



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107212/2022

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Held in Glasgow on 26, 27, 28 and 29 September 2023

**Employment Judge B Campbell
Members Ms J Ward and Mr J McCaig**

10 **Mr Pascal Daugert**

**Claimant
In Person**

15 **OneRen**

**Respondent
Represented by:
Mr D Milne -
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the tribunal is that:

1. The claimant was a disabled person according to section 6 of the Equality Act 2010 at the material time, being from 8 July 2022 onwards;
2. The respondent did not directly discriminate against the claimant on the basis of age, race or sex contrary to section 13 of the Act;
- 25 3. The respondent did not indirectly discriminate against the claimant on the basis of disability contrary to section 19 of the Act;
4. The respondent did not fail to make reasonable adjustments for the claimant contrary to sections 20 and 21 of the Act;
- 30 5. The respondent did not harass the claimant on the basis of age, race, sex or disability contrary to section 26 of the Act; and
6. Accordingly all claims are dismissed.

REASONS

Background

1. This claim arises out of circumstances where the claimant applied for a particular post with the respondent, but was not invited to an interview. Of those who were, another candidate was appointed. The claimant alleges various types of discrimination in connection with the process. The respondent denies all of his complaints.
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2. The hearing took place over four days which included dealing with preliminary matters, hearing of evidence and closing submissions. The tribunal reserved judgment to be issued in writing.
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3. Evidence was heard by the claimant and, on his behalf, from Mr Alex Taylor with whom he has shared a residence since around the year 2000. For the respondent, evidence was given by Mr Richard Weeks, Film Production Manager and Ms Victoria Hollows, Chief Executive.
- 15 4. The claimant represented himself and the respondent was represented by Mr Milne. Where necessary the tribunal took time to explain the rules and conventions of employment tribunal hearings, and some of the legal concepts to ensure as far as possible the parties were on an equal footing.
- 20 5. At an earlier stage in the claim, the respondent denied that the tribunal had jurisdiction to hear it on the basis that the position the claimant applied for was not one which would have allowed him the protection of section 39 of the Equality Act 2010. A preliminary hearing was scheduled to determine that question, but before it took place the respondent conceded that the legislation applied.
- 25 6. The parties had been unable to agree a single bundle of documents for the hearing, and each had provided their own. There was a substantial degree of overlap between them. Where it is necessary to refer to a document, this is done by way of numbers placed in square brackets to indicate page numbers of either bundle. The letters 'C' and 'R' denote pages in the claimant's and
30 respondent's bundles respectively.

7. A provisional list of issues had been drawn up at a previous case management preliminary hearing. It became clear that the parties' cases had moved on since then, and time was taken at the start of the hearing to revisit the issues and agree a new list of issues for the tribunal to determine. Those
5 are set out below in the section headed 'Legal issues'. It is recorded here that the claimant confirmed, after discussion and time to consider his position, that he did not wish to make any complaint of victimisation under section 27 of the Act, and that to the extent such a claim had been put forward, it was now being withdrawn.
- 10 8. The hearing was also to determine remedy if appropriate, and the claimant had provided a schedule of loss.

Legal issues

The legal issues the tribunal had to decide were:

Time bar

- 15 1. Were the complaints made within the time limit in section 123 of the Equality Act 2010 (the 'Act')? Claims would be within time if presented to the tribunal within three months after the acts complained of, subject to any extension of time through pursuit of ACAS Early Conciliation. This meant that any complaints about events on or before 28 July 2022 were provisionally out of
20 time.
2. If not within time by themselves, were the acts complained of part of a continuing act which carried on beyond the relevant time limit, so that they became within time?
3. If not, was it nevertheless just and equitable for the tribunal to determine those
25 complaints?

Disability status

4. Did the claimant have a disability as defined in section 6 of the Act at the time of the events complained about, namely from 8 July 2022 onwards? In other words:

- a. Did he have a physical or mental impairment? The claimant relies on the condition of depression;
- b. Did the impairment have an adverse effect on his ability to carry out normal day to day activities?;
- 5 c. Was the effect substantial?; and
- d. Was the effect long-term?

5. If the claimant had a disability, did the respondent know, or ought it reasonably to have known that fact?

6. If so from which date?

10 *Direct age discrimination*

7. Did the respondent treat the claimant less favourably than it treated, or would have treated a comparator, namely the successful candidate who was aged 25 when he was 54 by:

- a. Deciding on 11 July 2022 not to select him for an interview;
- 15 b. Describing his application as 'a little prescriptive' in an email on 12 July 2022; and
- c. Stating in an email on 14 July 2022 that the respondent was 'looking for something a little different'?

8. If so, was the less favourable treatment because of age?

20 *Direct race discrimination*

9. Did the respondent treat the claimant less favourably than it treated, or would have treated a comparator, namely the successful candidate who was Irish when he was French by:

- a. Deciding on 11 July 2022 not to select him for an interview;
- 25 b. Describing his application as 'a little prescriptive' in an email on 12 July 2022; and

- c. Stating in an email on 14 July 2022 that the respondent was 'looking for something a little different'?

10. If so, was the less favourable treatment because of race or nationality?

Direct sex discrimination

5 11. Did the respondent treat the claimant less favourably than it treated, or would have treated a comparator, namely the successful candidate who was female when he was male by:

- a. Deciding on 11 July 2022 not to select him for an interview;
- b. Describing his application as 'a little prescriptive' in an email on 12 July
10 2022; and
- c. Stating in an email on 14 July 2022 that the respondent was 'looking for something a little different'?

12. If so, was the less favourable treatment because of sex?

Indirect disability discrimination

15 13. Did the respondent apply a provision, criterion or practice in relation to the claimant's disability which it also applied, or would apply, to people not sharing his disability?

