



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Crompton

Respondent: Eden Private Staff Ltd

Heard at: In Chambers **On: Monday 26 and Tuesday 27 October 2020**

Before: Employment Judge Matthews

Representation:

Claimant: In Person

Respondent: Mr D Charity - Consultant

RESERVED JUDGMENT

1. Mrs Crompton's claims that she was harassed and directly discriminated against because of her age by reference to sections 26 and 13 of the Equality Act 2010, respectively, were presented to an employment tribunal before the end of the period specified in section 123 of the Equality Act 2010. The employment tribunals have jurisdiction to hear those claims.
2. Mrs Crompton's claim of harassment by reference to section 26 of the Equality Act 2010 succeeds in part.
3. Mrs Crompton's claim of direct discrimination because of her age by reference to section 13 of the Equality Act 2010 succeeds in part.
4. The Respondent is ordered to pay to Mrs Crompton £900 as compensation in respect of the harassment and direct discrimination together with interest on that sum of £100.41.

REASONS

INTRODUCTION

1. Mrs Mary Crompton claims that the Respondent Company harassed and directly discriminated against her because of her age (by reference to sections 26 and 13 Equality Act 2010 (the “EA”) respectively. At all relevant times Mrs Crompton was around 57 years of age.
2. As far as the alleged harassment is concerned, Mrs Crompton says this. First, that she was required to undertake a second period of probation when she moved from the job of Administrator with the Company to that of Search Consultant. Second that, between 11 February 2019 and 21 June 2019, her manager, Ms Katie Burrige, made comments such as “Is it the Alzheimers again Mary?”, “Oh dear, Alzheimers back again Mary?” and “Having a senior moment again Mary?”. Mrs Crompton alleges that this sort of comment was made several times a week, if not daily. Mrs Crompton says that this conduct related to her age and had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.
3. In respect of the claim of direct discrimination, Mrs Crompton points to the acts alleged to amount to harassment and, in addition, to her dismissal. Mrs Crompton says that, in these respects, the Company, because of her age, treated her less favourably than they treated or would treat a younger person. As far as comparators are concerned, Mrs Crompton relies on three people and a hypothetical comparator. The three people are Ms Lindsey Tring, Ms Vanessa Willimot and Ms Burrige. A comparator in this case is a person who does not share Mrs Crompton’s protected characteristic (that is, someone who is younger than Mrs Crompton) but who is not otherwise in materially different circumstances. None of these three people fall into this category. None was in a probationary period. In addition, Ms Tring was aged around 54 and Ms Burrige was a Search Consultant (Team Leader) rather than a Search Consultant. The Tribunal will use hypothetical comparators. First, someone taking up the role of a Search Consultant who was materially younger than Mrs Crompton (at a Preliminary Hearing before Employment Judge Dawson on 24 March 2020, Mrs Crompton suggested someone aged below 40 (28)). Second, such a Search Consultant in a probationary period.
4. The Company defends the claims. The Company says that requiring Mrs Crompton to serve a probationary period in her new role was perfectly reasonable and usual, did not amount to harassment and

had nothing to do with her age. Whilst it is admitted that Ms Burridge made one comment about “Alzheimer’s”, it did not have the purpose or effect of violating Mrs Crompton’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her and it did not amount to direct discrimination. Further, Mrs Crompton’s dismissal was on capability grounds that had nothing to do with her age and did not amount to direct discrimination. The Company does not advance any section 13(2) EA argument of justification for any direct discrimination found.

5. Mrs Crompton gave evidence supported by a written statement. Ms Burridge and Ms Hayley Wallbridge (Manager) gave evidence on behalf of the Company, supported by written statements.
6. There was an agreed electronic bundle of documentation. References in this Judgment to pages are to pages in the bundle unless otherwise specified.
7. The parties have given their written consent to these proceedings being heard by an Employment Judge sitting alone by reference to section 4(3)(e) of the Employment Tribunals Act 1996.
8. The hearing was a remote hearing using the Common Video Platform consented to by the parties. A face to face hearing was not held because of the constraints placed on such hearings by precautions against the spread of Covid-19. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way. The hearing was set down for four days. In the event only one day and a few minutes on the second day were used. Judgment was reserved to better consider the evidence and issues.

