



EMPLOYMENT TRIBUNALS

Claimant:

Mr Neel Rana

v

Respondent:

Royal Mail Group Limited

Heard at:

Reading

On: 11 and 12 November 2019

Before:

Employment Judge Hawksworth

Members: Miss L Farrell and Ms HT Edwards

Appearances

For the Claimant:

Mr J Preece (McKenzie friend)

For the Respondent:

Mr I Hartley (solicitor)

JUDGMENT

1. The unanimous judgment of the tribunal is that the claimant's complaints of harassment related to age and direct age discrimination fail and are dismissed.
2. The claimant's complaint of victimisation is dismissed on withdrawal.

REASONS

The claim

1. The claimant works for the respondent, currently he is in a Grade LA1 role. He complains of age discrimination in relation to an assessment for a deputy manager role. His claim was presented on 8 March 2018 after Acas early conciliation from 23 January 2018 to 9 February 2018.
2. The response was presented on 9 April 2018 and an amended response was served on 23 May 2018. The respondent denies the claims.

Hearing and evidence

3. There was an agreed bundle of 188 pages. The claimant's representative provided a helpful chronology.

4. We took some time at the start of the hearing to read the witness statements. We heard evidence from the claimant and then from the following witnesses on behalf of the respondent (in this order):

Mr Daniel Tovey (plant manager) and
Ms Elnara Sadykova (training and people development manager)

5. The claimant served statements by his former line manager Mr Davies and his union representative Ms Bethel. Neither attended the tribunal. Mr Davies' evidence was not challenged by the respondent. Ms Bethel was not permitted to take time off to attend the tribunal. The claimant asked us to consider Ms Bethel's statement and to attach what weight to it we felt was appropriate.
6. At the end of the evidence, during submissions, the claimant's representative withdrew the complaint of victimisation.

Issues

7. The issues for determination were set out in the case management summary of the preliminary hearing held on 9 January 2019. We went through them with the parties at the start of the hearing on 11 November 2019 and they were agreed by the parties.

8. They were:

- 8.1. Section 26: harassment related to age

- 8.1.1. Did the respondent engage in unwanted conduct as follows? During the claimant's interview on 19 September 2017 asking the claimant his age and when he intended to retire.
- 8.1.2. Was the conduct related to the claimant's protected characteristic?
- 8.1.3. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 8.1.4. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 8.1.5. In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

- 8.2. Section 13: direct discrimination because of age

- 8.2.1. Has the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act?

- During the claimant's interview on 19 September 2017 asking the claimant his age and when he intended to retire.
- 8.2.2. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on hypothetical comparators.
 - 8.2.3. If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
 - 8.2.4. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?
 - 8.2.5. And/or does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?
- 8.3. Section 27: victimisation (withdrawn by the claimant)
- 8.4. Remedies
- 8.4.1. If the claimant succeeds in whole or in part, the tribunal will be concerned with issues of remedy.
 - 8.4.2. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings and/or the award of interest.

Findings of fact

9. The claimant started working for the respondent on 8 November 1999 as an OPG. In 2006, he became an LA1 Letter Administrator Grade 1. In 2017, he was working in the Resourcing Department of Heathrow Worldwide Distribution Centre (HWDC) in a role in HR administration. His role includes dealing with annual leave pay and overtime for staff.
10. The claimant had made at least one unsuccessful application for the role of Deputy Manager, in 2015. The deputy manager role is to cover the role and perform the duties of a Work Area Manager when required. The Deputy Manager role would have been a promotion for the claimant.
11. On 9 October 2015, the claimant spoke to a director of the respondent to complain that he had discovered that two colleagues had been given the role of Deputy Manager without passing an interview board. The claimant did not make a formal grievance complaint at that time, and no further steps were taken about this complaint.
12. Deputy Manager vacancies were advertised again in around August 2017. The claimant applied for the role on 30 August 2017. He enclosed a CV which included his date of birth on it. He was 56 at the time.

