



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE MORTON  
Mrs J Jerram  
Mr C Rogers

**BETWEEN:**

Mr A Mensah

Claimant

AND

Anchor Hanover Group

Respondent

**ON:** 1-3 September 2020 and 10 September in Chambers

**Appearances:**

**For the Claimant:** Ms N Prempeh, Consultant

**For the Respondent:** Ms R Swords-Kieley, Barrister

## **JUDGMENT**

1. The Claimant's claim of direct age discrimination fails and is dismissed.

### **Reasons**

#### **Introduction**

1. By a claim form presented on 24 August 2018 Mr Mensah brought claims against the Respondent of unfair dismissal under sections 94 and 98

Employment Rights Act 1996 (“ERA”), direct age discrimination under s13 Equality Act 2010 (“Equality Act”), harassment related to age under s 26 Equality Act and breach of contract.

2. The claims of harassment and breach of contract were dismissed by Employment Judge Cox in the Leeds Employment Tribunal on 18 October 2018 on withdrawal of those claims by Mr Mensah. The claim of unfair dismissal was struck out by Judge Crosfill on 7 June 2019 on the basis that it had not been presented within the statutory time limit set out in section 111 ERA and the Tribunal did not therefore have jurisdiction to hear it. Judge Crosfill allowed the claim of direct age discrimination to proceed however on the basis that it was just and equitable to extend time for the presentation of that part of the claim.
3. At the hearing we heard evidence from Mr Mensah himself and from his two witnesses, Mrs C Opong, former manager of the Greenhive Residential Home where Mr Mensah worked and Mrs B Bowler, the home’s former Deputy Manager. The Respondent’s witnesses were Mr S Robbie, engaged by the Respondent to carry out the investigation into Mr Mensah’s conduct and Mrs J Darani, who took the decision to dismiss Mr Mensah. All the witnesses had prepared witness statements that the Tribunal read before the hearing.
4. The hearing was conducted by cloud video platform. The Employment Judge was present at the Tribunal Office and the Tribunal Members, the parties, the witnesses and the representatives all attended remotely. There was a bundle of documents of 257 pages – references to page numbers in these Reasons are references to page numbers in that bundle.
5. It was agreed by both parties at the end of the hearing that the current and former employees of the Respondent who were not parties to or witnesses in the proceedings but were referred to in the evidence, should be referred to in these reasons by their initials. That is in anticipation of the judgment and reasons appearing on the public register of Employment Tribunal judgments.
6. The Claimant suggested that he might make an application for anonymisation of the judgment and reasons as regards himself, but after the hearing his representatives confirmed in writing that he would not be pursuing that application.

### **The relevant law**

7. Only one claim remains – under s 13 Equality Act, which provides as follows:

#### **13 Direct discrimination**

**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.**

The comparison must be between persons whose circumstances are the same or sufficiently similar. If no actual comparator exists the comparison is made with a hypothetical comparator.

8. It is also relevant to consider the law on the burden of proof which is set out in section 136 of the Equality Act. In summary, if there are facts from which the tribunal could decide in the absence of any other explanation that a Claimant has been discriminated against, then the tribunal must find that discrimination has occurred unless the Respondent shows the contrary. It is generally recognised that it is unusual for there to be clear evidence of discrimination and that the tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in *Igen v Wong and others* [2005] IRLR 258 confirmed by the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246. In the latter case it was also confirmed, albeit applying the pre-Equality Act wording, that a simple difference in status (related to a protected characteristic) and a difference in treatment is not enough in itself to shift the burden of proof to the Respondent; something more is needed.

### **The issues**

9. It was agreed between the parties at the hearing before Judge Crosfill that Judge Cox had correctly described the remaining issue in the case in the Annex to the case management orders she made on 18 October 2018. That issue is as follows: Mr Mensah alleges that the decision to dismiss him was an act of direct age discrimination. He says that the Respondent viewed his conduct towards AM as inappropriate because of his age, which was 64 at the relevant time. He says that the trust would not have viewed his behaviour as inappropriate if he had been under 40.
10. It having been agreed when both parties were represented that that was the issue that needed to be determined in the case it was that issue alone that the Tribunal has considered in reaching this judgment.

