EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 25th 26th and 27th January 2022 and in chambers on 28 January 2022

Claimant: Mr D Edmondson

Respondent: Premier Christian Communications Limited

Before: Employment Judge Mr J S Burns
Members Ms T Breslin and Ms K Harr

Representation
Claimant: Ms L Millin (Counsel)
Respondent: Mr M Jones (legal advisor)

JUDGMENT

1. The Claimant's application to strike out the Response and for judgment under Rule 21 is dismissed.
2. The issues in this case are as per the Schedule.
3. The claim for direct age discrimination succeeds.
4. The Respondent must pay the Claimant damages of £41163 by 21/2/22.

REASONS

Reasons for paragraph 1 of the judgment

1. The Claimant made an application dated 25 May 2021 that the Response be struck out for the Respondent's failure to respond to his claim within 28 days. In his letter of application, he said that he wished his application to be considered at the preliminary hearing already listed for 6 and 7 October 2021. However, although the Claimant was represented by Counsel at that hearing, (at which after a full Hearing the unfair dismissal claim was dismissed), the application was not pursued. Instead the Claimant served a skeleton argument and asked for us to deal with it at the outset of the final hearing on 25/1/22. We heard evidence from Mr M Jones and Ms S Gurmeseva, ("SG") (an external part-time HR advisor who works for the Respondent), and then from the Claimant on this preliminary issue, and we were taken to various documents in the bundle.

2. The Claimant presented his ET1 on 21/11/2020 and in the normal course of events the ET1 should have been sent to the Respondent in late November or early December 2020. No ET3 was received and there was no attendance for the Respondent at a preliminary hearing on 18/3/2021 where the judge noted that it appeared that the Respondent may not have been served with the ET3, and gave directions that the ET3 should be served at two different addresses and by email. On 22/3/20 SG received an email from Rachel, (an office manager employed by the Respondent) attaching (i) the PH order dated 18/3/21 and (ii) a copy of the ET1 (not however accompanied by any "Notice of Claim" letter or draft ET3 which it is the practice of the ET to send with ET1s when they are normally first served on Respondents).

3. On 24/3/21 SG received a second email from Rachel attaching a notice of claim letter dated

24/3/21 and further copy of the ET1. SG immediately responded to these documents by instructing Mr Jones and an ET3 was filed on 24/3/21 attaching Grounds of Resistance which stated in paragraph 2 stating "*The respondent first became aware of this claim on 22/3/21 when it received a copy of the ET1 from the Tribunal, sent out to the parties on 19/3/21"*

4. Ms Millin submitted that as the ET1 ordered to be served by the judge at the PH on 18/3/20 was received by the Respondent only on 24/3/2020 under the notice of claim letter, it followed that the ET1 which was sent by Rachel to SG on 22/3/21 must have been the original which must have been sent to and received by the Respondent in late November or early December 2020 and hence the Respondent's ET3 was filed late.

5. Mr Jones submitted that as the ET1 sent by Rachel on 22/3/21 was not accompanied by any notice of claim letter and draft ET3 it was more likely that this was not a document first sent by way of original service by the ET to the Respondent in late November or early December 2020, but was instead an extra ET1 which had been sent to the Respondent by a member of the Tribunal administrative staff on 19/3/21 along with the PH order from the previous day, and that a further formal notice of claim letter with a further copy of the ET1 had then been sent out on 24/3/21.

6. Having heard the evidence, (and also having taken judicial notice of the less-than-perfect state of the London Central Tribunal administration as it operated in late 2020, and possibly also similar problems affecting the Post Office, as a result mainly of the impact of the Covid 19 pandemic, which caused many Respondents at the time to complain that they never received ET1s which they should have done), we have concluded on a balance of probabilities that the Respondent did not in fact receive the ET1 at any time before 22/3/21 and that therefore its ET3 was not filed late.

7. If we were wrong in reaching this conclusion, then, having applied the Kwik Save principles, we would have in any event extended time for the ET3 because, on any view, prior to 22/3/2020 the ET1 did not come to the eyes and hands of any responsible officer of the Respondent who had sufficient knowledge as to what it was and what action was required in response to it, and as soon as this happened, immediately action was taken to draft and present the ET3.

8. The Claimant has without reasonable excuse delayed in pursuing his application, and allowed a full Preliminary Hearing followed by a reasoned judgment on the unfair dismissal claim to proceed in October last year, and for the parties thereafter to the prepare for this four day full merits hearing, before belatedly resurrecting his application at the last moment on the first day of the trial (25/1/22).

9. Considerable prejudice would be caused not only to the Respondent but also to the Tribunal process in now overturning what has already occurred, and in depriving the Respondent not only of its interim judgment but also of being able to run its remaining defence to the age discrimination claim. The interests of justice and the overriding objective are best served by allowing the DAG claim to be tried on its merits.

