EMPLOYMENT TRIBUNALS

Claimant: Mr F Edreira

Respondent: Severn Waste Services Limited

Heard at: Midlands West

On: 26, 27, 28 and 29 February 2024

Before: Employment Judge Faulkner
Mrs S Bannister
Mr J Wagstaffe

Representation: **Claimant** - in person
Respondent - Miss C Mallin-Martin (Counsel)

JUDGMENT having been sent to the parties on 4 March 2024, and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Introduction

1. This is a case about alleged age discrimination and harassment, which the Claimant says occurred after he reached age 66, which he regards as the age at which the Respondent wanted employees to leave. He says that the alleged discrimination and harassment was thus designed to force him out at that age. The issues below were those the Tribunal had to decide, discussed with the parties at case management hearings and again at the start of this Hearing, and set out in the order adopted in the parties' draft list of issues, which is not entirely chronological.

Issues

Direct discrimination

2. Did the Respondent subject the Claimant to the following treatment:

2.1. Move him from the paper cabin to the plastic cabin in May 2022. The Respondent accepts that the Claimant was asked to move to the plastic cabin but does not accept that he performed any material work in that cabin before he complained and was moved back to the paper cabin. The Claimant compares himself to everyone else who worked in the paper cabin and who was not moved.

2.2. Move the Claimant from the paper cabin to the glass cabin in July 2022 (it is accepted this was in fact in May 2022). The Respondent accepts that this happened. The Claimant compares himself to everyone else who worked in the paper cabin and who was not moved.

2.3. In 2021 (it was accepted that it was in fact no later than 2014), Arthur Jones, a former cleaner for the Respondent, told the Claimant's wife (who remains employed by the Respondent) that the Respondent's Operations Director had said that the Respondent did not want people aged over 66 working there. The Claimant was not able to identify a comparator. We made clear at the outset that we could not see in any event how this could be said to be a complaint of direct discrimination, given that it did not relate to any treatment of the Claimant by the Respondent, though we noted that it was pursued alternatively as a complaint of harassment.

2.4. In June or July 2022, by Mr Idris Buraimoh, ask the Claimant if he wanted a chair. The Claimant compares himself to everyone else who was not asked if they wanted a chair.

2.5. Send the Claimant a letter dated 18 July 2022 warning him about being absent without leave despite his having left a message (directly or via Mrs Edreira) with Mr Buraimoh that he was off sick. The Respondent accepts that this happened but says that it was a mistake because Mr Buraimoh was also off sick at the time and did not report the Claimant's absence. The Claimant compares himself to Fernando Oliveira whom he says also left a message with Mr Buraimoh and was not sent such a letter.

3. The Respondent accepted that if the matter at paragraph 2.3 above happened, it was a detriment, but otherwise did not accept that by any of the other matters above the Claimant was subjected to a detriment.

4. Was that treatment less favourable treatment, that is, did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others (known as "comparators") in not materially different circumstances? The Claimant relied on the actual comparators set out above and/or hypothetical comparators.

5. If so, was this because of the Claimant's age? As noted above, his case was that the treatment was because he had reached age 66, which he regards as the Respondent's retirement age, or putting it another way was it because he was over that age?

6. The Respondent had indicated that it wished to show that the treatment was a proportionate means of achieving a legitimate aim but having considered the matter, in the light of relevant case law, informed us that it did not seek to do so.

Harassment related to age

7. Did the Respondent engage in the conduct set out above for the direct age discrimination complaints.

8. Was that conduct unwanted?

9. Did it relate to age?

10. Did the conduct have the purpose or the effect (taking into account the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect) of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Time limits

11. The complaint related to the comment by Arthur Jones was presented to the Tribunal after expiry of the relevant time limit. The issues for us to determine were:

11.1. Was it conduct extending over a period ending with an act of discrimination or harassment the complaint about which was presented in time?

11.2. Otherwise, was the complaint presented within such further period after expiry of the time limit as the Tribunal thought just and equitable?

Case history and hearing

12. At a Telephone Case Management Preliminary Hearing before Employment Judge Kelly on 23 March 2023, the Claimant was permitted to amend his Claim to add a complaint of victimisation. At a Public Preliminary Hearing before Employment Judge Harding on 31 August 2023, the Claimant was permitted to amend his Claim to add the first direct discrimination/harassment complaint set out above; a further amendment application was refused. EJ Harding made a deposit order in respect of the victimisation complaint. The deposit was not paid and so that complaint was struck out by Employment Judge Wedderspoon on 2 January 2024.

13. The parties agreed a bundle of documents comprised of around 250 pages. References to page numbers below are references to that bundle. Witness statements were produced and oral evidence given by the Claimant, Estela Edreira (the Claimant's wife), Fernando Oliveira (formerly employed by the Respondent as an operative), Jolanta Kruk (who remains employed by the Respondent as an operative), Jo Hornby (nee Birkett, the Respondent's HR Manager), Pete Darby (the manager at the site where the Claimant worked) and Fernando Capelastegui (the Respondent's Operations Director). Alphanumeric references below are references to the statements, for example PD4 is paragraph 4 of Mr Darby's statement.

14. Before hearing any evidence, we read the statements, the first 98 pages of the bundle, all of the documents referred to in the Claimant's statement and some additional pages which Miss Mallon-Martin asked us to read, making clear that it was for the parties to take us during oral evidence to anything else they

wanted us to consider, including other documents referred to in the Respondent's statements. Our findings of fact below were made taking all of that evidence into consideration and, where there was a dispute between the parties, on the balance of probabilities. We did not address in our findings every detail raised by the parties, focusing on those matters pertinent to the issues we had to decide, though that does not mean that those details were ignored.

Facts

Background

15. The Claimant was employed by the Respondent from 4 December 2006 until his dismissal on 23 October 2023, as an operative at its waste processing site in Worcester. The Respondent's business concerns taking co-mingled recycling and selling it on once it has been sorted. There was no complaint before us regarding the Claimant's dismissal. The Respondent has over 20 sites in total and over 300 employees.

16. The Claimant was employed on the day shift. There were 49 employees on that shift at the Worcester site, and around 80 employees working there in total; he was the only employee aged over 66 on his shift. This is shown by page 243 which is a record of employees on the day shift on 16 May 2022, though four other employees were aged 60 or over, and around half were aged 50 or over, with an age range from 21 to 66. A full workforce breakdown (apparently from September 2023) is at page 190 – 25 employees, or 8%, were 66 or over, 56% of staff were over 50, 27% were over 60 and 3% were over 70 across all of the Respondent's sites. Mr Capelastegui says (FC9) that the Respondent has never compelled anyone's retirement; he told us people retire when they wish to do so, as long as they can do the work. We will come back to that in our conclusions. Mr Capelastegui himself is 61 years old.

17. The Claimant's written contract of employment is at pages 244 to 248. On the question of flexibility, it said that the Respondent reserved the right, notwithstanding the Claimant's job description, to require him to undertake any duties which may be reasonably required of him, including those carried out by the other categories of staff employed by the Respondent, and, where operational needs require it, to transfer him to alternative work (or locations) after due consultation.

18. The Respondent says that staff are not assigned to any particular line or cabin permanently and are regularly moved for various reasons, including to ensure fairness between employees because some areas are more popular than others. The paper cabin is popular because it is physically light work in a large team. As Mr Darby says at PD4ff the glass cabin involves removing small and light items that have not been sorted via an automated cleaning system, whilst the plastic cabin involves removing small items from the line. Mrs Hornby says (JH5) that whilst there are some duties only some employees can do, others can be required of pretty much anyone. At JH6 she says that it is important to move staff around to cover all areas of the plant operationally when people leave or are off sick or where there is high demand, that one move can also lead to others, and that moving staff between tasks is also important so that they remain trained and skilled.