### **Findings of fact**

11. The Respondent is a not for profit organisation providing housing, care and support to people over 55 years old. Mr Mensah was employed by the Respondent from 29 March 2005 as a Home Administrator at Greenhive Care Home. This was the third most senior position in the home after the Director and Deputy Director. He remained employed until his dismissal for gross misconduct on 26 January 2018. Prior to that he had had an unblemished disciplinary record.
12. The circumstances leading to his dismissal were as follows. On 15 November 2017 a junior member of staff, AM, who had been engaged by the Respondent in 2016 as an apprentice before going on to become a care assistant, raised a grievance against three members of staff including Mr Mensah. We were not concerned with her complaint against the other staff

- members. Her complaint against Mr Mensah, who had no line management responsibility for her, was that he had made an inappropriate comment to her about her uniform, had initiated inappropriate and persistent contact with her over a period of several months, had physically touched her, made personal comments and asked her inappropriate questions about her sexuality. One aspect of her complaint related to a very large number of WhatsApp messages that had passed between them over a number of months. The grievance was detailed and was set out at pages 89-93 of the bundle although only pages 90-92 concerned her complaints against Mr Mensah.
13. On receipt of the grievance Simon Barnes, District Manager of the Respondent suspended Mr Mensah without disclosing the identity of the person who had complained and began an investigation. The investigation was then handed to Sean Robbie, who is employed by the Respondent as an ER Investigator, tasked with investigating serious misconduct and complex grievances. The investigation was handed to Mr Robbie after Mr Mensah objected to Mr Barnes continuing with it. His reason for objecting, as confirmed in his evidence to the Tribunal, was that Mr Barnes had been responsible for suspending him and Mr Mensah therefore perceived him as not impartial and as having already made up his mind about the issues. At the point of handover Mr Barnes had interviewed AM and his notes were at pages 95-103 of the bundle. Mr Robbie did not rely on these notes as he described them as illegible and the Tribunal agreed that they were difficult to read. Mr Robbie also took from Mr Barnes a list of members of staff who he considered should be interviewed in connection with the complaint. Mr Mensah would later complain about this, including in the Tribunal proceedings, a matter we return to below.
  14. Mr Robbie interviewed AM briefly on 18 December 2017 before going on to interview Mr Mensah. During his brief meeting with AM, she told him that she had deleted the WhatsApp message exchanges with Mr Mensah from her phone. This too was a matter that Mr Mensah would later complain about.
  15. Mr Robbie's notes of his interview with Mr Mensah were at pages 124-139 of the bundle. During the interview Mr Mensah denied ever behaving inappropriately towards colleagues but he did admit that he had had issues with younger members of staff and specifically that he had had difficulties with an apprentice who had gone on to become a carer. He said that he had acted as her "guide" but had had to draw a line in relation to her behaviour towards him (page 126). He confirmed that he was talking about AM who at the time of the interview was 19 years old. He admitted to texting her and when asked whether he still had the messages he produced his phone which contained hundreds of messages between him and AM. Mr Robbie did not read all of the messages but noted that there were a very large number of them. Mr Mensah denied that any of them were sexual in nature. He said that he would "not necessarily" send such a volume of messages to other staff members and explained his interest in AM as arising from the fact that she had what he described as a "sad story" and in his view needed guidance.