Reasons for paragraph 2 of the judgment

10. The parties had failed to agree a list of issues for trial so we had to hear submissions about this as a preliminary matter. We read the witness statements and the bundle before deciding what the issues should be.

11. The main disagreement over the issues was that the Claimant had recently indicated a wish to include in his direct age discrimination claim contentions that (i) there had not been a genuine redundancy situation and (ii) that the selection criteria themselves were age discriminatory.

12. We reject Ms Millin's submission that these points had been referred to by the Claimant in his particulars of claim where he wrote that "*the whole process was a charade*". In context that was a reference to Annette Clowes' scoring of the Claimant against the selection criteria only. (Annette Clowes ("AC") is a commercial director employed by the Respondent).

13. Far from disputing the existence of a genuine redundancy situation, the Claimant had stated inter alia in an email dated 24/7/2020 to SG as follows: "*I must stress that I fully understand that Premier is having to undergo a major restructuring to accommodate and survive the dramatic effects of COVID19 – an unprecedented period of our history. Sadly, I realise this will inevitably result in job losses, and appreciate there will be a necessary reduction in the number of advertising sales staff employed by Premier."*

14. The Claimant, while still employed and having reviewed both the selection criterion as well as the marking, then in his emails of 25/7/20 and 31/7/20 limited his criticism to AC's low scoring only.

15. In his further particulars of his discrimination claim produced on 25/5/21 the Claimant stated "*20. The Claimant was treated less favourably than his comparator Mr D Russell in the selection criteria for redundancy because of his age."* …Of which, the Claimant provided no particulars of the less favourable treatment save that: *"22. When the criteria for redundancy selection was applied, the Claimant was treated less favourably because of his age. His length of service, work performance and aptitude for work were not properly considered by Ms Clowes who had recently joined the Respondent company and as a result he was made redundant on 11th August 2020"*

16. In supplementary Grounds of Resistance, the Respondent recorded its reasonable understanding that the discrimination claim was therefore limited to the allegation that, when scoring the Claimant against the redundancy selection criteria: the Claimant's length of service, work performance and aptitude for work was not properly considered by AC because of the Claimant's age.

17. When Ms Millin subsequently produced on 19/7/2021 an earlier draft of the Claimant's list of issues, she omitted any suggestion that there had not been a genuine redundancy situation or that the selection criteria themselves were age discriminatory.

18. Thus, on a fair reading of the ET1 and POC, together with the Claimant's further particulars and his Counsel's draft list of issues served before the PH in October 21, the Claimant had not, prior to service on 7/1/22 of an amended draft list of issues, made these contentions.

19. The witness statements on both sides served in early January 2022 have not commented on or provided any evidence as to whether there had been a genuine redundancy situation or whether or not the selection criteria themselves were age discriminatory.

20. It is plainly impossible to allow these new issues to be included in the Claimant's case now without a formal amendment which would require an adjournment of the trial which would be unreasonable and disproportionate.

21. Seeing that it was only after the Claimant saw recently for the first time SG's witness statement that he learned that she had marked some of the scores, we permitted the Claimant to rely, if appropriate, on any points arising from that scoring, (which matter SG was able reasonably to deal with without an adjournment) but beyond that were unwilling to allow the Claimant to make late extensions to his case.

22. The tribunal therefore re-amended the Claimant's draft list of issues (as per the Schedule to these Reasons) so as to reflect the permitted issues only and we emailed these to the parties before the witnesses started to give their evidence.

23. The main liability issue for present purposes is whether the scoring of the Claimant against the selection criteria, and particularly the low scoring by AC, was unfavourable treatment because of the Claimant's age.

Reasons as to paragraphs 3 and 4 of the judgment

24. We heard evidence from the Claimant and then from the Respondent's witnesses SG and AC. The documents were in a bundle of 163 pages. In addition, the Claimant provided some further summaries in relation to figures shown in his schedule of loss and we were sent a copy of a first written warning previously issued to the Claimant. In closing both sides produced written and oral final submissions.

25. We found the Claimant to be an honest and straightforward witness and where they differ we prefer his version of events to those of the Respondent's witnesses.

26. Some background facts are set out in the Reasons for the previous Judgment in this matter dated 6/10/2021.

Further findings of fact relevant to the remaining issues:

27. The Claimant who was born on 1/3/1956 and who thus attained the age of 64 years on 1/3/2020, joined the Respondent, on 18/7/2017, as a Telesales Executive. He reported directly to Beverley White, ("BW") with whom he maintained a good relationship.

28. The Respondent sells advertising on various media, for example on three digital Christian-orientated radio stations which it owns and broadcasts from nationally.