19. For 10 years up to May 2022, the Claimant worked only in the paper cabin, he says because he could not do heavy lifting after undergoing surgery in 2012 and 2015. Mrs Edreira was also based there. Whilst the Claimant says it is rare for someone to move cabins, particularly once they have worked in one place for a while and are good at what they do, he worked in five different areas of the business himself prior to his surgery. Mrs Edreira has worked in the paper cabin for 11 years and Ms Kruk for 7 years; she told us she recalls one colleague being moved from that cabin, and whilst others have also been moved, that was usually only for a few days.

20. When Mrs Hornby joined the Respondent in August 2018, she found things had been badly documented or not stored properly. As a result, she was initially unable to find information about some of the things the Claimant raised either whilst still employed by the Respondent or during these proceedings, including information about his health. A recent change to an electronic filing system revealed that his medical records had been placed on Mrs Edreira's file. We accepted that as an explanation of why the Respondent told the Claimant during correspondence and a grievance process (see below) that it had no record of his medical condition but was then able to provide him with the records which were included in the bundle.

21. Mr Darby says at PD10 that when he joined the Respondent in September 2019 on the twilight shift, he found a chaotic situation, with employees basically doing what they wanted. He took on responsibility for the day shift in April 2021 and says that things were not running well there either. He and Mrs Hornby told us that the previous manager did not move anyone from one task to another if they resisted doing so, with the result that routine allocation of employees to different types of work did not take place. We accepted that unchallenged evidence. Mr Darby says that this has changed under his leadership, saying at PD8 that there is a fair amount of staff turnover and sickness which means that he shuffles people about on "most shifts". When he started to move people around, there were a number of informal complaints (JH8). Mrs Hornby has dealt with 6 or 7 complaints about moves over the last couple of years or so; a recent complaint came from an employee in their mid-40s.

Comments

22. The Claimant turned age 66 on 3 November 2021; he wanted to work for another 18 months. He fairly accepted that he has no evidence of anyone being forcibly retired at that age apart from what he says in relation to Arthur Jones which we now come to.

23. In his email to Mrs Hornby dated 15 July 2022 (page 104 – we will come in more detail to the full exchange of emails), the Claimant referred to two comments he said he had heard, both of which he relies on before us as evidence of the Respondent wanting employees to leave when they reached retirement age and one of them as a specific complaint of age discrimination/harassment. What he said in his email was, "Let me rephrase what I meant. I heard someone tell that in the meeting you and Fernando had with the twilight people he said people with more than 66 years should retire and also the person that was cleaning the toilet before Neil want to continue working but Fernando did not let him [this was a reference to Arthur Jones]".

24. The first comment was attributed to Mr Capelastegui. The Claimant says he had heard that Mr Capelastegui had said to the twilight shift in the canteen that people over 66 should retire. The Claimant was not there when the alleged comment was made, but Mrs Hornby was. She said to the Claimant, and to us, that Mr Capelastegui was simply congratulating a colleague who had decided to retire and did not say that people should retire at 66 or anything like it. The Claimant's case is that even if this is what was said, it was encouraging people to retire at 66. For himself, Mr Capelastegui confirms Mrs Hornby's account and, as already noted, is insistent that there is no wish to retire people who want to keep working at any age. Particularly as the Claimant was not present on the occasion in question, and is therefore relying on rumour, we had no hesitation in accepting the evidence of Mrs Hornby and Mr Capelastegui on this point. Further, we could not accept the Claimant's suggestion that congratulating an employee who has decided to retire was a means of, or resulted in, encouraging others to follow suit.

25. The second comment references a former cleaner for the Respondent called Arthur Jones. The Claimant reported to Mrs Hornby in his email that he had heard from Mrs Edreira that the person who was the cleaner before someone called Neil wanted to continue working but Mr Capelastegui did not let him. This person was originally thought by the Respondent to be someone called Maurice but it is agreed that it was in fact a reference to Arthur Jones. Mrs Hornby has since looked at Mr Jones' records and discovered that he left the Respondent in 2014 at age 64 after 5 years' service. The records only say that he left to work elsewhere. Attempts to contact Mr Jones have been unsuccessful. Mr Capelastegui does not recall Mr Jones or any conversation with him. He categorically denies ever saying that the Respondent did not want employees over age 66 and (FC6) that it is such a vague allegation, he is unable to work out what he is alleged to have done. Mrs Edreira did not refer to this conversation in her statement, but confirmed it in oral evidence.

26. We concluded that the comment was not made, for two reasons. The first was the almost complete absence of dealings between Mr Capelastegui and Mr Jones. The second was equally important, namely that the evidence of the comment was very much hearsay evidence, even from Mrs Edreira, and relates to a point in time many years ago. It was thus impossible for us to have any confidence that Mr Jones understood correctly what was said to him, if anything was said, or whether Mr Jones was making assumptions based on something else he had heard from someone other than Mr Capelastegui. Furthermore, as the Respondent pointed out, we had no evidence of the reason Mr Jones left its employment, and he has not been contactable, other than the Respondent's record that he left to go to another job. The Claimant accepted that the comment was reported to him by his wife whilst Mr Jones was still in the Respondent's employment. As he confirmed, it was not directed at him; he also said it had no effect on him.

Move to plastic/glass cabins

27. In May 2022, a supervisor called Peter Gdanis and a colleague called David Jacobs came to see the Claimant at the paper cabin during the course of one afternoon and told him to go with them. They then assigned him to work in the plastic cabin. The heart of the Claimant's case is that there was no need or justification for this change in his duties. It is accepted that no explanation was given for it at the time. As we have indicated, there was nothing on the Claimant's file saying that he needed to undertake light duties, though the

Respondent's case is that the work in the plastic cabin constituted light duties in any event. Mr Oliveira, who had been working in the plastic cabin for 3 years, was moved in the opposite direction, to the paper cabin. He was not given any explanation for the move either. He was surprised at being moved and surprised that the Claimant was put into the plastic cabin, particularly given that at times he would be working alone.

28. Either immediately, or more likely after working in the plastic cabin for a very short period, the Claimant complained – we assume to Mr Gdanis – that for medical reasons he could not twist around to his left to put items in the bin. He says that in response he was told to work on the other side, which he thought was unsafe. Mr Darby regards it as highly unlikely the Claimant was told to do this, saying that it would have been next to impossible given how things are set up. We did not need to decide whether this instruction was given, though we were inclined to doubt it given the safety issues it would have raised. Eventually the matter was referred to Mr Darby and as a result the Claimant was returned to the paper cabin the same day until his shift was completed. The Claimant says that Mr Oliveira was swapped back to the plastic cabin, but both the Respondent and Mr Oliveira himself told us that he stayed in the paper cabin. We thought the balance of the evidence clearly indicated that Mr Oliveira did not move out of the paper cabin to return to the plastic cabin, for the additional reason that the Claimant did not remain in the paper cabin himself so that there was no displacement of Mr Oliveira by his doing so. This is because on his next shift the Claimant was asked to move again, to work in the glass cabin. This request came from Mr Buraimoh, who had been a supervisor on the shift for about 6 months by that point.

