



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE K ANDREWS

MEMBERS: Mr M Sparham
Mr R Walden

BETWEEN:

Mr R Miclaus

Claimant

and

English Handball Association Ltd

Respondent

ON: 24 & 25 April 2018

Appearances:

For the Claimant: In person

For the Respondent: Mr B Watson, Peninsula

REASONS

For the Judgment issued on 9 May 2018.
Provided at the request of the claimant.

1. In this matter the claimant complains that he was unsuccessful in an application for employment with the respondent because of his age.

Evidence

2. We heard evidence in person from the claimant and also read a statement prepared for him by Mr G Woodall. We accorded that statement appropriate weight to reflect that Mr Woodall was not present to attest to its truth or be questioned about it.
3. For the respondent we heard evidence from Mr D Meli, chief executive, Mr M Briers, its former chairman (unpaid) and Mr M Fayemi, its competition and events director (unpaid). We also considered two documents submitted by

the respondent in response to Mr Woodall's statement and the relevant parts of an agreed bundle of documents.

Relevant Law

4. Section 13 of the Equality Act 2010 (the 2010 Act) provides that a person discriminates against another if, because of a protected characteristic, he treats that person less favourably than he treats or would treat others. Age is a protected characteristic.
5. To answer whether treatment was "because of" the protected characteristic requires the Tribunal to consider the reason why the claimant was treated as he was. The Equality and Human Rights Commission Code of Practice states that whilst the protected characteristic needs to be a cause of the less favourable treatment it does not need to be the only or even the main cause.
6. It is a matter for the Tribunal to determine what amounts to less favourable treatment to be interpreted in a common-sense way and based on what a reasonable person might find to be detrimental.
7. Section 23 of the 2010 Act refers to comparators and says that there must be no material difference between the circumstances relating to each case. The relevant "circumstances" are those factors which the employer has taken into account when treating the claimant as it did with the exception of the protected characteristic (*Shamoon v Chief Constable RUC* 2003 IRLR 285).
8. Section 39 of the 2010 Act provides that A must not dismiss against B in the arrangements made for deciding to whom to offer employment. It is clear that 'arrangements' includes any recruitment process followed when determining applications for a vacancy.
9. We were referred by the respondent to the European Court of Justice decision from April 2012 (*Meister v Speech Design*) which confirmed there is no right to information or feedback concerning an application for employment but a refusal to provide such feedback is a factor to be taken into account by the Tribunal.

Findings of Fact

10. Having assessed all the evidence, both oral and written, we find on the balance of probabilities the following to be the relevant facts.
11. The respondent is the governing body in England of team handball - a growing sport in this country. The respondent received funding in 2009 which allowed it to take on employees and it grew further particularly following the London Olympics in 2012. It has a board of directors who are, with the exception of Mr Meli, unpaid enthusiasts for the sport who are elected annually by its membership at the annual general meeting.

12. The respondent has a strategic plan for the period 2017 to 2021. The section headed workforce development includes the statements 'England handball is a youthful company with a small workforce'.
13. The respondent also has a recruitment policy. Under roles and responsibilities this specifically states that those with recruitment responsibility will be accountable for ensuring all employees engaged in recruitment and selection processes are aware of, understand and are able to implement the policy and ensuring the board is provided with a record of all those who have received the appropriate training and are, therefore, eligible to participate in the processes.
14. The policy sets out in some detail the procedure that is to be followed on any recruitment and this includes that shortlisting will be completed by a panel consisting of at least two representatives including the recruiting line manager and that if candidates request feedback as to why the application has been unsuccessful, this 'must' be provided unless there were more than 150 applicants.
15. The claimant's date of birth is 23 August 1963. At the time of the event in question, therefore, he was 53. He has a long-standing enthusiasm for handball and a very extensive knowledge of and experience both playing, staging and managing it at both a national and international level. He has also undertaken academic qualifications specific to the business of handball.
16. The claimant first joined the board of the respondent as an unpaid director of competition and events in 2012.
17. In 2013 a paid competition and events officer role was introduced at the respondent. The claimant, who was then 50, applied for this role but was unsuccessful. The successful candidate on that occasion was 46. The claimant was unhappy with the decision and raised some queries about that internally. He resigned from the board in May 2013. Shortly thereafter he put himself forward for election again and was re-elected by the membership in June 2013.
18. In March 2014 the claimant was asked to step down from the board following what the respondent saw as his unacceptable behaviour at a handball match. The claimant disagrees that he behaved in any way inappropriately.
19. In February 2017 the competition and events manager role was again advertised as it had become vacant. It was a four-year fixed term role with an annual salary of £26,000. The advert stated that the main focus of the role would be responsibility for ensuring the successful organisation of an annual programme of competitions and events involving liaison with the competition and events group which oversees national leagues, engagement with regional league coordinators and regular communication with clubs and other organisations.

20. The person specification set out nine bullet points of key skills and experience. These included a current knowledge of organising and delivering competitions and events, and understanding of the structures of education based and community sports, ability to develop effective relationships with key partners together with other requirements.

