column headed ' Result- Hiring Managers Sift' in which he marked ' yes' or 'no' depending on whether the candidate was selected for interview, in addition to the column headed ' Result Recruitment Sift.' The form therefore contained reference to candidates F and G whom Mr Harvey had rejected at the sift stage. The hiring managers column is marked 'no' for each of these candidates.
- 25 90. Candidate A the was successful candidate for the post.
91. Candidates can be required to produce evidence of their qualifications by the hiring manager.

92. The respondents undertake a vetting procedure for candidates who are successful at interview. A Candidate will not be offered employment unless they pass the respondent vetting process.
93. In the event that an applicant provides false information and an application then this would result in vetting been refused.
94. Mr Borthwick, as the respondent's Vetting Manager undertook a vetting assessment of the claimant's application in July 2021, due to a suspected dishonesty on the claimant's application. His enquiries, on the basis of the email trail between the Claimant and IOSH and the date of issue of Graduate Membership referred to above, led him conclude the claimant did not have graduate membership of IOSH as he claimed on his application form. Had the claimant obtained the post, then Police Scotland would have treated this misrepresentation as a serious matter, and it would have been reported to the Crown Office to consider criminal proceedings.
95. After the claimant submitted his application directly to the respondent's recruitment centre on 2 December 2020, he received an email from the recruitment centre dated 3 December 2020 acknowledging his application. The email advised that this application was progressing to the next stage of the recruitment process and they would be back in touch in due course. The email also stated that due to the large number of applications which are received they were unable to provide feedback at this stage.
96. On 11 January 2021 the claimant sent an email to the email address in the email he received on 3 December rejecting his Total Jobs application, asking for feedback.
97. The claimant then emailed the respondents generic contact email address on 27 January 2021, advising that he had not received a response to the email of 11th January asking for feedback, highlighting the terms of the email he received on 3 December rejecting his application.
98. The claimant received an email on 27 January from the respondent's generic email address, advising that his email would be forwarded to the relevant

department for their attention and someone should be in contact in due course,

99. The claimant did not receive any further contact from the respondents.

100. It is not the respondent's policy to provide feedback on applications which are
5 rejected at the application stage.

101. On 16 March 2021 the claimant made a Freedom of Information (FOI)
request of the respondents. There was a late response to this, for which the
respondents apologised. The respondents did not provide the claimant with
all the information requested on the basis that they considered it to be exempt,
10 and they provided the claimant with the reasons for this.

102. The Tribunal subsequently issued an order for the production of the redacted
application forms. One of the candidates' names was handwritten on an
application, but otherwise the applications were redacted.

103. The claimant has applied for four jobs from the date when his application was
15 rejected, until the date of the hearing. He has taken steps to set up his own
business, Enviro 14 Ltd. The claimant started this business in April 2121. He
is confident this will be very successful and generate significant income,
however the business has yet to achieve an income, and the claimant
considers it unlikely that it will so until June 2022.

20 **Note on Evidence**

104. The initial focus of the Tribunal in terms of credibility and reliability was on the
respondent's witnesses.

105. **Mr Borthwick's** evidence was in the main confined to the events which
occurred after the claimant's application had been rejected. The Tribunal had
25 no difficulty in accepting his evidence as to the conclusion he reached that the
claimant did not have Graduate Membership of IOSH when he made his
application for the post, and his reasons for that conclusion. The Tribunal was
satisfied on the basis of the evidence before it that that position was factually
correct. The claimant applied for in Post in December 2012. His certificate of

Graduate IOSH is dated 11 July 2021. The Tribunal also accepted Mr Borthwick's evidence as to the likely consequences of this having been discovered at the vetting stage, had the claimant's application proceeded.

