EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103739/2020 (V)

Held on 28 and 29 June 2021 by CVP

Employment Judge: L Wiseman
Members: E Farrell
S Larkin

Mr W Brown	**Claimant** **Represented by:** **Mr E Mowat** **Solicitor**
Hayward Contracts Ltd	**Respondent** **Represented by:** **Mr T Campbell, Counsel** **Instructed by Mr C Bent,**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided:-

(i) to dismiss the age discrimination claims (direct discrimination; indirect discrimination and harassment) and the claim of discrimination arising from disability;

(ii) to dismiss the claims of unfair dismissal and notice pay which were withdrawn at the commencement of the hearing;

(iii) to uphold the claim of harassment because of disability and to award the claimant compensation in the sum of £2154.70 and

(iv) to sist the claims made in respect of holiday pay and wages for a period of 28 days to allow for settlement to be concluded.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 13 July 2020 alleging he had been unfairly dismissed and discriminated against because of age and disability. The claimant also sought payment of notice, holiday pay and wages.

2. The respondent entered a response in which it challenged the jurisdiction of the Tribunal to hear the complaint of unfair dismissal in circumstances where, it said, the claimant had less than two years' qualifying service. The respondent denied the allegations of discrimination and asserted the claimant had been dismissed for poor workmanship.

3. The claimant had, prior to the hearing, confirmed he accepted there had not been a TUPE transfer and that accordingly he had less than two years' service with the respondent. The claims of unfair dismissal and notice pay were withdrawn. The claimant further confirmed, at the commencement of the hearing, that the claims in respect of holiday pay and wages were to be sisted for a period of 28 days to allow for settlement.

4. The respondent, at the commencement of the hearing, confirmed it had conceded the claimant was a disabled person at the date of the alleged discrimination. However, the respondent maintained they did not know of the disability.

5. The issues for the Tribunal to determine were:

   - a complaint of direct discrimination, where it was said the dismissal of the claimant was less favourable treatment because the reason for the dismissal was his age;

   - a complaint of indirect discrimination where it was said the respondent applied a provision criterion or practice relating to slowness of work,

which disadvantaged the claimant and would disadvantage others in his age group;

- a complaint of harassment in relation to certain comments alleged to have been made by Ms Ann Hay, concerning the claimant's age and ability due to age;

- a complaint of discrimination arising from disability where it was said the claimant was treated unfavourably when he was dismissed because the dismissal was due to the claimant's slowness of work, which was caused by his arthritic condition and

- a complaint of harassment in relation to the comments allegedly made by Ms Hay in relation to the claimant's disability.

6. We heard evidence from the claimant and his daughter, Ms Charlene Williamson; and from Ms Ann Hay, Administrator and Mr Ian Hay, Contracts Manager.

7. We were also referred to a volume of jointly produced productions. We, on the basis of the evidence, made the following material findings of fact.

Findings of fact

8. The claimant commenced employment with a company called Hay & Anderson (Kilwinning) Ltd in 1984. The company was owned by Mr Ian Hay and his brother.

9. The claimant was employed as a Fencer. He was employed with the company until it went into liquidation in August 2018, and all employees were made redundant.

10. Mr Ian Hay found the claimant alternative employment with Landscape Contracts Ltd. The claimant worked with that company from the 27 August 2018 until the 21 September 2018, when he was asked by Mr Ian Hay to join the newly established respondent company.

11. The claimant commenced employment with the respondent on the 25 September 2018, until the termination of his employment on the 16 March 2020. The claimant was employed as a fencer throughout his working life.

12. A written statement of employment particulars was sent to the claimant (page 210).

13. The claimant was aged 64 at the date of the termination of his employment.

14. The claimant's health started to deteriorate in 2018 and he had time off after having dropped a slab on his right foot in November 2018, and suffering back pain in October 2019 and neck pain in December 2019.

15. The deterioration in the claimant's health accelerated from January 2020 when he was signed off work with what was initially diagnosed as gout. The claimant's right index finger and hand were swollen and painful, his nails started to grow away from the nail bed, and he was unable to use his hand.

16. The claimant provided Fit Notes to the respondent from January to March 2020, which confirmed he was unfit for work because of gout.

17. The claimant was referred by his GP on the 31 January 2020 to a Rheumatologist (page 137). Dr Huica, Consultant Rheumatologist, confirmed that her diagnosis had been hampered by the fact the claimant had had so much treatment. She initially suggested he may have had an atypical gout attack or an episode of cellulitis. Dr Huica reviewed the claimant and in mid-June she diagnosed asymmetrical inflammatory arthritis (inflammatory arthropathy), for which he continues to have treatment.

