Case Number: 3202275/2018

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr M French**

Respondent: **Informa UK Limited**

Heard at: **East London Hearing Centre**

On: **Wednesday – Friday 5 – 7 June 2019**

Before: **Employment Judge Prichard**

Members: **Mr NJ Turner**
Mrs P Alford

Representation

Claimant: In person

Respondent: Mr B Mitchell, Counsel instructed by Greenwoods GRM LLP, Peterborough

Also in attendance: Ms P Patel, paralegal

JUDGMENT

It is the unanimous judgment of the Tribunal is that that the two claims of age discrimination fail and are dismissed.

The claimant is ordered to pay a contribution to the costs of the respondent in the sum of <u>£14,183.60.00</u>

REASONS

<u>Passages underlined are passages which have been inserted, on editing, after the live voice-recording of the judgment.</u>

1 The claimant, Michael French, is currently 29. He was dismissed by the respondent shortly before his 28th birthday, allegedly for gross misconduct, a matter we do not have to make finding on. It arose from a meeting where the respondent stated he had

behaved in a threatening way. The claimant denied any threatening behaviour.

2 He started work with the respondent on a 3-month temporary contract on 6 August 2018 as a Tax and Compliance Accountant. He worked there until dismissal with effect on 26 September. He was paid one week in lieu of notice notwithstanding that the respondent said he had been summarily dismissed for gross misconduct.

3 Informa is an international business intelligence, academic publishing, and knowledge and events business. Its business accounting function is in Colchester providing services to the Informa companies. It has 3,000 employees in the UK and 300 employees at the site where the claimant worked in Colchester.

4 The claimant himself has previously had jobs in accountancy functions, previously without any formal qualifications. However, in 2017 he achieved the qualification of accounting technician from AATQB (Association of Accounting Technicians Qualifications Body). He left school in 2008 and has been working since in what seem to be large companies - McLaren Construction, ACE Group Limited, Sea Wind (wind generators), and Geometric Results Inc. His latest employment before taking up employment with the respondent was with Fenn Wright estate agents as an Accounts Assistant. He had also been qualified at that stage with the AAT.

5 He was employed by the respondent on a 3-month temporary contract by the Tax and Compliance Department to catch with a backlog which had developed within the department. We are told the backlog was principally because one of the senior accountants had been off on long-term sick leave. There were 3 senior Tax & Compliance Accountants - Jessica Blake, Isabella, and Nnami. Despite being senior they have the same job title as the claimant and others - Tax and Compliance Accountant. Because it was working on a backlog the work was going to be finite, and thus the contract was fixed-term.

6 The claimant originally brought claims for sex discrimination, whistleblowing, public interest disclosure, detriments and dismissal, breach of contract i.e. wrongful dismissal and age discrimination.

7 These claims came before the tribunal for a case management preliminary hearing before Judge Russell on 13 February 2019. She defined the issues in paragraph 4 of the preliminary hearing record. It was helpful. She also listed the case for a 1-day open preliminary hearing at which the tribunal was to consider whether to strike out or order deposits on any of the claims, or issues, as defined.

8 That preliminary hearing was heard on 15 March 2019 by Judge Ross. The outcome of that hearing was that the breach of contract claim was struck out because the claimant had been paid all he would be entitled to by way of pay in lieu of notice. All the whistleblowing complaints under section 47B and section 103A of the Employment Rights Act 1996 were struck out. Deposits were made then on all but two of the remaining complaints of age discrimination. There were 10 such issues and the claimant was ordered to pay £200 on each, which amounted to £2,000 in deposit payments. However, the claimant did not pay the deposits, as he has maintained that there was no “legal basis” on which these orders could have been made.

9 He has appealed to the EAT and he assures us that his grounds of appeal are "strong", but we have to take his word for that. He has stated that the appeals have been allowed. He explained if the EAT did not write back to him by a certain date he would take it that his appeals were allowed. That, it seems, is his understanding of the legal process.

10 This voice recording was a live *ex tempore* judgment with all present. At this point of announcing the reasons the claimant interrupted and said he was not going to stay. I told him that he should stay because the end of this oral judgment may not be the end of the hearing, as we would not have been surprised if the respondent applied for costs. As it is, Mr Mitchell confirmed that the respondent did intend to apply for costs. Nonetheless the claimant chose to leave having been warned of the possible consequences. The respondent also invited him to stay.

11 I clearly warned the claimant that if he did leave, any costs application would be heard and decided in his absence, without any input from him. He left nonetheless.

12 This has not been an easy hearing. The claimant has not been easy party to deal with, representing himself. His conduct of cross-examination was good, contrary to expectation. He asked intelligent and directly relevant questions to witnesses. He did that a bit of the process well. But sometimes latterly he resorted to threatening the tribunal panel, mostly the judge, saying that he was trying to get judges Ross and Russell "struck off", and then also myself as the judge presiding at this hearing, even before the judgment was announced. He said to the tribunal that we should "be very careful indeed", in view of his intention to get Judge Ross struck off.