29. The Claimant had about 35 years of prior media sales experience.

30. His role was to generate new business and also service the needs and build the accounts of existing clients. When the Claimant started he was given 70 existing clients to manage, and develop.

31. There were usually 4 sales executives, although the number fluctuated.

32. There was a dispute between the parties as to whether the Claimant's sales had steadily increased with each financial year of his employment. The Claimant asserted from the beginning and in his witness statement that they had - and he was not challenged in cross-examination about this.

33. However, in her oral evidence AC, in seeking to justify the very low marks she later gave the Claimant in scoring him against the selection matrix, (and to justify her high scoring of the younger sales-executives) suggested, for the first time, that the Claimant had lost clients and also had not shown any growth in his sales performance over the years, whereas the younger sales executives had shown growth in their sales, despite the difficulties of a "cold start".

34. AC was unable to explain why she had not mentioned this important matter in her witness statement. When asked by the Tribunal judge whether there was any document in the bundle which showed this, she said there was not, although she said there was evidence in "data" which was not in the bundle. Only in re-examination did she suggest, contradicting what she had just told the judge, that if we carried out some mathematical calculations (which she did not clearly explain) in relation to the figures shown on pages 154 and 155 of the bundle, we would see that the Claimant's sales figures had "stood still".

35. We do not see that in the figures, and the Claimant had not been given an opportunity to deal with this allegation because it had not featured in the Respondent's arguments before this. We were not taken to any documentary evidence showing under-performance. AC did not know basic facts about the Claimant's sales performance such as whether the Claimant's target had been increased year on year.

36. We recognise that it can be harder to win business from a new client from a cold start than it is to develop an existing client . However, AC's explanation failed to take into account that a new recruit not engaged in managing a large volume of existing accounts would naturally have more time to look for new clients and show growth from a nil base than would a busy established sales executive who was already managing a large portfolio and bringing in much higher sales.

37. Of the four sales executives, the Claimant achieved by far the highest sales figures. The Claimant was sent on furlough and was unable to work from 6/5/2020. We were taken to records of sales already completed and booked for the future for the period October 2019 to the end of September 2020, as shown on 5/5/2020 (151). At that point the Claimant had sales of £219358.

38. The next highest achieving sales executive was Sally Reeves ("SR") aged about 56 years, who despite having been sent on furlough in early April 2020, had achieved sales of £95720.

39. In contrast, the third sales executive Dodi Russell ("DR") who was aged about 24 years, had sales of £76282.

40. The fourth sales executive Neil Burrows ("NB) who was aged about 36 years, had joined in the beginning of April 2020. He had achieved only £25903 of sales by the end of September 2020 by which time DR had increased his yearly sales to £114376 while the Claimant's sales were then recorded as £218981. (155)

41. These figures have to be read in the light of the fact that the Claimant had been unable to work from 6/5/20 onwards whereas DR and NB had been permitted to do so, and also the generally dampening effect which the Covid19 pandemic had on sales generally. Had these factors not been operating, we find it highly likely that the Claimant would have achieved his target of £340000 by the end of September 2020.

42. In the previous year - ie to October 2019 - the Claimant had achieved sales of £267029 in contrast with DR who achieved £71511.

43. In her evidence AC, again seeking to justify the very low marks she later gave the Claimant in comparison with his comparators (DR and NB) in scoring them against the selection matrix, suggested that the Claimant had been given a significant advantage in achieving higher sales because of the large number of accounts he had been given at the outset. For example, the Claimant had been given the management of an important account with a client called the Harvest Partnership.

44. However the Claimant gave detailed evidence about this explaining that since he had taken over responsibility for the account in October 2017, he had significantly increased sales with Harvest Partnership from £30K annually Oct 16 to Sept 17, to £60K between Oct 17-Sept 18 and nearly £100K of booked business for the Oct 19 to Sept 20 period.

45. This evidence was corroborated by an email sent by the Harvest Partnership MD on 4/8/2020, lavishly praising and supporting the Claimant and confirming that he had increased their account with the Respondent.

46. If the Claimant had not being growing and developing sales, BW, who is agreed to be a competent manager, would not have given the Claimant the support that she did.

47. We find that it is unreasonable to discount the credit due to the Claimant for his significantly highest sales performance, as AC has sought to do.

48. The Claimant, when subsequently engaged in contesting his selection for redundancy, produced in July 2020 a summary of his achievements (100) which reads interalia as follows;

> *"Revenue generator: Has been consistently generating an average of over £20K of sales revenue each month for nearly 2 years. Prior to COVID19 lock-down, was on target to generate in excess of £300K of sales – Oct 19 to Sept 20. Despite lock-down and furlough, this still currently stands at @ £225K*
>
> *Comparative Sales Performance: Consistently generates over twice the annual sales revenue of the other sales execs.*
>
> *Existing Client development: Have effectively used my media sales experience to significantly increase the spend of many established clients with Premier. Amongst these - The Harvest Partnership's spend with Premier has more than trebled compared to 3 years ago ; Many of the Bible & theological colleges have dramatically increased their spend across all Premier's platforms.*
>
> *New Client Development: Has consistently researched and developed new business opportunities across a range of industries. If needed, happy to work out-of-hours with clients to help solve problems and generate revenue. …"*

49. None of this was really contested at the material time when the Claimant was still employed, or in any detail at the tribunal and it is consistent with the documents we do have. We accept it as a fair and accurate summary of the position.

