EMPLOYMENT TRIBUNALS

Claimant: Mrs Mena Gosling-Hughes

Respondent: Babcock DSG Ltd

Heard at: Birmingham

On: 9, 11, 12, 13, 16 December 2019

Before: Employment Judge Meichen, Mr RW White, Mr MP Machon

Appearances:
For the claimant: Mr G Graham, counsel
For the respondents: no appearance or representation

JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant's application to strike out the respondent's response is not well founded and is dismissed.
2. The claimant's claim of direct age discrimination is not well founded and is dismissed.

REASONS

Introduction and issues

1. By her ET1 submitted on 24 September 2018 the claimant raised complaints of age discrimination and unfair dismissal.
2. The case came before the Tribunal for a preliminary hearing on 2 January 2019. At that hearing the claimant withdrew her claim for unfair dismissal and it was dismissed. The claimant also confirmed that her claim for age discrimination was a claim of direct age discrimination only.
3. The less favourable treatment for the purpose of the age discrimination complaint was identified by the claimant as follows:
   (i) A failure to appoint the claimant to the Contract Manager position on 7 June 2018.

(ii) A failure to properly investigate the claimant's grievance in that:

a. The respondent ignored supportive evidence from Nicola Calvert. In particular that Miss Calvert had said that Alison Davies clearly had a problem with the claimant and did not treat her the same way as others.

b. The respondent rejected the claimant's complaints of bullying whilst accepting that Alison Davies had an aggressive management style

c. The respondent on appeal failed to address the points that the claimant had raised.

4. The respondent originally complained that not all of those matters had been put in the claim form but later made clear it did not oppose the claim being amended so that all the above issues could be considered.

5. At the preliminary hearing the claimant was also asked what the facts were which she relied upon to prove age discrimination. The claimant said that it was her case that once she had applied for the Contract Manager role the respondent altered the selection criteria in order to allow a younger person (who was not otherwise eligible) to apply for the role and the respondent had no legitimate reason for altering the selection criteria.

The claimant's strike out application

6. The case was listed to take place over 6 days starting on Monday 9th December. The week before the hearing was due to start the claimant made an application, on 4 December, to strike out the respondent's response.

7. We shall consider that application first of all. The application was put on the basis that the claimant said there was *"a substantial risk that a fair trial cannot be held, which is contrary to the overriding principle".*

8. We have therefore treated this as an application to strike out under rule 37(1)(e) of the Tribunal's rules of procedure which provides that a response may be struck out where a tribunal considers it is no longer possible to have a fair hearing.

9. We refuse this application. We think it is evident that a fair hearing is possible in this case. We had a bundle of documents, statements were exchanged and skeleton arguments were prepared so a fair hearing was in our judgment possible.

10. The key points raised by the claimant in her application appeared to be firstly that the respondent's witness statements contained false evidence and secondly that there had been a disclosure failure by the respondent. We think neither of those points prevented a fair hearing. If the claimant wished to challenge the evidence of the respondent she was entitled to do so by way of cross examination and in respect of the alleged disclosure failure REJ Findlay

had directed on 20 November that the claimant was entitled to ask questions about that at this hearing. In short therefore there was a clear way for these issues to be resolved fairly.

11. It is appropriate to record at this stage that we did not find that there had been any material failure to disclose by the respondent and in terms of the evidence it seems to us that each party was aware of the other side's case and has responded to it by way of statement and argument. We have therefore been able to take into account both side's positions and reach a decision. As we explain below the claimant did not in fact attend the hearing to ask questions herself but she asked for it to proceed in her absence and the Tribunal asked pertinent questions. For those reasons our view is that this was a fair hearing.

The hearing

12. At this point it is appropriate to explain the way in which the hearing has proceeded before us.

13. On Sunday 8th December, i.e. the day before the hearing was due to start, the claimant (who has represented herself throughout) sent two emails to the tribunal timed at 10.34 and 14.14. Both emails seem to say more or less the same. The claimant applied for the hearing to proceed in her absence on the basis of evidence provided in the bundle, statements and skeleton arguments. She referred to mental health concerns, stress and anxiety and said it was impracticable for her to participate in an oral hearing. The claimant emphasised that she was not seeking to postpone or adjourn the hearing but wished for it to be dealt with in her absence.

