EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr N Clements		**(1) Guy's and St Thomas' NHS Foundation Trust**

Heard at: London South Employment Tribunal
On: 6, 7 and 8 November 2019
In chambers on 28 February 2020

Before: Employment Judge Hyams-Parish
Members: Mr P Adkin and Mrs N Christofi

Representation:
For the Claimant: In person
For the Respondent: Ms C Casserley (Counsel)

RESERVED JUDGMENT

The claim of direct age discrimination is well founded and succeeds.

The claim of direct sex discrimination is well founded and succeeds.

The claim of failing to make reasonable adjustments fails and is dismissed.

REASONS

Claim(s)

1. By a claim form presented to the Tribunal on 28 September 2018, the Claimant brings the following claims against the Respondent:

a. Direct age discrimination (S.13 Equality Act 2010 ("EQA"))

b. Direct sex discrimination (s.13 EQA)

c. Failure to make reasonable adjustments (s.21 EQA)

2. The claims arise out of two job applications made by the Claimant to the Respondent: one on 28 June 2018 for a Band 7 project manager role; the second on 19 July 2018, again for a project manager role, but at Band 8. The direct age and sex discrimination claims are made in respect of the Claimant's failure to secure the first role; the reasonable adjustments claim is made because he was not selected for an interview for the second role.

Legal issues

3. The legal issues and questions which we need to consider in order to determine the above claims are as follows:

Direct age and sex discrimination

a. Did the Respondent treat the Claimant less favourably than it did treat, or would treat, others?

   The alleged act of less favourable treatment is not being appointed to the Band 7 role he applied for. The Claimant relies on an actual comparator, referred to as KM below.

b. Was that less favourable treatment because of the Claimant's age and/or sex?

Failure to make reasonable adjustments

c. Did the Respondent apply a PCP to the Claimant?

d. Did that PCP place the Claimant at a substantial disadvantage compared to someone who is not disabled?

e. If there was a duty to make a reasonable adjustment, did the Respondent comply with that duty?

   The reasonable adjustment that was not made, and which the Claimant says should have been made, was to give the Claimant an interview for the Band 8 role pursuant to the Respondent's "two ticks" system.

Practical and preliminary matters

4. We heard evidence from the Claimant and five witnesses for the

Respondent:

a. Dr Paul Wallace ("PW") (Health Innovation Clinical Director Digital)

b. Mrs Jenny Thomas ("JT") (Programme Director)

c. Ms Anna King ("AK") (Commercial Director)

d. Mr Denis Duignan ("DD") (Head of Technology)

e. Dr Charlotte Lee ("CL") (Regional Lead, Digital Health London Accelerator).

5. During the hearing, we were referred to documents in two bundles: one provided by the Respondent extending to 360 pages; and a separate one from the Claimant extending to 154 pages.

6. At the beginning of the hearing the Claimant applied to add a claim of victimisation. We noted that there had been two case management hearings in this case, during which the claims and issues had been discussed and agreed. Having considered the application carefully, including reasons for making the application at this late stage, the prejudice to the Respondent, and the fact that the Claimant still had his other claims, the application was refused.

7. At the beginning of the second day, the Claimant applied to enter into evidence a note of a telephone conversation between him and CL which the Claimant referred to when cross examined on the first day of the hearing. We decided that the evidence should go into the bundle as it was clearly relevant to the issues in the case. Counsel for the Respondent was asked whether any application arose from our decision and she said that it did not, save that she would like to recall the Claimant to question him about the note. We agreed to this request.

Background findings of fact

8. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all the evidence given by witnesses during the hearing, together with the documents referred to. Only findings of fact relevant to the issues necessary for us to determine, have been made. It has therefore not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

9. The Respondent is an NHS trust providing community, acute and tertiary health care services in South London. It has two teaching hospitals: Guy's Hospital and St Thomas' Hospital. The Respondent also provides community care in health centres for residents of Lambeth and Southwark.

