Case Number:2201539/2019av

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr H Snape		**Mr R Ardill R1** **Mr C FlinosR2** **Mr A Ismail R3** **[Hayvn UK Limited** **R4 – in Liquidation]**

HELD AT: London Central (CVP video audio call) ON: 10 November 2020

BEFORE: Employment Judge Russell (sitting alone)

REPRESENTATION:
Claimant: Ms. L. Suding Counsel
First Respondent: No appearance
Second Respondent: In Person
Third Respondent: In Person

Judgment

A. The Claimant's claims under ss.13, s.26 and s.39 (1) of the Equality Act 2010 fail and are dismissed.

B. The Claimant as a Receiving Party is nevertheless awarded costs award in his favour from the Second and Third Respondents as Paying Parties under Rule 75,76 and 78 of the ET Rules as follows: -

   i. The Second Respondent is ordered to pay the Claimant £3,500 by way of costs.
   ii. The Second and Third Respondent are ordered on a joint and several basis to pay the Claimant a further sum of £5,400 by way of costs.

Background to the complaints

1. This has been a protracted and time-consuming case. Partly because the Second and Third Respondents live in the UAE and have been difficult to track down and serve, reluctant to be contacted and aggressive in their objections to the claims made. But in addition, the First Respondent had to be served through the Second Respondent via a substituted service order and there were other complications as set out below.

2. Proceedings were brought by Mr Snape some 18 months ago claiming age discrimination after he applied for a job with the Fourth Respondent. He claimed that he was initially offered the job and then this was withdrawn on 12 March 2019. He had an

initial interview with the First Respondent, a second interview with the First and Second Respondents and a third interview with the First, Second and Third Respondents before the job was allegedly offered to him. He claims that the questions asked of him and actions of the Respondents in withdrawing the offer , together with (in particular) the actions and comments of the First and Second Respondents on 7 March 2019 in a telephone call to him, amounted to unfavorable treatment on the grounds of his age, a protected characteristic under section 5 of the Equality Act 2010, in breach of s.13 (direct discrimination, s.26 (harassment) and s.39 (1) (discrimination based on the Respondents' decision to offer or consider offering the job to an older candidate) of the Equality Act 2010.

3. The Fourth Respondent, Hayvn UK Limited, is in liquidation and proceedings against the Fourth Respondent have already been stayed since 16 July 2020. Hayvn UK Ltd was struck off the companies register on 4 February 2020.

4. The Respondents were all served at the registered office of the Fourth Respondent at 160 City Road, London EC1 and an ET3 was due by 15 August 2019. No appearance was entered and the Claimant sought default judgment, which was given by Employment Judge Wade on 28 October 2019, making all Respondents jointly and severally liable for the discriminatory treatment of the Claimant on the basis of age and harassment in breach of the Equality Act section 13, 39(1) and 26. A Remedy Hearing was fixed for 16 January 2020, in respect of which the Claimant claimed £15,000 including an injury to feelings award.

5. I (Employment Judge Russell) determined at the Remedy Hearing on 16 January 2020 that the Respondents were jointly and severally liable to pay the Claimant £4,000 following the Employment Tribunal Judgment on liability on 28 October 2019 and reasons were given for this remedy judgment which was sent to all the parties on 27 January 2020. However there was an issue as to service and on 26 and 28 January 2020 (coincidentally crossing with the remedy judgement being promulgated) the Second Respondent wrote to the Employment Tribunal indicating that none of the first three respondents had received any correspondence in respect of the claim and that the Fourth Respondent was a shell company and was not trading (albeit the Second Respondent accepted he owned it). The Second Respondent knew about the judgment through a journalist who had contacted him after the remedy hearing and Mr Flinos , the Second Respondent , asked for the case to be reconsidered. Including these words

"Reconsideration of Case Number 2201 539/2019 I am writing to request a reconsideration of a judgment. Case Number 2201 539/2019. We respectfully ask that the judgment be revoked as justice was denied as the respondents were improperly served, unaware of the action and therefore unable to defend the claim".

His fuller argument was a) the fact that only the Fourth Respondent had been properly served and that company was no longer trading and b) given the address of the Fourth Respondent had been used for service none of the other respondents had been properly notified of the claims or the remedy hearing . Mr Flinos was himself a resident in the United Arab Emirates and indicated that he had not worked with the First Respondent for some time and did not know his address in the Uk.He provided an email address for the Third Respondent who he said he did work with but not the First Respondent (although he said he had his email address) merely stating Mr Ardill was a consultant for the Fourth Respondent at the material time but not its employee.

