



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs Elizabeth Ryan

AND

Respondent

South West Ambulance Services NHS Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth

ON

16, 17 and 18 January 2019

EMPLOYMENT JUDGE N J Roper

MEMBERS

Mr T McAuliffe

Mr J Williams

Representation

For the Claimant: Ms L Mankau of Counsel

For the Respondent: Mr J Gidney of Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The Claimant's claims of direct age discrimination are dismissed on withdrawal by the Claimant; and
2. The Claimant's claims of indirect age discrimination are dismissed.

REASONS

1. In this case the claimant Mrs Elizabeth Ryan claims that she has been discriminated against because of a protected characteristic, namely her age. The claim was originally for both direct discrimination and indirect discrimination, but the claimant withdrew her claims of direct age discrimination during this hearing. The respondent denies the remaining indirect discrimination claim.

2. We have heard from the claimant. For the respondent we have heard from Mr James Petter, Mrs Paula Windsor Mr David Fletcher, and Mrs Amy Beet. We were also asked to consider, and did accept into evidence, a statement from Mr Andy Hardy on behalf of the claimant. However, we can only attach limited weight to this because the statement was unsigned, and because of illness Mr Hardy was not present to be questioned on this evidence.
3. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. We would also make the observation at this stage that following the withdrawal of the claimant's direct age discrimination claims, the findings of fact required are more focused and less extensive, because the nub of the claimant's remaining indirect age discrimination claims relates to the alleged disparate impact of her not being a member of the respondent's Talent Pool. It is accepted by the parties that the claimant was not offered the opportunity to apply for promotion on two occasions simply because she was not in the Talent Pool. The more detailed background is as follows.
5. The respondent is the South Western Ambulance Service NHS Trust which is responsible for the provision of the ambulance service throughout the south-western counties of England. It has approximately 4,300 employees. For obvious reasons there is a degree of urgency in many aspects of the respondent's Service Delivery requirements.
6. The claimant Mrs Elizabeth Ryan was born on 23 August 1950 and was aged 67 at the date that she submitted her originating application for these proceedings. She has continuous service commencing on 1 July 1991, and remains in the respondent's employment. She is currently engaged as Learning and Development Officer at Band 7 of the respondent's pay and seniority scale. The respondent has a pay and seniority scale commencing at Band 1, through to Band 7, after which it has more senior managerial positions commencing at Band 8a and above.
7. Between approximately 2013 and 2016 the claimant was employed as the respondent's Education Business Manager at managerial grade Band 8a. During this time she was involved in the development of the respondent's Talent Pool. This appears to be a diversion from the normally agreed recruitment and promotion procedures for NHS Trusts which are covered by Agenda for Change terms and conditions. The purpose of the Talent Pool was to identify future leaders and managers at bands 1 to 7 inclusive and retaining current leaders and managers at Band 8a and above. Effectively it was a precursor to promotion. The respondent wished to identify a pool of high performing and talented employees so that certain vacancies could be filled with limited need to advertise for and to interview candidates because those in the Talent Pool would already have been identified as worthy of promotion into leadership roles. Not all prospective positions were filled from the Talent Pool, for instance Paramedics were always in short supply and their positions more generally required more widespread advertisement.
8. There were two routes available to employees to gain access to the Talent Pool. The first was through the respondent's appraisal system during which employees would have one to one meetings with their line managers to review their performance, which were known as Career Conversations. Employees were then graded into one of three categories: failing to meet expectations; meeting expectations; and exceeding expectations. For an employee to be marked as exceeding expectations he or she was required to perform outstanding service in some way, and the achievement of exceeding expectations led to entry into the Talent Pool. If an employee felt that the line manager had unfairly or wrongly given the wrong performance appraisal, that employee had the opportunity of appealing the line manager's finding so that it might be assessed by an independent manager.
9. The other method of entry was to self-nominate for inclusion in the Talent Pool. Employees were notified of a window of opportunity of approximately two weeks twice every year during which they could self-nominate for inclusion in the Talent Pool. This

