



EMPLOYMENT TRIBUNALS

Claimant: Mr G Scott
Respondent: Change Grow Live
Heard by CVP 10 and 11 May 2022

Before: Employment Judge Rogerson
Members: Mrs J Lee
Ms N Arshad-Mather

Representation

Claimant: In person supported by Hannah Mellis, Peer Support Worker (Hull and East Yorkshire Mind)
Respondent: Mr S Bellm, Solicitor

RESERVED JUDGMENT

The complaints of direct age discrimination are not well founded and are dismissed.

REASONS

Issues

1. By a claim form presented on 22 October 2021, the claimant brought complaints of direct age discrimination. At a preliminary case management hearing on 21 December 2021 the issues were identified, and orders were made to help the parties to prepare the case for the hearing (see page 21 in the bundle).
2. The claimant alleges the following acts of less favourable treatment were committed by his line manager (Mr Luke Ingamells) on the grounds of his age:

- 2.1 Putting him on a support plan from 18 April 2021 to 24 June 2021.
 - 2.2 Setting the claimant impossible targets during the support plan from 18 April 2021 to 24 June 2021.
 - 2.3 The decision to put the claimant on the formal capability process under the disciplinary procedures on 24 June 2021.
- 3 In relation to each alleged act of less treatment the questions for the Tribunal to decide are:
- 3.1 Did the respondent do the alleged acts? Acts (2.1) and (2.3) were admitted (2.2) was disputed.
 - 3.2 Was it less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated (actual comparator) or would have been treated (hypothetical comparator) recognising that there must be no material differences between the circumstances of the comparators and the claimant.
 - 3.3 If so, was it because of the claimant's age?
 - 3.4 If so, was the treatment justified (a proportionate means of achieving a legitimate aim)?
3. The claimant identified 2 comparators (S) and (H) who were both younger than him and he alleges were treated more favourably in relation performance management than he was in not dissimilar circumstances. S and H were also managed by Mr Ingamells, and were also put onto support plans but they did not move onto the formal capability procedure (act 2.3) and he believes this was because of their age.
4. The respondent denies it treated the claimant less favourably because of his age. It asserts that the reason why the claimant was put on a support plan from 18 April 2021 to 24 June 2021 was because his manager was concerned about his performance and was expected to manage performance concerns of the team he managed in accordance with the respondent's procedures. Unfortunately, the claimant (unlike S and H) had failed to demonstrate sufficient improvement in his performance by the end of his extended support plan which was why he was put onto the formal capability procedures and it was not because of his performance and not because of his age. The respondent denied that the manager set 'impossible targets' during the support plan period and relies on the contemporaneous evidence of the extensive management support and intervention during the support plan to defend this complaint. It is for the claimant to prove the facts relied upon in relation to the disputed allegation to prove the necessary facts. If the Tribunal finds age discrimination, the respondent will rely on the justification defence relying on its legitimate aim of the "effective management of its workforce" (See paragraph 18 of the grounds of resistance (GOR)).
5. For the justification defence the Tribunal will have to decide:
- (i) Whether the unlawful treatment was an appropriate and reasonably necessary way to achieve the legitimate aim of performance management and was the respondent's use of informal processes a proportionate means of achieving the legitimate aim.

- (ii) Could something less discriminatory have been done? As part of his claim the claimant had not suggested how else the respondent should have managed performance concerns after his support plan had been extended and failed. In his closing submissions, the claimant suggested the respondent should have considered a second extension on 24 June 2022, as a more appropriate and reasonably necessary way of achieving the legitimate aim, instead of proceeding to the capability procedures.

Burden of proof

6. At the start of the hearing those issues were discussed with the claimant to explain that he had to first prove the necessary facts to establish a prima facie case of direct age discrimination identifying the evidence from which inferences could be made of less favourable treatment because of his age, before the burden of proof shifted to the respondent to explain its treatment was not because of his age. Only if the Tribunal was satisfied that he had suffered unlawful age discrimination would it then go on to consider whether the respondent proved the unlawful treatment was justified. The Tribunal would hear all the evidence from both parties before making its findings of fact to decide whether the burden of proof had been satisfied.

Contemporaneous evidence

7. Most of the documents in the bundle (470 pages) were the respondent's contemporaneous evidence (documents written closer in time to the disputed event) relied upon to support the decisions made by the manager to manage the claimant's performance to the level required for the role of a caseworker. It was made clear to the claimant that in making findings of facts about the material events any oral evidence from the claimant or his line manager supported by the contemporaneous written documents was likely to be more persuasive, in resolving disputes of fact about what had happened or what was said. In this regard much of the documentary evidence relied upon by the respondent was unchallenged.

