EMPLOYMENT TRIBUNALS

Claimant: Mr Raymond Levy

Respondent: McHale Legal Limited

Heard at: Manchester **On:** 22 May 2019

Before: Employment Judge Langridge
Mr Q Colborn
Ms B Hillon

REPRESENTATION:

Claimant: In person
Respondent: Ms L Amartey, Counsel

JUDGMENT having been sent to the parties on 21 June 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This claim was heard over 4 days beginning on 4-5 March 2019 and resuming on 21-22 May 2019. The claimant represented himself throughout, and the respondent was represented by Ms Amartey. Evidence was heard from the claimant on his own behalf and from Mr McHale and Ms Udalova-Surkova on behalf of the respondent. An agreed bundle of documents was produced. Judgment for the claimant was given orally in the presence of the parties, with summary reasons. An agreed list of issues for the remedy hearing was then prepared by the Tribunal in discussion with the parties, and appended to the Judgment.

2. This claim was limited to a single issue of law and fact, namely whether the respondent discriminated against the claimant in not offering him a position as a senior solicitor because of his age. In his application to the Tribunal the claimant relied on arguments that the failure to offer the post was either direct age discrimination or alternatively indirect discrimination, and therefore contrary to the Equality Act 2010. He sought compensation for loss of earnings, based on

continuing losses even after finding alternative work, and requested an award for injured feelings in the middle band of the Vento guidelines.

3. In its response to the claim the respondent denied that it had discriminated against the claimant. It said it had been giving thought to reorganising the firm's commercial department, partly with a view to reallocating regulatory tasks between managers of the firm. In this context, the respondent decided to advertise for a senior commercial property solicitor, and did so in order to test the market. The respondent advertised for a solicitor with at least 5 years' post-qualification experience (PQE), and averred in its response that using PQE as an aid to recruitment was a proportionate means of achieving a legitimate aim. It did not explicitly identify the aim in question, but in broad terms linked the level of seniority to the needs of the business, such that PQE would be a relevant factor in hiring a senior solicitor whose role and duties warranted such experience and such a salary.

4. The reason identified in the response for not hiring the claimant was that, following "detailed discussions" the respondent decided it did not need a senior hire. Instead, it decided to monitor the situation and consider hiring at a more junior level. The respondent felt it did not need to take on as large an overhead as a senior solicitor. It denied that age and seniority were interchangeable, as the claimant alleged.

5. The response referred also to a comment made by the claimant at interview, which it described as a discriminatory 'joke' about Ms Udalova-Surkova's Russian nationality. The respondent pleaded that it had concerns about the remark but also stated (in paragraph 48 of the response):

> "… though there were some concerns around his behaviour at the interview, [Ms Udalova-Surkova] was happy that he appeared to have the skills and expertise required to be a senior hire …"

6. The above is a summary of the respondent's positive case as pleaded. A substantial part of the grounds of resistance addressed other issues, one being a time point (which later fell away and was not relevant to this Tribunal), and the other being strongly-worded challenges to the claimant's good faith in bringing his claim and his attempts to quantify its value. For example, the respondent pleaded that:

a. The claim had "terminal deficiencies in fact, law and jurisdiction", which as a well-qualified solicitor the claimant should have known;

b. As an officer of the court the claimant "could reasonably be expected to ensure that […] errors in jurisdiction and law are not excusable";

c. It reserved the right to seek costs from the claimant and to make "an appropriate report to the Solicitors Regulatory Authority and/or the Law Society" if the claim were unsuccessful and the Tribunal "concurred with the respondent's view that given his standing and level of qualification", the claim was unreasonable and an abuse of process "for personal gain in breach of professional obligations and duties".

d. By requesting a declaration, the claimant was seeking to "leverage an unmeritorious claim" in order to harm the respondent and pressurise it to settle the claim:

e. The claimant was attempting to "inflate his claim, despite his being an officer of the court".

7. At a case management preliminary hearing on 16 October 2018 Judge Slater reviewed the issues with the parties. She noted in respect of the indirect discrimination claim that the respondent advertised a requirement for a solicitor with PQE of 5+ years. The claimant felt that, as an older applicant, he was disadvantaged because of his age. During this discussion the respondent was represented by one of its then partners, an experienced employment solicitor, who stated specifically that the respondent was not arguing that its decision not to appoint the claimant was based on his remark made at the interview with Ms Udalova-Surkova.

8. At the opening of the main hearing on 4 March 2019 it became apparent that this point remained in contention, namely whether the remark formed part of the respondent's explanation for not offering the claimant the position. In the concluding two paragraphs of his witness statement, Mr McHale (the senior partner) said he understood that at the preliminary hearing the claimant had denied making any comment to his colleague. Mr McHale said that if the Tribunal should decide that the claimant did make the remark alleged, then he would report this to "the relevant professional bodies". He went on to say that if the claimant were unsuccessful in his claim, he would seek advice as to "whether by presenting such a claim and assessing the value of his claim at the level he has could constitute professional misconduct".