10. Although there had been reference during the hearing to a Second Respondent called the Health Innovation Network ("HIN"), HIN is not a separate legal entity. HIN is part of the Respondent and does not employ any of its own staff; staff employed to work for HIN are employees of the Respondent. It was agreed by Counsel for the Respondent that any liability pursuant to this claim will be that of the Respondent and therefore to the extent that HIN was ever a Respondent, we agreed that it should be removed.

11. HIN works across a huge range of health and care services to transform care in diabetes, musculoskeletal disease and healthy ageing and to accelerate digital health uptake into the NHS. It was not created by the trust but was set up by the government to connect NHS and academic organisations, local authorities, the third sector and industry; as such, it is able to share information in the hope that positive change may be facilitated across whole health and social care economies, with a clear focus on improving outcomes for patients.

12. The Claimant suffers from a condition called genetic haemochromatosis which causes iron overloading and is known to cause cancer, heart problems, including cardiomyopathy, joint pain and other chronic symptoms. The variant of the haemochromatosis suffered by the Claimant is recognized as the most severe according to the British Heart Foundation. It is accepted by the Respondent that the Claimant was at all material times a disabled person within the meaning of EQA.

13. The Claimant applied for a role within HIN as a Band 7 Project Manager ("PM"). The post was within a scheme known as Digital Health London Accelerator" often referred to as the "Accelerator". The aim of the scheme was to speed up the adoption of technology within the NHS in London. As such, the Accelerator team and the successful candidate for the PM position would be required to work with around 20 - 30 start-up companies and small to medium-sized enterprises and support them to develop and put in place new IT systems and processes to ease some of the pressures and challenges that face the NHS in the London area.

14. The successful candidate was required to work with and support JT with the day-to-day delivery of the Accelerator programme. However, we find that the role would also have involved the Claimant working closely with, and reporting to, CL.

15. When the Claimant applied for the position, he disclosed his disability. The Respondent operates the "two ticks" or "Guaranteed Interview" scheme which guarantees an interview to a disabled person if the minimum criteria are met on the person specification.

16. The Claimant was shortlisted and invited for interview under the Respondent's two ticks policy on 18 July 2018. Four other candidates were

also invited for interview including the comparator in this case, KM, a female in her mid-twenties.

17. All five applicants were interviewed on the same day by a panel consisting of CL, PW and JT. JT chaired the panel.

18. CL had recently started working for the Respondent and had not been involved in interviewing before. She had not received the interview training by the Respondent at the point that she and other members of the panel interviewed the Claimant.

19. The Claimant's interview was held from 11.30am and 12.15 whilst KM's interview was held from 10.30am to 11.15am. These were the scheduled timings and we have no reason to believe the actual times did not broadly follow those timings.

20. As part of the interview process the candidates were required to deliver a presentation. They were given the following instructions:

> ***Please deliver a seven-minute presentation on "How will you support the accelerator team to achieve the following:***
>
> ***(1) Happy accelerator team***
>
> ***(2) Happy SMEs***
>
> ***(3) Happy partners, funders & of course London's NHS***
>
> ***(No slides required).***
>
> ***Points awarded for original, fun yet thoughtful and punchy presentations.***
>
> ***After the interview there will be an opportunity to meet members of the digital health London accelerator team.***

21. The Claimant gave his presentation using visual aids including a Minion backpack given to him by his daughter out of which he used objects to illustrate the talk. During his evidence the Claimant explained that Minions were playful, servile, cartoon film characters associated with a soundtrack of the song "happy" by Pharrell Williams.

22. During their questioning of the Claimant, we find that the panel sought to establish the Claimant's willingness to work for others that were younger than him and perform more menial tasks. PW referred to it as a willingness to "muck in" and "*roll up his sleeves*". To this end, the Claimant was asked during his presentation "*will you be a minion*" which the Claimant invited us to interpret as meaning whether the Claimant would be willing to "*do mundane tasks*" or be "*a servile follower or subordinate of a person in power*".