Assessment of Credibility

8. The Tribunal heard evidence for the claimant from:
 - 8.1 The claimant
 - 8.2 Miss Hannah Mellis (support worker at Hull and East Yorkshire Mind)
 - 8.3 Mr Nicholas Dixon (Unite the Union workplace representative).
9. Miss Mellis and Mr Dixon accepted they could not give any direct evidence about the disputed events and were not present at any of the meetings between the claimant and his manager. They gave evidence in a supportive capacity and accepted they could not assist the Tribunal with resolving any factual disputes and little weight could be attached to their evidence.
10. For the respondent the Tribunal heard evidence from Mr Luke Ingamells, who was the claimant's line manager at the material time.
11. On any material dispute of fact between the claimant and Mr Ingamells, the Tribunal preferred the respondent's witness evidence. Mr Ingamells' answers were clear direct and plausible and his evidence was supported by the contemporaneous documents. Much of the claimant's evidence was about

how he felt the role should have been carried out and he failed to appreciate that it was for the employer and not the employee to decide how best it could provide services meeting its contractual obligations with the available resource.

12. Mr Ingamells had also very sensibly kept very detailed notes of his supervision and support meetings with the claimant and other employees he managed. We accepted those notes provide an accurate record of the discussions that took place with the claimant. Additionally, the notes were objectively verifiable with data from the respondent's team management computer systems('CRIIS') used to manage the services provided. It recorded the individual caseworker's caseload and the steps taken in relation to each service user. Although we found the claimant was a credible witness, his recollection of events was less reliable in some parts and some of his answers were not supported by the undisputed contemporaneous evidence. On any material dispute of fact, we preferred the respondent's evidence to the claimant's evidence.

Findings of fact

13. The respondent is a large national charity providing drug and alcohol rehabilitation services typically commissioned by the local authority or NHS to provide services to vulnerable service users, experiencing substance misuse problems. The services are delivered in a variety of different ways including group work, medical detoxification, and individual case work.
14. The claimant was employed as a caseworker within the Alcohol Hub at the respondent's Hull service. In June 2020, Mr Ingamells became the team leader of the Alcohol Hub.
15. The claimant's responsibilities as a caseworker were to manage a case load of service users (SU) requiring after care support following medically assisted detoxification from alcohol or where the SU required support maintaining low levels of alcohol. The claimant would be expected to manage referrals on to his caseload and to work with SU for a period of 8 weeks with a view to discharging them from the service after some structured after care work had been completed resulting in case closure. If at the end of the time limited period, the SU required a referral back into treatment services due to increase alcohol use the caseworker would be expected to make the referral to another part of the team again removing the SU from his/her caseload.
16. The claimant joined the alcohol team in early 2020. He had previously worked as part of the opiate treatment team based at another site in Hull as a recovery worker. The alcohol treatment team consisted of 13 staff holding a variety of caseloads representing different stages of a SU's recovery journey. The claimant was the only worker within the aftercare team who provided one to one support.
17. The claimant was employed on a part time basis working 22 hours per week and it was agreed that an appropriate caseload for the claimant was between 30 and 35 service users. Typical caseloads for full time caseworkers were between 60 and 70.
18. The caseload of individual caseworkers and the effective delivery of support to service users was managed very carefully by the respondent. Although the respondent is a charity that works within the Health and Social Care sector it

is funded primarily by the income it receives from its contracts with NHS and Local Authority Commissioners. As with all parts of the public sector available resources for the work undertaken by the respondent and similar agencies have been squeezed over the last two decades. The respondent has increasingly been forced to work in a financially pressured environment and to compete for contracts on an extremely tight financial basis.

19. In many respects the respondent is assessed by reference to the success of the services delivered and it is paramount that caseworkers manage caseloads in an efficient and appropriate way. When caseloads are not managed appropriately caseloads rise to unworkable levels with the consequence that SU's in some cases do not receive the support they should be receiving, and the respondent could be in breach of its obligation to its commissioners. Managers are delegated with responsibility to ensure their teams are effectively managing caseloads through supervision and performance management in accordance with the respondent's procedures.