- might happen if, for example, an employee felt that his or her line manager had not fully appreciated their abilities. The application went to Executive Directors and did not involve the employee's line manager, and worked as a sort of "safety valve" under which the employee could bypass the line manager who would not know about the self-nomination application and would have no input in deciding it. We have heard from Mr Petter, the claimant's line manager, who explained that one employee, namely Mr Robin Gwinett, whom he had marked as meeting expectation following his Career Conversation (and therefore had not been exceeding expectations and had not entered the Talent Pool automatically), had self-nominated to the Talent Pool. He was successful in his application which was decided by the Executive Directors, and Mr Petter was not notified of his application and had no input in it.
10. On 25 January 2017 the claimant attended a Senior Leadership Team Meeting at which the Talent Pool was an agenda item. Following her partial involvement at least in the policy leading to the Talent Pool, we are satisfied that the claimant was aware of its existence and the methods of entry to the Talent Pool. Despite her role at Band 8a, the claimant was not a member of the Talent Pool, and historically had not been required to be in the Talent Pool before promotion to her then current position. She had always performed well and been marked as meeting the respondent's expectations, but had not gained entry to the Talent Pool by reason of any Career Conversation in which she was deemed to be exceeding expectations. On 8 February 2017 the respondent announced that the self-nomination application process would be open between 10 and 24 February 2017. The claimant did not apply.
 11. In the meantime, in December 2016 the respondent's Executive Directors undertook a Corporate Services Review and approved the deletion of the claimant's role as Education Business Manager. On 18 January 2017 the claimant and her line manager Mr Petter had a one to one meeting at which the claimant was informed that her position was at risk by reason of possible redundancy. The claimant originally alleged that this was the commencement of a course of discrimination on the grounds of the claimant's age, in that Mr Petter is said to have told the claimant that because she was near retirement age there was no point in seeking to progress her career or for her to enter the Talent Pool. Mr Petter strongly denies this, but accepts that they discussed whether the claimant intended to retire, by way of sensible potential retirement planning. On 18 February 2017 the claimant and Mr Petter had a further meeting to discuss the respondent's proposed restructuring which might well lead to her Education and Business Manager Band 8a role becoming redundant. Again the claimant alleges that Mr Petter would not agree to the claimant being in the Talent Pool on the basis that she was about to retire. Mr Petter strongly denies this allegation as well.
 12. On 1 March 2017 the claimant raised a grievance against Mr Petter for both age and sex discrimination. On 2 June 2017 the claimant's formal grievance to that effect was dismissed and the claimant was notified on 19 June 2017.
 13. On 21 March 2017 the claimant and Mr Petter conducted the claimant's Career Conversation appraisal. The claimant was rated as meeting expectations, and thus did not qualify for entry into the Talent Pool. The claimant did not appeal that decision.
 14. During the restructuring process there were two opportunities for redeployment in the Learning and Development Department. The more senior position was that of Learning and Development Manager at Band 8a. There was also a more junior position of Learning and Development Officer at Band 7. The claimant was interviewed for the more senior position of Learning and Development Manager on 21 July 2017. Mr Petter was on the panel, but because the claimant had earlier raised a grievance against him, two other senior employees were involved in that process. The claimant was unsuccessful in her application to become Learning and Development Manager, but she did accept the more junior position of Learning and Development Officer. Although this was a Band 7 position, the claimant was offered and accepted two-year pay protection at the level of Band 8a. She thus accepted this position by way of alternative employment, which was initially on a two-month trial period.