13 Returning to the narrative, (after the claimant had departed), what remained from Judge Ross's hearing were the following issues:

> 4.6(b) on or around 21 September 2018 the claimant was rejected for two permanent Tax & Compliance Accountant roles the respondent will provide detail of successful candidates on disclosure and
>
> (c) on 26 September 2018 Mr Stephen Henderson [HR] said that the claimant was "just a junior"

Those are the 2 issues we must try. The first is considerably more substantial than the second.

14 Having stated that the claimant was employed on a fixed-term 3-month contract, an opportunity came up for a permanent appointment, as it does frequently with the respondent. 3 internal candidates applied. There was the claimant, Josh McKenna who was 19 years old, and Muhamet Krasniqi who was a graduate and 22 years old. He had a first-class Economics degree from the university of Greenwich. This appears from his CV to be his first job after full-time education. We have seen the full interview records for all three candidates. Josh McKenna was the first in time to be interviewed.

15 The respondent has a recruitment procedure which is not unique. If an individual applies for a role and is not quite successful first time, they may be put forward again, if the same role is advertised again and has not significantly changed, and if not more than 6 months have passed between the old competition and the new competition. Josh McKenna was in that position. He had in fact been interviewed on 27 June by Sarah

Gamblin, who has been a witness before us, and Charlotte Lee, who has not. Both these individuals, in fact all the interview panels consisted of what the respondent calls Controllers which is the next level above Tax and Compliance Accountants. Controllers have oversight of a number of different projects.

16 Both the claimant and Muhamet Krasniqi were interviewed on the same day. It therefore seems to us rather odd that they should have been interviewed by completely different panels. The claimant was interviewed by Michaela Salvaris and Sarah Double. Mr Krasniqi was interviewed by Craig Spooner and Sarah Gamblin. To mitigate the potential inconsistency Sarah Gamblin went through a bench-marking exercise as she describes in paragraph 7 of her witness statement. She gathered all the interviewers together, as mentioned above, on 19 September, to ensure that everyone was marking consistently.

17 Then she also reviewed Josh McKenna's interview notes. Ms Gamblin had been one of the original interviewers for Josh McKenna. She satisfied herself that there was consistency. We have seen the final score sheets and we have spent some time examining the detail of the interview questions. Interviews are done from a set script, as is often recommended as good equal opportunities practice. Thus, there is a way of cross-checking the candidates' merits to ensure consistency. Like is compared with like

18 There are 3 categories against which the candidates were judged on a scale of 1 – 4, 4 being the best. 1 – general, 2 – competency, 3 – role specific. In this competition there were 11 criteria so the top score would have been 44. We have analysed these to try and see what the strengths and weaknesses of the candidates were.

19 The final scores were Josh McKenna 36.5, Muhamet Krasniqi 35.5, and the claimant 32.

20 Josh McKenna's scores under general were 16, which is the maximum, under competency he was scored 9 out of 12, and for role-specific he scored 11.5 out of 16. Muhamet Krasniqi was general 14, competency 8.5, and role-specific 13.

21 The claimant's scores were general 13, competency 8, role specific 11. If there was one salient point to explain some of the claimant's low scoring it would have been his apparent failure to research the company, research the work, or research the role. He came over as being blasé about it.

22 It has been at the forefront of the claimant's argument that, unlike the others, he had more experience in the workplace (some 10 years at that stage). Undoubtedly true though this was, the claimant's particular experience was considered to be not relevant to the role. We have seen that comment made in the writing of Michaela Salvaris on the final scoring sheet.

23 Another argument the claimant has relied upon is that on Mr McKenna's sheet is written the general comment at the foot of the sheet "perhaps more mouldable". Mr McKenna, being the 19-year-old and the youngest of the 3, could be seen as being mouldable, by dint of his age. The claimant was 29 years old. He might have been seen as less mouldable and potentially more set in his ways.

24 However, it has not been suggested at all by the respondent that the claimant was not appointable to the role - far from it. But the claimant was decisively in third place. As they were interviewing 3 candidates for 2 vacancies, the claimant lost out. He had to be informed.

25 The difference between financial accounting and management accounting was explained to us carefully. It is a distinction we now appreciate. It is of interest to note that the claimant is currently self-studying for a CIMA qualification - Charted Institute of Management Accountants. Management accounting consists of preparing figures for use in internal reports. It comes as no surprise to find that the respondent has a management accounting department. It is called Record to Report, R2R. In fact, the respondent, realising the claimant's apparent interest, had suggested that he try and find a role within R2R. For reasons best known to himself the claimant considered that the R2R roles were too junior for him, and beneath him.

