EMPLOYMENT TRIBUNALS

Claimant: **Mr Peter Connnell**

Respondent: **Aspirations Financial Advice Limited**

Heard at: **Bristol** **On: 16, 17, and 18 January 2023**

Before: Employment Judge Midgley

Members: Mr C Williams
Ms C Monaghan

Representation
Claimant: Mr T Tyndall (Solicitor)
Respondent: Miss S Clarke (Counsel)

JUDGMENT having been handed down to the parties on 20 January 2023 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:

JUDGMENT

The unanimous judgement of the Employment Tribunal is that the claim of age discrimination is not well-founded and it is dismissed.

REASONS

Claims and Parties

1. By a claim form presented on 26 February 2021, the claimant brought claims of unfair dismissal, non-payment of redundancy payment, non-payment of annual leave, and age discrimination.

2. Following a preliminary hearing before Regional Employment Judge Pirani on 20 October 2021, the case was listed for a final hearing on 19 – 22 September 2022.

3. The final hearing was listed before Employment Judge Smail sitting with members Miss G Mayo and Ms C Monaghan on 19 September 2022. The Tribunal elected to determine the preliminary of whether the claimant was an employee of his company, Moneythatworks Ltd, and whether his employment transfer to the respondent as a consequence of a sake purchase agreement.

4. By a judgment dated 11 October 2022, the Tribunal found that the claimant was not an employee of Moneythatworks Ltd, that there was no transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2003 from that company to the respondent by reason of the share purchase agreement. In consequence the claimant lacked the necessary continuity of employment prescribed in section 108 Employment Rights Act 1996 to pursue claims of unfair dismissal, redundancy and redundancy pay. Those claims were therefore dismissed. It listed the case for this hearing to resolve the age discrimination and annual leave claims.

5. The only claim that remained in issue at the time of the final hearing was the claimant's complaint of age discrimination in respect of his dismissal on the grounds of redundancy which took effect from 3 December 2020.

Procedure, Hearing and Evidence

6. The hearing was conducted by video with the parties' consent.

7. In preparation for the hearing, the parties had agreed a bundle of 229 pages, and had prepared witness statements as follows: for the claimant, the claimant alone; for the respondent, the following witnesses:

   7.1. Adam Palmer, the respondent's Managing Director;

   7.2. Mr Andy Harris, the respondent's Commercial Director.

8. Miss Clark had prepared a skeleton argument for the respondent.

9. The parties had initially objected to the Tribunal in the form constituted for this hearing having conduct of the final hearing, on the grounds that the claims had been reserved to the panel chaired by EJ Smail. The claimant's position was that the knowledge of the claim that had been derived from the preliminary hearing was essential to his case at the final hearing.

10. Neither Employment Judge Smail nor Ms Mayo were available for this hearing, but EJ Smail confirmed that the claim had not been reserved to the Tribunal he chaired, and in those circumstances the respondent withdrew its objection to our hearing the case. Having made enquiries with the listing team, we disclosed to the parties that we would be unable to list the case before June 2023 if it were not heard before us. In those circumstances the claimant withdrew his objection to this Tribunal hearing his claims.

11. We took time to read the statements, and the documents referred to within them, and the skeleton argument. In addition, we invited the parties to identify the key documents in the bundle upon which they relied, and to prepare a reading list of those documents. We were greatly assisted the reading list that the parties were able to agree. We took the time to read the documents they had identified.

12. Evidence began at 2pm, when the claimant began his evidence.

Factual Background

13. We make the following findings on the balance of probabilities.

The background to the claimant's employment by the respondent

14. The claimant was employed from June 2019 in the circumstances described in the written reasons of the Employment Tribunal, (Employment Judge Smail, Mrs C Monaghan and Miss G Mayo) dated 11 October 2022. It is unnecessary for the present purposes to rehearse that background detail, the Tribunal already having made the necessary findings of fact. We adopted for the purpose of these reasons.

The introduction of Intelligent Office software

15. In the spring of 2019, the respondent installed a new software product to manage its processes, including the recording of client care letters, client consultations, and instructions. The system allowed for each of those interactions to be entered directly onto the computer system.

16. The respondent scheduled a training session with the software providers on the use of that system. Regrettably, the claimant was absent when the training was undertaken. Consequently, the claimant (and other members of staff who had missed the training) were offered training from the respondent's support team.