14. If so, did its application put, or would it put, persons sharing his disability at a particular disadvantage compared with persons not sharing his disability?

20 15. Did it, or would it, put the claimant to that disadvantage?

16. If so, was it a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments

17. Did the respondent apply a provision, criterion or practice which put the claimant at a substantial disadvantage because of his disability in comparison
25 with persons who are not disabled? The claimant alleges two provisions, criteria or practices:

- a. Providing feedback to job applicants in a critical and negative way rather than a constructive and supportive way; and
- b. Stating in relation to the role the claimant applied for that it required 'someone who is patient, joyful, skilled, friendly and with a good sense of humour'.

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18. Did the respondent know, or ought it to have known, at the relevant time that the claimant was disabled and the nature of the substantial disadvantage to which he was put?

19. If so, could reasonable adjustments have been made to alleviate or remove the substantial disadvantage?

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Harassment – age, race, sex, disability

20. Did the respondent engage in conduct towards the claimant as follows:

- a. Providing feedback to him by email on 12 July 2022;
- b. Failing to provide him with access to a complaints process on or around 12 July 2022;
- c. Providing feedback to him by email on 13 July 2022; and
- d. Reinforcing (a) and (c) by email on 29 July 2022.

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21. If so, was such conduct unwanted?

22. If so, was it related to any of the protected characteristics of age, race, sex or disability?

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23. If so, did it have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, taking into account his perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

24. In the event of any claims succeeding, what compensation or other remedy should be ordered in relation to:

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- a. Loss of earnings;
- b. Injury to feelings; or
- c. Otherwise?

Relevant law

5 1. The Act contains a number of provisions which render types of discriminatory conduct unlawful. Employees, workers and those seeking work are protected against discrimination based on a number of protected characteristics such as disability, age, race and sex.

2. Section 6 of the Act defines a disability for the purposes of discrimination law.
10 It states:

6 Disability

(1) *A person (P) has a disability if—*

(a) *P has a physical or mental impairment, and*

(b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

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(2) *A reference to a disabled person is a reference to a person who has a disability.*

3. Section 13 of the Act sets out the test for direct discrimination as follows:

13 Direct discrimination

20 (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.*

(2) *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.*

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- (3) *If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*
- 5 (4) *If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*
- (5) *If the protected characteristic is race, less favourable treatment includes segregating B from others.*
- (6) ...
- 10 (7) ...
- (8) ...

4. Indirect discrimination is a separate type of complaint which is explained in section 19 of the Act:

19 Indirect discrimination

- 15 (1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
- (2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's*
 20 *if—*
- (a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*
- (b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with*
 25 *persons with whom B does not share it,*
- (c) *it puts, or would put, B at that disadvantage, and*

(d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

5. Sections 20 and 21 of the Act explain where an employer may be under a duty to make a reasonable adjustment for a disabled person:

5 **20 Duty to make adjustments**

(1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*

10 (2) *The duty comprises the following three requirements.*

(3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

15 (4) *The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

20 (5) *The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*

25 (6) *Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.*

- (7) *A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.*

5 **21 *Failure to comply with duty***

- (1) *A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*

- (2) *A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*

- 10 (3) *A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.*

- 15 6. The Act also renders acts of harassment unlawful. The criteria for harassment are found in section 26 of the Act:

26 *Harassment*

- (1) *A person (A) harasses another (B) if—*

- 20 (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.*

- 25 (2) *A also harasses B if—*

- (a) *A engages in unwanted conduct of a sexual nature, and*
- (b) *the conduct has the purpose or effect referred to in subsection (1)(b).*

(3) *A also harasses B if—*

- 5
- (a) *A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*
 - (b) *the conduct has the purpose or effect referred to in subsection (1)(b), and*
 - (c) *because of B's rejection of or submission to the conduct, A*
10 *treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*

(4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

- (a) *the perception of B;*
- 15 (b) *the other circumstances of the case;*
- (c) *whether it is reasonable for the conduct to have that effect.*

7. Government guidance has been published covering matters to be taken into account when determining questions relating to the definition of disability. The latest version is published by the Office for Disability Issues and is referred to
20 below as the 'Guidance'.

Findings of fact

The tribunal found the following to be established on the balance of probabilities based on the evidence provided.

Background

25 1. The claimant is of French nationality and identifies as male. At the relevant time for the purposes of his claim he was aged 54.

2. The respondent is a registered charitable trust, established by Renfrewshire Council for the purpose of delivering services to the public in the areas of culture, leisure and sport. It operates at arm's length from the Council and is an employer in its own right, engaging some 450 individuals.
- 5 3. The claimant is skilled in a number of areas including bookbinding, paper art, quilting, embroidery and textile crafts. He operates a business with a dedicated website which has information about the services he provides and shows examples of his work.

The respondent's commission

- 10 4. In June or early July 2022, the respondent issued details of a commission they had devised in partnership with another local charity named 'CIRCLE', which specialised in supporting individuals recovering from addiction. Together, the respondent and CIRCLE had created a 'bothy' where individuals could spend time and socialise. The commission was to help the service users
15 create a 'friendship blanket' which would be displayed on the wall of the bothy.
5. The respondent published details of the commission online via a two-page document headed 'Artistic Opportunity: a friendship blanket' [R36-37]. The brief was explained as follows:

20 *'Our 'Tranquillity Bay' Healing Hut will be a calm, joyful, inspiring pace where you can forget your worries and chill out. It is based in the grounds of CIRCLE, Glasgow Road, Paisely PA1.*

*We are looking for an artist to work with a recovery group of 6-8 people at CIRCLE. We will run the project for 10 weeks and there will be a one 2 hour workshop each week. The workshops will run concurrently at a mutually
25 agreed time between august and Dec 2022.*

We are offering £150 per session with up to £1,000 materials budget (to include display mechanism). Total maximum budget £2,500.'