9. There was a brief discussion about the issue at the outset of the hearing. The claimant made clear that he found the threats to report him to the SRA intimidating and offensive, and indeed the Tribunal expressed its reservations about such strong threats being made in the face of a discrimination claim which was yet to be determined and whose merits had not therefore been tested. As for the remark itself, the claimant's position was that he had never denied making a comment at interview, but he did not say the words attributed to him by the respondent about Ms Udalova-Surkova's Russian nationality. This dispute, and the question whether the respondent could rely on the remark in its defence of the claim, necessitated a review by the Tribunal of the notes made by Judge Slater at the preliminary hearing. Judge Slater's notes of what the parties said summarise the position succinctly:

- Respondent: "Russian origin and throwaway comment – not going to poison me".

- Claimant: "No comment about Russian origin".

10. Having reviewed these notes, the Tribunal was quite satisfied that the claimant did not dispute making any comment; he disputed only that he had referred to Russian origin. Judge Slater's notes also showed that the respondent told the Tribunal and the claimant that it did not rely on his remark at interview as one of the reasons for not offering him the job. The Tribunal also took account of the fact that the respondent had at no time written to the Tribunal to question the way the case

management notes and orders had been written up. As a result of this clarification, and with the agreement of the respondent, the final two paragraphs of Mr McHale's witness statement were deleted.

11. During this preliminary discussion on 4 March, the claimant also clarified that he wished to rely on an age group of 39 and older, and had produced some statistical evidence in the bundle on this basis. A late supplementary witness statement from the claimant was produced even though its purpose was not clear and it had not been provided to the respondent until 2 March. This was accepted into the evidence since the respondent had no objection to it, not having been taken by surprise by the content of the statement. It was also apparent that much of the statement dealt with matters relevant only to remedy, and it was agreed that this hearing would deal with liability only.

12. The claimant made an application that the evidence of two other witnesses for the respondent (two receptionists who were present when the remark was made) be excluded from the hearing. This was on the grounds that the respondent had said at the preliminary hearing it was not relying on the 'joke' as a reason for not employing him. In answer, the respondent felt that it would not disadvantage the claimant for that evidence to be heard, but it did not dispute the indication given at the preliminary hearing. The Tribunal reviewed the respondent's additional statements and did not consider them relevant, as they contributed nothing to the comment the claimant admitted making. They were therefore excluded.

Issues and relevant law

13. This was a claim for age discrimination relying on the direct and indirect discrimination provisions of the Equality Act 2010 ('the Act'). Although both claims arose out of the same set of facts only one or the other could succeed. The claims arose from the respondent's recruitment exercise which led to the claimant being interviewed though he was then not offered the position. The claimant asserted that this was directly discriminatory in that the respondent rejected him because he was too old and they wanted a younger candidate. This claim relied on section 13 of the Act, which provides that:

> *(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.*

14. Under section 39 of the Act, this claim could be brought before a Tribunal as it related to recruitment arrangements and involved a refusal to offer employment:

> *39(1) An employer (A) must not discriminate against a person (B)—*
>
> *(a) in the arrangements A makes for deciding to whom to offer employment;*
>
> *(c) by not offering B employment.*

15. The direct discrimination claim required the claimant to show that he was treated less favourably than a comparator, being here a hypothetical candidate for the job who was not in the age group relied on by the claimant, namely 39 and older.

16. It was for the claimant to show that there were facts from which the Tribunal could conclude that he was treated less favourably than a comparator because of his protected characteristic of age. It was uncontentious to say that the claimant suffered a detriment per Shamoon v Chief Constable of the RUC 2003 IRLR 285, in that not being offered the job was something which could reasonably be considered a disadvantage.

17. A causal connection between the claimant's age and the unfavourable treatment had to be made out. It was not enough simply to say that the claimant was an older candidate and then make assumptions about the reason why the respondent chose not to offer him the position. The Act required the Tribunal to ask whether that decision was caused by the claimant's age. In Johal v Commission for Equality and Human Rights UKEAT/0541/09, the EAT adopted the reasoning of the House of Lords in Shamoon and summarised the question as follows:

> *"Thus, the critical question we think in the present case is the reason why question posed by Lord Nicholls: "Why was the Claimant treated in the manner complained of?"*

18. The leading Court of Appeal decisions in Igen v Wong [2005] ICR 931 and Madarassy v Nomura International plc [2007] IRLR 246 established the principles to be followed. Firstly, a claimant must prove facts from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. This is subject to the possibility that the respondent is able, through its evidence, to put forward an adequate explanation to displace any inference of discrimination. This may be approached as a two-stage process, but following the guidance in Shamoon, the two stages need not be separated in such a structured way. Instead, it is permissible to seek out the 'reason why' the claimant was treated in the way complained of. Whether the burden of proof shifts to the respondent in a formal way or not, dealing with the 'reason why' may usefully address both stages of the analysis.

19. In Madarassy the Court said that the words 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it. The second stage, which only applies when the first is satisfied, requires the respondent to prove that it did not commit the unlawful act. If the burden does shift, then the employer is required only to show a non-discriminatory reason for the treatment in question.