17. The claimant's habit previously had been to make handwritten notes of meetings, and subsequently to type them after the meeting in question. He initially found the transition to the new system difficult with the consequence that in January 2020 he agreed with Mr Harris that he would share with the respondent the cost of additional training for himself on the system. It was agreed that the claimant's salary would be reduced by £8000 a year to that end. At that time the claimant had informed the respondent that it took him approximately 4 ½ hours to write up a client consultation on the new system, and that he was seeing approximately 4-5 clients a week.

Fees

18. On 30 January 2019 Mr Harris, the Commercial Director, conducted a 1:1 with the claimant. He raised his concerns that the income from the claimant's client portfolio was not as high as it might be; he asked the claimant to achieve an increase in his fees initially to £80k and thereafter to 100k. The two men discussed the claimant's experience of minimising the impact of inheritance tax ("IHT") through the placement of investments to maximise Business Property Relief ("BPR"), and the use of Enterprise Investment Schemes ("EIS") and Venture Capital Trusts ("VCT"). The claimant's experience was limited; he agreed to refer cases which gave rise to those issues to Mr Harris.

19. Mr Harris explained that the respondent wished to charge its clients a standard fee of 1% of a fund's value for its services. This was higher than the industry average, and considerably higher than the fees charged by the

claimant to those in his client bank, which varied between 0.5% and 0.75%. Mr Harris encouraged the claimant to increase the fees, but the claimant was adamant that doing so would be difficult to justify to his clients and would likely lead to their loss. However, he agreed to apply a charge of 1% for any new clients. Mr Harris regarded the claimant's conduct as constituting poor performance, but he did not inform the claimant of that fact.

The respondent's financial position in quarter one 2020.

20. In early 2020 two self-employed Financial Planners, Mrs Blake and Mrs Day, left the respondent to conduct business on their own account. Each of them undertook work for the respondent and each of whom had their own client bank which provided the respondent with a share of the reccurring client fees. The consequent impact on the respondent's financial position was significant; the removal of Mrs Blake and Mrs days client bank led to a reduction in the respondent's turnover of approximately £400,000.

21. At or about the same time, the impact of the Covid-19 pandemic was beginning to be felt in the financial markets. The FTSE dropped from £7286 to a low of £5671.96 in March 2020. Given that approximately 75% of the respondent's income was derived from fees assessed against the value of its clients share portfolios, the consequent drop in value led to a further significant drop in the respondent's turnover. By way of a single example, the Tatton Core Balanced fund (a fund that a number of the respondent's clients held funds in) had dropped approximately 17% in that period.

The recruitment of Isabel Palmer.

22. As part of the respondent's business plan for expansion, prior to the downturn in the financial markets, it had entered into an agreement to employ another Financial Planner, Miss Isabel Palmer, and to purchase her client bank (with whom she had been dealing for approximately seven years) through a share purchase agreement. Miss Palmer was experienced in IHT, BPR, EIS and VCTs; in some part that was due to the complicated nature of the client fund accounts within her client bank. Her client bank consistent of approximately 300 households. She was to begin employment with the respondent in June 2020.

23. At the time of the impact of Covid-19 pandemic upon the financial markets, the respondent therefore employed the following financial planners, Mr Chris Iles (approximately 29), Mr Stuart Smart (in his 40s), Miss Izzy Palmer (in her 40s), the claimant, Mr Steve Gilpin, and a trainee financial adviser and para planner, Sam Lane. In addition, it engaged a further financial planner, Mr Roger Milburn, as a self-employed contractor. Mr Gilpin was 59 and was planning to retire at the end of 2020; the respondent had not yet finalised an agreement in order to take over Mr Gilpin's clients.

Furlough of employees

24. The directors of the respondent, Mr Andy Harris and Mr Adam Palmer, the Managing Director, were deeply alarmed by the potential impact of the loss of Mrs Blake and Mrs Day and the depressed financial markets upon the respondent's financial position. They elected to take a series of cost saving measures to preserve the financial sustainability of the respondent.