50. AC started working for the Respondent in late February 2020.

51. When AC arrived, the Claimant was absent on sick leave which started on 18/2/2020, caused by spinal problems. He underwent surgery but was then signed off for 5 weeks.

52. The Claimant met AC face-to-face for the first and only time very briefly (2 to 5 minutes) in mid-March 2020 when he visited the office to collect some equipment he needed in order to work from home. The Claimant was walking with the aid of a stick.

53. SR (the second highest earner) was sent on furlough in April 2020. She had worked in a role linked to recruitment which had collapsed with the lockdown.

54. The Claimant's sick leave ended and he started working again (remotely) in the last week of March, until furloughed on 6/5/2020. During this time the working sales executives were the Claimant, DR and NB, under BW's immediate supervision, with AC in overall charge.

55. During the 6 week period while the Claimant was working remotely he attended video meetings with the other members of the sales team and about 25 of these meetings were also attended by AC. The Claimant also asked for and was granted a couple of one-to-one video meetings with AC.

56. AC was dealing in April 2020 with the introduction of a new App which would allow the sales executives to book in adverts during radio programmes. Previously a "traffic manager" had booked in the advertising. The introduction of the new App required all radio advertising to be

suspended during April 2020. This was a temporary disruption, with service to be resumed in May. However the Claimant was concerned about the disruption and impact this would have on his large clients and in particular on the Harvest Partnership, which had paid for significant radio adverts during April. He initiated discussions with AC to try to ensure that the matter was properly explained to his clients, and that the disruption and impact on them was mitigated as much as possible.

57. In her evidence AC, in again seeking to justify the low scores she later gave the Claimant, suggested that the Clamant had shown an unwillingness and inability to adapt to digital changes she was trying to introduce. She also complained that in the video meetings the Claimant had shown that he was "*not engaged*", "*an outlier in comparison to* (sic) *the rest of the team*" and that "*he couldn't see past his own personal situation and concerns"* and he "*just wanted to know when it was going to end"*. None of this was shown in any document such as a contemporaneous meeting note or email. If the Claimant's attitude had been blameworthy at the time we would expect some contemporaneous evidence of this kind.

58. The Claimant's evidence (shown in italics) under cross examination on this point was recorded by the Tribunal as follows:

"After AC joined Premier going through changes?

C - a lot of these happened at end of 2019 as we lost our traffic manager who booked advertising slots on radio and we were moving towards a digital platform. Covid came and this changed how we worked. I didn't have any more concerns more than others. My main concern was to try and minimise loss of advertising revenue. My main task was to sell . During Covid needed to maintain business and approach new clients to further reinforce Radio advertising as everyone was at home. Digital fitted in with this . When you have a client spending 60k with you and not hearing their advertising they would be concerned. Not anything to do with digital.
I was not comfortable losing advertising revenue off the Radio . It was a major source of revenue . Every company had to maintain visibility on air waves

Q - you were impatient with change?
C - no. I was not against I was keen to discuss ways around the problem, work to a timeline and tell clients why removing radio air time and when we would be returning. Keen to boost advertising revenue on digital platforms - I had done this in 3 years previously. Also keen on additional print revenue.
I spoke on a few occasions with Annette.
When lockdown started we had 3 meetings per day
New digital, print products . I was naturally anxious to reintroduce radio advertising eg from Breakfast morning show to late afternoon.

Q - you saw change as a threat?
C - totally disagree . Wrong I was the least amenable to do this .I got additional £5K business in lockdown - a new concept "

59. We do not find AC's criticism of the Claimant's attitude to be reasonable or objectively justified. On the contrary, we find that the Claimant was engaging in AC's plans by discussing them with her so as to ensure that an important client was not damaged or lost in the process. Lockdown was a critical time for clients to have their advertising on radio. Taking the adverts off the radio

would have significant impact and naturally cause concern for his clients who were heavily invested in the radio services. The Claimant expressed his concerns about this. This was sensible and responsible behaviour which showed the Claimant trying to promote the Respondent's commercial interest, rather than anything else.