Performance concerns raised from 3 June 2020-April 2021

20. The claimant's first supervision meeting was conducted by Ms Charlotte Norman and took place on 3 June 2020 (page 93 of the bundle). Ms Norman was concerned about how the claimant was managing his caseload. She had carried out a review of the claimant's cases on 'CRIIS' and was concerned he was not using a structured approach to provide time limited support. She discussed her concern that after 8 weeks the claimant was not closing the case or transferring it to another part of the service for reassessment. She explained effective management was required to ensure more service users could be supported to meet the service requirements. Ms Norman selected a few cases at random where the claimant had either missed appointments with SU's, or he was not closing cases or was not transferring cases in time or was spending time undertaking work outside the remit of his role for example, liaising with a SU's GP, which was something the keyworker was expected to do. Ms Norman made suggestions for improvement and explained why it was important for the claimant better manage his caseload (page 94).
21. The next supervision meeting on 22 July 2020 was conducted by Mr Ingamells, who had taken over this responsibility as the Team Leader of nine caseworkers (including the claimant) and four group facilitators (page 96 in the bundle). Mr Ingamells had reviewed the claimant's caseload and shared Ms Norman's concerns that he was not managing his cases effectively in a structured way. The claimant admitted that he was not closing cases down as he should have been because SU's would get upset when he told them their case would be closed, so he left them on his caseload. Mr Ingamells suggested that if at the outset the claimant better managed the SU's expectations of the service by informing them it was time bound and how each session would be structured he would be preparing them for closure, and they would be able to understand why it was important to use the time effectively and would be less likely to get upset when the time period came to an end. If the claimant did not manage his cases in a structured way the consequences were that as new SU's were added to his caseload it would become unmanageable. To assist the claimant, he identified all the SU cases that could be considered for closure.

22. The next supervision meeting took place on 2 September 2020. Again, there was a discussion about the claimant's caseload. The claimant reported that he was struggling with the high caseload and that he did not feel that he had time to complete all his tasks. Mr Ingamells agreed to look through his caseload and to resolve some of the issues that appeared to be more pressing and identified cases that could be closed or moved on to other parts of the service to reduce the workload (page 100 of the bundle).
23. Outside of these scheduled supervision meetings, there were discussions by way of email exchanges which show that Mr Ingamells was trying to encourage and support the claimant to help him to better manage his caseload.
24. The next supervision session took place on 10 November 2020 (page 106). Each supervision meeting followed the respondent's standard format. Mr Ingamells would first check on the claimant's welfare he would ask the claimant how he felt he was managing his caseload. He would review the claimant's caseload to enable him to better understand the number of active cases and he would identify any cases that could be closed. Unfortunately, there were still a significant number of cases that could have been closed that had not been closed, which did not suggest that the claimant was following the guidance he had been given by his managers. To support and assist the claimant his manager identified all the actions the claimant was required to take and set timescales for those actions to be completed. Mr Ingamells was becoming concerned that the claimant was not following the advice given or taking steps to reduce his caseload to a manageable level.
25. At the beginning of January 2021, Mr Ingamells had to intervene again following a second detailed review of the caseload identifying cases for closure to bring the caseload back down. He was becoming increasingly concerned about the claimant's capability to manage his work-load independently in the way the service required.
26. On 6 January 2021, Mr Ingamells sent an email to the claimant reminding him of the instruction to adopt a more structured approach to his case management and to make sure he actioned the cases identified in his second review. He also confirmed that having helped the claimant to get his caseload down to a manageable level, he expected the claimant to keep on top of it in future by following the suggested structured approach (page 113 of the bundle).
27. In an exchange of emails at the end of February 2021 the claimant informed Mr Ingamells that he was getting "a little bogged down with clients". Mr Ingamells asked the claimant whether he was due to close anybody else, knowing there were clients on the caseload from the previous month who would have completed their sessions and it followed that those cases should have been closed.
28. By the beginning of March 2021, the claimant's caseload had increased to approximately 60. Mr Ingamells contacted the respondent's HR business partner, Irram Khan for advice. He explained his concerns that the claimant was not independently effectively managing his caseload, was not booking appointments correctly and was not following up on missed appointments. He explained he had already worked with the claimant on two occasions to reduce the caseload to a manageable level and had given clear guidance on

the structure the claimant should be following. He asked Ms Khan whether it would be appropriate to move the claimant to an informal support and action plan or whether he should intervene again to manage and reduce the claimant's caseload before considering a support and action plan.