6. The reason there were 2 emails from the Second Respondent at this time (neither copied to the Claimant and so in breach of rule 92 of the ET Rules) is because the first was sent before he had read the Remedy Judgment and he was asked to make a clear request for a reconsideration once he had which he did on 28 January 2020.The Third Respondent was aware of these exchanges but also failed to advise the Claimant nor communicated with the Tribunal.

7. I (Employment Judge Russell) then determined in the spring of 2020 that there was a prospect of the original decision being varied or revoked under Rule 72 of the Employment Tribunal Rules and Regulations 2013. I made this decision in light of the Second Respondent's request for reconsideration of 28 January 2020 as the Second Respondent gave a cogent if perhaps unreasonable explanation as to the non-service of the Employment Tribunal proceedings albeit it also dealt with a number of connected matters. As a result, the Judgment of 16 January 2020 was revoked on reconsideration under Rule 70 and 72 and it was ordered that the matter be set down for another one-day hearing to deal afresh with liability and remedy. Any costs associated with the resultant delays were reserved. Due principally to Covid related reasons this hearing could not take place until today 10 November 2020.

8. A further complication had arisen due the Claimant's Notice of Appeal filed at the EAT on 6 March 2020 but only received by the Tribunal from the EAT on 23 June 2020 again no doubt due to the hiatus of Covid. Under reference UKEATPA/0242/20/DA. It is unclear as the status/ progress of this Appeal. In this appeal the Claimant seeks to claim, inter alia, further economic loss not then awarded to the Claimant at the original remedy hearing and top of the award for injury to feelings that was made at such hearing on 16 January 2020.

Claimant Claims/ Issues.

9. The claims are: -

   - Discriminatory treatment on the basis of age (Equality Act 2010 section 13): because of age, the Respondents treated the Claimant less favourably than they treated or would have treated others.

   - Harassment (Equality Act 2010 section 26): the Respondents engaged in unwanted conduct related to age and the conduct had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

   - Unlawful discrimination against job applicants (Equality Act 2010 sections 39(1)(b) and (c) and (3)(b) and (c)): the Respondents allegedly discriminated against and victimised the Claimant as to the terms on which the Respondents offered the Claimant employment and by not offering the Claimant employment.

Jurisdiction.

10. The Claimant lived in London and applied to a UK job advertisement through UK recruitment company StopGap Ltd located in the UK and a UK registered Company. The Claimant was contacted by UK-based recruiter Rebecca Bryan. The Claimant and all Respondents met face-to-face on 1 March 2019 in London and the Claimant

expected the job location to be in the UK rather than the Middle East albeit he excepted to travel to work there from time to time. He legitimately if mistakenly believed he might work out of one of Maitland's offices in London, the Respondents' UK public relations firm. And there were a number of UK connections that the Claimant was relying on including the fact Mr Ardill and Mr Ismail (First and Third Respondents) are , and the Second Respondent seems to be , British citizens with the First Respondent based in London as was the Fourth Respondent's registered office (the potential employer) . It is clear The Tribunal has jurisdiction to hear this claim despite the Respondent's protestations to the contrary.

Findings

11. I heard from the Second Respondent and the Claimant before submissions from the Parties. However, by that time, having cross examined the Claimant in an aggressive manner, the Second Respondent chose to leave the hearing and took no further part in it. The Claimant and Respondents were invited to submit written submissions after the hearing and given a few days to do so. The First Respondent failed to do so and those from the Second and Third Respondents were light in information, primarily late served statements. However, I took all the statements and submissions made into account in making these findings.

12. The Claimant gave consistent evidence and was generally credible. In contrast, the Second Respondent contradicted himself on more than one occasion and was belligerent. The Third Respondent was less unreasonable but also acted in a hostile way towards the Claimant and was inconsistent in his evidence. Both the Second and Third Respondents simply denied all the conversations the Claimant referred to in detail based on his contemporaneous notes at the time. Such blank denials were not credible and their statements that the Claimant was making it (the interview questions) all up were unpersuasive and , in my determination, knowingly untrue.

13. There was however no offer of employment made to the Claimant in that whilst the agents may have led the Claimant to understand a job offer was to be forthcoming this was not the case. And the Claimant himself accepted it was certainly never an unconditional offer. In addition, it is also clear that no job offer was made to the unnamed Chinese woman (allegedly aged 34 so lightly older than the Claimant) or anyone perhaps being considered the job the Claimant applied for. And I accept no candidate was appointed to that job at the material time.

