



EMPLOYMENT TRIBUNALS

Claimant: Mr Alexander Martin Cubbin

Respondent: Age UK

Heard at: London Central Employment Tribunal

Hybrid Hearing (in person and by CVP)

Before: Employment Judge Gidney

Darian Keyms

Philip Madelin

On: 16th, 17th & 18th January 2024

28th March 2024 (Deliberation with Members)

2nd April 2024 (Judge alone)

30th April 2024 (Judgment & Remedy)

Appearances

For the Claimant: Mr Alexander Martin Cubbin

For the Respondent: Ms Joanne Twomey (Counsel)

JUDGMENT

1. It is the unanimous Judgment of the Tribunal that:

1.1 The Claimant's claim of age related harassment succeeds.

1.2 All of the Claimant's other claims are ill founded and are dismissed.

REASONS

Introduction

2. On 12th May 2023 the Claimant notified ACAS of a dispute with Age UK, the Respondent. He received his Early Conciliation Certificate on 6th June 2023 [4]. By a Claim Form dated 13th June 2023 [5] the Claimant presented claims of age and disability discrimination [10] ('the Claims') against the Respondent, pursuant to s5 and s6 of the **Equality Act 2010 (EqA)**. The Particulars of Claim identified claims of direct discrimination, indirect discrimination, harassment and victimisation [18]. The Respondent's Grounds of Resistance denied the Claimant's claims [34].
3. The case was case managed by Employment Judge Goodman in her Case Management Order dated 29th August 2023 [42]. During the course of that hearing the Claimant withdrew his claims of direct and indirect discrimination, which the Judge dismissed on withdrawal by the Claimant [50]. That left claims of harassment related to age (the Claimant was 59 at the material time) and victimisation after the Claimant had complained about discrimination. Both of the complaints of harassment and victimisation related to both of the Claimant's age and disability.
4. The Judge noted that the Claimant relied on the following mental impairments as qualifying pursuant to s6 **EqA** as obsessive compulsive disorder ('OCD'), clinical depression, generalised anxiety disorder, dyslexia and Autism, Neurodiverse and Autistic Communications ('ASD') as disabilities [44]. At the outset of the final hearing the Respondent accepted that the Claimant was, at all material times, namely March to June 2023, disabled, as defined by s6 **EqA** by the following mental impairments: anxiety, depression, ASD, Dyslexia and OCD ('the Conditions'). Medical records within the Final Hearing Bundle [153-154 & 160] supported this conclusion. The Respondent accepted that it had knowledge of the Conditions from 17th March 2023, being the date of the

Claimant's job application to the Respondent, in which he disclosed his disabilities [90].

5. On 7th September 2023 the Claimant made an application for the Respondent's ET3 Grounds of Resistance to be struck out on the grounds that it had no reasonable prospect of success [54]. On 18th September 2023 Judge Goodman directed that the Claimant's strike out application would be determined at the beginning of the trial [58]. At the commencement of the final hearing the Claimant withdrew his application to strike out of the Respondent's defence.
6. On the 20th September 2023 the Claimant filed a Schedule of Loss in which the Claimant confirmed that his losses were Injury to Feelings only, which he limited to the 1st or Lower **Vento** Band [60].

The Issues

7. The issues to be determined in this case were set out by Judge Goodman. At the outset of the Final Hearing both parties accepted that the Harassment and Victimisation issues as recorded were correct. Accordingly the Liability issues were as follows [48-49]:

Harassment related to age or to disability (EqA s26)

- 7.1 Did the respondent do the following things:
 - 7.1.1 By Trudy Boyson on 7th April speaking to him in a "condescending, pressurising" way about why he was not interviewed or shortlisted, stating it was a technical defect;
 - 7.1.2 Carrying out an unnecessary review of the Claimant's suitability for employment, rather than a review of the operation of their recruitment process;
 - 7.1.3 Breaching confidential data in his application;

