



EMPLOYMENT TRIBUNALS

Claimant: Mr N Norton
Respondent: Department For Work and Pensions
Heard at: London Central (by CVP)
On: 12-14/12/2023
Before: Employment Judge Mr J S Burns
Members Ms T Breslin and Mr R Baber

Representation

Claimant: In person
Respondent: Ms K Prince KC

JUDGMENT

The claims are dismissed

REASONS

Introduction

1. These were claims for age discrimination as set out in a List of Issues in the Schedule to these the reasons.
2. We heard evidence from the Claimant ("C"), and then his witnesses Mr K Higgins (his former line manager at Sodexo) Employee 2 (a Grade 6 colleague previously employed by the Respondent) and Mr R Tagliarini (a colleague managed by the Claimant at Sodexo). We then heard from the Respondent's witnesses Mr M Pepper (HR), Mr M Walker (retired Grade 6 business partner) and Ms L Wilkinson (appeal officer).
3. The documents were in a bundle of 334 pages. In addition we received an agreed chronology, agreed cast list and written final and oral submissions from each party.
4. At the request of the Respondent and with the agreement of the Claimant we redacted the names of the Claimant's comparators, instead referring to them as Employee 1 and 2 in these reasons.

Findings of Fact

5. Prior to the Claimant's TUPE transfer to the Respondent he worked at Sodexo, as a Senior Finance Business Partner and had done so since 1 July 2020, prior to which he worked for Sodexo as a contractor. Sodexo provided finance support services to the Respondent's Estates Finance Team ("EFT"). A decision was taken by the Respondent to bring the finance support services back in-house.
6. A review was undertaken to determine which of the employees at Sodexo would automatically transfer into the Respondent under TUPE. The Claimant was identified as one of those employees.
7. Once it had been determined which Sodexo employees were 'in scope' of the transfer a job description comparison exercise took place to match transferring employees to a role within the Respondent. This job-matching process, in respect of the Claimant's role, was carried out by Mr M Walker who was a man aged in his late 50s, a Grade 6 in the EFT, and who subsequently retired from his employment with the Respondent in May 2022.
8. Mr Walker had some knowledge of the Claimant through their mutual work and had seen him in Teams meetings etc. The most populous role in the EFT under Mr Walker's management was at SEO level and Mr Walker's initial view was that grade would best match the Claimant's Sodexo role. He asked a consultant who was helping with the process to produce a comparison chart (97) comparing the Claimant's existing role (as shown on the Sodexo job description - page 60) with the Respondent's job description for the SEO grade. Having considered the chart Mr Walker made a formal comparison and entered some information of his own and reached a conclusion that an SEO(G) grade was a good match.
9. No formal comparison was carried out of the Claimant's Sodexo job description with the Respondent's job description for the Grade 7 role, and nor was any Grade 7 job description subsequently produced in the evidence at the tribunal hearing. Various documents in the bundle show the relevant managers displaying doubt at the time whether any Grade 7 comparison had taken place.
10. On 7/3/22 Mr Walker had a discussion about the SEO grading with the Claimant, who was disappointed, as he thought he should have been allocated to Grade 7 as a minimum. After the discussion Mr Walker sent an email about this on 8/3/22 which included the following statements: "I'm sure like many Sodexo staff, he has a journey to go through to switch from what he was doing in Sodexo to what he'll be asked to do in DWP. He will need significant coaching support on arrival. ... I asked him to think about putting other check points in because coaching him into DWP ways will need repetition." (emphasis added)
11. The Claimant relied on this highlighted wording in the email as evidence of bias. Mr Walker in his oral evidence agreed that some of the wording in his email could have been phrased better. Mr Walker felt, probably correctly, that there was a cultural difference within the Respondent which the Claimant would have to adjust to after arrival, and may need some assistance with that. We do not regard the email as evidence of bias or ageism.