29. As indicated in a later welfare meeting with the Claimant in December 2022, Mr Darby was able to confirm that four people had been moved at the same time – page 141. The Claimant himself acknowledged at his later grievance hearing that a colleague called Steve Wagstaff was also moved out of the paper cabin (page 122) though he cannot recall if it was the same day. Mr Wagstaff is now aged 56, and so would have been around 54 at the time. The Claimant has no knowledge of two other staff also being moved. Mr Darby told us the four were the Claimant, Mr Oliveira, Mr Wagstaff and one other employee he cannot recall – though he does recall that Mr Gdanis gave him the names the following morning at their daily supervisors' meeting. Whilst one of the individuals is unidentified, we had no hesitation in accepting Mr Darby's evidence on this point, which was in any event not really contested.

30. As for the reason for moving the Claimant, at PD13 Mr Darby wrote that he did not recall why but "for some reason" the Respondent needed someone to work in the plastic cabin. He speculated that someone could have resigned or called in sick or been moved elsewhere and emphasised that it was Mr Buraimoh who decided the Claimant should be moved, not Mr Darby himself. Mr Darby went on in his statement to say that he had since asked Mr Buraimoh the reason for these moves and was told that Mr Buraimoh does not recall it. Mr Darby sought to emphasise that such moves are completely routine.

31. In his oral evidence however, Mr Darby told us that the Respondent had noticed a lot of contamination in the bales being produced from the plastic cabin and that following some investigation it was noted that Mr Oliveira was sometimes not in the cabin when he should have been. He was moved to the paper cabin as a result of that (where there are more workers) and the Claimant

was selected to replace him, Mr Darby presumes because he would pick more accurately. When asked why this was not in his statement (signed on 18 January 2024 and therefore little more than a month before this Hearing) Mr Darby told us he had thought about the case more, and recollected more information. He later told us however that he had always known why Mr Oliveira had been removed from the plastic cabin. He could not explain, in the light of that evidence, why his statement says what it does. He added that reasons are not given to staff when they are moved, most staff never ask for one, and that it would have been unprofessional to tell the Claimant that there was an issue with Mr Oliveira's work.

32. We could certainly accept the last of those points. As for the reason for moving Mr Oliveira out of the plastic cabin, whilst what Mr Darby said would seem on its own terms to be a plausible explanation, the development in his evidence, only a month after he signed a statement saying something markedly different, was noteworthy to say the least. We do not say that he was trying to mislead the Tribunal, because we found him to be a straightforward witness, but we could not accept the reliability of his oral account given its fundamental inconsistency with his written statement. We concluded therefore that there was no reliable explanation before us of why Mr Oliveira was moved. We did accept however the Respondent's submission that Mr Darby did not seek to give us an explanation of why the Claimant was moved which in any sense differed from his statement, as he made clear that he was only surmising in his oral evidence that the Claimant was selected to replace Mr Oliveira because of his experience.

33. At PD12, Mr Darby gave an example of an employee, who is aged 41, who was moved multiple times over a year to 18 months to cover staff shortages. Usually, Mr Darby told us, someone who has done the relevant work before will be moved where the need arises. The Claimant did not dispute that this employee was moved as Mr Darby described.

34. The Claimant's case is nevertheless that what happened to him in May 2022 was because of (or related to) age as it had never happened until he reached what he calls retirement age. He says it triggered what had happened to him 10 years before (see below) and that he was fearful and anxious that the same things could happen again. Given his health he was also concerned about working alone in the plastic cabin and similarly concerned about working in the glass cabin where there could be two workers, but often only one.

Chair

35. The Claimant says that around the same time as the move, Mr Buraimoh asked him if he wanted a chair when he had not asked for one. The Claimant replied he did not want one. Mr Buraimoh did not give a reason for the offer, though there was nothing unpleasant or rude about the way in which he asked the question. The Claimant told us he believes Mr Buraimoh was told to offer it – we assume by management – as part of the Respondent's aim to get him to leave as someone who had reached age 66.

36. The Respondent says it is commonplace to offer appropriate support which will help employees be more comfortable at work and that chairs are routinely offered to those on light duties or feeling unwell. It says that because shifts are 10 hours long it is not uncommon for people to need to sit, and that chairs can also be offered long-term as an adjustment for health reasons. Mrs Hornby's

evidence (JH38) was that chairs are routinely offered to staff who might find them beneficial, because of health or pregnancy, some would prefer not to use them, whilst others may use them from time to time. Mr Darby told us of a pregnant woman, and a male employee, who were both offered chairs for use should they need them. By contrast, the Claimant and his witnesses told us that no such equipment is given unless an employee has a medical note. The Respondent says that this confuses the general availability of chairs when needed ad hoc, and those who need them long-term. The Claimant insisted that the Respondent did not let employees sit down during their shifts and that he did not see anyone using a chair.

37. As for the offer of a chair to the Claimant, Mrs Hornby says that Mr Buraimoh cannot recall making the offer or why it was made, because it is such a routine occurrence. Mr Darby's account (PD31) is that when the Claimant was moved to the plastic cabin, he disclosed his health condition, with Mr Buraimoh present, and that he would not be surprised if the offer was made soon afterwards, that is because Mr Buraimoh had become aware of the Claimant's health concerns. The Claimant does not recall telling Mr Buraimoh about his health condition before May 2022, though he says that the Respondent's workplace was an environment where "everyone talks".

38. We concluded on balance that chairs were not routinely offered to employees in or around May 2022. There were four witnesses before us who were working in cabins every day at that time who told us that they never saw it happen. On the other hand, Mr Darby and Mrs Hornby say that it did, but by the nature of their roles, they were (and are) only infrequent visitors to the cabins and it is much more likely that the question of providing a chair would only have come to their attention when needed on a long-term rather than a casual basis. We also concluded that, whilst the Respondent – no doubt with the involvement of Mr Darby and Mrs Hornby – would have provided chairs when they had supporting information that to do so would meet a long-term need, it is inherently much less likely that supervisors routinely went into cabins asking if anyone needed a chair. As to whether Mr Buraimoh offered the Claimant a chair, we concluded that he did. The Claimant says he did; Mr Buraimoh cannot recall whether he did or not, and was not present to give evidence on the point.

39. The Claimant also says that Mr Darby asked him, with Mr Gdanis also present, why he took a long time in the toilet and that after "a certain age" people can have problems "down there". He told us that the comment was made when he moved to the glass cabin, and that Mr Darby also added that the Claimant could tell him if he had a problem in this respect. Subsequently, he says, Dave Jacobs was regularly seated in the canteen, writing down the names of those going to the toilet and how long they took. Mrs Edreira told him that this stopped when the Claimant went on sick leave (see below). Mr Darby told us he had no recollection of making any such comment, had no reason to make it, and in any event cannot see who visits the toilets from where he is based. He confirmed that Mr Jacobs was asked to sit in the canteen where he could see the toilets, as a deterrent to people going to the toilet area together for unscheduled breaks at exactly the same time each day. This has been done twice in three years.

40. We concluded on balance that Mr Darby did not make a comment to the Claimant about him regularly going to the toilet, for two reasons. First, it seems a comment (as Mr Darby himself said) which would have been incongruous with the rest of their conversation about the Claimant's specific health condition.

Secondly, Mr Darby had no personal awareness as to who was using the toilet at any time. As to why Mr Jacobs sat in the canteen, we were satisfied that this was for the reason given by Mr Darby.

AWOL letter

41. Unauthorised absence was a big issue at the time Mrs Hornby commenced employment with the Respondent. As a result, she put in place a clear policy requiring staff to report any absence on day 1, and that if this were not done a template absence without leave ("AWOL") letter would be issued. There had been no issue with the Claimant reporting sickness absence in 16 years.

