EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Karapetian	v	Harrow, Richmond and Uxbridge College

Heard at: Watford
On: 4 & 5 April 2024
Before: Employment Judge R Lewis
Members: Ms A Brosnan and Ms M Harris

Appearances:
For the Claimant: In person
For the Respondent: Mr J Munro (Solicitor)

JUDGMENT

1. The claimant's claims of age discrimination fail and are dismissed.

2. The respondent is ordered to pay to the claimant preparation time of £1,075.00.

CORRECTED REASONS

Introduction

1. On 5 April the tribunal gave judgment and oral reasons in which it rejected the claimant's claims of age discrimination. Later the same day it made a preparation time order against the respondent. The respondent has written to request reasons, limited to reasons for the preparation time order. **The judge has corrected paragraph 4 of these Reasons in accordance with rule 69, in order to correct a typo, for which he apologises. The corrected sentence is shown in bold font.**

2. These Reasons should be read in conjunction with our Order of 12 February 2024.

3. Page references in these Reasons are to the 196-page bundle used at the April 2024 hearing. Where we refer to the 56-page bundle available for the February 2024 hearing, we preface the page number with the letter 'F.' Thus for example pages 106 and F35 are the same item.

Litigation history

4. The index events in the case (see below) took place on 4 November 2021. Day A was 17 January 2022, and Day B was 10 February 2022. The ET1 was presented on 9 March. The claimant has throughout acted in person. The ET3 was received on 20 April 2022: the respondent has throughout been represented by Peninsula. A case management hearing took place by telephone on 8 November 2022 (EJ King). Mr Munro took part on behalf of the respondent. EJ King's Order was sent on 14 November. The order identified the issues, and set a case management timetable. The bundle was to be finalised **in time for hearing preparation to be completed with** exchange of witness statements on 31 March 2023. In the same order the final hearing was listed to take place in person at Watford on 12-14 February 2024. The hearing came before the present tribunal on 12 February as listed. The tribunal could not proceed on that day, and adjourned to the above dates, reserving the case part-heard to itself. It gave further directions.

Outline of the claim

5. We do not here give Rule 62 reasons for rejecting the claim of age discrimination. We set out a bare summary of the age discrimination claim, so as to explain the background in which we made the preparation time order.

6. The claimant was born in May 1962. He has followed a career in practising and teaching art since his late teens. In September 2021 he began teaching at the respondent College as an agency teacher / lecturer.

7. The respondent undertook a recruitment to make a permanent appointment to the post which the claimant was filling as agency staff. The claimant applied.

8. At the first stage, his application and cv were considered by two senior colleagues, who selected him, from a total of 23 applications, to proceed to a short list of seven. Ms Atkins, who was then Senior Recruitment Co Ordinator, then checked the seven cv's to ensure that all the shortlisted candidates were eligible for appointment.

9. All shortlisted candidates were assessed on 4 November at what was called a 'microteach' session. Each was sent instructions to prepare a presentation (106). Each was required to deliver a presentation, and was then interviewed. The panel consisted of Ms Atkins and the two senior staff who had shortlisted. The panel selected two candidates to proceed to a final selection interview the following day, when both were interviewed, and one was offered and accepted appointment.

10. The claimant was 59 in November 2021. He was not selected to proceed to the final selection stage. The two candidates who proceeded were aged 26 and 36, of whom the younger candidate was appointed.

11. On 4 November Ms Atkins emailed the claimant to tell him that he had not

been selected to proceed further (161). Her email wrote*, 'We enjoyed your presentation very much, but it was a strong field and unfortunately your experience was not as strong as those we took through to interview.'*

12. The claimant had seen the other candidates at the start of 4 November, and met the appointee on 17 November. It was plain to him that she was much younger than him, and that she could not have more experience than he had. It followed, he reasoned, that Ms Atkins' email of 4 November could not be true.

13. On 2 December the claimant wrote what he called 'an official complaint' about the recruitment process and outcome to Ms Atkins (179). Ms Long acknowledged his complaint the next day and said that it would be investigated, and that there should be 'a full response' in late December (178).

14. The respondent's unchallenged evidence was that Mr Aziz, who was then a senior member of the respondent's HR function, and is no longer employed by it, was tasked with investigating and reporting in reply to the claimant's complaint, and that he failed to take any action about it.