29. Ms Khan advised Mr Ingamells that he should work with the claimant again to reduce his caseload for two weeks and once it was at a manageable level, the claimant should be placed on a '6' week Support and Action Plan (SAP) in accordance with the respondent's capability management procedure. She explained that during the SAP, the claimant's performance should be closely monitored, and he should be supported with regular weekly review meetings which should be documented. She also explained that the SAP could be extended for a further two weeks to 8 weeks if appropriate but that was the maximum period the respondent considered was reasonable for an employee to show the required level of improvement had been made. Ms Khan sent the relevant documentation for the support action plan and a tool kit to help him follow the correct performance management procedures. She also reviewed the draft SAP when it was prepared to check it before it was issued to the claimant.
30. Mr Ingamells was a new manager and sensibly sought HR advice at each stage to ensure he was acting in accordance with the respondent's capability policies and procedures. At paragraph 6.3 (page 70) the procedures provide:

*“as outlined above **before** capability issues are referred to disciplinary hearing, it is expected that the majority of employees will have been **given adequate opportunity to improve their performance.** Managers must be able to evidence the following:*

- *That there has been regular supervision in line with CGL policy, which has addressed the specific issues raised – this will be evidenced by supervision notes/emails etc.*
- *That a support and action plan has been in place (see appendix C) and can be supported by relevant documentation such as notes of review meetings, the employee's PDF, job description, service level agreement policies etc. When the support and action plan is set the employee will be told the possible outcomes of the process.*
- *That SMART targets have been as part of the support and action plan.*
- *That appropriate support has been in place that could easily be accessed by the employee.*

The severity of the poor performance concerns will impact on the length of the support and action plan but ideally it will be for no more than six to eight weeks as it is reasonable to expect performance improvements in this time.** In some circumstances it may be appropriate to extend a support and action plan if, for example if the training required could not be arranged within the initial six to eight weeks or due to pre-booked annual leave, but this would not be the normal practice. **A support and action plan would not normally exceed eight weeks. Should the performance not improve sufficiently at the end of this time period, then following the final support and action plan review meeting the matter will be referred

to a disciplinary hearing for consideration. At this final review meeting the line manager will ensure that they have explored with the employee the reasons behind their failing to meet the expectations of the plan and any potential mitigation. Notes of this meeting should be taken and signed by the employee. A report detailing the points above should then be produced and the matter will then proceed to a disciplinary hearing in accordance with procedures". (highlighted text Tribunal's emphasis)

31. On 1 April 2021, Mr Ingamells contacted the claimant by email identifying SU's who had no next appointment booked on the system and SU's who had not had any recent contact, who needed to be contacted for next appointments. The claimant responded stating that he was having problems finding a space to re-book them but indicated that because his case load had been reduced by his manager, he hoped he could sort the problems out. (page 126).
32. On 6 April 2021 Mr Ingamells emailed HR reporting concerns about how the claimant was engaging with SU's on his caseload. A SU had reported that he thought the claimant "was lonely" and just "wanted someone to chat to." Another SU's reported that the claimant's chats were too informal and that he would be more likely to speak about the football than their recovery. Some SU's reported that the claimant was just contacting them for a '5' minute conversation but no progress was being made with their aftercare. Some SU's had requested a transfer to another caseworker because they did not want to work with the claimant. Mr Ingamells also reported a concern raised by a social worker who was dissatisfied with the claimant's lack of communication. Mr Ingamells suggested that those matters should be informally managed in the SAP and was clearly not trying to use this information to get the claimant into trouble. Otherwise, he might have suggested these reported concerns were sufficient in and of themselves to be considered under the formal capability process as at this date.
33. Instead, these concerns were included in the SAP, to explain why the appointments with SU's were more than a quick 5 minute catch up but were expected to last for an hour so the contact made was meaningful and purposeful for SU, and fit with the respondent's timebound service requirement. Mr Ingamells recognised that having good rapport with service users was important and expressed his view that that this did not prevent the claimant from adopting a structured approach to the appointments to work towards closure and to achieve a more manageable caseload.

Performance concerns from 18 April 2021 to 24 June 2021

Allegations 1: Putting the claimant on a support plan from 18 April 2021 to 24 June 2021.

Allegation 2: Setting the claimant impossible targets during the support plan from 18 April 2021 to 24 June 2021.