42. On 18 July 2022, 18 of 40 day shift employees at the Worcester site were absent. The Claimant and Mrs Edreira were two of them. Mr Gdanis decided that those who had not turned up and had not reported their absence should be sent AWOL letters. As it turned out, one of the Claimant and Mrs Edreira had in fact called Mr Buraimoh about their absence. The Respondent was subsequently able to confirm that to be the case, but Mr Buraimoh was also off sick and did not pass on the message. At the request of Mr Gdanis, Mrs Hornby asked her assistant to send the template AWOL letter to the employees marked on a list sent to her by Mr Gdanis. On the same day therefore, the Claimant was sent the letter at page 109, in Mrs Hornby's name, saying that he had not attended work and had not reported his absence, with no explanation, meaning that the Respondent would consider him to have resigned if he did not contact Mr Darby by 5pm on 20 July 2022. Failure to report absence was described as a serious disciplinary offence. Mrs Edreira also received an AWOL letter; she is younger than the Claimant, as did a number of other employees. The Claimant's case was that the letter sent to Mrs Edreira was a cover to disguise the real reason one was sent to him, namely his age; he added that the other employees who received the letter were also people the Respondent wanted rid of.

43. Mr Oliveira (who was aged 53 at the time) was not sent an AWOL letter. The Respondent has not been able to establish why with any certainty, but believes that Mr Oliveira's car share partner is likely to have reported it. The table at page 54 indicates that a number of absences were reported in this way. It also shows that of the 18 employees who were absent, 6 got a letter, with an age range of 45 to 66. Those who reported their absence in some way and so did not get a letter (including Mr Oliveira) were aged 21 to 61.

44. Mrs Hornby details the position further in her statement at JH30-1. Eight employees had notified their absence. Eight other employees had notified Mr Buraimoh. Of these, six employees had told only Mr Buraimoh, and two had officially notified someone else as well. The Claimant and his witnesses say that this is not an explanation for what happened, as whenever someone is absent the Respondent requires them to phone in themselves, without exception. Mrs Hornby says there is a difference between not reporting in at all and not reporting by the correct means. The former means the Respondent considers a person to be AWOL; the latter does not, though there would be a conversation about failure to report absence correctly when that person returned to work. The Respondent would only issue an AWOL letter if it had heard nothing about the absence at all (JH33).

45. As stated above therefore, six AWOL letters were issued, two correctly and four incorrectly (including the Claimant and Mrs Edreira). Of the four who were

issued letters incorrectly, the three other employees were 55 (Mrs Edreira), 65 and 53. The method of reporting amongst those who did not get letters is not clear in all cases. As with Mr Oliveria, the Respondent assumes that some reported their absence via their car share partner. The Claimant worked on 20 July 2022 and the letter was waiting for him when he got home. He regards the Respondent's actions with suspicion because he has never had an issue reporting absence before over many years of employment. He describes this as the worst of the events in question, showing him without doubt that the Respondent wanted rid of him.

Sickness absence and grievance

46. Shortly after 18 July 2022, the Claimant went on sick leave. The Respondent held several welfare meetings with him, the main aims of which (PD35) were to update the Claimant so that he was engaged ready to return to work, and to work through his concerns about the working environment.

47. On 1 June 2022, the Claimant had emailed Mrs Hornby (page 99), in part complaining about events 10 years previously and indicating that things had happened recently which were repeating it. As the email said, and as the Claimant told us, what happened 10 years before was that he had been given a sick note saying he should not lift heavy items and so went to work in the paper cabin where the work was light. Sometime later, the then supervisor, Mark Williams, told him to go to the 3D cabin which involved moving heavier items. He does not know why this happened but guesses that the Respondent wanted rid of him. He also got an AWOL letter around that time, he says again incorrectly, though on that occasion only after 5 days of absence.

48. Email exchanges between the Claimant and Mrs Hornby followed, with the Claimant acknowledging (page 100) the need to move between cabins (he told us, when there is a valid reason). He wrote, "I fully understand that an operative has to work where the company wants and needs you". Mrs Hornby sought clarification of the Claimant's concerns and to arrange a meeting, and during their exchanges the Claimant enquired about redundancy, he says because it was clear the Respondent wanted him to leave. Mrs Hornby told him this was not on offer (page 102), saying, "I am not sure why you think the Company wants you to leave as this is not the case".

49. On 13 July 2022 the Respondent received a fit note, saying that the Claimant was fit for light duties, excluding heavy lifting (page 225). It was then that he sent the email at page 103 referred to above (on 15 July 2022) and first mentioned that what had happened was because of his age. He says at this point he could see the whole picture.

50. The Claimant visited the CAB on 22 July 2022, and called Mrs Hornby from that meeting. She told him if there had been a misunderstanding about his absence on 18 July, there would be no issue. The Claimant submitted a grievance letter on the same date (page 112), saying that he was stressed and harassed at work because of the change of duties and the AWOL letter. He did not mention age or discrimination. The grievance was heard on 3 August 2022 by Mr Darby. We did not consider the notes of that hearing except to the extent we were taken to them in oral evidence. Mr Darby's decision letter was sent on 16 August 2022 – pages 124 to 125. In relation to the AWOL letter, it was said no action would have been taken without investigation. That part of the

grievance was upheld and an apology given, though the Claimant says that by then the damage was done. The letter also referred to moving staff from cabin to cabin as an operational necessity.

51. The Claimant appealed this decision, but did not attend an appeal hearing. The appeal decision was taken by Mr Capelastegui and sent to the Claimant on 16 September 2022 (pages 127 to 128). On the question of the change in duties, it said that the Claimant had been assigned to a cabin the Respondent regarded as light duties; operational requirements mean people are commonly moved around, ensuring staff remain skilled in various areas to ensure the smooth running of the facility, moving more experienced staff to areas where quality requires attention and moving staff in and out of less popular areas to ensure fairness. It added that the size of the paper cabin meant that less experienced staff can be placed there while experienced staff are deployed elsewhere.

52. Mr Capelastegui's letter also said that the Claimant could stop the machinery if he needed to get help lifting heavy objects off the conveyor whilst working in the glass cabin. The Claimant says that it does not make sense to put him in a position where this was likely to be needed, if the point of moving people around was to ensure operational efficiency. Mr Capelastegui told us it would be very unusual for a heavy item to get past various prior processes into the glass cabin, which we accepted. Mr Darby agrees, and told us in unchallenged evidence, that in any event the line is stopped for all sorts of reasons multiple times each day, which again we accepted. Mr Capelastegui's letter ended by saying that the Respondent looked forward to welcoming the Claimant back to work.

53. In a report on 8 November 2022 (page 132), the Claimant's GP requested (apparently not for the first time) that the Claimant continue indefinitely on light duties and said he should not lift over 5kg. Mrs Hornby wrote in reply on 2 December 2022 (page 145) to say none of the cabins required lifting weights above 5kg and nothing was proposed that would change that. On 27 January 2023 (pages 150 to 154), the Respondent carried out a weight assessment of various cabins as an update to its site risk assessment. It shows that staff in all cabins except plastic could be required to lift up to 8kg. Plastic is the lightest. In relation to glass, the assessment says that there is discretion for an operative to empty a bin before it gets to 8kg. The Claimant questions the reliability of this information, saying the health and safety manager who wrote it could be very competent, but is not independent. We saw no reason to doubt the accuracy of the report.

Time limits and other matters

54. ACAS Early Conciliation took place from 8 August 2022 to 19 September 2022, the ET1 Claim Form being filed on 21 September 2022. The complaint relating to Mr Jones was plainly well out of time. As to why it was presented late, the Claimant said it was many years ago and he could not complain for another person; he said Mr Jones should have complained.

