EMPLOYMENT TRIBUNALS

Claimant: Miss J Fairclough

Respondent: Mrs Helen Allen t/a Olivia George

Heard at: Liverpool **On:** 28 February 2018

Before: Employment Judge Horne

Members: Mrs J V Bolton
Mr J Murdie

REPRESENTATION:

Claimant: In person
Respondent: Mr J Allen, husband

JUDGMENT having been sent to the parties on 28 February 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The issue for determination

1. By a claim form presented on 4 July 2017, the claimant raised a single complaint of direct age discrimination. The claimant was an apprentice beautician, who was employed by the respondent from 23 March 2017 until she was dismissed on 31 May 2017. There was no doubt that, in dismissing her, the respondent treated the claimant less favourably than others. What we had to decide was the reason why the respondent took this decision. Was it because of the claimant's age or was it for some other reason? Had we found that the claimant was dismissed because of her age, the claim would have succeeded: the respondent did not seek to justify any such discrimination as being a proportionate means of achieving a legitimate aim.

Evidence

2. We heard evidence from the claimant, Mrs Allen, Mr Allen, and Jade Trainer. We also considered documents in an agreed bundle which we read cover to cover.

3. This is a convenient opportunity for us to record our impressions of the various witnesses who gave evidence to us.

4. First, the claimant. We made two observations:

   4.1. The claimant was very quietly and quickly spoken. We took into account that she was representing herself and that a tribunal room is a highly artificial setting. It is very common for people who appear in front of us as witnesses to be nervous. The claimant impressed us with her preparation of the documents and the clarity of her arguments. Nevertheless, we did find her manner of speaking in the tribunal room as providing some supporting evidence when it came to resolving disputes about how she spoke whilst employed by the respondent.

   4.2.. We thought that the claimant was genuinely trying to tell us what she remembered from her own point of view. As is often human nature, she viewed the events concerning her employment through a particular lens. She is likely to have wanted to remember her achievements and to have wanted to forget areas where she struggled. We also found that one piece of her evidence was inconsistent with a contemporary text message. We therefore had to be careful in relying on what she told us where her version clashed with that of other witnesses.

5. The respondent was genuinely upset to have been accused of discrimination. This is not uncommon, even amongst people who are ultimately found to have discriminated against an employee. Nobody likes being accused of discrimination. We could not therefore regard her strong emotion as tending to support her version.

6. We made one observation of the respondent's and Mr Allen's evidence, taken together, when it came to the controversial issue of whether they had discussed the claimant's complaint of discrimination prior to Mr Allen sending the e-mail of 6 June 2017. Their evidence that was that they had not discussed the claimant's complaint. That evidence, when set against their contemporary emails, seems to us to be unlikely. Just as with the claimant's evidence, therefore, we had to be careful in our approach to what they had to say.

7. Of all the witnesses we thought the evidence that was most straightforwardly given was that of Jade Trainer. We thought that she gave her evidence in an honest and straightforward way, plainly and spontaneously. One thing that we had to take into account, of course, was that Miss Trainer had a very good working relationship with the respondent. She would not want to say anything in her evidence that would put that relationship at risk. Even taking account of that danger, however, we found ourselves able to place a good deal of reliance on what she said.

8. Before leaving the witness evidence, we need to mention a person who did not give evidence. Her name is Ms Lisa Sharples. Her evidence would have been relevant to the question of whether the respondent raised concerns about the claimant's performance prior to dismissing her. At the outset of the hearing the claimant raised the fact that Ms Sharples had not been called as a witness. She did not ask the tribunal to do anything in particular about Ms Sharples' absence,

for example, to make an order requiring Ms Sharples to attend. When called to give evidence, the respondent gave an explanation for not having called Ms Sharples herself. We weighed that explanation together with the other factors affecting the quality of the respondent's evidence. Her explanation seemed plausible. In the end we did not think it was appropriate to draw any inference against the respondent based on Ms Sharples' absence from the hearing. What it did mean, however, was that we had to be conscious that, when it came to findings about one-to-one conversations between the respondent and Ms Sharples, there was no independent evidence to support the respondent's version.

Facts

9. The respondent has been in the beauty trade for about 17 years. For some 15 years she has operated one or more salons of her own. Her longest-established salon is based in Whiston, Merseyside. Recently, around about 12 to 18 months ago, she opened a new salon in St Helens. Both salons trade under the name, "Olivia George".

