



# EMPLOYMENT TRIBUNALS

**Claimant:** A

**Respondent:** Sebden Steel Services Centres Limited t/a Sebden Steel Northern

**Heard at:** Leeds **On:** 4 January 2023

**Before:** Employment Judge Jones  
Ms BR Hodgkinson  
Ms GM Fleming

## REPRESENTATION:

**Claimant:** In person  
**Respondent:** Ms Kennedy-Curnow, litigation consultant

# JUDGMENT

The complaints of direct age and disability discrimination are dismissed.

# REASONS

1. The findings of the Tribunal are unanimous.

## Introduction

2. These are claims for direct age and direct disability discrimination. They arise from a job application.
3. The admitted disabilities are chronic kidney disease and HIV.
4. The claimant was 61 years at the date of the job application. The comparator age group is those in their forties or fifties.

5. The Tribunal made an indefinite restricted reporting order and an anonymity order in respect of the identity of the claimant for which reasons were provided at the hearing.

#### The Issues

6. The issues were considered at a preliminary hearing on 28 July 2022 before Employment Judge Wade. She identified five questions which arose from the way in which the case had been pleaded and responded to.

7. The issues at the final hearing were not on all fours with those questions, because of the information provided in the witness statements. However, we have addressed those as necessary in our summary below.

#### The Evidence

8. The claimant gave evidence. The respondent called Mr Tony Smith, HR Director and Mr John Rider, Works Manager.

9. In addition the Tribunal had a bundle of documents of 48 documents.

#### Background/Findings of Fact

10. The respondent is a steel processing and stockholding business which employs up to 250 employees but at the time the response was filed that was 111.

11. The respondent advertised for up to 4 warehouse operatives at about the beginning of December 2021. Over 100 people applied for the jobs and 19 were to be interviewed, including the claimant. Only 4 ultimately attended for interview. Many were not contactable. The other 3 were offered and accepted jobs to commence on 10, 24 and 31 January 2022. The interviews they had attended were on 5, 17 and 31 January 2022 respectively. Two of these candidates had been recommended by staff at the respondent. The fourth was the claimant who withdrew his job application on 22 December 2021.

12. The claimant applied for the post of warehouse operative in December 2021. He was called by Mr McManus on 17 December 2021 to attend for an interview which was arranged for 20 December 2021.

13. The claimant was interviewed at the respondent's Pontefract site by the Works Manager Mr Rider who was accompanied by a Team Leader, George Roebuck. It is common ground that the interview fell into three parts with discussions in the Board room for the first part, an accompanied site tour view with Mr Roebuck around the warehouse and premises for the second and a final series of questions in the Board room for the third. The claimant was asked at some point by Mr Rider about his shoe size and when he would be able to start. He was told he would receive a call from Mr Rider the next day.

14. There is a dispute as to whether that was because Mr Rider did not have the forms on the day, but we preferred Mr Rider's evidence that the reason was because he wished to have a discussion with Mr Roebuck first before making the offer.

15. The accounts about what was said at interview were contradictory and inconsistent both between Mr Rider and the claimant but also between a number of versions the claimant has given: from an email the day after the interview, the claim form and his witness statement. As to the discussion at interview, Mr Rider's account is more consistent, but there was a major inconsistency in his evidence and paragraph 18 of his witness statement as to why the claimant was not contacted about the offer on 21 December 2021. We address this in our analysis below.

16. In respect of the discussions of 20 December 2021, Mr Rider denied he had asked about why the claimant left his previous job but said they had discussed the claimant's job experience. He said he had asked the claimant if he was alright when he was short of breath on reaching the top of a flight of stairs.

17. The claimant denied he was asked that at all. He said in his claim form that he was not offered a job, which he said in his evidence was a mistake and incorrect. He also said in his claim form he explained the reason he left his job was discussed at the first part of the interview and he had then said the wearing of masks caused discomfort because of his asthma. In his witness statement and evidence, on the other hand, he said he had not been asked about this until the third part of the interview. He said he had then been pushed and pushed about why he had left his job, having given an explanation which included reference to the face masks but also included a number of other reasons which included language barriers with the number of overseas worker and difficulties that created working with dangerous machinery. Having been pressurised he said he then informed Mr Rider of the cause of the asthma being stress related. He informed Mr Rider that he had been interviewed by the police following an allegation made by a former partner, related to his HIV status. This arose in November 2021. This was very traumatic and the consequential stress had exacerbated his asthma. He said he told Mr Rider that he had contracted HIV 17 years before. His wife's drinks had been spiked and then she was raped, whereby she contracted HIV.

