EMPLOYMENT TRIBUNALS

Claimant: Mr A I Gravrov

Respondent: Edinburgh Trams Limited

Heard at: Croydon Employment Tribunal by Cloud Video Platform

On: 10 October 2022

Before: Employment Judge Nash
Dr Maydell-Koch
Ms Beeston

Representation
Claimant: In Person
Respondent: Ms Bucher of HR

JUDGMENT having been sent to the parties on 15.11.22 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. Following ACAS Early Conciliation from 12 July to 21 July 2021, the claimant presented his claim to the Tribunal on 26 August 2021.

2. At this final merits hearing the Tribunal heard from the claimant who swore to his witness statement.

3. Ms Bucher of HR informed the Tribunal that she had not intended to lead evidence. The Tribunal explained that, whilst it cannot advise a party on how to run its case, in a discrimination case it is usually in the respondent's interest to lead evidence. Accordingly, Ms Bucher gave evidence and as she had not prepared a witness statement, she swore to the grounds of resistance. The grounds were made up of two documents – a provisional grounds in the ET3 and the amended grounds prepared following a case management order of Employment Judge Hyams-Parish on 30 June 2022.

4. The Tribunal had sight of an agreed bundle to 159 pages. In practice, there were considerable difficulties with the bundle during the hearing. The bundle had not been prepared in line with the Employment Tribunal order and this, accordingly, delayed the hearing. However, the tribunal verified that the

parties and the Tribunal were able to identify and rely on all documents during the hearing.

The Claims

5. The only claim before the Tribunal was for victimisation under section 27 of the Equality Act 2010.

Preliminary Issues

6. This was a recruitment case. The claimant who lived in London had unsuccessfully applied for a job in Edinburgh. Before hearing the case, the Tribunal asked the parties if they accepted the jurisdiction of the English Employment Tribunal and accepted that the case should be decided in line with English law, although the respondent's place of business was in Scotland. Both agreed and the Tribunal proceeded to hear the case on this basis.

The Issues

7. The issues for the Tribunal were as follows: -

    i. It was accepted that the claimant had committed a protected act when he had, in about June or July 2021, presented an age discrimination claim in the Employment Tribunal in Edinburgh against the same respondent (the first claim).

    ii. It was accepted that the respondent had subjected the claimant to a detriment by rejecting his application for employment.

    iii. The only issue, accordingly, was what were the reasons for the rejection of the claimant's application for employment? Was it the first Employment Tribunal claim?

The Facts

8. The respondent runs the public tram system in Edinburgh.

9. The claimant had first applied to work for the respondent as a tram driver in about 2019 or 2020. Having got through to a selection test in 2021, he scored 5/5 on the papers. However, he then underwent a psychometric test and was rejected. He brought an Employment Tribunal claim against the respondent for age discrimination (the first claim). The first claim was heard and dismissed by the Edinburgh Employment Tribunal. Ms Bucher told the tribunal that in the first claim the claimant made an allegation that she had colluded with those responsible for psychometric testing to alter his test results which led to his failing the test.

10. The tribunal now turns to the events material to this claim.

11. The claimant applied again for employment as a tram driver with the respondent on 27.5.21. By this point, the respondent's process for recruitment had changed. The respondent told the tribunal that it was no

longer prioritising tram driving experience, at least in the early stages of its process, because there was very little experience of tram driving in Edinburgh. It was now prioritising behavioural skills.

12. The application process was by an on-line portal. Applicants including the claimant completed boxes in a form, some of which were mandatory and some of which were not. They then had to answer three questions which asked for: -

    i. Experience of explaining something complex;
    ii. Experience of customer service and;
    iii. Dealing with distractions.

13. The claimant completed the online form. He answered the questions and gave an example of explaining delay following an illness on a tram. In respect of customer service, he dealt with first aid. In respect of distraction, he explained how he had dealt with time pressures following instructions from his control.