14. We considered this application carefully. The respondent did not object save to the extent to which the claimant was suggesting that the hearing should be dealt with on paper. In short, the respondent's position on that was that if the hearing proceeded in the claimant's absence it would be still be fair and appropriate for the respondent witnesses to give evidence and for the respondent to make oral submissions.

15. We decided to allow the claimant's application for the hearing to proceed in her absence. We took into account our general power to regulate our own procedure as contained in rule 41 and the overriding objective. In our view it was not proportionate to postpone the hearing and create delay and expense when the claimant expressly said she did not wish for that to happen and there was no indication that she would feel able to attend a hearing in the future. We bore in mind that the claimant had submitted a detailed witness statement and skeleton argument. We were satisfied that we knew the nature of the claimant's case from her pleadings, what she had said at the preliminary hearing, her witness statement and skeleton argument and that we could ask relevant questions to the respondent's witnesses ourselves. In the circumstances we were of the view that this amounted to a fair process.

16. We took into account fairness to both sides and we decided that although the claimant was not participating in an oral hearing that should not prevent the respondent from doing so. We felt that fairness required us to question the respondent witnesses if we felt it appropriate and we noted that rule 41 gave us an express power to do so. We therefore decided to allow the respondent's witnesses to give evidence and for the Tribunal to have the opportunity to ask questions and we decided that we would permit the respondent to make oral submissions at the end of the evidence.

17. At this stage we were conscious that the claimant had apparently made her mind up not to attend the hearing the day before it was due to start, and she had participated in the process fully up until that point. We therefore wished to keep her updated as to what was happening in the case and also make clear that she could still attend the hearing she wished. We also wanted to reassure the claimant that if there was anything the tribunal could do (for example by way of adjustment) to make her feel more comfortable in attending then she should let us know, so that we could consider it.

18. For those reasons we arranged for an email to be sent to the claimant on Monday 9 December at 12.04 which said as follows:

"The tribunal has decided to proceed with the case in the claimant's absence in light of the emails sent by the claimant at 10.34 and 14.14 yesterday. We will spend the remainder of today reading the pleadings, statements from both sides, skeleton arguments and key documents in the bundle. We will resume the hearing at 10 am on Wednesday as we cannot sit on Tuesday. Our intention is to ask any questions of the respondent's witnesses which we may have, and the respondent will also be entitled to make oral submissions if they wish. We will consider the claimant's case on the basis of what is put in her claim form, witness statement and skeleton argument and we will attach what weight we consider is appropriate to her evidence in view of the fact she is not here to be questioned herself. We would like to remind the claimant that she is still able to attend the hearing on Wednesday and participate if she felt able to do so as we have not heard any evidence yet. If there is anything which the claimant feels the tribunal could do which would enable her to attend the hearing, she should let us know as soon as possible, copying in the respondent."

19. We then spent the remainder of Monday reading as indicated above. We had before us the claimant's witness statement, statements from each of the 4 respondent witnesses, skeleton arguments for both the claimant and respondent, and a bundle which ran to 510 pages. We record that we added pages 69 a – j to the bundle during the hearing as this was documentation which the parties had disclosed to one another very recently and the claimant in correspondence had indicated she wished for us to take this into consideration. We have done so, but we have found this was not directly relevant to any of the issues we had to determine.

20. We reconvened on Wednesday 11 December as the tribunal could not sit on Tuesday. At that point we received an email which the claimant had sent to the tribunal at 17.32 the day before. In that email the claimant said as follows

"Thank you for your email and for the judge's consideration. I will not be able to attend the hearing to give evidence and I appreciate that this will affect the weight attached to my evidence. However, the stress and anxiety cause is too severe, exacerbated by my pending divorce and recent personal bereavements. I want to participate but am not well enough to do so. However, I believe that the specific disclosure application points raised in September, the witness statement and skeleton arguments and claim form and the further disclosure yesterday cover all points. In the interests of justice I'm prepared to answer any questions of the respondents or the tribunal judges and will be able to do so by email in the afternoon if they hear from the respondents in the morning if this will be of any assistance.".

