



EMPLOYMENT TRIBUNALS

Claimant: Mr O. B. Ogedegbe
Respondent: Utilitywise Plc (in administration)
Heard at: East London Hearing Centre
On: 19 November 2019
Before: Employment Judge Gardiner
Mrs S Jeary
Ms M Long

Representation

Claimant: In person
Respondent: No attendance

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The Claimant's claim for direct age discrimination contrary to Section 13 of the Equality Act 2010 fails and should be dismissed.

REASONS

Introduction

1. This is a claim for direct age discrimination brought by the Claimant, Mr Ogedegbe, against Utilitywise Plc, contrary to Section 13 of the Equality Act 2010. In April 2018, whilst working for another company, he applied to Utilitywise Plc for a job as a Field Based Energy Consultant with the Respondent. He was unsuccessful. He claims that the reason he was not offered the role was because of his age. At the time of his application he was 69. The Respondent's defence to the claim is that the

successful candidate was chosen entirely on merit and the Claimant's age played no part in the selection decision.

2. At this Final Hearing, the Claimant represented himself. He gave evidence by reference to a signed witness statement which he confirmed on oath. He answered further questions from the Tribunal. There was no attendance by the Respondent. The Respondent is currently in administration although the Administrator has consented to these employment tribunal proceedings continuing against the Respondent company. In terms of the Respondent's position, albeit untested under cross-examination, we have had regard to what is stated in the ET3 and in the contemporaneous documents.
3. We have been referred to documents in a bundle. The bundle was assembled during the Final Hearing of potentially relevant documents either supplied by the Claimant at this hearing, or already on the Tribunal file from an earlier hearing in front of Employment Judge Prichard, when they had been supplied by the Respondent. The bundle was numbered from 1-21. In addition, we have referred to the Response lodged by the Respondent when the claim was first issued. Many of the documents had been provided to the Tribunal by the Respondent at the Preliminary Hearing conducted by Employment Judge Prichard on 16 January 2019. These documents would not have been before the Tribunal at this Final Hearing unless they had been retained on the Tribunal file, because the Claimant had chosen not to produce them in the documents he had brought to the Tribunal.
4. As a result, the picture initially presented by the Claimant to the Tribunal was potentially a partial picture, which was only corrected in the course of questions from the Tribunal. As a result, the Tribunal has a better understanding of what took place, although no direct evidence from the Respondent.

Findings of fact

5. The Claimant applied for the role of Field Based Energy Consultant on 28 February 2018. With his application, he submitted a CV. This referred to the experience he considered potentially relevant to the role, which spanned the period from 1998 until the date of his application. He considered that the CV showed he had 14 years of relevant experience in the energy sales industry. We note that in the period between 2005 and 2009 he was working as a business consultant and mortgage broker. As a result, during this period he not working in the energy sector. The CV did not refer to his age.
6. His CV also referred to his degree in accounting and finance, and to an MBA from Middlesex University, London. His most recent experience was in his current position at the time of the application, with a company called Strategy Energy Services Limited. In this role his CV said he had advised home owners as to how their energy bills could be reduced through loft and cavity wall insulation. He had also, according to his CV, advised businesses on reducing energy consumption, although this was the second of the two aspects he cited of his role at Strategy Energy Services Limited.
7. According to the Respondent's ET3, there were three vacancies. The Claimant had a telephone interview with Ami-Jo Murray on 3 April 2018. Later that day, he

received an email informing him that he had passed the telephone interview and was invited to a face to face interview on 10 April 2018. The interview took place on that date in the Westfield Shopping Centre in Stratford, East London. It was conducted by Tiffani Bologna, Area Manager. Bilal Awan attended as a note taker.