12. The Claimant appealed against the grading decision by a detailed document sent by email dated 18/3/22. His argument was that by virtue of his experience and also by reference to the work he had and was doing for Sodexo, the minimum grade to which he should be assigned when the TUPE transfer occurred should be Grade 7. At the end of his appeal document he offered to provide further evidence and information in support of his submissions, should this be required. This offer was never taken up.
13. Ms L Wilkinson, a senior civil servant and Mr Walker's manager, was asked to deal with the appeal. She did not, at first at least, appear to know what was required from her and entered into correspondence about this with Mr Pepper, in the course of which Mr Pepper sent an email dated 28/3/2022 which, at least on one reading, appears to show Mr Pepper giving Ms Wilkinson a steer towards dismissing the appeal. However, this was never put to Mr Pepper and he was not given a chance to explain this, so we do not rely on it.
14. Ms Wilkinson did not take up the Claimant's offer to provide additional evidence, and she did not discuss the matter with the Claimant before she dismissed his appeal in an email to Mr Pepper dated 4/4/22 which is extremely short and perfunctory and which does not engage with many of the points made by the Claimant in his appeal document. However, the Claimant's initial grading of SEO(G) which was recognised as a mistake was changed to SEO(Q).
15. Ms Wilkinson claimed in her witness statement that before dismissing the appeal she had requested Ms N Porthouse, a newly-appointed Grade 6 in her team, to conduct an independent review of the mapping of Mr Norton's role at Sodexo, both then and in March 2021, to the SEO grade and that she had discussed the conclusions following this review, and that Ms Porthouse had confirmed that she had assessed both the comparison against the SEO job description; and one undertaken against the Grade 7 role.
16. However, there are no contemporary documents to show any such process and the description of the process actually carried out by Ms Wilkinson as set out in her email dated 4/4/22 does not refer to it.
17. On 1/5/22 the Claimant was transferred by TUPE to the Respondent's employment. His salary and benefits were protected on transfer but he was graded SEO(Q) in which he remains at the time of the tribunal hearing.
18. Kevin Higgins, was a finance manager (and the Claimant's line manager) at Sodexo and knew the Claimant and his work from December 2019 onwards, and he also had 16 years experience of working with the EFT in the period up to May 2022. Mr Higgins gave us evidence that the Claimant had been "his "right hand man", and "*would lead the consolidation of reporting, be the lead presenter at meetings for senior DWP stakeholders and manage the*

team (of about 6 qualified accountants) to complete these core tasks". In commenting on the Claimant's assignment to SEO within the Respondent, he stated that "When I heard who Nick was being compared to on the Estates finance team, and who was graded above him, I was in a state of shock and disbelief. It was an insulting approach to a man of Nick's age. Experience ability and skills. Something had clearly gone wrong in the decision-making process".

19. Mr Higgins is 46 years of age in December 2023 and would have been 44 or 45 years of age in March 2022. He told us that he had been wholly engaged in DWP work at Sodexo, but was refused a TUPE transfer by the Respondent on the erroneous basis that he was less than 50% involved, and that he started a grievance process about his own treatment which was only withdrawn when he was paid a redundancy payment. Ms Wilkinson was a decider about that also, as shown by another part of her email of 4/4/22 referred to above.
20. We find that that refusal to accept Mr Higgins was because of the reason already given - namely that a genuine mistake was made about how much of his time at Sodexo was spent on the Respondent's work. There is no evidence that it had anything to do with his age.
21. Mr Higgins also told us that when he was contacted by DWP to work as a contractor in the Summer of 2022 he was also offered work at an SEO level (which was three grades below his Sodexo pay rate) which offer he refused. However, we accept the Respondent's evidence that contractors are not graded but instead offered particular work at particular contractor rates. This was therefore not a case analogous to the Claimant's experience.
22. Employee number 1, whom the Claimant relies on as a comparator for his direct discrimination claim, is a man in his 20s who was recruited into the EFT on 12/7/21 at Grade 7 following his successful completion of the Civil Service Fast Stream.
23. Employee number 2, whom the Claimant relies on as a second comparator for his direct discrimination claim, is a man in his 20s who was recruited into the EFT on an external appointment after he had successfully applied for a Grade 7 role on the basis of merit via fair and open competition.
24. From May 2022 onwards Employee number 2 worked with the Claimant. He gave evidence as follows: "*we collaborated on a very technical paper in relation to IFR16 - a lease accounting standard exceptionally pertinent to the DWP estate... We also worked together on delivering the site-level database, a project Nick was managing across the Estates Finance Team. Both tasks were that of a G7 level in my opinion. ...I do not understand why Nick was given such a low grade when he transferred into the civil service. It was apparent to me that he was at least of Grade 7 level...*"
25. Mr Walker and Ms Wilkinson both gave evidence that they were unaware of the Claimant's age at the time.
26. Mr Walker stated "*I had seen Mr Norton on Teams meetings and was vaguely aware that he had a young baby. I recall thinking that he was in his 30s or early 40s and being surprised to find out that his claim was for age discrimination against those around 50. I would have been in my late fifties when carrying out the assessment process and had no concerns about younger or older workers coming into the team*".