- 7.1.4 A person who was not a graphic design specialist reviewing his portfolio of work;
- 7.1.5 Providing degrading feedback.
- 7.2 If so, was that unwanted conduct?
- 7.3 Did it relate to age?
- 7.4 Did it relate to disability?
- 7.5 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- 7.6 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation (EqA s27)

- 7.7 Did the Claimant do a protected act by saying in an email at 1:32pm on 17 April 2023 that the Respondent was in breach of the EqA?
 - 7.8 Did the Respondent do the following things:
 - 7.8.1 Carrying out an unnecessary review of the Claimant's suitability for employment, rather than a review of the operation of their recruitment process;
 - 7.8.2 Breaching confidential data in his application;
 - 7.8.3 A person who was not a graphic design specialist reviewing his portfolio of work;
 - 7.8.4 Providing degrading feedback.
 - 7.9 By doing so, did it subject the Claimant to detriment?
 - 7.10 If so, was it because the Claimant did a protected act?
8. Over the course of the hearing the Claimant amended his claim by abandoning a number of factual claims. The Respondent did not object and all of his

amendments were allowed. The net result of all of the amendments was to reduce the List of Issues to the following points only:

Harassment related to age or to disability (EqA s26)

8.1 Did the respondent do the following things:

- 8.1.1 By Trudy Boyson on 7th April speaking to him in a “condescending, pressurising” way about why he was not interviewed or shortlisted, stating it was a technical defect;
- 8.1.2 Breaching confidential data in his application;
- 8.1.3 Providing a degrading review and feedback of the Claimant’s application.

Victimisation (EqA s27)

8.2 Did the respondent do the following things:

- 8.2.1 Providing a degrading review and feedback of the Claimant’s application.

The Evidence

9. We were provided with Opening Summary Statements from both parties. We were provided with an agreed trial bundle which ran to 228 pages. We were provided with the following witness statements:

- 9.1 The Claimant’s witness statement running to 6 pages;
- 9.2 Donna Marshall, Age UK’s People Director, running to 7 pages;
- 9.3 Trudy Boyson, Age UK’s Recruitment Manager, running to 7 pages; and,
- 9.4 Rebecca King, Age UK’s Senior Brand Identity Manager, running to 9 pages.

10. Each of the witnesses gave evidence from their witness statements and were subject to cross examination.

Findings of Fact

11. We have not recited every fact in this case, or sought to resolve every dispute between the parties. We have limited our analysis to the facts that were relevant to the Issues that we were tasked to resolve. We made the following findings of fact on the basis of the material before us, taking into account contemporaneous documents, where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities, taking into account its assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts.

12. Trudy Boyson is a Recruitment Manager employed by the Respondent. Emma Sharples was a Recruitment Consultant in Ms Boyson's team. Ms Sharples was tasked with processing the applications received by the Respondent for its advertised Brand Asset Designer role. The hiring manager was Rebecca King, the Respondent's Senior Brand Identity Manager, who was assisted by Jemma Rayner. Ms Sharples roll was to collate the application forms and send them to Ms King and Ms Rayner for an initial sift to determine which candidates should be invited to interview. The Respondent operated a Recruitment and Selection Policy and Procedure [61]. Within that policy the Respondent set out its commitment to the Disability Confident Scheme ('DCS') [73] as follows:

'Please be aware that we are members of the Government's Disability Confident scheme. As part of our commitment, we guarantee an interview for any applicant who declares that they have a disability if they meet our minimum requirements for the role.'

13. The Respondent's online applications portal contained a similar statement [90]:

'Age UK is a member of Disability Confidence scheme by the Department of Work and Pensions through its actions in encouraging applications from candidates with disabilities if you identify as having a disability and meet the required essential criteria for the role, you will be offered an interview.'