25. In consequence, in approximately March 2020 three members of staff were placed on furlough; Mr Lane, one member of the support team, and the claimant. The decision to select the claimant for furlough was one that was taken as a direct consequence of the comparatively high salary which he benefited from in comparison with other financial planners. That salary was a consequence of the claimant's successful negotiations that led to the Share Purchase Agreement by which the respondent had bought the claimant's company, 'Moneythatworks Ltd', and was intended to preserve his income levels in circumstances where he surrendered his right to recurring fees from his client portfolios.

26. The respondent has suggested within these proceedings that the claimant volunteered for furlough. We reject that argument; we preferred the claimant's account that Mr Harris informed him that he was to be placed on furlough because his salary represented the greatest saving to the business. The claimant did not volunteer: the furlough schemes cap on wages of £2500 a month was less than half of the claimant's gross monthly salary. The claimant was informed of the decision on 31 March 2020 and offered to do anything that he could to help the business through the period that it would avoid furlough.

27. The decision was confirmed in a letter of the same date from the respondent to the claimant.

28. At the time the claimant was furloughed he was on target to meet his bonus target at the end of March 2020.

29. On 5 June 2020, Mr Palmer telephoned the claimant and advised him that his period of furlough was to be extended. Again, that decision was confirmed in a letter of the same date. Mr Palmer told the claimant that he should not worry, that he would definitely be returning to the business and in the interim he should simply enjoy playing golf.

30. The consequence of the claimant's furlough was that those financial planners who had not been furloughed became responsible for the day-to-day management of the clients that formed the claimant's former client bank. At that stage, the claimant was responsible for managing the clients who had formerly formed his client bank, amounting to approximately 80 households, and an additional dozen of Mr Palmer's high net worth clients. The claimant was also mentoring Mr Tutton, to whom approximately a dozen of the claimant's lower net worth clients had been passed, although the claimant still retained overall responsibility for the management of their funds.

The redundancy process

31. In approximately July 2020 Mr Harris and Mr Palmer reviewed the respondent's financial position. At that stage, whilst the markets had largely recovered (or at the very least stabilised), the respondent had a significant shortfall in its turnover. The respondent's accounts for the period January to July 2020 identify a reduction of approximately £233,000 in its turnover, with a consequent reduction in gross profits of approximately £80,000, notwithstanding a reduction of approximately £60,000 (equating to approximately 30%) in its costs.

32. There is some argument between the parties in these proceedings as to whether or not there was a genuine redundancy situation and, if not, whether any inference should be drawn in support of the claimant's claims of discrimination. We address that argument in our discussions and conclusions below.

33. In or about August 2020, the respondent instructed an external HR consultant to assist with the redundancy process. She provided a redundancy policy, a planner identifying the dates for consultation meetings and decisions, a template letters for the respondent to use, and a draft redundancy scoring matrix. In relation to the latter document, she advised the respondent that it should adjust the criteria to reflect the nature of the business undertaken and the desired skill sets that it wished to retain.

34. On 14 August 2020, the respondent identified that the appropriate pool would be financial planners, and sent the claimant and four other individuals letters advising them that they were at risk of redundancy and that a consultation process would be undertaken over a four-week period.

35. Those who were placed at risk of redundancy and their ages at the time were the following, the claimant (60), Miss Palmer (40), Mr Iles (29) and Mr Smart (40). None of them were provided with a copy of the scoring matrix or advised of the criteria that would be used to score them for the purposes of the redundancy exercise.

36. On 17 August 2020 the respondent wrote to the claimant inviting him to attend a first consultation meeting. He was advised that four posts were affected and that the purpose of the consultation was to explore alternatives to redundancy.

The first consultation meeting

37. The first consultation meeting took place on 20 August 2020. It was conducted by Mr Palmer. Amongst the matters discussed was whether the claimant would be willing to take voluntary redundancy, he indicated that he would need to see the redundancy package but would prefer to remain employed, not least because he would have lost the value of his client bank. He indicated a willingness to reduce his hours and to forego his bonus, which would be approximately £15-£20,000. There was no discussion of the scoring criteria that would be used for the purposes of the redundancy exercise, notwithstanding that the respondent had it in its possession.

The scoring process

38. Mr Palmer and Mr Harris conducted the scoring process for each of the individuals who were at risk of redundancy. They scored each individual together, rather than providing a score individually and moderating it to produce a single score.

39. The criteria used were as follows: skills, relevant qualifications, job performance, experience, versatility, timekeeping, and disciplinary record. Each criteria offered a maximum score of four points and a minimum score of one.