13. The claimant was shortlisted for the role and invited to an assessment and interview. The letter inviting him to the assessment was dated 6 September 2017. He was told that as part of the assessment, he should prepare a 15-minute presentation on leadership, interpersonal skills and analytical thinking.
14. The claimant's assessment took place on 19 September 2017. At the assessment, the assessors were Mr Daniel Tovey and Ms Elnara Sadykova. Mr Tovey, the chair assessor, was the Plant Manager for HWCD; Ms Sadykova is a Training and Development Manager. Both Mr Tovey and Ms Sadykova were trained assessors.
15. Mr Tovey has worked for Royal Mail for 24 years. He has had Royal Mail training in assessment and in recruitment interviewing techniques. He also had unconscious bias refresher training as part of ongoing training.
16. Ms Sadykova has a Bachelor's degree in HR, a related Master's degree, and she completed her CIPD level 7 training prior to starting work for the respondent. She joined Royal Mail in 2016 and moved to her current role, a second line manager role, in July 2017. She has also had assessor training, unconscious bias training and annual refresher training to retain accreditation as an approved assessor for Royal Mail. She also had additional training in second line manager skills on taking up her current post.
17. The claimant said that Mr Tovey introduced Ms Sadykova at his assessment as a notetaker, not an assessor. Mr Tovey and Ms Sadykova said that both were introduced as assessors. We prefer the evidence of Mr Tovey and Ms Sadykova on this point. It was consistent with the documents, for example, the assessment interview form named both as 'interviewers' and included no reference to notetakers. It also reflects the policy which requires that interviews be conducted by two individuals. It also reflects Royal Mail's standard procedure as explained by Ms Sadykova that notetakers would normally only be provided in grievance and disciplinary meetings; in interviews, assessors were expected to take notes themselves as part of the process. Finally, Ms Sadykova's position, skills and qualifications are more consistent with her being asked to be an assessor rather than a notetaker.
18. The claimant said that Ms Sadykova took notes on a laptop as well as handwritten notes on the assessment form. We find that the only notes taken in the assessment were two sets of handwritten notes completed separately by Mr Tovey and Ms Sadykova on the pre-printed assessment forms, both of which were in the bundle. We find that there was a laptop in the interview room. It was used for candidates to present their PowerPoint presentations and for inputting the candidate scores at the end of the assessments onto an Excel spreadsheet. We do not find that the computer was used to take notes nor that there were any typed notes taken during the claimant's interview. The respondents' witnesses' evidence on this seems to us more likely as we do not consider that Ms Sadykova would

have taken two sets of notes at the same time and we accept that, as she said, it would have been distracting for candidates to have had someone taking notes on a laptop.

19. The claimant's assessment started with a pre-prepared presentation which was followed by an interview. The claimant had been told to prepare a 15 minute presentation on leadership, interpersonal skills and analytical thinking. The claimant had prepared a PowerPoint presentation with 14 slides (including the title slide). It had ten slides on leadership, one slide on interpersonal skills, and two slides on analytical thinking. Many of the slides contained very large sections of text. The claimant's presentation started at 12:08. He mostly read the slides verbatim.
20. Mr Tovey and Ms Sadykova had copies of the claimant's full presentation in front of them (and so could see where he had got up to). Mr Tovey warned the claimant when he had two minutes left as he did with all the candidates. At 12:23, after 15 minutes, the claimant was only three quarters of the way through his presentation and Mr Tovey stopped him.
21. There were nine criteria for assessment on the presentation. The claimant was scored average or below average on all sections apart from two sections where, due to the non-completion of the presentation, no score was given by either Mr Tovey or Ms Sadykova.
22. After the presentation, there was a structured interview with set questions. Mr Tovey and Ms Sadykova both took notes on separate copies of the pre-printed assessment forms and which also included the questions to be asked. The interview section of the assessment was divided into three. Section 1 was general interview questions; section 2, problem solving and teamwork; and section 3, leadership and resilience.
23. The claimant was scored as average by both assessors on section 1 of the interview.
24. On section 2, both assessors scored the claimant as below average. He gave the same example to questions about problem solving and being part of a team. His response to a question about the most difficult situation he had faced was that when there were not enough people in resourcing, if someone was on sick leave they would have to bring in reserve staff.
25. On section 3, the claimant was scored below average by both assessors. He was asked about a time when he took a leadership role. He spoke about being a monitor at school. In response to a request for an example of when the candidate had demonstrated resilience, the claimant spoke about a hockey tournament when he was at university and an occasion when he was shadowing a colleague and told some staff who were standing round talking that they should do some work. He was scored as below average by both assessors for this section of questions.