20. The Act introduced a statutory statement of the above principles in section 136, which provides that:

> *(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.*

21. In Hewage v Grampion Health Board [2012] IRLR 870, the Supreme Court agreed with a warning given by Underhill J in Martin v Devonshires Solicitors [2011] ICR 352, that it is 'important not to make too much of the role of the burden of proof provisions':

> *"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence, one way or the other."*

22. This approach was reaffirmed in the case of Ayodele v Citylink Ltd [2017] EWCA Civ 1913. In that case, the Court of Appeal not only re-stated that a claimant bears the burden of proving primary facts from which discrimination might be inferred, but also identified three questions which Tribunals may consider:

(i) Did the alleged act occur at all?
(ii) If it did occur, did it amount to less favourable treatment of the claimant when compared with others?
(iii) If there was less favourable treatment, what was the reason for it? In particular, was that reason discriminatory?

23. On the facts of the present case, questions (i) and (ii) were not in dispute, since the respondent undoubtedly did not offer the claimant the job he applied for, and so the heart of the case revolved around question (iii). The Tribunal therefore gave particular consideration to the respondent's explanations for not offering the claimant the job he applied for.

24. The indirect discrimination claim was put forward in the alternative, the claimant arguing that the decision not to appoint him was in breach of section 19 of the Act, which states that:

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

25. It was common ground that the respondent adopted a provision, criterion or practice (PCP) in that it used post-qualification experience as a guide to its recruitment decision. It advertised initially for a solicitor with 5+ years' PQE, a

criterion which the claimant fitted, as an older and more experienced solicitor. At the point of rejecting his application, however, the respondent said it wished to recruit a more junior solicitor with 3-5 years' PQE. At that stage the respondent applied a different criterion to the claimant, and this PCP was potentially engaged for the purposes of a claim under section 19. The Tribunal had to decide whether this PCP was in fact applied to the claimant and the pool of younger solicitors who might be eligible to apply for the vacancy. If so, the next question was whether the claimant, along with other older applicants, was put at a particular disadvantage.

26. In respect of both direct and indirect discrimination the respondent argued that the treatment of the claimant, and the application of a PCP, were proportionate means of achieving a legitimate aim, it making commercial sense to appoint (and pay) solicitors according to their PQE where this was compatible with the duties of the role.

Findings of fact

27. The claimant was admitted as a solicitor in 1985 at the age of 24. Over the course of his lengthy career he developed a specialism in commercial property law. He worked in a number of different firms in London and elsewhere, and by early 2018 he was looking for work after being made redundant from his previous position. At that time the claimant was 57 years of age. The respondent is a firm of solicitors with offices in Altrincham, Middleton and Heywood and employs around 60-70 people in total. The firm is headed by the senior partner, Andrew McHale. One of his partners is Maria Udalova-Surkova, a senior solicitor specialising in commercial property law. She had been assisted by an experienced associate solicitor, also specialising in commercial property work, who had resigned and was leaving the respondent's employment at the time of these events.

28. The respondent had an employee Handbook and an Equality Policy, neither of which featured in the bundle originally prepared for this hearing. Copies were added to the bundle at the Tribunal's request. Extracts from the Handbook said this, under the heading "Everyone is welcome":

> "McHale & Company actively supports Human Rights, Age Discrimination, Sex Discrimination and Race Relations legislation."
>
> and:
>
> "We believe that all decisions about people at work should be based on the individual's abilities, skills, performance and behaviour and our business requirements. Questions about an individual's race, colour, marital status, age, religion, sex or sexual orientation are never relevant to our business."

29. The Handbook stated the respondent's commitment to ensuring that its diversity and equality policy was complied with, and said that any discrimination would result in disciplinary action being taken. It reminded staff that this policy was also a requirement of the Solicitors Code of Conduct set by the professional body.

30. The respondent's Equality Policy identified a number of commitments aimed at eliminating unlawful discrimination and encouraging equality and diversity. They included a commitment to take seriously complaints of unlawful discrimination by

employees and others, and to monitor the make-up of the workforce by reference to their age amongst other characteristics. At the time of these events, neither Mr McHale nor any of his senior colleagues had ever attended formal training in diversity and equality issues.

31. On 26 February 2018 the respondent advertised in the Law Society Gazette for a commercial property solicitor with five or more years' PQE "to join a busy team". The advertisement stated a requirement to have knowledge of all aspects of real estate transactions, though residential property work was not identified as a feature of the role. On Monday 5 March the claimant telephoned Ms Udalova-Surkova to say he was interested in the vacancy. She told him that the need for the appointment was "fairly urgent". He indicated that he was prepared to work on an interim basis at the very least. It was agreed that the claimant would send Ms Udalova-Surkova his CV and that they would meet for an interview. The interview took place on Wednesday 7 March at the respondent's office.

32. Before the interview started the claimant was in the respondent's reception area and accepted the offer of a drink. The television in reception was showing the news and there was a report about the Novichok poisoning in Salisbury. As Ms Udalova-Surkova greeted the claimant to take him downstairs to the room where the interview would take place, he made a comment to the effect of, "I hope you aren't going to poison me". He did not refer to Ms Udalova-Surkova's Russian nationality and was not directing the remark to her personally, but was prompted to make what he saw as a joke by the news report. Ms Udalova-Surkova was taken aback by the comment but said nothing in response, and the interview went ahead without further reference to it.