21. The claimant also said that she would be happy to provide a closing submission by email if that was permissible, and the letter also referred to the disclosure which we inserted into the bundle as mentioned above. We noted the claimant's belief that the documents she had submitted *"cover all points"* and we felt this supported our decision to proceed in the claimant's absence.

22. We declined the claimant's invitation to ask questions of her via email. This course of action was objected to by the respondent essentially on the ground that it would not be fair. The respondent also said among other matters that they would not wish to ask questions by this method as their position would be that no weight could be attached to the answers which may be received. Our reasons for declining the claimant's invitation to ask questions of her via email may be summarised as follows:

    (i) We did not think it was necessary. The issues in the claim had been set out at the preliminary hearing and both parties had tailored their statements and written arguments to address those issues. We understood the nature of the claimant's case from the detailed pleadings, skeleton and statement she had submitted. We had also made up our minds to allow the claimant to submit closing submissions which was another opportunity for her to explain her case.

    (ii) We did not think it was fair. The tribunal and the respondent would have no way of knowing the circumstances in which the claimant provided her answers to emailed questions, even whether she received assistance or wrote the answers herself. Evidence obtained in such a manner would not even carry the weight which may be attached to a signed witness statement accompanied by a statement of truth where a witness does not attend. In fact, we could not envisage that we would be able to place any weight at all on emailed answers to questions in these circumstances. We noted that rule 43 requires witnesses to give oral evidence on oath or affirmation and we felt this was an important

safeguard. We recognised our ability to regulate our procedure as set out in rule 41, but we did not think it would be fair to modify our procedure to the extent of replacing oral evidence with emailed questions and answers in the circumstances which were before us.

(iii) There was no medical evidence to support a suggestion that the claimant could only answer questions via email, or at all.

(iv) We also considered the overriding objective. For the reasons already explained we felt it would not be fair for the claimant to answer questions via email and we took into account that this would mean the parties were not on an equal footing as the respondent witnesses were giving evidence on oath or affirmation and were putting themselves forward for oral questioning by the Tribunal. There would also be delays and further expense caused by formulating questions, awaiting responses and then hearing submissions in light of those responses. We doubted whether we would be able to conclude the case in the allocated time if we did all of that. We felt that this was not a proportionate course to obtain evidence to which we would likely not be able to attach any weight.

23. We did however decide to permit the claimant to provide written submissions if she wished and we also allowed for the respondent to provide a reply to those in writing if they decided it was necessary.

24. We then heard from the respondent's 4 witnesses. We asked any questions which we had. We felt that the respondent's statements were detailed and gave us a full account of what had taken place from their perspective and we were able to explore certain areas through our questioning which we felt was appropriate from what we had read and understood from the claimant's statement and skeleton (which were also both detailed). We then heard oral submissions from the respondent's counsel. We indicated that we would take some time to reach our decision and consider the written submissions which may be sent in by the claimant and replied to by the respondent and that we would give an oral judgment on the last day of the hearing.

25. We again sent an email to the claimant informing her of our decisions and letting her know that she may provide written submissions and that she could attend to hear the judgement if she felt able to do so.

26. The claimant provided written submissions on Thursday 12 December and the respondent provided a reply on Friday 13 December. The respondent's reply essentially said they were content to rely on the arguments they had made already. In correspondence with the Tribunal the claimant indicated that she would not be attending the hearing on Monday to hear our oral judgment and that she instead wished to apply for written reasons. In light of this we decided that it was not worthwhile for the respondent to attend an oral hearing as we were going to need to do written reasons in any event. We therefore decided

not to give an oral judgment and spent the time instead producing this reserved judgement and reasons.