16. Mr Robbie then asked “Do you think it as appropriate given your position in the Home to be messaging a girl that age so much”. Mr Mensah relied “I think it depends on what is being communicated”. Mr Mensah denied commenting on AM’s appearance and in particular denied telling her that he uniform was too tight. The Tribunal notes that Mr Robbie accepted in cross examination that he had put that question on the mistaken assumption that that is what AM’s complaint was, when in fact it was she who had said that her uniform was too tight and Mr Mensah had then asked her to turn round. It was the request to turn round that was the subject of AM’s complaint on that occasion. Mr Robbie went on to probe AM’s complaint that Mr Mensah had asked her whether she was gay or straight. He denied doing so and denied saying that homosexuality was ungodly.
17. AM had complained that she had had to ask Mr Mensah to stop messaging her. When Mr Robbie put this to Mr Mensah he replied “For what reason I don’t know”. When asked whether he had nevertheless continued to contact her he replied “I haven’t contacted her for a long time now due to the way she was behaving” (page132). Mr Mensah accepted that no other member of staff was receiving this number of messages from him (page 133). He denied any physical contact with AM other than accidental contact (page 134) and denied physical contact with any other member of staff or behaving inappropriately to other staff members.
18. The investigation continued on 2 January 2018 when Mr Robbie interviewed CC, FK, RO, LF, VR and a staff member who wished to remain anonymous. Their statements, which were recorded by Mr Robbie contemporaneously and which the Tribunal accepts as accurate records of the conversations, were set out at pages 141-48 of the bundle. Mr Robbie was questioned about one aspect of FK’s account. She stated that she herself had no complaint about Mr Mensah but that RO had told her that Mr Mensah had groped her. FK maintained that she had reported that to Mrs Oppong, who had been the home manager at the time. However Mrs Oppong denied that in her evidence to the Tribunal. Mr Robbie was asked why he had not verified FK’s account with Mrs Oppong and his answer was that firstly Mrs Oppong had left the organisation by that time (he was unaware that she had returned to work as a bank worker – in the Tribunal’s view reasonably so given the nature of his role) and secondly that he had checked the home records for evidence of an investigation at the time and had not found any.
19. As a result of his investigation Mr Robbie concluded that there was sufficient evidence of inappropriate behaviour by Mr Mensah for the matter to be escalated to a disciplinary hearing. He prepared an investigation report (pages 116-121). The allegations to be put to Mr Mensah were as follows:
  1. **From the 1st November 2016 until 1<sup>st</sup> December 2017 at Greenhive you behaved inappropriately towards a colleague, namely AM by touching her inappropriately on her legs, knees, thighs and bottom.**
  2. **Between the 1st November 2016 until 1st December 2017 at Greenhive you behaved inappropriately towards a colleague, namely AM by making inappropriate comments towards her by calling her "My baby", asking about**

her personal life, asking her if she was "gay or straight" and stating homosexuality was "ungodly".

3. From the 1st November 2016 until 1st December 2017 at Green hive you behaved inappropriately towards a colleague, namely AM by repeatedly sending messages to her despite being asked not to.

4. Between the 1st January 2017 until 1st February 2017 at Greenhive you behaved inappropriately towards a colleague namely RO by touching her inappropriately on her bottom.

20. On 10 January 2018 the Respondent sent Mr Mensah an invitation to attend a disciplinary hearing. The invitation letter, which repeated the allegations set out in the investigation report was at page 149. Attached to the letter was a set of appendices consisting of the notes of the investigation meetings with Mr Mensah and other member of staff interviewed, a copy of the disciplinary policy and a copy of the Respondent's behaviour framework. Mr Mensah initially told the Tribunal that he had not seen the statements of the other members of staff prior to the disciplinary hearing, but he accepted in his oral evidence that he had been sent them but had not read them prior to the meeting, which he attributed to lack of time. However the Tribunal notes that he was sent the documents nine days before the hearing.
21. The disciplinary hearing was conducted by Jane Darani, Director of Care Services for the London and Surrey area and a District Manager at the time of Mr Mensah's employment. Notes of the disciplinary meeting were at pages 151- 167. Mr Mensah was accompanied by Beth Bowler, a colleague and one of Mr Mensah's witnesses. Mr Mensah had produced a statement which he called "My account of the allegations" which was at page 249-253. He continued to maintain that the allegations against him were untrue. His principal argument was that members of staff had conspired to tarnish his character and reputation. His statement sets out an account of various incidents during which he had had difficulties with various staff members, including those who had given statements to the investigation. He suggests that the complaints against him had come to light at a "surgery panel" the meaning of which was not explained to the Tribunal but which we understood to be a meeting at which staff could raise general concerns and issues with managers. It was Mr Mensah's case at the disciplinary hearing that the surgery panel had been used as an opportunity for staff to raise concerns against him and that they had colluded in order to do so.
22. Ms Darani did not accept that explanation. Her detailed reasons for deciding to uphold the allegations against Mr Mensah were set out at paragraphs 38-44 of her witness statement. As regards the first allegation, of inappropriate touching by Mr Mensah. Ms Darani was persuaded by the range of evidence – the evidence of RO that she had witnessed Mr Mensah touch AM's leg, the evidence of RO and an anonymous witness that Mr Mensah had touched them and the evidence of CC and RO that Mr Mensah had said inappropriate things to them. Mr Mensah had also admitted touching a colleague's hand inappropriately and having been reprimanded by Mrs Oppong for doing so.