33. During the lengthy interview, Ms Udalova-Surkova explained that the respondent was seeking to replace a senior associate who was leaving the commercial property team. He was the only solicitor with any experience in commercial property directly assisting Ms Udalova-Surkova, and both were at the time of the interview in the middle of working on a complex property purchase for a Russian client. Ms Udalova-Surkova told the claimant that the work was "piling up" and new instructions were coming in. She said the firm was in fact looking for two property solicitors. Reference was made to another solicitor, Mr Burke, who dealt with residential property work. Ms Udalova-Surkova told the claimant that Mr Burke was an older lawyer and thinking of cutting his hours. There was no discussion about the claimant's experience in residential property work or his ability to cover that work in the role.

34. Ms Udalova-Surkova explained that she had a lot of Russian clients and visited the firm's London office twice a month to service their work and develop new contacts. The claimant said he was available to start immediately, and they discussed his contacts in London as this was of interest to Ms Udalova-Surkova. The claimant was told that the respondent was flexible about working patterns and he was asked what salary he was looking for. He indicated that in Manchester he was aware that the salary would be less than the £60,000 he would expect to be paid in London. He suggested that the salary of the departing associate could form a starting point for discussing his salary expectations. He made a note that the associate's salary had been £45,000 although Ms Udalova-Surkova told the Tribunal

in her evidence, and we accepted, that the correct figure was £42,000. The claimant simply noted it incorrectly.

35. On hearing that the relevant salary was (as he understood it) £45,000 the claimant said he would ask for around £50,000 for the first three months, and offered to work on a self-employed consultancy basis. Ms Udalova-Surkova made a note of his VAT registration number in this context.

36. They discussed the potential start date and Ms Udalova-Surkova envisaged an immediate start, telling the claimant it could be "next Monday", meaning 12 March. She explained that the decision was subject to what she described as a "board meeting" but which was in fact a meeting of heads of department, routinely referred to in the respondent firm as a board meeting. This was scheduled for the following day. Ms Udalova-Surkova said she would revert to the claimant after that. She retained no notes of this interview, unlike the claimant whose very detailed contemporaneous note was accepted as accurate by the Tribunal. The content of this and his other notes was not seriously challenged by the respondent.

37. The board meeting took place on Thursday 8 March. This too was not formally recorded by the respondent, though the Tribunal did have the benefit of some very summary notes taken by Ms Udalova-Surkova and brief notes taken by the firm's Practice Manager, Steven Randell. The two records did not fully correspond with each other.

38. Ms Udalova-Surkova's note included the heading "Commercial", under which there was reference to an associate solicitor leaving the firm and the need for a solicitor both to cover Mr Burke's residential property work and to assist Ms Udalova-Surkova on the commercial property side. This was consistent with the claimant being told at interview that two property solicitors were to be hired. The note recorded that there had been only one interview following the advertisement (as the claimant had been the only person to apply). The possibility of the work covering Manchester and/or London was mentioned, and a salary of £50-£60,000 was noted. This overstated what the claimant had said he would be looking for. The note included the following words:

> "Expensive. Doesn't cover all our needs."

39. Ms Udalova-Surkova's note referred to another property solicitor (working in the respondent's Middleton office) needing to increase his billing, and that Ms Udalova-Surkova would be sending more work to him. There was also a question mark about support from a paralegal and/or trainee, as well as a need to provide support to Mr Burke for his residential property work, possibly through a paralegal or a newly qualified solicitor. It was noted that a semi-retired former partner, who was still working part-time in the firm, could help with the overflow in the commercial property work. The note made no mention of the respondent advertising for a more junior solicitor.

40. Mr Randell's note of the same meeting took the form of an email summary. The content touched on some of the same subject-matter but curiously did not include any mention whatsoever of the interview with or decision about the claimant. The note did refer to Ms Udalova-Surkova having identified a need for two new

members of staff in light of the departure of the associate solicitor. As for covering commercial property work, the note recorded that a paralegal would be assisting Ms Udalova-Surkova.

41. There followed on 9 March an email exchange between Ms Udalova-Surkova and Mr McHale in which she asked: "Just to confirm, we are not interested in Raymond Levy, right?" and the reply was "Yep".

42. Having chased the respondent for a decision, Ms Udalova-Surkova emailed him on 12 March to say the respondent had decided not to offer him the job. She gave a number of reasons for the decision. She said the firm had assessed its requirements at the board meeting and that:

> "I regret to inform you that at this stage we would not require your services as we have decided to go for a 3-5 PQE solicitor to train ("mould") to our specific requirements."

43. She added that the firm's immediate needs were being met internally by "our usual locum", meaning the semi-retired solicitor. The email went on to express regret that there could have been many opportunities for both the claimant and Ms Udalova-Surkova, reflecting her interest in working together to develop work in London or with Russian clients. She concluded her email by saying:

> "… if I see it is the right time to move forward with a senior lawyer / consultant, I shall no doubt get in touch with you to check if you would be interested".

44. The respondent did not then re-advertise the vacancy at any level of seniority or experience.

45. In the period which followed, a few changes took place within the respondent firm. At the beginning of June 2018 Ms Udalova-Surkova was promoted to director and appointed as the firm's Compliance Officer for Legal Practice. At the same time, a paralegal who had worked previously in a different department was moved into the property team, partly to assist with commercial property work. On 7 June a new paralegal was appointed, an Israeli lawyer not qualified in England and Wales, to assist Mr Burke with the residential property work pending qualification as an English solicitor. All of this happened around 10 weeks after Ms Udalova-Surkova told the claimant the need for a commercial property solicitor was "fairly urgent".