6. In a section headed 'Artists Skills' the brief said that the following were being sought:

- *'An ability to work with groups and experience working with groups*
- *A client focussed approach*
- *Proficiency in one or more of the following skills: sewing, embroidery, knitting, crochet, tapestry, quilting*
- 5 • *An ability to encourage, inspire and teach others to learn the above skills'*

In relation to 'Artists Sensibilities it was said:

'We are looking for patient, joyful, skilled, friendly and with a good sense of humour. We would welcome artists with lived experience of recovery.'

- 10 7. The brief invited interested applicants to send a CV and brief statement of why they would like to work on the project, together with either two examples of their work or a link to their website where similar could be viewed. Applications were to be sent to the email address of Mr Richard Weeks. The deadline for doing so was 11.59pm on Sunday 10 July 2022.
- 15 8. The brief had been drafted by Mr Weeks in conjunction with CIRCLE. The 'Artists Skills' and 'Artists Sensibilities' sections were prepared with input from service users.
9. The claimant applied for the role by sending covering letter [R41], a CV [R42-43], an image of a quilt [R44], an additional note setting out a proposed payment schedule other information [R45] and an outline of how the project would be carried out in numbered steps [R46-47]. Together these items made up what is described below as his application.
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10. The claimant's application was sent to the respondent on 8 July 2022. It described the claimant as a 'Bookbinder – Paper Artist' but also said that he had ability and competence in quilting and sewing, portrait embroidery and textile colouring among other skills. It provided a link to his professional website. His CV listed details under the headings 'Training & Education', 'Work Experience' and Areas of Expertise'. Neither his nationality nor his age were disclosed. Under 'Training & Education' he stated 'BAC administration,
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public relations, public commerce, languages (FR)' and in evidence he confirmed that this was a reference to him attaining the French Bacalaureat qualification. The application disclosed no health conditions or similar information.

- 5 11. The claimant was one of ten applicants for the role.

Assessment process

12. The assessment panel was made up of Mr Weeks, a representative of CIRCLE and one of its service users. Each had an equal say in the process. Two hours were set aside on the morning of 11 July 2022 for the applications
10 to be reviewed. All applications were reviewed on a digital screen in succession. Only Mr Weeks had access to the documents, and the others were merely permitted to view them on the screen in turn. The panel reviewed the applications in succession, devoting an approximately equal amount of time to each, and scored them against the four listed 'Artists Skills'.

- 15 13. Within its allotted time, which would have amounted to no more than 15 minutes, the panel considered the claimant's application with interest. They considered that he had the necessary attributes for the role. However, other applicants were also deemed able and suitable candidates. The claimant did not compare as favourably with some others in that:

- 20 a. his application was deemed to suggest he had more of a background in bookbinding and paper art than quilting and embroidery. The claimant emphasised in his evidence to the tribunal that bookbinding, and other crafts which he practised, involved sewing skills. That was accepted by the tribunal to be the case, but the assessment panel did
25 not appreciate this fully;

- b. he had not provided two relevant examples of his work. He had provided an uncredited photo of a quilt which had no information to put it in context, and it was clarified in his evidence that this was not his own image, but one taken from elsewhere on the internet to illustrate
30 a quilt similar to one he had made;

- c. His website similarly did not suggest that quilting or embroidery was his speciality and there were no obvious examples there;
- d. his CV was structured in such a way that did not show his working history chronologically with details of who he worked with, or the skills and responsibilities corresponding to each role; and
- e. his proposed structure of the project was considered, as Mr Weeks later put it, 'a little prescriptive' and more detailed than was required, as the aim was more to develop the project in conjunction with the service users as it went along.
- 10 14. It did not register with the panel that the claimant had suffered from any particular illness or other condition which might amount to a disability under the Equality Act 2010. Other candidates had referred to themselves as having suffered from poor mental health or disabilities in another way. Similarly the question of the claimant's age was not given particular thought and was not
- 15 discussed.
15. The assessment panel chose four candidates to interview. The claimant was not among them. Those chosen for interview had scored better in relation to demonstrating the 'Artists Skills'. The top score was 9.5 out of ten. The claimant did not receive the lowest overall score.
- 20 16. The successful applicant was chosen after interviews and issued with a contract covering the terms of their engagement [R50-51]. The project ran from 29 August to 7 November 2022.

Post-application correspondence with Mr Weeks and Mr Payne

- 25 17. The claimant, and the other applicants not selected for interview, received an email from Mr Weeks to thank them for applying but explaining that they had not been shortlisted. The claimant received such an email in the afternoon on 11 July 2022. The email stated that the standard of application was very high and that some very good candidates had to be let down [R48]. The same evening, the claimant replied to request feedback on his application and

details of who had been selected for interview. He also asked for the name of the director of the respondent.