26 At the time, it was worth noting, and it only came out as a result of the tribunal's questioning, the claimant was earning £23,000. Both Josh McKenna and Muhamet Krasniqi were earning £18,000 / £19,000 - significantly lower salaries. The claimant was paid more salary because, at the time, the respondent urgently needed the temporary cover. Also, he had more work place experience and therefore came with a certain salary expectation. This is common in recruitment. It is not suggested by the claimant in these tribunal proceedings that the reason the respondent went for the younger people was because they were cheaper hires. Indeed, that argument could have undermined his age discrimination complaint, as he may have had the wit to appreciate.

27 Immediately following the recruitment process, the claimant seemed quite magnanimous and resigned. He was told on 21 September that he had been unsuccessful. There was then an exchange between himself and his line manager Sarah Gamblin. He wrote:

> "Further to our conversation today I can confirm that I was very disappointed with being unsuccessful in the application of the perm role within tax and compliance. However, I fully respect the business decision made."

28 That latter statement is one that later events proved to be quite untrue. Ms Gamblin consoling him wrote back and said:

> "You've been a great guy to have around and fully getting involved with team activities such as the away day and being really positive about the team and the company at team meetings. This will all be fed back to R2R if you did want to apply for one of the roles."

29 That seemed to us a supportive and friendly way of addressing him to deal with his disappointment. The claimant has laid great store on that stating that his attitude cannot have been a problem because she said in writing that he has been a "great guy to have around". We can see the context in which she wrote that and quite understand why she pitched it so.

30 Further, Ms Gamblin was asked about having said this and stated that she had liked the claimant that she found him funny and that his contribution at the away day was particularly good. He had said in front of the whole team that this was the best company

he had ever worked for. So, this was true, and not merely consoling the claimant.

31 Soon after that, the claimant wrote to her saying:

> "There is nothing further to discuss regarding the perm role. A business decision has been made and I accept all business decisions made are final."

32 However, as time went by, he clearly he became more and more aggrieved. There was correspondence between himself and the other witness in this tribunal hearing Stephen Henderson, who was in HR. (He since left and is taking a career break but he attended throughout this hearing). He was asked about feedback for the job interview in which the claimant had come in third place. He states to Stephen Henderson in answer to his question about feedback:

> "Feedback certainly, no valid reason as to why I was not selected. It appears I have the right experience and skill set to be the right fit for the team but I was not selected for either of the two perm roles, rather frustrating. As mentioned the current 3-month contract I am in remains unfulfilled also and I am currently actively chasing more of this to be fulfilled."

33 This latter sentence reflects the fact that the claimant's job description as a Tax and Compliance Accountant is very broad and it mentions many different roles within that can be undertaken by Tax and Compliance Accountants. It runs to 2½ closely-typed pages. The claimant clearly saw his time with Informa as a way of training himself in various diverse departments and specialisms. He was aggrieved about the fact that he had spent 50% of his time (a large percentage) with clearing a backlog on Payroll Settlement Agreements, PSA.

34 PSA refers to the more difficult than average allowances, vouchers, special privileges, and their tax treatment - whatever is given to employees which are taxable benefits which the employer pays the national insurance contributions on. The claimant described it to one of the senior accounts, Nnami, as "boring" and later to his managers as "laborious".

35 The claimant was accused of being slow to pick up skills. One senior Tax Compliance Accountant, Jessica Blake, had referred to him as taking 5 hours to pick up a relatively simple skill which she would expect someone to pick up in 1 hour.

36 At one point the claimant was asking for more work. He relies on this email to show that he was not slow to pick things up and that in fact he was hungry for work and picking things up very well.

37 On 11 September he emailed Sarah Gamblin as follows:

> "M French ongoing training/development
>
> Hi Sarah. Further to our conversation yesterday I am happy to take on additional work am also happy to delegate out / share some of my workload in order to be more involved in other aspects of the job role. Maybe we could arrange a meeting sometime this week to further discuss my progress and ongoing development."

38 The claimant was in fact carrying out the PSA work for the whole of Informa UK Limited which had fallen behind, hence his recruitment on the fixed-term contract. Ms Gamblin, whom we questioned closely about this, said that other PSA work which was given to the others but there not as much of that work for the 2 other companies as there was for Informa UK Limited. She said she would not consider splitting the work for one company between two or more accountants.

39 The reason for that she said is that you would lose the control of that particular task it would also generate the need for more Controllers to supervise more people in respect of the same work which would be an inefficient use of management time. We have to accept that evidence, and the logic of it. There has been no serious refutation of it here.

40 The claimant really failed throughout the hearing to appreciate the weighting of criteria for the interview selection. Job experience itself was a very lightly weighted criterion. It was only one of 11 criteria. The maximum you could score was 4 in this specific category. The claimant was given a 2, on account of his job experience not being relevant to the role. The claimant gave no proper reasoned refutation of the distinction the respondent is relying upon. We can understand that, seeing the claimant's CV from the respondent's point of view. The sheer length of time in accounts related roles is not the point. So, there were two reasons - (a) that experience *per se* is not such a heavily weighted criterion and (b) the claimant's experience was not relevant to the role being interviewed for.