15. On 6 September 2007 the respondent notified its staff that the self-nomination process to the Talent Pool would open again on 18 September and close on 29 September 2017. The claimant did not apply.
16. At about this time Mr Petter left the respondent's organisation on a secondment to Health Education England. His position as Head of Education was therefore vacant, temporarily at least. Mrs Amy Beet, from whom we have heard, is the respondent's Executive Director of People and Culture. She was newly appointed to that role and concerned to fill Mr Petter's vacancy as soon as possible. She did so immediately from the Talent Pool, thus taking advantage of the system under which he knew she had talented managers available. Mr Neil Lentern had already been undertaking that role on one day a week, and Mrs Beet therefore appointed Mr Lentern to the vacant position. She informed the claimant of the same on 30 October 2017 and Mr Lentern started on 1 November 2017. It is agreed between the parties that the claimant was not considered for this role simply because she was not in the Talent Pool.
17. On 11 November 2017 the claimant's trial period in her Band 7 Learning and Development Officer role came to an end and the claimant accepted that role. Her new line manager was Mrs Paula Windsor, from whom we have heard. The claimant's two-year period of pay protection began and she was no longer at risk of redundancy.
18. Meanwhile, another vacancy had been created by reason of Mr Lentern accepting the alternative position made vacant by Mr Petter. This was as Learning and Development Manager at Band 8a. On 14 November 2017 the claimant submitted a formal expression of interest in this vacancy. On 22 November 2017 the claimant was told that the role had been advertised within the Talent Pool, and she could only apply if it remained unfulfilled at which stage it would be advertised more widely. On 23 November 2017 the position was awarded to Mr Steve Knowles who was already in the Talent Pool. It is accepted between the parties that the claimant was not eligible to be offered this position because she was not in the Talent Pool.
19. On 11 December 2017 the claimant submitted a grievance alleging that her exclusion from consideration from these two roles was discriminatory on the grounds of her age. That process was eventually concluded in March 2018 and the grievance was rejected. On 1 February 2018 Mrs Windsor conducted another Career Conversation appraisal and again the claimant was rated as meeting expectations. On 15 February 2018 the claimant presented this application to the Tribunal. In April 2018 the claimant submitted an appeal against the grievance which had been refused, but withdrew this to allow the Tribunal process to run its course.
20. We now deal with the relevant statistics and the allegations of disparate impact arising from membership of the Talent Pool.
21. As noted above the Talent Pool was divided into two subdivisions: Bands 1 to 7 inclusive for aspiring Leaders, and Band 8a and above for existing Leaders. The system was effectively developing from 2015/2016, and entry into the Talent Pool was restricted to two methods: establishing a grade of exceeding expectations at the Career Conversation appraisal; or being successful in an application to self-nominate. The Career Conversations were undertaken at least annually, and there were windows of opportunity to self-nominate every six months. Because the system was developing, the respondent kept the process under review, and in particular reviewed the position at least twice annually to consider the make-up of the employees within the Talent Pool. To this extent the respondent undertook Equality Impact Assessments and began to monitor the statistics to assess whether there was any significant disparate impact against any group of employees.
22. The relevant statistics (which were attached to an email dated 28 February 2018) show the relevant percentages, which were rounded up and down to whole percentage points. Against the protected characteristics of gender, marital status, ethnic origin, disability, religion, and sexual orientation, there is a striking similarity between the percentage of employees in the Talent Pool, as against the percentage of employees working for the respondent generally. In other words, there is no disparate impact or group disadvantage