FACTS

9. Mrs Crompton did not have the necessary two years’ service to claim “ordinary” unfair dismissal (although the dismissal will be considered in the context of the reason for it being Mrs Crompton’s age). Notwithstanding, it is evident from the case papers and the hearing that Mrs Crompton found the experience of being dismissed by the Company a very unhappy one and she believes it to have been unfair and unreasonable. This is the issue that has preoccupied Mrs Crompton. That is wholly understandable. However, it has meant that there is little focus on the claims that the way in which Mrs Crompton was treated was related to her age.
10. A consequential feature of the case is that there is a lot of evidence about the performance issues Ms Wallbridge and Ms Burridge say

they relied on when they made the decision to dismiss Mrs Crompton. That is very relevant because a lack of genuine performance issues might point to the dismissal being for some other reason. In particular, it might be related to age. The Tribunal, however, will not analyse the performance issues in detail. Although Mrs Crompton questioned some of them, she accepted that there were performance issues.

11. The Company has a London address and recorded 23 employees at the time it lodged its response in these proceedings. Its business is to provide an introductory service for domestic staff of different types. The part of its operations that Mrs Crompton worked for is based at Crewkerne in Somerset. The Crewkerne Nannies & Maternity Team of 7 employees dealt with the placement of nannies and maternity nursing specialists with clients. The Company maintains a database of such people on which it draws to match supply and demand.
12. Mrs Crompton was employed by the Company from 1 March 2018 until her dismissal with effect from 21 June 2019.
13. At the time she was recruited Mrs Crompton was preferred to a much younger candidate for the job (see Ms Wallbridge – WS 3).
14. Mrs Crompton joined the Company as an Administrator and completed a 3 months' probation period. Ms Wallbridge observes that Mrs Crompton did that job well (WS 4).
15. In August 2018 there was a vacancy for a Search Consultant in the team and, on 21 August 2018, Mrs Crompton asked Ms Burrige if she could be considered for it. An e-mail of that date from Ms Burrige to Ms Wallbridge records that Mrs Crompton had told Ms Burrige that she would "love" to have the relationship with specialists and clients that went with the Search Consultant role (62 - see also 65). Contrary to her assertion, it is clear that it was Mrs Crompton who originated the idea that she should switch to a Search Consultant role.
16. Around 30 August 2018 Ms Wallbridge and Ms Burrige met Mrs Crompton to discuss the job switch. Their evidence is that they explained to Mrs Crompton that the job would be subject to a probationary period and that they would have to recruit a replacement Administrator, which would mean there would be no way back to her old job for Mrs Crompton. Mrs Crompton's evidence is that she was not told there would be a probationary period, nor that her old job would not be open for her to return to (see WS 4 and 6). At pages 66 and 67 in the bundle the Tribunal sees emails from Mrs Crompton to Ms Wallbridge dated 1 and 19 October 2018 respectively, in which Mrs Crompton clearly contemplates a period of probation. The

Tribunal finds that Mrs Crompton knew that the new role would include a probationary period and there was no way back to her old job.

17. On 7 January 2019 Mrs Crompton switched to the role of Search Consultant.
18. Things went well in that Mrs Crompton was enthusiastic and communicated well on the telephone and with the team. However, Mrs Crompton was making errors in welcome letters and CVs that she was sending out.
19. On 6 March 2019 Ms Wallbridge and Ms Burrige met Mrs Crompton as part of the probationary process. The errors were mentioned but, overall, the feedback was positive so as not to discourage Mrs Crompton. Ms Burrige sent Mrs Crompton an e-mail confirming the position (68). Whilst there was mention of the possibility of extending the probationary period because of holidays, sickness and bereavement, there was nothing to alarm Mrs Crompton.
20. Ms Burrige and Ms Wallbridge remained pleased with Mrs Crompton's enthusiasm and communication externally and with the team but little changed as far as Mrs Crompton making errors was concerned.
21. On 18 April 2019 Ms Wallbridge and Ms Burrige met Mrs Crompton to discuss progress. Specifically, they required Mrs Crompton to address call logging, getting to know the specialists and their requirements, taking time to avoid errors, check letters and CVs more carefully before sending them out and check that the most up to date CVs were used. Mrs Crompton's account of this meeting includes this (WS 8):