8. His evidence to the Tribunal was that at the start of the interview, Ms Bologna walked behind where he was sitting and stood behind him looking down at the back of his head. She, on his version of events, did not explain why she was doing this, nor did the Claimant ask him. His belief was that she was doing this in order to check whether he had any grey hairs. We have heard no evidence to contradict this version of events put forward by the Claimant, although it is strongly denied in the account recorded in the ET3.
9. The interview proceeded with Ms Bologna asking the Claimant to give details of his experience relevant to the position for which he was applying. At the end of the interview, the Claimant was asked to sign a document. Again, there is a dispute as to the document the Claimant was asked to sign. In an email sent on 19 April 2018, the Respondent claimed that the Claimant was signing a candidate declaration form confirming that the information provided on his curriculum vitae was correct and up to date. This was apparently their standard practice. The Claimant's contrary position, as he claimed in an email sent in response at the time, was that the document he signed was a document noting what was discussed during the meeting. He says that he was given little time to check the document before being asked to sign it.
10. We do not consider it necessary to resolve this factual dispute in order to determine the discrimination claim before us. It is likely that the signature process that was followed in the Claimant's case would have been the same process followed for all candidates, rather than a unique feature of the Claimant's interview.
11. The Claimant was told he would hear whether he had been successful the following day, 11 April 2018. As the Claimant was leaving his interview, he saw what he assumed was another candidate waiting in the lobby. The Claimant's view was that he was in his thirties.
12. In all, three candidates had a face to face interview, including the Claimant. However, the Respondent only offered one candidate the role of Field Based Energy Consultant at the end of the interviews. Its position is that the remaining two candidates, including the Claimant, did not meet the required standard.
13. Before any communication was made with the Claimant, Ms Bologna sent Ami-Jo Murray an email on 10 April 2018, the date on which the three interviews had been carried out. This recorded that she would like to make an offer to a candidate called Imran, but that she did not consider an offer could be made to the Claimant and to the third candidate named Abdul.
14. In relation to the Claimant, the following comments are recorded :

Benjamin – No Offer – weak interview poor examples to questions, lack of understanding of the role/experience. No motivation to earn. Didn't ask

about commission or earning potential. Polite and positive man, prompt and on time.

15. The email made similarly specific comments about the merits of the other two candidates interviewed. The only reference to age in this email was to the other unsuccessful candidate, Abdul. The comment recorded is "polite presentable young man". Nothing is noted about the age of the successful candidate, Imran. It is not clear, and the Claimant cannot say, whether the person he saw waiting in the lorry Imran, the successful candidate, or Abdul, the unsuccessful candidate. The age of the successful candidate remains unknown.
16. The Claimant chased the Respondent to be told the outcome of the interview, which was not communicated to the Claimant on 11 April 2018 as originally indicated. The Claimant received an email on 19 April 2018 at 08:25 from Ami-Jo Murray. It was Ms Murray who had conducted the original telephone interview, which had shortlisted the Claimant and invited him for a face to face interview. She apologised that the Claimant had not been successful at interview, but said that she hoped he would not be discouraged from applying to Utilitywise for other roles in the future. She went on to say that they have a wide range of roles available and he may find one of those more suited to his skills.
17. The Claimant responded to that email an hour later, at 09:24, sending a lengthy email setting out his thinking as to why he had not been appointed. To justify the strength of his application, he referred to 14 years of field sales experience. He said he did not think that other job applicants had similar experience. However, when giving evidence to the Tribunal, he accepted he did not know what experience the successful candidate had. He added the following :

I also told her that there is a property management company I worked with while I was at British Gas and this property management has more than 600 properties which they manage and that the property management company is responsible for paying the gas and electricity bills for these 600 properties and I asked her if the property management company can be suitable for the Utilitywise management plan since they pay the bills and she told me yes.
18. What is recorded in this email as set out in the previous paragraph differs from the evidence the Claimant gave to the Tribunal about this potential business opportunity. He told the Tribunal that while working for Strategy, in the role he was undertaking at the time of his application, he came across a property management company that had 600 properties. He asked her if he could transfer this business to Utilitywise. His evidence was therefore confused as to when this opportunity first arose and whether (if it was a business connection whilst working with British Gas 14 years earlier) it was realistic.
19. The Claimant's email included sentences wholly in capital letters. It alleged that his interviewer, Ms Bologna, did not know anything about the role for which she was recruiting. In capital letters, it said that she was not fit to work in any sales positions and in any other roles dealing with customers. Earlier it had said that he thought she had never done a sales job herself but, if she had, she must have been involved in mis-selling. He accused her of behaving in a dangerous manner and

against the law for requiring him to sign documents without having them read to him first.