18. Mr Ian Hay sent a "letter of concern" to the claimant dated 31 January 2019 (page 228) to advise there had been a number of complaints from clients regarding the claimant's work. The letter warned the claimant that if there were further instances of poor workmanship in the future, disciplinary action would be taken.

19. Ms Ann Hay received an email (page 229) from Mr Alan Anderson of Clyde Valley Housing Association, on the 2 October 2019. The email referred to a fence which had been erected in the wrong place and asked her to investigate. Mr Anderson had attached some photographs to the email(page 230 and 231) .

20. Ms Hay visited the site and noted the fence had been erected approximately a foot short of the boundary line, and that it had not been tied into the end wall. Ms Hay confirmed from the squad sheets that the claimant and another employee had worked on the site.

21. Ms Hay spoke to the claimant about the work. The claimant explained they had been unable to dig up the old foundations and so had erected the fence as close to the boundary line as possible.

22. The claimant was given a verbal warning for the work and this was confirmed in writing by letter of the 10 October 2019 (page 233). The letter referred to the claimant having been advised on previous occasions regarding his workmanship and lack of performance, and the fact that poor workmanship had a financial cost for the company because it required to be remedied.

23. The claimant was unfit for work from the 6 January 2020 until the termination of his employment. The Fit Notes (pages 234 and 235) confirmed the reason for his absence was Gout.

24. The claimant was, by letter of the 13 February 2020 (page 236) invited to attend a disciplinary hearing regarding shoddy workmanship and poor performance. The letter confirmed complaints had been received regarding the claimant's work at Govanhill and Grangemouth sites.

25. The claimant's daughter, Ms Williamson, contacted ACAS for advice and wrote to the respondent to request copies of the documentation being relied upon. This was provided by the respondent (page 228 – the letter of concern; page 229 – Mr Anderson's email; page 231 and 232 – photographs of the fence; page 238 – email from Mr Steven Gray of Landscapes and Contracts;

page 214 to 227 – daily squad sheets and page 262 to 264 – daily squad sheets.

26. Ms Hay agreed Ms Williamson could accompany the claimant to the disciplinary hearing and further agreed to postpone the hearing until the 10 March 2020.

27. The claimant's position at the disciplinary hearing was that he had not received the letter of concern, or the verbal warning and that he was unaware of any problems with his work. The claimant argued the email from Mr Gray was general and referred to work at Govanhill, when the claimant had primarily been working at Grangemouth. The claimant also challenged Ms Hay to provide specific details of work he had done which was faulty. Ms Hay agreed to visit the site and speak to the Site Managers regarding the work.

28. Ms Hay told the claimant the letter of concern and verbal warning had been issued/sent to him and that he had been told on numerous occasions about shoddy workmanship. Ms Hay was satisfied the squad sheets indicated where the claimant had been working and that the complaint from Mr Gray, albeit general, had included work carried out by the claimant (and others).

29. The claimant told Ms Hay that he was slow at his work because he was 63 and could not keep up with his younger colleagues. Ms Hay commented that "it showed" and she had noticed he was getting slow. She went on to refer to the fact that half the workforce are over 60 and being slow was not an issue: the issue was shoddy workmanship. Ms Hay further commented that she was the same age and showed up every day to do her work.

30. Ms Williamson told Ms Hay the claimant was in pain with his hand, could barely move it and his wife was doing everything for him. The claimant told Ms Hay it was suspected gout. Ms Hay remarked how sore his hand looked and commented "you won't be able to do much with them".

31. Ms Hay carried out a site visit after the disciplinary hearing and the problems with the work carried out by the claimant were reiterated, together with the snagging required to rectify the problems.

32. Ms Hay decided to dismiss the claimant because the level of complaints had escalated and his position had become untenable. The decision was confirmed in writing by letter of the 16 March 2020 (page 243). The claimant was paid one week's wages in lieu of notice.

33. Two other employees of the respondent left their employment before being disciplined for poor workmanship on site.

34. The claimant appealed against the decision to dismiss (page 246). The letter was undated but was sent to the respondent towards the end of May. The claimant argued there was no reasonable basis to conclude his performance had been poor in circumstances where his performance had never previously been an issue, and the respondent had not acted reasonably in dismissing him. The claimant also referred to the comments made by Ms Hay at the disciplinary hearing regarding his age and that he was getting slow. The claimant suggested this was the real reason for dismissal.

35. Mr Hay believed the claimant did not have a right of appeal because of his length of service and the fact the appeal was submitted late. He however gave consideration to the letter of appeal and responded by letter of the 16 June (page 247). Mr Hay confirmed there had been "ample reasonable basis" to conclude his performance was poor because he had been warned formally and informally on numerous occasions. Mr Hay referred to the comments made at the disciplinary hearing and asserted it had been the claimant who had raised the issue of age and getting slow. He referred to most of the workforce being over 60 and still working well, and confirmed age had not been a factor in his dismissal.