60. In early May 2020 the Claimant was surprised and shocked to hear from AC that he was to be furloughed, while DR and NB were not. On 6/5/2020 BW made a private call to him to express her opposition and regret about this. The Claimant in two witness statements and under cross-examination confirmed that BW had told him that it was AC who had made the decision to furlough him. He later also said that he had assumed this because AC had initially told him about it. We are not satisfied that these two statements are necessarily incompatible because he could have both assumed it from the first and been told it later.

61. Despite the fact that the Claimant referred to this conversation in paragraph 2 of his first witness statement in September 2021 (where he stated "*A subsequent private telephone call from Bev White confirmed that she was very much against this decision made by Annette*" and had repeated it in paragraph 22 of his second witness statement *"My line manager Beverly White made a private call to express opposition and regret at Annette's decision*", and despite the fact that BW is still employed by the Respondent, the Respondent, for some unexplained reason, did not call BW to give evidence about this (or indeed about anything else) at the trial.

62. In her evidence AC suggested that she had played no part in the decision as to who to furlough, and had simply received a unilateral instruction passed down from the CEO to the effect that the Claimant rather than DR should be furloughed. (It was not possible under the government rules to furlough NB as he had joined the Respondent recently).

63. AC had been brought in as the most senior person responsible for the sales area and it is not credible that the CEO would have made a decision about who in the sales team was to be furloughed without her involvement.

64. It was a surprising decision strongly opposed by the Claimant's own line manager BW. The most obvious explanation, and our finding, is that AC made the decision and then forced the decision through in the face of BW's objections.

65. After going on furlough, the Claimant no longer participated in the video meetings and was no longer working and had no further contact with AC although he did have occasional contact with BW.

66. On 13/7/2020 at 14.10 SG sent selection criteria to AC for a redundancy selection exercise to be carried out on the four sales executives, of whom two were to be chosen for dismissal. A similar email was probably sent to BW (who was to be the other main marker) at much the same time.

67. Later that day at 16.36 AC asked SG whether she should password protect the completed scoring forms and observed that the "*formula are not pulling through on the tabs*". She sent the completed forms to SG at 17.13. This timing suggests and we find that AC spent a surprisingly short period of time on this important task, which to be carried out conscientiously including proper consideration of available evidence, should have taken far longer. BW spent longer on the task and sent them in to SG after a few days.

68. Both AC and BW marked 16 out of 20 selection criteria, with SG marking the remaining 4.

69. The total scores awarded to the four candidates were as follows:

    By BW: DR 76.5 NB 75 SR 69 DE (the Claimant) 80; and

    By AC: DR 86 NB 81.5 SR 65.5 DE (the Claimant) 58

70. Thus, BW who had known the Claimant and his work for 3 years, had scored him the highest of all the sales executives in the pool whereas AC, who had known him under extremely limited circumstances for 6 weeks while he was working remotely during lockdown from late March to early May, scored him the lowest, by far, and preferrred in her scores the younger DR and NB.

71. Having combined the scores, the low-marking of the Claimant by AC had the effect that the Claimant was one of the two selected provisionally to be made redundant, the other being SR.

72. On 14/7/20 the Claimant met SG and was informed that he was at risk of redundancy, and she confirmed this in a letter of the same date. SG told the Claimant not to contact or talk to either AC or BW further.

73. The Claimant was very upset and he composed and sent in a document extolling his achievements, part of which document we have quoted from above.

74. The Claimant did not attend a scheduled consultation meeting on 22/7/20 so SG sent him his scores by email.

75. On 31/7/2020, having examined his scoring and consulted with the CAB, the Claimant sent in to SG a complaint pointing out the significant discrepancy between the AC and BW marking. This was passed back the same day by SG to AC and BW at 15.42 with a suggestion that either or both may wish to revise their scores to bring them closer into alignment.

76. On 3/8/20 BW confirmed that she was happy with and would not change her original scoring but the same day AC sent in revised scoring increasing her scores of the Claimant from 58 to 64, still leaving him as the lowest scored candidate in her marking and causing him to remain relegated as one of the two employees to be dismissed.

77. AC suggested that she had received additional information during the period from 13/7/2020 to 31/72020 which had caused her, even before receipt of the Claimant's complaint, to wish to revise the Claimant's score upwards. She suggested that the new information included July 2020 information. It is difficult to see how those particular figures would make any difference as they do not appear to be markedly different to previous months. She also stated that she had received positive feedback from the Claimant's biggest client Harvest Partnership, which account AC had taken over in the Claimant's absence. However, the positive feedback from Harvest in the bundle (126) was sent late on 4/8/20, after AC had already increased her scoring, and that email does not refer to previous feedback having been given before the email was written. Furthermore, before receipt of the Claimant's complaint, AC had taken no step nor made any enquiry with SG to see if she could adjust her scoring in the Claimant's favour. It is clear that AC adjusted the Claimant's scores because of and in response to the Claimant's complaint only.