46. The work that was intended to be covered by the appointment of a new experienced commercial property solicitor was carried out by Ms Udalova-Surkova with assistance from the solicitor in the Middleton office (a residential conveyancing solicitor), and with some part-time help from the semi-retired solicitor and some unqualified staff.

47. At the time of the claimant's application for the vacancy, he was a 57 year old solicitor who had qualified after completing his law degree and two year training contract. He had no career break. The claimant produced information he had obtained from the Solicitors Regulation Authority (SRA) showing the age breakdown of those admitted to the profession from 1985 (when he qualified) to 2015. The data demonstrated that, of the solicitors who were admitted to the Roll in 1985:

a. 0.8% were under 24 years old

b. 82.9% were 24 to 29

c. 10.6% were 30 to 34

d. 3.9% were 35 to 39

e. 1.5% were 40 to 44

f. 0.6% were 45 to 49

g. 0.3% were 50 and over

h. 0.3% were unknown

48. Although the respondent sought to challenge the picture presented by the statistics, arguing that the figures might be distorted, for example, by women taking career breaks for family reasons, it did so without producing any evidence. The Tribunal accepted the SRA statistics as being accurate on their face, and accepted the claimant's assertion that the vast majority of solicitors tend to qualify at the same age, fairly seamlessly after their academic studies and training contracts. On this basis, the claimant's age at the later stages of his career would be broadly commensurate with his peers.

49. Using the same SRA data, it was also possible to determine the likely ages of the solicitors admitted to the Roll in less than 5 years before March 2018 when the respondent said it intended to recruit a 3-5 PQE solicitor. Solicitors admitted in 2013 comprised the following age groups:

a. 0.1% were under 24 years old

b. 70.9% were 24 to 29

c. 16.6% were 30 to 34

d. 6.2% were 35 to 39

e. 3.0% were 40 to 44

f. 1.9% were 45 to 49

g. 1.4% were 50 and over

50. For those who qualified more recently, in 2015, and who had three years' PQE, the vast majority (73.3%) were 24 to 29 years old, with 17.3% being age 30 to 34. The remaining age groups were similarly underrepresented as for 1985 and 2013, with only 0.9% of solicitors over 50 being admitted in 2013.

51. The statistics demonstrated that the age group in which the claimant belonged represented 82.9% of solicitors entering the profession when he did. By the time the respondent was recruiting in 2018, he was part of a tiny percentage (less than 1.4%) of solicitors who were over 50. By comparison, over 87% of the solicitors who met

the criterion of 5+ years' PQE in 2018 were in the age group 24 to 34. If a 3 year PQE criterion were applied, then the majority group in the 24 to 34 age range represented over 90% of all solicitors at the time.

Conclusions

52. The facts which formed the basis for this claim were barely in dispute. In summary: at the age of 57 the claimant applied for a vacancy as an experienced commercial property solicitor, he was the only candidate who applied, he was interviewed, and he was not then offered the position.

53. The Tribunal found proved primary facts from which it could infer that the claimant's age was the reason or principal reason for the decision not to appoint him. The respondent advertised for an experienced solicitor with 5+ years' PQE, at a time when Ms Udalova-Surkova considered herself to be in urgent need of assistance following the departure of an experienced commercial property solicitor. She was in the middle of working on a large and complex commercial property transaction and was looking to develop more work from London clients. She was satisfied that the claimant had the requisite skills and experience for the role, and she expected the start date to be within days of the interview.

54. When rejecting the claimant's application by the email of 12 March 2018, the respondent told him that it "had decided to go for a 3-5 year PQE solicitor" instead. This was also the respondent's stated position at the time of the preliminary hearing. The only reason for the decision which was noted by the respondent at the 8 March board meeting was that it felt the claimant was "expensive" and "doesn't cover all our needs".

55. The claimant's remark about poisoning may not have endeared the claimant to Ms Udalova-Surkova, but it did not represent an obstacle to the claimant's appointment as her subsequent actions were inconsistent with such a view. We were satisfied that, notwithstanding the note about not covering all the firm's needs, she conveyed to her colleagues at the board meeting that the claimant had the necessary skills and experience.

56. Having made our findings of fact, it was important to examine carefully the respondent's explanations for not appointing the claimant. The Tribunal took time to consider that evidence in detail and also reviewed what the respondent had said at the various stages of the case, from its initial response, to the representations made at the preliminary hearing in August 2018, and finally (and most importantly) what was said in the written and oral evidence put before the Tribunal.

57. In its response the respondent said the advertisement for a 5+ PQE solicitor was to test the market and enable it to decide whether to go ahead with provisional plans to recruit. The 8 March board meeting was described as "detailed discussions" about reorganisation and budget, though this description was at odds with the limited and extremely abbreviated notes produced to the Tribunal. Whatever else was discussed at that meeting, the notes gave no indication that the claimant's application was given any real attention. Rather, the note made by Ms Udalova-Surkova said simply that he was "expensive" and "doesn't cover all our needs". This suggested a cursory knee-jerk reaction to the salary expectations which Ms Udalova-

Surkova had incorrectly told her colleagues to be £50-60,000, when the reality was that the claimant was willing to accept "around £50,000", or something in the region of what the departing associate solicitor had been paid (around £42,000).