23. Following the interview, the candidates were taken to meet other members of the team. We find that there was no consistency in terms of who met who and therefore there were people who met KM who did not meet the Claimant.

24. The Claimant finished his interview at 12.15 and it was therefore approaching lunch time. The timing is relevant because the Claimant says that when he was taken to meet other members of the team, there were a number of people eating lunch, including two female members of the team, Rose and Augusta, who the Claimant described as more concerned with eating their lunch than talking to the Claimant. The Claimant had another interview at 1pm and accepted that he had limited time to spend with the team. The Claimant spoke briefly with Augusta and Rose and had a longer conversation with a male member of the team called Tom.

25. The Respondent witnesses said that the Claimant was disinterested in meeting the team; we find that it was less about being disinterested and more about the Claimant having arranged, and needing to attend, another interview at 1pm, as he had travelled down to London and wanted to fit in another interview whilst he was in town. Importantly, we find that the Claimant was not told that these informal meetings played any part in the selection process and he was not told that the employees he met informally would be providing their feedback to the interview panel.

26. The panel met together after the final interview to discuss and score the candidates. They concluded that the best performing of the five candidates were the Claimant and KM. The final decision therefore became a decision between the Claimant and KM. Both were scored as follows, the maximum score for each member of the panel being 35:

Interviewer	Claimant	KM
JT	25	28
PW	26.5	23
CL	30	29
TOTAL	**81.5**	**80**

27. The scores for PW in respect of KM could not be found but it was clear from the evidence before us that PW scored the Claimant higher than KM. We therefore accept that the highest score that could have been awarded to KM in these circumstances was 29 although of course it could have been lower. Totalling the scores resulted in the Claimant being given the highest overall score. We also noted that two out of three of the panel preferred the Claimant based on the above scores.

28. After all of the interviews and informal meetings had finished, the panel discussed the candidates. At this point it was clear that the two top scoring candidates were KM and the Claimant. There then followed a process

during which, notwithstanding the Claimant had been given a higher score by two out of three of the panel, they proceeded to discuss who to select on the basis, it would appear from the evidence, to be the "*best fit*". The Respondent witnesses described this as a process of "*moderation*" but what was clear to us was that there was little that was scientific about the process. The panel did not go back to the scores and discuss whether the scores were correct or whether any of them needed to be adjusted. At the end of the process, the Claimant still had the highest score.

29. An important feature of this case was what role the informal meetings played in the process. The Respondent witnesses described it as a "*sense check*". We concluded that the comments played a more important part in the process than had been suggested by witnesses for the Respondent. Their comments were noted on the interview sheets for CL and JT. The Claimant contends that they were pivotal in the final assessment. We would not go so far as saying they were pivotal, but they were influential.

30. As part of an investigation into a complaint brought by the Claimant, set out in a letter dated 8 August 2018, following the rejection of his application, JT, PW and CL were interviewed by Catherine Dale. We found these notes very illuminating in terms of describing the process followed. JT said that following the interviews, KM was the strongest candidate, but she wanted to sense check with the team. CL was less clear in her notes that a decision had actually been made prior to PW leaving the meeting. She told Ms Dale that at the end of the interview the panel discussed the candidates with the rest of the team and discussion centred on whether the Claimant or KM "were a better fit". Ms Dale then wrote as follows "*CL explained that they got the views of the rest of the team. She thought they allowed each person to select their top two candidates and she and Jenny tallied the results and that KM came out strongest, but it was a very close call*". PW told Ms Dale that at the point he left the meeting "a decision about who to appoint had not been made". He then said, "*there was no obvious consensus from the panel, so the team's views would need to be taken into account". Ms Dale reports that PW "had kind of said to the other panel members this is up to you – you make the decision and I'll go along with it*"

31. Based on the evidence, we have concluded that members of the team had a far greater say in who was selected than was suggested in their evidence during the hearing. We find that no firm decision had been made during panel decisions and the final decision was only made after discussions with the team. These were discussions PW was not present at and he scored the Claimant the highest. The importance of views provided by the members of the team is also evidenced by the fact that notes of what members of the team said during their discussions with the panel are noted on the interview scoring sheets. If their views were not as influential and that the discussions were purely to "sense check", we take the view that there would have been little point in noting their comments at all.