“At this meeting I took the opportunity to mention how I found Katie Burrige's anger and impatience towards me difficult and uncomfortable and made it difficult for me to ask for help. Katie Burrige reacted badly and “exploded” with rage in front of Hayley Wallbridge saying “I've always been the same and I'm not going to change now”. This showed a total disregard for my feelings and their conduct towards me was impacting my life and health outside of work at this point. I am a women of a certain age and to be treated in this way was knocking all my self confidence. I enjoyed the nature of my work, speaking to candidates and clients but the thought of entering that office each morning made me tearful and nervous.”

22. Neither Ms Wallbridge nor Ms Bur
23. ridge make any mention of the alleged “explosion” incident in their respective evidence. Ms Burrige sent Mrs Crompton a confirmatory email following this meeting (71). Again, on the face of it there was little in this email to alarm Mrs Crompton. Nor, if it had actually happened, was there any mention of Mrs Crompton having said how she felt “*difficult and uncomfortable*”.
24. On 9 May 2019 Mrs Crompton sent an email to a specialist (73). In it, Mrs Crompton apologised for having “*a senior moment*”.
25. Against the background of Mrs Crompton continuing to make mistakes and, in Ms Burrige’s view, not owning up to them, Ms Wallbridge and Ms Burrige met Mrs Crompton on 10 May 2019 for more “*training*”. It seems to have been another review rather than training. Ms Burrige recorded the outcome in an email to Mrs Crompton on 16 May (75-76). The email can be referred to for its full content. It seems, however, to be a catalogue of fairly fundamental errors. Notwithstanding, there was nothing to suggest Mrs Crompton’s job was at risk although, by this stage, an objective observer might have expected Mrs Crompton to be worried.
26. The problems persisted. There was mounting frustration with Mrs Crompton’s errors amongst her work colleagues and, by 24 May 2019, Ms Wallbridge and Ms Burrige had concluded that Mrs Crompton was taking too long to learn the basics and had to be dismissed.
27. On 24 May 2019 Ms Wallbridge met Mrs Crompton and handed her a letter of dismissal (79). The dismissal was with notice expiring on 21 June 2019. The reason given was “*Inadequate performance during extended probation period*”.
28. As has been recorded, Mrs Crompton had no warning of her dismissal. That, allied to her inability to recognise her own mistakes, no doubt contributed to the shock Mrs Crompton’s dismissal caused her.
29. On 3 June 2019 Mrs Crompton was signed off work due to stress and did not return to work thereafter.
30. On 14 June 2019 Ms Wallbridge received a grievance letter from Mrs Crompton (82-85). The essence of the grievance was Mrs Crompton’s dismissal. For the most part the letter is a straightforward contesting of the performance issues behind the decision to dismiss. The letter can be referred to for its full content. However, there are some further points that are noteworthy for the purposes of the issues

the Tribunal must decide. First, Mrs Crompton records that it was the Company that approached her to offer the switch to the Search Consultant role. That is plainly wrong on the facts. Second, Mrs Crompton here refers to her probationary period without complaining that she had not expected it. Third, Mrs Crompton writes this:

“I have to ask myself if my age has contributed to your decision as you didn’t even offer for me to return to do the administrator role if you believe I am not performing as a Search consultant.”

31. That last remark was despite the fact that it had been explained to Mrs Crompton that her old role would not be available to her if she made the switch to Search Consultant. Later in the letter Mrs Crompton adds *“I feel you have treated me unfairly in connection with age discrimination....”*. There is no mention of the alleged “Alzheimer’s” remarks.
32. The Company asked Mr Charity, as an outside HR consultant, to investigate and report on the grievance.
33. Mr Charity had a telephone conversation with Mrs Crompton on 19 June 2019. The note is at 96-101. During the conversation Mrs Crompton said that age *“might have been a factor”* in the decision to dismiss her. Later the note includes these extracts:

“MC Katie Burridge would make comments like “is it alzheimers again” when I had forgotten something. I can’t provide dates and times.”....