10. Once the St Helens salon had opened, the respondent remained based in Whiston and spend most of her time there dealing with her own clients. She would travel on a regular basis to St Helens to oversee the work there. At the time with which we are concerned, the most senior member of staff at St Helens was Jade Trainer. She started as an apprentice in about September 2016 at the age of 18. Mrs Allen trained her personally. Miss Trainer exceeded all expectations and was regarded by the respondent as "a fantastic apprentice". She was initially paid the National Minimum Wage, but by late December 2016, the respondent had given her a substantial pay rise. This was because she was more than covering her wage by the income she was bringing in from clients. Miss Trainer's particular expertise was in nail treatments.

11. In about January 2017, the respondent decided to recruit further apprentices. She placed an advertisement with local colleges for a Beauty and Nail Therapy Cosmetic Treatment Apprentice, with a closing date of 24 March 2017.

12. Amongst the applicants for apprenticeship was the claimant. She was born on 21 May 1997. At this time, aged 19, the claimant was at college studying beauty therapy. She had, by this time, some experience of volunteering in a beauty salon run by Ms Diane Crowley. Whilst at Ms Crowley's salon, the claimant had done some work on clients' nails. The claimant's previous experience included working on reception for another employer.

13. As part of the application process, the claimant informed the respondent of her age.

14. The claimant attended an interview with the respondent on 10 March 2017. There may have been other interviews. The parties disagree as to whether, at this or another interview, the claimant was told that she would be mainly working in Whiston. At any rate, she was successful in obtaining the apprenticeship. Her employment with the respondent started on 23 March 2017. On 29 March 2017, there was a meeting between the claimant, the respondent and Ms Lisa Sharples from City of Liverpool College. The three of them signed an apprenticeship agreement. Amongst other things, it was agreed that the apprenticeship would last between 12 and 18 months, with the claimant expected to obtain her final qualifications in June 2018.

15. Employing an apprentice made the respondent eligible for a government grant of £4000. It was a condition of eligibility that the respondent would continue to employ the apprentice for a minimum qualifying period. We did not have sufficient evidence to enable us to make a precise finding about how long that period was. We accept, however, the oral evidence of the respondent that, by the end of May 2017, the respondent would have needed to retain the claimant for "a couple more months" in order to qualify for the grant.

16. The claimant disputes that the grant would have been available at all in respect of her apprenticeship. She says that someone at the College told her that there was no government funding available for her apprenticeship and that the respondent would have to pay for it entirely herself. We did not make a specific finding about whether the claimant was told this or not. We are nonetheless satisfied that the respondent believed that the funding assistance was available. She had good reason to believe that she would get a grant: in the same year, 2017, the respondent retained another apprentice by the name of Ellie and, as a result, was awarded the £4,000.00 grant money.

17. As with the other apprentices, the claimant's starting rate of pay was the National Minimum Wage for employees. In April 2017 the hourly rate of the National Minimum Wage increased. For employees under 18 years of age it was £4.05. For employees aged between 18 and 20 it was £5.60 and for employees between 21 and 24 the hourly rate was set at £7.05.

18. The claimant initially worked for a couple of weeks in the Whiston salon. Early into the apprenticeship, Mrs Allen asked the claimant what she was studying in college. The claimant replied that she was studying nails. The respondent thought that the claimant would benefit from working with Miss Trainer. She therefore decided to place the claimant principally at St Helens. From that point, the claimant worked mainly at St Helens, although a text message exchange shows that she also worked at Whiston from time to time. Whilst St Helens may have given the claimant a better opportunity to develop, it was also inconvenient for her. To get to St Helens the claimant had to take two bus journeys. As a result the journey was more time-consuming and expensive than her commute to Whiston.

19. Once based at St Helens, the claimant worked alongside Miss Trainer who was responsible for her day-to-day supervision. At that point Miss Trainer was still an apprentice, albeit a very good one. Mrs Allen showed the claimant various tasks. These included very basic tasks such as making a cup of tea or coffee for a client. Day-to-day work included cleaning the salon and answering the telephone. When Miss Trainer was able to fit it in, she would spend time teaching the claimant. As an example of her training in telephone skills, Miss Trainer would phone the claimant using her own personal mobile phone and pretend to be a customer. The claimant would answer her mobile phone and they would run through the process of making an appointment with the claimant entering details on the system. They would also do mock walk-in customer visits. Miss Trainer also helped the claimant to learn nail preparation. She would prepare the claimant's nails and then ask the claimant to do the same to her. If Miss Trainer did not think that the claimant had done the job to the required standard they would try again either later that day or the following day.