78. AC was aware that she knew very little about the Claimant in comparison with BW and that BW was a competent and experienced line manager who knew the Claimant much better than

did AC. AC should herself have been concerned by the fact that she had come to the very opposite conclusion to that reached by BW. If she had approached the matter responsibly, AC would have seen this as a red flag and would have done something about this before the Claimant complained.

79. This willingness by AC to ignore the matter and then rapidly change her scoring prompted simply by a complaint and without clear reference to any discernible change in objective circumstances, demonstrates a lack of rigour and her failure to base her decision-making about the Claimant on objective considerations throughout.

80. SG scored 4 criteria out of the 20 in total. She made an error in the Claimant's favour in marking the total long-term sickness in the previous 24 months but made an error in the Claimant's disfavour in awarding a low score for intermittent short-term sickness, she having already marked him down for the same first written warning in the disciplinary record section (this was contrary to the instruction "*Must not double up with disciplinary record*".) We find nothing sinister about this and find that SG simply carried out a transactional administrative role throughout, in good faith and to the best of her abilities.

81. We have considered the Claimant's adjusted final scores (page 116) generally and compared them with those given by AC to other candidates. We note that in relation to some criteria AC gave the same score to the Claimant as did BW against whom the Claimant makes no discrimination complaint.

82. However, generally and overall, and even after AC increasing her scoring of the Claimant, we find that the Claimant's scoring by AC was harsh and unjustifiable by reference to the objective evidence, whereas that of BW was fair and easily understandable. Also, the scoring AC assigned to the younger DR and NB appears disproportionately high in comparison with her scores for the Claimant.

83. In reaching this conclusion we have noted the explanation, for example, that NB had valuable skills in the film industry which AC wished to retain; but we nevertheless do not understand her assigning of such a high score across numerous different criteria to NB who had been with the Respondent since only April 2020 and in July 2020 remained under a 6 month development plan with little or no sales accrued.

84. This is not simply a case in which two managers disagreed in scoring, but a case in which they reached polar opposite decisions, BW scoring the Claimant the highest and AC scoring him the lowest. AC's scoring is not properly explained or demonstrated by reference to the legitimate objective facts.

85. The meetings the Claimant had with AC did not give her a reasonable basis for this outcome. To the extent that AC concluded that the Claimant was inflexible, resistant to change etc, we find that that in itself was the result of her applying an ageist stereotype.

86. The Claimant was told on 3rd August that the adjusted scoring still left him selected for redundancy.

87. The Claimant was given notice of dismissal by redundancy on 11/8/20 effective 16/9/2020.

88. As described in the Reasons for the previous judgment, the Claimant thereafter negotiated an

alternative means of terminating his employment, (which termination was by then inevitable,) namely by the Respondent withdrawing the dismissal and allowing the Claimant to remain on furlough until he resigned on 31/10/2020.

89. SR was also made redundant. Although she was also a higher earner and older than the two salespersons who were retained, her recruitment work had disappeared since March 2020 and she had also been scored low by BW. Hence the evidence pertaining to her is mixed and does not really assist us in our task.

Relevant legal provisions

90. Section 4 Equality Act 2010 (EA) provides that age is a protected characteristic.

Direct Age Discrimination

91. Section 13 EA provides that a person discriminates against another if because of a protected characteristic, he treats another less favourably than he treats or would treat others, unless, in the case of age, he shows the treatment to be a proportionate means of achieving a legitimate aim.

Onus of proof

92. Section 136 provides that it there are facts from which a court could decide, in the absence of any other explanation that a person has contravened a provision under the EA, the court must hold that the contravention occurred, unless the person shows that he did not contravene the provision.

Time limits

93. The relevant statutory provision is s.123 (1) of the Equality Act 2010 (the EQA) which provides for a three-month time period for issuing tribunal proceedings, or starting ACAS early conciliation, or at such other period as the Employment Tribunal thinks just and equitable.

94. The relevant criteria to be applied in terms of whether it would be just and equitable to extend time are those set out in s.33 of the Limitation Act 1980. These criteria should not be followed slavishly but nevertheless represent a useful guide to tribunals in assessing whether an extension of time should apply. Potentially relevant factors include: the length and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected; the promptness of which the Claimant acted once she knew of the facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate professional advice once she knew of the possibility of taking legal action.

95. The length of, and reasons for the delay, and any prejudice to the Respondent, are “almost always relevant to consider” Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, per Leggatt LJ at [19]).

96. Robertson v Bexley Community Centre 2003 IRLR 434 CA [25] per Auld LJ "*An employment tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However time limits are exercised strictly in employment cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. On the contrary, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. The exercise of discretion is thus the exception rather than the rule".*

Conclusions about time limits

97. The discrimination complained of is the scoring which was finalised on 3/8/2020. If the scoring process was a continuing act it ended on 3/8/2020. The three-month period started to run then and ended on 2/11/2020.