The law

27. Section 13 Equality Act 2010 provides as follows: *"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".*

28. The burden of proof provisions apply to this claim. Section 136(2) Equality Act 2010 sets out the applicable provision as follows: *"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".* Section 136(3) then states as follows*: "but subsection (2) does not apply if A shows that A did not contravene the provision".*

29. In addition to the above well-known case law has demonstrated that the burden of proof requires the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act. That approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258 and has been reaffirmed recently in the case of Efobi v Royal Mail Group Limited [2019] IRLR 352.

30. It is also well established that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. These principles are most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

31. In addition to the above case law has shown that mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular the case of Bahl v The Law Society and others [2004] IRLR 799).

Findings of fact

32. The claimant's employment with the respondent began on 2 October 2017 and she was employed in the position of Contract Officer.

33. An issue was raised by the claimant that she had been interviewed for the post of Contract Manager prior to her being employed as a Contract Officer. This was disputed by the respondent and in particular it was denied by Gary

Cloughley in his witness statement who said he had only interviewed the claimant for the contract officer vacancy in 2017. The late disclosure which was added to the bundle at pages 69 a – j concerned this dispute. The claimant recorded her position in correspondence as being that Mr Cloughley was *"at best mistaken, at worst dishonest"* on this issue and that she would use this to question his evidence overall.

34. We have found that this dispute does not assist us to decide the issues in the case. It has nothing to do with the decision not to appoint the claimant to the Contract Manager role in 2018 which is what this case is mainly about. Looking at all of the documentation including the late disclosure we are not persuaded that the claimant did in fact interview for the Contract Manager role in 2017. The documentation does not clearly show that; it only clearly shows the claimant was interviewed for the Contract Officer role. We do not think there is any reason to call into question Mr Cloughley's overall credibility as a result of this issue.

35. In Spring 2018 the respondent advertised for the role of Contract Manager which had become vacant. The claimant applied for that role in May 2018, by way of submitting a cover letter and a CV. The respondent received five applications in total for the Contract Manager role. The applications were made up of three external candidates and two internal candidates. The two internal candidates were the claimant and Sam Cufflin-Wallis. There were two managers involved in the process to appoint a person to the contract manager role; they were Alison Davies and Gary Cloughley ("the appointing managers"). Both of the appointing managers had an equal say in who would be appointed.

36. The first stage of the appointment process was that the appointing managers carried out what was referred to as a "sift" of the paper applications. The sift stage was essentially to assess the candidates' CVs against the criteria which was contained in the job specification for the Contract Manager role. This part of the process simply involved the appointing managers meeting and making a decision as to who would be put forward for the interview stage of the process by assessing the candidates' CVs. Part of the claimant's disclosure complaint was that no documents had been produced regarding the sift process. We accept however that the sift part of the process was not documented and not formally scored as there were so few applicants. We do not therefore think there has been a disclosure failure in this respect.

37. At the sift stage the appointing managers decided that two of the external candidates did not meet the role specification and therefore they were not invited to interview. However, the appointing managers felt that both the claimant and Sam Cufflin-Wallis met the essential criteria for the role and therefore they were both invited to interview. In respect of the third external candidate they too were deemed to be suitable for interview, but that application was not taken any further forward when it became known that the

candidate's salary expectations did not match that of the Contract Manager role.

38. On 29 May 2018 the claimant raised a query with HR as to whether "essential criteria" in a job specification were truly essential. The claimant was told that the essential criteria was normally used as the basis for shortlisting candidates, but a hiring manager may go outside of that in exceptional circumstances.

39. Only the claimant and Sam Cufflin-Wallis were interviewed for the Contract Manager role. The interviews were carried out by the appointing managers on 6 June 2018. The interviews were scored, and the claimant scored 22/64 whilst Sam Cufflin-Wallis scored 40/64. We were told that it was obvious to both of the appointing managers that the claimant was nervous during the interview and she did not perform very well on the day. From the evidence we have heard in this case it seems that the claimant was nervous during the interview and we find this meant she unfortunately did not perform very well. We understand that the claimant does not agree with the scoring of the interviews, but we could not see anything obviously wrong or improper in the approach taken by the respondent.