40. At the time of the exercise, for the preceding year the claimant's recurring fees were £80k, Miss Palmers £200,000 and that of Mr Smart and Mr Iles approximately £50k. The claimant had created approximately £17-20K of new business, and Miss Palmer, Mr Iles and Mr Stuart in the region of £150,000 - £200,000. The respondent took that information into account when scoring the performance criteria.

The claimant's matrix

41. The claimant was given the following scores:

    41.1. Skills – 2 "*has some technical and practical skills required for the role, but not all*."

    41.2. Qualification – 4 has the appropriate qualifications for the role; in the comment section it was noted that the claimant "*was not studying towards Chartered, which although not a requirement is a preference*."

    41.3. Job performance – 2 "*Meets some performance targets. Completes work but frequently misses deadlines. Work often contains errors. Requires guidance beyond what would normally be expected for their level*." In the comment section it was noted "*Pete needs a lot of support/training and tends to forget what he's been shown.*"

    41.4. Experience – 2 "*has some experience with role, but consistently seeks guidance from colleagues*." It was noted "*this was a surprise given how long Pete has been advising.*"

    41.5. Versatility – 3 "*willing to perform different functions/duties*." It was noted "*has offered to train new advisers that given the above, not appropriate*."

    41.6. Timekeeping – 4 Never late

    41.7. Disciplinary record – 4 no disciplinary record

    41.8. Absence – 4

42. The claimant's total score was therefore 25 out of a maximum of 32 points. By way of general comment, Mr Harris wrote:

    "Pete is very slow when picking new things up, this tends to take up a lot of the support team's time. He is also very reluctant to do things the 'Aspirations way', particularly when it comes to client fees."

The matrices of the others in the pool

43. The other employees at risk received scores of 27, 28 and 28. The individual scores each received in respect of the criteria do not need to be rehearsed here. What the claimant relies upon is the comments that were made in their scoring matrices, which he argues are indicative of a stereotypical view of the effect of age upon skills and performance, and we therefore set out below:

    43.1. "*being relatively new to advising (just under three years), still has*

plenty to learn but does pick things up quickly and is very keen to learn."

43.2. "*Is eager to learn and therefore does seek guidance were necessary, but not very often*"

43.3. "*is a keen and valued member of the FP team*."

44. No evidence was identified on the matrix of Miss Palmer, this was because she had only been employed for a matter of weeks before the redundancy process began. However, the respondent made enquiries with her former employer which it used to score her matrix and commented at the end of her form that she was "*an essential member of the team as she services many of the clients of a newly acquired business and most of the remaining clients also know her*."

The second consultation meeting

45. On 27 August 2020, the claimant attended a second consultation meeting which was conducted by Mr Palmer and Mr Harris jointly. At the meeting Mr Palmer informed the claimant that the decision had been made to make one financial planner redundant, and that the claimant had been selected for redundancy. The claimant was shellshocked. He asked why he had been selected and not Mr Gilpin or Mr Tutton. He did not know at that stage that neither had been included in the pool for redundancy.

46. Mr Palmer very briefly identified, as examples of the factors that had been considered in reaching the decision, that there had been an assessment of ability, performance, attendance, knowledge, and experience. However, the claimant was not provided with his scoring matrix, nor was he advised of the full criteria that had been used. He therefore had no opportunity to make representations in respect of the criteria or his scores.

47. Mr Palmer explained the redundancy package that would be offered to the claimant, and the parties' discussions rapidly turned to the financial consequence of the claimant, and the future management of his client bank. The meeting was a very short one indeed.

48. On 28 August 2020, Mr Palmer emailed the respondent's staff, notifying them that the claimant had been made redundant.

Notice of dismissal

49. On the 2 September 2020, the claimant was sent a letter providing him with formal notice of redundancy, by which his employment was to terminate on 27 November 2020. That date was an error, given the claimant was entitled to 3 months' notice in accordance with his contract of employment, a fact which the respondent conceded within these proceedings. The letter informed the claimant that he had five days to appeal the decision.

50. On 3 September 2020, without prior consultation with the claimant, the respondent, acting through Mr Harris, sent a standard form email to all of the claimant's clients advising them that the claimant had been made redundant, that he had been on furlough since April, that that position would continue until October, whereupon he would commence gardening leave. The letter

was therefore sent within the five-day period in which the claimant was permitted to appeal.