- 5 106. **Mr Harvey** was cross examined at length by the claimant. The Tribunal formed the view he was credible and in the main reliable. Where his reliability was impacted, the tribunal considered this was commensurate with the passage of time.
- 10 107. One point of credibility which the Tribunal had to determine arose from the claimant's submission to the effect that Mr Harvey had not sifted him at all, and had lied about the fact that he did, and that that was because of the claimant's disability .
- 15 108. The claimant referred to Mr Harvey's evidence in his witness statement to the effect that his personal experience of a close family member having a severe learning disability, and his involvement in sports coaching for children with disabilities, had positively influenced his attitude towards disability. This, the claimant submitted, demonstrated a heightened awareness on his part of how a physical disability can affect someone's ability to perform a task. He submitted that the claimants statement in his application form about his disability put Mr Harvey off, and he dropped the claimant straight away , when
20 no one else was dropped.
109. The claimant submitted that proof of that was to be found in Mr Harvey stated in his witness evidence that he did not recall why the claimant candidate E that they were not on the sift form. He submitted that Mr Harvey had admitted in evidence that he had not sifted the claimant.
- 25 110. The claimant also submitted that no explanation is given as to why the claimant's name is not on the sift form and it is likely that he was not sifted at all, although the respondents have not admitted that. The Claimant referred to the metadata properties of Mr Harvey's sift form. This, he submitted proved that the claimant was not sifted as the form was only created at 14.43 on 3
30 December, by which time the claimant been sent a rejection email.

111. The Tribunal considered each of these points and considered whether either individually or taken collectively they supported the conclusion contended for by the claimant; that his application had not been sifted at all by Mr Harvey.
112. The Tribunal did not draw any inference adverse to Mr Harvey's credibility whatsoever from his evidence about his involvement with individuals who have a disability. There was nothing, other than the claimant submission, to suggest that Mr Harvey's decision-making in relation to the sifting process was in any way adversely influenced by his personal experiences.
113. The Tribunal was satisfied that the rejection email which the claimant was sent at 14.40 on 3 December 2020 was issued in respect of his application via Total Jobs, which was sifted on a different platform to applications made directly to the respondents, which explained why he received this email. The timing of the rejection email was not of itself sufficient to give rise to the conclusion that the claimant's application, made directly to the respondents, had not been sifted.
114. The Tribunal also take into account that there was no explanation provided for this the fact that the claimant and candidates E's name did not appear on the sift form, other than Mr Harvey thought it might be accounted for by an administrative error in downloading information. He also explained that sometimes he made notes on a notepad and transcribed them, although he could not confirm that it was some failure of transcription which accounted for the claimant and candidate E names missing from the vetting form. This however, did not amount as submitted by the claimant to an admission that the claimant was not sifted by Mr Harvey.
115. The claimant's casting Mr Harvey's evidence as constituting an admission that he did not sift the claimant, as he did in his submissions, is incorrect. The claimant put to Mr Harvey in cross examination that the reason his name did not appear in the sift form was because he had not sifted him. Mr Harvey responded to that question by stating 'I did sift you'. The claimant then put to him that you sent in the rejection email by the time he created the sift, to which Mr Harvey yes. He was then asked 'you didn't sift me' to which Mr Harvey

responded no. The claimant then put to Mr Harvey that he had noticed that the claimant disability and he rejected him, to which Mr Harvey responded that that was disgusting. It was then put to him and that the reason he was rejected was because of his disability, to which he said he strongly disagreed.

5 It was then put to him that was the reason he not be sifted which is that responded: 'yes, you where sifted'. Mr Harvey was then asked that did anyone tell him not sift the claimant because he has a disability, to which was the whole respondent that 100% did not happen

10 116. It clearly was a misinterpretation of this evidence on the part of the claimant to suggest that Mr Harvey had accepted that he did not sift the claimant.

117. It was however the case that that Mr Harvey could not provide anything other than a speculative explanation as to why the claimant candidates E's names do not appear on the sift form and the Tribunal considered this along with the other factors relied upon by the claimant.

15 118. In considering this point the Tribunal attach significant wight to the fact that Mr Harvey gave persuasive evidence as to the reasons why the claimant and candidate E did not pass the initial sift. The fact that he was able to do so, and that his explanations of his decision about the claimant's application was credible (he did not meet the essential criteria; did not have recent relevant
20 experience and had not completed question 9 of the form in accordance with the Guidance), supported the conclusion that he had carried out a sifting exercise albeit the claimant's name and that candidate E did not appear on his sift form.

25 119. The claimant submitted that Mr Harvey was clearly wrong to reject his application on the basis that he did not meet the essential criteria. He submitted that Mr Harvey referred to the fact that the claimant had not provided evidence that he was actively working towards Chartered IOSH, but that he had admitted in cross examination that the job advert did not require evidence of an applicant working towards Chartered IOSH.