32. Looking then to the comments made by team members, we find that there were a number of comments made which questioned whether he was too experienced, whether he was too senior, how would CL/JT manage him etc. it was also commented that the Claimant was "*very different to Dee*" (the previous post holder, a woman in her twenties) and "*nothing like Dee*".

33. During the hearing, we were shown tweets from the twitter account for Rose whose twitter handle was "deMenRo" and described her interests as including "*social justice, inequality……feminist*". Many retweets shown to us were of a feminist or gender equality theme. One retweet read "*So this is how the world ends, just as I thought: with two men comparing penis sizes*". Another tweet we saw said "*Bloody great, unintential pun, wheeeeyyy) chat about vaginas, vulvas and other words beginning with V with the @vagina_museum and @wordonthewater this evening smashing oppression. PLUS vaginas are fun #preach*". Another retweet read "*London is the most diverse city in the UK but women are still paid less than men and there are too few of them in leadership roles*". We were also shown CL's twitter account where she described herself as a "*millennial*"

34. CL was given responsibility for relaying the outcome of the process to the Claimant and providing feedback to him. She called him on Thursday 19 July 2018. However, his phone was switched off and so CL left him a voicemail. The Claimant picked up his voicemail the next morning and he returned CL's call. She was at the airport and going through security to catch a flight. It was agreed that she would call him back a few minutes later.

35. CL and the Claimant spoke on the phone for seventeen minutes. What was said during the call was disputed by the parties. However, the Claimant produced a "post it note" of his handwritten notes of the conversation taken at the time. These were largely consistent with what he told Catherine Dale during her investigation into the Claimant's complaint. CL did not produce any notes of the conversation and simply relied on her recollection of what was said.

36. During the call the Claimant said that CL told him he had not been successful and that a main factor in the decision was that CL was "*uncomfortable asking you to do things given you have an 11-year-old daughter*". The Claimant said that CL sought to reassure him that he "*had so much more to give compared to other applicants*". The Claimant said that he expressed his disappointment to the news to which CL responded that it was an objective of the accelerator team "*to encourage team members to develop their careers*" and that given the Claimant's maturity, it was "*better to employ someone at an early stage of their career as they would then progress to develop their career over a longer period elsewhere in the NHS*". The Claimant also said that CL had told him that other members of the team had been asked to assess each of the candidates.

37. On the evidence before us, we accepted that the conversation took place

between CL and the Claimant largely as described by the Claimant. It considered that the comment alleged to have been said by CL referring to the Claimant's daughter was a rather odd comment to make, but even if it wasn't said precisely as the Claimant described, we concluded that the point CL was making was that she would find it difficult to manage someone who was much older than her; the reference to the daughter was to illustrate the maturity point.

38. The Claimant complained about what he considered to be a discriminatory selection process on 30 July 2018 by email to the HR department. He was referred to Mr Robbins in the HR team and he formalised his complaint by writing to Mr Robbins by letter dated 8 August 2018. This complaint was investigated by Catherine Dale who interviewed those involved. The Claimant's complaint was not upheld.

39. The Claimant applied for a separate position, a more senior Band 8 project manager position, on 19 July 2018. The Claimant disclosed his disability on his application form and selected the option on the form to be shortlisted for interview, if he met the person specification, in line with the Respondent's two ticks policy. On 10 August 2018 the Claimant was informed that he was not being called for interview and that his application had been unsuccessful.