14. Nor was that job, as he states, going to be based in London. None of the Respondents' employees were based in London. This was the Claimant's genuine misunderstanding albeit perhaps through no fault of his own as unclear information was provided to him by the Respondents and or agents. I find the job he applied for was to be based abroad, and not in London with travelling abroad, although also accept he would not have wished to take the job if he had known.

15. The Respondents acted dismissively towards the Claimant in coming to their decision not to offer the Claimant employment. The Second and Third Respondent conducted the interviews with the Claimant in March 2019 rudely by, for instance, walking away from the Claimant and or interrupting him and asking him inappropriate sometimes offensive questions. I accept for instance the Claimant's evidence that he was asked if he was married and if he had children and when replying in the negative was told "Good because we need someone that can travel''. And that the Second Respondent at one

point said to him "'I'm now going to ask you a question that you're probably not use to, but it's important and I would like to hear your thoughts. You talk a lot, so I am wondering are you full of shit and thinking about coming into our family and fucking things up?'". This is also wholly consistent with the frankly unpleasant way the Second Respondent, in particular, has conducted himself during these proceedings.

16. The Claimant was asked how old he was to which he replied, "I'll be 27 this July'. There is no evidence that his age was stated on his CV and whilst he had no obligation to do so I accept they wished to question his experience and financial expectations by reference to his age. But I also find that there were others working in the then Fourth Respondent's business who were of a similar age to the Claimant including their Chief Technical Officer. And find the fact of the Claimant's relative youth was not a factor in the Respondents' decision not to offer the Claimant a job. I accept the Respondents' evidence that they were interested in the Claimant's experience (where they then decided there was an insufficient fit) and salary expectations (higher than they wished) not his age. And whilst there was no need for them to ask the Claimant his age there was no intention to prejudice him because of it and it is natural his experience and age might be linked in their mind. Even if his experience was already considerable for a younger man it was legitimate for them to question the extent of that experience in the light of and given his age.

17. It was not because of the Claimant's age that Mr Flinos and Mr Ismail the Second and Third Respondents behaved in an offensive manner. The fact they did so is because that was their (albeit unpleasant and unnecessary) way of behaving.

18. And the discussions did not get anywhere near a job offer as material facts such as pay and job location and even job duties were not adequately discussed

19. Although the First Respondent Mr Ardill did not actively say or do anything amounting to discriminatory treatment and harassment on 1 March 2019, he did not correct or try and prevent Mr Ismail's clearly inappropriate questions and remained in the meeting in a supportive role to the Second and Third Respondents.

20. The Claimant states that by shutting him down at the meetings and being asked to prove himself because 'You do not have the job yet' and that 'You still needed to prove yourself'(both statements or similar statements I accept may have been made) this had both the purpose and effect of creating a degrading and intimidating environment. And that Mr Flinos would not have used them in his treatment of a candidate whom he did not consider young. But I do not find this to be the case. These were aggressive and unnecessary interview questions if asked but there is no compelling evidence they or any other questions were asked of the Claimant because of his age and I find the language used did not have either the purpose or effect of creating a degrading and intimidating environment. If that were the case the Claimant would not have been so upset and disappointed not to have been offered the job .The Respondents treated the Claimant discourteously but this falls short of harassment and even if this is not the case any harassment was not related to his age.

21. The Claimant states that *"Mr Flinos's pattern of interrupting, talking over, and firing off questions quickly was observed in his cross-examination of the Claimant by video during the remote hearing, and it is submitted he used those devices by telephone on 7 March 2019 to create a hostile and offensive environment for the Claimant and to attempt to violate the Claimant's dignity*". But as with the questioning referred to above it is instead simply an example of a deeply unpleasant interview technique by the

Second and Third Respondent and I find they would no doubt have (unfortunately) behaved the same way with other interviewees irrespective of age.

22. When the Second Respondent said "I don't know who has been paying you £400 a day, but if that's your proposal this deal is over, and we can end the call…" this may have been part of Mr Flinos' attempt to lower the Claimant's day rate as claimed by the Claimant, but it was not victimisation based on age. Nor was the Second Respondent's use of words such as "good lad" , to the extent he said that , evidence of discrimination against the Claimant because of his age. The Claimant may not have liked (understandably) the Second Respondent's manner of negotiation but I find this is what it was – a manner of negotiation.

23. Although the Claimant may have felt slightly bullied by these difficult exchanges, he still wanted the job and would have been prepared to accept it on the right terms. So however emotional and unpleasant the interview process it is inconsistent to argue that he was intimidated and humiliated by the respondents.