41 It seems approximately at this point that the claimant's attitude towards the respondent deteriorated sharply. Ms Gamblin, as his line manager, undertook a routine performance development review, PDR on 25 September 2018. Her feedback was gets uploaded onto a portal called "Successfactors". She quotes the following interchange:

> "Michael has also been working on the PAYE settlement agreements [PSA] analysis. Although Michael does not mind the task, his [the claimant's] view is that the work should be spread so that 12,000 lines of analysis does not sit all with one person. I explained that we had spread different companies between the different members of the team and when Michael has Informa UK which had the most items, I explained it was not possible to spread the task further at the moment due to capacity issues of other members of the team having scope to take on more work, hence Michael's role in helping us to get up to date with projects that had started to fall behind".

42 Following this the claimant placed a response on Successfactors. This was the start of the more serious problems that led to the claimant's dismissal. He emailed Ms Gamblin on 26 September to say that he had put up some notes on his PDR in Successfactors which were relevant. Reading certain parts of his notes worried Ms Gamblin because it seemed that he was saying that colleagues were incompetent and that she was mismanaging the department. It was hard to read it any other way.

43 Let us not forget at his stage the claimant had only been in role for some 7 weeks at the company altogether. He talked about his continuing desire to diversify into different tasks and states:

> "This request remains unfulfilled much to my continued frustration"

Then he states:

> "Having only started in August the additional fall-behind of this task and lack of allocation to meeting the deadline prior to my arrival is in my opinion unacceptable"

He then states that:

> "…It needs to be spread out …. maybe 1000 lines for each team member"

44 This would have been totally impracticable anyway, because the team consisted of 9 Tax Compliance Accountants. And there is also the loss of control element referred to by Ms Gamblin as the manager of the PSA process. It would result in duplication of supervision and lack of consistency in PSA within the same company. Let us recall, this was the catch-up project the claimant was specifically recruited for on a fixed- term contract.

45 He then states:

> "… In addition, there is historic performance going back very far…. The lack of allocation of time to this task prior to my arrival in my opinion remains unacceptable. It remains my opinion that other members of the team should learn to master other tasks before moving on to less favourable tasks. The fact the department is so far behind demonstrates this has not happened (running before we can walk possibly?)".

46 We could quote more. It goes on. We entirely understand Ms Gamblin's concern about reading posted comments like that. It goes beyond personal dissatisfaction, and shows disrespect both to colleagues and to Ms Gamblin's management of the project.

47 Ms Gamblin decided to email these comments to Stephen Henderson in HR and asked for his help and views on handling it. The claimant seized upon her words "handling the situation" as if he had become a "situation" that had to be "handled", and somehow had to be got out of the business. The tribunal cannot accept that interpretation of what she said there. It is an utterly unreasonable and unwarranted interpretation. By these comments the claimant had, objectively, created a situation which was tricky for a manager.

48 We can understand exactly why Ms Gamblin might have sought HR help because, as a manager, she was in a difficult situation when someone was demonstrating not just criticism, but positive lack of respect.

49 The claimant has made a lot of one particular excerpt in the company handbook on appraisals (which, after all, is what the PDR was). It is as follows:

> "The appraisal discussion is valuable not only for agreeing standards and actions but also for the opportunity it provides for an honest and forthright exchange of views between you and your manager."

50 The claimant states that Ms Gamblin was in breach of the Informa policy by failing to see that his PDR feedback was somehow "an honest and forthright exchange of views." Neither Ms Gamblin nor Mr Henderson saw it like that. The tribunal agrees. It crosses the line and shows disrespect over issues which were not the claimant's business. It also shows a lack of understanding of the role the claimant was recruited to.

51 Mr Henderson had previously talked to the claimant about his job interview which also led to his offer of having a chat with him.

52 Mr Henderson set up a meeting. He wrote in a light and chatty tone to the claimant saying he would set up a meeting:

> "I'll pop us in a meeting to discuss this later this afternoon. We can run through this and I understand you had been in touch with Jenny Rodway regarding feedback from your interview and that you were not pleased with the outcome."

(Jenny Rodway is also from HR).

53 Mr Henderson had assumed that Sarah Gamblin was going to be at the meeting but the claimant states that he was not aware she was going to be at the meeting. That is fair. There was no way he would necessarily have known she would be there. The claimant saw her presence at that meeting as immediately and automatically bringing about a "confrontational situation". That had not been the intention and should not have been the effect. She was, after all, his line manager.

54 Mr Henderson stated, as is true, that Sarah Gamblin was a new manager. Knowing her experience, (she had started in April 2018, and she came to Informa as a manager within that department, so it was just some 4 months before the claimant and Muhamet Krasniqi started), he decided she might need some support with what was a tricky management issue.

55 Mr Krasniqi had made a very favourable impression with the respondent in this period. He seemed willing and able. Josh McKenna worked in a different department at the time - R2R. However, they regularly had routine contact with him and had found him extremely helpful. He had in fact been in the company some time since he left school and was generally known to the company, and had impressed them.