27. The Claimant whose date of birth is 11/7/73, accepted in cross-examination that he has a youthful appearance for his age.
28. Ms Wilkinson stated *“when reaching my decision on the appeal I knew very little about Mr Norton other than what I had garnered during our informal call in February 2022. I had never met him or seen him and was not aware of his age. I do recall that during our call he mentioned that he had a very young baby, but I did not actively consider his age. My decision when considering the grading appeal only took into account the work he performed at Sodexo; and which role (and therefore grade) it best matched at the Respondent”*. In oral evidence she agreed that the Claimant had referred in his appeal document to the fact that he was *“a qualified accountant with twenty years experience”* and from this she would have been able to infer that he was in the age group 40 to 60 years, but she did not think about his age at all during the process.

The law

Age Discrimination

29. Section 4 Equality Act 2010 (EA) provides that age is a protected characteristic.

Direct Age Discrimination

30. Section 13 EA provides that a person discriminates against another if because of a protected characteristic, he treats another less favourably than he treats or would treat others, unless, in the case of age, he shows the treatment to be a proportionate means of achieving a legitimate aim.
31. Section 23 EA states:- *“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”*
32. The relevant circumstances are those factors which the employer has taken into consideration when deciding to treat C as they did with the exception of the protected characteristic. Shamoon v Chief Constable of Royal Ulster Constabulary [2003] UKHL 11.
33. In order to determine whether C’s treatment was ‘because of age’ the Tribunal must determine the ‘reason why’ the Claimant was treated less favourably.
34. A person cannot directly discriminate on a prohibited ground if they do not have knowledge of C’s protected characteristic.

Indirect Discrimination

35. Section 19 of the EA provides that a person discriminates against another if he applies to that other a provision, criterion or practice which he applies or would equally to persons with whom the other does not share the protected characteristic, it puts persons who do share the characteristic at a particular disadvantage when compared with persons who do not share it, and he cannot show it to be a proportionate means of achieving a legitimate aim.

Onus of proof

36. Section 136 provides that if there are facts from which a court could decide, in the absence of any other explanation that a person has contravened a provision under the EA, the court

must hold that the contravention occurred, unless the person shows that he did not contravene the provision.

37. Lord Justice Mummery's in Madarassy v Nomura International plc [2007] EWCA Civ 33 stated that *'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 ... the respondent had committed an unlawful act of discrimination.'*
38. In Dziedziak v Future Electronics Ltd EAT 0271/11 Mr Justice Langstaff considered where the burden of proof lies in an indirect discrimination claim (and the burden of proof provisions in s.136 EqA set out above):- *"In this case the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it disadvantaged women generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual claiming. Only then would the employer be required to justify the provision, criterion or practice, and in that sense the provision as to the reversal of the burden of proof makes sense; that is, a burden is on the employer to provide both explanation and justification"*
39. In Ishola v Transport for London [2020]ICthe Respondent 1204 Lady Justice Simler provided guidance as to the meaning of the phrase PCP within the EqA:- *"35. The words, provision, criterion or practice are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the statutory code of practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words act or decision in addition or instead. As a matter of ordinary language, I find it difficult to see what the word practice adds to the words if all one-off decisions and acts necessarily qualify as PCPs... If something is simply done once without more it is difficult to see on what basis it can be said to be done in practice. It is just done; and the words in practice add nothing. 37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision that is neither direct discrimination nor disability-related discrimination or other relevant ground, it is artificial and wrong to seek to convert them by having a process of abstraction into the application of a discriminatory PCP. 38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurs again. It seems to me that practice here connotes some form of continuum in the sense that it is the way in which things generally are or will be done."*
40. The burden of proof is on the employer to establish justification. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking and the tribunal must make its own assessment of whether the former outweigh the latter. The more serious the disparate adverse impact, the more cogent must be the justification for it. The test is a matter for the tribunals own judgment, based on a fair and detailed analysis of the working practices and business considerations involved.