18. In the claim form he gave a different reason for disclosing his HIV status and his chronic kidney disease. He stated it was because he had been asked further questions about his health and he feared he could be disciplined, if successful at interview, for non-disclosure.

19. In resolving what happened in the interview, we derived some assistance from the email which the claimant sent late on 21 December 2021, because it is the written document made nearest in time to the events. Mr Rider took no notes of the interview. Drawing the strands of evidence together we are satisfied, on a balance of probabilities:

- 19.1 The claimant was asked by Mr Ryder why he had left his previous job;
- 19.2 The claimant explained that it concerned his asthma and this was stress related. He added that he was under particular stress at the time because of the police investigation and he explained the circumstances in which he had contracted HIV which we set out above.
- 19.3 The claimant was not expressly offered a job, but was told he would be contacted by Mr Rider the next day. Having given his shoe size and a possible start date, the claimant inferred he had been successful at interview. That inference was accurate, because in answer to a question from the Tribunal, Mr Rider said he had intended to offer the claimant a

job the next day, but simply had not done so because of other pressures of work. The decision to offer was made immediately after the interview.

20. Mr Rider did not call the claimant on 21 December 2021 as promised. That was because he had many other demands on his time as Works Manager with the imminent shutdown for Christmas.

21. At 23.35 on 21 December 2021, the claimant sent an email to Mr Tony Smith, the HR Director. He stated that the interviewer had not called him back and appeared to have had a change of mind. He referred to having been asked about his age and health conditions and that he believed these matters had swayed the decision maker. He said that would constitute age and disability discrimination. That is the subject heading to the email. He raised the issue of bringing proceedings in the Tribunal and invited a settlement offer.

22. Mr Smith replied at 14.21 on 22 December 2021. He had been on leave but had picked up his email. He thanked the claimant for his email and feedback and said that as he was the first interviewee and it had been a couple of days ago “we have not yet made a decision. We will be interviewing more applicants in the New Year”. He said they would confirm whether the claimant had been successful in due course.

23. The claimant replied at 16.45. He said there was no way forward in being offered the job because working with men who had placed him in an impossible position of disclosing his health status and age placed him in a catch 22 situation because he could not lie and had exposed himself to discrimination.

24. Mr Smith replied the following morning to say he was sorry the claimant had taken that decision but he would be happy to discuss his concerns at a meeting in the New Year.

25. Mr Rider had spoken to the site Director Mr Richard Smith when he arrived at work on the morning of 22 December 2021. He had been forwarded the email the claimant had sent to Mr Tony Smith late on 21 December 2021, which he read before he reached work. It had also been forwarded to Richard Smith.

26. The respondent decided to take legal advice and Mr Rider was told to take no more part in the process.

## The Law

### Unlawful acts of discrimination

27. By section 39 of the EqA

- (1) An employer (A) must not discriminate against a person (B)— (a) in the arrangements A makes for deciding to whom to offer employment;
- (c) by not offering B employment.

28. By section 109(1) of the EqA, anything done in the course of a person’s employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

Definitions of discrimination

29. Direct discrimination is defined in section 13 of the EqA: 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.
30. By sections 5 and 6 of the EqA, age and disability are protected characteristics.
31. By section 23 of the EqA, on a comparison of cases for the purpose of section 13, there must be no material difference between the circumstances relating to each case and the circumstances relating to a case for the purpose of section 13 shall include a person's abilities if the protected characteristic is disability.

Burden of proof

32. Section 136(1) of the EqA concerns the burden of proof: If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. Section 136(2) provides that does not apply if A shows that A did not contravene that provision.
33. In *Laing v Manchester City Council and another* [2006] ICR 1519, the Employment Appeal Tribunal stated that if a tribunal was satisfied on the evidence that the respondent had provided a reason which, on a balance of probabilities, had eliminated any discriminatory cause, it was not necessary for the tribunal to trouble about whether the burden of proof had shifted in the first instance. In *Hewage v Grampian Health Board* [2012] ICR 1054, as later endorsed in *Efobi v Royal Mail Group Limited* [2021] UKSC 33, the Supreme Court stated that it was important not to make too much of the role of the burden of proof provisions: "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other", per Lord Hope in *Hewage*.