15. On 10 February 2022 Ms Atkins wrote to the claimant (184). Her unchallenged evidence was that it came to be realised that Mr Aziz had failed to deal with the claimant's complaint, and that she was tasked with responding. In her letter, Ms Atkins wrote that her email of 4 November contained incorrect information, for which she apologised. She wrote, and explained, that the real reason why the claimant had not been selected for final interview was, 'your performance at the microteach session.'

16. In all the circumstances, including other events not set out in the above summary, the claimant did not accept that this was the truthful reason. He claimed that he had not been selected to proceed on grounds of age. He also raised a number of peripheral points which he alleged were free-standing acts of age discrimination, or, at least, evidence of discrimination.

17. In rejecting all the claims of age discrimination, the tribunal noted the absence of any record of the recruitment process kept by anyone other than Ms Atkins. It noted that her initial explanation of the claimant's rejection was wrong; and that tasked with investigating an allegation of discrimination, a senior member of HR did precisely nothing to investigate or report. The time between complaint and response was just under three months. The tribunal accepted the integrity of the notes produced by Ms Atkins, and of her oral evidence, that the two other candidates performed better in the microteach exercise and interview than did the claimant, and that his age was not a material consideration.

The February adjournment

18. Despite the lapse of some 15 months between the hearing before Judge King and the listed final hearing, neither side was fully prepared on 12 February 2024. The first paragraph of the tribunal's Order of that day stated,

> "This was to be the three day hearing listed by Judge King in November 2022. Both parties had replied to the tribunal's Pre Hearing Check List by stating that the case was fully prepared. It was not. The claimant had not submitted a witness statement; this could be overcome by allowing his ET1 and his original complaint to stand together as his witness evidence. The respondent had not provided bundles; when the tribunal printed them, they appeared incomplete. It had wrongly advised its witness that she need not attend until the following day."

19. In its case management order that day the tribunal directed of its own initiative that the respondent give further disclosure, and that the parties were at liberty to update their witness statements. Of its own initiative it issued a witness order to secure the attendance of Ms Atkins. Those Orders reflected the tribunal's view of the shortcomings which had necessitated the adjournment. We now deal with them separately.

20. The claimant's default was unexplained but surmountable. Although he provided a witness statement for the April hearing, it added little of substance to what he had written in his ET1 and his 4 November complaint. When, during the April hearing, he tried to amplify his case by the addition of entirely new allegations, we did not permit him to do so.

21. There were three points of default on the part of the respondent. The first was wholly that of Peninsula. Hard copy bundles were not available. The reason, as the emails which Mr Munro gave us showed, was that he had, during the morning of the previous Friday (9 February) instructed Peninsula staff to dispatch the paper bundles to the tribunal in Watford. A member of Peninsula's post staff had replied after 5pm on Friday to say that that had been done. They arrived at Watford during the afternoon of the first day of hearing. The direction to provide bundles had been issued by Judge King in November 2022. Leaving the bundles to the last working day before the hearing, and then dispatching them at close of business, with no guarantee of early delivery in Watford, was very poor practice. The solution – namely that the tribunal would print at least four working copies, and possibly more – was not acceptable to us in principle, because it would have the effect of (1) displacing to the tax-payer the respondent's cost of preparing the bundles; and (2) indicating to Peninsula that the tribunal would take responsibility for rectifying its mistakes.

22. The second was the absence of Ms Atkins, the respondent's only witness. We were told that she had been advised that she would not be needed until the second day of the hearing.

23. We accept, for present purposes, that if the only concerns had been those two, the tribunal could probably have found a work around, and proceeded.

24. The third matter, which was determinative of our decision that we could not proceed in February, was that our brief reading of the 56-page bundle showed that there were disclosable relevant documents which had not been provided. The categories of omissions are set out at paragraphs 2(a) to 2(f) of the Order for disclosure made after the February hearing, which were:

> "(a) All records of all stages of any investigation into the claimant's complaint, including notes of interviews, reports, outcome, and records of any appeal;

(b) The application and CV submitted by the claimant;

(c) The applications and CVs submitted by the two candidates who were selected for final interview;

(d) All notes of all three panellists of the presentations of the claimant and the two candidates who were selected for final interview;

(e) Typed transcripts of (d), including a typed transcript of pages 33 and 34 of the hearing bundle;

(f) Any audio file or other audio record made on zoom of the claimant's presentation and those of the two candidates who were selected for final interview."