40. We heard that all of the application forms for this role were printed, anonymized and handed to DD to produce a longlist. The Claimant made it onto the longlist which was then passed to AK to shortlist candidates for interview.

41. DD and AK said in evidence that due to a mistake when printing out the applications it should have been apparent that the Claimant had stated that he wished to be considered for an interview under the two ticks policy. We accept that this was an administrative error on the part of the Respondent and that for whatever reason the two ticks did not appear on the Claimant's application when it was being considered by AK and DD. We reject any suggestion that there was anything deliberate about this and we therefore conclude that it was an unfortunate mistake.

42. In their evidence, AK said that in any event the Claimant would not have qualified for an interview because he did not meet all of the "*essential criteria*". However, when questioned, it appeared to us that most, if not all, of the criteria seemed to be considered "e*ssential*" which we considered defeated the very purpose of the two ticks scheme.

Legal principles relevant to the claims

(a) Direct discrimination

43. Direct discrimination is defined under s.13 EQA as follows:

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

44. The burden of proof is dealt with under s.136 EQA:

> ***(1) This section applies to any proceedings relating to a contravention of this Act. Equality Act 2010***
>
> ***(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.***

45. This means that there is a two-stage test to proving discrimination:

    a. Firstly, it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination.

    b. Only if that burden is discharged would it then be for the Respondent to prove that the reason they dismissed the Claimant was not because of race.

46. Accordingly, the burden of proof shifts onto the Respondent only if the Claimant satisfies the Tribunal that there is a 'prima facie' case of discrimination. This will usually be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases given the unlikelihood of there being direct, overt and decisive evidence that a claimant has been treated less favourably because of a protected characteristic.

47. When looking at whether the burden shifts, something more than less favourable treatment than a comparator is required. The test is whether the Tribunal "*could conclude*", not whether it is "*possible to conclude*". The bare facts of a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "*could conclude*" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.

48. Section 23(1) EQA states that there must be no material difference in the circumstances relating to each comparator. In other words, in order for the

comparison to be valid, "*like must be compared with like*". However, the Equality and Human *Rights* Commission Employment Code also states that the circumstances of the Claimant and the comparator need not be identical in every way. Rather, what matters is that the circumstances which are relevant to the Claimant's treatment are the same or nearly the same for the Claimant and the comparator.

49. We are mindful that our consideration of comparators should not distract us from focusing on the "reason why" question. The focus in direct discrimination cases must always be on the primary question "*Why did the Respondent treat the Claimant in this way?"* or *"What was the Respondent's conscious or subconscious reason for treating the Claimant less favourably?"*

(b) Disability discrimination

50. A claim for failure to make reasonable adjustments is to be considered in two parts. First the Tribunal must be satisfied that there is a duty to make reasonable adjustments; and only then must the Tribunal consider whether that duty has been breached.

51. Section 20 of EQA deals with when a duty arises and states as follows:

> ***(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.***
>
> ***……***
>
> ***(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.***

52. Section 21 of the EQA states as follows:

> ***(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.***
>
> ***(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.***

53. In determining a claim of failing to make reasonable adjustments, the Tribunal therefore has to ask itself three questions:

    a. What was the PCP?

    b. Did that PCP put the Claimant at a substantial disadvantage compared to someone without that disability?

c. Did the Respondent take such steps that it was reasonable to take to avoid that disadvantage?

54. The key points here are that the disadvantage must be substantial, the effect of the adjustment must be to avoid that disadvantage and any adjustment must be reasonable for the Respondent to make.

55. The burden is on the Claimant to prove facts from which this Tribunal could, in the absence of hearing from the Respondent, conclude that the Respondent has failed in that duty. So here, the Claimant has to prove that a PCP was applied to him and it placed him at a substantial disadvantage. The Claimant must also provide evidence, at least in very broad terms, of an apparently reasonable adjustment that could have been made.