21. The claimant submitted a completed application form to Mr Meli on 15 February 2017. At the very beginning of the form it stated, in bold:

'Please read the guidance notes before filing in this form. Remember, the information you give in this application is our only way of knowing whether you're suitable for the job or not.'

and

under 'Relevant skills, knowledge and experience' it said:

'Please use this page to show how you meet items on the person specification. Continue on an additional sheet if necessary...'

22. The claimant set out his comments in respect of each of the nine bulleted requirements. He accepted in cross-examination that in some parts of this section of the document he did not give examples of his experience in relation to each requirement and that he could have 'slightly' sold himself better. He also said however that the respondent knew about his extensive experience and that if he had set it all out it would be a very lengthy document.

23. The claimant's application was acknowledged by Mr Meli on the same day. All applicants were told that the respondent would be in touch with shortlisted candidates soon after the closing date of 3 March and that if they did not hear from them within one week of that date should assume their application was unsuccessful. The respondent received 52 applications for the post and all were considered for shortlisting by the panel of three - as described below.

24. On 9 March 2017 Mr Meli, after the shortlisting had been completed, contacted the respondent's external HR advisers, Peninsula, 'just in case of problems'. Peninsula's note of that contact was in the documents before us and stated:

'Going through recruitment process
One particular individual was not shortlisted
They were aware of this individual and his previous behaviour so did not shortlist him
Believe this individual may asked to see other candidates information that were shortlisted
Advice given
Do not need to provide him with this information, not relevant to his matter
May give him shortlisting criteria and inform him how he did not match to this'

25. On 13 March the claimant emailed Mr Meli and asked for confirmation that he had not been shortlisted. Mr Meli replied on the same day confirming that that was the case, that they had had over 50 applications which made for difficult decisions on deciding the shortlist. He said he appreciated the

claimant would be disappointed and that whilst his application was one of the stronger ones received, certainly in terms of his handball knowledge, they had identified a number of candidates whose wider skills, experience and background more closely matched the person specification.

26. The claimant then requested information regarding his and others' applications. Ultimately this was refused by the respondent as it was confidential and they also confirmed that there was no right of appeal. On 14 March 2017 the claimant complained to the board of the respondent officially protesting the decision. Mr Meli replied on the same day stating:

'As I put in my first email to you, whilst your application was a strong one in terms of handball knowledge, we had other candidates who had demonstrated more skills, knowledge and experience across the wider area of competitions, events and safeguarding and was therefore a stronger match to the person specification as set out in the Job Description for the role. On this basis, and this basis alone, we arrived at our shortlist with the interviews and unfortunately you were unsuccessful on this occasion.'

We find that this was sufficient and reasonable feedback to give to the claimant.

27. On 18 March 2017 there was a board meeting. There was discussion at that meeting about concerns regarding a recent recruitment process for internal employees of the respondent at risk of redundancy. It was noted that it may be necessary for Mr Meli and other relevant personnel to be trained on the recruitment policies and that the policies may need to be updated. That in turn led to a review – completed in July 2017 - by Mr Simpson, director of governance and legal, of the recruitment processes the national and regional partnership manager roles. This identified a number of concerns with that process. None of those concerns related to the claimant or age discrimination. It also led to an updating of the recruitment policy and more formal training but those were not in place at the time of the claimant's job application.
28. As a result of the claimant's complaint to the board, however, Mr Simpson was also asked to review the handling of his application for the role. On 21 March 2017 Mr Simpson wrote to the claimants with the outcome of that review which was that he was satisfied his application was dealt with correctly and that the decision not to shortlist was appropriate. He set out that there had been 52 applications which were scored against four criteria and gave an overview of the scores in general terms together with how the claimant score ranked alongside them. He confirmed that the claimant's score was above the average but was not sufficiently high to merit shortlisting. He said that he had not seen any evidence of discrimination or bias.
29. On 21 March 2017 the claimant submitted a further complaint to the board regarding his application. In that complaint he expressly stated his belief that he had been discriminated against on the grounds of age.
30. On 9 May 2017 the claimant submitted his claim to the Tribunal.

31. In April 2017 the claimant had submitted to the board a proposal for development and progress of competitions. This led to an exchange of emails in which on 24 May 2017 Mr C Smith, the respondent's workforce development director, sent a lengthy email in which he said

'We are now fortunate to have a team of employees who are young, willing and able. They are also streetwise and savvy and for us to reap the full benefit of their experience, expertise and enthusiasm and help them to be more effective and productive for the company I believe we must provide them with a supported, stable, risk averse environment where they can execute their role free from distraction and interference.'

32. The shortlisting process

33. Mr Meli led the selection process with Mr Briers and Mr Fayemi also on the panel. The claimant says that Mr Fayemi should not have been on that panel as he had a conflict of interest because of a business relationship with the ultimately successful candidate. Mr Fayemi's evidence was that this was absolutely not true and that there was no link at all between him and that candidate. We find that there was no conflict of interest. Further the claimant said that Mr Fayemi had a personal dislike of him. Mr Fayemi's evidence was that his relationship with the claimant was long-standing and cordial although they did have different opinions and approaches. We find that there was nothing inappropriate about Mr Fayemi being on the shortlisting panel.

