

Reserved judgment



EMPLOYMENT TRIBUNALS

Between:

Claimant: Mr A Price

Respondent: DL Insurance Services Limited

Heard at London South Employment Tribunal on 17 November 2018

Before Employment Judge Baron

Lay Members: Ms B Leverton & Mr M Sparham

Representation:

Claimant: The Claimant was present in person

Respondent: Alice Carse - Counsel

JUDGMENT

It is the judgment of the Tribunal that the claim be dismissed.

REASONS

- 1 This claim arises out of an application made by the Claimant to the Respondent for employment in July 2017. The Claimant was interviewed for the post following an initial sift, but he was not selected for a second interview. The claim is of indirect discrimination within section 19 of the Equality Act 2010 based upon the protected characteristic of age. The Claimant was aged 53 at the time. Section 19 of the 2010 Act is as follows:

19 Indirect discrimination

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
 - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are— age;

.....

2 The way that the Claimant put his case was that the Respondent had applied a provision, criterion or practice ('PCP') of lack of experience, not having too much experience, and/or not being overqualified as a specific requirement for the successful candidate.

3 The Claimant gave evidence and did not call any other witnesses. We heard evidence from Annette Fox, Product Development Manager, and also from Jon Hughes who is working on a graduate trainee programme.

4 The group of companies of which the Respondent is a part provides insurance under the 'Direct Line' brand. This matter concerns employment in the Motor Product Development Team, which is a team of 10 people, and is part of what was described as the 'Motor Personnel Lines Team'. A vacancy arose for a Motor Product Analyst. We unashamedly quote paragraphs 9 and 10 from the witness statement of Ms Fox for the sake of convenience as they were not challenged by the Claimant:

By way of background, the Motor Product Analyst is a general business management role with a technical slant. In short, the requirements of the role includes supporting the production and development of the Monthly Motor Product Dashboard (manipulating data gained from other analytical areas within the business), business administration (including the administration of the Product Forum) and general business and project management.

As the role sits within a generalist business management team (I should point out that there are more specialist technical teams in the business, including Pricing, Underwriting, Claims Insight, data analyst), the successful candidate would need to have a strong general commercial understanding and good communication skills, as well as good analytical and problem-solving skills (although not necessarily using primary raw data). Significantly, the successful candidate would also need to be able to tailor their message to their audience, in order to be able to facilitate product delivery.

5 A document was prepared for the purposes of advertising which essentially took the form of a job description. At the end there was a short list of skills being sought as follows:

- Strong analytical ability
- Excellent stakeholder management skills
- Commercial awareness essential
- Understanding of the regulatory environment
- Previous SAS experience and knowledge is desired but not essential

6 SAS is an analytical programme used primarily elsewhere in the business. The manager of the team, Neil Ingram, thought it desirable that there should someone in the team who had the experience of using the software and understanding the output. As we understand it, although the team used output of the software provided to it from other parts of the business there was nobody in the team who could use it to produce customdesigned analyses.

7 The Claimant provided his CV which did not disclose his age but it did refer to him having passed various 'O' levels, which we were told were

abolished in 1988. If anybody had troubled to do the calculation it was therefore possible to deduce that the Claimant was at least 46. He was invited for an interview.

- 8 The Respondent has a structured interview system. The questions to be asked of the candidate are categorised under the following headings or competencies:

Cultural Fit and Motivation

Do the Right Thing – For our people, customers, and shareholders

Aim Higher – Striving to be the best in every area of the business

Work Together – Collaborating and developing relationships based on trusting each other

Take Ownership – Taking the Initiative and being accountable for our actions

Say It Like It Is – Being open, authentic and keeping things simple

Bring All of Yourself to Work – Being a role model to others and believing in yourself

Technical Competence

- 9 As Miss Carse pointed out, there is no reference to experience or qualifications under any of those headings. There are standard or sample questions provided under each heading (apart for some reason for Technical Competence), and then what can best be described as a 'marking guide'. There is a colour coding system in respect of the first competency of 'Red', 'Amber' and 'Green'. Marks are awarded out of five in respect of each of the remaining sections. The maximum score is therefore 'Green' and 35 marks. At the end of the interview pack there is a summary table into which the marks awarded under each section are transposed. There are also sections headed 'Key strengths' and 'Key development areas'.

