



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S A Atkinson

**Respondent:** Arteria Limited

**Heard at:** Liverpool (by CVP)

**On:** 16 18 and 21 November 2022

**Before:** Employment Judge Benson

**Members:** Mr J Murdie  
Mr G Pennie

## **Representation**

**Claimant:** Professor T Curnow - Friend

**Respondent:** Mr J Jenkins – Counsel

**JUDGMENT** having been sent to the parties on 1 December 2022 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

## **The claims and issues**

1. The claimant brings claims of direct age discrimination, harassment related to age and victimisation. There have been four case management hearings on 11 March 2021, 24 June 2021, and 22 April 2022. A list of issues to be decided by the Tribunal was agreed and is set out below.

### Direct Age Discrimination

2. What acts of alleged less favourable treatment does the claimant rely on?

- a. The respondent's decision to invite the claimant to a meeting on 9 January 2020 to discuss performance related concerns (relating to incidents on 3 August 2019, 25 September 2019, 10 December 2019 and 23 December 2019).

- b. The conversation between the claimant and Mrs Richardson on 9 January 2020 during which Mrs Richardson “linked the claimant's age with her performance” saying “with your birthday just gone...I wanted to ask you if there are any physical tasks that you are not able to do?”
    - c. Mrs Richardson’s request to meet with the claimant on 21 January 2020 in relation to the incidents detailed at 1(a) above.
3. Did such conduct occur?
4. If so, did the respondent treat the claimant less favourably than it would have treated a comparator:
  - a. The claimant relies on her younger female colleagues in store.
5. Was the reason for such conduct because of the claimant's age?

#### Harassment

6. Did the respondent engage in any unwanted conduct? The acts of unwanted conduct relied on are:
  - a. The respondent’s decision to invite the claimant to a meeting on 9 January 2020 to discuss performance related concerns (relating to incidents on 3 August 2019, 25 September 2019, 10 December 2019 and 23 December 2019).
  - b. The conversation between the claimant and Mrs Richardson on 9 January 2020 during which Mrs Richardson “linked the claimant's age with her performance”.
  - c. Mrs Richardson’s request to meet with the claimant on 21 January 2020 in relation to the incidents detailed at 1(a) above.
7. If so, did it relate to the protected characteristic of the claimant's age?
8. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect), the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
9. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on section 13(2) of the Equality Act 2010, namely compliance with its common law and statutory duties to ensure the welfare of its employees and/or to effectively manage day-to-day issues within the business as and when they arrive, and to address unacceptable standards of behaviour (as set out in paragraph 28 of the Grounds of Resistance).

#### Victimisation

10. Did the claimant do a protected act? The claimant relies on her letter dated 13 January 2020. (The respondent disputes that this is a protected act).

11. If so, did the respondent subject the claimant to detriment because she had done a protected act? The acts of detriment relied upon are:

- a. Mrs Richardson's request to meet with the claimant on 21 January 2020;
- b. The respondent's refusal to allow the claimant to be accompanied by her doctor to a meeting; (this allegation was withdrawn)
- c. The claimant being "pressured" to meet Jane Richardson face to face;
- d. The claimant being "pressured" to liaise directly with the respondent in respect of her ongoing Employment Tribunal proceedings rather than through her McKenzie friend, Mr McKittrick.

### Time

12. Insofar as any complaints relate to acts occurring more than three months before the submission of the claim form (8 June 2020), does the Tribunal have jurisdiction to hear them as to:

- a. Did they form part of a series of similar or continuing acts?
- b. If not, would it be just and equitable to extend time for acts contravening the provisions of the Equality Act 2010?

### Remedy

13. What is the correct award for injury to feelings and interest in respect of any claim of discrimination?

14. What is the correct award for compensation?

15. Should there be a reduction for breach of the ACAS Code of Practice?

### **Evidence and Submissions**

16. The Tribunal heard evidence from the claimant and from Mrs Jane Richardson who is the owner and Managing Director of the respondent. Both provided written witness statements and were cross-examined and submissions were provided by both representatives.