Questions on recruitment

34. Section 60 of the EqA provides:  
Enquiries about disability and health:
  - (1) A person (A) to whom an application for work is made must not ask about the health of the applicant (B)—
    - (a) before offering work to B, or
    - (b) where A is not in a position to offer work to B, before including B in a pool of applicants from whom A intends (when in a position to do so) to select a person to whom to offer work.
  - (2) A contravention of subsection (1) (or a contravention of section 111 or 112 that relates to a contravention of subsection (1)) is enforceable as an unlawful act under Part 1 of the Equality Act 2006 (and, by virtue of section 120(8), is enforceable only by the Commission under that Part).
  - (3) A does not contravene a relevant disability provision merely by asking about B's health; but A's conduct in reliance on information given in response may be a contravention of a relevant disability provision.
  - (4) Subsection (5) applies if B brings proceedings before an employment tribunal on a complaint that A's conduct in reliance

on information given in response to a question about B's health is a contravention of a relevant disability provision.

(5) In the application of section 136 to the proceedings, the particulars of the complaint are to be treated for the purposes of subsection (2) of that section as facts from which the tribunal could decide that A contravened the provision.

(6) This section does not apply to a question that A asks in so far as asking the question is necessary for the purpose of—

- (a) establishing whether B will be able to comply with a requirement to undergo an assessment or establishing whether a duty to make reasonable adjustments is or will be imposed on A in relation to B in connection with a requirement to undergo an assessment,
- (b) establishing whether B will be able to carry out a function that is intrinsic to the work concerned,
- (c) monitoring diversity in the range of persons applying to A for work,
- (d) taking action to which section 158 would apply if references in that section to persons who share (or do not share) a protected characteristic were references to disabled persons (or persons who are not disabled) and the reference to the characteristic were a reference to disability, or
- (e) if A applies in relation to the work a requirement to have a particular disability, establishing whether B has that disability.

(7) In subsection (6)(b), where A reasonably believes that a duty to make reasonable adjustments would be imposed on A in relation to B in connection with the work, the reference to a function that is intrinsic to the work is to be read as a reference to a function that would be intrinsic to the work once A complied with the duty.

(8) Subsection (6)(e) applies only if A shows that, having regard to the nature or context of the work—

- (a) the requirement is an occupational requirement, and
- (b) the application of the requirement is a proportionate means of achieving a legitimate aim.

(9) “Work” means employment, contract work, a position as a partner, a position as a member of an LLP, a pupillage or tenancy, being taken as a devil, membership of a stable, an appointment to a personal or public office, or the provision of an employment service; and the references in subsection (1) to offering a person work are, in relation to contract work, to be read as references to allowing a person to do the work.

(10) A reference to offering work is a reference to making a conditional or unconditional offer of work (and, in relation to contract work, is a reference to allowing a person to do the work subject to fulfilment of one or more conditions).

(11) The following, so far as relating to discrimination within section 13 because of disability, are relevant disability provisions— (a) section 39(1)(a) or (c);

(12) An assessment is an interview or other process designed to give an indication of a person's suitability for the work concerned.

- (13) For the purposes of this section, whether or not a person has a disability is to be regarded as an aspect of that person's health.