- 10 Annette Fox, accompanied by Lisa Adams, carried out interviews of four candidates in accordance with the interview scheme summarised above. Both Ms Fox and Ms Adams marked the Claimant as 'Amber' in respect of 'Cultural Fit and Motivation'. Ms Fox awarded the Claimant '3' in respect of four categories, '4' in respect of two categories, and '5' in respect of Technical Competence. Ms Adams awarded the same scores. He thus scored a total of 25 marks.

- 11 It was not suggested by the Claimant that the scores were deliberately lowered because of his age. The Claimant did not refer us to any of the notes made by the interviewers of the answers he gave to the various questions which were asked.

- 12 Each of Ms Fox and Ms Adams provided summaries. The summary by Ms Fox was as follows:

Key strengths

Technical analyst skills (beyond role – potential for pricing / insight / underwriting)

Loyal

Uses own initiative

Key development areas

Tailor message to audience / technical terminology used

Wouldn't be challenged within this role

- 13 Ms Adams' summary was as follows:

Key Strengths

Definitely someone for the business – technical knowledge. But better matched to pricing / MI /

Customer insight / underwriting – risk analysis

Loyal, technical knowledge awesome

Key Development areas

Not concise. Too intense in knowledge. Knowledge beyond role. BUT good for another team + would benefit the business.

Honesty + say translate knowledge into language [illegible] would understand

- 14 Of three other candidates interviewed two were invited for a second interview and one of them was appointed. Both were 'Green' for the purposes of the first competency. 'R' was awarded 30 marks and 'S' was awarded 32 marks. Although not referred to in evidence we note from the bundle that the remaining candidate who was not invited for interview scored 28.5 marks.

- 15 Ms Fox asked Jon Hughes to inform the Claimant that he had not been selected for a second interview. Mr Hughes had not been involved in the selection process at all. He spoke to the Claimant on the telephone on 22 August 2017. Mr Hughes made a contemporaneous note of the interview for the HR Director as the Claimant was demanding to speak to her. The relevant section of the note is as follows:

Feedback – we felt that the level of experience he offered was not right for the team. If anything 'overqualified' – however hiring manager felt that AP offered a good skillset and would be a good fit for other areas if DLG just not right for the balance of the team and what she was looking for.

- 16 The note records that the Claimant then said that the Respondent had broken the law and that there had been age discrimination. He said that 'salary was the real reason'. The Claimant then became abusive and it is not necessary to provide further details.

- 17 We did not of course hear the conversation and so cannot make any definitive findings as to what was said. The exact words which were used could in any event be only secondary evidence as to the reason(s) why the Claimant was not selected for a second interview by Ms Fox and Ms Adams. Mr Hughes explained his approach to a potentially difficult conversation during which he has to explain that the application was not to proceed further is to emphasise the positives, and 'let the unsuccessful candidate down gently.' We find that Mr Hughes did refer to the Claimant as being overqualified for the role, or words to that effect.

- 18 There was then correspondence between the parties in which the Claimant maintained that the reason he had not been selected for a further interview was that he had been told that he was too experienced, that Ms Fox was looking for someone at a more junior level, and that he would not be a good fit as he had too much experience. Nicola Porter wrote to the Claimant on 31 August 2017 and the relevant paragraphs are as follows:

Lisa [Adams] and Anette [Fox] confirmed individually that whilst you did meet the benchmark for the role on the basis of your competency answers, other candidates achieved higher scores, specifically on the values-based questions. You demonstrated that you have excellent technical skill and have a great deal of experience in your field of expertise; however a key part of the role is stakeholder engagement and an ability to help others understand the technical side of the subject matter. There is a value in keeping things simple and both Anette and Lisa found that your answers, whilst technically sound, were not articulated in a way that would engage others outside of the team without such a deep technical understanding.

There were 4 candidates the role and age was not in consideration when making the final decision. All outcomes were based on scores achieved against set criteria and you were not the highest performing candidate. Independently, both Lisa and Anette confirmed that they believed you would be good in a more specialist role within DLG and recommended that to the recruitment team.