58. As noted in the introduction to this judgment, the response expressed some concern about the claimant's remark about poisoning, as if to suggest that the comment had factored in the respondent's reasons for not making an offer, but then the respondent explicitly pleaded the contrary:

> "… though there were some concerns around his behaviour at the interview, [Ms Udalova-Surkova] was happy that he appeared to have the skills and expertise required to be a senior hire …"

59. The respondent's pleading said its decision was based on the fact that a senior solicitor would command a higher salary, consistent with its note that the claimant was "expensive". It said the firm decided it no longer required a "senior hire", that it intended to monitor the situation and would then consider a "junior hire".

60. The response made no mention of the departure of the associate solicitor nor to the volume of urgent or complex work that was being carried out at the time of the advertisement, despite the urgency this had created in the mind of Ms Udalova-Surkova. The response also made no mention of the respondent deciding that the work could be covered internally. On the contrary, it stated that the respondent would, after a period of monitoring, consider a "junior hire" to assist the senior team.

61. At the preliminary hearing on 18 August 2018 the respondent's representative said it had simply changed its mind by deciding the firm needed a 3-5 PQE solicitor instead of a more experienced 5+ PQE person. That explanation was consistent with the message to the claimant in the rejection email of 12 March. He explicitly stated on the respondent's behalf, as recorded in Judge Slater's notes, that the reason the respondent did not employ the claimant was nothing to do with his remark before the interview.

62. Our conclusion on content of the respondent's note of the 8 March meeting – that the claimant did "not cover all our needs" – was that this did not represent a reason (or not the principal reason) for not appointing the claimant. There had been no discussion at interview about his ability or willingness to cover other areas of work, such as residential property. The Tribunal's conclusion is that the claimant's capabilities and experience were not in fact in issue, and he would have been a suitable replacement for the experienced associate solicitor who had until recently been assisting Ms Udalova-Surkova. The redistribution of the property work within the firm, utilising staff who were either inexperienced in commercial property work or even unqualified, did not in our view fill the gap for which the respondent advertised. The fact that the respondent chose to embark on this course was equally consistent with it taking steps to manage the consequences of not appointing the claimant. The need for assistance with commercial property work had not disappeared, but the respondent made up its mind that the claimant would not be the person to provide it. The exchange email between Mr McHale and Ms Udalova-Surkova on 9 March 2018, when he confirmed her understanding that the respondent was "not interested in" the claimant, was targeted at him personally and was not framed in terms of

confirming a decision not to hire anybody, or to deal with the job vacancy in some other way.

63. The Tribunal also reviewed carefully the respondent's witness evidence to understand what explanation was relied on for not hiring the claimant. Mr McHale and Ms Udalova-Surkova signed pre-prepared written statements which were tested on cross-examination. In summary, Mr McHale said that the firm did not want to recruit from a pool of one, suggesting there might be concerns about not testing the quality of the claimant as a candidate. He said it was felt to be worth using existing resources and perhaps bringing in a less senior person before going on to review the position. He said the respondent was very mindful that a more junior person would command a lower salary. He did not suggest (nor did any other evidence produced by the respondent) that the claimant's CV or his merits as a candidate were considered.

64. Ms Udalova-Surkova in her written statement said that the respondent's directors had decided in advance of the 8 March meeting to utilise the existing workforce, and they also wanted to see an increase in the billing of the solicitor in Middleton. She said that at the board meeting there was a discussion about using the semi-retired solicitor to assist her, and they looked into getting support from a paralegal and/or a trainee. She said that to assist Mr Burke on the residential property side of the work they would re-list the vacancy for a 3-5 PQE solicitor, again broadly consistent with what the claimant was told at the time. On this account, it was not a decision to abandon plans to recruit, but rather to go ahead and recruit a less experienced solicitor.

65. In her oral evidence, Ms Udalova-Surkova said she felt the claimant had very good experience but she had reservations about whether he would be a good fit within the firm. She related this to the 'poisoning' comment which she perceived might cause problems with Russian clients. She also reiterated what she said in her note of the 8 March meeting, that the claimant did not cover all the firm's needs. When asked what this meant, she said he could not help with residential property work, so "we had no choice but to find another solicitor". That again suggested that the firm was not deciding not to recruit at all; but was in fact deciding to recruit somebody other than the claimant. Had the successful candidate been required to help with residential property work, the respondent could and would have asked the claimant if he could do so. It did not.

66. When asked to explain what experience the claimant was lacking, such that he could not cover all the firm's needs, Ms Udalova-Surkova said the firm required one solicitor to provide cover for two fee earners, meaning herself and Mr Burke. She felt the claimant's involvement with residential property work was "not very profound" and those skills were "not as vivid" as his commercial property skills. She conceded that she had not asked the claimant any questions at interview about his experience of residential property work.