14. The respondent told the tribunal that the final instruction in the online application was for the applicant to upload their CV. The claimant told the Tribunal he did not recall what the online portal had instructed him to do. He thought that either the CV upload link was there, but it did not work, or that there was no box instructing him to upload a CV.

15. The respondent, during the proceedings, had disclosed the document at page 1 which was agreed to be the cover letter that the claimant had written in respect of his application. This stated that he was a qualified driver and had good performance.

16. The claimant agreed that he had sent this letter to the respondent on the day of the application. However, he could not recall if he had, as the respondent contended, uploaded it on the CV link, or had got it to the respondent in some other way.

17. The Tribunal preferred the respondent's version of events for the following reasons.

18. The respondent had disclosed the cover letter so the letter must have come into the respondent's possession before tribunal proceedings some way or another. The claimant's account of how he sent the letter to the respondent was notably vague. He said he could not remember how he sent the letter.

19. The respondent's account that the claimant had uploaded the letter to the CV link during the online application was a simple straightforward explanation. In contrast, if the claimant had sent it separately from his online application, it was less likely that the respondent would have managed to match it up with his online application. The recruitment process was significantly over subscribed with hundreds of applicants.

20. The Tribunal decided against drawing an adverse inference from the respondent's failure to provide screen shots of the online application. The reason for this was that the respondent was unrepresented. Further, even

taking into account the respondent's failure to disclose such information, its case that the claimant uploaded the cover letter on the CV link was convincing whilst the claimant provided no clear denial.

21. Further, the tribunal found that the claimant had failed a second time to give an accurate account of how he had completed the online application. He said that he had included his references in his application although the application showed he had not done so. (References were not a mandatory field in the online application so it was possible for an applicant to leave them blank and still submit the application.)

22. The claimant sought to explain this by alleging that the respondent had subsequently altered his online application to delete his references. He said that he had included references in his online application, and they did not appear later because the respondent had deliberately deleted them, presumably, to make his application look poor. The Tribunal did not find this a plausible allegation. The claimant could not point to a reason for the respondent seeking to amend his application by removing his references and leaving everything else intact. Accordingly, the tribunal found that the claimant had not included references in his online application, contrary to his account.

23. The respondent's case, which was unsupported by any documentary evidence, was that it had received 452 applications - including the claimant - for six tram driving jobs. It shortlisted 197 of these applicants. It then whittled these down to about 70 who were invited to selection days. The day consisted of a tram simulator session, group working, and an interview.

24. The respondent again, unsupported by any documentary evidence, stated that the first stage was that the 452 applicants were processed by assessors in HR. Each assessor processed a batch of the 452 applications and rejected about half. This included the claimant's application.

25. Ms Bucher told the tribunal that some weeks after the event she spoke to the assessor who had processed the claimant's application. The assessor checked their records to find that the claimant had been rejected because he had not provided his CV and his replies to the three standard questions were not of sufficient quality.

26. The claimant received, on 9 June 2021, a generic rejection email. This was addressed to 'Dear candidate' and stated that due to the unprecedented number of applications, there would be no feedback.

27. Nevertheless, the claimant wrote back that day asking for feedback. The respondent did not reply.

28. The claimant then wrote a formal complaint on 21 June 2021 saying that receiving a large number of applications was no reason to reject him. He had tram driving experience and he described himself as an ideal candidate.

29. He made a Subject Access Request under data protection legislation, a Freedom of Information Request and asked for the diversity statistics as to the age, race and background of the shortlisted candidates.

30. The respondent treated the claimant's email of 21 June 2021 as a formal complaint. Ms Bucher told the Tribunal that she then went to make the enquiries of the assessor, who had relied on their records rather than any specific memory of the claimant's application.

31. Ms Bucher replied to the claimant on 8 July saying that, since the claimant's last application, the recruitment process had changed. He had not put in an adequate CV and his answers to the three questions were not as strong as other candidates. She provided the requested diversity statistics.

