



## EMPLOYMENT TRIBUNALS

**Claimant**

Mr Karl Donovan

v

**Respondent**

Somerset County Council

# Judgment

**Heard at:** Southampton, by VHS

**On:** 14 and 15 July 2022

**Before:** Employment Judge Rayner  
Ms V Blake  
Ms E Smillie

**Appearances**

**For the Claimant:** In Person

**For the Respondent:** Miss S Bowen, Counsel

**The Claimant's claim of age discrimination, by age related harassment, contrary to section 26 Equality Act 2010, is dismissed.**

1. This hearing took place by video (VHS), with all parties attending remotely. A number of parties had technical difficulties during the course of the hearing with microphones and cameras, but all parties persevered and with assistance from the clerks and technical staff, it was possible for the claim to be heard and determined.
2. The Judgment with a summary of the reasons was given verbally on the last day of hearing. No application for written reasons was made and it was explained to the parties that an application could be made within 14 days of the short form judgment being sent to the parties.
3. Following the hearing and before the short form judgment had been promulgated, the Claimant contacted the ET to ask when written reasons would be received.
4. Although this was not the correct format for the request for written reasons, I determined to treat it as such, and the Claimant was written to and told that his letter would be treated as an application and that the written reasons would be

### Background to the claim

5. This is a claim of age discrimination brought by the Claimant arising from his job application made to the Respondent for a post of leaving care worker in or around November 2020.
6. The Claimant was shortlisted for the post and was interviewed along with four other candidates on the 18 November 2020. He was unsuccessful at interview and informed that he had not succeeded shortly after interview.
7. The Claimant contacted ACAS on 5 January 2021 and his early conciliation certificate was issued on 22 January 2021.
8. He filed his claim to the employment tribunal on 17 February 2021.
9. The Respondent filed their ET3 and grounds of resistance on 31 March 2021
10. The Claimant initially claimed against the Respondent for discrimination on grounds of age and sex. The Claimant's sex discrimination claim and claim of direct age discrimination were struck out as having no reasonable prospect of success at an early stage in the proceedings.
11. The Claimant's remaining claim is a claim that he was harassed for a reason related to age, contrary to section 26 of the Equality Act 2010. That is the only claim which we have to determine today.
12. The Respondent denies that the comments relied on by the Claimant are capable of amounting to harassment related to age further asserts that in any event they ought not to be treated as being capable of amounting to unlawful harassment in the circumstances of this case.
13. The Claimant's claim of harassment arises from comments written about him by members of the Young Person Panel (YP Panel) during the course of their video interview with him. Because the post applied for was one working with young people leaving care, the Respondent told us that they asked candidates to attend a short interview with a panel of young people, who were service users, as part of the process.
14. An application was made at the outset for a limited anonymity order in respect of one of the Respondent's witnesses, who had taken part in the recruitment exercise as a member of the YP Panel, ( see below) because they are a person who has left care. The person asked for anonymity because of their status as a care leaver. It was explained to the tribunal that the fact of being a care leaver was not something that they wanted to be known more widely, because of potential prejudices and assumptions amongst some members of the public.
15. We all agreed that in this case it was in the interests of justice for a limited anonymity order to be made and the person is therefore referred to as J, they and their within this judgment.
16. An Anonymity order has been issued.