67. Another reason for the decision was provided in Ms Udalova-Surkova's oral evidence: she said that at the salary level which the claimant required, it did not make commercial sense to hire him because the firm would then have needed to hire another solicitor to support Mr Burke with residential property work. This was inconsistent with the evidence that the respondent initially set out to appoint two

property solicitors. She said the decision was based on the salary figure mentioned by the claimant, and that it was a commercial decision. She further conceded that the respondent at no point went back to the claimant to ask whether his figures were negotiable, or whether he would work for less, something which Mr McHale in his evidence accepted is not an unusual outcome where a person might take less than market rates.

68. Ms Udalova-Surkova said in her oral evidence that on 8 March a decision was made to take a different route by utilising existing staff, but no mention of this was made in the notes of that meeting, and it contradicted the evidence that the respondent would be looking to recruit a more junior solicitor. She said that by the end of the board meeting, the senior solicitor role had simply ceased to exist, but went on to add a new reason for why the claimant was not being offered the job, namely that he was not suitable. When asked to explain this Ms Udalova-Surkova referred to the claimant's comment in the reception area, again contradicting other evidence of the respondent's stance. When asked whether cost was the barrier to the claimant's appointment Ms Udalova-Surkova confirmed that it was. She said that if the claimant had mentioned a figure of £42,000 (the former associate solicitor's salary), "our position would potentially have been slightly different". However, the salary figures mentioned by the claimant had come as no surprise to her or to Mr McHale. His evidence was that he would expect a senior hire at this level (5+ PQE) to attract a salary of £50-£60,000. Furthermore, the respondent knew the claimant had offered a figure by reference to the former associate's salary, and it took no steps to revert to him with a view to negotiating the salary further.

69. A final and quite different reason for the decision was mentioned by Ms Udalova-Surkova at the very end of her questioning by the Tribunal. She said she had discussed with Mr McHale the claimant's CV and his track record, which showed that he had worked in many different jobs. She said Mr McHale agreed that her doubts about his suitability on those grounds were valid. However, the Tribunal was unimpressed by this evidence as that reason had never reared its head prior to that very late stage in her oral evidence. It was not referred to in Mr McHale's witness statement at all. We did not accept that any such consideration of the claimant's CV took place.

70. In Mr McHale's oral evidence he acknowledged that an experienced person might well take a lower salary than market rates. The claimant was never asked if he was prepared to do that. He was unemployed at the time and highly likely to have been flexible about salary. When asked the direct question, "Why was I not offered the job?" during cross-examination, Mr McHale gave an extremely lengthy and somewhat convoluted response. He began by saying it was a long and complicated answer and talked in very broad terms about management style and the decision-making process. He said that Ms Udalova-Surkova's perception of the volume of work was simply wrong and it was "wrongheaded" to go out to advertise, even though he was aware that she was going to do that, and the Practice Manager had been asked to make those arrangements. In continuing his answer to this question Mr McHale referred to the fact that the firm already had resources in-house, which raised the question why an expensive advertisement was placed at all. He said he was not sure that the claimant's merits as an applicant were even discussed, though he did later concede in answer to the Tribunal's questions that in a brief conversation with Ms Udalova-Surkova, she had told him she had no doubts at all about the

claimant's capability. The accounts given by the respondent's witnesses were therefore inconsistent and in some respects directly contradictory with each other or with their documents.

71. On the question whether a clear decision was reached as an outcome of the board meeting on 8 March Mr McHale was ambiguous. On the one hand he felt there was a very clear outcome, which he expressed as: "We can cover this work internally and we don't need to appoint anybody", but then he said Ms Udalova-Surkova may have left the meeting thinking she would be recruiting someone "different". He defined "different" as "cheaper". Mr McHale also acknowledged that from the perspective of Ms Udalova-Surkova, things were "still on the table" after the meeting, which is at odds with the notion that a clear decision was made.

72. When asked about hiring a 3-5 PQE solicitor who could be "moulded", as Ms Udalova-Surkova had put it in her email to the claimant, Mr McHale said that that part of her email was "not true" and that was "not what happened". He described her email as "regrettable and unnecessary" and attributed the content, as she did herself, to a desire to be polite to the claimant. When asked about the reason for the decision being that the claimant was "expensive", Mr McHale took issue with the idea that this was synonymous with a solicitor who was senior and therefore older. He said that expense is a major part of any commercial decision. He said the intention when the process had started was to recruit a safe pair of hands to do the work in the office while Ms Udalova-Surkova was in London developing new work, but he had no discussion with her about how long the firm was prepared to invest in that sort of arrangement to allow time for a pipeline of new work to be developed. When asked about this Mr McHale said, "Well we would have known [the position] and we did know within several months", meaning that the anticipated and hoped-for work did not materialise. However, at the time the respondent made its decision it did not have this knowledge. It was in fact aware that the claimant was prepared to work on an interim basis and therefore had no fixed idea that the job would be open-ended or long term.