32. The claimant applied to the Employment Tribunal.

The Law

33. The law is set out in the Equality Act 2010 as follows: -

S27 Victimisation

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
>
> …

S136 Burden of proof

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

Submissions

34. Both parties made very brief oral submissions.

Applying the Law to the Facts

35. It was accepted that the claimant's first claim for age discrimination amounted to a protected act for the purposes of section 27 Equality Act. It was accepted that the failure to recruit was a detriment.

36. The only issue for the tribunal was causation. The essential question is what motivated the decision maker. When considering the employer's motivation, the protected act need not be the only reason for the employer's conduct. In

Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL, the House of Lords instructed Tribunals to look for the core reasons, the real reasons for the employer's actions.

37. In *Nagarajan v London Regional Transport* [2000] 1 A.C. 501; [1999] 3 W.L.R. 425; [1999] 4 All E.R. 65; [1999] I.C.R. 877; [1999] I.R.L.R. 572; the House of Lords told Tribunals to ask if whether the protected act had a significant influence on the employer's decision making, whether consciously or sub-consciously. The Employment Appeal Tribunal stated in *Villalba v Merrill Lynch & Co Inc* [2007] I.C.R. 469; [2006] I.R.L.R. 437; (2006) 150 S.J.L.B. 742; that if in relation to any particular decision a discriminatory influence is not a material influence or factor, it is trivial.

38. According to the EHRC Code a protected act need not be the only reason for detrimental treatment.

39. Further, there is no need for a decision-maker to be consciously motivated. A Tribunal does not need to distinguish between conscious and sub-conscious motivation when deciding if a respondent has victimised a claimant. The question is whether the putative discriminator consciously or sub-consciously permitted the protected act to determine or influence their treatment of the claimant.

40. The tribunal considered how to approach the burden of proof under section 136 Equality Act. In these circumstances the Tribunal followed the line of authorities in *Laing v Manchester City Council* [2006] I.C.R. 1519; [2006] I.R.L.R. 748; EAT where the EAT President, Mr Justice Elias as he then was, stated (relying on *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] 2 All E.R. 26; [2003] N.I. 174; [2003] I.C.R. 337; [2003] I.R.L.R. 285) that for the purposes of the statutory burden of proof,

    "'it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment.'

41. Further, in *Brown v Croydon LBC* [2007] EWCA Civ 32; [2007] I.C.R. 909; [2007] I.R.L.R. 259; CA (Civ Div) the Court of Appeal endorsed Elias P's comments to the effect that it is not always desirable to go mechanically through the two stage burden of proof. In cases where the reason why and the less favourable treatment are "so intertwined…that a sequential analysis can give rise to needless problems and should be dispensed with". It was explained that on the facts of a particular case, a Tribunal may be fully entitled in the circumstances, if the essential facts are not in dispute, to focus on the reason why, that is to proceed straight away to the second stage of the burden of proof enquiry.

42. The essential facts in this case were not in dispute: the claimant had done a protected act and respondent had subsequently rejected his job application. The Tribunal viewed the crux of the case as straightforward and proceeded to ask itself a simple question. Why did the respondent reject the claimant's

job application?

43. The claimant's case was essentially that he was an experienced tram driver and had been rejected at the first stage, on the papers in effect. The only logical reason for this was he was victimised for his first claim. The respondent's case was that the claimant had failed to follow the application process correctly and his application was not of good enough quality.

44. The Tribunal asked itself why the claimant had been rejected at the first stage. The Tribunal had found that the claimant had failed to follow the application process correctly. He had not uploaded his CV when asked but had uploaded a cover letter and whilst this did refer to his experience as a tram driver, it was by no means a CV and nor was it described as such.

45. The respondent accepted that it kept CVs for two years. Therefore, the claimant criticized the respondent for failing to source his CV from his earlier application when he failed to submit his CV on this second application. The Tribunal found this inherently illogical. It was based on an assumption that his name would somehow be recognised by an HR person whilst processing tens if not hundreds of applications, and they would therefore have been able to trace his CV.