17. The hearing took place over three days, and we heard evidence from the Claimant, Mr Karl Donovan on his own behalf, and for the Respondent from Mr Daniel Batchelor, who is employed as the team leader for leaving care , and from J, a person who is a leaving care apprentice with the Respondent who was a member of the YP panel, which interviewed the Claimant.
18. In addition, we were provided with an agreed trial bundle.
19. The tribunal makes the following findings of fact.
20. The Respondent council has statutory responsibility to look after young people who are within the care system.
21. The Respondent continues to provide services to people when they leave care, at the age of 18 including support and help with matters such as finding and managing housing dealing with their finances, as well as other life skills.
22. It was in respect of these services that the post of a leaving care worker was advertised.
23. The Claimant was an external applicant for the job and applied for the position of leaving care worker with the Respondent in November 2020.
24. As is standard in many recruitment exercises, the Claimant was sent a job description and person specification for the role and was required to fill in an application form, providing details about himself and his past employment history.
25. These documents set out the key competencies and the essential experience necessary for the job. It is against these factors, that individuals were shortlisted and interviewed .
26. The job description also set out the main tasks of the job
27. The first key competency identified is communication and three bullet points were set out. The individual would be someone who
  - 27.1. *communicates confidently and sensitively with colleagues, service users and outside agencies*
  - 27.2. *makes a positive contribution during meetings, coordinating as required and achieves desired outcomes*
  - 27.3. *is able to determine the extent to which information is critical and should be acted upon urgently and or referred on.*
28. Under the essential experiences the job information stated the requirement of a *good level of communication, advocacy and presentation skills to enable engagement with a wide range of young people, their families, colleagues and other agencies.*

29. The tasks and responsibilities are wide-ranging and not repeated in full here, but we note that the role was intended to assist young people who were care leavers, up until their 25<sup>th</sup> birthday, with a full range of life skills including preparation for independent living; identification of support needs, liaison with a range of agencies; supporting care leavers in relation to all aspects of the physical and sexual health, emotional and mental well-being; assisting young people in identifying and accessing suitable accommodation; and involvement with provision of personal and other allowances to care leavers.
30. We agree with the Respondent that all of these services require an ability to adequately and effectively communicate, liaise and work with those young people who were leaving care.
31. The process which the Respondent used to appoint people to this role, was firstly to consider the application form and carry out a shortlisting process.
32. The Claimant filled in an application form, and we find, and the Claimant does not deny this, that the Claimant did not provide either his full name, address or his date of birth on his application and nor did he set out full details of all his work experience and education. Instead, he provided details of his work experience and training from 2008 only.
33. The Claimant and four other candidates were shortlisted for interviewed for the post. We accept that the candidates who were interviewed were male and female and that the ages of those interviewed included people who were both older and younger than the Claimant. We accept that the ages ranged from 37 to 59, and that four of those interviewed were in their 50s, one of whom was the Claimant.
34. The process for interview and selection included a written exercise and two interviews, one with a panel of the Respondent staff and one with a panel of young people who were care leavers.
35. The second interview, chronologically in this case, was a 45-minute interview before a panel of three members of the Respondent staff. We heard evidence from Mr Batchelor, the leaving care team leader, who was a member of the panel with two other individuals, which interviewed Mr Donovan and other candidates.
36. The first interview to take place was the interview before a panel representing the clients or service users who the successfully appointed leaving care worker would be working with. We heard evidence from J, who was a member of that panel.
37. The interview by the staff panel was on 18 November and we find the Claimant was asked the same questions as all other members. The Claimant was scored according to his performance. Mr Donovan did not score as well as other candidates and therefore he was not the preferred candidate for appointment.
38. Before us, Mr Donovan raised a concern about the scores he had been allocated. He stated that he had been allocated the lowest possible score in some categories and that this was unjustified. In fact we find that Mr Donovan had simply misread the information provided to him by the Respondent.