56 Mr Krasniqi had no longer exposure in the respondent than had the claimant. However, the former clearly made a more favourable impression with managers. The main criticism of the claimant was that he was slow to pick things up. He was slower at tasks and slow to pick new things up.

57 The meeting happened on 26 September. Sarah Gamblin was there. Both she and Mr Henderson described the claimant's behaviour as frightening. He seemed to be threatening them. He was staring at them in a threatening way. He did not raise his voice. Nor did he swear. That is not his style, as we have seen. He is what is commonly known as "passive aggressive". He tends to speak quietly but the sense of threat has been obvious. It was obvious to them. We have to say, it also became obvious to us, as a panel. The claimant did himself no favours here at the tribunal in that respect. It corroborated the respondent's perception of him.

58 Today we are not finding one way or the other on the reason for the claimant's dismissal because we do not have to. There are no dismissal issues left, after the Ross hearing, and the claimant not paying the deposits.

59 When Mr Henderson stated that the claimant was slow to pick things up the claimant reacted very badly indeed and said:

> "You are joking …. you're having a laugh…. you have a good sense of humour"

He also repeated the word "unacceptable" about Ms Gamblin's management style.

60 It was at this point that Mr Henderson referred to the claimant being "junior" within the organisation in the context that he was someone who could hardly criticise the management style of his own line manager after 7 weeks in service. This was not a comment about his age or that he was too young, not in any sense.

61 The tribunal did ask Mr Henderson whether he could have re-phrased this in some way. If you think about it, it is extraordinarily difficult to rephrase it. He came up with the suggestion of "less senior" but that is no better from an age discrimination point of view, he could have just avoided mentioning it at all, e.g. "someone in your position", but that would not have been descriptive enough.

62 What was the claimant's position? He was a basic grade Tax and Compliance Accountant. He had been with the company for 7 weeks he was telling Ms Gamblin how to run her department. It is cheeky at best and insubordinate and impertinent at worse. The way in which it was expressed was aggravated. Mr Henderson decided he would have to ask for a recess and they had a 10-minute recess at which stage the overall manager Ms Helen Banks came into the meeting and they relayed what had just happened.

63 A joint decision was then taken between Sarah Gamblin and Ms Banks that the claimant would have to be asked to leave at once, and that they would pay him in lieu of notice. He was not to remain there.

64 Thus it was, when the claimant came back in, he was told this and he reacted coolly and calmly, to their surprise. He was accompanied by Mr Henderson to collect his belongings and to be escorted off the site.

65 A novel dismissal letter the next day stated:

> "Given for the reason for your termination you are not permitted to intend any Informa offices or allowed on site, i.e car parks, unless there is a prearranged appointment. Failure to comply with this will result in criminal prosecution."

66 The respondent in its case preparation helpfully compiled some demographics with the ages of the job applicants and some demographics of the teams. The average age of controllers is 40. The average age of Tax and Compliance Accountants is 29 while the claimant at the time was underneath that average, at 28. The youngest Tax and Compliance Accountant we know was 19. The oldest was 40. For what it is worth the youngest Controller was 35 and the oldest was 49. We remind ourselves that the interview panels were all Controllers. These demographics are helpful in as much as they give some perspective on the age issue. They tend to render the claimant's allegations before the tribunal less plausible.

67 We referred ourselves to section 5 of the Equality Act 2010:

> "5(1) In relation to the protected characteristic of age a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group
>
> (1)(b) a reference to person who share a protected characteristic is a reference to persons of the same age group
>
> (2) a reference to an age group is a reference to a group of persons defined by reference to age whether by reference to a particular age or to a range of ages."

68 We remind ourselves that this claim is only for direct discrimination under the Equality Act 2010 section 13(1) i.e.

> "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 …
>
> (2) if the protected characteristic is age A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim"

We know under the Act that age discrimination is the only form of direct discrimination which can be justified.

69 We also referred ourselves to Section 23 of the Equality Act.

> **23 "Comparison by reference to circumstances**
>
> … on a comparison of cases for the purposes of Section 13 … there must be no material difference between the circumstances relating to each case."

70 That is the law. No particularly abstruse law is raised by the present case. The claimant has clearly been doing some legal research and presented to us the Employment Appeal Tribunal decision in the case of *Canadian Imperial Bank of Commerce v Mr A Beck* UKEAT/0141/10. He uses it to argue that a claim can succeed even when age differences are small. So far as material, the claimant was 38 years old. It is almost inconceivable that that tribunal would have found any age discrimination in that case were it not for highly incriminating memorandum stating that they were "seeking younger entrepreneurial profile (not a headline rain maker)". When you read that immediately it is clear why the respondent lost at first instance and on appeal. They were explicitly seeking somebody younger, as the Employment Appeal Tribunal found:

> "The use of the word "younger" in the briefing called for an explanation particularly given the evidence that the word had been used despite advice that it was inappropriate".