26. There was a significant dispute on the evidence concerning an exchange between the claimant and Mr Tovey during section 3 of the interview. The claimant's account was that after he spoke about his leadership activities at school, Mr Tovey asked, 'How long ago was this?' The claimant replied that it was 42 years ago. The claimant said that after this, Mr Tovey asked him how old he was and what his retirement plans were.
27. Mr Tovey agreed that he asked and he had noted on his assessment form how long ago the claimant was at school. Mr Tovey said that he asked this because the evidence the claimant was giving was so out of date and he would expect current examples. Ms Sadykova agreed that Mr Tovey had asked about the example the claimant was giving from his school days and that Mr Tovey may have said something like "*how old is your example?*". Both Mr Tovey and Ms Sadykova denied that the claimant was asked about his age or retirement plans.
28. The claimant said that his evidence was supported by the fact that he reported his account to his manager and union representative shortly after the assessment. We find the accounts given by the claimant to his manager and union representative took place not because the claimant deliberately took steps to speak to them but because the claimant's manager called him into a room to ask him how the assessment had gone and because the claimant briefly met his union representative in the canteen.
29. The claimant's manager made a witness statement which was not challenged by the respondent and he did not attend to give evidence. The claimant's manager reported what the claimant had told him. He said that the claimant was annoyed that Mr Tovey had asked him about his age and that the claimant thought that it was inappropriate. The claimant's line manager agreed that Mr Tovey should not be asking the claimant questions relating to his age. The claimant's line manager did not mention any question about retirement plans in his witness statement. This was not consistent with an interview which he gave as part of the grievance process, in which he said that the claimant had been asked about his plans for retirement.
30. The claimant's union representative also produced a witness statement. She was not permitted time off to attend the hearing to give evidence. The claimant's union representative said in her statement that the claimant had told her that Mr Tovey asked questions in relation to age and retirement plans. This was not consistent with what she said in an interview on 14 June 2018 as part of the grievance procedure, in which she said the claimant told her that he was not happy with what had been done at the interview but she could not remember anything specifically that he was not happy with.
31. We have considered this factual dispute carefully. We prefer the evidence of the respondent's witnesses. We consider that an experienced candidate giving an example from school would be likely to have been asked a

question about the age of the evidence being put forward. We think it is unlikely though that Mr Tovey would then have gone on to ask about the claimant's age because the claimant had put his date of birth on his CV and Mr Tovey had worked with him for some time and would have had a good idea of his age.

32. We also bear in mind that this was a structured interview with set questions that the assessors were following and that the contemporaneous notes of the interview support the account given by the respondent's witnesses.
33. Further, it seems unlikely to us that an exchange about the age of the evidence would have led on to a question about retirement plans as this does not seem to follow naturally from the earlier discussion.
34. We conclude that the claimant may have misremembered a question or questions about the age of his evidence or about when he was at school as questions about his age or his retirement plans. We did not find the witness statements of the claimant's manager and union representative to be of assistance to us in determining this factual dispute as neither was consistent, and both were only reporting what they had been told by the claimant.
35. For these reasons, we find that Mr Tovey did ask the claimant, 'How long ago was this?' and that this was a question about the currency of the evidence he was being given rather than a question about the claimant's age. We find that Mr Tovey did not ask the claimant about his age or retirement plans.
36. Mr Tovey and Ms Sadykova scored the claimant independently in the assessment forms. We find that the reason the claimant's application for the Deputy Manager role was unsuccessful was because of his poor performance on the presentation and at the interview.
37. On 2 October 2017, the claimant was told that his application was unsuccessful. The tribunal was provided with a breakdown of the ages of successful and unsuccessful candidates:
 - 37.1. There were 16 successful candidates ranging in age from 32 to 64. Of these, six were in their fifties and sixties.
 - 37.2. There were 17 unsuccessful candidates ranging in age from 34 to 65. Of these, seven were in their fifties and sixties, and 10 in their thirties and forties.
38. The claimant's representative said that the average age of successful candidates was 40 compared to an average age of 49 unsuccessful candidates. We calculated the average age of the successful candidates as 45.5 and the average age of the unsuccessful candidates as 48.5.