46. In the view of the Tribunal, this showed that the claimant simply failed to understand the scale of the respondent's recruitment exercise involving over 400 applications.

47. In effect, for the respondent to have let the claimant through to the next stage, it would have to have made an exception for him. It would have to have failed to follow its own process of requiring candidates to upload a CV.

48. The tribunal accepted that the respondent had a good reason for rejecting the claimant because of his failure to upload a CV.

49. The Tribunal also considered the respondent's case that the claimant had not provided a good enough answer to the three questions when compared to other applicants. To this end the respondent had provided the Tribunal with five sets of answers from five other candidates, three successful and two not.

50. These five sets of answers were, in the view of the Tribunal, clearly superior to those provided by the claimant. The claimant nevertheless asked the Tribunal to draw adverse inferences from the respondent's failure to provide - as he had asked - the answers from the 197 shortlisted candidates. Further, he asked the tribunal, in effect, to draw an adverse influence from the respondent's failure to provide the

    names of the five candidates. He invited the tribunal to infer, therefore, that the respondent had invented the answers of these five candidates.

51. The Tribunal declined to draw these adverse inferences for the following reasons.

52. The Tribunal accepted the respondent's case that the claimant's request was disproportionate. There were 197 candidates with three answers each.

Further, the Tribunal did not believe that the respondent had invented these five sets of answers. There was nothing on the face of the answers to indicate that they were invented. For instance, none of the five candidates, including the three successful candidates had tram driving experience. The five sets of answers provided by the respondent therefore fitted with the respondent's case - that it was not prioritising tram driving experience. Further, it fitted with the respondent's case that the five candidates had a very wide range of experience including retail, air transport and estimating plumbing projects.

53. The five sets of answers were materially superior to the claimant's. Although the tribunal accepted that the five sets of answers were in effect "cherry picked" by the respondent, they nevertheless provided examples of the sorts of answers the respondent was looking for.

54. In the view of the Tribunal, the quality of the claimant's answers was mixed. Some answers were good in some respects, but others essentially did not answer the question, for instance, the distraction question. The claimant gave an answer which did not relate sufficiently to the question.

55. Accordingly, the tribunal accepted that the respondent had a good reason for rejecting the claimant as his answers were not of a high quality.

56. The Tribunal considered the claimant's arguments in support of his contention that the respondent had victimized him. The claimant asked the Tribunal to find that the respondent was not being truthful when it said that the decision maker was unaware of the previous application. He pointed out that although he had not mentioned that he had applied for employment before, the respondent had sent him an email on 8 July including the phrase 'since you previously applied'. Therefore, from what the Tribunal could tell on the documents, the claimant was correct, it was the respondent who had mentioned the claimant's previous application first.

57. The respondent's explanation was that when he was rejected, he was simply one of over 250 rejections. The respondent receives a lot of queries and complaints, and therefore it did not action his first challenge. It was only when the claimant made a formal complaint on 21 June that it was treated as a serious matter and escalated to Ms Bucher as the head of HR.

58. At this point the Tribunal found that Ms Bucher would have recognised the claimant's name. By now the claimant had brought his first claim. Although it was unclear whether the hearing had occurred by that point, it was highly likely that Ms Bucher recognised the claimant's name, particularly as he was making serious allegations against her – colluding in deceptive psychometric testing.

59. However, the fact that Ms Bucher had made a link between the claimant's first claim and his second application to the respondent on 21 June did not mean that the separate decision maker was aware of it when rejecting the claimant before 8 June, some weeks earlier.

60. The Tribunal accepted the respondent's account of the processes of decision making. It was a logical and plausible process. In a bulk recruitment, which was very significantly over-subscribed, the Tribunal found it plausible that as

a manager in HR, Ms Bucher would not have been involved in dealing with individual applications. Accordingly, the tribunal accepted that it was not Ms Bucher who decided to reject the claimant, but the HR person who processed the claimant's application, along with tens of others. There was no evidence that this person knew about the first claim. There was no evidence that Ms Bucher had early warning of the second job application and could, somehow "tip off" the decision maker to reject the application.