The April hearing

25 The tribunal re-convened in April, and read the April bundle. We noted the addition of some 140 pages which had not been in the February bundle. There were no items in the categories (a) or (f) which we had identified in February, respectively because there had been no investigation, and because interviews were not recorded. Items (b) and (c) were provided, along with the applications (redacted) of the other four shortlisted candidates. Items (d) and (e) were part provided. The bundle now contained Ms Atkins' notes of all seven microteaches / interviews, and her notes of the final interviews of the last two candidates; but no records or notes were provided by either of the other two panellists. Typed transcripts of all handwritten notes were provided, as directed.

26 At the start of the hearing, we told the parties that at the end of the case we would of our own initiative consider whether to make a preparation time order. We gave judgment on the discrimination claim in the late morning of the second day. The Judge then outlined the basis upon which a preparation time order might be made. We then adjourned for lunch, after which we offered the claimant the opportunity to add any submissions, including any comments on how many hours work he had done. Mr Munro replied, and we gave our costs judgment the same afternoon.

27 We put to the parties three possible bases for making an order. We explained that they all related to our inability to proceed on 12 February 2024. They were the three points set out above: unavailability of bundles, the absence of Ms Atkins, and incomplete disclosure by the respondent. In his submissions, the claimant added little of substance to the tribunal's outline, except to add that he estimated that his preparation time incurred since February had been in the order of 100 to 120 hours. He explained that he was slow to work with unfamiliar legal paperwork, and slow to work with pdf materials.

28 Mr Munro made a number of points in reply, which we deal with individually.

29 He submitted first that the respondent's actions had not been vexatious or abusive, and could not be considered as part of the same category of conduct. We agree that we have considered the case only as 'unreasonable' conduct and that none of the other tests within rule 76(1)

applies.

30 He reminded the tribunal that the claimant's preparation of the case had also been non-compliant with Orders, and outlined briefly the difficulties which he had manifested as a litigant in person. We agree that the claimant's failure to provide a witness statement put him in breach of case management orders, but that was a surmountable hurdle. We accept that a litigant in person may, through ignorance and inexperience of the law and procedure of the tribunal, create challenges for their opponent and for the tribunal. That does not justify a respondent or experienced representative departing from a proper standard of preparation.

31 Mr Munro questioned whether it was right to proceed with this matter of the tribunal's initiative, especially as the claimant had not applied for costs, and had told the tribunal that the case was not about money. We took it that the tribunal had power to consider the matter of its own initiative; that seems to us implicit in the words of Rule 76(1), which state, 'and shall consider whether to do so, where it considers ....' We understood the claimant's comment that the case was not about money to refer to the issues of principle which almost always arise in a discrimination claim. This point did not assist us.

32 Mr Munro submitted that the claimant never had any prospect of succeeding in this claim, nor the respondent of losing it. That did not seem to us a good point. The rules of disclosure may well affect the outcome of a case, but whether or not they do, they are a fundamental part of a fair process. The Respondent was represented, and a representative is required to assist the Tribunal to achieve the overriding objective of placing parties on an equal footing. Justice does not depend on the respondent's prediction of outcome. It seems to us especially important to ensure that any claim brought by a litigant in person is seen to be properly and fairly defended. The merits of the claim were not material to our inability to proceed with a fair hearing in February.

33 Mr Munro challenged the proposition that the claimant had undertaken any further work as a result of postponement, let alone the hours which he had claimed. He submitted that the tribunal should apply a 'but for' test. We accept that the claimant had undertaken work between February and April. We do not accept that the tribunal must necessarily find that a causal link has been shown between the unreasonable conduct and the amount of costs to be awarded.

34 Mr Munro stated that the Tribunal had recommended further disclosure, not ordered it; he said that the claimant had not asked or applied for disclosure relating to other candidates; and he sought to distinguish between relevant disclosure (which he said had been given before February) and an indiscriminate process, perhaps akin to DSAR, of disclosing everything which the respondent had about the claimant.