30 120. It was clear from however from Mr Harvey's evidence that he used the term 'evidence' to describe the written content of the application form, rather than

any physical form of evidence, and he did explain this. He repeated on several occasion that all the claimant would have had to have done was write down that he was actively working towards Chartered IOSH, and Mr Harvey would have accepted that. That position is consistent with the terms of the Guidance and the Tribunal drew no adverse inference from Mr Harvey's use of the word 'evidence' in this context.

121. The claimant made much of the fact that there hiring managers shortlisting form contained details of candidates who had not passed the recruitment sift.
122. Initially in answering questions about this, Mr Harvey indicated he thought the application forms for the rejected candidates may have been sent to the hiring manager by mistake. He changed his evidence on this point later during his cross-examination to say he thought the fact that there were comments about the candidates who did not pass the recruitment sift on the hiring managers sift was explained by the fact that the hiring manager had simply replicated what was on the initial recruitment sift form.
123. When Mr Harvey attended again on the 23 April, and his cross examination continued, he once again stated that the applications of the candidates who did not pass the sift might have gone through to the hiring manager in error, but that he did not know that.
124. Regardless of this change in his evidence the Tribunal drew no inference adverse to Mr Harvey's credibility or reliability for this change in his position. Both positions were speculative on his part.
125. The Tribunal accepted that the respondent's practice was that that the hiring manager should only receive the applications of the candidates who have passed the recruitment sift. This conclusion was supported by the evidence of Ms McCall, who confirmed Mr Harvey's evidence that it is intended that it is only the applications of the candidates who pass the sift which are passed to the hiring manager.
126. **Ms McCall.** The Tribunal found Ms McCall to be a credible and reliable witness. She had carried out what she termed a 'sense check' to check if the

claimant had been incorrectly denied a guaranteed interview under the positive action scheme, and found that not to be the case.

127. Her vetting form contained additional comment on the claimant's computer skills, but the Tribunal did not consider anything turned on that. It was not capable of giving rise to any inference adverse to the respondent's decision making at the initial vetting process.
128. Ms McCall was criticised by the claimant for not having carried out a comparative exercise of all the applications, however that was not a matter which went to her credibility or reliability,
129. **The claimant** The Tribunal considered that aspects of the claimant's evidence lacked credibility. It lacked credibility in the Tribunal's view for the claimant to suggest that there was nothing amiss in him stating he had Graduate membership of IOSH on his job application when in fact he did not have it, on the basis that he had been told that an application for transfer of category would take six weeks to process.
130. Further, it was incredible for the claimant suggests that he had worked for Full Circle Ltd until 2017 in circumstances where that company has ceased trading in 2015.
131. The claimant's credibility on these matters only becomes relevant, in circumstances where the tribunal finds that he had been discriminated against by having his application rejected at the sift stage.

Submissions

132. Both parties made produced written submissions. In the claimants case these run to just over 100 pages in total and in some instances raise new points not canvased in the initial claim, (e.g. the claimant indicating that he is relying on hypothetical comparators) or which appear to be entirely speculative (e.g. that candidate E was deliberately redacted or removed from Mr Harvey's sift form, or that candidate a lied on her application form).

133. In the interests of brevity, the parties submissions are not reproduced in full and are dealt with, where necessary, below.

Consideration

134. This is claim under section 13 of the EQA which provides as follows;

5 (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.*

.....

10 (3) *If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

135. Section 23 provides;

15 (1) *On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*

(2) *The circumstances relating to a case include a person's abilities if—*

(a) *on a comparison for the purposes of section 13, the protected characteristic is disability;*

136. Burden of Proof - Section 136 provides;

20 (1) *This section applies to any proceedings relating to a contravention of this Act.*

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

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

(4) *The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

137. The Tribunal was referred by the respondents to the cases of ***Igen v Wong (2005) ICR 932, Royal Mall Group v Efobi (2012) UKSC 33***, and
5 ***Madarassy v Nomura International PLC (IRLR246)*** on the burden of proof provisions.