### **Findings of Fact**

17. The respondent business is a gift and art gallery in Lancaster city centre. It is housed over 3 floors with the shop, a small office and a staff room at the back on the ground floor. The claimant commenced employment with the respondent in early 2005, which was shortly after the business opened. She has worked as a retail assistant throughout that time and her employment is continuing but she has been absent through sickness since 10 February 2020. At the time this claim relates to,

the business had two full time members of staff being Mrs Richardson and Sharon Burns the General Manager and four part-time staff, including the claimant. Until July 2019, all staff worked well together, and Mrs Richardson had a good relationship with the claimant.

18. There had been some issues relating to the claimant and her interactions with staff in August and December 2019, which had been brought to Mrs Richardson's attention and the earlier issues dealt with informally. An incident involving the claimant on 10 December resulted in an email being received by Mrs Richardson from Mrs Burns. There was a further incident on 23 December and again Mrs Richardson received an email, this time from Nicole, another staff member about the claimant and her behaviour. In the run-up to Christmas the shop was particularly busy and Mrs Richardson did not follow up on these emails until after the Christmas break.

19. On 30 December it was the claimant's 60<sup>th</sup> birthday.

20. Mrs Richardson spoke to the claimant about her celebrations when she saw her on 2 January 2020. The claimant had been given a card and a present by the Mrs Richardson and expressed her thanks.

21. Mrs Richardson had realised that there was a tension on the shop floor between her staff and decided she needed to follow this up. She initially spoke with Mrs Burns who agreed with her and that this needed to be resolved. Mrs Burns did not admit she was at fault and she expressed concerned that the claimant's behaviour seemed unusual. Mrs Richardson considered that she needed to get the relationship between her staff back on track. She therefore decided to meet with the claimant and see how she felt about matters in the shop and how things were going from her perspective.

#### 9 January 2020

22. On 9 January when the claimant came into work, Mrs Richardson asked to have a chat with her in the office. Her normal practice when she had issues which she wanted to discuss with staff was to have an informal chat with them. This applied to previous conversations with the claimant and to other conversations with staff in the shop. She took her notebook with her and she jotted down some of the points which the claimant made in that meeting. Mrs Richardson intended to discuss the claimant's wellbeing and thereafter discuss the relationships between the staff from her point of view.

23. There has been a dispute about this conversation, exactly what was said and in what order relating to Mrs Richardson raising the claimant carrying out physical tasks. On the balance of probabilities, we accept Mrs Richardson's version as set out in her witness statement. She commented about the claimant's recent 60<sup>th</sup> birthday party and that the claimant seemed 'very fit and healthy' and 'managed fine with physical tasks'. It seems to us that the parties' recollection is not that far apart. The issue appears to be one of emphasis: essentially whether Mrs Richardson was asking the claimant if she had any difficulties with physical tasks (as alleged by the claimant), or whether she commented that the claimant did not seem to have any

problems with physical tasks (as alleged by Mrs Richardson), and indeed when those issues were first raised in the conversation.

24. We find that both Mrs Richardson's and the claimant were truthful as to their recollection of events, but that Mrs Richardson's recollection is more accurate.

25. The reasons we accept Mrs Richardson's evidence is that the claimant's concerns about that meeting only materialised when she had dwelt on the conversation and discussed it with family and friends on days following it. The claimant left the meeting reassured that the ongoing concerns she had about relationships in the shop were going to be addressed. The claimant's responses in cross examination to Mr Jenkins' questions reinforce our view as to the claimant's mindset at that time.

26. She did not challenge Mrs Richardson in the meeting about the comment, and it was only after the weekend (after discussions with family and friends) that she started to consider that the comment was inappropriate and potentially discriminatory. The comment grew in significance and concern to the claimant. She was already anxious about relationships in the shop after the events in December and that anxiety increased. She was influenced by family and friends, including Mr McKittrick, and we believe that all of them (and in our view Mr McKittrick particularly) influenced the claimant's view as to what was said and when and what her approach should be going forward.

27. There was a need for a further conversation to continue resolution of these issues after Mrs Richardson had spoken with Mrs Burns again, and we accept that that was mentioned in that meeting, or at least intimated.

28. On 13 January the claimant wrote to Mrs Richardson (page 173 of the bundle). The letter included the comment, "I have concerns about some things that you said to me on 9 January 2020", and the claimant then mentioned five specific issues, and one of them was "why did you refer to my age, me just having turned 60 years of age?". The remainder of the email refers to the rest of the conversation on 9 January, being the concerns that Mrs Richardson had sought the claimant's view upon and a request for notes of the meeting. One of the claimant's comments in the email is: "perhaps I am overreacting but my livelihood in part depends upon by continued employer at Arteria".