34. On 7 April 2021, the claimant was informed that he was to be placed on the SAP. In his diary the meeting had only been identified as a 'catch up'. Mr Ingamells did not refer to the SAP before the meeting to avoid 'worrying' the claimant. While the Tribunal did not doubt that was his motive it agreed with the claimant that he should have been warned about the purpose of the

meeting. However, that did not mean we agreed with the claimant's suggestion that the fact he was to be placed on the SAP, came as a 'complete shock' because "nothing had been mentioned in my previous supervisions that my work was below standard".

35. The history set out above shows that on more than one occasion, managers had communicated the same performance concerns that were recorded in the SAP in the period June 2020 to April 2021 whether in supervision meetings or email communications. Mr Ingamells had a very proactive, hands-on style of management and had intervened and invested time and resource in the period before the SAP to avoid taking that step by helping the claimant address the capability and performance concerns to independently and effectively manage his workload.
36. The claimant complains that he was set "*impossible targets because he also had to attend meetings and social services appointments.*" The claimant has failed to adduce any evidence of any impossible targets set for him during the SAP, in relation to meetings or to social service appointments. The plan was only introduced when the caseload had been reduced to a manageable level to give the claimant the best chance, it was detailed and clearly identified why the areas of the claimant's work were below the expected standard, each of the performance concerns, the required level of improvement, the time by which the improvement was required to be made, how performance would be measured, and any support or training needs. The claimant understood what he was required to do during the monitoring period to demonstrate satisfactory performance to bring that monitoring process to an end.
37. It was clear that the claimant's personal view of the SAP was that he was not prepared to work in the way expected because he did not agree with it. At paragraph 7 of his witness statement, he says:
- "this did not take into account meetings and that when a client is in distress, they often require much more than one hour support and I was not prepared to put my clients at risk by not giving them the support they needed. I also had to attend social services meetings if my clients had children or were vulnerable adults. That could last anything from an hour to three hours. I regarded these meetings as extremely important and would have justifiably faced disciplinary action if I had not attended these meetings but felt I was in a catch 22 situation as if I did not attend the meetings would have faced disciplinary action, but if I did or could not meet the targets on the support plan would face disciplinary action. I decided that my clients' needs, and the care of their children must always come first so put their welfare before the support plan."*
38. The claimant ignores the negative impact on SU's if his caseload was not managed in the structured way for the reasons explained to him by his managers on more than occasion. The negative feedback that was being provided to the manager from SU's/ Social Services was that the service provided was not as effective as it should have been. The claimant had been provided with support guidance and intervention as to how he should structure his workload but would not follow that structure because he did not agree with it. The concern for Mr Ingamells was whether the claimant could sustain the required levels of performance independently without intervention.

39. Immediately after the meeting on 7 April 2021, the claimant emailed Mr Ingamells complaining that he had been denied union representation. Mr Dixon had suggested to the claimant that he had the right to be accompanied at the SAP meeting which was why the claimant raised a complaint. Mr Dixon is a union representative who was not directly involved in the claimant's case.
40. Mr Ingamells was unsure about the legal position and sought advice from HR. Ms Khan confirmed that the claimant did not have any right to union representation at an informal management meeting which was part of the informal capability process. She confirmed that the claimant was only entitled to have representation if matters progressed to a formal meeting under the disciplinary procedure.
41. Following the SAP there were regular weekly review meetings over the next 6 weeks. During those meetings it was Mr Ingamells practice to start the meeting by enquiring about the claimant's welfare and then to discuss his progress against each objective of the plan. On each objective he would try to identify any support and assistance he could offer. No training needs/other support was identified.
42. Initially the plan worked well and the claimant was hitting targets four out of five key areas. This does not support the claimant's assertion that he was set impossible targets rather he was demonstrating his ability to perform the targets set.
43. Following that initial period there was a dip in the claimant's performance and he failed to meet targets. During weeks four to six progress began to slow which resulted in an extension of the SAP for a further two weeks to 8 weeks. This was to allow the claimant more time to show improvement in all the areas identified to complete the plan. During this period, Mr Ingamells sent a list of the outstanding actions the claimant was required to do to complete the plan which was to help him succeed.
44. By taking these steps Mr Ingamells was being supportive and was giving the claimant every opportunity to succeed and complete the SAP. The claimant did not identify any obstacles that preventing him completing the required actions in that further time (3 June 2021-24 June 2021). In evidence he suggested there was only one outstanding task at the end of the SAP extended period. Mr Ingamells disagreed and suggested there were 9 tasks outstanding. He took the Tribunal to the contemporaneous documentary evidence supporting his evidence which identified 9/36 cases 25% of the claimant's caseload a significant amount of SU cases with outstanding actions.

