EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Jeff Martins	**v**	Network Rail Ltd

Heard at: Cambridge
On: 14 and 15 December 2023 and 27 March 2024
Before: Employment Judge Andrew Clarke KC
Members: Ms H Gunnell
Mr D Sagar

Appearances
For the Claimant: In person
For the Respondent: Mr S Liberadzki, counsel

RESERVED JUDGMENT

1. The respondent directly discriminated against the claimant because of his age contrary to s.13 of the Equality Act 2010.

2. The claim in resect of unlawful detriment by reason of trade union membership contrary to the Trade Union and Labour Relations (Consolidation) Act 1992 is dismissed.

3. If the parties are unable to agree remedy within 35 days of the date on which this judgment is recorded as having been sent to them, they must each inform the tribunal in writing of any dates to avoid in the succeeding four months and this matter will then be relisted for a one day hearing to determine remedy before the same panel. If the parties are able to reach agreement as to remedy, they must so inform the tribunal as soon as possible.

REASONS

Background

1. The claimant was a man at all material times in his mid-50s and a member of the Unite Trade Union. On or about 20 July 2022 he applied for a job with the respondent. He was not shortlisted. He claims that this was because of his age and/or his trade union membership.

2. For the purposes of his claim for unlawful age discrimination, he compares his treatment to that of two other named individuals who were shortlisted for the job whom we shall refer to as Ms A and Ms B. Both were in their 20s. We do not know whether they were, at the material time, trade union members.

3. This claim was listed to be heard in October 2023. It was adjourned as the tribunal had listed only one non-legal member and the respondent wished to have a full panel. It was again adjourned, this time part-heard, on 15 December 2023 to enable a witness order to be issued to compel the attendance of a Mr Engelbretson. The respondent had originally intended to call him as a witness, but on the October dates he was attending a pension trust meeting and by the time of the December hearing dates he had left the respondent's employ and did not wish to leave his new job in order to give evidence.

4. We made a witness order at the claimant's application. In so doing, we had in mind:

   (1) that the case would, in any event, have gone part-heard to enable the parties to make submissions,

   (2) the evidence that we heard from Mr Jolly, then the respondent's sole witness, as to what he believed must have been Mr Engelbretson's central role in rejecting the claimant's application, and

   (3) The claimant's desire to have the best evidence before the tribunal, rather than seeking to rely upon the absence of any evidence from the apparent decision maker.

   We left open with the parties the possibility that the respondent might itself decide to call Mr Engelbretson. In the event, this is what happened and the respondent produced a further (and much more detailed) witness statement from Mr Engelbretson which had been written in the light of the evidence given by Mr Jolly.

The respondent's case and the oral evidence

5. We will begin by looking at these matters as they have been important in our eventual decision making. In reviewing them we will also make some findings of fact as to the claimant's work experience as set out in his CV and the respondent's recruitment process generally and as operated in this case.

6. The respondent's initial grounds of resistance asserted that Mr Engelbretson (then Head of Pensions) and Mr Jolly (Pensions Manager) reviewed the claimant's CV against the published essential and non-essential criteria (the latter of which related to pensions knowledge and experience) for the role and found that he did not meet either and that the successful candidates put forward for interview demonstrated in their CVs that they met all essential and some non-essential criteria.

7. It is clear that when the grounds of resistance were drafted it had not been appreciated that there were various stages in the recruitment process for the advertised roles and that these had been elided in that document. An amended grounds of resistance sought to address this. However, it still maintained the respondent's position to be as summarised above.

8. The claimant's evidence was straightforward. He explained his work experience, as summarised in his CV, his application for the job, its rejection and his attempts to understand why he had not even been interviewed when, as it appeared to him, he met the "essential skills and experience" requirements set out by the respondent, even though the rejection letter asserted that he did not meet any of them.

9. His CV gave the claimant's date of birth at the very start. It listed two HR qualifications, and affiliate membership of CIPD (an HR related professional institute) as part of his education and noted his having attended a Unite Health and Safety Representative course. His recent work experience was as a warehouse operative, but he noted that he had taken on workplace representative and health and safety representative roles, doing training and mentoring and explaining complex issues to staff. He described earlier roles as a Freelance Project Manager and Trainer, as a Senior Application Consultant (where he described his roles and responsibilities in some detail in terms of planning and managing, leading and directing projects and working with customers), as a Trainer for a payroll and personnel provider and as a Trainer and HR Officer for British Rail.