51. The claimant subsequently received a number of calls from his clients expressing their discontent with the decision, their concern for the claimant, and reporting that some of them had been advised that the claimant had "retired."

Disclosure

52. From 20 September 2020, the claimant and his legal representatives requested disclosure of the redundancy criteria, and the scoring matrices of the claimant and the others in the pool. The claimant was not provided until 21 July 2022 and that of the other pool members' until 8 September 2022.

53. We address the reasons for that omission in the discussion and conclusions section below as it is a matter from which the claimant invites us to draw an inference of discrimination.

54. The claimant's employment terminated on the 1 December 2020. The claimant began early conciliation on 5 February 2021 certificate was issued on the same day. The claimant presented his claim on 26 February 2021.

The Issues

55. The issues were set out in the case management order of Regional Employment Judge Pirani on 20 October 2021. As a consequence of the determination of EJ Smail, the sole issue for the tribunal was as follows:

55.1. The respondent accepted that the claimant was treated less favourably than others within the pool for redundancy because the claimant was selected for dismissal on the grounds of redundancy.

55.2. Were the others within the pool appropriate comparators the purposes of section 23 EQA 2010 on the grounds that their circumstances were not materially different to the claimant's?

55.3. Was the claimant's age more than a trivial influence on the respondent's decision to select him for redundancy and to dismiss him?

The Relevant Law

56. The claimant brings a claim under the Equality Act 2010 for direct discrimination (s.13 Equality Act 2010 ("EQA").

57. The relevant law is contained in sections 39, 13, 23 EQA 2010 which provide respectively (in so far as is relevant) as follows:

39 – Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) as to B's terms of employment;
(d) by subjecting B to any other detriment.

13. Direct discrimination

(1) 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.

23. Comparison by reference to circumstances

(1) 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.

Section 13

58. The basic question in every direct discrimination case is why the complainant was subjected to less favourable treatment (Amnesty International v Ahmed [2009] IRLR 884, per Underhill P, para. 32).

59. Once it is established that the treatment is because of a protected characteristic, unlawful discrimination is established, and the respondent's motive or intention is irrelevant (Nagarajan v London Regional Transport [1999] IRLR 572 HL).

60. The protected characteristic does not need to be the only reason for the less favourable treatment, or even the main reason, so long as it was an 'effective cause' of the treatment: O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372, EAT.

The reverse burden of proof

61. The statutory tests are subject to the reverse burden of proof in section 136 EQA 2010 which provides:

(2) If there are facts on 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.

62. The correct approach to the reverse burden of proof provisions in discrimination claims has been the subject of extensive judicial consideration. In every case the Tribunal has to determine the "reason why" the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question."

63. It is for the claimant to prove the facts from which the Tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong [2005] IRLR 258 CA), i.e., that the alleged discriminator has treated the claimant less favourably or unfavourably and that the reason why it did so was on the grounds of (or related to if the claim is under s.26) the protected characteristic. That requires the Tribunal to consider the mental processes of

the alleged discriminator (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

64. In Igen the court proposed a two-stage approach to the burden of proof provisions. The first stage requires the claimant to prove primary facts from which a Tribunal properly directing itself could reasonably conclude that the reason for the treatment complained of was the protected characteristic. The claimant may do so both by their own evidence and by reliance on the evidence of the respondent.

65. If the claimant does so, the second stage requires the respondent to demonstrate that the protected characteristic was in no sense whatsoever connected to the treatment in question. That requires the Tribunal to assess not merely whether the respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question. If it cannot do so, then the claim succeeds. However, if the respondent shows that the unfavourable or less favourable treatment did not occur or that the reason for the treatment was not the protected characteristic the claim will fail.

66. The explanation for the less favourable treatment advanced by the respondent does not have to be a 'reasonable' one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

67. Furthermore, it is not sufficient for the claimant simply to prove that there was a difference in status i.e. that the comparator did not share the protected characteristic relied upon by the claimant) and a difference in treatment. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination (see Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.)

68. The Tribunal does not have slavishly to follow the two-stage process in every case - in Laing v Manchester City Council and anor [2006] ICR 1519, EAT, Mr Justice Elias identified that '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." That approach was endorsed by the Court of Appeal in Stockton on Tees Borough Council v Aylott [2010] ICR 1278.