- in respect of any of these protected characteristics. Membership of the Talent Pool cannot be faulted in respect of the membership percentages for these characteristics.
23. The position is different with regard to age. The relevant age group in respect of which the claimant claims there is a group disadvantage with disparate impact is the age group of 55 to 70, of which the claimant is a member. The relevant statistics are these, which are the age band, the percentage of those employees in the Talent Pool, as compared to the percentage of those employees throughout the 4,300 employees of the respondent.
 24. Age 16–20, 0%, 2 %; Age 21–25, 4%, 10%; Age 26–30, 15%, 13%, Age 31–35, 16%, 12%; Age 36–40, 20%, 15%; Age 41–45, 18%, 13%; Age 46–50, 14%, 13%; Age 51–55, 8%, 10%; Age 56–60 5%, 8%; Age 61–65, 1%, 3%; and Age 66–70, 0%, 1%. In addition, at the relevant time there were 119 employees registered into both divisions of the respondent's Talent Pool.
 25. The respondent concedes that the effect of the statistics is as follows. Of the 4,300 employees employed by the respondent 12% of that number fell into the age group of 55 to 70 which is the relevant age group of which the claimant complains. 12% of the total employees of the respondent is 516, or one in eight rounding down. On the other hand there were 119 employees registered into the Talent Pool and of these only 6% (or seven employees) fell into the age group of 55 to 70, which is one in 17.
 26. The claimant has made further calculations to this effect. Only 6% of the Talent Pool employees (which number 119) are aged 55 to 70, namely seven employees. The total employees aged 55 to 70 were 516. One in 73 employees aged 55 to 70 were therefore members of the Talent Pool. When this is compared to employees aged below 55 they are 94% of the 119 employees, or put another way 112 members of the Talent Pool are aged below 55. This is one in 34 of employees aged below 55 who are in the Talent Pool. So, in short, employees aged below 55 have a 1/34 chance of being in the Talent Pool, whereas employees aged over 55 only have a 1/73 chance of being in the Talent Pool.
 27. Finally, another relevant statistic is that 27 of the 119 employees aged 55 to 70 in the Talent Pool are said to be "retired returners". That is to say they have been able to retire at age 55 in order to take certain pension benefits for which they qualify at that age, but have then returned to the respondent's employment in a different or more junior capacity. Accordingly, they are said by the respondent to have no interest or significantly lesser interest in being involved in the Talent Pool.
 28. Having established the above facts, we now apply the law.
 29. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges both direct discrimination and indirect discrimination.
 30. The protected characteristic relied upon is age, as set out in sections 4 and 5 of the EqA.
 31. The claim is for indirect discrimination: under section 19(1) of the EqA a person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision criterion or practice is discriminatory in these circumstances if (a) A applies, or would apply, it to persons with whom B does not share the characteristic; (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; (c) it puts, or would put, B at that disadvantage; and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
 32. Under subsection 19(3) EqA age is a relevant protected characteristic.
 33. With regard to a comparison by reference to circumstances, section 23(1) EqA provides: "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."
 34. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that 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. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