18. Mr Weeks emailed the claimant around the middle of the following day [R54-55]. He gave details of the panel who evaluated the applications, and the process which had been followed. He explained that all of the candidates' scores were within a narrow range of 2.5 out of a maximum 10 points. He said that the claimant's application had been considered impressive, but that the overall standard of the candidates had been high. Other candidates had demonstrated extensive experience of quilting or embroidery, and with working in groups. He explained that the panel had felt that the claimant had shown less relevant expertise or experience in those areas. He said that whilst the panel had enjoyed considering the claimant's application, it was thought not to have complied with the brief as fully as some other candidates. He stressed that the panel had found it difficult on the day of the assessment to choose between the candidates based solely on documents they had submitted. He signed off by wishing the claimant the best for the future and 'a pleasant summer'.
19. The claimant emailed Mr Weeks back at 17.45 the same day, i.e. 12 July 2022 [R56-57]. He said that the feedback '*does not work at all for me*' and gave his reasons why. He asserted that the assessment process as Mr Weeks described it had elements which were illegal, although he did not explain further how that was the case. He took Mr Weeks' comments as unwarranted criticism when Mr Weeks did not possess his skills or speak his language. He suggested Mr Weeks was unsuited to undertaking the selection exercise. He accused Mr Weeks of selecting candidates based on his own preference and discriminatory practices, although did not give further details of how this had happened or what was the basis for that belief. He asserted that he was good enough to be selected for an interview. The claimant ended his email by saying that he wanted to make a complaint and therefore sought the name of Mr Weeks' team leader or contact details for a complaints department at Renfrewshire County Council.

20. Mr Weeks forwarded this email to his Human Resources department and an HR People Manager emailed the claimant on 13 July 2022 to confirm that the Chief Executive of the respondent was Ms Victoria Hollows, but that she was on holiday at that time. The Head of Finance and Corporate Services was nominated in her place. Email addresses for both were provided.
21. Later the same day Mr Rikki Payne, Arts Manger of the respondent, emailed the claimant [R61-62]. Mr Payne was at the time the person a level above Mr Weeks' line manager. He clarified that the commission was for a freelance artist on a fixed term basis and not a salaried post. He also mentioned that the respondent had its own policies and procedures separate from Renfrewshire Council. He re-stated the 'Artists Skills' required and said that an issue with the claimant's application was that there was a lack of detailed evidence of those skills in some respects. This included who he worked with previously and when. Mr Payne also said that the claimant had not given two examples of his work, and on his website there was no evidence of textile related work. He reiterated that the proposed structure of the project had been found 'a little prescriptive' as the service user on the assessment panel already had ideas about how it would be delivered.
22. Mr Payne stressed that both he and Mr Weeks were impressed by many aspects of the claimant's application, but that there were other candidates who could demonstrate better the required skills and experience. He said that the assessors were '*looking for something a little different.*' He provided an email address in the event that the claimant wanted to make a formal complaint.
23. Mr Payne copied his email to two internal colleagues so that if the claimant took a complaint forward they would understand the background. He summed up the claimant's unsuccessful application as '*in essence, incomplete*'.
24. On 14 July 2022 the claimant emailed Mr Payne back [R64-66]. In short, he still held the view that adequate reasons had not been given for his application being rejected, and he believed that the process had been used unfairly to select another candidate. He found it 'outrageous' that a service user would

be on the selection panel and believed that in so doing, the respondent had allowed his and other applicants' personal data to be inappropriately shared. He said his consent should have been requested in advance, and that a service user would not have had the capacity to perform the tasks required of a panel member. He said that Mr Weeks and now Mr Payne had both revealed that they '*strongly resented my application due to your respective prejudices and discriminatory ways*'. However, he did not explain what it was that Mr Weeks or Mr Payne had done to lead him to that view. The claimant explained that he had verified that only one page of his website had been viewed by anyone within the respondent, and that his business was registered under the category of textiles, providing evidence that he did in fact have expertise in that area. He made the point that the original brief set out a number of desired skills, and textiles was only one of them.

25. The claimant ended by saying that he would lodge a formal complaint with the benefit of legal assistance. This complaint would set out the issues with the process and the ways in which the claimant had been unfairly rejected. He stated that this had been done because he was believed to be too old to deliver the project. He did not say any more about how he had reached that view.

20 *Consideration of complaint by Ms Hollows*

26. The claimant contacted the respondent to indicate that he wished Ms Hollows, its Chief Executive, to consider his complaint. He was told that she was on annual leave but would respond to him on her return to work.

27. On 29 July 2022 Ms Hollows emailed the claimant to say that she had read the earlier email correspondence between the claimant and both Mr Weeks and Mr Payne. She said that she could see that the claimant was complaining about breaches of the Equality Act and Data Protection Act, but that it was unclear how. She said that if the claimant could provide clearer details of those concerns she would be happy to look into them and provide a response. Until that happened, she felt unable to say any more than Mr Weeks and Mr Payne had done.

28. The claimant responded to Ms Hollows on 31 July 2022. He said that he was not in a position to give her a detailed response at that time, but would do so by 29 September 2022, and if there was to be a change to that timeframe he would let her know. In evidence he explained that he wanted to gather further information about some of the other candidates, so he could make his complaint more focussed.
29. The claimant did not follow up his email to Ms Hollows in any way. His evidence was that he was distracted by the death of someone very close to him. He produced a copy of a notice of the death of an elderly lady on 27 September 2022.
30. The claimant began early conciliation via ACAS on 27 October 2022 and was granted an Early Conciliation Certificate on 11 November 2022.

Discussion and decision

Time bar

31. The rules in relation to time limits for discrimination complaints are found in section 123 of the Act. In summary, steps must be taken to initiate a claim within three months of the act (or failure to act) complained of. If the act or omission is continuous in nature, time is measured from the end of the act. The step which must be taken is to commence the early conciliation process via ACAS. A certificate will be issued by ACAS showing that date, and the date when the early conciliation process ended. This is normally essential before an employment tribunal claim can be raised.
32. It follows that if early conciliation is commenced more than three months minus a day after a particular event complained of, the claim will be 'out of time' and an employment tribunal will have no power to hear it.
33. This rule is subject to an exception where a tribunal considers it to be 'just and equitable' to hear the complaint, even though it is outside the normal time limit for doing so – section 123(2) of the Act.

