



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Z Kiani

**Respondents:** 1. Mr Ross Hill  
2. Essential Finance Group (UK) Limited

**Heard at:** Manchester **On:** 21 and 22 January 2020  
& in chambers on 6  
February 2020

**Before:** Employment Judge Ross  
Mr R W Harrison  
Mr S T Anslow

## REPRESENTATION:

**Claimant:** Mr Whalley, Legal Representative  
**Respondents:** Mr J Boyd of Counsel

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim that by not offering him employment, the first and second respondent discriminated against him because of age is not well founded and fails.
2. The claimant's claim for age related harassment against the the first and second respondent in relation to the alleged comments of Mr Hill that the claimant would not fit in as he would have a 24-year-old on one side of him and a "jack-the-lad" on the other and the fact that at the age of mid 30s a person's energy is gone and pointed out that the claimant was 41, is not well founded and fails.
3. The claimant's claim of indirect age discrimination where he alleged the respondent applied a provision criteria or practice of (1) recruiting only workers of a more junior level of seniority (2) recruiting only workers who were under 40 years old and (3) recruiting only workers who were in the early stages of their career, is not well founded and fails.

# REASONS

1. The claimant applied for a job with the second respondent as a Business Protection Adviser. He was interviewed by Mr Hill and was unsuccessful.
2. The claimant alleged, and the respondents disputed, that Mr Hill made some comments suggesting that the claimant would not be suitable for the role due to his age.
3. The complaints and issues were identified by Employment Judge Slater at a case management hearing on 19 September 2019, and it was agreed at the outset of the hearing that these were the relevant issues in this case.

## **Direct age discrimination – s.13 and s.39 Equality Act 2010**

4. By not offering the claimant employment, did the respondent treat the claimant less favourably than it would have treated others in the same material circumstances? The claimant relies on a hypothetical comparator.
5. If so, was this less favourable treatment because of age.

## **Harassment related to age**

6. Did Ross Hill make the comments that the claimant would not fit in as he would have a 24 year old on one side of him and a “jack-the-lad” on the other and the fact that at the age of mid 30s a person’s energy is gone and pointed out that the claimant was 41?
7. If so, by making such comments, did the respondents engage in unwanted conduct?
8. Was the conduct related to age?
9. Did the conduct have the purpose or effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
10. Does the tribunal have jurisdiction to consider the complaint having regard to the relevant time limit?

**Indirect age discrimination**

11. The claimant relies on the following provisions, criteria or practice "(PCP)", which are limited to recruitment to this role in this particular recruitment round:
12. Recruiting only workers of a more junior level of seniority.
13. Recruiting only workers who were under 40 years old.
14. Recruiting only workers who were in the early stages of their career.
15. Do these constitute a "PCP"?
16. If so, did the respondent apply these PCPs to people not of the claimant's age group i.e. those under 40?
17. Did the PCP put people of age 40 and over at a particular disadvantage compared with people under age 40?
18. Did the PCP put the claimant at that disadvantage?
19. At the outset of the hearing Mr Boyd for the respondent clarified that the respondent was not relying on the justification defence either for the direct age discrimination case or for the indirect age discrimination case.

**The Relevant Law**

20. For the direct discrimination claim the relevant law is s.13 (direct discrimination) and s39(1)(c) (not offering employment) Equality Act 2010. The burden of proof provisions at s136 Equality Act 2010 are relevant. The Tribunal reminded itself the established authorities demonstrate there is a two stage process in a direct discrimination case. We must consider whether the claimant can adduce facts which could suggest the reason for the treatment is discriminatory. If so the burden shifts to the respondent to show there is a non discriminatory reason for the treatment. These authorities include Igen Ltd v Wong 2005 3 ICR 931, Madarassy v Nomura International plc 2007 IRLR 246 and Efobi v Royal Mail Group Ltd 2019 2 All ER 917
21. The Tribunal reminded itself that a difference in treatment and a difference in protected characteristic are not sufficient to shift the burden of proof. There must be "something more". See Mummery LJ in Madarassy v Nomura International plc.
22. We also reminded ourselves that it is necessary to explore the alleged discriminator's mental processes. We took into account Lord Nicholl's guidance in that bias may be unconscious. See Nagarajan v London Regional Transport 1999 ICR 877.