10. Until the late decision to call Mr Engelbretson, Mr Jolly was the respondent's sole live witness. We were concerned at the disparity between his written evidence (in two witness statements) and his oral evidence. Furthermore, it appeared to us that aspects of his oral evidence changed to some extent over time. In particular, he began by suggesting (as had the grounds of resistance) that this recruitment exercise followed the pattern which he said was usually adopted, whereby he and Mr Engelbretson would separately review the applicants' CVs after the application period had closed and would then reach a consensus (regarding who to interview) during an online meeting to discuss them.

11. Latterly, he made clear that not only had he got no recollection of seeing the claimant's CV (which lack of recollection he had always maintained) but he now believed that he never saw it (or the CVs of the other applicants, save those interviewed) until this claim was made and that he had not undertaken any shortlisting exercise with Mr Engelbretson, who must have done this himself. Further, having explained in detail, and at some length, in his witness statement that the claimant's CV would not warrant his being shortlisted, he stated in oral evidence the claimant did have some relevant experience which might well have led to his being interviewed (in his view) unless the claimant's CV was being considered against a number of other CVs which showed that their authors each had direct experience of pensions work.

12. This had caused us to treat Mr Jolly's evidence with some caution but, on balance, we consider that his evidence as eventually clarified was accurate when he said that he played no material part in the relevant decision making. We note that he explained, by reference to his then workload and the lack of relevant diary entries and emails to and from Mr Engelbretson, why he believed that they had not discussed these candidates at all prior to shortlisting, which had been dealt with by Mr Engelbretson alone.

13. Mr Jolly, in his oral evidence, explained the role of the essential and desirable criteria for the posts. He said that when he and Mr Engelbretson looked at CVs for these kinds of roles as Pensions Administrator, they were really looking for people who appeared to them as if they might be able to communicate complex information well to employees and pensioners making enquiries, who might have experience in managing customer expectations (two of the essential criteria) or who, in some way, demonstrated that they might be able to develop such skills and/or who had some HR and/or payroll experience (another of the criteria). Someone with prior pensions experience would stand out, but such applicants were rare. He explained (and we accept) that the expectation was that training would need to be provided for somebody who undertook this role.

14. Mr Engelbretson's initial witness statement was short and confirmed the content of Mr Jolly's witness statement. Hence, his evidence was that he sifted the CVs and decided with Mr Jolly (who had also sifted the CVs himself) who to interview. Like Mr Jolly, he said that he had no recollection of the claimant's CV but he agreed with Mr Jolly's then views as to why he would not be suitable for shortlisting.

15. Mr Engelbretson's second witness statement was much longer and sought to deal with the deficiencies of the claimant's CV in the context of this role in detail. He accepted that "It would have been me who reviewed the claimant's CV", but maintained that he would have discussed it with Mr Jolly and together they would have decided that the claimant was not a suitable candidate for the role. That was in direct contradiction to the evidence of Mr Jolly and Mr Engelbretson did not advance any reason why his recollection must be correct (for example having a record of such a meeting between them having taken place). As indicated above, we prefer the evidence of Mr Jolly on this matter.

16. Mr Engelbretson maintained that none of the claimant's previous roles were "relevant to administration and there is nothing in the details provided in the CV which suggests relevant potentially transferable skills". Having been cross examined and taken to the claimant's CV we were careful to establish whether Mr Engelbretson wished to clarify this statement, perhaps to make it more nuanced. He did not. We consider that it does not do justice to the claimant's CV which clearly shows that the claimant had undertaken administrative tasks and, given what Mr Jolly had said about what he and Mr Engelbretson would habitually look for in a candidate, there were indications that the claimant had transferable skills in relation to dealing with customers, explaining complex matters and managing expectations, being two of the essential criteria.