23. It was put to Ms Darani that in fact there had been inconsistencies in RO's evidence, based on notes of her interview with Simon Barnes. However the notes of Mr Barnes meeting were not in the materials that Ms Darani was relying on and cannot therefore have operated on her mind or affected her assessment of the evidence. It was also put to Ms Darani that she should have interviewed other witnesses, including Edna, who worked in an open office with Mr Mensah and Mrs Oppong. Ms Darani said that she considered this proposal but decided that Edna would only have been able to give evidence that she worked in an open office with Mr Mensah and that Mr Mensah was generally of good character. Ms Darani already knew that. There was no need to interview Mrs Oppong, because Mr Mensah had accepted that Mrs Oppong had reprimanded him for touching a colleague's hand. Finally a witness who had allegedly said to Mr Mensah that colleagues were conspiring to raise concerns about him at the surgery was not willing to come forward and verify that.
24. On the second allegation concerning comments about Mr Mensah's sexuality and a suggestion that homosexuality was "ungodly", Ms Darani found that AM's account was inherently more likely.
25. On the issue of the text messages, Ms Darani noted that Mr Mensah himself accepted that there was a large volume of messages and that he had not sent such a large number of messages to any other colleague. She accepted AM's assertion that she had asked Mr Mensah to stop and that the messages were sent to a colleague for whom Mr Mensah had no line management responsibility. Ms Darani's evidence to the Tribunal was she had considered it important to understand the context in which the messages were sent and the volume of them and that these were more important factors than the content itself. Mr Mensah consistently complained that the Respondent had not read or checked the actual content of all the messages and indeed had been prevented from doing so because AM had deleted the messages from her phone. However the tribunal notes that the Respondent did not base its disciplinary case against Mr Mensah on the content of the messages and it was not suggested in the disciplinary proceedings that the content had been sexual or otherwise inappropriate. Ms Darani confirmed that and said that she did not believe the content was part of the dispute. It was the volume, the fact that messages had been sent day and night, that there was no legitimate reason for Mr Mensah to be messaging AM in that way, that no-one else was sent such a volume of messages and that Mr Mensah did not stop when asked, that led to her conclusion that this allegation should be upheld.
26. Ms Darani was asked about her belief that Mr Mensah had been asked to stop, there being no clear evidence that AM had asked for this on a specific date. Mr Mensah maintained that he had not been asked and had himself decided to stop to "draw a line" when AM's behaviour towards him changed, he maintained for the worse. However Ms Darani came to the conclusion on the evidence overall, including the fact that AM had blocked him, that Mr Mensah had been asked to stop and had not stopped in a timely manner when asked to do so. Mr Mensah's responses during the investigation meeting, quoted above at paragraph 16 contributed to this conclusion as they

- fell short of clear denials that AM had asked Mr Mensah to stop ending her messages or of the fact that Mr Mensah did not do so when asked.
27. As regards the fourth allegation, Ms Darani considered that RO's statement had seemed inherently credible and that the interchange she described between herself and Mr Mensah had seemed natural and likely to be true. She considered the "not a playmate" comment to have a particular ring of truth about it. Furthermore RO's account of the incident was corroborated by FK.
  28. The outcome letter was at pages 174-177. Ms Darani's evidence to the Tribunal was consistent with the reasoning in that letter. Her decision was that the allegations were proven and that Mr Mensah would be dismissed for gross misconduct. Mr Mensah appealed unsuccessfully against his dismissal.
  29. It was also put to Ms Darani in cross examination that she had been influenced by Mr Mensah's age in reaching her conclusions. Mr Mensah relied particularly on page 181, a section of the disciplinary hearing minutes in which Ms Darani asked Mr Mensah whether he had ever considered that it was appropriate for him to be having contact of this nature with what Ms Darani described as a "young girl". Here evidence was that what was on her mind was Mr Mensah's seniority in the management structure by comparison with AM. She described him as a senior member of the management team. She also noted that he had no line management responsibility for AM, had not had such a relationship with any other staff member and had simply kept repeating that the allegations were all lies and fabrication. (Ms Darani had stated in the outcome letter that Mr Mensah had not shown any insight into why his behaviour was inappropriate.) Ms Darani however accepted that it would have been better to have described AM as a "colleague". She maintained that the discussion at the disciplinary hearing was about the difference in seniority between Mr Mensah and AM in the line management structure.
  30. Ms Darani's evidence to the Tribunal, which we accepted as true, was that she had no preconceptions about the allegations against Mr Mensah. When it was put to her that she had been biased against Mr Mensah because of his age she did not accept that and maintained that the decision to uphold the allegations and dismiss Mr Mensah for gross misconduct would have been taken irrespective of his age.