39. He asked for and was provided with information about his scores. The format it was provided in, was a table. This table recorded the names of candidates, the questions and the scores allocated, as well as the possible scores.
40. Because of the formatting and printing of the table, the box with the possible scores appeared at the top of a page, and Mr Donovan read this as meaning that he had scored the lowest score. However, by scrolling down the page, the actual score allocated to him was set out in the same box. This was explained to Mr Donovan during the hearing and he did accept, after some discussion, that he was wrong.
41. We find that there was no issue with the Respondents panel scoring the Claimant at all, and that the scores were reached after a fair process.
42. The YP panel interviews also took place on 18 November and again, the Claimant was interviewed and asked the same questions as other candidates.
43. We accept the Respondent's evidence that the purpose of the young person's panel is to provide some input in respect of those candidates who the Respondent panel propose for appointment. We accept Mr Batchelors evidence that the panel decided which candidates to put forward for appointment and that only then did they meet with the YP panel.
44. The interviews took place over video. The Claimant did not have his camera on during the interview, and therefore the panel could not see him. He told us that this was due to a fault with his camera on his computer.
45. We agree with the Respondent that the information provided by the Claimant on his application form did not state the Claimant's age or make it obvious to anyone how old the Claimant was or what his age group was.
46. We accept the Claimant's assertion that it would have been obvious to anybody from the information he did provide what experience he had, from 2008, but we do not consider that this alone gave any indication of his age or any indication of any age.
47. Therefore, not only could the panel not see Mr Donovan, but we find that they did not have any information about his age provided to them at all.
48. We accept the evidence of the Respondent witness J that neither they, nor the panel discussed the age of the applicants or the Claimant's age at all.
49. We accept J's evidence that they did not consider or think about the age of the Claimant at the point that he was interviewed, or when making the comments on the feedback sheet. We accept their evidence that they did not consciously think about age at all, but that they and their colleagues addressed the question on the form, and gave honest answers on the basis of how the Claimant had come across to them as a group in his interview.
50. We accept J's evidence that as far as they are aware, no one formed any view of the Claimants age on the basis of how he sounded on the call. We accept J's evidence that the comment that *he was slow and young people may get bored*

was a genuine view and about how he spoke to them, and was not consciously related to how old he was.

51. The panel did record their thoughts and views about each candidate.
52. The panel were told who would be offered the role, and were asked to give their comments on the proposed appointments. It was only at this point in the process then that the comments of the YPP were discussed with the appointments panel.
53. We accept that in this recruitment process, as was the practice, the comments about the candidates made by the YPP were only relevant in respect of the candidates who were successful and appointable.
54. In this case we accept that the Claimant was not one of the successful individuals considered for appointment and that therefore the views of the YP panel about him were not taken into account in the decision not to appoint him.
55. We accept that the Respondent panel did listen to the comments made by the YP panel in respect of all five candidates.
56. In so far as it may be relevant, we find that any views the YP panel members had about Mr Donovan made no difference to the decision not to appoint Mr Donovan, because that had already been made.
57. Following the interview, the Claimant tells us that he was unhappy about the process and that he sought feedback from Mr Batchelor. He says that he did not receive any feedback and he therefore raised the complaint with the complaints system.
58. At the start of the second day of evidence the Respondent provided us with a copy of an email from Mr Batchelor, written on 18 November telling Mr Donovan that he had been unsuccessful and asking him if he would like feedback. Mr Donovan replied the following day stating that he did not require feedback.
59. He has not produced any email in which he asked for further feedback and we accept the evidence of Mr Batchelor that he has no further emails from the Claimant about feedback.
60. Mr Donovan states that he did make a complaint about the process, and Mr Batchelor acknowledges that an email was received asking about the process for making a complaint, but we accept that Mr Batchelor did not ever see any complaint that may have been made.
61. Mr Donovan has not provided a copy of any complaint and it is not in the bundle. He confirmed that he did not think that he had disclosed it to the Respondents but asserted that they should have had a copy in any event.
62. We find that Mr Donovan did not request feedback from Mr Batchelor and his evidence in this respect was incorrect.