55. Mr Oliveira told us he believes he was dismissed by the Respondent because he was a witness for the Claimant in these proceedings. We found his evidence as to the reason for his dismissal confusing. The Respondent says it was for stealing items from the line, conduct which Mr Oliveira denies, but without properly deciding the point it appeared clear to us that this was what the Respondent relied on. The date of dismissal was 3 January 2024; it appears

statements were exchanged after that. The Claimant asked Mr Oliveira to be a witness before his dismissal but Mr Oliveira did not tell any manager about it. We were clear that based on the evidence before us – which we emphasise was very limited and cannot in any sense therefore be taken to be determinative – that the Respondent did not dismiss him because he was going to give evidence for the Claimant.

56. Mrs Hornby called Ms Kruk to meet with her after the exchange of witness statements. She asked her if she was a witness for the Claimant, and when Ms Kruk confirmed she was, said that this was not a problem for the Respondent, but she wanted to make Ms Kruk aware she would not be paid for her time at the Tribunal hearing, as although it related to the Respondent, she would not be on the Respondent's business; she made clear that Ms Kruk could take a day's holiday. Mrs Hornby wanted to avoid any misunderstanding after the event.

57. As already indicated, Mr Buraimoh did not attend the Tribunal hearing to give evidence. Mrs Hornby said that the Respondent had decided Mr Darby would be best placed to deal with the relevant issues, even though it was Mr Buraimoh who moved the Claimant to the glass cabin and offered him a chair. Mr Gdanis is no longer employed by the Respondent.

Law

Burden of proof

58. Section 136 of the Act provides as follows:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court [which includes employment tribunals] *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".

59. Direct evidence of discrimination is rare and tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] ICR 931**, updating and modifying the guidance that had been given by the Employment Appeal Tribunal ("EAT") in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205**. The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "there is nothing unfair about requiring that a Claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the Respondent's act was a discriminatory one) then the claim will succeed unless the Respondent can discharge the burden placed on it at the second stage".

60. At the first stage, the Tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful

act. Instead, it is looking at the primary facts to see what, if any, inferences of secondary fact could be drawn from them. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

61. Unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

62. In a harassment case, the first stage of the burden of proof is particularly relevant to establishing that the unwanted conduct was related to the protected characteristic, here age.

63. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the alleged act of discrimination or harassment. To discharge that burden, it is necessary for the Respondent to prove that the treatment was in no sense whatsoever on the prohibited ground. That would require that the explanation be adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

64. All of the above having been said, the courts have warned tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**. In some cases, it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination.

65. This decision was recently considered by the EAT in **Field v Steve Pye and Co (KL) Ltd and others [2022] EAT 68**. The EAT said that where there is significant evidence that could establish that there has been discrimination, it cannot be ignored. In such a case, where a tribunal moves straight to the "reason why" question it could only do so on the basis that it has assumed a claimant has passed the stage one threshold, so that the burden was now upon the respondent in the way described above. The EAT went on to say that if at the end of the hearing the tribunal concludes that there is nothing that can suggest that discrimination has occurred and the respondent has established a non-discriminatory reason for the impugned treatment, there would be no error of law in just answering the "reason why" question, but in fact the complaint would fail at the first stage. If having heard all of the evidence the tribunal concludes that there is some evidence that could indicate discrimination, but nonetheless is fully convinced that the impugned treatment was in no sense whatsoever because of the protected characteristic, it is permissible to reach a conclusion at the second stage only, but there is much to be said for properly grappling with the evidence and deciding whether it is sufficient to switch the burden of proof. Particular care should be taken if the reason for moving to the second stage is to avoid the effort of analysing evidence that could be relevant to whether the burden of proof should have shifted at the first stage.

66. Miss Mallon-Martin referred to the EAT's decision in **B v C and A [2010] IRLR 400** in which it was said that for the burden of proof to shift to the Respondent there has to be a reason for the Tribunal to believe that the explanation could be that the Respondent's behaviour was attributable (at least to a significant extent) to the protected characteristic.

Direct discrimination

67. Section 39 of the Act provides, so far as relevant:

"*(2) An employer (A) must not discriminate against an employee of A's (B)— … (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service … //(d) by subjecting B to any other detriment*".

68. Section 13 of the Act provides, again so far as relevant, "*(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*". The protected characteristic relied upon in this case is age. Section 5 of the Act says that in relation to age, a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group, and that a reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

69. Section 23 provides, as far as relevant, "*(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*".

70. The Tribunal had to consider therefore whether one of the sub-paragraphs of section 39(2) is satisfied, whether there has been less favourable treatment than a comparator, and whether this was because of the Claimant being aged 66, that is what he regards as the Respondent's retirement age.

71. In determining whether the Claimant was subjected to a detriment, "one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment? An unjustified sense of grievance cannot amount to 'detriment'" (**Shamoon v Chief Constable of the RUC [2003] UKHL 11**).

72. Miss Mallon-Martin referred to the Court of Appeal's decision in **Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting [2002] IRLR 288** which seemed to us to add little of relevance for our purposes other than that a hypothetical comparator should be considered where appropriate.

73. The fundamental question in a direct discrimination complaint is the reason why the Claimant was treated as he was. As Lord Nicholls said in the decision of the House of Lords in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Age being part of the circumstances or context leading up to the alleged act of discrimination is insufficient.

74. Most often, the act complained of is not in itself discriminatory but is rendered discriminatory by the mental processes (conscious or otherwise) which led the

alleged discriminator to act as they did. Establishing the decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances. In determining why the alleged discriminator acted as they did, the Tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for the protected characteristic to be significant in the sense of being more than trivial (again, **Nagarajan** and **Wong v Igen Ltd [2005] ICR 931**).

Harassment

75. Section 40 of the Act renders harassment of an employee unlawful. Section 26 defines harassment as follows:

"*(1) A person (A) harasses another (B) if - //(a) A engages in unwanted conduct related to a relevant protected characteristic [here, age], and //(b) the conduct has the purpose or effect of //(i) violating B's dignity, or //(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B …*

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account - //(a) the perception of B; //(b) the other circumstances of the case; //(c) whether it is reasonable for the conduct to have that effect".

76. The Tribunal was thus required to reach conclusions on whether the conduct complained of was unwanted, if so whether it had the requisite purpose or effect and, if it did, whether it was related to age.

77. It is clear that the requirement for the conduct to be "related to" age entails a broader enquiry than whether conduct is because of age as in direct discrimination. What is needed is a link between the treatment and the protected characteristic, though comparisons with how others were or would have been treated may still be instructive. In assessing whether it was related to age, the form of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it. In this case, the words used and the overall context fall to be considered.

78. The question of whether the Respondent had either of the prohibited purposes – to violate the Claimant's dignity or create the requisite environment – requires consideration of each alleged perpetrator's mental processes, and thus the drawing of inferences from the evidence before us. As to whether the conduct had the requisite effect, there are clearly subjective considerations – the Claimant's perception of the impact on him (he must actually have felt or perceived the alleged impact) – but also objective considerations including whether it was reasonable for it to have the effect on this particular Claimant, the purpose of the conduct, and all the surrounding context.