29. On 16 January Mrs Richardson wrote back to the claimant. We find that Mrs Richardson's letters are measured and conciliatory. In that letter, she said that she does not agree with all the points that the claimant has made but seeks to reassure the claimant and welcomes another meeting over the next couple of weeks to continue the discussion.

#### Request to meet on 21 January 2020

30. There is very little dispute about that course of events on 21 January. Mrs Richardson asked the claimant to meet with her, the claimant refused to meet. The claimant wanted an answer to her letter of 13 January and also would not meet unless she was accompanied. Mrs Richardson could not understand why and requested that the claimant do so. Mrs Richardson wrote to the claimant again and

referred to the request to have a one-to-one discussion. Again, the letter was measured but made the point that Mrs Richardson needed to speak with members of her team about matters which affected the daily operation of the shop. She suggested that they meet on 30 January to have an informal discussion.

31. From 24 January Mr McKittrick became actively involved and his initial letter to Mrs Richardson was inflammatory, accusatory and unreasonable. It sets out unreasonable conditions for Mrs Richardson to comply with before the claimant would meet. It is condescending and needlessly aggressive. Mrs Richardson replied to the claimant on 29 January, adjourning the meeting on 30 January as requested by Mr McKittrick. The following day Mr McKittrick wrote back to Mrs Richardson and there then followed some emails between him and Mrs Richardson on 3, 5 and 8 February.

32. Mrs Richardson continued to write to the claimant and on 4 February she said she would be continuing to write to her as the employment relationship was with the claimant but that a supporter or friend could attend any meeting. She suggested that a meeting was the way to take matters forward and reassured the claimant that there were no concerns about her future employment and confirmed how valued the claimant was to the business. Mrs Richardson suggested she would put together a draft agenda.

33. Mr McKittrick response was again inflammatory and it alleged breaches of the Equality Act 2010 and age discrimination. After further correspondence from Mr McKittrick, Mrs Richardson agreed to correspond with him if it assisted the claimant's welfare as suggested. The meeting did not take place as Mr McKittrick said the claimant was unwilling to meet until questions were answered in writing. Essentially thereafter matters reached an impasse and the claimant remained in employment but on sick leave.

34. We also make reference to one other piece of correspondence, and that is the one which we were referred to by Professor Curnow (pages 241-242) which is an email from the claimant in response to one from Mrs Richardson dated 15 September 2023. In that email the claimant appears to be asking Mrs Richardson not to communicate with Mr McKittrick but at the same time refers to him as her representative. The position is confusing to us and we are unclear as its relevance to the allegation 11(d) above which is Professor Curnow's submission.

## **The Law**

### Direct Discrimination

35. Section 13(1) of the Equality Act 2010 ("EQA") provides that 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.

36. Section 13(2) of the EQA provides that if the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

37. Section 23 (1) provides that on a comparison of cases for the purposes of section 13...there must be no material differences between the circumstances relating to each case.

### Harassment

38. Section 40(1)(a) prohibits harassment of an employee. The definition of harassment appears in section 26, for which disability is a relevant protected characteristic, and so far as material reads as follows:

- (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 sub-section (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.

39. Chapter 7 of the EHRC Code deals with harassment.

### Victimisation

40. Section 27 EQA provides protection against 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.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

41. It is clear from the case law that the tribunal must enquire whether the alleged victimisation arises in any of the prohibited circumstances covered by the Act, if so, did the employer subject the claimant to a detriment and if so what that because the claimant had done a protected act. Knowledge of the protected act is required and without that the detriment cannot be because of a protected act.

#### Burden of proof

42. Section 136 of EQA 2010 applies to any proceedings relating to a contravention of EQA. Section 136(2) and (3) provide that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

43. We are reminded by the Supreme Court in Hewage v. Grampian Health Board [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

#### Time Limits

44. The time limit for bringing a claim appears in section 123 EQA as follows:-

(1) subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable.

(2) ...

(3) for the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;



- (b) failure to do something is to be treated as occurring when the person in question decided on it.