63. We find that if Mr Donovan did make a complaint following the recruitment process, it was not made to Mr Batchelor, and it was not a complaint that was ever shown to Mr Batchelor. We have no evidence of any date on which any complaint may have been made.
64. By the 20 November then, Mr Donovan knew that he had been unsuccessful and had declined the offer of feedback.
65. Mr Donovan told us that he then made a request under data protection legislation for access to any personal information which was held about him. This of course included any notes from the interviews which had taken place with the interview panel and the young person's panel.
66. It was as a result of this request we find, and not as the result of any request for performance feedback, that the Claimant was provided with the information that the panel members had written and provided as potential feedback to the interview panel.
67. We note that this information was received some time after Mr Donovan had been told that he had been unsuccessful in his application.
68. It is this information that Mr Donovan says formed the basis of the age-related harassment.
69. The information, which is headed *Interview Feedback* is at page 96 onwards of the agreed bundle.
70. The first comment which Mr Donovan takes issue with is under the heading, *Initial Impression* and it is stated *slow talker and spoke to much. I feel like young people may lose interest and get bored...came across arrogant very sure of himself. I do not feel likely to be a good match for young people and as an employee I feel I'd struggle to get along with him.*
71. It is also noted under *Eye Contact, Smile and Appearance* that there was *no camera*. As set out above, the interviews took place over a video hearing because of the Covid 19 pandemic. The Claimant told the tribunal, and we have no reason to doubt that on the day of the interview, the camera on his laptop was not working and that he explained this to the panel. We accept that therefore the interview took place in circumstances where the panel were unable to see Mr Donovan. Mr Donovan was apparently able to see the people who were interviewing him.
72. Mr Donovan states that the comments implicitly suggest that the people on the panel made the comments because they considered that the Claimant was an older person. He asserts that the words "*I feel like young people may lose interest and get bored*", suggest a comparison with young people as a whole compared to older people.
73. We disagree. We accept the evidence and submission of the Respondent that the words written down, make reference to the group of service users which the person appointed to the post would be working with.

74. The term “young people” refers to the specific group of service users, using the language and label that is commonly used by this authority, and by CQC and elsewhere.
75. We also find that on any ordinary and fair reading of the words written, and in the specific context, there is nothing that suggests that the YP Panel were making a comparison between themselves or between the claimant and people of other ages, or tht they were saying what they said because of any thoughts about how old the claimant might be. They are not words which disclose any comparison with people of other ages.
76. Before us the Claimant stated that the term *Young People* should not be used, and that he suggested that the term *service user*, should be used instead as it avoids discrimination. He is entitled to his view but we can see nothing problematic at all in the use of the term Young people to describe You people who were young, and who were in need of, or were offered the services partly because of their youth. We find that the use of the term was appropriate and widely used and is not of itself discriminatory, but rather descriptive of one of the group characteristics.
77. We also find that the use of the term was known and understood by the Claimant to be the preferred description of the group he would be working with. It was not a term used to draw distinction between one age group and another, but was simply a label. In any event, the choice of the term is not what the Claimant has complained about.
78. The job the Claimant was applying for was specifically about working with young care leavers, up to the age of 25. It was entirely understandable that the young persons panel would refer to themselves and other service users as young people. This is the context of the role.
79. We do not accept, as suggested by the Claimant , that by referring to themselves in that way that they were suggesting that young people would get bored because the individual was old, but rather were saying clearly that they would become bored because Mr Donovan came across as a slow talker who spoke too much. We observe that such a comment might be made about a person of any age.
80. Similarly, the comments that he came across as *arrogant*, *was very sure of himself* are not obviously comments linked to a person of any particular age, but comments which might be made about a person of any age.
81. We find that the comments that he would not be a good match for young people is not a comment made related to the Claimant age.
82. Firstly, we find that panel members did not know how old Claimant was, and secondly, we find that the reference to young people is a reference to the group of service users and is not of itself imply any awareness or consideration of the age of the person being interviewed.
83. Questions two and three in the feedback form simply record the Claimant’s answers. Question eight, *what do you think makes you different to the other*



*candidates we've seen today, recorded comments plenty of experience being able to talk to people; came across arrogant saying everyone thought he was cool and that no one had anything bad to say about him.*