79. That much is clear from section 26 and was confirmed by the EAT in **Richmond Pharmacology Ltd v Dhaliwal [2009] ICR 724.** The words of section 26(1)(b) must be carefully considered; conduct which is trivial or transitory is unlikely to be sufficient. Mr Justice Underhill, as he then was, said in that case:

"A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard … whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …

"…We accept that not every racially [as it was in that case] slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"

80. It is for the Claimant to establish the necessary facts which go to satisfying the first stage of the burden of proof. If he does, then it is plain that the Respondent can have harassed him even if it was not its purpose to do so, though if something was done innocently that may be relevant to the question of reasonableness under section 26(4)(c). Violating and intimidating are strong words, which will usually require evidence of serious and marked effects. An environment can be created by a one-off comment, but the effects must be lasting. Who makes the comments, and whether others hear, can be relevant, as can whether an employee complained, though it must be recognised that is not always easy to do so. Where there are several instances of alleged harassment, the Tribunal can take a cumulative approach in determining whether the statutory test is met.

81. Miss Mallon-Martin referred to the EAT's decision in **Greasley-Adams v Royal Mail Group Ltd [2023] ICR 1031** in which it was said on the question of the effect of the unwanted conduct that a claimant must perceive it and that the context of the conduct is relevant.

Time limits

82. Section 123(1) of the Act provides that proceedings on a complaint under Section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. Section 123(3) says that for the purposes of this section conduct extending over a period is to be treated as done at the end of the period.

83. The provision for extending time where it is just and equitable to do so gives to tribunals wider scope than the test of reasonable practicability which applies for example in unfair dismissal cases. Nevertheless, there is no presumption that

it will be – **Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434**, though extending time does not require exceptional circumstances. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that similar considerations arise in this context as would be relevant under the Limitation Act 1980, namely the prejudice which each party would suffer as a result of the tribunal granting or refusing an extension, and all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

84. In **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** Leggatt LJ in the Court of Appeal said that Parliament has given tribunals "the widest possible discretion" in deciding whether to extend time in discrimination cases. Notwithstanding **Keeble** there is no list of factors which a tribunal must have regard to, though the length of and reasons for delay, and whether delay prejudices a Respondent for example by preventing or inhibiting it from investigating the claim whilst matters were fresh, will almost always be relevant factors. At paragraph 25 he said that there is no reason to read into the statutory language any requirement that the Tribunal must be satisfied that there are good reasons for the delay, let alone that time cannot be extended in the absence of an explanation of delay from the Claimant. At most, he said, whether any explanation or reason is offered and the nature of them are relevant matters to which the Tribunal should have regard.

Analysis

85. Without repeating the summary of the law set out above, we record that the key points we kept in mind in reaching our conclusions were as follows:

85.1. The initial burden of proof was on the Claimant.

85.2. Direct evidence of discrimination is rare, hence the burden of proof provisions.

85.3. We had to ask whether the primary facts could reasonably lead to inferences of secondary fact that discrimination or harassment had occurred so as to shift the burden to the Respondent. This applied to each question we had to consider both for direct discrimination and harassment and included taking account of facts proved by the Respondent which would prevent the burden from shifting.

86. We also reminded ourselves that we could only decide the case presented to us by the parties. It is not for any tribunal to decide a different case. With these key principles and the findings of fact and law set out above in mind, we dealt with the complaints in chronological order as far as possible (which, as already indicated, did not entirely follow the order of the complaints in the list of issues).

The comment to Arthur Jones

87. This complaint failed because we concluded the alleged comment was not made. We repeat that this was because in particular of the almost complete absence of dealings between Mr Capelastegui and Mr Jones, and because the evidence we had before us was very much hearsay even from Mrs Edreira, so that it was impossible to have any confidence about what, if anything, Mr Jones heard, whether he understood correctly what was said to him (if anything was), or whether he was making assumptions based on something he had heard from someone else.

88. In any event, as again already indicated, we could not see how this could properly be a complaint of direct discrimination, because it is difficult to identify any treatment of the Claimant that could be said to be less favourable than that afforded to others or that would have been afforded to others. It was treatment of Mr Jones, not the Claimant. As to harassment, even if the comment had been made and was thus conduct related to age, whilst it does not have to have been a comment directed at the Claimant to be unwanted conduct for these purposes, the Claimant told us it had no effect on him. On that basis, harassment could not have been made out either. Further, Mr Jones was not in the right age group to support the Claimant's case about the Respondent not wanting people to stay beyond retirement age. We heard no evidence of what the Claimant believed any retirement age to have been all those years previously.

89. In any event, this complaint was significantly out of time. The relevant comment, had it been made, was made at least 8 years before the Claim was presented, and it is difficult to see, even if one of the other complaints succeeded, how this could be part of the Claimant's case that there was a course of conduct. As to whether the complaint was brought within such period after expiry of the time limit as was just and equitable:

89.1. It was brought a very long period of time after the time limit expired.

89.2. The Claimant's explanation for the delay in presenting the complaint was inadequate – he said it was for Mr Jones to bring a claim, not him.

89.3. The delay had very obviously created prejudice for the Respondent, because it could not check the relevant facts with Mr Jones, whereas it very likely could have done if the claim had been brought at the time.

90. For all of the above reasons, this complaint was bound to fail.

The cabin moves

91. We considered both cabin moves together (to the plastic cabin and then to the glass cabin), though we kept in mind that they were the subject of separate complaints. The first question of course was whether the Claimant had shifted the burden of proof as set out above.

92. To do so in a complaint of direct discrimination, there must be evidence of more than less favourable treatment and a difference in age between the Claimant and his comparators, in other words something which indicates that the moves were because he had reached age 66. We agreed with the Respondent that the Claimant not being able to think of any other explanation for the moves,

of itself, would not be enough. There must be facts from which we could reasonably conclude, in the absence of an adequate explanation, that in each case the Claimant was subjected to a detriment, less favourably treated than someone in materially similar circumstances, and that this was because of age (that is, age was a factor in the decisions).

93. In relation first to the question of whether he was subjected to a detriment, the move to the plastic cabin meant that he had to work where he had difficulty twisting. That was clearly a detriment to him given his health, regardless of what the Respondent knew of his medical history. As to the move to the glass cabin, where there were sometimes two workers but sometimes not, we concluded that it was a reasonable and legitimate view on the Claimant's part that to be in a more isolated environment was a detriment given his particular concerns about his health (he was concerned about falling unwell with no-one at hand to notice). We were thus satisfied that the Claimant was subjected to a detriment in both cases.

94. On the question of whether he was less favourably treated than his comparators, we acknowledged the Respondent's submission that there was some difficulty with the way in which the Claimant put his case, by effectively naming everyone else in the paper cabin, because that gave the Respondent the not insignificant task of presenting evidence about the circumstances of up to around 20 other people. As Miss Mallin-Martin recognised however, the Claimant did identify some specific individuals in the paper cabin on whom he relied as his comparators, including of course Mrs Edreira. In our judgment, the relevant circumstances for a comparison under section 23 of the Act were only that they be someone below age 66 who had worked in the paper cabin for a lengthy period of time. Mrs Edreira was in those circumstances and was not moved. We concluded therefore that the Claimant had proved facts from which we could conclude that he was less favourably treated than a valid comparator.

95. The crucial question therefore, as much of the case law summarised above recognises, was whether this was because of age. The Claimant being moved and being above age 66 was not enough. The question was whether he had proved something more, namely facts from which we could conclude that the moves were because of age.

96. What the Claimant was able to establish on the evidence was as follows:

96.1. He had worked for 10 years in the paper cabin completely undisturbed until a few months after he reached age 66.

96.2. He was given no explanation at the time of the moves which, whilst the Respondent could understandably be reticent about saying why someone else was moved in the opposite direction (whatever the reason was), left the Claimant with no idea why this was being done.