## Conclusions

### Direct Discrimination

45. The claimant relies upon three allegations of less favourable treatment, and in each case, she relies upon the younger members of staff in the shop as comparators. Their ages range from 30s to late 40s but the claimant is the oldest member of staff. We have also had regard to a hypothetical comparator.

46. The first allegation of less favourable treatment is the decision to invite the claimant to a meeting on 9 January 2020 to discuss performance related concerns relating to incidents on 3 August, 25 September, 10 December and 23 December.

47. We accept that the purpose of that meeting was to discuss the relationships between the staff in the shop, it was not to discuss the performance issues on the dates alleged by the claimant. At that stage Mrs Richardson was focussing on the atmosphere amongst her staff which needed to be resolved and not any behavioural issues involving the claimant.

48. Mrs Richardson had spoken to Mrs Burns, the General Manager about it and then wanted to talk to the claimant as Mrs Burns had mentioned that something did not seem right with the claimant. Mrs Burns, as a younger member of staff, was a comparator named by the claimant. The discussion with the claimant was a normal informal approach in small business. Relationships between colleagues in a small shop are important to ensure the smooth running of the business. It was a perfectly legitimate and reasonable request for an employer to make of its employees, particularly as it had been noted that her demeanour had been out of the ordinary. It was also the way in which Mrs Richardson had handled any previous concerns with staff, though there had not been many.

49. Whether the comment about the claimant was a justified comment or view, and whether Mrs Burns and her other colleagues had been raising issues unnecessarily about the claimant, as she alleges, we accept that so far as Mrs Richardson was concerned, she needed to find out what the claimant's views were on the relationships between her and the other members of staff. The fact that Mrs Richardson did not give any notice to the claimant about the meeting is not an issue. It was an informal discussion which Mrs Richardson was perfectly entitled to have with her employee. We also accept that her reasons for having a notebook with her were entirely appropriate. We find that the claimant has not shown that there was any less favourable treatment of her as against her comparators (actual or hypothetical). Further that the claimant has not shown any facts from which we could conclude that the invitation to the meeting was because of her age. This claim fails.

50. The second allegation of less favourable treatment is the conversation during the meeting on 9 January when the claimant alleges Mrs Richardson linked the claimant's age with her performance. As indicated, we accept Mrs Richardson's

version of that meeting and the comments about the claimant's age and physical tasks. We accept however that a comment about the claimant's ability to manage fine with physical tasks in the shop in the same conversation about a 60<sup>th</sup> birthday party is not a comment which would have been made to a younger member of staff. It has an underlying theme that an older member of staff might have difficulties with physical tasks, and it is not a question (as we say) which would have been asked of the younger staff members. It is therefore a comment which was made by Mrs Richardson because the claimant had reached the age of 60. It is also something which would be less favourable to older employees, in this case the claimant.

51. We find, however, that this was a perfectly justifiable comment to make to the claimant and indeed even on the claimant's own version of events we still feel that it would have been justifiable. The respondent had a legitimate aim to ensure the welfare of its staff and manage day-to-day issues within the business. There were issues between the staff in the shop. There was an atmosphere. Reports had been made about the claimant's behaviour which were out of the ordinary. It was entirely proportionate for Mrs Richardson to raise with the claimant her welfare and how she was managing, including with her tasks, and to comment about her abilities in performing physical tasks. It was an opening for the claimant to provide any view upon this if in fact it was causing her any difficulties herself or between her staff. It was not, she did not, and the conversation moved on. This claim therefore fails.

52. The final allegation of less favourable treatment was the request to meet the claimant on 21 January 2020 in relation to the incidents in August, September, December and a further one in December.

53. The request to meet with the claimant on 21 January we find is not less favourable treatment. We consider that Mrs Richardson would have asked any employee to meet in that situation regardless of their age. It was the obvious way to deal with questions raised by the claimant in her letter of 13 January. The claimant makes a point out of the fact that in her email of 16 January Mrs Richardson had said that she did not agree with all of the points the claimant had made in her letter. We do not see why this was an issue. Our reading of this is that she is saying that she agrees with some of the points, but not all. The meeting was the perfect opportunity to continue that discussion and to seek to resolve any issues. Mrs Richardson made it clear in her letter that the discussions were informal, and it should not be regarded as a formal meeting. She reassured the claimant that the discussion she wanted to have is no different than those which she has had in the past.