20. The claimant's uniform consisted of black jeans, a black T-shirt and a black cardigan. This is a detail that is unimportant to the claim, but which did lead us to

question the reliability of the claimant's evidence. She told us that she had a conversation with the respondent in which she had offered to wear her grey college uniform and had been told that was unacceptable. Yet on 22 May 2017, towards the end of her employment, the respondent texted her to ask whether she had a uniform from college that she could wear that week in work. We think it is unlikely that the respondent would have sent that text message if she had already refused permission to wear her college uniform.

21. On 5 April 2017, another apprentice, whose first name was Shauna, started working for the respondent. She was 17 years old and turned 18 on 18 May 2017. Shauna had been recruited in a process that overlapped with the recruitment of the claimant. Her interview took place the same day as the claimant started work. For reasons that are not particularly clear to us, the respondent did not tell the claimant that Shauna had been recruited. Shauna did not work alongside the claimant because Shauna was based principally in the Whiston salon. Shauna learnt her skills quickly. By May 2017, she was carrying out fee-earning work for clients.

22. By contrast, Miss Trainer formed the impression that the claimant was struggling to learn the basics of therapy and nailcare. For example, Miss Trainer noticed that the claimant was holding the cuticle nippers the wrong way round. Both Miss Trainer and the respondent found that they were having to go over aspects of fairly basic elements of the claimant's training. It became repetitious and they wondered whether the claimant was really picking up the skills. Miss Trainer and the respondent observed the claimant's manner on the telephone and, rightly or wrongly, they believed that she lacked confidence.

23. This latter finding is disputed by the claimant. Her case is that the respondent could not genuinely have believed that the claimant was timid on the telephone. The arguments on this point require us to step briefly out of the timeline. By October 2017, after her employment with the respondent had ended, the claimant obtained employment in a call centre. How, she asks, could she have come across so badly on the telephone when only 6 months later her telephone manner was good enough to be a professional call handler? We have borne that rhetorical question in mind when evaluating the evidence of Miss Trainer and the respondent on this point. In the end, we did not think that the claimant's subsequent job was inconsistent with a genuine belief on the part of Miss Trainer and the respondent. The claimant may have improved her telephone manner after April 2017. In any event, forming an impression of a person's confidence, or lack of it, is very much a subjective exercise. Some people, as we have been, could have been impressed by the claimant's command of the English language, her attention to detail and her ability to articulate her points. Others could have been more concerned about her quiet speaking voice and the speed with which she spoke. We think the most likely explanation is that Miss Trainer and the respondent took, or possibly mistook, the claimant's speaking manner as an indicator of lack of confidence.

24. Before rejoining the narrative, we pause to question whether the respondent had a sufficiently structured approach to training the claimant. She was in a relatively new salon. The most senior beautician present on a day-to-day basis, and who was responsible for delivering daily training, was herself an apprentice. The respondent who was ultimately responsible for the training, only visited. She was based most of the time at the Whiston salon. It may have been that a more structured approach could have brought out the best in the claimant. And that might also explain how

the claimant may have found herself able to pick up skills in other salons which she did not pick up working for the respondent.

25. We have referred already to the computer system. On the system, each member of staff who delivered treatments to clients was given a spreadsheet column, under which the client booking could be made. By May 2017 a column had been set up on the system for Shauna but there was no column for the claimant. That strongly suggests to us that, by May 2017, the respondent did not think that the claimant was ready to accept client bookings. Had she been ready the respondent would have had a strong financial incentive to putting the claimant to work generating money for the business.

26. In late May 2017 Mrs Allen had a meeting with Ms Sharples from the City of Liverpool College. We are satisfied that the respondent did raise concerns about the claimant's performance. We have no doubt that Miss Trainer's day-to-day observations were genuine from her point of view and that she would have had no reason to hide her findings from the respondent. In turn, it is likely that the respondent would have wanted to bring up these concerns with the College. It is the respondent's evidence that, at the meeting, Miss Sharples told the respondent to "let the claimant down gently". On this point we did not think that the evidence was sufficient to enable us to make a positive finding. In our view, it does not matter.