36. A list of employees was produced at page 209. There were 10 employees (including the claimant) of whom 6 (including the claimant) were aged over 60. The other 4 employees were aged 56, 48, 38 and 30.

37. The claimant is unable to work. He has been in receipt of Employment and Support Allowance from 26 March 2020 (page 260) and Personal Independence Payment (page 261).

Credibility and notes on the evidence

38. We found the claimant's evidence to be less reliable than that of Mr Hay and Ms Hay. We did not find the claimant to be untruthful but there was some confusion in his evidence.

39. We acknowledged the claimant's evidence was supported by his daughter. We concluded however that her knowledge of the situation would have been based on what she had been told by her father, and for this reason we attached less weight to her evidence.

40. We found the evidence of the respondent's witnesses Ms Hay and Mr Hay, to be on the whole credible and reliable. Their credibility was challenged in two key respects: firstly, it was suggested it was not credible to suggest there were issues with the claimant's performance in circumstances where the claimant had worked with Mr Hay for a very long time and Mr Hay had specifically asked the claimant to come and work for the new company. Mr Hay accepted he had found a job for the claimant after the original company went into liquidation and had then offered him employment with the new (respondent) company. Mr Hay also accepted there had been issues with the claimant's work, but justified all of this on the basis fencers were hard to recruit. We accepted Mr Hay's evidence and did not consider his credibility impacted by this.

41. The second challenge to credibility related to the fact both Ms Hay and Mr Hay made reference to having paperwork regarding complaints about the claimant's work, but none of this was produced for the Tribunal. We could not accept the proposition that Ms Hay and Mr Hay were simply making all of this up: rather, we took from the evidence of Ms Hay and Mr Hay that there had, on an ongoing basis, been issues with the claimant's work and that he had been spoken to by Ms Hay and Mr Hay regarding these matters although no formal action had been taken until the verbal warning had been issued.

42. There were two material issues where there was a dispute in the evidence. The first issue related to the claimant's position that he had not received the

letter of concern or the verbal warning. Ms Hay, when asked about these letters, confirmed they had been issued and she was almost certain they had been sent to him. Mr Hay told the Tribunal the claimant had a history of refusing to accept letters he was given and he recalled an occasion when Ms Hay's husband had tried, unsuccessfully, to give the claimant a letter, but he did not know whether that related to one of these letters.

43. The respondent's witnesses rejected the suggestion put to them that the letters had been manufactured to support the disciplinary action.

44. We concluded on balance that the claimant had received the letter of concern and the verbal warning. We reached that conclusion because we considered it more likely than not that if the letters were sent to him, he would have received them.

45. Further, we could not, having heard the evidence of Mr Hay and Ms Hay, accept the proposition that they had conspired to manufacture a letter of concern and a verbal warning to support the decision to dismiss. We noted there was no dispute regarding the fact there was an issue with the fence being erected a distance from the boundary line. The claimant invited the Tribunal to accept he had spoken with Ms Hay about it, informed her of the problem and had been told to go ahead with the work. Ms Hay disputed this, and we preferred her evidence because we considered that if the claimant had contacted her about the problem with the job, she would have had to contact the client to agree to the fence being erected away from the boundary. We noted there was no suggestion of this either from Ms Hay or from the client (in the email of concern).

46. The second dispute concerned what was said at the disciplinary hearing. The notes of the hearing (page 241) were very brief. The note recorded that Ms Hay opened the meeting with reasons why the meeting was called, and the claimant responded by saying he was slow because he was 64. The claimant maintained he only made that response because Ms Hay had commented about him slowing down. Ms Hay's position was that she had not made any

such comment and that it had been the claimant who had introduced the issue.

47. We found as a matter of fact that it was the claimant who first introduced the subject of his age, that he was slow in his work and could not keep up with younger colleagues. Ms Hay responded to that to say "it showed" and she had noticed he was getting slower.

48. We concluded the issue was first raised by the claimant because it was an issue for him. We accepted the evidence of the respondent (both Ms Hay and Mr Hay spoke to this) regarding the age profile of the workforce and the fact that being slow was not an issue and was preferable to shoddy workmanship. We concluded, on this basis, that age/slowness was not an issue for the respondent and in those circumstances there would have been no reason for Ms Hay to raise it.

Claimant's submissions

49. Mr Mowat invited the Tribunal to find the claimant and his daughter to be credible and reliable witnesses. Mr Mowat acknowledged the claimant had become confused at times, but submitted this should not undermine his overall credibility. Mr Mowat invited the Tribunal to accept the claimant's evidence that he did not ever receive the letter of concern or the verbal warning.