17. We recognise that Mr Engelbretson claimed to have no recollection of examining the claimant's CV at the material time and thus his evidence was an attempt to recreate what might have been his thinking at the time. However, his assertion that he reviewed the CVs with Mr Jolly and what we consider to be an exaggerated attempt to explain what he claimed to be the claimant's obvious failure to show his potential suitability for the role, led us to question the accuracy of his evidence. We are of the view that, save where his evidence is confirmed by Mr Jolly, or by contemporaneous documents, or otherwise dealt with below, we cannot accept it. Whether he does now have any recollection of his dealing with the claimant's CV at the material time is unclear to us, but we reject his evidence as to the relevance of the content of the claimant's CV to the roles applied for.

Further findings of fact as to the application process

18. Mr Engelbretson and Mr Jolly were, in mid-2022, the effective leader and deputy in the respondent's Pensions Team. This team consisted of about 10 employees. Of those, the most junior were Pensions Administrators. The team's duties included advising the respondent's employees and pensioners as to their rights under a series of pensions schemes. The Pension Administrators would spend considerable time dealing face-to-face, or by telephone, with the respondent's employees. There appears to have been a significant turnover of staff at the Pensions Administrator grade.

19. For some years, recruitment to the Pensions Administrator role was undertaken using an advert which set out a list of so-called essential skills and experience and another list of desirable skills and experience. The essential skills and experience were said to be the following:

> "• Experience in an HR generalist of payroll role.
>
> • Understanding of defined contribution and defined benefit pension schemes.
>
> • Ability to effectively communicate complex information and issues to non-specialists.
>
> • Ability to manage customer expectation."

The desirable, but not essential, criteria related to pensions experience and qualifications.

20. The respondent has detailed written policies on recruitment. Recruiting mangers have to undergo online training annually. However, it is clear that, so far as the Pensions team was concerned, the prescribed policies were not followed. That is certainly true of the material recruitment exercise and, from what Mr Jolly and Mr Engelbretson told us, probably more generally.

21. What were described in the advert as essential skills and experience were treated as being, at most, desirable. The starting point appeared to be to look to see if a CV showed pensions related knowledge and experience (which it was anticipated that few would) and then to adopt a more flexible approach as regards other applicants. Mr Jolly described this in the terms

that we have recorded above. Whilst this did focus on the essential criteria, it was clear that these were looked at rather more loosely than the term "essential" might suggest, the focus often being more on potential that experience. Mr Engelbretson's description of the process of reviewing CVs was much looser and more vague. He referred to looking for evidence of potentially transferable skills, such as some experience in related areas (he pointed particularly to general administration work). He summarised this as looking for a "golden nugget". Given his statements (referred to above) regarding the claimant's CV we conclude that he looked at CVs to see whether he thought someone might be suitable, often without applying any objective criteria at all. Given that he cannot explain why he rejected the claimant, because he cannot recollect even seeing his CV, and given that we do not accept the accuracy of his evidence on why, looking at the CV now, he believes he would have decided not to interview the claimant, and given Mr Jolly's evidence as to his having no role in that process (which we have accepted) the respondent has only the contemporaneous documents to evidence what might have happened.

22. No record of the reasons for inviting (or not inviting) candidates for interview was maintained, although the respondent's recruitment guidelines provide that this should be done. Such record of the process as was maintained was produced by somebody from the HR department. The recruitment checklist was at page 77 of our bundle. It records there being 22 candidates for the posts. It notes that reasons for rejection should be recorded and that "to avoid discrimination" the same criteria should be applied in respect of each candidate. The sifting is there said to have been undertaken by Mr Engelbretson, Mr Jolly and a Mark Holloway, who we were told was from HR.