96.3. On the evidence we were prepared to accept, it was a straightforward swap with Mr Oliveira (so that it was not a case where Mr Oliveira had moved elsewhere and the Claimant was backfilling for him), it was a lone working position, and so the logic of the move can be said to be questionable.

96.4. The Respondent cannot say with any certainty why the Claimant was selected to move into the plastic cabin as opposed to someone else from the

paper cabin being moved. Our having set aside Mr Darby's conjecture on that point, the Respondent was left to rely on its general practice of moving people on a regular basis. As to that, in our judgment it did not establish the commonplace nature of moves which it asserted in its evidence and ET3 Response. We did not hear any specific evidence for example of people being moved for training purposes or to ensure fairness amongst the workforce. We accepted the Respondent's evidence regarding the shortcomings of the previous management, including in relation to moving staff around, but even since Mr Darby was in charge, Mrs Edreira and Ms Kruk have continued to stay in the paper cabin. Any moves seem to be reactive rather than designed and as we say, on the evidence we heard, were not as regular as the Respondent asserted.

96.5. Finally, Mr Gdanis did not attend to give evidence as to his thought processes about the first move. Mr Buraimoh was not present to give evidence either, when on the face of it he activated the second move.

97. What we have just summarised might ordinarily be thought to be sufficient to shift the burden of proof, if the Claimant's case was simply that he was moved because of his age. The Claimant's case was not however that the Respondent moved him because he was "old" or "older than other workers"; his case was that the Respondent moved him, and did the other things at issue in this case, because it wanted him to leave its employment as he had reached what he asserts the Respondent viewed as a retirement age and did not want to keep people after that age.

98. The critical point therefore was that in order to shift the burden of proof to the Respondent, the Claimant had to prove facts from which we could conclude that this was the reason why the Respondent moved him. That is the case he presented, and that was the case we had to decide. As to that case:

98.1. The Claimant pointed out that the moves happened after he turned 66. They did, but it was getting on for 6 months after he reached that age, so that there cannot be said to have been an especially close correlation between the two events.

98.2. Despite our conclusions on what the Respondent did and did not prove regarding the regularity of routine moves, the Claimant's contract did require flexibility on his part, albeit after consultation and arguably only if the Claimant was no longer going to be working as an operative.

98.3. We also noted the Claimant's email at page 100 – "I fully understand that an operative has to work where the company wants and needs you".

98.4. He was moved before, working in multiple different areas, when he was well below what he sees as the Respondent's retirement age.

98.5. The Claimant told us that one of the issues he raised with Mrs Hornby that had upset him 10 years previously was that Mr Williams had asked him to move. Again, that was evidence from the Claimant himself of being moved as (on his case) a pre-retirement age person.

98.6. Mr Wagstaff was also moved out of the paper cabin at around the same time as the Claimant in May 2022. He would have been around age 52.

98.7. Two other employees were also moved, Mr Oliveira being one, and despite not accepting Mr Darby's evidence as to the reason for that, we do not know who was the catalyst for the moves, whether the Claimant or Mr Oliveira, or indeed Mr Wagstaff or the unidentified employee. In other words, whilst the Claimant understandably saw it from his perspective, we have no evidence that he was the central piece in the decisions to make these four changes.

98.8. We accepted that there were complaints from other employees, once Mr Darby started to move people, and none of them, we understand, were aged 66 or over. The individual referred to in PD12 was age 41.

99. Summarising the above, although we could not accept, on the evidence presented, that moving employees was routine, the Claimant's moves in May 2022 were by no means isolated incidents affecting only him.

100. There was then the crucial additional point that there was no prima facie evidence that the Respondent wanted the Claimant to leave its employment. In fact, the evidence was to the contrary:

100.1. It moved the Claimant out of the plastic cabin almost immediately on his raising concerns about his health which, whilst of course the Respondent would have wanted to avoid a major health and safety risk, offers some indication that this was not about making life difficult for him.

100.2. To the same effect, the Respondent gave us a good explanation of why working in the glass cabin was not an issue in terms of what the Claimant was required to lift from the line.

100.3. Once the Claimant went on sick leave, the Respondent embarked on a detailed welfare process, which it seems included several meetings and more than one referral to occupational health, none of which would make much sense if it wanted him out.

100.4. The Respondent waited until the Claimant had been absent for 15 months before dismissing him. We recognise that this was after the events with which this case is concerned, and we make no comment on the merits or otherwise of that decision, but what it shows is the absence of an eagerness to dismiss him.

100.5. The Respondent ran a full grievance process and offered an apology to the Claimant about the AWOL letter, both at the initial hearing stage and on appeal, which again shows an endeavour to engage with the Claimant as a continuing employee.

100.6. We noted the Claimant's point that much of the welfare and grievance processes (and all of dismissal process) followed ACAS Early Conciliation and the presentation of his ET1 Claim Form, but they were still relevant to note. We also noted Mrs Hornby's email at page 100 – which was before any Early Conciliation – that it was not the case that the Respondent wanted him to leave.

101. Moreover, whilst the Claimant was the only 66-year-old on his shift, and we recognised that it could be that only those who made the decision to move him had a view that workers over 66 should leave, we could not ignore the following additional matters:

101.1. The Respondent had, and continues to have, a diverse age profile, with a very positive attitude towards older workers remaining employed as long as they can do the job.

101.2. The Claimant accepted that he has no evidence of the forcible retirement of any colleague. Arthur Jones is not such evidence, because he was aged 64 when he left; this was some years before, but the Claimant did not say – or establish on the evidence – that this was the retirement age at that earlier point.

101.3. We have rejected the Claimant's interpretation of Mr Capelastegui's comment in the canteen wishing a retiring employee well.

102. For all of those reasons, we concluded that the Claimant had not proven facts from which we could conclude even in the absence of an adequate explanation that his being over 66 was a factor in the decisions about moving him. Alternatively, even if he had, we were satisfied that despite its difficulty in showing the reason why it selected the Claimant to move to the plastic cabin, the Respondent has shown on all the evidence, as just summarised, that the move was nothing whatsoever to do with the Claimant having reached age 66 and that it did not regard that age as an age at which employees should depart its employment. In other words, had the burden shifted, the Respondent would have discharged it.

103. The above analysis also disposed of the alternative complaint of harassment in relation to both moves, because for the same reasons we were not satisfied that the Claimant had shown a prima facie case that the decisions were related to age.

AWOL letter

104. There is no doubting that the Claimant was subjected to a detriment by the receipt of the AWOL letter. There was no proper investigation of his circumstances before the communication was issued and it was in stern terms. We could readily understand why he took it ill. The crucial question again however was whether it was less favourable treatment because of age.

105. The context we considered in relation to the moves in May 2022 was relevant here also, namely that the Claimant did not establish facts from which we could conclude that the Respondent wanted him to leave its employment because he had reached age 66 or otherwise. In addition, we were not satisfied that the Claimant had proved facts from which we could conclude that the Respondent sent the letter because of age, for the following additional reasons:

105.1. Unauthorised absence was a big concern for the Respondent in general. It was therefore keen to address it whenever it arose.

105.2. 18 July 2022 was an unusual and highly pressurised day, for Mr Gdanis in particular. It was clear to us that it was a kneejerk response to the situation he found himself in to direct that AWOL letters be sent. In those circumstances, it seems highly unlikely to say the least that he had time to have the Claimant's age group in his mind in making this decision.

105.3. It had become part of Mrs Hornby's standard practice, as a way of addressing the Respondent's concern, to send AWOL letters, using a standard template and it was a standard letter it sent to the Claimant.