54. Further, there is nothing which the claimant has shown us which would link this request to her age. That issue had been done and dusted on 9 January. The issues concerning to Mrs Richardson going forward were the relationship between the claimant and her colleagues. This claim also fails.

### Harassment

55. The first allegation of unwanted conduct is the decision to invite the claimant to meet with Mrs Richardson on 9 January to discuss the earlier incidents. We do not find this to be unwanted conduct. The meeting was not for the purpose which the claimant alleges. The claimant was given the opportunity at that meeting to

explain her concerns about the relationships in the shop. She opened up to Mrs Richardson about the issues she was concerned about and gave her version of events. The comment about her age did not concern her at the time and, as we have said, it was only afterwards when she spoke to her friends and family did this meeting and that comment gain the significance that she now relies upon. We note that the email of 13 January includes the comment that the claimant might be oversensitive. We agree. In any event the claimant has not shown facts from which we could conclude that the invitation to this meeting was related to her age, and further we do not consider that the claimant has shown that Mrs Richardson's invitation had the purpose or effect (taking into account the matters set out in section 26(4) EQA above) of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

56. The second allegation was the conversation on 9 January in which Mrs Richardson (the claimant says) linked the claimant's age with her performance. We accept that this comment was unwanted and for the reasons stated above related to the claimant's age. It did not, however, have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

57. We also find that at the time it was made, it could not be said to have had that effect either. It was only after the meeting, having spoken to family and friends, that these comments built up in the claimant's mind such that it had a significant impact upon her perception of the meeting and the correspondence with Mrs Richardson thereafter. Much of that was to do with Mr McKittrick who without doubt inflamed the situation with his aggressive and intimidatory correspondence which was written on the claimant's behalf and which she was party to.

58. We have to consider whether in all the circumstances of the case whether it was reasonable for that comment to have the effect the claimant says it did. We find it was not. The comment that was made by Mrs Richardson has been blown out of all proportion. It was one comment, it was a reasonable one to make and it was not reasonable to have had the effect it did upon the claimant. This claim fails.

59. The final allegation of harassment was a request to meet the claimant on 21 January. It is clear that the claimant did not want to meet Mrs Richardson that day, so therefore the invitation was unwanted. We do not however consider that the claimant has shown facts upon which we could conclude that the request to meet with the claimant was related to her age. The claimant has not discharged her burden. That comment was a minor point in the correspondence on 9 January and indeed in the claimant's correspondence with Mrs Richardson on 13 January. Even if the claimant had been able to discharge her burden, the respondent has shown a non-discriminatory reason (a non-age related reason), namely the need to meet to discuss the relationship issues within the business. For the reasons set out above, it was not reasonable in all the circumstances of the case for the request to meet Mrs Richardson to have had the impact it did upon the claimant.

60. For those reasons we find that the claims of harassment fail.

### Victimisation

61. We do not find that the email of 13 January was a protected act. In view of the content of the meeting on 9 January there was nothing in the email of 13 January and the comment about age which led Mrs Richardson to understand that this was a complaint or allegation of contravention of the Equality Act 2010 – we are also of that view. It was a question which the claimant was posing, and which Mrs Richardson would have answered had she been given the opportunity to discuss it in a meeting. This therefore does not amount to a protected act and this claim therefore fails.

62. However, we have also, in the alternative considered the alleged detriments. We find that the request to meet with Mrs Richardson on 21 January was not because the claimant had written the email of 13 January or specifically that it made any comment about age discrimination. Further, we find that there was no pressure on the claimant to meet Mrs Richardson face to face. It was a reasonable proposal and in fact it was Mr McKittrick who was pressurising Mrs Richardson who in each case responded in a reasonable and appropriate fashion.

63. Finally, we do not understand the final allegation of detriment. The correspondence highlighted by Professor Curnow in the pages we have referred to is confusing and does not appear to support what is alleged. In any event, on a wider basis we find that in the correspondence generally there was no inappropriate pressure in Mrs Richardson's correspondence, and indeed none of the correspondence was sent because of the claimant's email of 13 January or specifically any comment about or reference to her age. This claim also fails.

64. All claims fail and are dismissed.

Employment Judge Benson  
Date: 27 February 2023

REASONS SENT TO THE PARTIES ON  
7 March 2023

FOR THE TRIBUNAL OFFICE

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