Analysis and conclusion

35. On our findings, a decision was made by Mr Rider and Mr Roebuck to offer the claimant the job immediately after the claimant left them, on 20 December 2021. There is a dispute between the parties as to whether the claimant was expressly offered the job during the interview. Because of the inconsistencies in the claim form, we prefer Mr Rider's recollection. It is clear Mr Rider's language and demeanour evinced that an offer was in his mind, (subject to no objection from Mr Roebuck), not least by the request for the shoe size and possible start date nor is it disputed the claimant had the necessary relevant experience. That would have given the impression of a favourable interview.
36. In the event, nothing particularly turns upon whether the offer had been specifically stated. The question is why the offer was subsequently not communicated. If there had been a change of mind because of one of the protected characteristics, it would be unlawful under section 39(1)(c) of the EqA. In deciding that, it would be sufficient if that had a significant influence on the decision, an influence that was more than trivial. Such an influence could be conscious, that is known to the decision maker, or even subconscious, not known to him.
37. We summarise the countervailing arguments and the evidence.
38. For the protected characteristic of age, he was 61, the claimant relies upon the fact he had to produce his driving licence and passport for the interview, both of which contained his date of birth. Mr Tony Smith agreed that was inappropriate at that stage of the recruitment process. It should have awaited the job offer, after which the identity of the candidate would need confirming.
39. The claimant points to the fact the other successful candidates were 31, 29 and 22 years of age. At the preliminary hearing the comparator age group was said by the claimant to be someone in his forties or fifties. He says that he sensed a change in the tone and atmosphere after his documents were photocopied by Mr Rider. He believes this explained Mr Rider's change of heart.
40. The claimant says he was specifically asked his age. Mr Rider denies this. This was referred to in the email of the claimant of 21 December 2021, the following day. That leads us to find, on balance, the question was asked.
41. Mr Rider said that age was an irrelevance. The claimant's experience was more important. If age had been a factor, he would not have decided to make the offer after the interview. We accept that. Having asked the question about age, for whatever reason, Mr Rider decided to offer the claimant the job immediately after the interview, after confirmation with Mr Roebuck. That was in full knowledge of the claimant's age and regardless of it.
42. In respect of disability, the claimant says he was improperly asked questions about his health. Although he referred to an incorrect legislative provision in his email, he drew the attention of Mr Tony Smith to this impropriety. He was

correct, to the extent of the limitations imposed by section 60 of the EqA above. No such limitations apply to age, as he suggested. Direct age discrimination can be justified in limited circumstances, so such a prohibition would be difficult. Nevertheless that justification is not raised in this case and it is not clear how querying the claimant's age could have had any relevance to the decision whether to offer him the job at all.

43. The claimant has summarised attitudes to HIV in society which are ill judged and inappropriate. He has lived with the condition for 17 years, experienced such prejudices and been discriminated in work and elsewhere. The fact that Mr Riley did not revert back to him with the offer on 21 December 2021 confirmed to his mind that this was another such response, following questioning in interview he says should never have occurred in any recruitment exercise.
44. The claimant draws attention to one aspect to the response to the claim. The suggestion of Mr Tony Smith and Mr Rider that offers were not routinely made at or shortly after the interviews is demonstrably untrue. All the other three candidates were offered their jobs before the conclusion of the recruitment process and so the contention of Mr Tony Smith that it was routine not to make earlier offers until all information on all candidates was available to evaluate them is not only incorrect it is, the claimant says, an attempt to conceal the real reason.
45. Mr Rider roundly refutes that the disability of HIV had anything to do with what happened the next day. He had decided to make the offer, but only failed to do so because of the pre-Christmas workload, which overtook him. The receipt of the claimant's email then arrested the process.
46. Having regard to these arguments, the background and context we make further findings of fact, as follows:
  - 46.1 Mr Rider was to offer the job to the claimant on 21 December 2021. He did not do so because he was overcome with other duties that day. In his evidence Mr Rider said that if the claimant had called him, he would have offered the job. We accepted that. Mr Rider acknowledged he should have called the claimant but failed to do so as promised and apologised in his evidence.
  - 46.2 Mr Rider did not contact the claimant on 22 December 2021 because he had received the claimant's email to Mr Tony Smith early that morning. In his evidence he said, "I did not feel in a position to do so because of your allegations". We accept that explanation.
  - 46.3 Mr Rider spoke to the site Director, the same morning. Mr Richard Smith told Mr Rider that they should wait for legal advice and in the meantime Mr Rider should not contact the claimant. Mr Richard Smith informed Mr Rider that he would contact Mr Tony Smith who was then on annual leave.
  - 46.4 Mr Rider said he had no contact with Mr Tony Smith at all. This is contradicted by the evidence of Mr Tony Smith (who gave evidence before Mr Rider) which was that he had spoken to Mr Rider before he sent his reply to the claimant's email, at 14.21 hours on 22



December 2021. Notwithstanding, we preferred the account of Mr Rider. There was simply no reason for him to deny speaking to Mr Tony Smith, had that been the case. Mr Tony Smith did not ordinarily work at the site. We consider it likely Mr Tony Smith's communications were with the site Director and Mr Richard Smith had spent about an hour discussing the claimant's email with Mr Rider on the morning of 22 December 2021.