27. On 31 May 2017, the respondent spoke to the claimant and told her that her apprenticeship was being terminated. Her words were, "We will have to let you go." That much is common ground. What is more contentious is what reason the respondent gave the claimant at the time and – even more hotly disputed – what the respondent's actual reason was. We return to these factual fault lines in due course, but first we record further facts about what happened later.

28. On 2 June 2017 the claimant posted a letter to the respondent, addressed to the Whiston salon. The letter was headed, "Unfair dismissal on grounds of age discrimination". It alleged that, on 31 May 2017, the respondent had told her "I had done nothing wrong as my work was great, but I would not be 'cost effective' in the long run due to my age." It continued by asserting, "I was told to purchase a uniform a week earlier which I had done. I was also told to purchase a gel polish lamp…"

29. Not having heard a reply by 6 June 2017, the claimant sent a further copy of the letter to the respondent by e-mail. It was received by the respondent at 8.25am that day. We find that the respondent read the e-mailed version before becoming aware of the hard copy. Whether that was because of delays in the postal service or the respondent not opening her mail is of little importance. The respondent was upset to read the contents of the letter. Eight minutes later she forwarded the e-mail to her husband. Then, at 9.01am, Mr Allen sent a reply to the claimant on the respondent's behalf. Mr Allen's e-mail stated (with the original emphasis, wording and punctuation),

> "You was not dismissed due to age discrimination it was due to **incapability of the job**. You have been with the shop 4 months and and there had been a number of occasions you had demonstrated a lack of basic salon knowledge and you were some way from performing a treatment so it was not cost effective to keep funding your training. Helen was being too polite in sayings it's your age when she should have been clear it was your capability.

Let me summarise response to your other points:

- The other apprentice hired was level 3, while you are level 2 so you have different qualification, the other apprentice is proving capable for the job and has performed treatments in initial 2 months
- You was not told to purchase a uniform (Helen has a text which proves this)
- You was not told to purchase a gel lamp."

30. Having related this post-dismissal conversation, we return to what the respondent said to the claimant 31 May 2017. In our view it is more likely than not that the respondent did say "it won't be cost effective in the long run". This was a gentle way of saying that the respondent did not expect the claimant to be able to cover her salary with fee-earning work. The respondent did not say outright that the claimant's work was sub-standard. Nor, however, did she say, "Your work is great". Such a remark would have been completely inconsistent with the impression the respondent and Miss Trainer formed about the claimant's work.

31. At some point in the conversation, the respondent used the phrase, "it's your age", although we were unsure of the precise context. This is a controversial finding, so we set out our reasons here:

    31.1. The quoted passages from Mr Allen's e-mail show that, by the time Mr Allen sent it, he had sufficient information to respond in detail to the various complaints set out in the claimant's letter. Mr Allen must have had a conversation with the respondent, either on the telephone or by text, about the gel lamp and about the uniform. That conversation was sufficiently detailed to enable Mr Allen to learn of the existence of the inconsistent text message.

    31.2. Mr Allen's e-mail specifically countered assertions made in the claimant's letter about what Mrs Allen had told her. From this, we deduce that Mr Allen was focusing his mind on potential disputes about what the respondent had said to the claimant. Both the respondent and Mr Allen knew that the claimant had complained of age discrimination, based on what the respondent had allegedly said on 31 May 2017. If the respondent had not mentioned the claimant's age at that meeting, we would have expected Mr Allen to have said so.

32. By 31 May 2017, the claimant had recently had her 20th birthday. Losing her apprenticeship was not only disappointing for the claimant; it put her fledgling career as a beautician in a precarious position. It meant that she had only 42 days to find another work placement, or she would be unable to continue with her college course. The decision also had unwelcome consequences for the respondent, albeit less stark. As a result of terminating the claimant's employment, the respondent forfeited her eligibility for the grant.

33. We know about at least two successful apprentices: Shauna and Miss Trainer. We did not hear any evidence about any apprentices who were unsuccessful apart from the claimant. There is no example that we know about of any 18- or 19-year-old apprentice being given any more time to prove themselves than the claimant was given.