14. The role of Brand Asset Designer, which went 'live' on 15th March 2023, had the following 'must haves' or minimum requirements that any CV of a DCS candidate must demonstrate in order to get a guaranteed interview **[78-79]**:

- Strong experience in all aspects of print and digital design.
- Exceptional creative layout and typographic ability.
- Ability to work within brand guidelines to develop creative solutions that exceed industry standards.
- Track record of producing superb design solutions online, offline demonstrable through a portfolio of work.
- Keen attention to detail and a passion for high standards of design and implementation.
- Advanced skills in Adobe Creative Suite, particularly Photoshop, Illustrator and InDesign.
- Team player keen to inspire colleagues.
- Excellent oral and written communication skills.
- Ability to prioritise and manage a fast moving workload to deliver projects on time and on brief.
- Graphic design degree level qualified or above.

15. On 17th March 2023 the Claimant applied for the Brand Asset Designer role. His CV contained the following statements:

I am 58 have been working in the industry for 40 years and in a voluntary capacity for the past 14 years and I'm not quite ready to put my slippers on. Please follow the link on my CV to view my portfolio of charity work **[89]**.

I had a positive assessment for dyslexia **[86]**.

I have depression, and severe anxiety and a combined diagnosis of both OCD and ASD **[86]**.

[Under Training] Some PC experience, Mac OSX, Quark 6, Adobe CS4 (InDesign, Illustrator, Photoshop ...) **[86]**.

[Under Please feel free to disclose any disability you may have] ASD, OCD, depression and severe social anxiety **[90]**.

16. 298 people applied for the role, 26 of which applied under the DCS. On Friday 31st March 2023 Rebecca King, emailed Emma Sharples with the 6 candidates shortlisted for interview [98]. The Claimant was not among the successful candidates. On 13th April 2023 at 9.47am Ms Sharples messaged Ms King to say that she had 56 candidates still 'in process' and 17 DCS candidates on the system [99]. The six shortlisted candidates were interviewed between 4th and 14th April 2023. On 14th April the successful candidate was offered the role.
17. At 4.00pm on 14th April the Respondent emailed the Claimant to reject his application, in the following terms [100]:

'Thank you for applying for the position of Brand Asset Designer. After careful consideration, we will not be taking your application further on this occasion. We have the following feedback from the hiring manager for you. Thank you for your application. We were overwhelmed with the response for the role. The general standard of applications has been extremely high and we've shortlisted candidates whose skill sets are more closely matched to the role requirements.'

18. That day the Claimant emailed the Respondent, attaching its own application guidelines, noting the Guaranteed Interview Scheme for disabled candidate and asking for a copy of the Respondent's complaint's procedure.
19. On 17th April 2023 Ms Sharples and Ms King had the following message exchanges [103-104]:

'EM: I've had some pushback from a DCS candidate, Alex Cubbin. Please could you review his application and let me know what minimum criteria he didn't meet which meant that we were not required to invite him for an interview?

RK: Both Gemma and I have looked through all the files and can't find his CV.

EM: OK, let me check. You definitely don't have the CV for Alexander Cubbin?

RK: Neither of us can find him in our folders.

EM: OK, maybe it was an Internet glitch in sending the CV over. I will check in with Trudy with how to move forward with this. Trudy is

giving him a ring to explain. It seems that it was a technical mishap, unfortunately.'