35. We have been referred to and we have considered the cases of: Essop and Ors v Home Office (UK Border Agency); Naeem v Secretary of State for Justice [2017] IRLR 558 SC; and Homer v Chief Constable of West Yorkshire [2012] IRLR 601 SC.
36. We have also been referred to the Equality and Human Rights Commission: Code of Practice on Employment (2011), referred to below as the EHRC Code, and in particular paragraphs 16.20 and 16.21 in relation to “Advertising a Job”, which provides: “16.20 the practice of recruitment on the basis of recommendations made by existing staff, rather than through advertising, can lead to discrimination. For example, where the workforce is drawn largely from one racial group, this practice can lead to continued exclusion of other racial groups. It is therefore important to advertise the role widely so that the employer can select staff from a wider and more diverse pool. 16.21 Before deciding only to advertise a vacancy internally, an employer should consider whether there is any good reason for doing so. If the workforce is made up of people with a particular protected characteristic, advertising internally will not help diversify the workforce. If there is internal advertising alone, this should be done openly so that everyone in the organisation is given the opportunity to apply.”
37. The issues in this case were determined and agreed at a case management preliminary hearing on 1 May 2018. The claimant withdrew her claims of direct age discrimination during the course of this hearing, which left her remaining claim of indirect age discrimination in respect of the respondent’s actions in excluding the claimant from applying for promotion to the two vacancies filled by Mr Lentern and Mr Knowles. More specifically, the issues to be determined are these: (i) Did the respondent apply the following PCP generally, namely the practice of promoting staff on the basis of their membership of the respondent’s Talent Pool? (ii) Did the application of that PCP put people of the claimant’s age group, namely 55 to 70 years old, at a particular disadvantage when compared with persons who do not have this protected characteristic? (iii) Did the application of that PCP put the claimant individually at that disadvantage in that she was not considered for the posts filled by Mr Lentern and Mr Knowles? and (iv) Does the respondent show that any (otherwise discriminatory) treatment was justified in that it was a proportionate means of achieving a legitimate aim?
38. We deal with each of these above matters in turn, and we apply the guidance given to us in Essop, and in particular paragraphs 23 to 32 of Lady Hale’s judgment.
39. The relevant PCP above was identified and agreed by the parties as an earlier case management preliminary hearing. During the course of this hearing, and in particular Mrs Beet’s evidence, it became clear that not all of the respondent’s employees are promoted by reference to the Talent Pool, for instance those positions which are difficult to fill will be advertised nationally, such as paramedics. Nonetheless it is clear for the purposes of this case that there was a PCP that the respondent relied on the Talent Pool to fill managerial vacancies promptly, and that this PCP was applied to the positions filled by Mr Lentern and Mr Knowles, which is the recruitment process of which the claimant complains. For the purposes of this case therefore there was a PCP that the respondent only promoted managerial staff on the basis of their pre-existing membership of the Talent Pool.
40. The second question is whether the application of that PCP put people of the claimant’s age group, namely 55 to 70 years old, to any particular disadvantage when compared with persons who do not have this protected characteristic. On the face of it the statistics do indeed show that there is statistical disadvantage or disparate impact applied to those aged 55 to 70. Put simply one in 34 of all employees aged 20 to 55 are in the Talent Pool, whereas only one in 73 of employees aged 55 to 70 are in the Talent Pool.
41. The respondent argues that the statistics are misleading and create an unreliable impression. This is because the statistics are said to make two dangerous assumptions. In the first place they assume that every employee in each relevant age group wants to be in the Talent Pool and that all employees have taken all necessary steps to gain access (put another way the PCP and the disadvantage are causally linked). In addition, it is argued that any difference in representation can be accounted for by factors outside the respondent’s control which bar employees from membership of the Talent Pool, for

- instance (and by reference to Essop) by failing to take an examination, or in this case by failing to self-nominate. The respondent also refers to the 27 employees in the 55 to 70-year-old age group who are described as “retired returners” who have chosen to take their pensions and age 55 and returned to the respondent in a lesser role and will therefore not be concerned to seek entrance to the Talent Pool.
42. It has also been argued on behalf of the respondent that the statistics are not discriminatory because they reflect the normal generalised career path of the respondent’s employees. In other words, the youngest employees on commencing employment with the respondent will need to build up their experience and expertise before being able to qualify for the Talent Pool. This is why for the age group 16 to 20, which is 2% of the respondent’s employees, none are in the Talent Pool, and for the age group 21 to 25, which is 10% of the respondent’s employees, only 4% are in the Talent Pool. Similarly, as employees get to the age group of (for example) 55 to 60, they are more likely to be “winding down”, and less interested in promotion, which is why in that age group (which is 8% of the respondent’s employees) only 5% are in the Talent Pool.
 43. We do not agree with these submissions which appear at this stage to be seeking an explanation for the obvious disparate impact of the statistics. As noted by Lady Hale in paragraph 26 of her judgment in Essop the reasons why one group may find it harder to comply with the PCP than others are many and various. The reason for the disadvantage need not be unlawful in itself, nor be under the control of the employer. In this case the statistics speak for themselves. If an employee is under age 55, he or she has a one in 34 chance of being in the Talent Pool, whereas if an employee is aged between 55 and 70, he or she has a one in 73 chance of being in the Talent Pool. The claimant would have had the opportunity to apply for the vacancies filled by Mr Lentern and Mr Knowles “but for” her exclusion from the Talent Pool. Accordingly, we find that the application of the PCP on the face of it put the claimant individually at the disadvantage complained of in that she was not considered for the posts filled by Mr Lentern and Mr Knowles.
 44. However, as noted in paragraph 32 of Lady Hale’s judgment in Essop, it still remains open for the respondent to show that this particular claimant was not put at a disadvantage by the requirement. This relates to the “undeserving” claimant who has suffered a disadvantage for reasons which have nothing to do with the disparate impact, and is undeserving in the sense that that claimant might otherwise “coat tail” upon the claims of the deserving claimants. We mean no disrespect to this claimant Mrs Ryan in referring to her as “undeserving”, but do so by reference to analysing her position in this respect.
 45. We have found that the claimant was clearly aware of the workings of the respondent’s Talent Pool system. She had been involved in the creation of the policies which had led to the inception of the Talent Pool system. She was a senior employee who knew of and was confident enough to use other procedures available to the respondent’s staff, as shown for instance by her raising two formal grievances against her line manager. The claimant did not seek entry into the Talent Pool. There were two methods open to her: the first, if she considered that her Career Conversation appraisal results of “meeting expectations” were wrong and she should have been considered to be “exceeding expectations” (thus gaining entry to the Talent Pool), she could have appealed those decisions; secondly, she was notified of the opportunities to self-nominate to the Talent Pool, in a process which would have bypassed her line manager Mr Petter of whom she complained, but she failed to do so.
 46. For these reasons we find that there was no causal link between the PCP and the disadvantage suffered by the claimant. The claimant was not offered the opportunity to apply for the roles given to Mr Lentern and Mr Knowles, because she was not in the Talent Pool, but we find that this was because she had not realistically tried to gain entry to the Talent Pool. For this reason, we find it was not the application of the PCP which put the claimant at that particular disadvantage, but her failure to apply to the Talent Pool.
 47. For this reason we dismiss the claimant’s claims for indirect age discrimination.
 48. However, even if we are mistaken in this conclusion, we would have dismissed the claimant’s claims in any event on the basis that the respondent’s actions were justified.