20. The tribunal considers it abundantly clear from this email that the Claimant was extremely angry at not being appointed to the role. He was prepared to speak his mind to explain in blunt terms to the Respondent what he thought of their decision. Tellingly, he did not make any reference to age discrimination in this email, nor did he complain about the behaviour of Ms Bologna at the outset of the interview in staring at his hair, as described above.
21. There were further email communications between the Claimant and Ami-Jo Murray. The tone and content of the emails from Ms Murray was friendly and respectful. The tone and the content of the emails from the Claimant was not. He continued to accuse Ms Bologna of a lack of professionalism and expertise, on occasions continuing to use capital letters to vent his feelings.
22. Ms Murray's correspondence was taken up by James Colwill, Recruitment Resourcer. In an email sent on 20 April 2018, Mr Colwill told the Claimant, by way of feedback that the interview panel felt he was polite, positive and prompt but unfortunately felt that his understanding of the role was not as in depth as was required, given the answers he had given to the interview questions. As had Ms Murray, he said that he hoped that this feedback did not discourage the Claimant from applying to the Respondent in the future.
23. In response the Claimant accused Ms Bologna of giving false reasons for rejecting his application. For the first time, he said that she was discriminating against him because of his age. He did not explain in that email why he had reached this conclusion. However, he went on to note that there were several other similar roles being advertised by the Respondent and asked if he could apply for those roles and be interviewed by someone other than Ms Bologna.
24. There was a subsequent telephone conversation between Mr Colwill and the Claimant, which is referred to in a subsequent email. In that conversation, Mr Colwill apparently said that the Claimant had not spoken about commission during the interview, and this was a factor as to why he did not secure the role.
25. The Claimant sent a further email on 21 April at 08:45 in which he disputed this version of what took place at the interview, which he said was totally false.
26. On 23 April 2018, Mr Colwill responded in a further email by referring to the Respondent's zero tolerance policy towards any type of discrimination. He said that if the Claimant could provide evidence to corroborate his allegations of age discrimination he would of course take those claims seriously and follow their internal policies and procedures to investigate his claims thoroughly.
27. The Claimant chose to send a letter to Mr Brendan Flattery, which was headed Age Discrimination. It was dated 20 April 2018 but the evidence is that he in fact sent it on 23 April 2018. In that two-page long, relatively lengthy letter, he did not provide any evidence to justify why Ms Bologna was guilty of age discrimination. In particular, he did not make any reference to the encounter alleged to have occurred at the start of the interview in which Ms Bologna was apparently searching for his

grey hairs. Nor did he refer to the ages of the other candidates. By way of explanation to the tribunal for these omissions, he said that the allegation of age discrimination spoke for itself but that if a specific request was made for further details these would have been provided. In so stating, he appears to have overlooked the specific request made by Mr Colwill in his email of 23 April 2018.

28. In the event no further evidence was provided. The first time there was any reference to the unusual alleged grey hair incident was in the Claimant's ET1, which was lodged on 16 August 2018. This was over four months after the interview had taken place.

29. So far as the disputed grey hair incident at the start of the interview is concerned, the Tribunal is not persuaded on the balance of probabilities that this incident occurred as the Claimant recalls it. It is inherently unlikely and was not referred to by the Claimant at any point in any of the numerous and forthright emails he sent following news of his rejection. He had been specifically asked by Mr Colwill to justify his allegation of age discrimination and had this incident occurred, he would probably have referred to it by way of response.

Legal principles

30. Section 13 of the Equality Act 2010 is worded as follows :

(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.

31. The Claimant seeks to compare himself against the treatment of the successful candidate, or to how a hypothetical comparator would have been treated. Such a hypothetical comparator must in all other respects be in a comparable position to the Claimant apart from his age.

