EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr H Agravat	v	McColl's Retail Group Ltd

Heard at: Watford **On**: 30 April 2021 & 25 May 2021

Before: Employment Judge R Lewis
Mrs J Hancock
Mr C Surrey

Appearances
For the Claimant: In person
For the Respondent: Mr B Brown, Solicitor

JUDGMENT having been sent to the parties on 14 June 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Procedure

1. The claimant presented a claim form on 21 August 2019 complaining of age discrimination. Day A was 26 June and Day B was 24 July. He had never been an employee of the respondent and his claim related to an unsuccessful job application. The response was accepted on 17 November 2019.

2. It appears from the tribunal file that the file was then mislaid for a period of time, causing some delay, for which we apologise to the parties. In due course, the file was seen by the present judge in accordance with Rule 26. The judge decided that in light of the delay, the conciseness of the issues, and the clarity of the pleadings on both sides, a preliminary hearing would not be necessary. Straightforward case management directions were issued on 3 December. On 19 December the case was listed for a 1-day hearing on 30 April.

3. That hearing began before the present tribunal and it was adjourned in circumstances set out in our case management order of the same day. In accordance with that order, the claimant sent to the tribunal and respondent a revised witness statement and skeleton argument, responding to what he considered to be new material.

4. At the start of this hearing therefore, there was an agreed bundle of 76 pages. The hearing proceeded as a hybrid hearing. The judge and claimant were present in the tribunal room; the NLMs, and respondent's

representative and witnesses took part remotely.

5. There were three witness statements and before the hearing, the tribunal had the opportunity to read the statements of all three witnesses, the claimant's skeleton argument, and a selection of the bundle.

6. The claimant gave evidence and was cross examined for just over an hour. The respondent called two witnesses, Mr D Edwin, Area Manager, who had interviewed the claimant for employment and rejected him; and Ms C Parrott, HR Business Partner, who had dealt with his complaint. Mr Edwin gave evidence for about 45 minutes and Ms Parrott 20 minutes. There were concise closing submissions from both sides.

General framework

7. The only issue in this case was whether the respondent directly discriminated against the claimant on grounds of age when he was interviewed and rejected for employment on 9 April 2019.

8. Although the paperwork and evidence referred to a wide range of issues, our task is limited to the one above point only. Therefore, where we make no finding on a point which was mentioned; or if our finding does not go to the detail to which the parties went, that should not be taken as oversight or omission, but as a reflection of the extent to which the particular point truly assisted the tribunal.

9. The tribunal is familiar with the difficulties faced by litigants in person (ie those who represent themselves). We understand that the events before the tribunal may have been stressful and/or emotive. We also understand the imbalance which cannot be avoided where the respondent is a large company, supported by professional legal advisors. It is the duty of the tribunal to try to keep both sides on equal footing; while at the same time maintaining its independence and impartiality. That balance is sometimes difficult to maintain.

10. The claimant was entirely courteous in his dealings with the tribunal; but it was frequently necessary to draw him away from points about which he felt strongly, and into the narrow focus of the tribunal's enquiry.

11. This claim was brought only under the provisions of sections 5, 13 and 39(1)(c) of the Equality Act 2010. The complaint was that because of the protected characteristic of age the respondent had failed to offer the claimant employment. Mr Brown reminded us of the proof provision of s.136, and in particular 136(2):

> "If there are facts from which the court could decide, in the absence of any other explanation, that A contravened the provision concerned, the court must hold that the contravention occurred."

12. In practice, the claimant must prove facts from which, in the absence of explanation from the respondent, the tribunal could infer that discrimination had taken place. If he does so, the respondent must prove that the explanation is one in which the protected characteristic of age played no part whatsoever. The tribunal need not ask if age were the sole or main

reason for the treatment complained of; it is sufficient if it finds that age was a material factor.

13. The tribunal recognises further the difficulty of proving discrimination cases, as discrimination is often covert; it recognises also the commitment of social policy in favour of equality and the elimination of unlawful discrimination.

Findings of fact

14. We find as follows. The claimant was born in 1952 and at the time of these events was aged 66. From 1975, he had a successful career in retail, including publishing, and running his own news agents business (20).

15. The respondent is a nationwide retail chain, which has developed from what was initially a news agents business, into a wider business of convenience stores. On 14 January 2019 it advertised for an Assistant Manager for its Borehamwood convenience store, which had recently undergone refurbishment.

16. We accept that the Borehamwood store was more than a news agents. We were told that its opening hours were 6am to 10pm 7 days a week, and that it had a range of stock, including alcohol, which would not be found in a newsagents.

17. The claimant applied for the job on 23 March. His application set out his date of birth, his age in years, and a summary of his career. There could be no doubt about his age from a short glance at the CV (20).