40. Following the interviews Sam Cufflin-Wallis was offered the position of contract manager; she accepted that offer and started in her role a short while later. It is notable that the respondent had a choice over whether to mark the claimant as a reserve for the position of Contract Manager (so that if Sam Cufflin-Wallis had declined it could have been offered to the claimant). However, the respondent took the view that because of the claimant's poor performance at the interview stage she should not be marked as a reserve and therefore the claimant would not have been offered the Contract Manager role in any circumstance. We felt this was indicative of just how badly the claimant had performed at interview.

41. The claimant subsequently raised a grievance about the appointment process to the Contract Manager role. That grievance was submitted to the respondent on 22 August 2018. At that stage the claimant said that her issue related to what she described as a complete and deliberate failure by the respondent to adhere to considerable sections of the recruitment and selection policy and interlinking policies. The claimant identified as one of the key facts that she was complaining about that the sift had not been made against the essential and desirable criteria on the job specification. The claimant also raised numerous other matters which she wished to complain about in relation to the process which been adopted by the respondent.

42. The claimant made it clear in her grievance that she had a specific concern that a candidate had been progressed through the sift despite not meeting the essential requirements. It was plain that that aspect of the complaint related to Sam Cufflin-Wallis.

43. The respondent carried out an investigation into the claimant's grievance and this was done by James Coward. Mr Coward's investigation involved arranging an investigation meeting with the claimant which took place on 10 September 2018 and subsequent to that Mr Coward interviewed 10 further people including Gary Cloughley, Alison Davies and Sam Cufflin-Wallis. Mr Coward also reviewed the documentation which had been forwarded to him and produced an investigation report. He then held a grievance meeting with the claimant which took place on 17 October 2018. Mr Coward then sent the claimant a grievance outcome letter dated 24 October 2018. Mr Coward's conclusion was that the grievance was not upheld, and he found no evidence of any bias against the claimant including relating to age.

44. The claimant appealed against the grievance decision on 31 October 2018. In her grievance appeal the claimant stated that she felt there had been unconscious bias and age discrimination in the appointment process. It is salient at this point to record that the age difference between the claimant and Sam Cufflin-Wallis is 12 years and at the relevant time the claimant was 42 years old and Sam Cufflin-Wallis was 30 years old.

45. The claimant's appeal against the grievance decision was heard by Andrew Godden. Mr Godden arranged an appeal hearing with the claimant and that took place on 13 November 2018. Subsequent to the hearing Mr Godden carried out a review of the relevant documentation that he had been provided with. Mr Godden took the view that it was not necessary for any further investigations to be carried out or for anyone to be re-interviewed. In his opinion he felt that a thorough investigation had taken place at the initial grievance stage.

46. Mr Godden's conclusion was that the grievance appeal should not be upheld, and he supported the outcome of the grievance. This outcome was recorded in a letter which was sent to the claimant on 26 November 2018. As part of his conclusion Mr Godden found that the claimant had not been subjected to any bias either conscious or unconscious, that the recruitment policies and procedures were adhered to in all material ways and that there had been no age discrimination in the recruitment process. Mr Godden's decision marked the end of the claimant's rights of appeal in the respondent's procedures and therefore the claimant was told that his decision was final.

47. On 22 March 2019 the claimant resigned from her position as Contract Officer with the respondent. She gave four weeks' notice so that her last day in the employment of the respondent was Friday 19 April 2019. The claimant's resignation letter records that she had secured by that stage alternative employment in a procurement role to help her realise her career goals. The claimant did not bring any claim to the tribunal arising out of the termination of her employment.

Conclusions

48. In her witness statement the claimant focused her claim on the sift selection process to invite candidates to interview. The claimant describes this *as "the initial act of less favourable treatment".* The claimant explained in her statement that Sam Cufflin-Wallis did not meet the essential criteria contained in the job specification for the Contract Manager role. As the claimant's skeleton argument and submissions made clear her case was that the inconsistent application of the essential criteria was to allow the hiring panel to invite the younger candidate to interview. The claimant's argument was that this meant that the subsequent acts – the appointment of Sam Cufflin-Wallis over the claimant, the grievance and the appeal – were tainted by age discrimination.