71 The claimant should know, you cannot just compare superficial facts of precedent cases either from the Employment Tribunal or the Employment Appeal Tribunal. That was all he was doing. We will not recite all the other authorities most of which were first instance authorities on cases of age discrimination where fine distinctions have been made between people of slightly different ages, possibly within the same age group. Each case depends on its own facts. There is nothing at all that on these facts which could suggest that the age of 28 was either too old for recruitment or too young to avoid being

called “junior”. That was the only less favourable treatment alleged.

72 It appears that the claimant is relying on a hypothetical comparator. However, he vehemently insists he was relying on an actual comparator i.e. Jessica Blake whose only real role was to inform Sarah Gamblin she had taken 5 hours to explain to him a relatively simple task. For the purposes of Section 23 of the Equality Act 2010, this is not a valid comparison in any way whatsoever. It is not about being called “junior”. The claimant appears to be muddled on this.

73 Jessica Blake is an example of someone who is known by management as a senior accountant, who was in fact young in years. She has oversight of whole projects. She is 22 years old. 2 other accountants of the same sort have been mentioned - Nnami and Isabella for example. They still have the title of Tax & Compliance Accountant. There may be more. It shows the respondent moves people through the ranks. Today’s TCA may move through tomorrow’s senior accountant to Controller after that. This is all unexceptional staff progression.

74 We agree with the respondent that the claimant’s reaction to the word “junior” was total hyperbole. If you think about it rationally it is very hard to see what other word could have been used. “Junior” is not synonymous with “younger”.

75 The claim about being called “junior” we have to say is all but impossible conceptually. We were surprised that Judge Ross did not include it in the matters on which a deposit should be paid. We can see, to some extent, why he did not take a view on the recruitment issue because that is quite fact sensitive and scores were not hopelessly far apart 32 out of 44 is not objectively too low. Nor did it denote that the claimant was not appointable.

76 If we have any adverse criticism for the respondent, they should try, if possible, to ensure the same interview panel for a recruitment competition. In this case we can see that Josh McKenna being interviewed on a different day might have involved different people but the claimant’s and Muhamet Krasniqi’s interview both took place on 19 September. We cannot see why they did not take place one after another in front of the same people. At least Sarah Gamblin was a common element with the Josh McKenna score, because was one of the interviewers there so had some insight into the scoring of Josh McKenna and how he got 36.5 then.

77 The claimant turns this logic on its head. He says that is the common element. Ms Gamblin was the person who interviewed, she was common to the interviews of Josh McKenna and Muhamet Krasniqi, and that is why they got the 2 jobs. He has not really looked at the objective evidence about the low weight given to experience and the relevance of his own experience.

78 Mr Mitchell for the respondent examined the claimant, in our view, effectively putting to him his previous experience and his answers to the experience questions and he had not done this kind of work before. Therefore, the comment that the claimant’s previous experience was not relevant to the role was eminently a fair comment.

79 For those reasons the tribunal dismisses the claims.

Conclusions

80 The tribunal has found that the claimant has not raised a *prima facie* case of discrimination. He has established before the tribunal evidence from which a tribunal could find there to have been unlawful discrimination for the purposes of Section 136 of the Equality Act 2010.

81 In this regard the respondent referred us to the recent case of *Royal Mail Group v Efobi* [2019] EWCA CIV 18*,* a judgment of Sir Patrick Elias who cites *Madarassy v Nomura International Plc* [2007] ICR 867, a generally well-respected authority on the reverse burden of proof:

> "… Section 63A(2) [under the previous burden of proof discrimination legislation] must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination such as the evidence of a difference in status, a difference in treatment, and the reason for the differential treatment."

82 The *Madrassy* case established that a mere difference in status and a difference in treatment *per se* was not sufficient to put the burden of proof on the respondent. There has to be more than a mere assertion, and, in this case, we have heard nothing more than an assertion from the claimant.

Costs

83 The respondent has applied for costs. They said they were going to, shortly after the outcome of the case was announced and the tribunal started to recite and record its reasons.

84 First, the tribunal has to be satisfied under Rule 77 of the Employment Tribunals Rules of Procedure 2013, that the claimant has had a reasonable opportunity to make representations at a hearing in response to the application. Rule 77 provides as follows:

> "A party may apply for a costs order …. at any stage up to 28 days after the date on which the judgment finally determining the proceedings was sent to the parties. No such order may be made unless the paying party had a reasonable opportunity to make representations in writing, or at a hearing as the tribunal may order in response to the application."

85 The claimant was here today. He was on notice that the tribunal would consider and decide a costs application today.

86 The claimant had told us he is not in work. He said sarcastically that he was on "sabbatical" and that whether it was a paid sabbatical or not "remained to be seen". He seemed to be referring to these proceedings. He had emailed a letter of complaint to the tribunal copying it to the other side clearly before he had even got home. The tribunal started dictating at about 12:20pm the email was at 12:58. I was still dictating then.