23. There was no sifting meeting at which those three (or any two of them) were present. Mr Jolly did not supply the information to enable the checklist to be completed and, given his lack of involvement, he could not have done so. Mr Engelbretson described looking at one, or more, CVs in odd moments between dealing with other matters. We accept his account of this and it accorded with Mr Jolly's view of how busy he and Mr Engelbretson were. The checklist states that the claimant's CV did not suggest that he had HR or payroll experience (when he had, albeit some years before) and did not suggest an understanding of direct contribution and direct benefit pension schemes (it was simply silent on the point). It does not deal with the other two essential criteria, the boxes on the checklist in respect of them are left blank. For four candidates who were selected for interview at various points in the process, it is said that they met all four essential criteria with one exception where it was said that the respondent was "unsure". It is not disputed that this summary is inaccurate. Similarly, three candidates were recorded as being the respondent's current employees when they were not. Mr Engelbretson could not explain where the information used to complete the form had come from, although the form itself suggests that it came from Mr Engelbretson and Mr Jolly. It is plainly not a reliable source of information as to why the claimant was not shortlisted. When, by whom (and using what information) and for what purpose the checklist was

compiled, we are unable to say. Not only do we do not regard it as a reliable source of information, it may be that other applicants from a previous recruitment exercise referred to below are included and others who may well have applied after the claimant was rejected certainly are.

24. We now turn to examine the sequence of events which led to the claimant not being offered an interview.

25. In May 2022 a recruitment exercise took place for a Pensions Administrator post. The claimant did not apply. The shortlist of those to interview was drawn up following a meeting online between Mr Jolly and Mr Engelbretson. Ms A was shortlisted, and eventually appointed. She did not meet any of the essential criteria for the job, according to her CV, save that she had had a customer facing role of a Sales Assistant. Both Mr Jolly and Mr Engelbretson say that she was interviewed because they believed, wrongly, that all internal candidates (she being one) should be interviewed. In fact, that was not the respondent's policy. Furthermore, we note that when the amended response was put together, at a time when it was known that the claimant was pointing to her as one comparator, that point was not made when her appointment was described. We are sceptical as to whether either Mr Jolly or Mr Engelbretson considered that she had to be interviewed. We think it more likely that something in her CV struck Mr Engelbretson as amounting to a "golden nugget" (ie, he felt that she might be worth considering for the job) and that was enough. She had not given her date of birth, but her job and education dates suggested that she was in her early 20s.

26. On 29 June a further Pensions Administrator recruitment process began for two posts. The advert was to close on 13 July. One of the three persons shortlisted was Ms B. The shortlisting process was undertaken by Mr Engelbretson alone in the rather haphazard way described. Ms B was a recent graduate, in politics with economics. She had spent a year on placement with the Governments Economic Service. She appeared to Mr Engelbretson to be worth interviewing because her degree included economics and because of her placement. He considered that she might have transferrable skills. She did not meet the essential criteria.

27. Ms B was shortlisted with two other applicants. One, Ms W, was aged 42. She had two degrees and was an administrator in the prison service. The other, Mr N, appears to have been in his 20s and was a Warranty Administrator for a car franchise with a BTEC in business. Neither met the essential criteria, but both were seen as having potentially transferrable skills. In fact, only Ms B took the matter further, the others withdrew.

28. Shortly prior to 20 July 2022 the respondent advertised again for two Pensions Administrators. The claimant was one of a number of applicants. We know nothing of relevance about the other applicants. There are some brief details on the checklist completed in respect of all applicants by HR, but that information may well not be accurate, as we have already noted.

29. Mr Jolly and Mr Engelbretson were concerned that they were not attracting applicants with pensions experience for this and, indeed, for a more senior post, because of the salaries offered. Mr Engelbretson sought permission to increase salaries. That was granted by email of 8 August. By this time Mr Jolly was having to divide his time between his pensions role and another role. It had been intended that from about 22 July he would be seconded full time to that other role, but the Pensions Team was overstretched, not least by reason of a proposed voluntary redundancy exercise which had led to numerous requests for pensions information. The latest such proposal was one part of a controversial proposed reorganisation which was currently resulting in strike action. Hence, Mr Engelbretson asked that Mr Jolly do both jobs for a period. This was agreed, but Mr Jolly was under great pressure. We consider this most probably explains his lack of involvement in the dealings with the claimant's application and those other applicants who submitted their CVs during the currency of the advert.

30. On 9 August the claimant received a standard letter rejecting his application. It suggested that he had not met "the required criteria". Such a letter is generated by someone with authority changing the status of an application on the respondent's systems from being a pending application to being "rejected". Mr Jolly did not do that, but we are satisfied that Mr Engelbretson must have done so. The rejection letter came before the closing date specified in the advert. The letter said that all applications had been reviewed against the role criteria, whereas at that time Mr Engelbretson had not reviewed all applications. He did not review the applications together and when (as in the claimant's case) he did not think a candidate suitable he rejected them there and then.