49. The problem with this argument is that we do not think it succeeds on the facts. In particular we do not accept that the respondent applied the essential criteria inconsistently. In her witness statement the claimant identified 4 essential criteria that she felt Sam Cufflin-Wallis did not have and therefore she should not have progressed through the sift. Those criteria were as follows:

    (i) A minimum of three years' experience in a commercially focused senior role within a similar operating model.

    (ii) Significant experience of leading teams and taking accountability for functional area delivery.

    (iii) Degree or three years relevant experience.

    (iv) Experience of working for a large commercial organisation within a procurement function.

50. In the claimant's evidence she challenged whether Sam Cufflin-Wallis fulfilled these criteria principally on the basis of the experience which Sam Cufflin-Wallis had. In short, the claimant believed that Sam Cufflin-Wallis' CV did not demonstrate that she had the requisite level of experience to fulfil the essential criteria identified above. This is disputed by the respondent who says that both candidates did meet the essential criteria and so it was appropriate to invite them both to interview. We have considered Sam Cufflin-Wallis' CV and the respondent's evidence on this point and it was an area on which we asked Alison Davies in particular further questions to clarify our understanding. We found ourselves unable to agree with the essential point made by the claimant that Sam Cufflin-Wallis lacked relevant experience such that she did not fulfil the essential criteria which we have set out above.

51. Sam Cufflin-Wallis' CV demonstrated that she had worked at the respondent for roughly 18 months in the role of Procurement Officer. It seems that "Procurement Officer" and "Contracts Officer" were titles given to describe effectively the same job and were therefore used interchangeably at the respondent. We think the respondent was entitled to regard this as relevant experience which fell within the criteria which we have set out above.

52. Prior to working for the respondent Sam Cufflin-Wallis had worked for Keysight Technologies Ltd in the role of Global Sourcing Buying Coordinator. Sam Cufflin-Wallis had worked at Keysight for over 2 years. The respondent was entitled to consider that this this too amounted to relevant experience in procurement/contract management work which fell within the experience required by the criteria set out above. Taken together then Sam Cufflin-Wallis' experience at the respondent and Keysight meant she had in excess of the 3 years relevant experience which was essential for the Contract Manager role. Her experience satisfied each of the criteria which we have set out above.

53. The claimant has also pointed out that Sam Cufflin-Wallis did not have a degree (whereas the claimant did). However, a degree was not in fact an essential criterion – the criterion was for a degree or 3 years relevant experience and Sam Cufflin-Wallis had the latter. Another challenge made by the claimant was that part of Sam Cufflin-Wallis' experience was formed when she was deputising in a role and it should therefore not be regarded as relevant experience. We do not think that argument can possibly be correct – time spent doing a role, whether deputising or otherwise, is still experience of doing that role.

54. We therefore take the view that there was nothing wrong or inconsistent in the respondent deciding at the sift stage that both the claimant and Sam Cufflin-Wallis fulfilled the essential criteria and that therefore it was appropriate to invite them both to interview. Our decision is therefore that the claimant's case has not been made out on the facts and the claimant has not proved the facts from which she invited the tribunal to find that discrimination could have occurred.

55. We also find that we agree with the respondent's conclusion that the claimant has not demonstrated any material breach of the respondent's recruitment policy. The only breach which has been identified is that the recruiting managers had not taken the Leadership Essentials Modules as required by the policy. We do not see how this breach caused any disadvantage to the claimant whether compared to Sam Cufflin-Wallis or at all. Both of the appointing managers have subsequently taken the modules and we have no reason to disbelieve their evidence that it would not have made any difference at all to their decisions or processes. This is a matter from which we could not possibly infer age discrimination.

56. We have considered the evidence as to the claimant's performance at interview. Some of the criticisms of the claimant's performance put forward by the appointing managers were as follows: that the claimant was visibly nervous, that she attended the interview with a folder full of notes and referred to these during the interview even to the extent of reading out pre-prepared answers to questions, that she did not answer confidently, that she was unable to articulate examples that were relevant to the competencies required and that she was unable to identify how she had acted as a leader.