There is no “range of reasonable responses” test in this context. (Hardys and Hanson PLC v Lax 2005 ILR 726)

Conclusions

Direct discrimination

41. We find that both Mr Walker and Ms Wilkinson were unaware that the Claimant was aged “about 50” which is the age group the Claimant identified for purposes of his claims. If they had thought about his age at the material time, (and we find that they did not), they would have concluded that he was significantly younger than that.
42. Employee number 1 and 2 are not good comparators because they were recruited through different processes and at different times from the Claimant being assigned his role.
43. The treatment of Mr Higgins does not support the Claimant’s case because the reasons for the treatment were not age-related.
44. The wording to which the Claimant objects in Mr Walker’s email of 8/3/22 does not show bias but a probably realistic assessment of a cultural difference, expressed in words which could have been better chosen.
45. The Claimant’s witnesses’ surprise and shock by the assignment of the Claimant to the SEO grade is, partly at least, a consequence of the fact that they did not fully understand the Respondent’s role-matching process.
46. We accept the Respondent’s explanation that the role to which it assigned the Claimant did not depend on his qualifications and experience but was solely determined by the extent to which his pre-transfer work and responsibilities (as shown principally by his formal Sodexo job description) matched the job descriptions for the DWP grades, and that having carried out a paper-based comparison, the Claimant’s job description matched the SEO grade, and therefore he was assigned to that grade. In other words, his experience and qualifications (as well as his age) were irrelevant.
47. We know that on TUPE transfers, this method of simply matching roles by comparing job descriptions is widely used and is a reasonable approach. It was reasonable for the Respondent to use it here.
48. However, in implementing the approach the Respondent was careless. It made an initial mistake in grading the Claimant as SEO(G) instead of SEO(Q). It should have carried out a formal comparison of his Sodexo role against the Respondent’s EFT Grade 7 role, especially on appeal, but it failed to do so. In determining the appeal, a reasoned letter giving the Claimant a full explanation should have been sent to him. In the absence of these shortcomings, the likelihood of the Claimant bringing these proceedings would have been much reduced. However, we do not find that the shortcomings are evidence of agediscrimination. They were carelessness by persons who were unwilling to spend more care and time on the process.

49. The Claimant's own witness statement highlights various claimed non-age-related factors which in his view could or did affect/determine the Respondent's actions. These are: that at the time of the TUPE transfer his team and role had been significantly reduced; that the Respondent did not properly understand his role; that his Sodexo job description was not up to date and not reflective of his full duties; that the Respondents own job-descriptions overstated their roles, and that he came to DWP via a TUPE transfer from the private sector.
50. The Claimant has not adduced facts which pass the onus of proof to the Respondent to show that age-discrimination did not occur. If we are wrong about this, in any event we are satisfied by the Respondent's non-discriminatory explanation.
51. Hence the direct age discrimination claim is dismissed.

Indirect discrimination.

52. The first claimed PCP is ambiguous but on a proper construction means "*appointing transferees from the private sector to (inappropriately) lower grades than the grades of existing employees*". We make no finding one way or the other whether the Claimant was placed in an inappropriately low grade. If he was, it was not because of his age and there is no evidence of group disadvantage.
53. The second claimed PCP is "*Appointing experienced transferees to lower grades than the grades of less experienced existing employees/less experienced employees hired from outside*". It is true that the Claimant was an experienced transferee who was appointed to a lower grade than one of his less-experienced comparators who was hired from the outside. However, the reason that this happened was not because the Claimant was aged about 50 but rather because he was TUPE transferred in, whereas the comparator was hired through a quite different competitive process. There is no evidence of group disadvantage.
54. The third claimed PCP is "*appointing experienced employees, who have not come from the civil service, to lower grades than their experience warrants*". We do not find that this happened to the Claimant because under the Respondent's job-matching process, experience is irrelevant and does not determine the matching grade. Hence no grade is warranted by experience.
55. In any event there is no evidence that anyone else had the same experience as the Claimant so the Ishola test is not met in the case of all three of the claimed PCPs.
56. Hence the indirect age discrimination claim is dismissed.
57. The Respondent ran a justification defence in the alternative. This is set out in paragraphs 5 and 11 of the Schedule. Had it been necessary for the Respondent to try to rely on this defence, it would not have succeeded before us. While accepting that role-matching is a reasonable method of dealing with TUPE transfers, in order for us to have found it to be a proportionate means, it would have to have been carried out carefully and without the procedural shortcomings we have noted above. However, it is unnecessary.