87 Again, he shows the same misconception:

> "This is now the second time I have had to have a judge who doesn't understand the law and has

> demonstrated disregard for process and bias toward the respondent.
>
> Legally you are required and I request the outcome of the case in its entirety as well as his alleged "legal basis" for the outcome.
>
> Until such time the outcome of this case is deemed to be in favour of me as per the law [sic].
>
> Should the judge feel brave enough to put in writing his "findings" please be aware I will be appealing the decision based on facts, evidence and the law in addition as well as Judge Ross I will be requesting the Judge who oversaw this case to be struck off [sic]".

88 During the course of the costs application the tribunal has been told that the respondent's solicitor, Greenwoods in Peterborough, had been on the receiving end of a lot of correspondence of this nature. The claimant has a misconception about his applications and his appeals somehow freezing the *status quo* in his favour. It is utterly mistaken, and it is hard to imagine where he gets any such a concept from.

89 Costs are awarded under Rule 76. So far as relevant 76(1) provides:

> "A tribunal may make a costs order … and shall consider whether to do so where it considers that
>
> (a) A party or that party's representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or part of them or the way that the proceedings have been conducted: or
>
> (b) Any claim or response had no reasonable prospect of success."

90 In this case the judgment already given contains enough reason to show that the claimant should have appreciated his remaining claims had no prospect of success. He will have had evidence before him in the bundle that was also available at the Ross hearing to the effect of his scoring sheets reveal that job experience, which was his main point in the case, was not the point. Even, theoretically, if he had scored the maximum for job experience, he would still have been in third place on this recruitment. Look at the numbers. That is how it has to be analysed.

91 The claimant simply refused to accept evidence that the others were better candidates than him despite attempts to explain that to him, both in work by Sarah Gamblin, in the course of feedback, and by Judge Ross in the course of his consideration. Although Judge Ross said that this needed to progress to a hearing, we are not bound by that finding, made at a wide-ranging one-day preliminary hearing.

92 Judge Russell at paragraph 8 of her preliminary case management hearing had strongly advised the claimant both to sit in to observe an Employment Tribunal and to avail himself free legal advice. He did neither. He said he had better things to do with his time, despite the fact he is unemployed. He has been completely insular in approaching these tribunal proceedings, buoyed up only by his own considerable, and misplaced, self-confidence. He has demonstrated a lack of curiosity, and a lack of humility about it all. A further instance is in his latest email:

> "This again shows yet another judge's lack of understanding not only regarding the law but also that costs get awarded in 'exceptional' circumstances"

The tribunal had not even heard or decided the application for costs at the stage he departed. All that had happened was that Mr Mitchell had informed the claimant that he intended to make an application for costs, as he has done. We sit here, without the claimant here, when he knew this application would be made. He has voluntarily chosen to absent himself.

93 Judge Ross, in the course of his judgment, commented that certain of the claims about age were implausible on the basis of the demographic evidence adduced by the respondent and the separate page giving the age of the job applicants. See for instance paragraph 35 (2) of the Ross judgment.

94 If the claimant took this to be a green light on his age discrimination complaints, he was wrong to do so. Yes, perhaps one did need to look at the evidence but a quick look at the scoring sheets and the low weight given to experience would have told any sensible person that the primary argument was flawed.

95 We had even less trouble in concluding that use of the word "junior" was not a valid complaint. It is very hard to see the mere use of the word junior as "less favourable treatment" i.e. comparatively less than any hypothetical comparator. The comparison with Jessica Blake was nonsense and she would fail to qualify as a valid comparator under section 23 of the Equality Act 2010. Her circumstances were materially different. Indeed, the whole context was different.

96 Having pored through the evidence making efforts to find points in the claimant's favour, we concluded that there is a vacuum at the heart of these claims. Further the claims had no reasonable prospect of success, contrary to the quite generous judgment of Judge Ross at the preliminary hearing. That does not bind us.

97 Further, the claimant has acted unreasonably. He has in fact acted abusively and disruptively particularly in correspondence with the respondent's solicitors. His abusive conduct at this tribunal itself has not actually caused costs so that is an aside. It is the unreasonableness at the heart of the claim that is the nub of our reasoning of why the claimant meets the costs trigger conditions. We find there is unreasonable conduct and in bringing the claim and the way it has been conducted and unreasonable and the fact that the claim itself had no reasonable prospect of success.

98 Looking at the evidence that was then available, rightly the respondent had limited its costs application to those incurred after 9 April. Why 9 April? Because the hearing before Judge Ross had been on 15 March. The parties had had a chance to digest it. He had given the reasons orally before them. It is clear that they did not sink in with the claimant. That judgment and reasons from that hearing were promulgated on 4 April.

99 On 9 April the respondent's solicitors wrote to the claimant and made an offer without prejudice save as to costs. We see a lot of these letters. Suffice it to say this is a restrained, constructive, and relatively friendly letter reminding the claimant of the consequences of not paying a deposit and reiterating an offer that had been made previously through Acas on 24 October 2018 when this case was in its early conciliation stage. They were offering him £1,916.67 being precisely one month's gross salary. This was now put on the basis that they would apply for costs if he was unsuccessful at the final hearing.