57. We also took into account the evidence that the claimant was given feedback on her performance and during that the claimant accepted that she had not performed well due to her nerves on the day. Even in her statement for the tribunal hearing the claimant admitted that she was nervous at the interview. We conclude that the claimant was nervous at her interview, that her nerves prevented her from performing well at the interview and in consequence she did not score well or impress the interviewing managers and ultimately was not offered the Contract Manager role. We were satisfied that the respondent had shown that the reason why the claimant was not appointed was her poor performance at interview. A younger hypothetical comparator who had the same performance at interview would not have been appointed either. We therefore find that the respondent has in any event demonstrated that their actions in not appointing the claimant to the Contract Manager position were not to any extent influenced by age.

58. Dealing with the claimant's complaint that there was a failure to properly investigate her grievance, we find that this complaint too fails on the facts. Our overall conclusion is that the respondent did conduct a proper investigation into the claimant's grievance. In fact, we were impressed with the detail of the investigation conducted by Mr Coward who conducted no less than 10 investigatory interviews in addition to meeting the claimant.

59. The claimant's first specific complaint is that the respondent ignored supportive evidence obtained in the investigation, in particular from Nicola Calvert. We do not think this complaint has been made out. In his investigation report Mr Coward referred to supportive evidence as to Nicola Davies' behaviours and so we do not agree this was ignored. The point in relation to Nicola Calvert's evidence was that she had said there was friction between Alison Davies and the team and that it appeared worse for the claimant (although she did not feel that was based on age). This was referred to in the outcome letter sent to the claimant in that there were *"frictions in the team"* and Alison Davies had a *"harsh management style*". In his investigation report Mr Coward referred to *"consistent mentions of a poor relationship"* between the claimant and Alison Davies. Again therefore we do not think that this evidence was ignored.

60. The next specific complaint is that the respondent rejected the claimant's complaint of bullying whilst accepting that Alison Davies has an aggressive management style. The first and fundamental problem with this specific complaint is that Mr Coward's findings had fallen short of saying that Alison Davies was aggressive. He found that there was a style which generated friction and was harsh and was therefore *"potentially damaging to team morale and cohesion".* This is not the same as saying Alison Davies was aggressive and it did not mean that Mr Coward was required to find that the she had bullied the claimant. Instead, Mr Coward's conclusion was that viewing the evidence as a whole there was insufficient evidence to support the claimant's claim of bullying, but he did recognise that there were

management styles which were generating unhappiness and therefore required addressing. We do not think that the overall picture of the evidence collated by Mr Coward meant that he was bound to come to the conclusion that the claimant was being bullied, and we find he was reasonably entitled to come to the conclusions which he did. It is notable in our view that he did not shy away from evidence or findings that were critical of Alison Davies (albeit he found on balance that she had not bullied the claimant as alleged).

61. The final specific complaint raised by the claimant is that on appeal the respondent failed to address the points she had made. We do not agree. It seems to us that the appeal outcome letter demonstrates that Mr Godden engaged in a reasonably detailed way with the key points raised by the claimant, including her complaints of bias and age discrimination. It seems that Mr Godden's approach to the appeal was by way of review rather than re-hearing, but we do not think that was a wrong or unreasonable approach in the circumstances (especially since Mr Coward had already carried out a full investigation).

62. In relation to each of the specific complaints then we find that the claimant has failed to establish the matters she complained of. Taken together we are of the view that the claimant's complaint about the grievance and the appeal amounts to little more than assertion that she disagrees with the processes adopted and the outcomes reached. We do not think that the outcomes or processes were improper, and the claimant has not proved any facts from which we could possibly conclude that they constituted unlawful acts of age discrimination. For those reasons we find that in relation to the complaint of failing to properly investigate the claimant's grievance the burden of proof has once again not shifted to the respondent.

63. Our overall conclusion is therefore that the claim of direct age discrimination is not well founded, and it is dismissed.

Signed by: Employment Judge Meichen

Signed on: 16 December 2019