98. The Claimant applied to ACAS on 8/11/2020 by which time had already expired and he received the EC certificate on 20/11/2020. As time had already expired before the application to ACAS, time is not extended by the ACAS conciliation period. The Claimant presented his claim on 21/11/2020, about 19 days late.

99. While the discrimination ended on 3/11/20 its real impact did not occur until the dismissal on 11/8/20. Even then he managed to negotiate a later departure while he remained employed on furlough until 31/10/2020. It was only then that the real impact of the discrimination made itself felt. During the period until 31/10/20 it is likely that the Claimant felt hampered or at least that it would be premature to apply to ACAS or issue proceedings.

100. As a result of the treatment he had received from the Respondent, the Claimant was stressed and upset during the three-month period, and not able to deal efficiently with a new situation which he had been thrust into.

101. He tried to get professional legal help but was unable to find a solicitor to take on the matter. There was a lockdown in force and lawyers were inundated with people asking for help with employment problems. He was able to get some advice from the CAB but without a detailed analysis of the complicated facts (which it has taken two separate ET judgments to consider) it would have been unlikely that the CAB would have been able to recognise that time was already running from 3/8/20.

102. The delay was quite short and there is no forensic prejudice to the Respondent.

103. We find that it is just and equitable to extend time for the claim and do so.

Conclusions about the direct age discrimination claim

104. The Claimant has adduced facts which transfer the onus to the Respondent under section 136 EA 2010. We have dealt with this in more detail in our fact finding, but in summary, the primary facts are that the Claimant, who by far was the oldest as well as the most successful sales executive in terms of revenue earning, was first forced into furlough by AC in the face of objections by BW while his youthful comparator DR was not furloughed, and then given the lowest score by AC, while both the younger comparators DR and NB were given much higher scores by AC ensuring that their services would be retained while the Claimant would be

dismissed. There is an obvious mismatch between AC's scoring and the objective facts which should have underpinned them, which is also accentuated by the fact that AC's scoring is not only different from, but the polar opposite, of the scoring by BW, who was the Claimant's and the comparators' far more knowledgeable immediate line manager.

105. We exonerate SG from discrimination, but are not satisfied by AC's evidence or explanations.

106. We find that AC perceived the Claimant as an old person who as a consequence would not fit in with her programme. This prevented her from recognising the Claimant's obvious success and achievements. Because of the Claimant's age, AC was not interested in and unwilling to consider properly or at all the Claimant's length of service, work performance and aptitude for work. She turned a blind eye to the obvious important facts that the Claimant had a good employment record and was far ahead of the three other sales executives, generating twice or more the number of sales.

107. AC applied an unjustified ageist stereotype which conflicted with the objective facts. She was guilty of both conscious and also probably a degree of unconscious bias against him as an older person.

108. Absent the discrimination, the Claimant would have not been selected for redundancy.

109. There is no justification defence being relied on by the Respondent in this case.

110. The Respondent is vicariously liable for AC's actions and accordingly the direct discrimination claim succeeds.

Remedy

Injury to feelings

111. From 6/4/2020 to 5/4/2021 the Vento bands were as follows £900 - £9,000 for lower band offences (isolated or one off occurrences); £9,000 - £27,000 for middle band offences (serious cases in which highest band unjustified) and £27,000 to £45,000 for upper band offences (most serious cases for example in which there has been a lengthy campaign of discriminatory harassment).

112. Ms Millin submitted that this was a mid-band case and should attract an award of £16000. We find that the matter is serious but towards the lower end of the middle band and that the appropriate damages for injury to feelings are £13000.

Financial losses - Causation

113. The Respondent submitted that the Claimant's losses were caused by a new act by the Claimant intervening between the discrimination and the loss of his employment, namely his negotiated resignation on 31/10/20. We reject this submission. The only reason the Claimant resigned was because this was the lesser of two evils, both of which were inflicted by the discrimination. Had the Claimant not been scored low he would not have been dismissed. Had he not been dismissed he would not have been put in a situation in which he had to either be dismissed on 16/9/20 or, through negotiation, buy a stay (on furlough) of execution until 31/10/20. The termination of his employment was caused directly by the discrimination.

Mitigation

114. The Claimant started to look for alternative work shortly after 11/8/2020 and by 15/9/2020 had entered into a commission-only self-employed contract as a sales-executive with a company called MBC. This did not provide him with income for some time and when it did it was considerably less than his earnings had been with the Respondent.

115. He registered with recruitment agencies and paid to update his CV and has continued throughout applying for other jobs (about 12 in number) but without success until recently when he has managed to obtain a second stream of self-employed work.