34. The claimant commenced early conciliation on 27 October 2022 according to the certificate issued by ACAS. Applying the normal rules, anything complained about which occurred on or after 28 July 2022 would be within time, but anything before that date would be out of time.
- 5 35. The events complained about by the claimant occurred between the dates of 11 July and 29 July 2022. Those were:
- a. Not being selected for an interview, a decision taken on 11 July 2022;
 - b. Mr Weeks in an email describing the claimant's proposal as *'a little prescriptive'* on 12 July 2022;
 - 10 c. Mr Payne saying in an email that the recruitment assessors *'were looking for something a little different'* on 13 July 2022; and
 - d. Ms Hollows agreeing with the comments of Mr Weeks and Mr Payne in an email on 29 July 2022.
- 15 36. It is noted that the dates of some of those events were incorrectly recorded in the original list of issues, and also that the last event was only recorded as an issue in relation to the harassment complaints and not the complaints of direct discrimination, despite it being clear from the claimant's evidence that he believed Ms Hollows was behaving in a similar manner to Mr Weeks and Mr Payne before her.
- 20 37. On the basis of the above it can be appreciated that complaint 'd' is within time, but 'a' to 'c', if treated as free-standing complaints (or related but only to each other) are out of time. If, however the whole sequence of complaints is treated as a continuing act, they are all within time.
- 25 38. The respondent argued, as it was entitled, that the claimant had the opportunity to raise his claim earlier than he did. After his email to Ms Hollows on 31 July 2022 the position was that he was going to provide further information to support his request for information about the other candidates. There were no actions outstanding on the respondent's part, and Ms Hollows

was not obliged to send a reminder to the claimant at a later point in order to either prompt his response or gain confirmation that the matter was closed.

39. It was also argued that the claimant, by his own admission, had volunteered at a Citizens Advice Bureau in the past, and had directed individuals with employment complaints to ACAS for further advice. He should have been aware of the need to act more promptly. That said, he did not state in evidence that he had given employment law advice himself, or had any working knowledge of the rules in relation to time limits.
40. The claimant's evidence was that he fully intended to write back to Ms Hollows around the end of September 2022, but the death of a close family member around that time affected him to the extent that it slipped his mind.
41. The tribunal had some sympathy with the respondent's argument. There was nothing to stop the claimant approaching ACAS at any time from the beginning of August 2022 onwards, even whilst the matter of his questionnaire was being dealt with. However, any claimant is entitled to take account of the full period granted for raising a claim, and beyond that there is no onus to commence the process as soon as possible. Rightly or wrongly, he wished to obtain further information about the other candidates before making a claim, or identifying which type of claim he wanted to make.
42. The tribunal also considered that one of the complaints was within time, and so would be decided regardless. To do so would involve considering the evidence about the recruitment process from the beginning, with the result that the facts giving rise to the earlier complaints would have to be recorded and evaluated anyway. This was so even if the tribunal's ultimate finding was that there was not a continuous act linking Ms Hollows' actions with those of Mr Weeks and/or Mr Payne.
43. Any complaints which were out of time were only late by a small margin. They were closely related and self-contained in terms of evidence. There was no suggestion that evidence would have been lost, or the recollection of witnesses would be detrimentally affected, by the resulting passage of time.

44. Finally the tribunal noted that the claimant was not legally advised at the relevant time.

45. Considering all matters which appeared to be relevant, the tribunal was of the view that it was be just and equitable to hear the claim in full, notwithstanding
5 that some elements may have been out of time had they been individual acts.

Disability status – section 6 of the Act

46. The tribunal next considered the question of whether the claimant was a disabled person as the term is defined in section 6 of the Act. The relevant time of assessment is the period between 11 and 29 July 2022, as the events
10 complained of took place between those dates.

47. This issue breaks down into four component questions. As is made clear by the Employment Appeal Tribunal in ***Goodwin v Patent Office [1999] IRLR 4***, an employment tribunal should approach those questions in the following order:

- 15
- a. Does the claimant have a physical or mental impairment;
 - b. Does the impairment have an adverse effect on their ability to carry out normal day-to-day activities;
 - c. Is that effect substantial; and
 - d. Is that effect long-term?

20 48. It was added in ***J v DLA Piper UK LLP UKEAT/0263/09*** that it can in some cases be helpful to consider the effect of an alleged impairment before deciding whether there is an impairment. This may be so particularly in cases involving a claimed mental impairment which is disputed.

49. The onus is on a claimant in any case to establish that each factor was present
25 at the material time. There is no strict requirement to provide medical records or other evidence from qualified medical practitioners, but owing to the way the test is applied it may be otherwise difficult to establish that all of the necessary elements are or were present at the appropriate time.

Was there a physical or mental impairment?

Did any impairment have an adverse effect on the claimant's ability to carry out normal day to day activities?