56. It is a defence available to an employer to say "*I did not know, and I could not reasonably have been expected to know*" of the substantial disadvantage complained of by the Claimant.

Submissions by the parties

57. As there was insufficient time for the parties to give their submissions at the end of the hearing, the Tribunal ordered written submissions. These submissions were considered carefully, including the caselaw referred to, before reaching its decision.

Analysis, conclusions and associated findings of fact

The comparator issue

58. It has been suggested by the Respondent in their closing submissions that KM was not an appropriate comparator. We find that KM is an appropriate comparator. They were compared against the same selection criteria for the same post and both selected for interview. The fact of having slightly different experience and skills does not make KM an inappropriate comparator. Neither does having different personalities; KM does not need to be a clone of the Claimant to be an appropriate comparator. It is clear that both of them had the skills and experience necessary to be selected for the role.

Direct age discrimination

59. We were in no doubt that on the basis of what occurred during the interview process and based on our findings of fact, that the burden of proof shifted to the Respondent in this case to disprove age discrimination. We rely on our findings of fact at paragraphs 26-37 as the evidence in support of shifting the burden of proof. We were concerned that both conscious and unconscious bias were at play and that their focus on finding a person who

was the "*best fit*" led them to take into account factors which were discriminatory. We did not think the Respondent fully appreciated that the danger in going down that path was that they would be more inclined to choose a candidate that was more like them. We find that the decision was ultimately made by CL and JT (because PW had by that time left) having been influenced by team members. We find this grouping to be predominantly female and with an average age of 30-32.

60. The burden of proof having shifted, there being little documentary scientific or objective proof that the Respondent's rejection of the Claimant (particularly as he achieved the highest score) in favour of KM was in no sense whatsoever connected with his age, the Tribunal concluded that the claim of age discrimination should succeed. Even looking at the totality of the evidence, we were satisfied that the reason that JT and CL chose not to select the Claimant for the Band 7 PM role was significantly influenced by his age.

Sex discrimination

61. We found the evidence not quite as overt as that relating to age but we still found that there was sufficient evidence to shift the burden of proof, relying on the same findings at paragraphs 26-37 above, particularly given the concentration on finding the "*best fit*" when viewed against the gender make-up of the grouping of people who contributed to the decision, the unconventional process adopted by the Respondent, the fact that the Claimant achieved the highest score, and the views retweeted by Rose, which we reasonably concluded that she supported and had an affinity with.

62. The burden of proof having shifted, we were not persuaded from the evidence provided by the Respondent that their decision to reject the Claimant in favour of KM was in no sense whatsoever because of his sex. For these reasons, we concluded that this claim should succeed.

Disability discrimination

63. The PCP for the reasonable adjustments claim was not very clear, but whichever way we considered it, we were not satisfied that this claim should succeed.

64. If the PCP was to require the Claimant to go through the same interview process as non-disabled persons, this is factually incorrect because we know that the Respondent does have a two ticks policy which means that disabled applicants do not go through the same process. The result was that the two ticks were not considered in the Claimant's case but that is not because of a PCP operated by the Respondent, but rather an administrative error in the system.

65. If the PCP was that the Respondent did not apply their two ticks scheme to

the Claimant, we concluded that this could not be correct because the Respondent did apply the two ticks scheme (in that it was applied to the recruitment exercise in which the Claimant applied for his role) but the reason the Claimant did not secure an interview was because of the administrative error which resulted in those selecting for interview not seeing that the Claimant had made an application under the scheme.

66. Finally, if the PCP was the two ticks scheme itself, it is difficult to see how this places the Claimant at a substantial disadvantage; on the contrary, it provides disabled people, including the Claimant, with an advantage.

67. There being no PCP which we could identify that placed the Claimant at a substantial disadvantage compared with non-disabled persons, we concluded that this claim is not well founded and fails.

68. This matter will be listed for a remedy hearing in due course.

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Employment Judge Hyams-Parish
13 March 2020