24. It may well be that the recruiter had given the Claimant the impression that he had been offered a job. And , further , that having been " offered " an initial 6 week contract on or about 5 March 2019 that such offer was then withdrawn on or about 11 March 2019.But that is sometimes what recruiters , reliant on commission , say or do and to the extent they did so here this was misleading. There was no job offer. Nor, as I found above , was a job offer made to anyone else for the role sought by the Claimant whether older or not.

25. The Claimant submits that the Tribunal does not have to decide factually whether employment was offered or not. If the Respondents made a decision not to offer employment, or alternatively made a decision to rescind an offer, it was unlawful discrimination against a job applicant in breach of the Equality Act 2010 sections 39(1)(b) and (c) and (3)(b) and (c)) as long as the Tribunal finds that the Respondents discriminated against or victimised the Claimant by not offering the Claimant employment. But I have found that this was not the reason the Claimant was not offered the job.

26. When the Third Respondent issued a limited apology to the Claimant ("I'm sorry you felt like that") the Claimant was grateful and perhaps he would not have brought his claim at all if the Respondents had shown a similar sensitivity when determining not to offer him a job. The behaviour of the Second and Third Respondent perhaps highlights why he brought proceedings at all but however offensive the Respondents conduct it was not unlawfully or at all linked to the Claimant's age.

27. Both the Second and Third Respondents Mr Flinos and Mr Ismail hired and had a working relationship with the First Respondent Mr Ardill. But other than offering (inappropriate but principally silent) support to the Second and Third Respondents I do not find the First Respondent to blame for the way in which the Claimant was treated in his application, interview, and job offer process .Where all of the wrongful acts/omissions were allegedly done. The First Respondent has expressed ignorance of the claim and denies any material link to the Fourth Respondent's business and I accept this is the case even though he should have attended this hearing of course.

28. For all these reasons the Claimant's claims fail and are dismissed against all respondents.

Costs

29. The Claimant divided its claim for costs into 3 parts. A March 2019 to 28 January 2020. B It's Appeal. C the period following the Respondents' application for a reconsideration and setting aside of the remedy judgement to include this hearing. As for the Appeal the Claimant determined he wished to appeal that remedy judgment, and this was his decision and not due to the Respondents. But I have ordered costs to be paid by the Second (A and C periods) and Third Respondents (C period) for the other parts of the litigation as set out below.

Period A March 2019 to 28 January 2020

30. At the last preliminary hearing in July I observed that the non-attendance of the respondents at the Remedy Hearing on 16 January 2020 needed to be explained as well as the Second Respondent's failure to give an email address for the First Respondent when asked to do so as well as claimed ignorance of his own application to have the case reconsidered on 26 January 2020. No acceptable explanation has been forthcoming on any of these points. The Respondents claim that they had not received the ET documents and have been believed in this respect but these were sent to the Registered Address of the Fourth Respondent company, which was valid until February 2020. There is no acceptable reason why the Second Respondent who stated that he owned the Fourth Respondent and that the First and Third Respondents had "no connection " to the Fourth Respondent should not have known of the claim made even if he did not, in practice. The (then current and correctly used) Registered Office may have been a postal box/one of convenience, but it is there for a purpose, and even if the company had been a shelf company the Second Respondent was a director and shareholder perhaps 100% shareholder. I have accepted that the Respondents did not know of the claims made but they should have done, through the Second Respondent, and the fact they did not led to unnecessary hearings and confusion.

31. The Second Respondent failed to copy in the Claimant's representative with his application of 26/28 January 2020 for reconsideration of the judgment and when the Second Respondent was subsequently ordered in the summer of 2020 to provide a copy of his request an application for reconsideration to all parties he replied "what application?" suggesting ignorance of the whole matter. When asked by me of this exchange in the hearing today he said of his denial that, "it was just my joke". The Second Respondent had also said that he did not know how to contact the other respondents, but this is wholly inconsistent with his email of 26 January 2020. And in this 26 January email, I note he must have been in contact with both the First and Third Respondents given his statement that neither had been served as otherwise why he would know this.

32. This is all wholly consistent with the Second Respondent's attempts to deflect from the claim as is the fact he later served an out of time ET3 referring almost exclusively to a jurisdictional defence. Failing to deal with the actual complaints at all. He should have defended the claim substantively and in a timely fashion as the other Respondents should have done. If they had done so and conducted the defence in a professional manner, then the claim would no doubt have been successfully defended and no order of costs would have been made. But they all failed to do so and although the Claimant might have served the respondents more effectively, he tried his best to do so. And the Second Respondent must take significant responsibility for his own misconduct. He

acted unreasonably for not checking the Registered Office post and with misleading emails to follow and I order that he pay a proportion of the Claimant's costs as a result . Under Rule 78 I may order a specified amount by reference to the costs of the receiving party. The Claimant's costs amount to £7,794 for this period A and the Second Respondent is ordered to pay £3,500 of these. But my order for costs against the Second Respondent for this Period A is against him alone.