23. For the harassment claim the relevant law is s26 Equality Act 2010. We reminded ourselves of the principle in *Richmond Pharmacology v Dhaliwal* 2009 ICR 724 EAT which gives guidance as how the “effect” test in s26(4) should be applied.

24. For the indirect discrimination claim the relevant law is s19 Equality Act 2010.

25. We remind ourselves that the purpose of the law of indirect discrimination in the words of Baroness Hale is: “an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic”. See *Chief Constable of West Yorkshire Police and anor v Homer* 2012 ICR 704, SC.

26. We have had regard to *Essop and ors v Home Office (UK Border Agency)* 2017 ICR 640, SC. We remind ourselves it is for the claimant to identify the PCP, to show it puts people of the claimant’s age group (over 40) at a particular disadvantage and that it put the claimant at that disadvantage.

27. It is then for the Respondent to show the treatment was a proportionate means of achieving a legitimate aim. However, in this case the respondent does not seek to rely on the justification defence.

## **Facts**

We find the following facts:

28. The role for which the claimant applied was a Business Protection Adviser for the respondent (see page 171).

29. The job was advertised (see pages 171-174) although the claimant had approached an agency and was put forward for the position by the agency. He did not see the advertisement at p171-4.

30. The Tribunal was not provided with the specification or competencies for the role but was informed by Mr Hill that in the online version at page 172 if a candidate clicked on “Business Protection Adviser” they would be taken through to a document which provided a job role specification. There was no copy of that document in the bundle. However, Mr Hill said that details of the role were given to the agency in the format of page 175. Although page 175 is dated June 2019 Mr Hill said it referred to the same role for which the claimant applied in January 2019. The claimant agreed.

31. There is no dispute the claimant had signed up with Platinum Recruitment Group, a recruitment agency (see page 177). Mr Hill explained that Platinum was their preferred agency supplier and they had a good relationship with that agency and had worked with them for approximately ten years. He said the agency had a good idea of the candidates the business wanted (see page 175). The claimant also referred to page 175 (see paragraph 2 of his statement).

32. The recruitment agency provided a CV based on instruction from the claimant (see pages 178-179).

33. It is not disputed that having viewed the CV provided by the agency Mr Hill made the annotations seen in black on page 178 and the claimant was invited for interview.

34. The claimant was invited and attended for interview on 22 January 2019. His invitation noted the interview time was "11-12(approximate)"

35. The claimant noted that "got there 10.30, finished 12.15". (See his feedback to Mr Huw Roberts from the agency immediately after the interview. p200)

36. We accept the evidence of Mr Hill that the process for candidates including the claimant was: the claimant attended the business and was then asked to complete an application form (see pages 180-182). After completing the form, the candidate was then asked to answer some questions entitled "recruitment tasks" (see pages 184-188). These were the scenario based questions. The final stage was the interview. The claimant was interviewed by Mr Hill. If the claimant was successful he would progress to a further interview with another manager, Sean(p200), Mr Hill's line manager who would decide whether the candidate could be recruited.

37. Mr Hill's evidence was that he looked at the claimant's application form and the responses to the recruitment tasks and then interviewed the claimant. There is a pro forma of interview questions at pages 189-191. Mr Hill confirmed that the notes on that pro forma are written by him in the course of the interview.

38. The claimant provided a notebook (the original was brought to the Employment Tribunal hearing). Part of the notebook had pages which were taped together and therefore sealed. The claimant offered to unseal those pages but given they had not been previously disclosed this was not required.

39. The claimant was inconsistent in his evidence as to when the notes in the notebook had been written.

40. Initially he said the entries at the back of the notebook had been written immediately after the interview had taken place once he was back in his car. However, later when it was pointed out to him that he referred to Huw of the agency (see page R11 for entry to Hugh in the midst of the entries) he suggested that he had been on the phone to Huw in his car and the entry might have been completed after that.