- 19 The Claimant drew our attention to some statistics provided by the Respondent as to percentages and numbers of employees in different grades categorised by age groups. Apart from the fact that in order for such statistics to have any relevance much more analysis would need to be undertaken, we do not see that they are particularly relevant to the facts of this case. It is not a case in which the Claimant alleges that he was directly discriminated against because of his age, but rather that there was a PCP which was applied which disadvantaged him.
- 20 The Claimant referred the Tribunal to a decision of an Employment Tribunal in *Rainbow v. Milton Keynes Council* where there was a finding of unlawful indirect discrimination. In that case there had been an advertisement for a teacher which stated the post 'would suit candidates in the first 5 years of their career.' It was not disputed by the Respondent that that put a 61 year old teacher with 34 years of teaching experience at a disadvantage by comparison with younger teachers. That example does not help the Claimant in these circumstances for two reasons. The first is that the Tribunal found that a PCP had been imposed. The second is that there was in those circumstances there was no dispute that the Claimant was in an age group which was disadvantaged by the decision.
- 21 Miss Carse made closing submissions first to which the Claimant replied. The Claimant referred to what he said he had been told by Mr Hughes during the conversation of 22 August 2017 and said that there had not been any denial of his version of the conversation. He said that his level of experience was clearly an issue and he had been the subject of indirect discrimination as older candidates were more likely to have greater experience.
- 22 Miss Carse submitted that the Claimant had not established the PCP which was claimed. The fact that the Claimant had greater experience of the SAS software that was required for the role in question did not mean that therefore a PCP of having lesser experience was adopted. She further submitted that the Claimant had not shown what is usually referred to as 'group disadvantage' for the purposes of section 19(2)(b) of the 2010 Act. Finally, Miss Carse submitted that even if the Claimant could establish that

there was the relevant PCP, and also that that disadvantaged people within his age group, the Respondent would rely on the justification defence in section 19(2)(c).

- 23 The Claimant maintains that there was a PCP of the nature set out above. We reject that. What the Respondent did was to use a detailed interview scheme, and then to select for further interview those candidates who achieved sufficiently high marks. That was the practice adopted.
- 24 The interview system required marking under different competencies, including Technical Competence. There was nothing which we can see inherent in any of the other competencies used at the interview which could have any relevance to age, and we do not understand the Claimant to maintain to the contrary. Experience or qualification was at least potentially a material factor under the heading of Technical Competence. However the marking was based on having sufficient technical competence, and not an excess of it. Indeed, the Claimant scored '5' under that heading. The decision not to interview the Claimant a second time was simply because he did not score highly enough under the other headings. That was a consequence of the practice which was adopted by the Respondent through Ms Fox and Ms Adams.
- 25 In coming to that conclusion we have noted the final comments made by each of Ms Fox and Ms Adams as to the Claimant's technical skills being more than was required for this particular role. Those comments do not mean that therefore they required someone with lesser skills.
- 26 That is sufficient to dispose of this claim. However, we will deal with the other two elements. The next element is the question as to there having been a disadvantage. In his claim form the Claimant put the point as follows:
- They have used experience as a criterion which cannot be justified, and puts older candidates at a disadvantage because older candidates will usually have more experience than younger candidates.
- 27 It is apparent from all the evidence which we heard that the knowledge or experience of the Claimant which was material was his substantial technical expertise in the SAS analysis software which went beyond what was required for this particular role. There was no evidence that generally people of the Claimant's age group were more likely to have that expertise than those of a younger age group. There was no attempt by the Claimant to limit the pool to a smaller group of people of his age group. If the issue had been before us, we would not therefore have found that paragraphs (b) and (c) of section 19(2) had been satisfied.
- 28 Finally we turn to the question of justification within section 19(2)(d). Again, this point was not before us for decision. In order for this point to be relevant we must have found that there was a PCP that disadvantaged the Claimant because his age had resulted him in being over-skilled, and he was not selected for interview for that reason. We would have to assume also that he had scored more highly in respect of the other

competencies. This is all too hypothetical and we decline to venture further into the point.

Employment Judge Baron
Dated 19 November 2018