Allegation 3: The decision to put the claimant on the formal capability process under the disciplinary procedures on 24 June 2021

45. Before making any final decision, Mr Ingamells discussed the claimant's performance with Ms Khan and Ms Norman after which a collective decision was made to move the claimant onto the next stage the formal capability process because he had failed to meet the SAP objectives in the extended SAP period. By the end of the SAP, the claimant was still missing appointments which was a recurring concern which could not be explained by his caseload which had been reduced to 36 before the SAP. SU's were not being offered regular appointments and a significant amount of time could

pass without contact which could put the SU at more significant risk. This was an area of concern clearly identified in the SAP objectives and in the list of outstanding tasks. The claimant knew what he was expected to do to show improvement in this area but was either, unwilling/incapable of changing the way he worked.

46. Mr Ingamells met with the claimant on 24 June 2021. He started the meeting by enquiring about the claimant's welfare. No concerns were reported. Mr Ingamells then informed the claimant that following his review at the end of the extended SAP, he was not satisfied that the claimant completed the SAP and that after discussion with HR, it had been decided that the claimant would be referred to a disciplinary hearing under the capability procedure.
47. At that point in the meeting, the claimant informed Mr Ingamells that it was the anniversary of his wife's passing and that he could not stay to discuss matters further. Mr Ingamells apologised, confirming that he had not known that and reassured the claimant that nothing further was going to happen that day. The meeting was the final review to inform him of the decision that he had failed to satisfactorily complete the SAP (page 193).
48. The claimant was upset at this meeting but accepts that Mr Ingamells would not have known there was any problem with the timing. Unfortunately, for the claimant this meeting was the catalyst for the claimant's subsequent '3' month sickness absence from work at the end of which he decided to resign on 2 September 2021,
49. Although he was invited to, the claimant did not put in any grievance before he resigned to raise any of the matters raised in this claim. He did not accept the offer made by HR on 7 September 2021 to retract his resignation if he had resigned in haste. The claimant says that he explained that he could not ever work with this manager again "after his total disregard and lack of compassion and **what he believed to be ageism** and bullying and a breach of his confidentiality". This was the first and only time the claimant referred to 'ageism' and it was after he had ended his employment. He did not explain why he believed it was ageism. His witness statement does not explain why the claimant believed his treatment was significantly influenced by his age and he does not dispute the evidence about his performance relied upon by the respondent. It appeared that the claimant has made assumptions it was ageism without identifying any of the underlying facts to support his assumptions.

Comparators

50. At the preliminary hearing on 21 December 2021, the claimant confirmed that he was relying upon his protected characteristic of age, and in particular his age group of "60 to 65". He compares his treatment with people in the younger age group "20 to 40". The preliminary hearing record confirms that the Employment Judge explained that the circumstances of any actual comparator must not be materially dissimilar to the circumstances of the claimant at the time of the alleged unlawful treatment to ensure a like for like comparison could be made (excluding the protected characteristic). The claimant identified 2 comparators H and S who were both younger than him and in the "20-40" age group. They were also managed by Mr Ingamells and were also placed on a support plan. The less favourable treatment in comparison was the decision to move him onto the formal capability process

drawing an inference that a difference in treatment and difference in age means it was less favourable treatment because of his age.