138. The success of the claim of direct discrimination under Section 13, relies upon a comparative exercise. In order to succeed with his claim, the claimant has to satisfy the tribunal that in rejecting his application at the sift stage the
10 claimant was treated less favourably than a relevant comparator. The burden of proof under section 136 rests with the claimant in the first instance. In the event that is discharged, the burden shift to the respondents.

139. In this ET1 the claimant identifies as comparators those candidates who were not disabled and who did obtain job interviewees. The tribunal understood the
15 claimant included in his comparators, candidate A, who was selected for the post,

140. As is clear from the terms of Section 23 of the EQA, the comparison has to be made with an individual whose circumstances are materially the same as those of the claimant other than they do not have the claimant's protected
20 characteristic, which in this case is disability.

Candidate A

141. There is a fundamental flaw in the claimant's case to the extent he relies on a comparison with candidate A. Candidate A also has the protected characteristic of disability, and therefore any comparison between how she
25 was treated and how the claimant was treated does not advance the claimant's claim under section 13.

142. The claimant submitted that candidate A had lied on her application form about her role, and since she had done so it stood to reason that she was willing to declare she was disabled when she was not.

143. Mr Borthwick was cross examined on Candidates A's personnel records, and it was suggested to him that she did not hold the post of health and safety representative, as it was not recorded in the respondent's personnel records. Mr Borthwick explained that the fact that candidate A was engaged by Unison was likely to explain why her position was not recorded within the respondents HR records (Scope), and the Tribunal accepted this.
144. Mr Borthwick also explained that employees can update their own personal records. The claimant appeared to consider that this gave employees licence to falsify their records and suggested effectively in cross examination that was that this is what had happened in this case.
145. There was no evidence to support such a conclusion, and Tribunal considered that any notion that candidate A, or someone on her behalf, had falsified her HR records was conjecture on the part of the claimant.
146. Mr Harvey denied that he had access to the claimant's personnel records when making his assessment of the candidates and the Tribunal accepted this. As he said there no good reason why he would look into a candidate HR record, breaching GPDR, when sifting job applications. The Tribunal accepted his evidence that he took what was stated on the application forms at face value.
147. The claimant also relied on the fact that the respondents had not provided documentation 'proving' that the claimant was a disabled person, submitting that the Police require 'evidence' of everything. It was not however necessary for the respondents to produce any such documentation. The claimant did not have to produce documentation to prove his disability when he submitted his application for the post, and there was no requirement as far as the respondents were concerned for him or any other candidate to do so. There was no reason why candidate A's position in relation to proving disability status should be different on the basis that she was an internal candidate.
148. The Tribunal accepted the evidence of Mr Harvey and Ms McCall that the respondents treated the information contained in the job applications,

including a declaration of disability, at face value without the need for disability status to be established by some other means.

149. The claimant's suggestion that candidate A had falsely declared that she had a disability was an unsubstantiated accretion on his part.

5 150. The claimant also suggested that he was directly discriminated against because he had a physical disability, and no other candidate had a physical disability. The basis on which the claimant made that accretion was unclear, given the information about Candidates A's disability on the redacted job application form. Regardless of that, the Tribunal did not consider there was
10 any merit in suggesting that his circumstances could be distinguished from candidate A's on the basis of the nature of his disability. The Tribunal was satisfied that the respondents accepted what was said on the application forms of the claimant and candidate A about their disability status at face value. Mr Harvey's accepting that the candidate had to be 'fit and mobile' in
15 cross examination was insufficient to suggest that the nature of either candidate's disability was a relevant consideration.

Candidates B, C and D

151. The Tribunal was satisfied that Mr Harvey had legitimate and credible reasons for selecting candidates B, C and D to proceed beyond the sift, and for
20 rejecting the claimant's application at the sift.

152. The claimant was critical of the way in which Mr Harvey assessed the applications, suggesting in cross examination that his own experience was superior, in particular in elements such as fire safety, in comparison to other candidates, who did not have a NEBOSH Diploma. The claimant appeared
25 to suggest that Mr Harvey was remiss in not identifying this. The claimant made lengthy written submissions on the merits of the other the candidates' applications, which he submitted in a large number of respects were inferior to his.