“DC So how often did Katie make this comment, about Alzheimers?”

MC It was something that was said perhaps once per week.”....

“DC Was it meant to offend in your view?”

MC I think Katie would deny she meant to offend, but there is a lack of regard to the consequences of things she said. It was offensive, but Katie would consider it was just her being her. I think it was meant to offend at the time it was said.”....

“DC How did you take the comment at the time?”

MC Hurtfully, but did not raise it as an issue, but it used to sting.

DC Is there any other issue that you are aware of that you think Katie is prejudiced against people because of their age?

MC Yes, when she spoke about candidates in the office, Katie would say candidates were too old (commenting that the client did not want someone who was old).”....

“DC Has Hayley said anything that suggest she is apt to discriminate against those in late 50s?

MC No.”

34. On 20 June 2019 Mr Charity spoke to Ms Burrige on the telephone. There is a record of the discussion at 178-180. It provides some insight into Ms Wallbridge’s and Ms Burrige’s decision to dismiss Mrs Crompton. It also includes these extracts:

“DC MC is concerned that her age may have been a factor in the decision, what is your response to this?

KB Not at all, there are others who are a similar age and age was not mentioned at all, it was all about her ability to do the job and whether we could see potential for improvement.”

“DC Have you made comments about Alzheimers?

KB There is a bit of a laugh and joke, they call me “cranky Katie” and MC joined in this spirit. It was never said in a malicious manner and MC never said she felt hurt by it to my knowledge. Lyndsay is referred to as “dementia Debbie”, everyone calls her this. I know it does not upset her. I believe I made this comment generally, I don’t specifically remember saying it to MC directly, but may have. I did not say it on a weekly basis.”....

“DC What about comments about candidates?

KB I am afraid this is the industry, the clients call and they have specific requirements and know what we want. In the office we discuss candidates’ attributes but there is always a reason behind it. We have some clients who will only consider certain types of candidates and we would be wasting everyone’s time if we put the wrong kind of candidates forward. MC knows this and she has also spoken frankly about candidates in this way.”

35. In her witness statement, Ms Burrige gives further detail about the “Alzheimer’s” comments (WS 31). Ms Burrige recalls saying to Mrs Crompton *“That will be the Alzheimer’s Mary”*, on one occasion. In response to questions from the Tribunal, Ms Burrige freely admitted that she now sees that her comment might have caused offence, she is sorry for it, has had training and has moved on. Apart from that comment, Ms Burrige does not recall making any such comment or similar comment to Mrs Crompton.
36. Mrs Crompton’s evidence on this is short (WS 9):
- “Katie Burrige began making remarks towards me suggesting that I had Alzheimers. The comments began to increase and were along the lines of, “Is it the Alzheimers again Mary?”. The comments were made on a daily basis. It was clear that she had not forgiven me for calling her out on her behaviour. I remained silent and got on with my job but the comments and her general anger hurt me greatly.”*
37. In answer to questions during the hearing, Mrs Crompton allowed that she could not be specific about when these comments had been made and their frequency was more like weekly rather than daily.
38. Apart from Ms Burrige’s admission, there is a conflict of evidence on this point between Ms Burrige and Mrs Crompton. On the balance of probability, the Tribunal’s finding is that these remarks were not made frequently to Mrs Crompton but there was more than one occasion on which they were made.
39. Mr Charity submitted an investigation report dated 8 August 2019 to the Company (202-208.)
40. On 13 August 2019 Ms Alex Peto-Dias (the Tribunal understands Ms Peto-Dias to be the wife of the Company’s proprietor) wrote to Mrs Crompton upholding one of her grievances (relating to the communication to Mrs Crompton of the reasons for the decision to extend her probation period) but otherwise dismissing the grievances (209-213).
41. Mrs Crompton makes no detrimental observations about her experience with the Company prior to her switching roles from Administrator to Search Consultant. However, Mrs Crompton’s evidence about the atmosphere in the office during her time there as a Search Consultant is far from complimentary. In particular, Mrs Crompton complains about Ms Burrige. Mrs Crompton observes (WS 7) *“Katie Burrige was known to have anger issues. She would frequently slam doors and was extremely intimidating.”*