- We have considered the justification defence put forward by the respondent, and our conclusions are these.
49. The respondent's actions would only be justified if they amount to a proportionate means of achieving a legitimate aim. The legitimate aim relied upon in connection with the creation and maintenance of the Talent Pool is appropriate succession planning to enable the respondent to identify emerging talent in bands 1 to 7, and retaining existing talent in bands 8a and above, by providing partially preapproved candidates for short-term appointments and secondments which are likely to be necessary in an emergency response organisation.
 50. Although it was not specifically conceded by the claimant, we have heard no cogent argument on behalf of the claimant to suggest that this is not a legitimate aim. Given that the claimant assisted in the creation of the Talent Pool system it would seem disingenuous of her to criticise it. In any event we agree with the respondent that it has established a legitimate aim in this respect.
 51. The next point to consider is the extent to which the PCP in question was a proportionate means of achieving this legitimate aim. We note the following points: (i) the Talent Pool covers the entire spectrum of ages and experience within its two subdivisions, and no particular age group is precluded from entry to the Talent Pool by reason of age; (ii) the entry requirement to the Talent Pool is entirely neutral, and definitely neutral with regard to age, in that it requires exceeding the expectations of the line manager in completion of the relevant role; (iii) in any event there is a second route to entry by way of self-nomination which bypasses the line manager resulting in independent consideration by Executive Directors, which is also age neutral; (iv) the Talent Pools are reviewed twice annually to ensure fair representation; and (v) equality impact assessments and monitoring of representation by characteristics have been carried out, and will continue to be carried out. There is no disparate impact by reference to any of the protected characteristics with the exception of the age statistics, which will continue to be monitored and investigated, and may give a false figure (as suggested by the respondent).
 52. For these reasons we conclude that the introduction and maintenance of the Talent Pool amounted to a proportionate means of achieving a legitimate aim, and we would have also dismissed the claimant's indirect age discrimination claim for this reason.
 53. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 27; a concise identification of the relevant law is at paragraphs 29 to 36; and how that law has been applied to those findings in order to decide the issues is at paragraphs 37 to 52.

Employment Judge N J Roper

Dated : 21 January 2019