153. The Tribunal was satisfied however that Mr Harvey applied the guidelines on
30 essential criteria for the Educational and Special Aptitudes categories in the

job description, and that he gave persuasive evidence as to why he selected the candidates B, C and D (as well as candidate H, who passed the sift but was not invited to interview) at the sift stage.

5 154. The Tribunal accepted Mr Harvey's evidence that he regarded qualifications other than a NEBOSH Diploma which were noted on the applications of candidates C, and D who were successful at the sift stage, as falling into the NEBOSH Diploma 'or equivalent'¹ category, and even if the claimant considered that that this approach lacked rigour, the Tribunal was satisfied that that was the approach Mr Harvey took to sifting all the applications, and
10 drew no adverse inference as a result of this. Even if the claimant did not consider it to be the case that the Diplomas held by candidates C and D were the equivalent to a NEBOSH Diploma, the Tribunal was satisfied that Mr Harvey was entitled to exercise his discretion in order to conclude that candidates C and D, had an equivalent qualification for the purposes of the
15 job application process. His doing so was in line with the criteria specified in the job application.

20 155. The claimant submitted he fulfilled the essential criteria. His position was that IOSH clearly state that only Grad IOSH can become Chartered members of IOSH (CMIOSH). The job application specifically looked for candidates who had CIMOS or were working towards it. The claimant submitted that as he had Grad IOSH, he was therefore at the only level of IOSH that could be working towards CMIOSH, and that it was a known fact that IOSH require Graduate Members to be working towards the next level. He also submitted that Mr Harvey knew that to be that case but could not be relied upon to tell
25 the truth.

30 156. The Tribunal considered the claimant's interpretation matters in this way was not accurate. The information from IOSH makes clear that although Grad IOSH is the level below Chartered IOSH, it is necessary to complete IPD to become a Chartered Member. While it is necessary to have Grad IOSH, in order to become Chartered member of IOSH, there was no evidence to support the conclusion that all those who have Grad IOSH are working towards Chartered IOSH, or are required by IOSH to be working towards Grad IOSH as

suggested by the claimant. Mr Harvey's accepting that there were levels, and that Grad IOSH was one level below Chartered IOSH, did not give rise to the conclusion that because the claimant stated he had Grad IOSH, Mr Harvey should have been aware or have assumed he was working towards Chartered IOSH.

5

157. The Tribunal was satisfied that Mr Harvey's reasons for concluding that the claimant did not meet the essential criteria against which he sifted the applications were credible and reliable. He correctly stated that the claimant had not fulfilled the essential criteria against which he sifted the applications, in that the claimant did not indicate on his application that he had Chartered membership of IOSH or was actively working towards it.

10

158. While the claimant may have deemed this to be wrong of Mr Harvey, as the claimant has stated on the application (albeit wrongly) that he had Graduate membership, which meant that he had to be working towards Chartered Membership, it was not unreasonable for Mr Harvey to take the approach which he did.

15

159. Furthermore, Mr Harvey correctly identified that the candidate B, C and D had more recent relevant experience than the claimant. The claimant's application disclosed that he had not worked in a Health and Safety Role since 2017, and that he had left that role to study nursing. Objectively viewed the claimant's work history did not demonstrate recent relevant experience and Mr Harvey was reasonably entitled to reach that conclusion. This was in contrast to candidates B, C and D, whose applications disclosed recent experience of working in the Health and Safety field.

20

160. It was reasonable for Mr Harvey to conclude that the claimant had not completed section 9 of the application form in compliance with the Guidance. Again, as a matter of fact, that was correct. The claimant may have attached no weight to that, and considered that he provided ample evidence of his skills, abilities and experience and training, but that is not to say that the Mr Harvey was not entitled to do so in circumstances where there were very clear directions given as to how the application form should be completed.

25

30

Furthermore, the Tribunal was satisfied that Mr Harvey, from his experience, was aware that hiring managers often rejected applications where section 9 not completed in compliance with the Guidance. This was attested to by Mr Borthwick. Such a conclusion is also borne out by the fact that hiring manager rejected candidate H, who had not completed section 9 of the form in compliance with the Guidance.