20. We were told, and we accept, that Ms Sharples sent the Claimant's CV to the hiring managers for assessment. In her witness statement [RK16] Ms King told us that Ms Sharples, undertook an initial sift of the candidates to remove those that did not meet the 'must have' criteria. Thus we feel able to conclude that Emma Sharples (who was not called as a witness) concluded that the Claimant satisfied the 'must have' requirements. This is because we accept that she did send his application onto the hiring managers.
21. However, we also accept that Ms King and Ms Rayner did not receive the Claimant's application. We have accepted Ms King's evidence on this point (at [RK32-33]) notwithstanding the Claimant's rejection letter which stated that his application had been '*carefully considered*' and that other applicant's skills sets more closely matched those of the advertised role [100]. We conclude that this was a generic email sent to those not selected for interview. It was, nonetheless, factually misleading to suggest to the Claimant that his application had been carefully considered when clearly it had not been considered at all, by anyone, save for an initial positive review by Ms Sharples.
22. We note, with some surprise, that only 1 of the 26 DCS candidates (candidate A) were judged to have met the minimum requirements for the role and thus offered a guaranteed interview under the DCS scheme [RK23]. We were troubled by this, but we did not have the evidence before us to explore whether their rejections without interview were appropriate, nor was it an issue before us during the trial. We note that a DCS scheme in which candidates can be judged not to have the essential criteria every time is a worthless scheme, with the potential for abuse by the sifter, particularly where the criteria is subjective and/or very difficult to quantify, such as '*team player keen to inspire colleagues*'. We are not sure that this metric can be fairly assessed without an interview.
23. A subsequent investigation revealed that system (ATS Talentlink Trainer) showed that the application had not gone to Ms King, but that it could not be

established if this was an internet issue or human error [106]. This means that the Claimant's application was received by the Respondent, Ms Sharples sent it to the hiring managers in good faith, but it was not received. As a result Ms King and Ms Rayner assessed who should be invited for interview and who should be rejected without sight or knowledge of the Claimant's application.

24. The Claimant was not informed of his rejection (and thus not able to challenge the failure to invite him to interview under the DCS scheme) until after the successful candidate had been informed of their appointment. Thus the entire exercise was conducted without the hiring managers knowing of the Claimant's application.
25. Trudy Boyson wrote to the Claimant on 17th April 2023 [105] to explain what had happened. She said:

'I am writing to sincerely apologise that due to an unknown technical issue, it appears that your application didn't go through to the hiring manager for review, as it should have. I have raised an internal inquiry to establish why that happened to make sure it doesn't happen again. Age UK are fully committed to interviewing Disability Confidence Candidates who meet the minimum requirements for the role. As I mentioned, we did receive 296 applications for this role and 26 of those were Disability Confidence Scheme candidates. We have now already filled this opportunity, so I'm not in a position to offer you an interview at this stage. We're extremely sorry that this has happened, but we would certainly encourage you to apply again for other suitable opportunities'.

26. The Claimant replied on the same day [105]. He disputed that he did not meet the minimum 'must haves' for the role and complained that the hiring process had discriminated against him, contrary to the **Equality Act 2010**. This email qualified as a 'protected act' as defined by s27(2)(d) of the Act.
27. Later on 17th April 2023 Ms Boyson emailed Ms King regarding the Claimant's application [110-111]. By now Ms Boyson knew that a DCS candidate had applied and been rejected without an interview, in circumstances the candidate considered to be discriminatory. She also knew that the reason for the

Claimant's failure to progress had nothing whatsoever to do with his age or disability but had been caused by an internal process failure which meant his application had not been considered by the hiring managers. She asked Ms King to carry out a retrospective review of his application to see whether he would have met the application's 'must haves' for an interview under the DCS scheme, had his application been considered. The email said:

'As discussed, unfortunately this candidate didn't come through to you, due to a technical error (which is being investigated). Can I please ask you to review this candidate as they applied through the disability confidence scheme'.

28. Ms King conducted her 'after the event' review of the Claimant's application and emailed Ms Boyson with her conclusions at 4.29pm on 17th April 2023. Given its importance to this case, it is necessary to recite the review in full:

- **Strong experience in all aspects of print and digital design.**
Whilst there were some print examples in his portfolio there was a lack of digital examples, (eg film or kinetic topography).
- **Exceptional creative layout and typographic ability.**
The standard of his layout and typographical skills are not reflective of 40 years' experience. With his experience in mind, I would expect a wealth of examples which explore numerous design solutions for a multitude of clients.
- **Ability to work within brand guidelines to develop creative solutions that exceed industry standards.**
I can see that there was a role at Tesco's working on their Christmas 2024 campaign. It's a shame that there are no branded pieces in his portfolio around brands we are aware of so we could see that he has the ability to work within brand guidelines but explore their creativity around particular campaigns.
- **Track record of producing superb design solutions online, offline demonstrable through a portfolio of work.**
The portfolio of work was limited, some of it didn't appear to be live, seemed to be self-initiated projects.