41. The respondent asked the claimant a number of questions in cross examination about the fact that some of the notes (R1-R9) were made in the front of the book and some were at the back and so were not in chronological order. The claimant said those entries in the front of the book were general notes that he made before the interview and the entries R10-R15 were made in the back of the notebook. The claimant said he is also an Urdu speaker and consistent with the

practice of that language he had written the interview related notes starting from the back of the book.

42. The Tribunal does not think anything turns on this explanation and attaches no significance as to where in the book the notes were written.

43. However the Tribunal is not satisfied the notes were made immediately after the interview and before the claimant spoke to the agency. Firstly, time was very short because the claimant himself says he spoke to Huw soon after the interview finished. Huw records the conversation taking place at 12.37.(p200) It seems unlikely the claimant could write all the notes in the back of the book in seven minutes. Secondly the reference to calling Huw is in the middle of the notes which suggests the notes could not have been written before the claimant spoke to Huw. Finally, later on in cross examination the claimant said he had made handwritten notes on pieces of paper which he had discarded and then later written up the notes in his notebook which again seems inconsistent with his original evidence that the notes in the notebook were made immediately after the interview.

44. The Tribunal finds there were other inconsistencies in the claimant's evidence.

45. We find that there is a discrepancy between the claimant's CV(p178) and his application form.(p180-181) His CV refers to his Education/Qualifications as "completed GVNQ in Art and Design" and "educated to GCSE level", whereas his application form which he completed on the day of the interview states, under name of school/college/university, "Manchester Metropolitan University 2001-2002 Bio Med Science Marketing Management" and then "Dewsbury Art College 1996-1998 Graphic and Product Design" and the grade is identified as "pass".

46. In his statement the claimant said within the interview he was asked:

“Mr Hill: Do you have any GCSEs?

Claimant: I have a few.

Mr Hill: When did you get them?

Claimant: A long time ago.

Mr Hill: Do you remember when?

Claimant: Over 20 years ago.

Mr Hill: Do you remember what year it was exactly?

Claimant: Early 90s so to be precise I was born in '77 so it was '93/94.”

47. The claimant said in answer to cross examination that this evidence was an exact verbatim exchange. However later he suggested in cross examination in answer to how he thought Mr Hill knew he was 41 the claimant said he was aged 41 in the conversation about GCSEs. He said he stated he was born in 1977 and was aged 41, which is not how the conversation was recalled in his statement.

48. The claimant also said in cross examination that he was “drilled so much in this question” in relation to GCSEs.

49. In answer to a question from Mr Harrison of the Tribunal when asked how long the discussion about GCSEs took, Mr Hill said it was a second or so and that there was no real discussion. He said he asked the question and got the answer and moved on.

50. On several occasions the claimant's representative asked Mr Hill why he had enquired about the claimant's GCSEs. The claimant's representative suggested it was to ascertain the claimant's age. Mr Hill said that was not right and he was not interested in the age of the claimant. He said the application form at page 181 had not been fully completed. It was incomplete because the claimant had not identified his school or his GCSEs. It was the inaccuracy and discrepancy between this document and the claimant's CV which Mr Hill said concerned him.

51. The Tribunal finds that that the exchange was in the nature of paragraph 6 of the claimant's written statement, save that the claimant also informed Mr Hill he was aged 41 as he conceded in cross examination. The Tribunal finds that is consistent with the evidence of Mr Hill that the exchange took no more than a few seconds.

52. The Tribunal finds the discrepancy between the CV and the application form and the failure of the claimant to fully complete the application form was the reason for the enquiry from Mr Hill about GCSEs. There is a clear inconsistency in the information provided in the two documents and the Tribunal finds an attention to detail was important in the role for which the claimant applied. (The role was an FCA regulated role). The Tribunal finds there was no further reference to the claimant's GCSEs in the interview.

53. We turn to page 183 which is the employer feedback of the interview to the recruitment agency. We rely on the evidence of Mr Hill when he was asked when he decided whether he would put the claimant through to the second round:

“I stepped outside the room after interview, I processed what I had written and decided within 15 minutes after he had left the building. I got back in touch with the agency within 24 hours.”