31. When the claimant queried why he had not been shortlisted, someone called Malik (a Helpdesk Customer Advisor) emailed to tell him that the "Hiring Manager" had sifted the applications on 9 August and decided to readvertise the vacancy. Hiring Manager is a term of art for the respondent and in this instance the Hiring Manager was Mr Engelbretson. Mr Engelbretson had the advert reissued with the same vacancy number in the respondent's system, but with a higher salary. The claimant believed that he did meet "the required criteria". He explained this in an email and asked for detailed feedback. He got none. He asked to reapply given the readvertising of the roles. He was told that the respondent would come back to him. Malik asked for instructions from Mr Engelbretson but he did not respond. Mr Engelbretson says that he did not receive the Question Reference from Malik (which attached the claimant's CV). We consider it more likely that he did receive it, but chose not to respond, possibly because he had already rejected this applicant.

32. Further applications were received and some, at least, appear on the checklist referred to above. Eventually, three candidates were selected for interview. These were Mr G, Mr M and Ms O. Mr G was a Tribunal Clerk with a degree in cinematography. His CV does not give his age, but from the dates of his education it would appear that he was in his late 20s. Mr M

had payroll administration experience and his CV referred to pensions related work. Again, from the dates given for his education he would appear to be in his late 20s. Ms O had a BTEC in Health and Social Care and had three years' experience as an HR Assistant, in that regard she referred to pensions administration among her duties. Again, she would appear to be in her 20s.

33. It is likely that these persons applied for the roles after the claimant's application was rejected. The reopened advert period ended on 24 August. Shortly thereafter, Mr Engelbretson gave to Mr Jolly a list of those three people to be interviewed and left him to organise this. Mr Jolly had taken no part in their shortlisting. Had they applied earlier we consider that Mr Engelbretson would have asked Mr Jolly to arrange interviews at around the time of the claimant's rejection.

34. The CVs of those three candidates were not disclosed until the tribunal ordered this at the beginning of the second day of hearing after they had been referred to in Mr Jolly's evidence. We know nothing of whether any of the applicants for the Pensions Administrator jobs, other than the claimant, were trade union members. Mr Jolly told us that he was unaware of any current member of the Pensions Team being a trade union member. He appeared to base this, at least partially, upon their not having gone on strike during the recent disputes. However, those disputes did not directly affect these employees and we heard no evidence as to whether they were balloted. There was no suggestion of the existence of a trade dispute involving them. Hence, we do not consider his evidence in this regard to be of any assistance.

35. Mr Jolly explained to us that he would have been more likely to shortlist someone who was a trade union member, especially if they had been a trade union representative, and, therefore, more likely to shortlist the claimant had he seen his CV. Mr Engelbretson gave similar evidence with regard to the impact of trade union membership and said had the claimant made clear to him on his CV that he was a trade union member, or representative, he would have been more interested in interviewing him. We accept that evidence from Mr Engelbretson, given that it mirrored that of Mr Jolly and that Mr Engelbretson was able to explain (by reference to his personal experience) why he held that view. We note that someone reading the CV with a little care could not have failed to realise that the claimant was a trade union member, a workplace representative and a safety representative. Despite this, the claimant was rejected and we consider that this occurred at a time when the respondent had no other candidates which it considered worthy of interview. Hence, it is our conclusion that Mr Engelbretson did not read the claimant's CV with any care and we think it most likely that he gave it no more than a cursory glance. That glance was, in our view, sufficient for him to notice the claimant's age (which appeared clearly at the top of the first page) and that his most recent experience was working in a warehouse.