51. Although less favourable treatment was relied upon in relation to these named comparators the claimant has failed to provide any evidence about S and H to explain why he says the inference can be made when he does not challenge the evidence that was provided about them and the decisions made based on their individual circumstances. The Tribunal only had the evidence disclosed in the documents and in the witness statement of Mr Ingamells which was not challenged by the claimant. Further time was allowed before cross examination for the claimant to consider his position after which he decided not to challenge the evidence in relation to S and H and B (all performance managed by Mr Ingamells).
52. Comparator S was placed on a support and action plan (SAP) in June 2021, because S was unable to manage caseload effectively. Mr Ingamells decided after consulting HR, the SAP was appropriate and drafted it for S, in a similar way to the claimant's SAP, using the same standard form. During the SAP process, the same weekly review process was followed with managerial support/intervention. S faced additional difficulties in achieving the standards required because of dyslexia. As a result, the respondent made adjustments extending the SAP, providing training and auxiliary aids. The claimant was not dyslexic and did not require those adjustments but had also been granted an extension of the SAP. Unfortunately, S left the respondent's employment to take up an offer of employment elsewhere.
53. Comparator H was placed on a support and action plan in December 2020 because H was unable to manage the caseload effectively. Mr Ingamells decided after consulting HR, the SAP was appropriate and drafted it for H in a similar way to the claimant's SAP, using the same standard form. During the SAP process, the same weekly review process was followed with managerial support/intervention. The performance concerns were not similar to the claimant in that H was not moving people through the service within the expected eight-week timeframe, assessments were not being fully completed, next appointments were not being booked for SU's and case notes were not updated in a timely manner on the computer system. During the SAP process, the same weekly review process was followed with the same level of managerial support/intervention. H made changes to the way the workload was managed and successfully completed the SAP and was not moved onto the formal capability process.
54. Comparator B was placed on a support and action plan in March 2021. Mr Ingamells decided after consulting HR, the SAP was appropriate and drafted it for B in a similar way to the claimant's SAP, using the same standard form. During the SAP process, the same weekly review process was followed with the same level of managerial support/intervention. B met all the objectives and successfully completed the SAP.

Applicable Law

55. Direct Discrimination

Section 13(1) Equality Act 2010 prohibits direct discrimination which occurs when “A person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others”.

Burden of Proof

Section 136 provides that it is for the claimant to prove a prima facie case:

“(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision”.

56. Case Law has provided guidance on how the burden of proof provisions should be applied. In **Hewage and Grampian Health Board 2012 ICR 1054 SC** Lord Hope endorsed the view of Mr Justice Underhill (then President of the EAT) in *Martin -v- Devonshire Solicitors* 2011 ICR 352 EAT that “*The burden of proof provisions in discrimination cases are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination-generally the respondent’s motivation...they have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or another and still less where there is no real dispute about the respondent’s motivation and what is in issue is the correct characterisation in law*”.

57. If the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then that is the end of the matter see **Laing -v- Manchester City Council 2006 ICR EAT** (a case involving race discrimination)

58. More recently in *Royal Mail-v- Efobi* 2021 I WLR 3863 the Supreme Court held that in applying the burden of proof provisions there was a two stage process for analysing complaints of discrimination, whereby, at the first stage the burden was placed on the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude in the absence of an adequate explanation that an unlawful act of discrimination had been committed that if such facts were proved the burden moved to the employer at the second stage to explain the reasons(s) for the alleged discriminatory treatment and satisfy the tribunal that the protected characteristic had played no part in those reasonsat the first stage all the evidence had to considered from whatever source it had come not just evidence adduced by the claimant”.

59. An employment tribunal may only find that there are ‘facts’ if the tribunal decides it is more likely than not that the relevant assertions are true. This means that the claimant has the burden of proving on the balance of

probabilities those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. This is not the whole picture as along with those facts which the claimant proves the tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn.

60. The Supreme Court also endorsed the Hewage approach and confirmed that it remains the case under section 136(2) that *“The bare facts of a difference in status and a difference in treatment only indicate the possibility of discrimination. They are not, **without more**, sufficient material from which a tribunal ‘could conclude’ that the respondent had committed an act of unlawful discrimination”* (referring to the judgment of Lord Mummery in *Madarassy-v-Nomura International Plc* 2007 EWCA Civ.33)

61. Section 23(1) Equality Act 2010 provides that:

“On a comparison of cases for the purposes of section 13 14 or 19 there must be no material difference between the circumstances relating to each case”

62. The Equality and Human Rights Commission Code of Practice on Employment (2011) at paragraph 3.23 refers to section 23(1) of the Equality Act 2010 and provides the following guidance:

*“in comparing people for the purposes of direct discrimination there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is the worker and the comparator) to be identical in every way, **what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator**”. If there is no actual comparator a tribunal may consider how a hypothetical comparator would have been treated. Paragraph 3.24 of the code refers to hypothetical comparators and provides that *“in practice it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.”* At paragraph 3.26: *“constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the claimant but not the same.”**

Conclusions

63. The Tribunal concludes that the reason why Mr Ingamells put the claimant on the SAP in April 2021 was because the claimant had failed to perform his role to the required standard despite supervision, informal support assistance and repeated interventions from June 2020 to April 2021. Despite an extension of the SAP to the maximum period permitted under the respondent’s procedures, and despite identifying all the outstanding actions required to show satisfactory completion of the SAP, the claimant failed to complete those actions to complete the SAP in a significant number of cases. The claimant was either unwilling or incapable of changing the way he worked and had not identified any obstacles preventing him from completing the SAP. At the end of the extended period (24 June 2021) by failing to complete the SAP the claimant met the criteria to be moved onto the formal capability process under its disciplinary procedure.