- **Keen attention to detail and a passion for high standards of design and implementation.**

There's a lack of examples included to be sure that this standard is met.

- **Advanced skills in Adobe Creative Suite, particularly Photoshop, Illustrator and InDesign.**

Referred to level of InDesign, Photoshop and Illustrator as version 4 (released in 2008) we work on the most up-to-date Creative Cloud suite, meaning that Alexander could be lacking skills in software.

- **Team player keen to inspire colleagues.**

From 2005 to present day, Alexander has been remote working on freelance contracts, this would suggest that he has not been part of a consistent team for some time. The nature of this role means that being able to work in a team is vital.

- **Excellent oral and written communication skills.**

According to Alexander CV, he is above average IQ and his standard of English and spelling are also above average.

- **Ability to prioritise and manage a fast moving workload to deliver projects on time and on brief.**

As Alexander has been remote working on individual projects, it would be hard to be confident of his ability to work across numerous projects, including a multitude of clients under variety of deadlines.

- **Graphic design degree level qualified or above.**

Alexander attended Liverpool Polytechnic in 1988 to 1992 and obtained a BA with an ordinary / college pass. Not clear what that means. I would expect the grade to be first class honours 2:1, 2:2 etc'.

29. It is this review of his application by Ms King that the Claimant relies on as both harassment related to his age and disability and an act of victimisation following his protected act discrimination complaint sent on 17th April 2023 at 1.32pm [114]. The review was not sent to him at the time. He had received a copy of it following a subject access request made by him on 25th April 2023, and received by him on 4th May 2023 [139]. On 12th May 2023 the Claimant responded to the review of his application by Ms King, stating [126]:

'Rebecca King's comments disrespectful, hurtful, humiliating, especially as she shared them, and deeply damaging. That she demeans my experience when I have not only worked longer than her, but at times at a higher grade shows sheer arrogance and the level of aggression which is unacceptable in the workplace. It is a full on attack on my reputation. That she shared such opinions and aspersions with her colleague Trudy Boyson are frankly grounds for libel. I also did not appreciate being profiled as a liar because I am disabled and therefore unable to present a usual profile. She was asked to evaluate my CV, not invited to express a bigoted opinion, using rude and insensitive languages to comment on my personality and honesty.'

30. We have no doubt that the Claimant found this evaluation, only discovered by him after the event, to be deeply upsetting. Donna Marshall responded to the Claimant's grievance. She concluded that discrimination had played no part on the Claimant's non-invitation to interview. She noted that the Respondent employs 532 people over the age of 55, over one third of its total workforce [135]. She told the Claimant in her response that the successful candidate had been 55 years old. She said this in order to satisfy the Claimant that the successful candidate's older age had not been a barrier to their appointment. However, in her witness statement Donna Marshall accepted that she had been wrong about the age of the successful candidate, who was in fact in their 30s [DM35]. We note that this mistake, which we accept was genuine, was nonetheless a self-serving mistake as it may have directed the Claimant away from his claim.