18. On 2 April the claimant had a telephone assessment by Ms Greene (22). We accept that that was a preliminary screening, and there appeared to be 19 questions. The "pass mark" ie, the score which would enable a candidate to proceed to interview, was 11 and the claimant scored 12. Ms Greene summarised at the end of her note, "Such a lovely man. Has all the experience has owned his own businesses and has excellent customer service" (25).

19. We accept Mr Edwin's evidence that at the end of the interview Ms Greene telephoned him to arrange an interview, so that an email sent on the afternoon of the interview with Ms Greene invited the claimant for interview at the Borehamwood store on 9 April (26).

20. In order that his ID could be verified, he was asked to bring certain documentation, and he brought his passport. Ms Greene emailed Mr Edwin the results of her telephone interview, including the claimant's CV. Mr Edwin read them.

21. At the heart of this case were the events of 9 April 2019 when the claimant went for his interview. We start off with the point which appeared to have the greatest emotional sting. The Borehamwood store had been refurbished. The store manager's office was tiny, and we were told that it had room for only one chair. We accept Mr Edwin's evidence that he had conducted about three interviews, including the claimant's, in the office. That being so, it follows that the claimant was not treated differently from

other candidates in the physical interview arrangements. The logic of that point, ie that direct discrimination has not occurred if the claimant has been treated equally badly with others, did not seem clear to the claimant. We accept Ms Parrott's evidence that the respondent, has, as a result of investigating this case, decided that that was not a suitable environment for an interview.

22. The claimant arrived at the store, and had a wait while Mr Edwin was completing other work. We attach no weight to the fact that the claimant had to wait, although the claimant appeared to feel belittled by it.

23. The claimant complained that Mr Edwin had not come out of the office to meet and greet him or shake hands. We accept Mr Edwin's evidence that he did so.

24. When the claimant came into the store manager's office he was taken aback by its size, and by the fact that there was only one chair. He sat on boxes. We agree with his concern that that was not an optimal manner of conducting an interview.

25. Before the start of the interview, Mr Edwin asked the claimant for his Right to Work documentation and photocopied the relevant pages of his passport. They included the claimant's date of birth.

26. The interview format was strictly structured by the respondent. It provided the interviewer with a competency based questionnaire (28-38). Mr Edwin went through the questions with the claimant and typed his answers straight on to the form on his computer. The cramped space available meant that he could not do this with eye contact with the claimant, a matter on which Ms Parrott again commented.

27. The claimant at this hearing admitted that he could not see the screen while Mr Edwin was typing and therefore could not know what he was typing; he was nevertheless sure that Mr Edwin was not giving his attention to the interview, but was in fact using the screen to type other work. We accept Mr Edwin's denial. His task was to appoint an assistant store manager, and we accept that he gave his time to that task.

28. There was dispute at this hearing as to whether Mr Edwin asked the claimant his age and asked him what he was doing. We accept Mr Edwin's denial that he asked the claimant's age; he had that information from the claimant's CV and from the passport and he had no reason to ask for it again. He may well have asked the claimant what he was doing (to which the answer was that the claimant was retired but wanted to get back to work) but we can see nothing to criticise in that and no evidence of age discrimination. It is a routine interview question.

29. The scoring matrix used by Mr Edwin permitted a maximum score of 24. The pass mark was 18, and the claimant's score was 7. Mr Edwin assessed the claimant's answers as being at a much lower level than the respondent's requirements. He did not doubt the claimant's experience or past achievement. The focus of the questions was on the skill set required in a setting with very different challenges. The claimant attached weight to

the discrepancy between the assessments made by Ms Greene and Mr Edwin. He submitted that they showed that Mr Edwin's assessment was tainted by discrimination. We do not agree: the discrepancy simply shows that in two different settings two different people may ask different questions and come to different answers. Ms Greene was triaging by telephone; Mr Edwin was interviewing in person for appointment. We attach no weight in the claimant's favour to this point.

30. The claimant's evidence and submission were stark. The document in our bundle which purported to be the completed interview questionnaire was, he submitted, a fabrication which Mr Edwin had written some time after the interview. He supported this argument by a reading of the notes of an interview on 8 May when Ms Parrott asked Mr Edwin a number of questions about the claimant's complaint. Her outline handwritten notes were in the bundle (57). We find that the claimant misread them. He is not to be criticized for this, because they were no more than outline notes. Our finding is that the notes show Mr Edwin stating that after the interview on 9 April he sent a copy of the claimant's questionnaire to Ms Greene the same day; and later, a second copy to an HR Assistant (named Donna) for the purposes of the complaint investigation. If the claimant has read the document as stating that Mr Edwin first wrote up his record of the interview for the purposes of answering the complaint, we find that he is mistaken.