54. We find it is likely that the information at page 183 is the feedback to the agency. There Mr Hill stated:

“Candidate struggled to give context to the competency based questions. I don't believe the candidate would fit in and his skillset would not lend well to

the protection role. I am not convinced this customer [candidate] wants to work in the protection industry.”

55. The Tribunal finds that this feedback was given to the agency at the latest by 30 January 2019 because there is a note from the agency file on 30.1.19 “Huw phoned -calling to present feedback for Essential”.p200

56. The claimant's feedback to the agency is at page 200 on 22/1/19 at 12:37 very soon after he left the premises at 12.30pm

“Interview was good. It was with Ross. Got there 10.30, finished 12.15. Ross focussed on how I would fit into the business as energy levels are quite high within the business and it is an extremely fast paced role. Explained it wouldn't phase me. Like to keep fit and want to emulate that type of success. Also asked about not going into another management position. Explained to Ross wanted to secure position and also cash incentive. Felt he focussed a lot on pace of the environment and got a feeling he felt I was too old and would lack energy within the role. Explained the next step if successful would be to see Sean. Overall thoughts: it was something I have done previously in terms of sales and servicing clients. Company is great. Explained how it has grown from 14 people to over 60 staff now. Didn't manage to get to see the sales floor, was in one of the rooms on bottom floor. I believe I can do the job. Would definitely go back for a second.”

57. The claimant confirmed in evidence that this was the feedback which he gave to the agency.

58. The claimant made no mention to Huw Roberts of the agency of the remarks he now maintains were said by Mr Hill in the interview. The claimant's explanation for that was that “there was no point in kicking off with Huw. Try to remain professional with Huw. It was not good to give Huw abuse. He was trying to earn commission. I gave my feedback in an honest way but I couldn't tell Huw every negative thing”

59. The claimant agreed he was willing to return for a second interview despite the comments allegedly made by Mr Hill.

60. The Tribunal finds the claimant was inconsistent in other matters. At p201 on 2/2/19 the claimant said to Huw about his assumption he had not been successful: “In all fairness I am not surprised -they told me I was too old in the interview”. However, in his statement he does not suggest he was told he was too old in the interview. His suggestion is more subtle: he says Mr Hill asked about GCSEs to elicit his age and that a comment was made to the claimant in relation to younger workers. The Tribunal has found there was only a factual enquiry about GCSEs by Mr Hill and that was because of the discrepancy between the application form and CV, not because Mr Hill wanted to ascertain his age.

61. In his statement paragraph 5 the claimant says: “The majority of questions appeared designed to elicit my age”. We find that is inaccurate. We find the only



question which could elicit information about the claimant's age was when he was asked about his GCSEs.

62. We find the claimant was over confident about the interview. He said in cross examination that the interview was a "formality" and questions 1-5 "irrelevant". We find he had not prepared. The claimant agrees that he did not give any evidence to suggest at any stage that he was particularly suited for an FCA role. We find this is consistent with the claimant's perception that the interview should just be a "formality".

63. We find that during the course of the interview the claimant was asked about the reason he was leaving his current role (page 189) and he explained that his own business of which he was a director was being dissolved. We also find, and the claimant agreed, that there was a discussion (see page 189) about other roles the claimant had applied for and these included a management role (see Telesales Manager, Bolton).

64. The nature of the role for which the claimant was applying (a Protection Adviser – Life Insurance Broker role) was a sales role. It was not a management role. It was a job subject to management by others.

65. We find that when the claimant was asked, based on what he knew about the new role in comparison with his current role, "which part do you think you may find difficult?" (page 191), the claimant said there was nothing. We find that Mr Hill was concerned about this answer because it suggested the claimant was over confident about the role for which he was applying. We find that the claimant was asked, "how do you think the current skills you have can transfer to the role you are applying for?". Mr Hill noted down, "treat everyone like grandma, understand people". In his statement the claimant categorically stated he did not use the expression "treat everyone like grandma". However, in cross examination he conceded that it was part of a more detailed nuanced explanation and he did in fact use the words "treat everyone like grandma".