105.4. Even though the Respondent could not say for sure why Mr Oliveira was not sent a letter, he appears to have been in materially different circumstances from the Claimant in that his absence was not only reported to Mr Buraimoh.

105.5. Further, some of the other employees who were absent received the same letter in error because the Respondent believed their absence was also unauthorised. That was clear and undisputed and was further evidence that what the Respondent did was not because of age. All of the employees in question were below age 66.

105.6. The Claimant was sent an AWOL letter 10 years previously, again mistakenly, albeit after 5 days' absence, which shows a similar practice regardless of age.

105.7. We were satisfied with Mrs Hornby's explanation of the distinction between not reporting absence at all and reporting it incorrectly. It is only the former which results in an AWOL letter. That is clear and logical.

105.8. Further, we agreed with the Respondent that Mrs Edreira was the best comparator, as someone who it is known only contacted Mr Buraimoh, and she was treated in the same way. The Claimant asserted that Mrs Edreira was sent her letter as a cover, to disguise that he was being discriminated against, and says that the Respondent also wanted to get rid of the others who received the letter. We cannot accept that. There is no evidence that any of those who got the letter in error, or indeed either of the employees who got it correctly, were dismissed or had any other action taken against them. In any event, an assertion that the Respondent wanted to remove other employees as well somewhat undermines the Claimant's case that sending the AWOL letter was a tactic to remove him because he was age 66.

106. In short, the Respondent got it wrong – it later acknowledged that – but sending the letter was nothing to do with age. Again, that also dispensed with the harassment complaint because the treatment, whilst it could certainly be said to be unwanted conduct and arguably might have had the effect of violating the Claimant's dignity (given that he had reported his absence and was vulnerable from a health point of view), was not related to age.

Offer of a chair

107. As set out above, we concluded that Mr Buraimoh did offer the Claimant a chair. Notwithstanding the Claimant's slight confusion about the date, it seems that it was between May and July 2022.

108. The first question therefore, for direct discrimination purposes, was whether this was a detriment. The question is whether a reasonable employee in the Claimant's situation could see it as detrimental, that is to his disadvantage. Given that we found it was an unusual thing to do, in our judgment the Claimant could legitimately conclude that he was being treated differently to others and therefore disadvantageously.

109. Furthermore, it followed from our conclusions that it was not a common practice, that although he did not identify a specific comparator as such, the Claimant proved facts from which on the face of it we could conclude he was less favourably treated than others in this respect – though see further below. The crucial question again therefore, as almost always is the case, was whether he had also proved facts from which we could conclude that the offer of the chair was because of age. Again, the Claimant's case was not that he was offered a chair because he was "old" or "older than most workers" (or indeed all workers on his shift) but because he had reached age 66, which as we have said many times he regarded as the Respondent's retirement age. As Miss Mallin-Martin submitted, the Claimant's evidence was that Mr Buraimoh "was told to do it".

110. It had never happened before and there was no explanation given for it, but we did not think that was sufficient of itself to indicate that the Claimant being over age 66 was in Mr Buraimoh's mind, consciously or otherwise, when he offered the chair. We were told that Mr Buraimoh does not know why he offered the chair, but we thought that what Mr Darby suggested was a much more likely explanation for the change of practice in this regard, namely that Mr Buraimoh – who the Claimant accepted had not been told by him about his health condition – had become aware of it at the time of the cabin moves and offered the chair for that reason. Recognising that less favourable treatment and the reason why are two sides of the same coin, that would make the comparator a younger person who Mr Buraimoh had learned had a serious health condition and it seems tolerably clear he would have offered them a chair as well.

111. Even if Mr Darby's explanation of Mr Buraimoh's conduct were not accepted, given that we have decided the other complaints against the Claimant for the reasons set out above, taking into account also all of the context and circumstances we have identified, there was insufficient evidence to shift the burden to the Respondent in this respect. We add that, given how the Claimant put his case, Mr Buraimoh himself would need to have had the Claimant's age in his mind on the basis that he had been told about a management policy of wanting to dispense with workers over age 66. There was simply no evidence of that being the case.

112. Whilst we could accept that it was unwanted conduct, the harassment complaint also failed because it was not age-related conduct. We have noted that there was not said to be anything unpleasant or rude, or age-related, about how the chair was offered.

Other matters

113. Looking at the position generally and standing back from the individual complaints, it was clear that whether taken individually or collectively, the way the case was put made it likely that they would stand or fall together, all of them depending on there being evidence of the Respondent having a view, consciously or unconsciously (the Claimant was clear it was the former), that it did not want to continue to employ people at age 66 or over. We considered a number of other issues from which the Claimant invited us to draw inferences that would support his case, and found that they did not:

113.1. First, there was Mr Oliveira's evidence that he was dismissed because he had agreed to give evidence. We have already said that based on the limited information we had before us we could not accept that.

113.2. Secondly, there was Mrs Hornby's dealings with Ms Kruk regarding her being a witness. We thought what Mrs Hornby did in this respect was beyond criticism. It was right to have the discussion with Ms Kruk to avoid confusion and she handled it very carefully.

113.3. A third point, not raised by the Claimant directly but which we fully canvassed with the Respondent, was Mr Buraimoh's absence from this Hearing. Two things struck us about that. First, on reflection, we noted that he was not really the decision maker as to the second move, that is to the glass cabin, as although he told the Claimant to move on that second occasion, his doing so was entirely consequent on the first decision taken by Mr Gdanis a day or so beforehand, and we accepted the Respondent's explanation of the difficulty in calling Mr Gdanis as someone it no longer employed. Secondly, although he could have given evidence on the offering of the chair – even if only to say he could not remember why – what he could not give evidence on was whether the Respondent wanted people above age 66 to retire. Put another way, the Respondent could sensibly conclude that Mr Capelastegui and the other witnesses could deal with the point. For those reasons, we drew no adverse inferences from Mr Buraimoh not being called as a witness.

114. The complaints failed for the reasons we have given. We could nevertheless understand why the Claimant raised questions about how he was treated by the Respondent, in three particular respects:

114.1. The first was the cabin moves. They were not explained to him, as someone who had worked in one location for a long period. We accept, as Mr Darby said, that the circumstances of moving another employee could not properly be disclosed, whatever the reason for Mr Oliveira's move, but some communication to the Claimant as to why this was happening to him was clearly called for and, if handled correctly, might have turned what the Claimant found a difficult experience into something much more positive.

114.2. Secondly, we could also understand, as we have said, the Claimant's strong objection to and distress about the AWOL letter, both the sending of it and its contents. We accept the difficulty of the day in question for the Respondent, but some pause for thought, perhaps at the instance of HR, would have avoided the difficulties that followed.

114.3. Finally, in both respects, although we are clear that treatment in question was not because of or related to age, the move to the plastic cabin and the sending of the AWOL letter in particular showed a lack of awareness of the Claimant's health needs which were both genuine and substantial. There is an explanation for that of course, namely poor record-keeping; the point is that the Claimant did not know about that, and it is understandable that he took both matters as he did.

Summary

115. In summary:

115.1. The Respondent did not contravene section 39 of the Equality Act 2010 by discriminating against the Claimant because of his age.

115.2. The Respondent did not contravene section 40 of the Equality Act 2010 by harassing the Claimant related to his age.

115.3. The Claimant's complaints were therefore dismissed.

Note: One of the Tribunal panel members throughout, and the parties and the full Tribunal panel on 29 February 2024 only, attended remotely. The parties did not object to the case being heard in part remotely. The form of remote hearing was video.

Employment Judge Faulkner
Date: 22 March 2024

Notes

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