73. We were satisfied that the burden of proof did shift to the respondent because the primary facts were sufficient to allow us to infer that age discrimination could have taken place. It was important that we heard a credible, coherent and consistent explanation for the respondent's decision, but we did not. Having examined carefully the respondent's explanations for not offering the job to the claimant, the Tribunal found them seriously wanting. We were satisfied that the reason why the claimant was not offered the position was that he was considered "expensive" and that this was indeed synonymous with his being an experienced and older solicitor. At the age of 57 he was in a tiny minority of solicitors even within the original field of 5+ PQE candidates. We were satisfied that his age was the reason for the decision not to offer him the position because as a candidate he was simply written off as "expensive", in favour of a more junior solicitor. An intention possibly to recruit a 3-5 PQE solicitor was replaced by a decision to cover the work with junior or unqualified members of staff, undoubtedly also at much lower salaries. No effort was made to negotiate pay with the claimant but instead the respondent leapt to a conclusion which was inextricably linked to his age and therefore directly discriminatory contrary to sections 13 and 39(1)(c) of the Act. In the rejection email the respondent explicitly told the claimant that it would be seeking a 3-5 PQE solicitor and that it would keep him in mind if they should have a need for a "senior lawyer" in the future.

74. Having evaluated the evidence as a whole, and Mr McHale's evidence in particular, the Tribunal felt that the respondent firm has little understanding and awareness of discrimination legislation, despite its clumsily-worded commitment in the handbook to "actively support … discrimination legislation". The lack of formal training in diversity and equality issues was apparent from the respondent's complacency, and its aggressive defence of this claim was wholly at odds with its self-imposed commitment in the handbook to take such complaints seriously. The continued threats to report the claimant to the SRA were revealing of an employer which is impervious to the possibility that it may have discriminated, even without appreciating that it had done so.

75. We did not consider that the respondent's decision was a proportionate means of achieving any legitimate aim, not least because it was clear from the context that the claimant was flexible about salary and the duration of the job, offering also to work on a self-employed basis, yet he was not even invited to negotiate. In the course of this hearing the respondent attempted in its evidence to explain what legitimate aim it was pursuing, but did so only in very broad terms about the commercial aspects of running a law firm. While we may accept that it is legitimate to appoint a solicitor whose experience and salary expectations match the commercial needs of the firm, in keeping with considerations such as workload and billing targets, the refusal to offer the claimant the job in this case was quite disproportionate. Rather than keep an open mind and negotiate terms with the claimant, the respondent instead deprived him of an opportunity to obtain work at a time when he was unemployed and receptive to discussing the salary level.

76. Having found that the direct discrimination claim succeeds, it is not necessary for the Tribunal to deal in detail with the alternative claim for indirect discrimination. We accepted the respondent's submission that the same set of facts could not amount to a successful claim on both grounds. Although we did not have to decide formally whether the section 19 claim succeeded, we considered where our decision might have led had we been required to make a judgment on that claim. We were satisfied that if we were wrong in our conclusion that this was an act of direct discrimination, the claim for indirect discrimination would have succeeded. In brief, our reasons are as follows.

77. The respondent's decision not to offer the claimant the job was communicated to him in the respondent's email dated 12 March 2018, in which stated it had decided to seek a junior solicitor with 3-5 years' PQE. At the point of rejecting the claimant because of his age, the respondent applied to him a criterion in respect of any future application, namely that the successful candidate should have no more than 5 years' PQE. That was a PCP for the purposes of engaging an indirect discrimination claim under section 19 of the Act, and the criterion was one which the claimant and others in his age group could not comply. In practice a person with 3-5 years' PQE was overwhelmingly likely to belong to a younger age group. According to the SRA statistics, the vast majority of solicitors who could meet that criterion would be under the age of 35.

78. It was manifestly obvious at the time that the claimant was excluded from that opportunity by virtue of his age, and the respondent would have known that because it went hand in hand with the decision to reject his application at a "senior" level. The claimant was therefore subjected to a substantial disadvantage as an older

candidate, and we accepted that the vast majority of solicitors aged 39 and over would be similarly excluded. There might well be exceptions to the usual career paths, for example with a few older entrants coming into the profession after another career, or with solicitors who have taken career breaks. However, we heard no evidence from the respondent other than anecdotal comments about one or two individuals, and no statistics were produced to contradict the SRA data, so as to suggest that the data led somehow to an odd result.

79. We were mindful of the fact that the respondent might in principle have had some good arguments to justify an act of indirect discrimination, and we considered all that we heard about the commercial realities of appointing solicitors and the need to balance this with the fees that the solicitor or the department of the firm is able to generate. These considerations might support the existence of a legitimate aim. Nevertheless, for the same reasons as we have given above in relation to the direct discrimination claim, on the facts of this case we would not have accepted that the respondent's decision was a proportionate means of achieving any such aim. We would be prepared to accept that the respondent's needs might have changed in the period following the recruitment exercise, once it became apparent (probably within a few months) that the hoped-for fee income was not being generated, but that was not the state of affairs at the time of these events.

80. In summary, the Tribunal's unanimous judgment is that the respondent directly discriminated against the claimant by not offering him the role of a commercial property solicitor on 12 March 2018. That was contrary to section 13 of the Equality Act 2010 in that the decision was taken because of his age. The claim for indirect discrimination under section 19 is dismissed as it was not necessary for us to formally make a decision on that.

81. A remedy hearing will take place to determine compensation.

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Employment Judge Langridge

16 January 2020

Date

REASONS SENT TO THE PARTIES ON

16 January 2020

FOR THE TRIBUNAL OFFICE

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