50. Mr Mowat suggested the letter of concern and the verbal warning had been manufactured for the dismissal of the claimant. This was supported by the fact no concerns had been raised with the claimant and no defective piece of work had been identified by the respondent. The email from Mr Gray was sent after the claimant had been invited to the disciplinary hearing. It primarily concerned Govanhill and referred to frustration with "the guys" on site. The time sheets produced by the respondent covered a three week period, but the job at Grangemouth had lasted a year.

51. Mr Mowat submitted the alleged flaws in the claimant's work were wholly lacking in specification and there had been no basis upon which to conclude his work was defective.

52. Mr Mowat invited the Tribunal to prefer the claimant's evidence regarding the comments made at the disciplinary hearing.

53. The claimant was a disabled person at the time of the dismissal. Mr Mowat referred to the case of ***Gallup 2014 IRLR 211*** and submitted the respondent had knowledge of the fact of the disability from the fit notes which confirmed Gout. Further, the claimant told Ms Hay his medication was being changed, that he was unable to move his hand/arm and that his wife was doing everything for him. Ms Hay was told the claimant was being referred to a Rheumatologist. Mr Mowat submitted there was sufficient evidence to conclude the respondent had constructive knowledge of the disability.

54. Mr Mowat, with regards to the direct discrimination claim, identified the comparator group as being the employees aged 30 – 49. All fencer/labourers worked at Grangemouth and no-one else had been dismissed. He submitted there had been no prior issues with the claimant's work and no reasonable basis to dismiss him. He invited the Tribunal to draw the inference that the reason for dismissal was age, because the respondent's explanation had been inadequate and their reliance on complaints about the claimant's work did not stand up to scrutiny.

55. The provision criterion or practice (PCP) relied upon for the claim of indirect discrimination was that the respondent assessed the claimant's work by reference to speed; there being a requirement to work at a minimum speed. Mr Mowat submitted that if that PCP was applied to the comparator group, it would put the claimant at a substantial disadvantage because he could not work as quickly as previously, and the claimant was dismissed for this reason.

56. The unfavourable treatment (section 15 Equality Act) was the dismissal of the claimant. The something arising in consequence of disability was the fact he

was criticised for the speed of his work. The speed of his work arose as a consequence of his disability.

57. The harassment (relating to age) arose from the comments made by Ms Hay at the disciplinary hearing: (i) Ms Hay remarked that she had noticed the claimant was getting slow and couldn't keep up with other colleagues; (ii) Ms Hay said the fact of the claimant getting slow showed; (iii) Ms Hay said she had to build up her reputation and the claimant being slow did not help her to do this and (iv) Ms Hay said she could show up and do her work every day and she was the same age.

58. The harassment (relating to disability) arose from the comment made by Ms Hay at the disciplinary when she noticed the claimant's hand and said "you won't be able to do much with them".

59. Mr Mowat submitted the context in which the comments were made was important in circumstances where the claimant's career was being ended whilst he was off sick.

60. Mr Mowat invited the Tribunal to find for the claimant and to make an award of 12 weeks' loss on the basis the claimant accepted he could not return to work. Mr Mowat further invited the Tribunal to make an award of injury to feelings of £9000. Further, the Tribunal should make an award for failure to provide the claimant with a written statement of employment particulars, and to uplift compensation to reflect the failure to follow the statutory procedures in relation to the dismissal and appeal.

Respondent's submissions

61. Mr Campbell reminded the Tribunal this was not an unfair dismissal case. He submitted it was unlikely the claimant was unaware of the complaints, letter of concern and verbal warning which had been made regarding his work. The evidence of Ms Hay and Mr Hay should be preferred.

62. There was a dispute regarding what was said and by whom at the meeting on the 10 March. The claimant said it was Ms Hay who raised the subject of his

age, but Ms Hay denied this. Mr Campbell invited the Tribunal to prefer the evidence of the respondent's witness and submitted her evidence was supported by the notes of the meeting. Further, half of the respondent's workforce was aged over 60 but that was no excuse for shoddy workmanship.

63. Ms Hay also disputed the claimant's evidence that he told her he could not use his hand or arm and that his wife was doing everything for him.

64. Mr Campbell noted, with regards to Mr Hay's evidence, that he had written the letter of concern because of the number of issues which had arisen regarding the claimant's work. Ms Hay had typed the letter. The Tribunal was invited to prefer his evidence to that of the claimant.