42. Mrs Crompton's employment ended on 21 June 2019. When asked by the Tribunal at the hearing, Mrs Crompton could not remember when she had first thought about making a complaint to the employment tribunals, but it was sometime after her dismissal. Mrs Crompton then made contact with ACAS. Mrs Crompton had thought about taking legal advice but had rejected the idea on the ground of cost. Mrs Crompton had wanted an outcome to her grievance before she entered into Early Conciliation or lodged a claim with the employment tribunals.
43. Mr Crompton approached ACAS for Early Conciliation on 25 September 2019. An Early Conciliation Certificate was issued on 2 October 2019 and Mrs Crompton's claims were presented to the employment tribunals on 20 October 2019.

APPLICABLE LAW

43. Section 123 of the EA, so far as it is relevant, provides as follows:

"123 Time limits

(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120" [the Tribunal has not set out the relevant part of section 120 but it includes complaints under sections 26 and 13 of the EA] "may not be brought after the end of-

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable."....

"(3) For the purposes of this section-

(a) conduct extending over a period is to be treated as done at the end of the period;"

44. Section 4 of the EA, so far as it is relevant, provides as follows:

"4 The protected characteristics

The following characteristics are protected characteristics-age;"

45. Section 13 of the EA, so far as it is relevant, provides as follows:

"13 Direct discrimination

(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.”

46. Section 26 of the EA, so far as it is relevant, provides as follows:

“26 Harassment

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B’s dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”....

“(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

*(5) the relevant protected characteristics are –
age”.*

47. Section 109 EA, so far as it is relevant, provides as follows:

“109 Liability of employers and principals”

(1) Anything done by a person (A) in the course of A’s employment must be treated as also done by the employer.”....

“(3) It does not matter whether that thing is done with the employer’s”....“knowledge or approval.”

48. Section 136 of the EA, so far as it is relevant, provides as follows:

“136 Burden of proof

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

(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.”....

“(6) A reference to a court includes a reference to-

(a) an employment tribunal;”

49. The Tribunal was not referred to any case law.

CONCLUSIONS

50. The jurisdiction issue

51. In this case the acts complained of are the imposition of a period of probation on Mrs Crompton when she switched to the role of Search Consultant, the “Alzheimer’s” comments and the dismissal.

52. In the case of the probation period, that remained in place on the effective date of termination of Mrs Crompton’s employment, 21 June 2019. It was conduct extending over a period to be treated as done at the end of that period. Time runs from that date. The three months primary time limit therefore expired at midnight on 20 September 2019. Mrs Crompton does not enjoy any extension of time under the ACAS Early Conciliation provisions because the Early Conciliation process was not commenced until after the normal limitation period had expired (it was commenced on 25 September 2019). The EC Certificate was obtained on 2 October 2019. This claim was presented on 20 October 2019. They were therefore around a month out of time.

53. The same analysis applies to the dismissal. Whilst the dismissal was communicated on 24 May 2019, time runs from the end of the notice period on 21 June 2019.

54. The position is different in respect of the “Alzheimer’s” comments. The Tribunal does not know when these were made. It cannot have been after Mrs Crompton went sick on 3 June 2019. This means that this part of the claim is probably at least 2 months out of time.

55. The issue, therefore, is did Mrs Crompton bring her proceedings in respect of these acts after the end of such other period as the Tribunal thinks just and equitable?

56. In making its decision, the Tribunal must consider the prejudice that each party would suffer as a result of its decision. In doing so it must have regard to all the circumstances of the case and in particular the factors in section 33 of the Limitation Act 1980.