39. On 3 October 2017, the claimant emailed Mr Tovey to request feedback. Mr Tovey replied on the same day to say that Ms Sadykova would provide the feedback. The claimant replied to say that he would prefer to discuss it with Mr Tovey as he had asked the questions.
40. A feedback meeting was arranged between Mr Tovey and the claimant for 26 October 2017, after Mr Tovey's return from annual leave.
41. At the meeting, Mr Tovey told the claimant that his biggest problem was that he had failed to complete his presentation. The claimant disagreed. He said that Mr Tovey had asked him questions about his age and retirement plans. Mr Tovey challenged this and said he had not asked such questions.
42. The claimant followed up the meeting with an email to Mr Tovey on 26 October 2017 and on 30 October 2017, the claimant emailed Ms Sadykova asking for a copy of the minutes of his assessment. He emailed Mr Tovey on the same day asking for written feedback. Mr Tovey replied to say that the claimant would have the written feedback in due course. After a chaser from the claimant on 3 November 2017, Ms Sadykova sent written feedback on 7 November 2017.
43. The written feedback was detailed; it recorded that the claimant had run out of time and was unable to cover two parts of the presentation and that he had read each slide verbatim to the assessors. It referred to the claimant giving an example from school when asked about leadership and resilience.
44. On the same day, the claimant emailed Ms Sadykova again and asked for the minutes of the assessment. She replied to say that she could not share the assessors' notes with him as she had already provided feedback. This was standard practice as the notes were recorded on a form which contained all the possible questions so providing the assessors' notes would mean providing the candidate with notice of the questions which could have been circulated widely.
45. On 7 November 2017, the claimant made a formal grievance.
46. Early on 8 November 2017, Ms Sadykova sent a further email explaining that assessment notes are intended as an aide memoire for formal feedback and are not intended to be shared with candidates. This was consistent with the respondent's recruitment guide for managers which states that as part of their role, assessors must also produce comprehensive feedback notes for candidates. The claimant accepted in evidence that this was to prevent other candidates from seeing the standard questions which were included on the form.
47. The claimant's grievance complaint was considered by the respondent at three stages and was not upheld. As part of stage 2, the claimant was

shown the assessors' handwritten notes on 24 May although he was not permitted to take these away.

The law

48. Age is a protected characteristic under section 5 of the Equality Act 2010.

Harassment related to age

49. Under section 26 of the Equality Act, a person (A) harasses another (B) if

“a) A engages in unwanted conduct related to a relevant protected characteristic, and

*b) the conduct has the purpose or effect of –
violating B's dignity, or
creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”*

50. In deciding whether conduct has the effect referred to, we must take into account:

*‘a) the perception of B;
b) the other circumstances of the case;
c) whether it is reasonable for the conduct to have that effect.’*

Direct age discrimination

51. Section 13 of the Equality Act provides:

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(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.”

Burden of proof

52. Sections 136(2) and (3) provide for a reverse or shifting burden of proof:

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

(3) This does not apply if A shows that A did not contravene the provision.”

53. This means that if there are facts from which the tribunal could properly and fairly conclude that a difference in treatment was because of the protected characteristic, the burden of proof shifts to the respondent.
54. In Igen v Wong [2005] ICR 931 the court set out 'revised Barton guidance' on the shifting burden of proof. The court's guidance is not a substitute for the statutory language and that the statute must be the starting point.
55. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination. "Something more" is needed, although this need not be a great deal: "In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred..." (Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279.)
56. Where the burden shifts, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of age. The respondent would normally be required to produce "cogent evidence" of this. If there is a prima facie case and the respondent's explanation for that treatment is unsatisfactory, then it is mandatory for the tribunal to make a finding of discrimination.
57. The tribunal must adopt a holistic rather than fragmentary approach, this means looking not only at the detail of the various individual acts but also stepping back and looking at matters in the round.

Conclusions

58. We have applied the relevant legal principles to our findings of fact to decide the issues for determination set out above.

Harassment related to age

59. The first issue for determination is whether the respondent engaged in unwanted conduct in the claimant's interview on 19 September 2017 in asking about his age and intention to retire and, if it did, whether this amounted to harassment related to age.
60. We have found that these comments were not made. We have found that Mr Tovey did ask "*How long ago was this?*" after one of the answers given by the claimant. We have found that this was a question about the relevance of the evidence being given and not about the claimant's age. The claimant did not suggest that this question amounted to harassment.
61. We therefore conclude that the claimant was not subjected to harassment related to his age.

Direct age discrimination

62. We also have to determine whether, if comments were made in the claimant's interview on 19 September 2017 about his age and retirement plans, this amounted to direct age discrimination. Again, we found that these comments were not made. The burden of proof does not shift to the respondent to provide an explanation for these comments as we have found that they did not take place.
63. We have also found that the claimant's age did not play any part in the decision that his application for the role of Deputy Manager was unsuccessful. It was his poor performance in the assessment that was the reason for his unsuccessful application.
64. We therefore conclude that the direct age discrimination claim fails and is dismissed.

Victimisation

65. The claimant's complaint of victimisation was withdrawn at the hearing and is dismissed on withdrawal.

Employment Judge Hawksworth

Date: 28 November 2019

Judgment and Reasons

Sent to the parties on: ..04.12.19.....

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For the Tribunal Office

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