31. We are not in a position to second guess or score the claimant for ourselves. Our finding is that the scores recorded at 28 to 38 represent the honest assessment made by Mr Edwin on the basis of the answers which he understood the claimant to have given. In short, he found the claimant's experience to be too narrow and too limited for the role in question.

32. A slightly subsidiary issue was that we accept Mr Ewin's evidence that he asked about the claimant working the respondent's shift pattern, and recorded that his understanding was that the claimant expressed a preference to work late shifts rather than early shifts, so that he could have a lie in rather than open up and start at 6am.

33. We find that after the interview on 9 April, which concluded with the normal courtesies, Mr Edwin completed the interview form and emailed it to Ms Greene. In light of his score, the claimant was plainly not appointable and on 10 April the respondent wrote to inform him that he had been unsuccessful (40). We attach no weight to the claimant's assertion that there was something sinister in the speed with which he was rejected. In particular, we do not agree that it shows that his rejection was predetermined. It is in our experience not unusual for unsuccessful candidates to be rejected promptly; and the claimant was plainly not a candidate who might prove appointable at a later stage, given his modest score.

34. Drawing the above together, our finding is that while the physical location and facilities for the claimant's interview could well be criticised (as the respondent agrees) there was no evidence whatsoever that age was any factor in the decision to reject the claimant. We find that the burden of proof does not shift, because the claimant has made a bare assertion of protected characteristic and a detriment without any evidence of a causal connection

between them. However, if the burden did shift we find that we accept the explanation, namely that Mr Edwin genuinely and honestly scored the claimant well below the appointable level of score.

35. Strictly that determines the matter, and the claim fails. However, we record briefly that on 22 April the claimant wrote a complaint to Ms Greene, in which he complained about a number of aspects of his experience, most notably about the space of the interview room, the absence of a chair, and the speed with which he had been rejected. He wrote: "Perhaps an age discrimination has been practiced here?" (42).

36. Ms Greene sent a standard reply, to which the claimant replied on 27 April (46) in which he threatened that he would approach Acas and then the tribunal.

37. In reply to that on 2 May Ms Parrott emailed to introduce herself, and asked to speak to the claimant to arrange a meeting; in a reply sent the following day the claimant declined any form of conversation or meeting and stated that everything needed to be in writing (50).

38. On 8 May Ms Parrott interviewed Mr Edwin (51-60) to obtain his view of the matter. On 17 May she replied to the claimant (61).

39. The reply is entirely to Ms Parrott's credit, and should be read in full. She said first that the offer of a meeting remained open. She apologised and acknowledged that the office was not "an appropriate location" and accepted that it was "not best practice" to type replies straight onto screen. She wrote:

> "Mr Edwin was able to clearly articulate that your responses to his questions were not substantial enough which resulted in you not scoring well against the criteria. He also had concerns over your flexibility which left him concerned that you would not be able to cover the necessary shifts when needed. I was unable to identify anything that suggested he has discriminated against you in relation to your age. The position is still vacant and will not be filled until we have a suitable applicant. I would like to offer you the opportunity to be re-interviewed for the position or any other suitable vacancies. I appreciate that the manner in which your interview was conducted may have made you feel uncomfortable and distressed."

40. Ms Parrott offered to reimburse the claimant's expenses for attending the interview with Mr Edwin.

41. The claimant did not wish to be interviewed again. He replied on 28 May (65) stating that the issue of discrimination had not been addressed and reiterating a number of his complaints about how Mr Edwin had dealt with the matter and indeed, how the store was operating. He made a request for compensation, to which Ms Parrott replied on 3 June (67) offering £30 towards travel expenses.

42. On 5 June the claimant reiterated a number of the earlier issues and asked for "an offer on the table for amicable settlement… in at least four figures." Ms Parrott repeated the offer of £30 (69-70).

43. Finally, on 16 July, the claimant wrote for the last time in this sequence, asserting for the first time that at the interview on 9 April Mr Edwin had asked the claimant what he was doing and asked him how old he was (74). When asked at this hearing why this crucial specific allegation had not arisen earlier, the claimant said that it had taken time to analyse. That answer was unconvincing: the claimant had complained about age discrimination on 22 April, but delayed several weeks before putting to the respondent an obvious piece of supporting evidence.

44. Ms Parrott did not reply to the letter of 16 July. She felt that matters were repeating themselves, and that there was no more to be said. That was the end of the correspondence. We regard the claimant's criticism of Ms Parrott for not replying to the 16 July letter as a counsel of perfection, and therefore misplaced. We reject the suggestion that by not replying to the 16 July letter, the respondent admitted the truth of anything that the claimant said.

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Employment Judge R Lewis

Date: 5/7/21

Judgment sent to the parties on

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For the Tribunal office