34. Mr Meli copied the respondent's recruitment and equal opportunities policies to both Mr Briers and Mr Fayemi in advance of the process. He 'talked them through' the recruitment policy. We find that the policy envisaged more than that by way of training (and we note that since the events we are considering, more formal training has indeed been put in place in accordance with Mr Simpson's recommendations).

35. The panel had agreed criteria against which the applications would be scored for shortlisting as follows:

- a. Initial application - an assessment of the candidate's letter of application and CV against job description. Quality application gets a high score, but only submitting CVs or poor quality applications receive a lower score
- b. Handball interest - an assessment of the candidate's interest/experience/knowledge of handball from the CV and application. Relevant knowledge, interest, experience receives the highest score, no mention of handball receives a lower score.
- c. Relevant additional experience - an assessment of any other relevant personal or professional experience that the candidate might bring to the role either from within or outside of sport.
- d. Match to person specification - an assessment of the candidate's overall match to the person specification – an assessment of the candidate's overall match to the person specification. Candidates matching a majority of the bullet points in the person spec get a higher score.

36. Each of the 52 applications were in due course scored individually by each member of the panel against those criteria. The three members of the panel then consulted with each other on a telephone conference to combine their scores. A matrix score sheet was completed together with a number of comments. There is no written evidence before us as to the basis upon which each score was determined. Given the scale of the exercise, however, we do not find this surprising or inappropriate.
37. The claimant disagrees with the comments made in respect of him. Regardless of who is right, those comments were not age-related and we find they were genuinely held by the panel.
38. The top six scoring candidates were shortlisted. The lowest shortlisted score was 19/40; the claimant's score was 17/40. The highest scoring candidate, candidate 2, scored 27/40. Following the interview stage candidate 2 was offered and accepted the job. He was already employed by the respondent and had been at risk of redundancy as part of the internal process referred to above. After that process he had already applied for and been offered another internal role but he withdrew from that as he preferred to be considered for the competition and events manager role which was being openly resourced. We do share the claimant's surprise that the candidate rejected an offer of a definite job in order to pursue the possibility of a better job but we do not conclude that this indicates a predetermined outcome to the process as the claimant suggests.
39. The successful candidate was aged 29. The other shortlisted candidates were aged 23, 27, 36, 36 & 47.
40. The claimant's evidence included statements regarding two other recruitment processes that he relied upon as showing age discrimination within the respondent. It became clear that the evidence he gave was not within his own personal knowledge but was based on 'multiple conversations with various people'. He also freely admitted that he had made a number of assumptions in that evidence. In particular he assumed that one unsuccessful candidate was a particular gentleman but in fact that gentleman had been on the selection panel for the role and was not a candidate.
41. The claimant also referred to the age range of employees recruited by the respondent from the beginning of January 2013 when Mr Meli was appointed. This shows eighteen roles with an age range of 22 to 69. Fifteen of those were under 40, two under 50 and one 69-year-old. He also relies upon Mr Woodall's statement that Mr Meli prefers to recruit young people as they can be moulded. Mr Meli strongly denies that he has said that and we accept his evidence.

Conclusions

42. The starting point is to consider whether the burden of proof shifts to the respondent. We consider that it does on the basis of the 'young willing and able' comment by Mr Smith, the reference in the respondent's strategic plan

to being a youthful organisation and the age profile of the employees recruited since 2013. We therefore look to the respondent for an explanation of its decision not to shortlist the claimant. It says that that explanation is simply that on the basis of the evidence in the claimant's application form he did not score within the top six candidates and therefore was not shortlisted.

43. We have carefully considered the exercise conducted by the respondent and conclude that it was a fair and reasonable exercise carried out with care by the panel and that there was no discriminatory element to it. Indeed we observe that the exercise carried out was of the standard we would expect to see in considerably larger organisations. The key factor in our conclusions is, as the claimant himself has admitted, that the information he provided on his application form did not include all the detail as to his experience that it could have done and in some parts was light on examples. It is certainly not our finding, as has been suggested by the claimant, that the shortlisting process was in any way a sham designed to cover up the predetermined appointment of the successful candidate based purely on his age.
44. We have identified that the panel did not get the training that we believe was envisaged by the policy but conclude that this had no negative impact on their approach to or the outcome of the procedure.
45. Finally we have considered the claimant's argument that the successful candidate's performance in the role is known to be poor and that this is evidence that he did not get the job on merit in the first place. The respondent disputes the premise of that argument but, in any event, we conclude that the performance of the successful candidate is irrelevant to the issues before us and we certainly make no findings in that respect.
46. Accordingly we conclude that the decision not to shortlist the claimant was because of the contents of his application form and not his age. The claim fails.

Employment Judge K Andrews
Date: 18 May 2018