61. The claimant also alleged that Ms Bucher had a personal animus against him. However, he had difficulty in explaining why this might be. He had stated that Ms Bucher was biased against him at the time he made the first original unsuccessful job application. He had hoped she had left which was why he applied again. He told the tribunal that her hostility arose from his original ET claim. However, he failed to explain why such hostility would have existed during his first application, before the first Employment Tribunal claim. There was no meaningful explanation for any bias during his first job application.

62. Further, it was not Ms Bucher who made the decision to reject the second application which was the subject of this claim.

63. The Tribunal also considered whether to draw any adverse inferences against the respondent for its failure to provide documents going to its recruitment process and how it processed the claimant's application. Although the respondent was unrepresented, the tribunal took into account that it had previously defended a claim in the Employment Tribunal against the Claimant. Accordingly, it should have some knowledge of the legal issues.

64. The Tribunal declined to draw such inferences for the following reasons. The respondent's account of its selection process and its processing of the claimant's application was plausible and unexceptional, particularly in light of the very large number of applications. The tribunal accepted that, all things being equal, it is inherently unlikely that an HR manager would have time to check through 400 plus applications to filter out any specifically undesirable applications - for whatever reason. There was no suggestion from the claimant that the respondent was even aware that he was re-applying, until it received his application.

65. The claimant further contended that the tribunal should draw adverse inferences from the fact that the respondent had provided two separate reasons for rejecting him: firstly, there was an unprecedented number of applications and secondly, the lack of CV and the quality of his answers.

66. The Tribunal declined to draw adverse inferences for the following reasons. The two explanations came from different processes. The first explanation – the large number of applications - was contained in the generic rejection going to over 250 rejected candidates. It specifically stated that there would be no feedback.

67. After that the claimant made a formal complaint including references to Freedom of Information and data protection laws and said that he would take it further if the respondent did not reply. The respondent dealt with this as an individual complaint and then provided a reply going to the specifics of the claimant's application. The two explanations were not inconsistent. The

second reason simply provided further details of the first reason.

68. Essentially, the claimant could not understand how he was not recruited. On a number of occasions, he described himself as the best applicant. For instance, he said that, because he had scored 5/5 during an early stage during the first recruitment, this meant that Ms Bucher had admitted that he was the best applicant for the job. However, this was not true. It simply showed that at an early stage the claimant scored 5/5. The tribunal had no evidence as to how many other candidates scored 5/5. In fact, those with 4/5 as well as 5/5 proceeded to the next stage, indicating that 5/5 was not a high priority in the recruitment process. There were further criteria later in the process.

69. From what the claimant said to the tribunal, he simply could not see how he failed and accordingly, assumed that there must be a disreputable reason. He in effect said that it was fundamentally unlikely that as an experienced tram driver, he was not shortlisted and indeed, selected.

70. However, the Tribunal accepted the respondent's case that it did not prioritise tram driving experience in this recruitment, at least in the early stages. It is important to understand that it is not for the Tribunal to determine the best way of recruiting tram drivers in Edinburgh. The only question before this Tribunal was, was the claimant's previous tribunal claim a factor in his rejection? The Tribunal accepted that the respondent had decided to prioritise what it termed as behavioural skills at the first stage. The respondent's case was that it did consider driving skills later in the process, using a simulator. Accordingly, at the first stage, the fact that the claimant was an experienced tram driver put him in little or no better position than any other of the 452 applicants.

71. Accordingly, the tribunal found that the protected act had no influence on the decision to reject the claimant and his claim must therefore be dismissed.

_____
Employment Judge Nash
Date: 23 November 2022

Sent to the parties on
Date: 25 November 2022