34. This concludes our findings of fact, except for the central issue in dispute: what was the respondent's actual reason for dismissing the claimant? Was her age a factor? Before answering that question, we remind ourselves of the relevant law.

Relevant law

Direct discrimination

35. Section 13(1) of EqA provides:

> (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.

36. Section 23(1) of EqA provides:

> (1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.

37. Age is a protected characteristic.

38. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

39. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572*.*

40. Tribunals dealing with complaints of direct discrimination must be careful to identify the person or persons ("the decision-makers") who decided upon the less favourable treatment. If another person influenced the decision by supplying information to the decision-makers with improper motivation, the decision itself will not be held to be discriminatory if the decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.

Burden of proof

41. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

42. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in

legislation preceding EqA. With the warning that guidance was no substitute for the statutory language, the Court made the following 13 points.

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
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> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
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> (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
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> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
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> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].
>
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the claimant has proved 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.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
>
> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) 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 discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

43. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

44. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Conclusions

45. We are now in a position to make findings about the actual reason why the respondent terminated the claimant's apprenticeship. We start by reminding ourselves of our finding that, on 31 May 2017, the respondent made a remark that looks suspiciously like a confession of age discrimination. She made matters worse for herself by denying it in her evidence to us. We could conclude from those facts, in the absence of an adequate explanation, that the decision was motivated by the claimant's age. Indeed, in this case, we would go further. When the respondent now tells us her reason for dismissing the claimant, we must look at it sceptically. In this particular case it takes cogent evidence and convincing reasoning to persuade us that the claimant's age was not a factor in any sense in the respondent's decision.

46. We have come to the view that the respondent has discharged that burden. We are satisfied that she was not motivated at all by the claimant's age. This may come as a surprise in the light of an apparent confession by the respondent, so we set out our reasoning in detail.

47. Our first reason is that we could not find any way in which the respondent could have thought the claimant's age was relevant to the question of whether to continue employing her or not. Before coming to this conclusion we looked for possible scenarios in which age might have influenced the respondent's reasoning:

    47.1. One theory is that the respondent was motivated by a desire to save money. Because of her age, the claimant was being paid more than the other apprentices and was more costly to retain. We do not think that this could have contributed in any way to the respondent's reasoning. Miss Trainer was already being paid substantially more than the National Minimum Wage and

she was already being paid more than the claimant, yet the respondent did not dismiss her. By the time the claimant was dismissed, Shauna had turned 18 and was being paid the same as the claimant. Yet she was retained. Age-based minimum wage costs cannot explain the claimant's dismissal.

47.2. The next hypothesis is also based on age-related wages, but this time it is based on the anticipated future cost. The claimant points out that, on 21 May 2018, the claimant would have reached the age of 21. That would take her into the next age bracket for the National Minimum Wage. Using the 2017 rates as a guide, her pay would have increased by £1.45 per hour. Because Shauna was a year younger, she would have to wait a further year before her rate of pay went up. We reject this theory as an explanation of the respondent's motivation. It cannot have been a factor, even subconsciously, in her reasoning. The apprenticeship was only intended to last for 12 to 18 months, so, by the claimant's 21st birthday, the apprenticeship would either have finished or be in its last few weeks. The respondent was used to paying apprentices more than the National Minimum Wage once they built up sufficient revenue-earning work. Miss Trainer managed to justify a substantial pay rise within a couple of months of the start of her apprenticeship; Shauna had already begun to take client bookings. There was no reason for the respondent to be worried about national minimum wage costs for a successful apprentice. Even if there was, the claimant's theory begs the question of why the respondent chose to dismiss the claimant so soon. If the respondent thought of the claimant as a valuable apprentice, but was trying to avoid age-related wage rates, it would have made much more sense for the respondent to continue to employ the claimant whilst her labour was cheap.

47.3. This leads us to another possible way in which age could have been a factor. Was it that Mrs Allen expected higher standards from an older apprentice? Could it have been that she would tolerate slow learning in someone younger? That was not the way the claimant put her case: it was her contention that she was performing well. In any event it does not fit with the facts. There is nothing to suggest that Mrs Allen would have tolerated somebody performing at the claimant's level even if she had been a year or two years younger. There is no example that we know about of any younger apprentice being given any more time to prove themselves than the claimant was given. The only two apprentices that we know about in detail, Shauna and Miss Trainer, were both client-ready within a much shorter time.