35 Taking those points separately: we had made an Order in February, which was clearly described as such. The claimant's failure to apply for disclosure was a thoroughly bad point: disclosure is the obligation of a party and representative, and a litigant in person cannot be expected to manage it

correctly. An experienced representative, particularly one dealing with a litigant in person, must take particular care to ensure that it and its client have met the disclosure obligations which fall on them.

36 Having seen the additional 140 pages, we are confirmed in our view that in February the respondent had not given full disclosure, and that our Order was necessary to make good its default.

The relevant rules

37 We do not set out in full the framework within the tribunal's Rules. Rule 76 provides as follows:

> "(1) A tribunal may make a ….preparation time order, and shall consider whether to do so, where it considers that a party, or that party's representative has acted… unreasonably… the way that the proceedings or part had been conducted..
>
> (2) A tribunal may also made such an order where a party has been in breach of any Order.."

Rule 79 requires the Tribunal to make any preparation time order by a multiplier of the statutory hourly rate (at the material time, £43.00) in light of any information given by the Claimant about time spent on the case, but also in light of, "the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work."

38 The tribunal must approach the matter in the same way as any costs application. At the first stage it must identify whether there has been unreasonable conduct, and, if so, what it has been. It must then ask whether it is in the interests of justice to make an order. It should balance a number of factors: the tribunal is not a jurisdiction where costs follow the event, and although the rules do not use the word 'exceptional,' we should note that a costs order is an exception. We should balance the openness of the jurisdiction with our need to ensure that the resources of parties and the tribunal are well used. We should consider any information we are given about a party's ability to pay.

Discussion

39 Our first task is to identify the relevant unreasonable conduct, if any. We regard Peninsula's management of the bundles as so poor as to reach the borderline of unreasonableness. We accept Mr Munro's explanation that he made a judgment call, which turned out to be wrong, about timing the attendance of Ms Atkins. Those were both mistakes, but taken together, and in isolation from the disclosure matter, we do not find that either constituted unreasonable conduct within rule 76, such as to expose the respondent to an order for costs. Neither of those points played any further part in our decision. We turn only to the failure of disclosure.

40 Our starting point is that this was a case of direct age discrimination only. In a lay person's ET1 the claimant made clear that the heart of his complaint was that he had applied for a job, and a younger person than him

had been appointed. It is clear from the ET3 that that was the plain understanding of the respondent.

41 At the heart of any claim of direct discrimination lies comparison. The claimant compares his treatment with that of someone else; says that his treatment was worse than the other person's; and attributes the difference in treatment to a protected characteristic. The focus of the tribunal's task will often be to ask, what was the reason why the claimant experienced the treatment he did? Why was he not selected, when much younger candidates were? In this case the claimant compared his treatment with that of the two candidates who progressed to final interview. He saw that his treatment was worse, because they went on to final interviews, and he did not; and he attributed that difference to their respective ages in comparison with his: at the time in question, he was 59, and they were 26 and 36.

42 As a matter of law, and logic, the question, was there unlawful discrimination, focuses on the stage at which the difference in treatment took place, ie the point at which discrimination is alleged to have happened; and focuses on the comparison between treatment of the claimant and treatment of those who were treated better than he was.

43 In this case, that stage cannot have been the initial shortlisting, when the long list of 23 was reduced to seven, because the claimant and the two comparators were all treated the same, in that they all progressed to the microteach stage. The claimant cannot compare himself with the 16 unsuccessful applicants, because he was treated better than they were – he progressed to microteach, and they did not.

44 By the same token, the point of comparison or discrimination cannot have been at the final interviews, at which the last two candidates were in competition, and one was successful. The reason is obvious: the claimant did not take part in that stage, and no useful comparison can be made between those who were interviewed and someone who was not.

45 In this case, the point of comparison was at the microteach stage, because, if there were discrimination, that is when it happened. That is the stage at which two candidates were selected to progress further, and the claimant was rejected. If therefore comparison is to be made, it is between the claimant and the last two candidates; it is not, as the claimant asserted, and Mr Munro (wrongly) agreed, between the claimant and the final appointee. We accept that that is in part an emotive comparison, and that the ultimate appointment of a person less than half the claimant's age may be relevant evidence; but the final appointment was not the stage when any discrimination against the claimant took place, and it is not the true comparison for discrimination purposes.