65. Mr Campbell submitted, with regard to the complaint of direct discrimination, and the claimant must establish the facts from which the Tribunal could infer there was discrimination. The claimant had started working with the respondent when aged 62: he joined a workforce where the majority of staff were aged over 60. The claimant was dismissed because of the quality of his work. There was no basis for saying speed of work had been an issue.

66. Mr Campbell submitted the complaint of indirect discrimination must fail because the claimant had produced no evidence to suggest there was a provision criterion or practice to work at a minimum pace.

67. The complaint of discrimination arising from disability should also be dismissed because the respondent lacked knowledge of disability. The respondent could not have known, at the disciplinary hearing, of the disability, because the Fit Notes provided by the claimant all referred to Gout. Further, the letter of appeal made no reference to any illness. Mr Campbell submitted it remained uncertain whether the respondent knew the claimant was waiting for an appointment with Rheumatology.

68. Mr Campbell referred to the complaint of harassment based on comments allegedly made by Ms Hay regarding age, which, it was said, the claimant found offensive. It was submitted the context in which comments were made was relevant, and it had not been reasonable for the comments to have the

effect alleged by the claimant. The comments did not create an offensive environment and it was a one-off incident.

69. Mr Campbell invited the Tribunal to dismiss the claim. However, if the claim was successful, the respondent did not dispute the calculations shown in the schedule of loss. Any award for injury to feelings should be in the lowest Vento band.

70. Mr Campbell noted an uplift can be applied in discrimination cases, but invited the Tribunal to give consideration to the fact the respondent is a small business and any award would have a financial impact.

71. The complaint that the claimant did not receive a written statement of employment particulars should be dismissed because the respondent's evidence was that the document was sent to the claimant.

Discussion and Decision

Complaint of direct (age) discrimination

72. We had regard firstly to the relevant statutory provisions. Section 5 of the Equality Act provides that in relation to the protected characteristic of age, a reference to a person who has a particular characteristic is a reference to a person of a particular age group. A reference to persons who share a protected characteristic is a reference to persons of the same age group.

73. Section 13 of the Equality Act provides that 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. If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

74. The claimant argued the respondent had, by dismissing him, treated him less favourably than it treated or would treat others. The claimant relied on a comparator group of employees in the age range 30 – 49. The claimant, in support of his position, asserted there had been no prior issues with his work,

no-one else from the Grangemouth site had been dismissed and there was no basis upon which to conclude there had been problems with his work. In those circumstances the claimant invited the Tribunal to draw an inference that the real reason for dismissal was because of age.

75. We considered each of those points in turn. We found as a matter of fact, preferring the evidence of the respondent's witnesses to that of the claimant, that there had been previous issues with the claimant's work. We acknowledged matters had not been raised formally until the time of the verbal warning, but we accepted the respondent's evidence that the claimant had been spoken to on various occasions regarding his workmanship.

76. The claimant's position was that he had not received the letter of concern and had not received the verbal warning. We noted from Mr Hay's evidence that the claimant had a practice of not accepting letters he was given and we inferred from this that it was more likely than not that the letters had been posted out to the claimant. This was supported by Ms Hay's evidence when she told the Tribunal that she was almost certain the letters had been sent out to the claimant.

77. We next considered the claimant's argument that no-one else from the Grangemouth site had been dismissed. There was no evidence from either side to support or challenge that statement. We understood two teams (four operatives) tended to work on the Grangemouth site, although they could also be asked to work on the Govanhill site. There was no evidence regarding any disciplinary action taken against an employee who worked at the Grangemouth site: equally there was no evidence that there had been bad workmanship which had not been addressed.

78. The only evidence regarding possible disciplinary action against other employees came from Ms Hay when she told the Tribunal that two other employees had resigned before they could be disciplined/dismissed. There was no evidence to explain which site the men had worked on or why they may have been dismissed.

79. We, in the circumstances, accepted the claimant's position that no-one else from the Grangemouth site had been dismissed, but we did not attach weight to it because of the lack of information regarding this situation, and the fact we accepted that two employees resigned before disciplinary action could be taken.

80. We next considered the claimant's position that there had been no basis upon which to conclude there were problems with his work. The claimant's position (as stated above) was that there were no problems with his work and that this had not ever been raised with him as an issue prior to the disciplinary hearing. The respondent's position was that the claimant's workmanship was an ongoing issue which had been raised with him frequently. The respondent relied on the letter of concern, the verbal warning and the letters of complaint from clients (these matters are discussed above and not repeated here).

81. Mr Hay and Ms Hay, in their evidence to the Tribunal, spoke of having a great deal of evidence to support their position in terms of client complaints and the cost of putting right the claimant's poor workmanship. Mr Hay referred at one point to having it all on his phone and that it could be provided if needed. The difficulty this presented is that the Tribunal must assess the respondent's position on the basis of the evidence presented both orally and in the documentation. There was nothing to explain why, if the evidence existed, it had not been produced.