48. Our second reason for accepting that the respondent's decision was age-neutral is that the respondent knew how old the claimant was when she recruited her. Of course, unlike some other protected characteristics, an employee's age changes over time. But the claimant was employed for such a short period that her dismissal could not be explained by the fact that she had become older.

49. We think that by far the most likely explanation of what the respondent said on 31 May 2017 was that she was trying to let the claimant down gently. She was trying, misguidedly, to soften the blow by saying that her decision was to do with cost and by mentioning her age. When she realised that these remarks would cause her difficulty in defending an age discrimination complaint, she tied herself in knots by denying having said it. In our view, had she told the truth all along, her real reason would have been perfectly clear.

50. Our view is the only reason why the claimant was dismissed was the belief held by the respondent was that the claimant was not working and improving to the standard they had expected of an apprentice. It was nothing to do with her age. The complaint of age discrimination therefore has to be dismissed.

The reconsideration application

51. Whilst the employment judge was announcing the tribunal's reasons for the judgment, the claimant stood up, walked past the respondent, made an offensive hand gesture towards her and shouted, "Fuck you, you only married him for the money". She then walked out.

52. A few minutes later, she re-entered the room, apologised, and listened to the rest of the judgment. Once the oral reasons had concluded, she asked to make two further points. She said that we were wrong to find that there would have been a government grant available for her apprenticeship. She also reminded the tribunal that Ms Sharples had not been present at the hearing. She said she did not want the tribunal "putting words into [Ms Sharples'] mouth". The employment judge agreed to treat this as an oral application for reconsideration and to give it immediate preliminary consideration under rule 72.

53. Rule 70 of the Employment Tribunal Rules of Procedure 2013 provides that a tribunal may, on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. Applications for reconsideration must be made in accordance with Rule 71.

54. Rule 72 requires that an employment judge must consider any application under Rule 71. If the judge considers that there is no reasonable prospect of the original decision being varied or revoked, the application must be refused.

55. The old Employment Tribunal Rules of Procedure 2004 required that judgments could "reviewed", but only on one of a prescribed list of grounds. One of those grounds was that "new evidence [had become] available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at that time." This proviso reflected the well-known principle in civil litigation deriving from *Ladd v. Marshall* [1954] 3 All ER 745, CA.

56. The current 2013 Employment Tribunal Rules of Procedure replaced the old list of grounds with a single test: a judgment will be reconsidered where it is "necessary in the interests of justice to do so". There is no specific provision for fresh evidence. Nor is there any express prohibition a party relying on evidence about which he knew or ought to have known before the judgment was given. Nevertheless, the "interests of justice" test must, in my view, incorporate a strong public interest in the finality of litigation, even if it is not as inflexible as the proviso in the 2004 Rules. Where a party could reasonably have been expected to rely on the evidence first time around, it would take a particularly good reason to give that party a fresh opportunity to rely on it.

57. In the light of these legal principles, the employment judge concluded that there was no reasonable prospect of the judgment being varied or revoked. Dealing with each ground of the application in turn:

57.1. We were well aware that there was a dispute about the availability of a government subsidy for the claimant's apprenticeship. We gave reasons for concluding that the respondent believed that the grant was available.

57.2. We did take Ms Sharples' absence into account. We asked the claimant if she wanted us to do anything about Ms Sharples' absence. She did not ask us to do anything. Specifically, she did not say anything that, even in a non-technical sense, could be understood as asking for a witness order. It is too late for her to apply for such an order now. We did not put words into Ms Sharples' mouth. Our recitation of the facts, both in these written reasons and in the oral reasons announced at the hearing, did not include any findings about what Ms Sharples had said. We did find that the respondent had raised concerns with Ms Sharples. That was based on the respondent's own evidence – which we had to approach with caution – and our application of what we believed to be common sense. There had already been one meeting between the respondent and Ms Sharples. It was plausible to think that there would be review meetings from time to time. We believed Ms Trainer's evidence that she thought the claimant was underperforming. It would have been natural for the respondent to want to raise it with Ms Sharples.

58. The reconsideration application was therefore dismissed.

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Employment Judge Horne

25 April 2018

REASONS SENT TO THE PARTIES ON

1 May 2018

FOR THE TRIBUNAL OFFICE