116. We accept that the Claimant has been anxious to find alternative employment and done his best to do so during a difficult time caused by the pandemic. We also accept as a reasonable explanation for the limited number of documents he can produce to show his searching, that searches and applications on-line do not generate a documentary record in many cases.

Financial losses- amount

117. The Claimant claimed his losses from 1/11/2020 to 25/1/2022 but not beyond. He expressed the hope that soon he would be able to improve his alternative earnings to a level equivalent to his old earnings with the Respondent. We find that the correct period for compensation is as claimed by him.

118. He was not cross-examined on his schedule of loss nor did the Respondent make any submissions about the figures and calculations in it. After some detailed inquiries by the tribunal, it became clear that the Claimant's figure for lost commission since termination has been conservatively estimated and the Respondent expressly agreed it as such.

Interest on damages

119. This is awarded on the damages for injury to feelings at 8% pa from 3/11/20 - 28/1/22 and at the same rate on the financial losses from the half way date (namely 16/6/21) to 28/1/22. Although the judgment and reasons are to be sent out on a later date, the calculation by the Tribunal was on 28/11/22.

Failure by Claimant to comply with ACAS grievance procedures

120. The ACAS guide on Discipline and Grievances at Work States that an employee with a grievance which cannot be resolved informally should raise the matter formally with a manager.

121. Section 207A TULCRA 1992 states that if an employee unreasonably fails to comply with the Code in relation to inter alia claims under the Equality Act 2010, then if the Tribunal thinks it just and equitable it may deduct up to 25% of the damages it would otherwise have awarded the Claimant.

122. The Claimant complained informally on 31/7/2020 about the scoring but did not raise a formal grievance and did not complain in any way about age discrimination until his ET1 was served. Accordingly, the Respondent was not prompted at the proper time to consider the question whether unlawful discrimination had occurred. We regard this as an unreasonable breach of the Code by the Claimant and that it is just and equitable to apply a 15% discount to all his damages.

Claim for Aggravated damages

123. The Claimant included a claim for these in the sum of £3000. We do not award these. Aggravated damages are for cases where the injury was inflicted by conduct which was high-handed, malicious, insulting or oppressive. We do not find that this applies here.

Calculation of Award.

Injury to feelings		£13000
Interest thereon. 8% pa from 3/11/20 - 28/1/22		£1285
Financial losses		
Net salary which would have been earned from 1st November 2020 to 25th January 2022 (£27,627.00) minus net earnings received from 1st November 2020 to 25th January 2022 (£13,275.00) =	£14, 352.00	
Loss of commission from 1st November 2020 to 25th January 2022	£17,257.00	
Loss of pension from 1st November 2020 to 25th January 2022	£921.00	£32,530.00
Interest thereon. 8% pa from 16/6/21 to 28/1/22		£1611
SUBTOTAL		£48426
Less 15% under section 207A TULCRA		(£7263)
TOTAL		£41163

The financial damages inclusive of interest but after the section 207A deduction are less than £30000 and so are not taxable. The damages for injury to feelings are not taxable. Hence there is no need to gross up the award for tax.

J S Burns Employment Judge
London Central
5/2/22
For Secretary of the Tribunals
Date sent to parties : 07/02/22

SCHEDULE (of issues for FMH)

The Claimant brings a claim of direct discrimination during and following the redundancy process after which he was made redundant.

EQA, section 13: Direct discrimination because of age

The Claimant alleges the less favourable treatment is the marking he was awarded which lead him to be provisionally selected for redundancy. He is not permitted to claim on the basis that the selection criteria were inherently ageist; or to suggest that there was no genuine redundancy situation.

He claims that
When scoring for redundancy:

i) the Claimant's length of service was not properly considered by Ms Clowes because of the Claimant's age.

ii) the Claimant's work performance was not properly considered by Ms Clowes because of the Claimant's age.

iii) the Claimant's aptitude for work was not properly considered by Ms Clowes because of the Claimant's age

iv) it was not taken into consideration by Ms Clowes that the Claimant had a good employment record and was ahead of three other sales executives, generating twice the number of sales.

(v) The Claimant also having seen the witness statement of Ms Gurmeseva contends that she also unlawfully took his age into account when marking home against the criteria that she did mark.

Was that treatment less favourable treatment i.e., did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others (comparators) in not materially different circumstances? The Claimant relies on the following comparators, Mr D Russell and Mr N Burrows.

Was the selection made because of the Claimant's age and/or because of the protected characteristic of age more generally?

No justification argument is being run by Respondent

Time limits/limitation issues
Were all of the Claimant's complaints presented within the time limits set out in sections 123(1)(a) &(b) of the Equality Act 2010 (EqA)

Remedy issue raised by Respondent
If the Claimant succeeds the Respondent will claim a discount on damages because of the Claimants failure to raise a grievance and or failure to appeal.

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