82. This left the Tribunal in the position of having to assess the conflicting oral evidence, the letter of concern and verbal warning which the claimant stated he did not receive, and the letters of complaint in the productions. There was no dispute regarding the fact the email from Mr Anderson of Clyde Valley Housing Association (page 229) did refer to work carried out by the claimant. The claimant's position was that he had contacted Ms Hay to tell her they did not have the right tools to dig out the foundations, and that she had told him to go ahead with the job. The claimant had done this and erected the fence approximately a foot from the boundary line. The claimant's position was that he heard no more about this until the disciplinary hearing.

83. Ms Hay denied there had been any such phone call. She insisted she had been contacted by Mr Anderson to complain about the job. She had visited the site and saw the fence was in the wrong place and not tied into the end wall. She described it as a terrible job.

84. We preferred the evidence of Ms Hay. We considered it implausible to suggest (a) Ms Hay would have agreed to the job proceeding in circumstances where it was being proposed to move a boundary fence and (b) without agreeing this with the client. We acknowledged the claimant may well not have had the correct tools with him to dig out the foundations, but beyond that we could not accept his recollection of the job.

85. The second letter of complaint relied on by the respondent was the email from Mr Gray (page 238).This email was sent on the 4 March, a day after the claimant had been invited to attend a disciplinary hearing. The email was entitled Govanhill and Grangemouth and noted the Clerk of Works on both sites had highlighted a number of issues in the quality of the fencing works. The email then went on to provide details of issues at Govanhill.

86. The email did not relate to or specifically mention the claimant or the work carried out by him. The email was general in its terms: for example, it referred to frustration with “the guys on site”; complained “your operatives” were having extended breaks throughout the day and “the operatives” were not on site about 3.15/3.30pm. The email went on to refer to the respondent now having a lot of snagging works to do to rectify these issues, this not being the first time he had to advise the respondent of snagging and workmanship issues and to payment being withheld until such times as the works were made good.

87. The claimant accepted he had worked at the Govanhill site, but there was no clarity regarding dates or the work he had carried out.

88. Ms Hay denied the suggestion she had asked Mr Gray to provide the email and suggested the timing of its arrival was coincidental.

89. We acknowledged the email from Mr Gray was not the reason for asking the claimant to attend a disciplinary hearing, but it did support the respondent's position that complaints from clients had been received; that quality of workmanship was an issue and that the respondent was having to spend manpower, time and money rectifying poor workmanship. The issue however was that the email did not relate specifically to the claimant or to work he had carried out. The email was a general complaint regarding workmanship and conduct.

90. We concluded having had regard to all of the above points, that the respondent had, on an informal basis, spoken to the claimant regarding the quality of his work; they had issued the letter of concern; they had issued a verbal warning and they had received complaints from clients regarding work both generally and work the claimant had carried out and which had to be rectified. We were satisfied, based on this, that this was the reason for inviting the claimant to attend a disciplinary hearing.

91. The claimant was aged 62 when he was employed by the respondent and aged 63 at the time of the disciplinary hearing. There was no dispute regarding the fact the respondent employed 10 employees (including the claimant) as at the date of termination of the claimant's employment, and of those employees 6 were in the age range of over 60. The employees aged over 60 included the claimant, another Fencer/Labourer, a Blacksmith and three Administrators.

92. The claimant argued he had been dismissed because of his age. We could not accept that argument because there was no evidence to support it. We say that because more than half of the respondent's workforce was in the same age range as the claimant and there was no evidence to suggest the respondent had any difficulty employing people of that age. There was also no evidence to suggest employees in the same age range as the claimant worked at a slower pace or encountered problems with the quality of their work.

93. The claimant suggested it would be obvious that an employee of his age would not be able to keep up with a younger employee, but Ms Hay rejected that general suggestion. She had had experience of younger employees not being interested in doing, or completing, the work; and the skill and experience of an employee in the age range of the claimant was a considerable positive. Ms Hay also told the Tribunal on a number of occasions that being slow was not a negative: the respondent preferred slowness to shoddy workmanship.

94. Mr Mowat invited the Tribunal to draw an inference that age had been the real reason for the dismissal. We declined to draw that inference. There must be primary facts from which a Tribunal can draw an inference and in this case there were no primary facts which would allow the Tribunal to draw the inference that the reason for dismissal was age.

95. We concluded there was an absence of evidence to support the claimant's position that the reason for dismissal was age: that was particularly so in circumstances where more than half of the workforce were in the age range of the claimant and there was nothing to suggest that rate of work was an issue.