100 They did not know at this stage that the claimant would not pay his deposit on the 7 May deadline. He never paid his deposits and therefore all the claims in respect of which there were deposit orders, stood automatically struck out. That left the two claims that we have just heard.

101 Following 9 April, the claimant must be deemed to have had a reasonable length of time to consider that offer. We consider such time to be a week. In the meantime, he was writing tirelessly to the respondent's solicitor, particularly about his EAT appeal and his belief that the fact of his appeal to the EAT ("on strong grounds") would automatically stay the proceedings in the Employment Tribunal, which is wrong. They were right to point this out. In email after email apparently, so, we think one week was a sufficient length of time for him to consider.

102 We have seen a detailed break-down of the respondent's acting solicitor's time. Stephanie Wilcox, had billed £1,311.50 since 9 May. We consider that any costs incurred after that to have been unreasonably incurred and they can include a significant amount of costs dealing with the preparation of the final hearing bundle. The claimant insisted that the Acas Code and the Acas guidance should be included in the bundle and there were more than 200 pages devoted to that. Tribunals always have access to the Acas code and guidance. It was wasted time and money. The Code only goes to remedy which has not arisen in this case at all. It was unrealistic. They pleaded with him to help keep the size of the bundle down, and limited to the issues. He refused to change position on this.

103 Further, right up until this hearing, the claimant has been reiterating his belief that in fact his claims have not been struck out because there was no "legal basis" for Judge Ross's judgment. Therefore, it was a pleasant surprise at the start of this final hearing to find that the claimant was accepting that this final hearing would be limited to just the two age discrimination complaints.

104 Following receipt of Judge Ross's reasons and judgment on 17 May 2019 confirming the striking out of the claims on which no deposits had been paid, the respondent's solicitor wrote again to the claimant, without prejudice save as to costs. Again, it was a restrained letter patiently pointing out he was wrong in his belief about the effect of the EAT, and that it would be unreasonable to pursue the claims already struck out. It clearly stated that their offer would be brought to the tribunal's attention in the event that his claims failed.

105 During the course of earlier negotiations in October 2018 the claimant had made no counter-offer which was unhelpful. It conveyed the message "See you in court". Later, he made a ludicrously extravagant counter-offer of reinstatement, £19,000 damages, and a guarantee against future redundancy. It is no wonder the case never settled. We cannot imagine any employer ever giving such a guarantee, given the way businesses work.

106 The bottom line of the costs claimed by the respondent is £15,495.10 since 9 April. As stated we consider 17 April to be a more just cut-off date (allowing a week to ponder the offer and the situation generally). Accordingly, we subtract £1,311.50 from that. The final order is therefore for £14,183.60.

107 We are under a duty to consider Rule 84. That is to decide whether we should take account of the claimant's means as at today. The claimant has not been here so we

have had no choice but to rely upon the best evidence we can. Fortunately, Judge Ross made an enquiry into the claimant's means as it was his duty to assess the amount of the deposits. The claimant told Judge Ross that he was earning £27,000 per annum in a permanent role and said this equated to approximately £1,900 net per month. He said he shared his household bills with his partner. Their home is near Clacton-on-Sea. He said that he estimated, after joint bills and personal bills, he had around £500 or £600 left each month. He also stated that he had £21,000 in savings. His partner therefore clearly has earnings. Judge Ross made an order for total deposits of £2,000.

108 The claimant is obviously not earning £27,000 per annum, if he ever did. He informed this tribunal on the first day of the hearing that he was taking a "sabbatical". He made a reference before us to taking another previous employer to the tribunal, one that clearly appeared on his curriculum vitae and shows on the tribunal's database as a live case. That is the best evidence we have of his means. There is no reason to think that he has spent £21,000 in 3 months, even being unemployed.

109 It would therefore seem that an order for £14,183.60 is actually within the claimant's means and that there is no reason in this case for us to modify the amount to take any account of the claimant's means particularly as he has chosen to absent himself from the costs application and any revised account he might have been able to give of his means.

110 We also note from a case cited to us *Arrowsmith v Nottingham Trent University [2012] ICR 159 CA* that once a tribunal has decided not to discount the amount under R 84 there is no reason why any award of costs should be affordable. That too was the conclusion in the previously controversial case of *Kovacs v Queen Mary & Westfield College* [2002] IRLR, 414, CA in which a wholly unaffordable costs order was made against an unsuccessful claimant. The *Kovacs* case predated Rule 84 and its similar predecessor in the 2004 Rules.

111 Rule 84 only states that a tribunal "may" take a paying party's means into account.

112 Finally, for what it is worth, the level of these costs generally we consider to be low, relative to many of the costs we have seen requested in this London tribunal, given the obvious amount of work which has had to be carried out by both solicitor and counsel.

Employment Judge Prichard

8 July 2019