69. It is for the claimant to show that the hypothetical comparator in the same situation as the claimant would have been treated more favourably. It is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR

288).

Discussion and Conclusions

70. The issue in this case is a simple and straightforward one: was the claimant's age in more than a trivial influence upon the decision to select him for redundancy?

71. The claimant was 60 at the time of the decision and relies upon those individuals who were not selected for redundancy as comparators, given that their relative ages were 27 and 40 respectively. The claimant is therefore able to show less favourable treatment and a difference in status. However, as has been made clear in any number of Court of Appeal authorities, such as Madarassy, a difference in status and a difference in treatment is not sufficient to establish discrimination, it only hints at the possibility of discrimination; something more is required, some evidence from which the Tribunal might infer that the conduct was influenced by the claimant's age.

The claimant's arguments

72. In this case the claimant argues that we should draw an inference of discrimination from the following matters:

72.1. First, the comments that are indicative of stereotypical views of age which were made to the claimant when he was placed on furlough, in particular that he was told that he should "and enjoy his golf."

72.2. Secondly, that the comments recorded on the claimant's scoring matrix and that of others in the pool are indicative of stereotypical views of age: namely that older employees are slower to learn, are reluctant to and struggle to pick up new skills and can be forgetful and require support. That mindset, Mr Tindall argues is writ large across the comments made by Mr Harris which were endorsed by Mr Palmer that:

> *"Pete needs a lot of support/training and tend to forget what he's been shown."*
> *"Pete is very slow when picking new things up, this tends to take up a lot of the support team's time. He is also very reluctant to do things the 'Aspirations way', particularly when it comes to client fees."*

72.3. Beyond that, Mr Tindall encourages us to compare that the comments made about claimant with the comments made in respect of the youngest individual in the pool, which were again indicative of such an ageist mindset and reflective of lazy discrimination, namely,

> *"being relatively new to advising (just under three years), still has plenty to learn but does pick things up quickly and is very keen to learn."*
>
> *"It is eager to learn and therefore does seek guidance were necessary, but not very often"*
>
> *"is a keen and valued member of the FP team."*

72.4. Thirdly, that the claimant's scoring matrix did not refer to the empirical evidence to support the criticisms which it contained. That failure to provide an objective reference was one, Mr Tindall sought to argue, that was also reflected in the matrix of Miss Palmer, which contained no reference points but scored her considerably higher.

72.5. Fourthly, that the explanation for the claimant's scores was given for the first time in the witnesses' answers to cross examination, and was not even contained in their witness statements, despite the witnesses knowing of the nature of the allegations that they faced.

72.6. Lastly, the respondent had failed to disclose the matrix for the claimant and for his comparators, despite their clear relevance, until very late stage in the proceedings and there was no reasonable explanation for that failure.

The respondent's arguments.

73. Ms Clark argues that the claimant failed to establish even a prima facie case of discrimination, with the result that the burden of proof does not transfer to the respondent. In particular she argues that the claimant was unwilling to articulate the essential nature of his claim when pressed, specifically he was unwilling to say that Mr Harris had deliberately and knowingly made decisions which were adverse to those in the age category of 60 or above, but could only insist that his age had been the deciding factor in his selection.

74. Secondly, Ms Clark argues that the claimant's argument that Mr Harris had such a discriminatory mindset is inherently implausible, given that Mr Harris is himself 60 and that his unchallenged evidence was that there was real value to be gained in the financial planning and services sector from the experience derived from such an age. Furthermore, she pointed to the fact that Mr Gilpin was 60 but was not selected for redundancy.

Conclusions

75. Looking at matters in the round, we are persuaded that the claimant has identified facts from which we could, properly directing ourselves, draw an inference that the claimant's age was an influence upon the decision to select him for redundancy. That is because the comments in the matrix are indicative of stereotypical views of age and are made in circumstances where the empirical evidence to support them is not identified in the form. When that omission is coupled with the failure to explain the scores in the statements of the witnesses, and the very late explanations given only in cross examination, it is reasonable for a Tribunal to consider that it could draw an inference of discrimination.