31. We shall turn now to the legal principles relevant to this claim:

The applicable Law

32. Harassment pursuant to s26 EqA – related to age and/or disability. The relevant provisions of section 26 of the **Equality Act 2010** state:

- (1) A person (A) harasses another (B) if:
(a) A engages in unwanted conduct related to a relevant protected

characteristic, and,

(b) the conduct has the purpose or effect of (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

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

33. Harassment claims require 3 elements¹, namely (i) unwanted conduct; (ii) having the purpose or effect of either (a) violating the claimant's dignity; or (b) creating an adverse environment; (iii) which are related (in this case) to the Claimant's age or disability.
34. In order to decide whether the conduct has either of the proscribed effects under sub-paragraph (1)(b) a Tribunal must consider *both* whether the putative victim perceives themselves to have suffered the effect in question *and* whether it was reasonable for the conduct to be regarded as having that effect².
35. The statutory words 'intimidating, hostile, degrading, humiliating or offensive' are important. Elias J³ stated '*Tribunals must not cheapen the significance these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment*'.
36. It is not necessary for a Claimant to be present when the conduct occurred to be harassed by it. If the conduct complained of is reduced into writing and/or recorded and the Claimant learns of them at a later date (even if it was never intended that he should ever learn of the conduct) the law allows that he can still find the conduct harassing.
37. Victimisation pursuant to s27 EqA. This is expressed in section 27 of the **EqA** in the following way:

¹ **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336

² **Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham** [2018] IRLR 542, CA

³ **Land Registry v Grant** [2011] IRLR, 748, CA

'27(1) *A person victimises another person if [the Respondent] subjects [the Claimant] to a detriment because [the Claimant] does a protected act.*

27(2) *Each of the following is a protected act ... (d) making an allegation that [the Respondents] has contravened [the EqA].*

38. A protected act must be a complaint that the **EqA** has been contravened, in others a complaint of discrimination (in this case age/disability discrimination)⁴. The primary object of the victimisation provision is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so⁵.
39. It is for the Claimant to prove the fact of the incidents of unfavourable or detrimental treatment said to have occurred and that the reason for the detrimental treatment was because he had raised an age or disability discrimination complaint. Causation is central to this determination. Lord Justice Slade has held⁶: *"If the necessary causal link is to be established, it must be shown that the very fact that the protected act was done by the complainant 'under or by reference to' that legislation [the EqA], influenced the alleged discriminator in his unfavourable treatment of the complainant"*.
40. Finally we remind ourselves of s212(1) **EqA** which states that detriment (arising from either discrimination or victimisation) does not include conduct which amounts to harassment. It can be either victimisation or harassment, but it can not be both.

Our Conclusions

41. The first point to make is that following the withdrawal and dismissal of the Claimant's claims of direct and indirect discrimination **[50]**, it is not the

⁴ **Khan v Trident Safeguards Ltd** [2003] EWCA Civ 1239 CA

⁵ Lord Nicholls in **Chief Constable of the West Yorkshire Police v Khan** [2001] IRLR 830 at paragraph 16

⁶ **Aziz v Trinity Street Taxis Ltd** [1988] IRLR 204

Claimant's case that his failure to be invited to interview was an act of discrimination. He complains that he found aspects of his treatment *post notification* of his non-selection harassing on grounds related to age or disability and/or that he was victimised following a protected act made after he had been notified of his non-selection for interview. This means that in the event any harassment or victimisation claim is upheld, it can only sound in an Injury to Feelings award. There can be no claim for lost salary or lost chance to earn salary if the non-selection itself was not an act of discrimination.

42. Even if the non-selection had been pursued as a discrimination claim, we would have rejected it on the grounds that we have already found as a fact that the Claimant's non-selection for interview had nothing whatsoever to do with his age or disability. We found that the reason was an internal error, either IT or human based, which caused the Claimant's application not to be forwarded for consideration and the entire competition to run without the Claimant's application being before the hiring managers. This reason, whilst desperately unfortunate, has nothing whatsoever to do with the Claimant's age or disability. It reflects very badly on the Respondent's processes for assessing job applications, but it is not a discriminatory failing.
43. Before turning to the remaining factual issues we wish to say this about the review undertaken by Rebecca King. We conclude that the Respondent was embarrassed by its failure to consider the Claimant's application or determine whether it met the 'must haves' for the role. Had the review concluded that the Claimant did meet the requirements, the embarrassment and fallout would have been much worse. There was no actual need for a review. The Respondent could simply have apologised for the mistake but conclude that following the appointment of the successful candidate, there was nothing further that it could do.
44. Instead the Respondent embarked on a self-serving exercise of shutting the stable door after the horse had bolted. We find that Rebecca King undertook that exercise well aware that a conclusion that the Claimant met the minimum criteria for the role would have been embarrassing and awkward, and was