66. There was a dispute between the parties about figures given by the claimant in the interview although the claimant agreed that his current basic salary was £35,000 (page 189) in his own business.

67. We find there was a conversation between the parties about the claimant's skills. We find the claimant asked (see his paragraph 11) whether Mr Hill thought he would "fit in". We find there was a discussion about the claimant's previous roles where he had run his own business and held a management role. We find there was also a discussion, which the claimant agreed, as to whether the claimant might be more suited to a role which was not front facing and calling customers but instead was a "business to business role".

68. We find in the context of the conversation about the claimant's previous experience running his own business and his management experience Mr Hill replied to the claimant's enquiry as to whether he would fit in by saying that he may find he

would have a “24 year old on one side of him and a jack the lad on the other”. We find this remark was made in response to the claimant's own question as to whether or not he would fit in and in the context of a discussion about whether, given his recent experience of running his own business and the fact he was also applying for management position elsewhere, a direct sales job which was customer facing was the right fit for the claimant. We find this based on the claimant's recollection and both his feedback and Mr Hill's feedback to the agency very soon after the interview. Although Mr Hill did suggest to the agency the claimant would not fit in and explained why, we find Mr Hill did not expressly say to the claimant at the interview that he would not fit in.

69. We rely on Mr Hill's feedback that the claimant “struggled to give context to the competency based questions”. He also stated: “I don't believe the candidate would fit in and his skillset would not lend well to the protection role. I am not convinced this customer [candidate] wants to work in the position”.

70. We find that the claimant had given very limited answers to the questions posed by Mr Hill. We find this is consistent with his own evidence that he thought the interview was just a formality. He agrees he did not give any direct evidence as to his previous experience of an FCA role.

71. There is no dispute that Mr Hill found that the claimant was not suitable and did not put him forward for a second interview, which was the next stage of the process.

## **Application of the Law to the Facts**

### **Direct age discrimination**

72. We turn to consider the first claim: direct age discrimination (section 13 and section 39 Equality Act 2010). We ask ourselves: did the claimant adduce facts which could suggest that the respondent treated the claimant less favourably than it would have treated a hypothetical comparator in the same set of material circumstances by not offering the claimant employment?

73. We remind ourselves that it is not sufficient to adduce a difference in treatment and a difference in protected characteristic to suggest discriminatory treatment in order to shift the burden of proof. We remind ourselves we must examine the mind of the decision maker, Mr Hill, for conscious or unconscious bias. We remind ourselves that there is rarely direct evidence of discrimination.

74. The only evidence the Tribunal has found during the course of the interview which could suggest discriminatory treatment is the reference to the comment that in the context of a discussion about the claimant fitting in he may “have a 24 year old on one side of him and a “jack the lad” on the other”. Although the Tribunal has found the claimant was an inconsistent witness, the Tribunal find that it is likely that the claimant's recollection is correct on this point. The Tribunal finds it plausible these words were spoken by Mr Hill in the context of a discussion about the

suitability of the claimant for a sales role when the claimant had previous management experience and his most recent experience was of running his own business.

75. Mr Hill's evidence on the words "he would have a 24-year-old on one side of him and a "jack the lad" on the other" was inconsistent in his statement and in cross examination. He stated both that he could not recall making the remarks and then said categorically he did not make the remarks.

76. Accordingly the Tribunal finds the words he may have a "24 year old on one side of him and a "jack the lad" on the other were spoken by Mr Hill. These words relate to a person who is young. Someone who is 24 is young in the workplace and "lad" refers to a young man. The Tribunal relies on this information to shift the burden of proof. For the avoidance of doubt, the Tribunal is not satisfied that the claimant stating he was aged 41 in reference to a legitimate question about his GCSEs where there was a discrepancy between his CV and the application form is sufficient to shift the burden of proof.

77. Having determined the burden of proof has shifted the Tribunal must consider whether the respondent can adduce a non-discriminatory explanation for the failure to offer the claimant employment.

78. Firstly, the Tribunal finds that Mr Hill was not in a position to offer the claimant employment in any event. He was simply the first stage interviewer. If the claimant had been successful in the interview with Mr Hill he would be passed through to a second interviewer.