The law and submissions

36. In submissions, the respondent concentrated on s.136 of the Equality Act 2010. Counsel accepted that whilst s.137 of the Trade Union and Labour Relations (Consolidation) Act 1992 contained no similar provision, a similar approach could be adopted, given the reasoning which had led to such an approach being adopted in discrimination law prior to the advent of s.136. We accept that to be correct. We were also reminded of the guidance given in Network Rail Infrastructure Ltd v Griffiths-Henry [2006] IRLR 865 by Elias J (as he then was) with regard to the approach to the two stages of the reasoning process required when first considering whether a prima facie case had been established. Of course, that case was decided in the pre-section 136 era, but relied on the similar approach suggested in cases such as Igen v Wong. We accept that the burden of proof does not reverse just because the tribunal finds a process to be unfair and the claimant to have a protected characteristic.

37. S.136 is clear that the burden only shifts if there are facts from which the tribunal could decide that (in this case) the claimant was directly discriminated against by the respondent. For the purposes of s.137 this would involve us deciding that there were facts from which we could conclude that he had been subjected by the respondent to a detriment due to his trade union membership.

38. In the case of direct age discrimination, the facts would have to be ones from which we could conclude that the claimant was treated less favourably because of his age than Ms A, or Ms B, or a hypothetical comparator was treated.

39. In the case of trade union membership discrimination, we would need to find facts from which we could conclude that the claimant was subjected to the detriment of not being shortlisted because of his trade union membership.

40. If the burden of proof shifts, the respondent must satisfy us that there is a non-discriminatory explanation for the conduct relied upon to reverse the burden of proof. We have reminded ourselves that a respondent may act in a certain way for a mixture of reasons. If the burden shifts, this respondent must show that the claimant's age (or his trade union membership) was not one of the reasons for his treatment. Were it merely a *de minimis* reason the burden would be satisfied and the claim would fail.

41. A comparator must be in materially the same circumstances as the claimant. Here it is said by the respondent that Ms A and Ms B are not because in one case they were interviewed because they were a current employee of the respondent and in the other case the CV showed a greater range of relevant education and involvement with financial matters than the claimant's CV revealed. The respondent accepted that in considering how and why the respondent selected those candidates (and how a hypothetical comparator would be treated) we could look at how and why it selected others.

42. Age discrimination can be justified but we need not consider the law in that regard as no such case was advanced.

43. The parties' submissions otherwise contended for their respective versions of the facts and we have indicated above that for which they contended and, where relevant, why we rejected it or accepted it.

Applying the law to the facts

44. We turn first to the s.136 issue. Are there facts from which we could decide, in the absence of any other explanation, that the claimant was discriminated against because of his age?

45. We consider that there are:

    45.1 The respondent interviewed Ms A when she did not meet the essential criteria and had no (or almost no) apparently relevant experience. It interviewed Ms B and proposed to interview Ms W and Mr N when none met the essential criteria. Ms W and Mr N had some administrative experience and Ms B had a degree and a year of work experience involving economics. All were significantly younger than the claimant and his CV demonstrated that he did meet the essential criteria (with the exception of knowing the difference between defined contribution and defined benefit pension schemes). It can also be said that Mr G met all or most of the essential criteria. Both Mr M and Ms O had some HR experience, but (like the claimant) at a junior level. We consider that Ms A and Ms B are appropriate comparators because they, like the claimant, did not (looking only at their CVs) clearly meet all of the essential criteria. Indeed, it is arguable that the claimant met more of them than they did. The essential difference between the claimant and those others (in particular Ms A and Ms B) was that he was in his mid-50s and they in their early or mid-20s.

    45.2 Mr Jolly accepted that the claimant's CV did evidence potentially transferrable skills and unless the qualities of other candidates outweighed his, he might well have interviewed him. Mr Jolly had been involved in very similar processes as described above, so his view as to who might be shortlisted and for what reasons is material.

    45.3 Mr Engelbretson, who rejected him, could not explain that rejection to our satisfaction. He was unable to say what happened at the time of rejection and his explanation, given from a current standpoint, appeared to us to be at odds with the material in the claimant's CV to a significant extent.

    45.4 At the time of the claimant's rejection there were no other candidates who had been selected for interview. We know nothing about the other rejected candidates. Hence, there could be no attempt to show that others who were rejected were persons, of whatever age, who

had a materially similar career history to the claimant, or otherwise mirrored aspects of his CV.