57. General prejudice to the parties

58. As far as overall prejudice to the parties is concerned, the Respondent has not suggested that it has been prejudiced by the late submission of the claims.

59. The Tribunal turns to each of the factors in section 33 of the Limitation Act 1980.

60. The length of and reasons for the delay

61. The delay was between 1 and two months, depending on the act in question. Mrs Crompton's evidence was that, whilst she was not particularly aware of time limits, she did want to pursue a grievance as a way forward. The outcome of that grievance was sent to her in a letter on 13 August 2019. That was less than two months before Mrs Crompton lodged her claims. There is no rule of law that time limits are extended by the period covered by a grievance process but it is a factor the Tribunal may consider in determining whether it would be just and equitable to extend time.

62. The Tribunal notes that Mrs Crompton was signed off sick from at least 3 June 2019 until 21 June 2019.

63. The extent to which the cogency of the evidence is likely to be affected by the delay

64. This does not appear to be a relevant factor in this case.

65. The extent to which the party sued has cooperated with any requests for information

66. Again, this is not a relevant factor in this case.

67. The promptness with which Mrs Crompton acted once she knew of the facts giving rise to the cause of action

68. Mrs Crompton did not act promptly to lodge a claim. Rather, Mrs Crompton engaged in the grievance process. What Mrs Crompton did

subsequently do was contact ACAS within a month or so of the outcome of her grievances.

69. The steps taken by Mrs Crompton to obtain appropriate advice once Mrs Crompton knew of the possibility of taking action

70. Mrs Crompton did not seek legal advice on the ground of cost but, rather, contacted ACAS.

71. There is no presumption that a tribunal should exercise its discretion to extend time. Time limits are exercised strictly in employment cases and the onus is on the claimant to justify the claimant's failure.

72. In this case, on the evidence before the Tribunal, the delay was primarily due to Mrs Crompton wanting to engage in the grievance process that might have delivered a satisfactory outcome from her point of view. The process was not assisted by her sickness absence. Mrs Crompton seems to have been generally unaware of time limits. However, once the process reached an unsuccessful conclusion, so far as Mrs Crompton was concerned, she acted in a reasonably timely fashion to contact ACAS, enter into conciliation and thereafter lodge her claim. There is no balance of prejudice favouring the Company and, weighing the factors in the balance, it is the Tribunal's decision that it is just and equitable to extend time to allow Mrs Crompton to bring her claims in respect of the three acts complained of.

73. **The harassment claim**

74. Was the requirement that Mrs Crompton undergo a period of probation when she switched to the role of Search Consultant unwanted conduct related to her age?

75. This is a two-part test. Was the conduct related to Mrs Crompton's age and, if so, was it unwanted?

76. The Tribunal is required to decide if there are facts from which it could conclude, in the absence of any other explanation that age was a factor in the Company's requirement that Mrs Crompton underwent a period of probation.

77. In the background we have Ms Burridge's "Alzheimer's" remarks and her implicit acceptance in her conversation with Mr Charity that age was a factor when clients selected candidates. Against that is the fact that Mrs Crompton was preferred over a much younger candidate when she was recruited and Mrs Crompton's confirmation to Mr Charity that Ms Wallbridge had not done anything to indicate she would discriminate against people in their late 50s. Taken together, it

seems to the Tribunal that these factors present a neutral picture. A probation period in a new role was normal in the Company and Mrs Crompton took the role on her own initiative in the clear knowledge that there would be a probationary period. The Tribunal has no hesitation in concluding that there is nothing which would lead it to conclude that age was a factor in the Company's requirement that Mrs Crompton underwent a period of probation.