50. The claimant relies on depression as a mental impairment. It is the impairment
5 itself which matters in a legal sense rather than the existence of a medical
condition by name, or a diagnosis. In other words, depression could amount
to a mental impairment or not depending on the details and circumstances of
the particular case. The Guidance suggests that the term 'impairment' should
be given its ordinary meaning (paragraph A3).
- 10 51. As stated above, it is for the claimant to show that he had a mental impairment
at the material time. The respondent denies that he had. The Guidance
recognises that impairments can exist in different ways, and specifically gives
as an example:
- 15 a. *'Mental health conditions with symptoms such as anxiety, low mood,
panic attacks, phobias, or unshared perceptions; eating disorders,
bipolar affective disorders, obsessive compulsive disorders,
personality disorders, post traumatic stress disorder, and some self-
harming behaviour;'* and
- 20 b. *'Mental illnesses such as depression and schizophrenia'* (paragraph
A5).
52. There is some evidence in this case to establish that the claimant had a
mental impairment, and of its adverse effect on his ability to carry out normal
day to day activities. His GP of approximately 20 years confirmed that he has
suffered from depression and been prescribed antidepressant medication on
25 a number of occasions.
53. Unfortunately this was the extent of the medical information provided. The
claimant was ordered on 8 February 2023 to disclose *'any medical notes,
reports, occupational health assessments and other evidence in the
claimant's possession and/or control relevant to the issue of whether [he] was
30 a disabled person in relation to the impairments relied upon.'* The order went

on to say that *'To comply with this order the claimant must obtain copies of medical records from any general practitioner or other medical professional and disclose them to the respondents.'* As a result of this he approached his GP who prepared the above letter. The claimant assumed that this was sufficient to comply with the order, when in effect he had been asked to obtain a more complete set of his medical records as they related to his depression. He had given the respondent express consent to their asking his GP for further material, but they had not done so on the basis that it was for the claimant to prove he was disabled – the onus was not on them to show the contrary.

54. The tribunal was asked by the respondent to draw a strong adverse inference from the absence of medical records, which was taken to be a suggestion that the claimant deliberately did not request their disclosure, knowing that their content would tend to hinder rather than help his case. It was undoubtedly less clear whether he met the statutory test in the absence of such records, but the tribunal believed he had misinterpreted what the order required, rather than deliberately disobeyed it in the knowledge that his records would be unhelpful to him.

55. The claimant's own evidence was that he had been affected by depression at various stages since at least as far back as his arrival in Scotland in 2000. He provided a witness statement [R79-82] in which he described aspects of his life at certain times since then which he submitted showed the existence of a mental impairment. He was not challenged on the content of his statement in cross-examination. By way of some examples, he described living a reclusive life between 2000 and 2010, being unable to form attachments with family or friends, and becoming either disproportionately angry or withdrawn in response to the everyday comments of others. He said that he felt unhappy or hopeless and had low mood on a regular basis. He also said that he experienced, and still experiences, anxiety all of the time. He had been prescribed Trazodone, a drug commonly used to treat depression and anxiety, although he did not specify at what times and for how long. He clarified in evidence that this had tended to happen when he felt the need to

visit his GP at different points in his life. When worst affected, he would be demotivated and spend two or three days in bed without an interest in doing anything. He would have to wait until this effect passed before being able to become active again. He described it as like being 'in a black tunnel'. At other times he would become overactive, not sleep for around 48 hours and overwork. He has tried applying mindfulness techniques to calm his mind, which had been partially successful.

56. Mr Taylor supported the claimant's account to a degree. He was asked whether he had observed in the claimant any of eleven different psychological symptoms listed by the NHS as common to depression [R86], and said that he had seen all of them over the 20-year period he had known the claimant. He described them coming and going, and changing in magnitude, like a sine wave. He similarly said that he had noticed all but two of the seven listed typical physical symptoms of depression. He believed he had seen all of the three listed social symptoms at one time or other. He verified that the claimant had spent spells in which he avoided all social contact and had expressed suicidal thoughts. Mr Taylor appeared to the tribunal to be a credible witness and he was not cross-examined by Mr Milne.

57. The tribunal accepted on the basis of the available evidence that the claimant had suffered from a mental impairment and that it had an effect on his ability to carry out normal day to day activities at certain times, but not continuously. The Guidance clarifies that if such an effect ceases, it is to be treated as continuing if it re-occurs, or is likely to do so – paragraphs C5 and C6. The claimant, being in such a situation, must be treated as having suffered from the relevant impairment over a 20-year period in a legal sense, even if the effects were not the same, or present at all, on every single day during that time.

58. Having been satisfied that the claimant both had a mental impairment, and was adversely affected by it in relation to his ability to carry out normal day to day activities, in line with *J v DLA Piper UK LLP UKEAT/0263/09*, the tribunal next considered whether the effect of the impairment was substantial.

Was the effect of any impairment substantial?

59. Section 212 of the Act confirms that substantial in context means 'more than minor or trivial'.

5 60. The effects of the claimant's impairment are deemed to be substantial on the evidence in this case. Again it was recognised that the effect of the impairment was not shown to be substantial at all times, but on a cyclical basis it was. During the most extreme occasions the claimant was unable to get out of bed, get dressed or deal with basic personal care. He was unable to work or interact with others. At other times his mind would not settle enough to
10 perform daily tasks as quickly or easily as normal. More frequently his sleep was disturbed. He over-reacted to the comments and behaviours of others. He did not form friendships. Taking into account that the effect of an impairment must be 'more than minor or trivial' there was evidence that this threshold had been met.

15 *Was the substantial effect of the impairment long-term?*

61. Long term in this sense equates to having lasted at least 12 months, or being likely to last 12 months at the time the test is applied, or being likely to recur or to last for the remainder of the individual's life.

20 62. The claimant's evidence, corroborated by Mr Taylor and unchallenged, was that the effects of his impairment had occurred since at least 2000. During that time they had fluctuated, but returned following periods of remission. This therefore is a suitably long period to satisfy the requirement.

25 63. The tribunal were therefore satisfied that the claimant had established he had a disability in terms of section 6 of the Act at the time of applying for the friendship blanket commission with the respondent.