96. We decided for these reasons to dismiss this complaint.

Indirect discrimination

97. We referred to section 19 of the Equality Act which provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of B's. A PCP is discriminatory in relation to a protected characteristic of B's if A applies or would apply it to persons with whom B does not share the characteristic; it puts or would put, persons with whom B shares the protected characteristic at a particular disadvantage when compared with persons with whom B does not share it; it puts or would put B at that

disadvantage and A cannot show it was a proportionate means of achieving a legitimate aim.

98. The claimant identified the PCP said to have been applied by the respondent as a practice of assessing the claimant's work by reference to speed: it was said there was a requirement to work at a minimum speed. It is for the claimant to identify the PCP with precision otherwise the claim will fail.

99. The claimant did not produce any evidence to suggest timescales for completion of work had been applied on site or personally to employees. The claimant did not give any evidence about any assessment of his work by reference to speed taken to complete a job. The respondent's witnesses were not cross examined about timescales for work; whether there had been any client complaints about the length of time taken to complete work or whether there was any assessment of employees' work by reference to the time taken to complete a job.

100. The only evidence relied upon by the claimant related to comments alleged to have been made by Ms Hay at the disciplinary hearing. The claimant alleged Ms Hay had remarked that she noticed he was getting slow and couldn't keep up with his younger colleagues. The claimant had responded to say he was 63 years old and of course he wouldn't be able to keep up with his younger colleagues. Ms Hay said it showed, and she went on to say that the claimant being slow did not help her to build up her reputation and that she was the same age and came in every day to do her work.

101. Ms Hay denied making these comments. We found as a matter of fact that it was the claimant who raised the issue of his age and slowness. We found as a matter of fact that Ms Hay said "it showed" (that he couldn't keep up with his younger colleagues) and that she had noticed he was getting slow. Ms Hay went on to say that half the workforce were over 60 and that being slow was not an issue.

102. We could not accept the claimant's submission that based on this conversation the respondent had applied a requirement to work at a minimum

speed. We considered the conversation disclosed quite the opposite. There was no issue with the speed at which the claimant worked: the issue concerned shoddy workmanship. The disciplinary hearing was not arranged because the claimant had been working too slowly: it was arranged because of shoddy workmanship.

103. We concluded there was no evidence to support the claimant's position that the respondent applied a requirement to work at a minimum speed, and for that reason we dismissed this complaint.

Discrimination arising from disability

104. We had regard to section 15 of the Equality Act which provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. The claimant argued that he had been treated unfavourably when he was dismissed and the dismissal occurred because of something (slowness of work) arising in consequence of his disability (because he could not use his hand).

105. We have set out above our conclusion that the claimant was not dismissed because of slowness of work: he was dismissed because of shoddy workmanship.

106. We, in considering this complaint, went on to note there was no suggestion that shoddy workmanship arose in consequence of the claimant's disability.

107. We decided, for these reasons, to dismiss this complaint.

Harassment

108. We had regard to section 26 of the Equality Act which provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating a hostile, intimidating, degrading, humiliating or offensive environment for B. A Tribunal must, when deciding whether conduct has this effect, take into account the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

109. The claimant relied on the comments alleged to have been made by Ms Hay at the disciplinary hearing. We found as a matter of fact that Ms Hay, in response to the claimant making reference to his age and not being able to keep up with his younger colleagues, said "it showed" and referred to being the same age as the claimant and coming in every day to do her work.

110. Ms Hay denied making the alleged comments, and accordingly there was no further evidence to suggest the context in which the comments may have been made or what Ms Hay may have meant/intended.

111. We, in deciding whether those comments had the purpose or effect of creating an offensive environment noted the following points. Firstly, the claimant had been asked to attend the disciplinary hearing because of "shoddy workmanship and poor performance". There was no suggestion that the claimant's age or speed of work had caused the shoddy workmanship.

112. Secondly, it was the claimant who introduced his age and not being able to keep up with younger colleagues. The claimant did not expand on this either at the disciplinary hearing or at this hearing. We knew, for example, the squad sheets showed the claimant usually worked with Liam Blakely, but we did not know how old he was or whether this was the younger colleague referred to by the claimant.

113. The claimant, in his witness statement, did refer to three younger colleagues, but there was no evidence to inform the Tribunal whether those employees

worked on the same site as the claimant, or whether they worked with the claimant.

114. Thirdly we questioned how Ms Hay's comment of "it showed" create an offensive environment when it was an acknowledgement/response to the claimant telling her that he could not keep up with younger colleagues.

115. Fourthly, we questioned how Ms Hay's comment that she was the same age as the claimant and came in every day to do her work created an offensive environment in circumstances where the claimant had done likewise.