79. The Tribunal turns to consider whether Mr Hill's decision not to progress the claimant to a second interview was discriminatory.

80. The Tribunal finds that the real reason the claimant was not progressed to a second interview was because he did not perform well in the interview with Mr Hill. The claimant even now suggests he thought the interview was a "formality" and questions 1-5 were "irrelevant". He agrees that he did not provide evidence of why he was particularly suited to this role. The claimant appears to have assumed because he had run his own business and had completed selling roles in the past that he was a suitable candidate for a role of this type. The Tribunal finds the real reason the claimant was not successful was because he struggled to respond adequately to the competency based questions, was not fully prepared and therefore did not seem well suited to this particular role. The Tribunal finds there was a non-discriminatory explanation for the treatment. The Tribunal is satisfied that a hypothetical comparator in the same circumstances as the claimant would have been treated in the same way.

81. Accordingly the claimant's claim fails.

**Harassment related to age**

82. The Tribunal turns to the first issue: did Mr Hill make the comments that the claimant would not fit in as he would have a 24-year-old on one side of him and a jack the lad on the other.

83. The Tribunal finds that these remarks were made although Mr Hill did not expressly state that the claimant would not fit in. We rely on our finding of fact that the conversation was in the context of a question raised by the claimant about whether he would fit in. The Tribunal is not satisfied that Mr Hill expressly said that the claimant would not fit in. Our reasoning for this is that we find it is unlikely that an experienced interviewer interviewing a candidate for a post would be so candid. We find it much more plausible that Mr Hill only told the agency the claimant would not fit in and for the reasons he noted.p187.

84. Having found the remarks were made in the context of the discussion about the claimant's previous role we turn to the second question: was the conduct unwanted?

85. The Tribunal is prepared to make a finding that it is unwanted because the claimant says now that it was. However, the Tribunal notes that the claimant at the time told Huw of the agency that "would definitely go back for a second" interview. It is difficult to reconcile what the claimant says now, that the comments were unwanted, with his willingness to attend a second interview.

86. However, taking the claimant at his word that the comments were unwanted and noting that the claimant had "got a feeling" Mr Hill felt he was too old (page 200), the Tribunal moves to the next question: was the conduct related to age? There is no doubt that a reference to "a 24-year-old on one side of him" is a reference to age. The comment "jack the lad" is more ambiguous. The Tribunal found that for many people the reference to a "jack the lad" is a reference to a personality type rather than a person of a particular age. Nevertheless, the Tribunal notes that the word "lad" is frequently used to mean a young man, so taking the comments together the Tribunal is satisfied that the comments were related to age because they relate to a young man.

87. The Tribunal turns to the next part of the test: did the conduct have the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

88. The Tribunal is satisfied that Mr Hill, who cannot clearly remember making the comments in any event, did not have any intention to harass the claimant.

89. The Tribunal therefore turns to the second part of the test: did the unwanted conduct have the effect of violating the claimant's dignity or of creating an

intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

90. The Tribunal reminds itself that in considering this part of the test the Tribunal must have regard to the claimant's perception, whether it was reasonable for the conduct to have that effect and all the circumstances of the case.

91. The Tribunal reminds itself that at the time, although the claimant "had a feeling" that the respondent thought he was too old for the role he did not report the remarks which he now says were offensive to the agency. Indeed he was willing to return for a second interview which seems inconsistent with the finding that he found Mr Hill had created an intimidating, hostile, degrading, humiliating or offensive environment for him.

92. The Tribunal reminds itself of the guidance in **Richmond Pharmacology v Dhalilwal [2009] ICR 724** that it is important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.

93. The Tribunal reminds itself of the context of the conversation where the "24-year-old" and "jack the lad" comments were made. We find the claimant had initiated the discussion by asking if he would fit in. We find it had followed from a discussion about the claimant's immediate previous role, which was running his own business, and also his management experience, that he was looking elsewhere for a manager's role and that he might be more suited to a business to business role rather than a sales role on the telephone direct to customers.