64. The claimant had demonstrated an initial period of improvement during the SAP which was not sustained to complete the SAP. The only reason his manager extended the SAP from 6-8 weeks was to allow the claimant more time to succeed. By doing this the claimant had another opportunity to complete all the outstanding actions during the extended period to complete the SAP knowing the consequences of not completing those actions was that he would fail the SAP and be moved to the formal capability process. If he had completed those outstanding actions, there would have been no reason for his manager to refer him to the formal capability process. Others in his team (comparator H) had managed to turn things around during the SAP and had successfully completed it by following the managers advice. It was a matter of choice and not of age and the claimant chose not to follow the advice and not to complete all the required actions by 24 June 2021. On the other hand, H had shown a willingness to address the performance concerns raised with her by changing her way of working to adopt a more structured approach. She completed the SAP and that was why there was no reason to move H on to the formal capability process because she did not satisfy the criteria.
65. Mr Ingamell's adopted the same supportive approach towards other members of his team who were struggling with performance but could not ignore the responsibility he had as a manager to ensure the service provided by his team was effective and met the required standards. The history of interventions show he had invested a lot management time and resource to try to help the claimant succeed, but in the end knew it was in the claimant's hands as to whether or not he completed all the outstanding actions. For Mr Ingamells, moving the claimant to the formal capability procedures was a last resort it was not a first resort. This was clear from all the steps he took before that final review meeting to ensure the claimant had the opportunity to succeed (reducing the claimant's caseload to a manageable level before starting the SAP, regular weekly reviews, extending the SAP from 6-8 weeks, identifying a list of outstanding actions before the final review meeting). These actions do not indicate a manager who was trying to treat the claimant less favourably than any other member of his team or was setting him up to fail in the way the claimant suggests.
66. The respondent's capability policy is clear and provides that "***Should the performance not improve sufficiently at the end of this time period, then following the final support and action plan review meeting the matter will be referred to a disciplinary hearing for consideration*** (see findings of fact at paragraph 29). At the end of the extended SAP, a collective decision was made (HR and 2 different managers) that the claimant's performance had not improved sufficiently. That is the only criteria the respondent requires for a referral to its disciplinary process and the claimant satisfied that performance-based criteria. This decision had nothing whatsoever to do with the claimant's age or age group and had everything to do with his (lack of) performance. The claimant has not proved facts from which the Tribunal could conclude direct age discrimination and the claim is therefore not well founded.
67. This is a case where the based on the positive findings of fact made on the unchallenged evidence of the respondent it was not necessary for the Tribunal to construct a hypothetical comparator because the reason for the treatment found to have occurred was clear and was not unlawful direct age discrimination. If the Tribunal had been required to construct a hypothetical

comparator it would be someone in the '20-40' age group who would have been in the same material circumstances as the claimant as at the date of the alleged discriminatory treatment i.e. a background of performance concerns of 9 months (June 2020 continuing in April 2021) who would have fallen within the parameters of the informal capability process, who would have been put onto a SAP for an initial period of 6 weeks, had it extended to the maximum period of 8 weeks, because they had failed to complete the SAP at the end of week 6, who then failed to complete it at the end of the extended period and falls within the criteria for referral to a disciplinary process. When the hypothetical comparator includes those relevant circumstances, it was clear that the hypothetical younger comparator would also have been treated in exactly the same way as the claimant in relation to the act of putting the claimant on a support plan from 18 April 2021 to 24 June 2021 and the decision on 24 June 2021 to move to the formal capability process.

68. Finally, the Tribunal did not find the disputed act (2.2) of "setting impossible targets during the support plan from 18 April 2021 to 24 June 2021" had occurred and the complaint fails at the first hurdle because the Tribunal found it did not happen. All the acts of direct age discrimination are not well founded and are dismissed. These conclusions support the respondent's primary submission that the claimant has failed to prove a prima facie case of unlawful direct age discrimination and the Tribunal do not need to, and have not considered justification, because it is not necessary to because no unlawful discrimination has been proved.

Employment Judge Rogerson

Date 28 June 2022.

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