84. The Claimant says that these comments have to be looked at in context and together, and that when read as a whole, they indicate a prejudicial attitude from the panel of young people towards older people in general and towards him as an older person in particular.
85. We disagree. We find that read as a whole the comments give feedback about their response to a candidate, and say nothing wither expressly or by implication about the age of the candidate or that age was a factor considered at all.
86. The Claimant tells us that when he received the subject access request information, he was extremely upset by the comments that have been made about him. He said that he considered that they were discriminatory and that they led to him having flashbacks about discriminatory treatment that he had experienced in the past. He states that he became depressed and that as a result he has decided that he does not wish to relocate to Somerset and stopped looking for jobs in Somerset
87. We accept the evidence of J, who gave clear concise evidence that the YP panel were giving an honest opinion of the suitability of the Claimant for a role, commenting on the things they had been asked to comment on.
88. We accept J's evidence that neither they, nor the panel knew consciously anything about the Claimant's age. They had no information about his age before them, they could not see him, and we accept J's evidence that his voice alone did not suggest to them at any point that he was a person of any particular age.
89. We find that the individuals did not write the comments with the intention or purpose of harassing the Claimant. We find that they were written with the purpose of providing a true and honest statement of how some individuals responded to those applying for the post. We find that at the time the documents were written, the individuals writing them did not expect or anticipate that they would be seen by the Claimant.

### **The legal principles**

90. Discrimination against applicants for a job on grounds of age is unlawful, as is harassment related to age in respect of job application see Equality Act 2010 s 39(1), (5) and s 40. The legislative provision It attacks first the employer who seeks to inhibit applications on grounds of the protected characteristic, ie in the arrangements the employer makes for the purpose of determining who should be offered the employment;
91. The only claim being made in this case is a claim of harassment related to age. The test is set out in section 26 Equality Act 2010.

## Harassment

(1) A person (A) harasses another (B) if –

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of –
  - (i) violating B's dignity, or
  - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B ...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

92. We therefore reminded ourselves that the test for harassment requires first that we determine what the conduct of the particular individual or individuals in question was, and whether it was unwanted conduct, and that we must then apply an objective test in determining whether it was 'related to' the protected characteristic in issue. In determining whether or not the conduct was related to age, the intention of the actors concerned might form part of the relevant circumstances but will not be determinative of the question the tribunal has to answer.

93. The second part of the test for harassment is concerned with the effect that any treatment found to be related to age has had upon the complainant and whether or not the treatment either had the purpose or effect of violating the complainant's dignity, or of creating and intimidating hostile, degrading humiliating or offensive environment for B.

94. Not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (*Bakkali-v-Greater Manchester Buses* [2018] UKEAT/0176/17).

95. When considering whether any conduct found to be unwanted had the statutory effect, we remind ourselves that we must take each of the following factors into account; the perception of B (Mr Donovan in this case); the other circumstances of the case and whether or not it is reasonable for the conduct to have that effect.

96. We have also reminded ourselves that, as explained at paragraph 7.9 of the ECHR's Code of Practice on Employment (2011), the conduct in issue can include conduct related either to the complainant's own protected characteristic of age, or to a protected characteristic of other people. We accept that this means the

conduct might relate to the Claimants own age or perceived age, or to older people or people of a certain age.

97. We remind ourselves that the view of the complainant that the conduct in question is related to the protected characteristic in question is a relevant matter for us to consider, but that it is not determinative. *in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495, EAT, *the court stated at 718,*

*The broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the tribunal which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the tribunal may consider it to be.*

98. As to causation, we reminded ourselves of the test set out in the case of *Pemberton-v-Inwood* [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as<sup>[3]</sup> having that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

99. It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in *Grant-v-HM Land Registry* [2011] IRLR 748, CA that “*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*” See, also, similar dicta from the EAT in *Betsi Cadwaladr Health Board-v-Hughes* UKEAT/0179/13/JOJ.

100. We were referred to several cases by the Claimant all of which we have taken into account. The first is *Bivonas LLP v Bennett* [2012] 1 WLUK 643. This case concerned a consideration of detriment for the purposes of a direct discrimination claim on grounds of sexuality. In that case, the detriment relied upon was a note found in a file which containing homophobic comments, which the Claimant found offensive and said amounted to a detriment. The claim

concerned the question of what a reasonable worker would consider to be a detriment and whether the ET had correctly applied the burden of proof.