78. The question of whether or not this conduct was unwanted does not, therefore, arise.
79. Were the "Alzheimer's" remarks unwanted conduct related to Mrs Crompton's age?
80. There can be no doubt that a remark such as that admitted to by Ms Burridge is age related. When made to Mrs Crompton the clear meaning was that Mrs Crompton's memory was defective because of her age.
81. Was the conduct unwanted? There seems little doubt that Mrs Crompton did not want comments of this sort.
82. Did the conduct have the purpose of violating Mrs Crompton's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? If not, did it have that effect, taking account of her perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect?
83. The Tribunal doubts that Ms Burridge's purpose was to violate Mrs Crompton's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her. Ms Burridge almost certainly saw her remarks as no more than office banter.
84. Did, therefore, Ms Burridge's remarks have that effect? On the evidence the Tribunal finds that they did. As far as Mrs Crompton's perception is concerned, Mrs Crompton's conversations with Mr Charity record that she found the remarks hurtful, even though she had taken no action at the time they were made. As far as the other circumstances of the case are concerned, the Tribunal takes account of the fact that Mrs Crompton had, herself, referred to her "*senior moment*" in a communication with a client. That does not detract, however, from the fact that it was reasonable for Mrs Crompton to find the remarks intimidating, hostile, degrading, humiliating and offensive.
85. The Tribunal's conclusion is that, in this respect, Mrs Crompton was harassed contrary to section 26 EA.

86. The claims of direct discrimination

87. The “Alzheimer’s” remarks were an act of direct discrimination. The remarks would not have been made to a Search Consultant materially younger than Mrs Crompton. The remarks were detrimental, they were less favourable treatment than Ms Burrige would have afforded to a materially younger Search Consultant and this was an act of direct discrimination.

88. Neither the requirement that Mrs Crompton undergo a probationary period nor her dismissal were acts of direct discrimination.

89. In the case of the probationary period, this was not a detrimental action. It was standard procedure. If it could be classified as detrimental action, it would not be less favourable treatment because it would have applied equally to a Search Consultant in Mrs Crompton’s circumstances but materially younger. Finally, the evidence does not support the proposition that the probation period was because of Mrs Crompton’s age.

90. As far as the dismissal is concerned, it was a detrimental action. However, a Search Consultant in Mrs Crompton’s circumstances (including being in a probationary period), but materially younger, would also have been dismissed. What drove the dismissal were the performance issues and, on the evidence, age was not a factor.

91. Remedy

92. Whilst it would be normal to consider remedy under each of the two heads of harassment and direct discrimination, it is right to combine them for this purpose in this case. The findings of harassment and direct discrimination arise out of the same act.

93. There is no direct loss arising from the act of harassment and discrimination. The Tribunal, therefore, confines itself to the question of compensation for injury to feelings.

94. Compensation under this heading is intended to compensate a victim of discrimination for the anger, distress and upset caused by the unlawful treatment they have received. It is compensatory, not punitive. The guidance offered by case law is that such awards should be considered in three bands. The bands themselves are the subject of guidance from the Presidents of the Employment Tribunals in England and Wales and Scotland. The top band of £26,300-£44,900 is appropriate in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. The middle band of £8,800-£26,300 is appropriate for serious cases which do not merit an award in the highest band. The lower band of

£900-£8,800 is appropriate for less serious cases, such as one-off occurrences.

95. The Tribunal has considered the appropriate award to make in this case carefully. It bears in mind that awards are compensatory and not punitive and its attention must be on the injury to Mrs Crompton's feelings. The indicators point to any injury having been slight. Mrs Crompton referred to herself as having a "*senior moment*" in an external communication. There is some evidence that Mrs Crompton herself took account of age when matching clients and candidates. Mrs Crompton made no complaint at the time the remarks were made and they were not mentioned in her grievance letter. It was only later, when prompted by Mr Charity, that Mrs Crompton said that she found the remarks hurtful. Mrs Crompton's focus has always been on the unfairness of her dismissal and the shift of emphasis towards age discrimination and the remarks the Tribunal has found to be discrimination appears to be opportunistic. Taking all this into account the Tribunal's finding on the appropriate level of award is firmly at the lower end at £900.

96. Interest is payable on this award calculated as follows:

Days between 3 June 2019 (that being taken as the day of the discriminatory act) and 26 October 2020 (the day of calculation): 509

Interest rate: 8%

$509 \text{ (days)} \times 0.08 \times 1/365 \times \text{£}900 = \text{£}100.41$

Employment Judge Matthews

Date: 2 November 2020