46 Where a discrimination claim rests on comparison, the claimant is entitled to disclosure of necessary relevant material as will enable the claimant, and the tribunal, to test the both the claimant's allegations, and any non-discriminatory explanation for the relevant treatment put forward by the respondent. In a case involving recruitment or promotion, that may involve for example considering any of the following, if they formed part of the relevant process: advertisement, job description, person specification,

applications, cv's, records of any sift or paper assessment, records or notes of interview material, references, or internal appraisals. (We overlooked, in February, to order disclosure of the first three items, and we add, for the sake of completeness, that they were at least arguably discoverable of the respondent's initiative, so that the claimant could test whether the other two candidates met the requirements of the advertised post. However, for present purposes, nothing turns on that point).

47 The claimant is entitled to disclosure of material of this type, both about himself, and about those with whom he compares himself. It stands to reason that almost all of this material is, in every case, in the hands of the respondent, and almost none of it in the hands of the claimant; and that where the claimant acts in person, and the respondent is represented, the respondent and its representative must be careful to ensure that the claimant is not disadvantaged through ignorance and inexperience of the law and procedure.

48 This outline is no more than a summary of basic discrimination law practice. The principles were first set out by the House of Lords in Science Research Council vs Nasse 1979 IRLR 465, albeit in the context of a discussion about forms of immunity from disclosure.

49 In our judgment, it was clear in this case that the claimant was entitled to, and the respondent was duty bound to give, disclosure of such documents as were relevant to the reason why he failed to progress to the final stage interview, and which were necessary to do justice to that issue. The disclosure obligation rested heavily on the respondent, in particular when dealing with a litigant in person, and especially in circumstances where it had all the 'comparative' documents, and the claimant had none of them.

50 In all those circumstances, we find that the failure of disclosure by the Respondent constituted unreasonable conduct of the proceedings. It does not matter in principle whether the failure was that of the respondent or of Peninsula. We accept, in the respondent's favour, that the failure was not a deliberate attempt to withhold or deceive.

51 We must then consider whether it is in the interests of justice to make an award of costs. At this stage, in addition to the matters referred to above, it is right to have in mind the exceptionality of costs awards; the imbalance of knowledge and experience between the claimant and the respondent (and Peninsula); and also to give some weight to the ultimate failure of the claims. This is a balancing exercise, to be considered carefully, and we find that it favours the claimant and an award being made. We say so in particular because of the importance to be attached to fair process and the value of transparency in the defence of a discrimination claim. We attach weight to particular elements in the factual matrix: the claimant knew that the successful candidate was a fraction of his age; he knew that he had been given an explanation for his failure which was at best mistaken, and at worst (so far as he knew) untruthful; the management investigation which he had been promised never happened; and in the end, some months after the events, he was given an explanation which he did not accept. It is in that background that he was entitled to fair process and full disclosure, both of which he was denied until after the tribunal's intervention at the February

hearing.

52 We accept that as a result the February hearing was unable to proceed, and that the preparation and work of that day were entirely wasted to the Claimant. We accept that as a result, he was obliged to duplicate his preparation of the hearing: having prepared for a trial in February, he was obliged to repeat the exercise, with full documentation, some weeks later. We accept the Claimant's submission that that is a matter which he approaches slowly and finds difficult.

53 We note, and disregard, one possible counter argument which was not advanced by Mr Munro: if the respondent had given full timely disclosure, the claimant would still have had to do the work required to master the material; and the effect of the failure of disclosure was simply that that work was done in March 2024, when it should have been done much earlier. We disregard that argument (which might apply in civil proceedings) because it is not the right approach under our rules; and because the reality was that the claimant was obliged to spend more time on preparation than should have been needed.

54 That said, we could not accept the Claimant's submission that up to 120 hours, (that is the equivalent of 16 full office days) would be reasonable or proportionate. The Order we have made is for 25 hours preparation time. It is the equivalent of three and a half working days, and although we are not called upon to attribute the time to a particular task, or to apply a rigorous 'but for' test, we were guided in our thinking by consideration of the wasted half-day on 12 February 2024, and an approximate estimate of three further working days spent on preparation.

Employment Judge R Lewis

Date: 13/5/2024

Judgment sent to the parties on
14/5/2024

For the Tribunal office

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