5
10
15
161. The claimant suggested in his submissions that candidate E was sifted by Mr Harvey, and his details sent by Mr Harvey to the hiring manager with a recommendation for interview. He suggests that candidate E was redacted from Mr Harvey's sift form, or deleted from it by the respondents as he was similarly qualified to the claimant. He submitted that candidate E must have been recommended for interview, just as the claimant would have been recommended for interview if he had not been discriminated against. The Tribunal considered that this suggestion amounted to conjecture and on the part of the claimant. For the reasons given in the Note of Evidence the Tribunal was satisfied that Mr Harvey had sifted the claimant and candidate E, notwithstanding that both their names were not included in the sift form, and it did not consider anything turned on the claimant's submission on this point.

20
162. The Tribunal notes that candidates B, C and D applied by CV, in which it is not stated that they held a driving licence.

25
163. The claimant put to Mr Harvey there were 4 essential criteria in the job advert and referred to holding a driving licence as one of these. Mr Harvey accepted this proposition. The claimant also put to Ms McCall that having a driving licence was an essential criterion for the post, which she accepted, initially on the basis that the claimant told her was the case.

30
164. Mr Harvey subsequently qualified his evidence to the extent that he said holding a driving licence was not part of the essential criteria against which he sifted the applications. He explained that a driving licence was a requirement for the role, but it was not part of the essential criteria in the Police Staff Job Description job description, against which he conducted his sift.

165. While it may be confusing to refer to having a driving licence as an essential criterion, when it was not in fact part of the essential criteria against which the sift was conducted, the Tribunal accepted that that was the case.
166. The Tribunal was satisfied that in conducting the sifting process, Mr Harvey in the first instance sifted the applications against the Essential criteria under Educational / Occupational and Special Aptitudes of the job description at page 96/97 of the bundle, not the job advert. That Criteria makes no mention of a driving licence as being part of the essential criteria. This is also the position which is reflected in Mr Harvey's evidence in chief at paragraph 14 of his witness evidence.
167. The fact that Mr Harvey assessed the candidates CV's against this criteria, explains in the Tribunal's view why he did not reject the CV's of the candidates which did not state in terms that they held a driving licence.
168. The Tribunal took into account that the email the claimant received via Total Jobs advised that his application had been rejected because he did not have the required UK residency. There was no explanation for the terms of that email, other than that it be sent in error. From the content of the claimant's application, what is stated in email is clearly incorrect. While that is unfortunate, it is not a matter for which the Tribunal is able to draw any inference adverse to the respondents.
169. The Tribunal did not draw any inference adverse to the respondents or Mr Harvey's on the basis of the fact that there was no response to the claimant emails seeking feedback. Firstly, it was not the respondent's policy to provide feedback on applications which were rejected, and the claimant had been advised that the initial email he received. Secondly, there was no evidence to suggest that Mr Harvey had ever actually received an email from the claimant.
170. The Tribunal was satisfied that Mr Harvey had legitimate reasons for selecting candidates B, C and D who were offered interview, to proceed beyond the sift, and for rejecting the claimant's application at the sift.

171. The circumstances of candidates B, C, and D were not materially the same as the claimant's in that each of those candidates were reasonably assessed by Mr Harvey as having met the essential criteria for the post, whereas the claimant did not
- 5 172. The applications of these candidates were also reasonably assessed by Mr Harvey as disclosing more recent relevant experience than the claimant's application which disclosed that he had not worked in a health and safety role since 2017.
- 10 173. These were material differences in circumstances of the claimant and his comparators, candidates B, C and D who passed the sift, which Mr Harvey was entitled to attach weight to in his decision-making as to who should proceed beyond the initial recruitment sift.
- 15 174. The Tribunal was also satisfied that Mr Harvey had legitimate reason for progressing candidate H beyond the sift, as his job application met the essential criteria against which Mr Harvey sifted the applications, however he was not offered an interview and was not therefore a relevant comparator in the claim.
- 20 175. In the circumstances the Tribunal was not satisfied that the claimant had established facts from which it could be concluded that the respondents were guilty of an act direct discrimination in not selecting the claimant to proceed beyond the initial recruitment sift and failing to offer him an interview.

176. As a result of that conclusion it is unnecessary for the Tribunal to consider the claimant's prospects of success at interview, and the claim is dismissed.

Employment Judge: Laura Doherty
Date of Judgment: 20 May 2022
Entered in register: 23 May 2022
and copied to parties

5

10

15