therefore something that could very conveniently be avoided if the review concluded that the Claimant would not have met the essential criteria for the role. For reasons that we shall explain we believe that Ms King approached her review from the perspective of knowing how useful a refusal would be and setting out to achieve just that. She did not do it because of the Claimant's age or disability, she did it because it would be a neat solution to an awkward problem arising out of the failure to consider the Claimant's application at all.

45. It is now necessary to turn to the remaining factual allegations, in order to state our conclusions on the harassment and victimisation claims and to explain why we have concluded that Ms King acted in the 'stable door shutting' way that she did whilst conducting her review.

46. Trudy Boyson on 7th April speaking to the Claimant in a 'condescending, pressurising' way about why he was not interviewed or shortlisted, stating it was a technical defect (said to be harassment only). The Claimant's account on this is set out at [AC8]. Tracy Boyson confirmed that she had apologised for what had happened, stating that his application had not been reviewed by the hiring manager due to a technical issue [TB19]. In evidence the Claimant accepted that the email [105] (quoted at paragraph 25 above) accurately reflected what he had been told. We did not consider that this communication was in any 'condescending or pressuring' and we accept Ms Boyson's evidence that it was said and meant in good faith. When asked in cross examination the Claimant admitted that he could not remember what it was about the communication that he found 'condescending' or 'pressurising'. In the circumstances we accept Ms Boyson's evidence as to how she meant her communication to come across and as such, this allegation fails on its facts and is dismissed.

47. Breaching confidential data in his application (said to be harassment only). In this allegation the Claimant is referring to Tracy Boyson telling Rebecca King that he was a disabled candidate. Ms Boyson did send Ms King a copy of the Claimant's application pack that contained multiple references to his disabilities. In his witness statement [AC12] the Claimant withdrew any suggestion that this was an act of victimisation, but he retained it as an act of harassment. We find it

difficult to understand this complaint. The Claimant was open, indeed actively promoting, his disabilities [90]. He wanted the hiring manager to be aware, indeed it was part of his planned route to an interview under the DCS. In the circumstances we conclude that there was no breach of his confidential information in Ms Boyson telling the hiring manager of the Claimant's disabilities. It was not unwanted and did not create any environment capable of amounting to harassment. The request for a review was not itself an act of detriment. It was intended to establish whether the Claimant should have had an interview under the DCS scheme, and as such, it was an absolute necessity for the reviewer to know that the candidate qualified under that scheme. In all of the circumstances this allegation is not made out on its facts and it is dismissed.

48. Providing a degrading review and feedback of the Claimant's application (relied on a harassment and victimisation). We shall consider whether this allegation is made out on its facts before turning to consider whether it meets the statutory definition of either harassment or victimisation.

49. As a matter of fact Ms King did review the Claimant's application after the event to determine whether he should have had a guaranteed interview under the DCS [109-110]. She was assisted in the review with Jemma Rayner [RK10]. Whilst a review was wanted by the Claimant (as a means of progressing his complaint) a negative review was unwanted, and as such we find that the review's conclusions amounted to unwanted conduct. This is well demonstrated by his reaction to reading Ms King's review [126].

50. We have considered each part of the review individually, as follows:
 - 50.1 **Strong experience in all aspects of print and digital design.** Ms King concluded that whilst there were some print examples in his portfolio there was a lack of digital examples, (eg film or kinetic topography). We conclude that this was based on Ms King's assessment of the Claimant's work. There is no evidence that it was related to his age of disability. We note however that it nonetheless supported the Respondent's preferred outcome that the minimum requirements for the role were not met.