47. We reach these findings whilst mindful of the inconsistencies and contradictions in the evidence both of Mr Rider and Mr Tony Smith. In addition to the inconsistency about whether there had been communications between Mr Tony Smith and Mr Rider, there is the further undermining aspect to Mr Rider's evidence. The proposition advanced by Mr Tony Smith was about awaiting the end of all interviews before selection. We summarise this at paragraph 69 above. Mr Rider himself acknowledged in his evidence that the second sentence to paragraph 18 of his statement he had sworn to be true could not be correct, namely that a three-month probationary offer was not offered on 21 December 2021 because there were other employees to interview
48. In spite of this we found Mr Rider to be a witness whose oral evidence was credible. It would have been far easier for him to have provided an explanation compatible with that of Mr Tony Smith, or to have said that he had spoken to Mr Tony Smith on 22 December 2021, if he had sought to mislead. He did not do so but gave his own recollection regardless of whether it might embarrass himself or his employer. He also took responsibility for the delay in communicating the decision and apologised for it.
49. It is clear that the site was desperate for employees at this level and that, by the time candidates reached the interview stage, they had a very good chance of being offered the job. The other 3 candidates were offered the job before all candidates had been interviewed and shortly after their own interviews. A similar approach was to be taken to the claimant. That account made sense and fitted the pattern. Mr Rider knew about the claimant's age and state of health when he and Mr Roebuck decided to offer the job. Those had no influence whatsoever on that decision.
50. What then changed his mind? The only material change in circumstances was the claimant's email which alleged discrimination. It was that which arrested the progress of his application. When it was seen by Mr Rider he had to make a decision about whether he called the claimant and offer the job in any event or take an alternative course. He frankly said in evidence that it was because of the allegations in the email he did not call the claimant. That approach was then required of him by Richard Smith. By the end of that day the claimant had withdrawn his application. We are satisfied the failure to communicate the offer on 22 December 2021 was because of the allegations the claimant had made and the withdrawal of his application for the job shortly thereafter.
51. There was no evidence to suggest that Mr Rider would be adversely influenced by the claimant's age. Mr Tony Smith disapproved the practice of asking for the documents at that stage, but it was an attempt to speed up the process of

verification of identity which takes place after an offer has been made. It was clear from the claimant's CV that he had a wealth of experience and was not fresh to the job market. We can see no reason that Mr Rider

would have rejected such a candidate when he and the respondent were in such great need for warehouse operatives and the recruitment process produced so few, not least because on Mr Rider's account the respondent paid less than other employers.

52. In respect of disability we are mindful of section 60 of the EqA and the prohibition on asking questions about health in the recruitment process. To the extent that there was reliance on information provided in response to a prohibited question, then it could be a factor to shift the burden of proof. We are not satisfied that the information was given in response to a question about health. The topic developed from a discussion about the claimant's previous job. It is noteworthy that the claimant referred to questioning "indirectly to ascertain my health status" in his email of 22 December 2021 in which he withdrew his application. This supports our finding that the information emerged from questions about leaving his former job.
53. The effect of section 60(5) of the EqA is that if reliance was placed upon such information elicited in contravention of section on 60(1), it may shift the burden of proof under section 136. We have been able to make positive findings about the reason the respondent acted as it did. This was not in reliance on the information which was discussed about the claimant's health. This is therefore not a case in which the shifting burden assists, in any event.
54. We recognise that HIV is a condition which carries a stigma, is misunderstood by many and treated judgmentally. Nevertheless, for the reasons we have set out we accepted the evidence of Mr Rider and do not find he was influenced at all by the disability. That is in contrast to the allegations of discrimination which Mr Rider said halted the process and the offer being made.
55. In closing submissions, the issue of amendment was discounted by the claimant, who said it was too late to change course and he wanted his claim determined. The evidence of Mr Rider pointed to a different type of claim, namely victimisation. The Tribunal explained that the law did not preclude a late amendment application, but the claimant maintained he wished to maintain the case as one of direct discrimination.

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Employment Judge D N Jones

Date: 3 February 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
6 February 2023

FOR THE TRIBUNAL OFFICE

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