32. The focus is on the mental processes of the person that took the decision said to amount to discrimination. In the present case, that is the mental processes of Ms Bologna, who took the decision that the Claimant should not be offered the role. The Tribunal should consider whether Ms Bologna consciously or unconsciously was influenced to a significant (ie a non-trivial) extent by the Claimant's age. Ms Bologna's motive is irrelevant.

33. Section 136(2) of the Equality Act 2010 is worded as follows :

(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) But subsection (2) does not apply if A shows that A did not contravene the provision.

34. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the

Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 22-32).

35. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that the Claimant's failure to secure the role of Field Based Energy Consultant was in part the result of his age.
36. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference in status and detriment treatment (see *Madarassay* at paragraph 54). In *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865, Elias J at paragraph 15 said that the mere fact that a unsuccessful candidate was a black woman and successful candidates were white men would be insufficient to be capable of leading to an inference of discrimination in the absence of a satisfactory non-discriminatory explanation. To shift the burden of proof a claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between the protected characteristic of age and the detrimental treatment, in the absence of a non-discriminatory explanation.
37. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the decision to reject the Claimant's application.

Conclusions

38. The Tribunal has heard no evidence as to the age of Imran successful candidate. It is unclear whether he was the person that the Claimant observed waiting in the lobby as he left his interview, that appeared to the Claimant to be in his thirties. Therefore, there is no evidence that the Claimant was in fact treated less favourably than a younger worker was treated, or as to the extent of any age difference. There is therefore no evidence that the Claimant was treated less favourably than an actual or hypothetical comparator.
39. In addition, there is no evidence based on the Tribunal's findings of fact, from which the Tribunal could infer, in the absence of a non-discriminatory explanation, that at least part of the reason for his rejection was his age. At no point did the Claimant disclose his age to the Respondent as part of the recruitment process. It was not included on his application form, nor was it discussed during the interview. Although the Claimant was aged 69 at the time of the interview, it would not have been obvious to Ms Bologa that he was in his 60s, still less that he was older than the state pension age. Even if his age was known or assumed by Ms Bologa, there was no evidence that she had preferred younger candidates in the past when selecting at interview or had otherwise said or done anything to demonstrate an antipathy to older workers. She had in fact rejected one of the other candidates, named Abdul, despite describing him in the email of 10 April 2018 as "a polite presentable young man". The Claimant has not shown that he himself was more qualified than the successful candidate who was appointed to the role.

40. In any event, even if (contrary to the Tribunal's view), the burden of proof transfers to the Respondent, the Tribunal considers that the Respondent has established on the balance of probabilities a non-discriminatory explanation, notwithstanding their non-attendance at the Final Hearing. The best evidence as to the rationale for the selection of one candidate rather than all three candidates is provided in the email of 10 April 2018. This email was sent by the person who carried out the interviews and made the selection decisions, Ms Bologna. It was sent on the same day that the interviews had taken place. It would have been fresh in her mind at the time. It was an internal email not sent to the Claimant or any of the candidates, in which Ms Bologna is likely to have recorded her full and frank assessment of each of the candidates' strengths and weaknesses.
41. The reason recorded against the Claimant provides the likeliest explanation for why he was not selected - namely that he did not perform well at the interview and that in her view, she did not understand the role. Her view, as recorded in this email, is consistent with the Claimant's decision in his CV to prioritise his business to customer selling experience over his business to business experience. The former experience is explained first, even though the role for which the Claimant was applying was exclusively business to business selling. The focus of the CV indicates supports the Respondent's concern that the Claimant's experience was too customer focused rather than business to business, and shows this was a genuine explanation as to why he was not suited to the role. That email of 10 April 2018 makes no reference to the Claimant's age, nor contains any other basis from which an inference can legitimately be drawn that his age influenced the outcome.
42. For these reasons, the Tribunal's conclusion is that the Claimant's direct age discrimination claim must fail.

Employment Judge Gardiner

19 November 2019