Period C Subsequent Proceedings including today's hearing

33. In the July Tribunal order there was a further Order that the Second Respondent should provide fuller written statements detailing the claimed non-service and explaining the events upon which the Claimant's claim is founded and the respective roles of the respondents and serve this on the Claimant at least 14 days before such hearing. He was also asked to assist on contacting the First Respondent recognising it may not otherwise be possible to serve and contact him without an accurate UK address to use. He did not comply with any of these orders.

34. Mr Flinos refused to provide the email address he had for Mr Ardill despite being requested to do so which resulted in the Tribunal having to make an order for substituted service. And then seemingly ignored that order anyway as Mr Ardill emailed the ET at 18:28 the day before the hearing (9 November 2020) claiming he did not know about the hearing and if this is true it is because Mr Flinos as the Second Respondent failed to inform him.

35. In the hearing the Second Respondent Mr Flinos made numerous intimidating, hostile, degrading, humiliating and offensive remarks during the Claimant's evidence, including via the CVP chat room suggesting the Claimant was a racist (without any justification whatsoever) stating "Are you just looking to get some money out of us?" , "Why is he making them up?", "His evidence is a lie." , "Pay attention!" and other offensive remarks despite my own request , made many times, for him to behave politely and professionally. I also find that the Third Respondent has not only seemed to condone the Second Respondent's conduct but has and has acted unreasonably himself .

36. Both the Second and Third Respondents have been found by me to have been untruthful in their recollection of the interview questions asked of the Claimant.

37. The Respondents' financial means have been requested on more than one occasion. The Respondents were told that the issue of costs would be considered at the listed hearing of this matter for today , 10 November, and the attending respondents were required to file evidence of their means in case an order for costs to be considered by the Employment Judge who then may wish to take Rule 84 [ability to pay] of the Employment Tribunal Rules into account." . They failed to do so at the hearing or in subsequent submissions and so have given no material defence to the costs application.

38. The Respondents failed to provide witness statements for today's hearing and failed to make any document disclosure. Mr Flinos served a late ET3 (even by reference to when they said they received the claim) , failed to address the claim's key issues when he did , did not copy the Claimant when submitting his ET3 in breach of Rule 92 of the ET Rules and the Third Respondent did not even submit a defence.

39. Mr Flinos as the Second Respondent attended the hearing late and then left early and

in a rude fashion. On more than one occasion I was forced to mute the Second Respondent because I felt he was trying to bully the Claimant. The Third Respondent was also intimidatory in his (brief) questions of the Claimant albeit less discourteous than the Second Respondent.

40. The Third Respondent has acted unreasonably in the manner of his defence and conduct of the action. And the Second Respondent has acted not only unreasonably but also abusively and disruptively again as set out above. He is most responsible for the difficulties in having this hearing heard properly without rancor or interruptions but the Third Respondent is not without blame as reflected by his failure to take an active part in the proceedings until the full hearing as well as his occasional discourtesy during the hearing. I am not going to apportion blame between the Second and Third Respondents in determining the costs award for Period C . They are both blameworthy and have both acted unreasonably.

41. I make an order for costs against both the Second and Third Respondents on a joint and several basis in respect of the post initial Judgment period C up to and including this hearing. Whilst the First Respondent has also acted unreasonably he had a more peripheral role , had no direct connection with the other respondents and his conduct has not been so culpable, especially compared to the Second and Third Respondents, that a costs order against him is justified.

42. Under Rule 78 I may order a specified amount by reference to the costs of the receiving party. The Claimant's costs incurred from the end of January up to this hearing amount to £5,400 as per the bills narrative and breakdown provided and I order that all these costs are reimbursed by the Second and or Third Respondents due to their conduct. This costs order is made against them both on a joint and several basis.

One of the frustrations in this case is the way the Respondents have dealt with these claims. The principal blame for the way in which the Respondents have conducted themselves lies with the Second and Third Respondents. The Claimant may have lost his claim, but he was quite entitled to bring it and argue this before the Tribunal and expect the respondents to defend it in a reasonable fashion. They have not done so. And due to their conduct pre the hearing and in the Tribunal and towards the Claimant it is right and proper they pay towards the Claimant's costs.

EMPLOYMENT JUDGE

November 27 2020
Order sent to the parties on

27/11/2020

for Office of the Tribunals