### **Submissions**

31. Both parties made both written and oral submissions which were very helpful to the Tribunal.
32. We reminded ourselves that the agreed issue in this case was as follows: Mr Mensah alleges that the decision to dismiss him was an act of direct age discrimination. He says that the trust viewed his conduct towards AM as inappropriate because of his age, which was 64 at the relevant time. He says that the trust would not have viewed his behaviour as inappropriate if he had been under 40.



33. Many of Mr Mensah's submissions were addressed to issues relevant to a claim of unfair dismissal, with which the Tribunal was not concerned. In relation to the claim of direct age discrimination, Mr Mensah advanced the case that he was treated less favourably than the hypothetical comparator aged under 40 because the Respondent predetermined his guilt even before the investigation took place. I did so, he said, on the basis that it assumed that was inappropriate for Mr Mensah, who is 64 years old, to be having a relationship with AM who was 18 years of age at the time she brought her complaint. In the Tribunal's view that is a different point from the one identified before the hearing as the issue to be decided and unnecessarily confuses an issue relevant to whether the dismissal was fair (whether guilt was pre-determined) with the issue of whether the decision to dismiss was tainted by age discrimination.
34. The Tribunal focused its deliberations solely on the agreed issue – would Mr Mensah have been dismissed had he been under 40? Or to put it another way, was the conduct for which he was dismissed only treated as gross misconduct because of his age at the time the allegations were made?
35. The Tribunal accepted the Respondent's submission that the decision of the Court of Appeal in the case of *Reynolds and ors v CLFIS (UK) Ltd 2015 ICR 1010* means that it could only be concerned with what was in Ms Darani's mind at the time of the dismissal and not what might have been on the mind of Mr Robbie.

### Conclusions

36. The Tribunal was not in this case concerned with what Mr Mensah did or did not do. It was clear during the evidence that Mr Mensah found the proceedings difficult and the Tribunal recognised that the fact that the hearing had to be conducted by CVP may have added to those difficulties. Mr Mensah maintained throughout that the allegations were fabricated and that his colleagues had joined forces against him. The Tribunal is not however concerned with whether that is true and we acknowledge that it is difficult for Mr Mensah not to have had that question determined.
37. The Tribunal is only concerned with whether the Respondent made a decision to dismiss that was tainted by age discrimination. It was clear to the Tribunal why Mr Mensah might have thought that age had played a part. Both Ms Darani and Mr Robbie had made reference to AM being "a young girl" during the disciplinary hearing and the investigation respectively. That would understandably have led Mr Mensah to consider that the age differential between them was operating on Ms Darani's mind when she decided that Mr Mensah should be dismissed. The Tribunal however accepted Ms Darani's evidence that she dismissed Mr Mensah because she believed the allegations against him to be true and whatever his age such a finding would have led to the same outcome.
38. At its highest Mr Mensah's case was that Ms Darani must have been thinking about the fact that he was 64 and AM was 18 when she reached her

conclusions. The Tribunal however considered that what the Respondent was finding objectionable in Mr Mensah's conduct was not the fact of his age, but his seniority in the organisational hierarchy and his apparent lack of awareness that he was behaving inappropriately given the power associated with a senior role. We accepted that in Ms Darani's mind the term "young girl" was really a proxy for the relative inexperience and vulnerability of AM. We find that the same objection would have been taken regardless of Mr Mensah's age and Ms Darani would have reached the same conclusion had Mr Mensah been under 40 at the time AM made the complaint. We also find that the Claimant's age was not a factor operating on the mind of Ms Darani when she upheld the allegation in relation to the Claimant's conduct towards RO. We find on the facts of this case that the Claimant's age was not a factor in any aspect of the dismissal decision.

39. Accordingly Mr Mensah's claim of direct age discrimination fails and must be dismissed.

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Employment Judge Morton  
Date: 18 September 2020

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