116. We decided, having had regard to the above points, that whilst comments were made by Ms Hay they did not create an offensive environment. Further, if we have erred in that conclusion, it was not reasonable for the conduct to have that effect given the four points set out above. We decided to dismiss this aspect of the complaint.

117. The claimant also complained that Ms Hay had made a comment at the disciplinary hearing regarding his hands. The claimant's right hand had been swollen and sore. Ms Hay, having noted the claimant's hand looked sore, asked what was wrong with him and commented that "you won't be able to do much with them".

118. Ms Hay told the Tribunal she had not intended the comment to be offensive, but more a statement of concern. The claimant did not perceive the comment to be a statement of concern: he was upset by it because of the pain and the limit it was placing on his ability to do things for himself. We noted this comment was made during a period of absence for what had, at the time, been diagnosed as Gout.

119. We concluded that in circumstances where the claimant was dealing with very painful hands which limited his ability to do things for himself, the comment made by Ms Hay did create an offensive environment.

Remedy

120. We have decided one aspect of the harassment complaint is successful. We must now consider the award of compensation.

121. The representatives agreed there had been a loss of 12 weeks' wages calculated in the sum of £1154.70 (being 3 weeks x £95.85 and 9 weeks x £96.35).

122. The claimant is entitled to an award of injury to feelings. We considered the lower band of **Vento** (***Vento v Chief Constable of West Yorkshire Police 2003 ICR 318)*** was appropriate in circumstances where one comment of a less serious nature was made. We noted the claimant had been upset by the comment in circumstances where he was in pain and where he had had a long working life and was in a situation where he was having to be helped to do everyday things. We decided it would be fair and reasonable to award the claimant the sum of £1000 for injury to feelings.

123. Mr Mowat invited the Tribunal to increase the compensation because of the failure by the respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Mr Mowat submitted the respondent's failures related to the disciplinary and appeals procedures.

124. We noted that in terms of section 207A of the Trade Union and Labour Relations (Consolidation) Act, that a Tribunal may (if it considers it just and equitable in all the circumstances) increase any award it makes to the employee by up to 25%. A Tribunal may do so where the employer has failed to comply with the Code and that failure was unreasonable.

125. We noted the respondent carried out some investigation prior to inviting the claimant to attend the disciplinary hearing; they provided to him the documents to be relied upon at the hearing; they allowed him to be accompanied by his daughter at the hearing and Ms Hay visited the site to further investigate matters as requested to do so by the claimant. We acknowledged the criticisms made of the respondent regarding the lack of specific details of shoddy workmanship, but we considered that given the

email and photos from Mr Anderson, the letter of concern, the verbal warning and the email from Mr Gray, there was sufficient information upon which to base the discussion.

126. The claimant appealed against the decision to dismiss. His letter of appeal was undated but appeared to have been sent to the respondent on or about the 27 May (approximately 10 weeks after the dismissal). Mr Hay did not arrange an appeal hearing but instead considered the letter of appeal and responded to it. Mr Hay did not understand, at the time, that the claimant was entitled to appeal.

127. We considered whether the respondent's failure to arrange an appeal hearing was unreasonable. We noted the claimant had not been given a timescale in which to appeal. We further noted the claimant offered no explanation why it had taken so long to write the letter of appeal. We concluded the appeal ought to have been submitted within a reasonable period of time and we did not consider 10 weeks after the event to be a reasonable period of time.

128. We also had regard to the fact that whilst Mr Hay acknowledged the letter of dismissal advised the claimant of his right to appeal, Mr Hay had, at the time he received the letter of appeal, been of the opinion that as the claimant did not have two years' service and as the letter of appeal was so late, the claimant was not entitled to appeal.

129. We also took into account the fact there was no evidence from the claimant to explain why the fact of not having an appeal hearing had been unreasonable. There was nothing to suggest, for example, that the claimant had been denied an opportunity to provide further information to Mr Hay.

130. We concluded, having had regard to these factors, that the failure to comply with the ACAS Code was not unreasonable. We decided it would not be just and equitable to apply an uplift to the award.

131. The claimant sought an award for failure to provide a written statement of employment particulars. We noted that written employment particulars were produced, but the claimant's position was that he had not received them. We

preferred the respondent's evidence that written employment particulars had been issued to all employees (including the claimant) by post, but that there had been a very poor response in returning a signed copy. We decided accordingly not to make any award.

132. We have awarded the claimant the sum of £2,154.70 (being £1,154.70 + £1,000).

Employment Judge: Lucy Wiseman
Date of Judgment: 04 August 2021
Entered in register: 09 August 2021
and copied to parties