101. The only similarity with the case before us, was that it concerned a note with comments on which upset the complainant. In the case before us, we are only considering harassment related to age, and relevant legal tests are different to those considered by the EAT in the Bivonas case.
102. The second case was only relevant in so far as the Respondent might take issue with the way that the Claimant had obtained the information. The Respondent did not, and the case, *Roberts v Cashzone*, ET 2012 was not therefore considered further.
103. The first question that we will have to consider is whether or not the Claimant was subjected to unwanted conduct. These are the comments written in the form from the young person's panel.
104. The second question is whether or not any of the comments made are related to age. This is a question of fact for the employment tribunal.
105. The third question is whether, if we find the unwanted conduct related to age, it had or should be treated as having had the statutory effect.

### **Discussion and Conclusions**

106. We have carefully considered the chronology of events and the information provided to Mr Donovan.
107. The first point that we make is that Mr Donovan received the information following an unsuccessful application for a job.
108. He was not a worker or an employee, but a job applicant, and at the point that he received the information he was an unsuccessful applicant.
109. We have considered the information that was written about the Claimant and we accept that the words were critical of the Claimant's performance at interview and that the Claimant thought that they were unfair.
110. However, we also find that the Claimant had recast the words actually written, and that his upset was about the words he thought had been written, or how he read them. We agree with the Respondent counsel, that this was one of several instances of the Claimant being unreasonable, albeit not deliberately about the information he had. Other examples were his analysis of his scoring, and his representations about the process for asking for feedback.
111. Whilst we accept that the words were capable of upsetting the Claimant, and that the Claimant was upset, we have taken this into account when considering whether or not it is reasonable for the words actually written to be treated as harassment, in so far as it is necessary for our determination.

112. We accept that the Claimant was offended and upset by the suggestion that he came across as arrogant and the suggestion that he was a slow talker who spoke too much and was somebody who the writer felt young people might lose interest in and get bored of. He was also offended at the suggestion that he was not a good match for young people.
113. We have considered whether or not the words were related to age at all.
114. This, we think is the primary difficulty that the Claimant faces.
115. We have considered very carefully the Claimant's assertions about society and the prevalence of age discrimination. He suggests that the young people in this case were prejudiced against older people. Firstly, having accepted the evidence of the Respondents about those shortlisted and subsequently appointed, we reject the suggestion that the panel was prejudiced against older people. We have made findings that the panel of young people did not have any information about the Claimants age before them at all and could not see him. We also accept their evidence that they did not take age into account when making their comments.
116. We accept the evidence from the Respondent that those appointed were 35 and in their 50s and therefore were in an older age group in the young people themselves
117. Further, whilst we accept the broad statement that there is age discrimination in society, that does not assist us with determining whether or not the comments made in this case were age related.
118. We conclude that the words written, and not those as recast by the Claimant, do not expressly refer to age as a protected characteristic at all.
119. Nor, we conclude, do they refer indirectly to age, just because the panel is described as a young person panel.
120. The words written are not ones from which we can infer a relationship to age – they are not comments which we think are made most commonly about old or older people. We observe that any one of any age may speak slowly or come across as boring or arrogant.
121. Any person of any age who the panel found boring or arrogant would be likely not to be a good fit, in their opinion.
122. We conclude that on any fair reading of the comments they had nothing to do with age and were not related to age. We consider that all of the comments could be made about a person of any age.
123. The Claimant suggests that the panel had formed a view about his age, but we conclude that there is no evidence before the tribunal to support that this was the case.
124. Taken at its highest, Mr Donovan's argument is that because there is discrimination against older people in society generally young people would

have been infected by this broad prejudice and have in some way assimilated it and used it against him despite not necessarily knowing what his age was despite evidence that they thought about it.