Direct age discrimination complaint – section 13 of the Act

64. The claimant alleges that the respondent carried out three acts of direct age discrimination:

a. The assessment panel not selecting him for interview on 11 July 2022;

b. Mr Weeks describing a part of his application as 'a little too prescriptive' in an email on 12 July 2022; and

c. Mr Payne saying on 13 July 2022 in an email that the panel was looking for '*something a little different*'.

5 65. The claimant's comparator was the successful candidate for the role, who was in her mid-twenties when he was aged 54.

66. In a complaint of direct discrimination the onus of proof falls initially on the claimant, who must prove 'primary facts' which at least provisionally suggest that discrimination has taken place because of the protected characteristic -
10 see for example ***Royal Mail Group Ltd v Efobi [2021] UKSC 33***. If a claimant can do so, the onus moves to the respondent to show that no discrimination occurred, and if it cannot do that the complaint is likely to succeed. If a claimant cannot identify those primary facts, the onus does not transfer to the respondent and the complaint will normally fail.

15 67. The claimant was unable to establish any such primary facts. The tribunal could not identify anything in the way the selection exercise was carried out on the morning of 11 July 2022, or the way that Mr Weeks or Mr Payne subsequently wrote to the claimant, to suggest that they had treated him less favourably than a younger candidate because of his age. It did not read the
20 comments '*a little too prescriptive*' and '*something a little different*' as indicators of bias against older individuals. The first comment was explained in evidence, and accepted, to be a reference to the fact that the claimant had set out a very detailed plan for completion of the project, which the respondent did not require as it anticipated the direction would be set more by the service
25 users themselves. The second comment was a reference to the respondent's genuine belief that the claimant's primary area of expertise was in bookbinding and paper art, not tapestry and embroidery.

68. The tribunal were satisfied that the selection of candidates to be interviewed was carried out in the absence of age bias, and based on other reasons which
30 were lawful. Those were related to the perceptions of the three panel members of which candidates had the most compatible combination of skills

and experience for the commission. The tribunal noted that the claimant had not added his age or date of birth to his application, and nor were there any other details which gave even a general indication of his age. In the short space of time the panel had to review his application, the tribunal accepted that his age was not a factor in their minds.

69. Therefore, the tribunal concluded that the claimant's complaints of direct age discrimination were unfounded.

Direct race discrimination complaint – section 13 of the Act

70. The claimant's complaints of direct age discrimination were the same three complaints he had alleged were examples of direct age discrimination, as set out in paragraph 64 above.

71. In this complaint the claimant's comparator was again the successful applicant, who was Irish. His claim was based on his French nationality being at the root of the less favourable treatment.

72. Again, the tribunal's view was that the claimant had not established primary facts which at least suggested that he had been less favourably treated than the successful applicant because of his nationality.

73. For similar reasons to those given in relation to the direct age discrimination complaint, the tribunal was satisfied that the selection process on 11 July 2022 was not affected by bias based on race. There was no evidence that this had happened. Whilst it was possible to assume that the claimant was French based on his application, a fact acknowledged by Mr Weeks, there was no evidence that this put him at a disadvantage with the panel. Their focus was on the substantive content of each application, which they had to absorb and evaluate in a short space of time.

74. Similarly, the language used by Mr Weeks and Mr Payne in their emails did not even suggest racial bias. The tribunal's findings as to the intention of each in writing what they did are set out above in relation to the age discrimination complaint and apply equally to this complaint.

Direct sex discrimination complaint – section 13 of the Act

75. The claimant makes the same three complaints as alleged acts of direct sex discrimination. His comparator again is the successful candidate, who is female when he is male.

5 76. Once more the claimant was unable to identify primary facts which pointed to sex discrimination. It was possible that the claimant's gender could be noted from reading his application, but as in relation to the age and race discrimination claims above there was nothing in the process followed or the language used by Mr Weeks or Mr Payne to suggest they had treated him
10 less favourably than they had treated, or would treat, a woman. The language complained of did not suggest gender bias to the tribunal.

Indirect disability discrimination – section 19 of the Act

77. The list of issues contained a complaint that the respondent operated a provision, criterion or practice during the recruitment process of giving
15 preference to candidates with qualifications and experience in the textiles field. He was allegedly placed at a disadvantage by its application as it resulted in him not being invited to an interview.

78. However, it was not made clear why the claimant believed that he was put at that disadvantage in relation to his disability as opposed to his perceived
20 experience or skills, or why other persons sharing his disability would also be put at a similar disadvantage. The skills requirement was not obviously linked to the disability for that to follow.

79. For completeness the tribunal considered whether a complaint made in relation to reasonable adjustments – dealt with in detail below – was one
25 which would more suitably be put forward as an allegation of indirect discrimination. This was the stated requirement for candidate who was 'patient, joyful, skilled, friendly and with a good sense of humour'. However, again the tribunal had no evidence that it either put the claimant at a disadvantage in the process, or would put others with the same disability at a
30 similar disadvantage. In particular, his application suggested to the

respondent that he did have those attributes, and he was not marked less highly than other candidates because they were able to impress the panel more than he could in relation to them. Rather, evaluation of the applications was based on evidence of the relevant skills and experience of working with
5 tapestry and embroidery, and in groups. Additionally, that wording was balanced out by words used elsewhere in the brief where, for example, lived experience of recovery was said to be welcome.

80. The tribunal could therefore not identify any way in which a claim of indirect disability discrimination could succeed on the basis of the evidence before it.