76. But that is not all, the respondent wholly failed to disclose the relevant documents in any timely manner at all; the claimant's notes and matrix was sent for the first time on 17 July 2022 and the comparator's matrices and notes on 8 September 2022 (days before the claim was originally listed for a final hearing). That failure extends not just to the matrix, the criteria at the school sheets, but also to the consultation letters, and the financial information that the respondent relied upon to establish that there was a genuine redundancy situation. The explanation provided for that failure of

timely disclosure was that the respondent's witnesses believed that the matrices and the letters to those in the pool were confidential. Given that they had the benefit of legal advice, and that any reasonable legal advice would necessarily have indicated that they were both relevant to the issues and not protected by litigation or legal advice privilege but were contemporaneous internal documents, and therefore disclosable, there is no good explanation for that failure.

77. The burden therefore transfers to the respondent to demonstrate that its decision to select the claimant for redundancy was in no way influenced by the fact of his age.

78. In that context, the respondent relies upon the following matters to establish a non-discriminatory reason for the claimant selection for redundancy:

    78.1. First, the claimant was the lowest performing of the four planners in the pool. The others had higher new business figures and higher recurring fees.

    78.2. Secondly, Miss Palmer was able to offer experience and expertise in specialist areas IHT, BPR, EIS and VCTs; that experience would be valuable to the respondent working with a reduced number of staff

    78.3. Thirdly, the claimant did require more support with the use of IO and was in consequence slower and less productive than others.

    78.4. Lastly, he was resistant to increase fees and when the respondent was squeeze for every penny, that was a concern.

79. We found the respondent's witnesses to be genuine and credible. Although the accounts they gave in relation to the comparator financial planners' new business figures, fee generation, and knowledge of IHT were given for the first time in detail in their answers to cross-examination, that was partly explained by the word count limit on the statements when viewed in the context of the broad scope of the issues that the statements had to address. Nevertheless, the respondent had the benefit of professional representation and the failure to apply for an extension of the word limits to address this evidence as concerning. That was a shortcoming on the part of the respondent's legal representatives, and we determined that it was not a basis on which to reject evidence which we found to be credible, and which was not the subject of significant challenge by Mr Tyndall.

80. In consequence, we accepted that the scores on the matrices, and particularly the claimant's, were genuine and represented the respondent's assessment of the claimant's skills and aptitudes. There was a factual basis which justified the lower scores which reflected the non-discriminatory factors relied upon by the respondent. Looking at each in turn:

    80.1. The claimant was not in a position to mount any challenge of significance to the figures that Mr Adams and Mr Harris provided for the comparators' fees and business generation. They would not have been matters within his knowledge in any event;

    80.2. The claimant accepted that Miss Palmer may have had the

expertise alleged but sought to argue that he had experience of those tax avoidance devices and/or could have gained built up his expertise within a short period. That does not however dislodge the fact that question of expertise was a genuine factor in the scores he received and is a non-discriminatory one.

80.3. The claimant accepted that initially he required more support with the Intelligent Office software, but argued that he had taken reasonable steps to obtain it and was successfully using it at the time of the redundancies. However, he was unable to challenge the respondent's evidence that others who missed the initial training by the software developer were able to pick it up more quickly and did not require the same degree of support from the respondent's inhouse IT support team.

80.4. Finally, the claimant accepted that he was reluctant to increase the annual fee basis for his clients. However, no matter how well founded his objections were, the fact remained that as a consequence of the share purchase agreement he had passed the authority to determine how that client bank was to be billed to the respondent. He could share his views as to the wisdom of the proposed course, but, ultimately, he was an employee, albeit a senior one, and therefore obligated to follow reasonable managerial instructions from his employer. The claimant's resistance to the proposal had nothing whatsoever to do with his age; marking him down because of it was similarly untainted by age discrimination.

81. In conclusion, the respondent has persuaded us on the balance of probabilities that its reasons for scoring the claimant were not tainted by age discrimination but were genuine reasons relating to the potential financial contributions to the respondent's business of each of those in the pool for redundancy.

82. We are satisfied that the respondent has established a non-discriminatory reason for claimant's selection and dismissal for redundancy. Therefore, the claim is not well founded and is dismissed.

Employment Judge Midgley
Date: 13 March 2023

Judgment & Reasons sent to the Parties: 20 March 2023

FOR THE TRIBUNAL OFFICE