45.5 The claimant asked the respondent to explain why he was said to have failed to satisfy the essential criteria in a reasoned email which explained how his CV demonstrated that he did so. Instead of providing detailed feedback the respondent did not engage with his points.

45.6 Against that background he asked to be reconsidered when the jobs were readvertised, but the respondent did not respond to him as it promised it would and Mr Engelbretson did not respond to an internal request in this regard.

46. Hence, we conder that the burden does shift. Can the respondent provide a non-discriminatory explanation? We do not consider that it can. The first point (of itself conclusive, in our view) is that the respondent cannot explain what happened at the time with regard to the claimant's CV. Mr Engelbretson rejected it, but he cannot recall even seeing it at the time. He cannot say that he considered it against the published criteria, because, as we have found, he conducted a much more subjective and impressionistic exercise. To point out that Ms A had to be interviewed as an internal candidate does not help (we have rejected that evidence) and to state that his suspicions that Ms B would turn out to be an excellent appointment have proved correct, is nothing to the point: Ms B did not meet the essential criteria. His evidence (which we have accepted) regarding what would have been his reaction to a statement of trade union membership, or office, demonstrates that he did not read the CV with any care. That leaves open the very real possibility that he saw the claimant's date of birth and his recent employment in a warehouse and looked no further. Indeed, we have found that to be what happened. However, even if we had not made a finding that this is what happened, the respondent cannot provide any explanation for the claimant not being shortlisted when other much younger comparator candidates were and for the failure to engage with the claimant's request for feedback and a chance to be reconsidered.

47. Hence, we find that the respondent did directly discriminate against the claimant because of his age.

48. We now turn to the claim under the 1992 Act. Again, it is Mr Engelbretson's mind that we need to look at. We do not consider that a prima facie case of detriment for trade union membership is made out. The claimant was certainly a member of an independent trade union. We consider that this is clear from a careful reading of his CV. However, we know nothing about the possible trade union membership of other applicants, in particular the successful ones. One might argue that Ms A, as a Technical Engineering Apprentice employed by the respondent (an employer recognising various trade unions and with largescale trade union representation) might well be a trade union member such that someone reading her CV could infer that. However, we have no definitive evidence and there is insufficient evidence with regard to the other interviewees and pension team members to reach

any conclusion as to their trade union membership. We consider that Mr Engelbretson did not realise that the claimant was a trade union member who had held representative office, because he did not read the CV with sufficient care.

49. We do not consider that, in the circumstances, that there is material from which we could conclude that the claimant's trade union membership was a factor in his not being interviewed. Hence, in this regard the burden to prove discrimination remains with the claimant. He has not satisfied that burden. Even if the burden was shifted, we consider that Mr Engelbretson did not even realise that he was a trade union member as he never considered the CV sufficiently to gain that knowledge and that had he done so, it would have made him better disposed towards the claimant. In those circumstances, had the burden shifted we consider that the respondent would have satisfied the burden then placed upon it.

50. Hence, the claim under the 1992 Act must fail.

Remedy

51. The second witness statement of Mr Engelbretson had not been seen by the tribunal prior to the start of proceedings. Hence, an adjournment was necessary to enable copies to be made and for it to be read. Partially as a result of that delay and also as a result of the need for careful deliberations, it became clear that we would not be able to deliver a reasoned judgment before the end of the resumed hearing. The possibility of hearing evidence as to remedy before the liability outcome was known was considered with the parties and rejected.

52. The parties indicated that as the claimant was only claiming compensation for injury to feelings (together with aggravated damages) they would probably be able to agree a figure, if appropriate once they had the reasoned judgment on liability. Hence, the matter was not then listed for a further hearing. If the parties cannot agree an award for injury to feelings within 35 days of the date on which this judgment (with reasons) is recorded below as having been sent to them, they must each inform the tribunal in writing of any dates to avoid in the succeeding four months so as to enable this matter to be relisted for a one day hearing before the same panel. If this matter is settled, the parties must so inform the tribunal as soon as possible.

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Employment Judge Andrew Clarke KC

Date: …9 April 2024……..

Sent to the parties on: ..11 April 2024....

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For the Tribunal Office

Recording and Transcription
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/