10 *Failure to make reasonable adjustments – sections 20 and 21 of the Act*

81. There are two complaints of failure to make reasonable adjustments:

a. That the respondent ought to have provided feedback to the claimant in a positive and constructive way rather than in a negative and toxic way, as it allegedly did. The provision, criterion or practice that the
15 respondent operated was a practice of giving feedback to applicants in the latter manner. It put him at the disadvantage of being more emotionally upset than a person who did not suffer from depression would be; and

b. That the respondent ought to have used different language in the brief
20 which was more welcoming to disabled candidates and did not suggest they were unsuitable – the claimant referred in particular to the '*Artists Sensibilities*' section of the brief which required '*someone who is patient, joyful, skilled, friendly and with a good sense of humour*'. The provision, criterion or practice in question was the use of language
25 which was more likely to attract or favour people unaffected by depression. This put the claimant to the disadvantage of being less likely to be selected for interview.

82. Before a complaint of failure to make reasonable adjustments can succeed, the claimant must prove that the employer had knowledge of two things - the
30 disability being relied upon and the substantial disadvantage caused to them

by the provision, criterion or practice in question. Knowledge can be actual, in the sense of something genuinely known, or constructive – where it is deemed that the employer ought to have known even if they did not because of the evidence reasonably available to them.

5 83. As the complaints have been framed, it is said that the respondent ought to have made the required adjustments no later than 10 July 2022 in relation to the wording of the brief, and on 12 July 2022 in respect of Mr Weeks' feedback. The issue for the claimant is that the respondent did not know either that he was disabled or that each provision, criterion or practice was putting
10 him (or would put him) at a substantial disadvantage compared to persons not affected by the same disability. The only material that the respondent had available to it was the claimant's application and his brief email of 11 July 2022 in which he requested feedback. Those items did not contain sufficient information to convey that the claimant had been significantly affected by
15 depression in his daily life on a long-term basis.

84. The only part of the application which even hinted at his condition was a passage in which he said *'At a certain time in my life, I found myself at a cross road. Something happened to me and I had to find a way to live in a particular way.'* Mr Weeks did not take from those words, or any part of the application,
20 that the claimant had a disability. The tribunal accepted his evidence as credible on the point.

85. As stated above, an employer may be deemed to have knowledge of a disability or a disadvantage if they ought to have known it. The tribunal considered this and reached the view that, whilst the claimant may have been
25 referring to his depression, that was by no means clear and could have been a reference to any number of life events which would not automatically imply the existence of a disability, such as for example the death of one's parents or a relationship coming to an end. In that sense Mr Weeks, and the respondent, could not reasonably have been expected to decode the
30 claimant's words.

86. As the claimant was unable to prove that the respondent had knowledge – actual or constructive – of both his disability and the substantial disadvantage caused to him by each provision, criterion or practice alleged, the complaint of failure to make reasonable adjustments cannot succeed.

5 *Harassment complaints – race, sex, age, disability – section 26 of the Act*

87. The claimant alleged harassment by the respondent on the basis of one or more of race, sex, age and disability. He complained about four things:

- a. The provision of feedback by Mr Weeks in his email of 12 July 2022;
- b. Failure to provide access to a complaints process on 12 July 2022;
- 10 c. The provision of further comments by Mr Payne in his email of 13 July 2022 and
- d. Ms Hollows effectively endorsing what Mr Weeks and Mr Payne had earlier said in her email of 29 July 2022.

15 88. For a harassment complaint to succeed, the claimant must show that (i) the conduct complained of happened, (ii) it was unwanted conduct and (iii) it related to a protected characteristic – in this case one or more of race, sex, age and disability.

20 89. The tribunal accepted that in relation to 'a', 'c' and 'd' above those events happened. Each was an email which was produced to the tribunal. The tribunal did not accept however that the respondent failed to provide a complaints procedure. The evidence before the tribunal was that the respondent did so, for example in Mr Weeks' email of 12 July 2022, the email from the HR People Manager on 13 July 2022, and Mr Payne's email of 13 July 2022. The claimant said in evidence that the generic link he was provided with related to a different type of complaints procedure. The tribunal considered however that the respondent had done enough by confirming the name of its Chief Executive.

25 90. In relation to the three emails, the tribunal accepted that they were unwanted from the claimant's point of view. He did not agree with their content and was

upset by it. However, the tribunal could not see that the sending of any of those emails, or any part of the wording used within them, related to any protected characteristic. The tribunal considered that the words chosen by each individual were permissible and intended to be helpful. It did not for
5 example agree with the claimant's assertions that:

- a. Mr Weeks referring to his project proposal being '*a little prescriptive*' hinted that the claimant was too old to change his ways;
- b. Mr Weeks wishing the claimant '*a pleasant summer*' was a veiled jibe concerning his race, as Scottish weather was not as hot as in France;
10 or that
- c. Mr Payne saying that the selection panel was '*looking for something a little different*' was a tacit reference to the claimant's age, gender or nationality not fitting a predetermined ideal.

91. It was therefore not necessary for the tribunal to decide whether the above
15 three emails violated the claimant's dignity, or created an intimidating, hostile, degrading, humiliating or offensive environment for him. The tribunal considered in any event that, as the claimant did not get to the point where the respondent provided him with a workplace, it was difficult to see that any of them could have created any kind of 'environment' for him at all. Although
20 the claimant clearly felt that they violated his dignity, a tribunal is bound by section 26(4) of the Act to consider whether it is reasonable that he should be affected in that way. The tribunal concluded that it would not be. Each of the three emails was written in civil and professional language. The claimant's perception was genuine, but not one which was objectively reasonable.

Conclusion

92. Although the claimant satisfied the tribunal both that he was a skilled individual and that he had a disability under the Act, he was unable to prove the factors necessary for each of his complaints to succeed. Accordingly his claims must be dismissed.

B Campbell

Employment Judge**21 November 2023
(corrected 2 January 2024)****Date****03 January 2024****Date sent to parties**