58. Although we have dismissed the claims and therefore do not have power to make a formal recommendation under section 124(2)(c) of the Equality Act 2010, we make the following nonbinding suggestion: that in the interests of good employment relations the Respondent should cause some competent and careful person to carry out in writing and as soon as possible, a formal comparison of the Claimant's Sodexo role as described in the job description at page

60, as supplemented by the Claimant's appeal document (pages 93 to 96) and the material referred to in the bullet points (at the foot of page 95)- to the extent that it is relevant, on the one hand, and the Respondent's Grade 7 in the EFT job description in April 2022 on the other. If the latter has been lost, the Respondent should honestly and fairly reconstruct it for the purpose of the comparison. The outcome (which we do not recommend one way or the other) should then be fully explained in writing to the Claimant. If and only if the Claimant's previous Sodexo role is found reasonably to be a better match to Grade 7 than grade SEO(Q) he should be regraded to Grade 7 within EFT with effect from 1/5/22.

Mr J S Burns Employment Judge

14/12/2023

For Secretary of the Tribunals

Date sent to parties

SCHEDULE (of the claims and issues)

Direct Age Discrimination

1. Did R treat the Claimant less favourably than it treats or would treat others because of the Claimant's age (the age bracket of 'around 50'), by appointing him to a lower grade but with higher pay than the grade to which younger, less experienced people were appointed to, when the Claimant had equivalent qualifications and experience (or more experience).
2. The Claimant seeks to rely on the following comparators:
 - a) Employee 1 age 29 (Grade 7 and the Claimant's Line Manager);
 - b) Employee 2, age 29 (another Grade 7 in the Claimant's team).
3. If R treated the Claimant less favourably as set out at paragraph 1, was it a proportionate means of achieving a legitimate aim?
4. The Respondent will deny that it directly discriminated against the Claimant on the grounds of his age, or that the Claimant's age was a consideration when allocating him a grade. The Respondent will further submit that the two comparators relied upon by the Claimant are not proper comparators, as both individuals obtained Grade 7 roles within R under different processes to that applied in the Claimant's case.
5. If R is found to have treated the Claimant less favourably as set out at paragraph 1, R will contend that it was a proportionate means of achieving a legitimate aim in ensuring that all employees are

graded equitably; that responsibilities and delegated authorities are assigned appropriately; and to allow employees joining r to be integrated into its workforce, payroll and management structure.

Indirect Age Discrimination

6. Did R apply one of the following provision, criterion or practices (PCPs):
 - a) Appointing transferees from the private sector to lower grades than the grades of existing employees; and/or
 - b) Appointing experienced transferees to lower grades than the grades of less experienced existing employees/ less experienced employees hired from outside; and/or
 - c) Appointing experienced employees, who have not come from the civil service, to lower grades than their experience warrants.
7. Did any of the listed PCPs put employees in the Claimant's age bracket of 'around 50' at a particular disadvantage?
8. Did any of the listed PCPs put the Claimant at that disadvantage?
9. If so, was it a proportionate means of achieving a legitimate aim?
10. the Respondent will contend that it applied an objective grading process when determining the Claimant's grade within R's organisation; and will deny that the Claimant was put, or would have been put, at a disadvantage by that grading process.
11. In the alternative, R will contend that any such PCP was a proportionate means of achieving a legitimate aim in ensuring that all employees are graded equitably; that responsibilities and delegated authorities are assigned appropriately; and to allow employees joining R to be integrated into its workforce, payroll and management structure.

Employment Judge J S Burns
14/12/2023
For Secretary of the Tribunals
Date sent to parties :14/12/2023