94. When asked by the respondent's counsel whether he was disgusted by the comments "jack the lad" and "24-year-old", the claimant replied, "I have forgotten how I felt". He then went on to say that he was unimpressed by the comment.

95. Taking the circumstances into account, the claimant's perception at the time (he did not complain to the agency and was willing to go back for a second interview and said the interview was "good"), the context of the conversation and the claimant's comment that he had forgotten how the comment made him feel and that he was "unimpressed" by it, Tribunal finds it was not reasonable for the conduct to have the proscribed effect.

96. The Tribunal turns to the second part of the comment relied upon by the claimant that Mr Hill said: "that at the age of mid-thirties a person's energy has gone" and pointed out that the claimant was 41.

97. The Tribunal is not satisfied that this part of the claimant's recollection is accurate. The contemporaneous document provided by the claimant to the agency suggests there was a conversation about energy levels in relation to the business and the role(p200) but there is no suggestion that it was in the context of the claimant's age. We find the claimant has made the assumption that a reference to a fast-paced role is age related.

98. The feedback noted by Huw from the agency notes that Ross Hill said the claimant had “worked in roles that are at a slower pace than how Essentia works...believes he would be more suited to a B2B (business to business) role”. P206.

99. The Tribunal finds the remark “that at the age of mid-thirties a person’s energy has gone” and pointed out that the claimant was 41” was not said by Mr Hill. We rely on our finding that it was the claimant who said he was 41 in the context of the GCSE conversation, not Mr Hill. We rely on Mr Hill’s evidence that he himself is close in age to the claimant (aged 38), does not believe that a person’s energy is gone by mid 30s and his categoric denial that he said this. We find he did not make such a remark.

100. Therefore, having found this part of the comment was not said, it cannot amount to age related harassment.

101. Accordingly, the claimant's claim for age related harassment fails.

### **Indirect Age Discrimination**

102. The Tribunal turns to the first issue: what is the Provision Criteria or Practice “PCP”? The claimant relied on the following PCPs: (1) Recruiting only workers of a more junior level of seniority, (2) Recruiting only workers who were under 40 years old and (3) Recruiting only workers who were in the early stages of their career.

103. The Tribunal turns to the first PCP, “recruiting only workers of a more junior level of seniority”. It is not entirely clear what the claimant means by this. No evidence was adduced by the claimant to suggest that the respondent had a practice of recruiting only workers of a more junior level of seniority. The Tribunal did not have evidence of all the candidates who were interviewed at this stage. There was evidence of candidates who had progressed to a second round of interviews and then had been appointed, but they had not been interviewed by Mr Hill (see candidate AC at pages 220-234 and candidate AB at pages 235-249).

104. Without understanding precisely what is meant by “only recruiting workers of a more junior level of seniority” and without any evidence to show the respondent recruited only “workers of a junior level of seniority” the Tribunal finds the respondent did not apply this PCP.

105. The Tribunal turns to the second PCP: “recruiting only workers who were under 40 years old”.

106. The Tribunal finds that the respondent’s application form does not ask the age of a candidate. It might be possible to deduce the age of a candidate from the dates a candidate attended school or university but there was no evidence to suggest that the respondent applied such a PCP. The only evidence was from Mr Hill who said that within the sales team there was a wide range of ages including an individual in

their sixties. The Tribunal is not satisfied the respondent applied a PCP of recruiting only workers who were under 40 years old.

107. We turn to the third PCP: “recruiting only workers who were in the early stages of their career”.

108. Once again the Tribunal is struggling with the meaning of this PCP. “Early stages of career” is highly subjective, particularly in the present day where the working life of many people is long.

109. No evidence was adduced to show the respondent only recruited workers who were “in the early stages of their career”.

110. The Tribunal is not satisfied the respondent applied a PCP of “recruiting only workers in the early stages of their career”.

111. The Tribunal is not satisfied the respondent applied any of the PCPs and accordingly the claim for indirect age discrimination fails at this point.

112. For these reasons the claimant's claims fail.

Employment Judge Ross

Date: 25 February 2020

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON  
27 February 2020

FOR THE TRIBUNAL OFFICE

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