125. We reject this.
126. We also accept the point made by the Claimant that discrimination can be subconscious, and that unconscious bias can exist.
127. In this case however, we have no evidence before us that leads us to conclude that the comments made were consciously or unconsciously either expressly or implicitly, anything to do with age at all.
128. We conclude that the use of the term young person, was simply the accepted language used to identify the users of the service and accept the evidence of J that this was a term preferred by the service users themselves. J said they themselves preferred being referred to as a *person* rather than a *user*. It is a term which accurately describes the people the Claimant was applying to work with, and he knew this. We conclude that its use on the form does not, as suggested by Claimant, lead to any conclusion that there was therefore some negative view or unconscious bias against old or older people.
129. Despite the fact that individuals have training on recruitment, and despite the fact that it is true that records of interviews are often disclosed as part of subject access request or as part of litigation, we conclude that when these comments were made it was not the purpose of any one on the panel, or the panel collectively, to create a hostile or other unlawful environment for Claimant. Their intention and purpose was to provide honest feedback to the interview panel, not to provide feedback to the Claimant.
130. Nonetheless, we accept that the comments made did have the effect of upsetting the Claimant.
131. If we are wrong about the words used being related to age, we have considered whether or not it would be reasonable in this case to treat the words as being capable of having the statutory effect.
132. We have considered whether or not they can be said to have created an intimidating, hostile, degrading, humiliating or offensive environment. We have also considered whether the comments violated the Claimant's dignity.
133. We do not consider that the comments violate the Claimant's dignity. We do consider that the comments are capable in themselves of being offensive or humiliating. This is not the same as creating a humiliating or offensive environment for the Claimant. He says he considered that the remarks were untrue, and unfair, but we find that they were the true opinion of the YP panel, and were made as an honest assessment of the interview. The Panel did not have the information about the Claimant that he has provided to the ET, and were not making a professional assessment of him, as explained by J. They were simply considering whether they thought he would be able to relate to and work with young people, and their view was that he was not a good fit.

134. We are not convinced in this case that the words created an intimidating, hostile, degrading, humiliating or offensive environment. We have considered subsection 4 paragraph 26 states in deciding whether conduct has the effect referred to in subsection 1 be each the following must be taken into account a section of the Claimant be the other circumstances of the case and see whether it is reasonable for the conduct that effect.
135. We find that it was the Claimant's perception that the words written down were offensive, but we also take into account the circumstances in which the words were written and the purpose for which they were written which the Claimant knew or ought to have been aware of. He ought to have known that they were not the purpose of harassing him.
136. We took into account his continued assertion under cross-examination that the purpose of writing the words was to harass him. We have also considered his recasting of the words written down.
137. We find that this is an indication that the Claimant is not himself entirely reliable, reasonable or rational in his response to the documentation. Whilst it is understandable that he might find the words upsetting, it is not understandable or rational for him to consider that this was purpose or intention of the people who wrote the words, as we have found they did not expect words to be read by the Claimant and he knew or ought to have known the purpose of the comments.
138. In any event, we do not consider, applying the legal principles set out above, and in particular taking account of the stated purpose of the legislation, the Claimants own views, including his recasting of these and other facts, and all the circumstances of this case, that it would be reasonable to treat these words as having had the statutory effect.
139. Whilst Mr Donovan was upset on reading the words, they were not written with the purpose of upsetting him or creating a hostile environment.
140. The words are not related to age either consciously, unconsciously or by implication.
141. In any event we are unconvinced that a hostile environment was created, although Mr Donovan was upset by the information he received. He was not working for the Respondent and was not attending at an interview. By this stage, he was not going to be attending at the Respondent's premises at all.
142. We would not have considered that in all the circumstances it would have been reasonable to treat this as having had the effect, even if we had found any evidence of the comments being related to age in any way.
143. We conclude therefore that there has been no harassment related to age, and dismiss the claimants claims of unlawful discrimination.

**Employment Judge Rayner**

Southampton

Dated 31 August 2022

Sent to the parties on

09 September 2022

By Mr J McCormick

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