50.2 **Exceptional creative layout and typographic ability.** We have concluded that this self-serving conclusion did tip the balance into age related harassment of the Claimant. Ms King stated that *'the standard of his layout and typographical skills are not reflective of 40 years' experience. With his experience in mind, I would expect a wealth of examples which explore numerous design solutions for a multitude of clients'*. We note that the 'must haves' for the role made no reference whatsoever to examples given by a candidate matching a particular level of experience. In imposing a level of competency to match a perceived level of experience Ms King was imposing a higher 'must have' on the Claimant than was required for the role. She was also concluding that a less experienced (or younger) candidate had to produce less than a more experienced (or older) candidate to progress to interview. This imposition of a higher standard was driven, we conclude, because Ms King wanted to support the Respondent in extraditing itself from the mess it had got itself into by failing to consider the Claimant's application at all. We consider that the conclusion, referencing 40 years' experience, was used to block the Claimant and it was related to his age. We find that when the Claimant read this statement that he found it to be 'intimidating, hostile, degrading, humiliating or offensive'. It was not intended by Rebecca King to have had that purpose, as she never intended him to read it, however we conclude that it did have that effect when he did read it. In the circumstances we find that the Respondent did harass the Claimant for reasons related to his age. There is nothing to suggest this conclusion was in any way related to the Claimant's disability.

50.3 **Ability to work within brand guidelines to develop creative solutions that exceed industry standards.** On this point Ms King concluded, *'I can see that there was a role at Tesco's working on their Christmas 2024 campaign. It's a shame that there are no branded pieces in his portfolio around brands we are aware of so we could see that he has the ability to work within brand guidelines but explore their creativity around particular*

campaigns'. There was some discussion within the evidence that Ms King did not access the whole of the Claimant's portfolio. It was put to Ms King that each of the Claimant's logos [183] was a link to a large number of files. Ms King replied '*I don't know. I reviewed it, I can't recall how many files, a can't recall a specific number*'. We accept that the view reached by Ms King on this competency was based on her professional assessment of what she had seen of the Claimant's work and was not related to his age or disability. In the circumstances this allegation fails and is dismissed.

50.4 **Track record of producing superb design solutions online, offline demonstrable through a portfolio of work.** On this Ms King concluded, '*The portfolio of work was limited, some of it didn't appear to be live, seemed to be self-initiated projects*'. A self-initiated project is one where the designer creates a logo without having a client brief to do so, in order to demonstrate their skill, albeit not for a fee-paying client. We do not consider that the 'must have' excluded self-initiated projects, and the rejection of that work by Ms King therefore imposed an artificially higher standard on the Claimant than the 'must have' required. However we conclude that the reason for this was Ms King's desire to 'tow the line' in order to reach a self-serving conclusion for the Respondent. There is nothing within it to suggest that the conclusion was related to the Claimant's age or disability. This allegation fails.

50.5 **Keen attention to detail and a passion for high standards of design and implementation.** On this Ms King stated that '*there's a lack of examples included to be sure that this standard is met*'. Our conclusions on this are essentially the same as our conclusion of the 'ability to work within brand guidelines' competency above. We are not convinced that Ms King considered all of the Claimant's portfolio, but we are satisfied on the balance of probabilities that her conclusions were based on her professional judgment and were not related to the Claimant's age or disability.

50.6 **Advanced skills in Adobe Creative Suite, particularly Photoshop, Illustrator and InDesign.** On this Ms King concluded, *'referred to level of InDesign, Photoshop and Illustrator as version 4 (released in 2008) we work on the most up-to-date Creative Cloud suite, meaning that Alexander could be lacking skills in software'*. We are troubled by this conclusion. In it Ms King concludes that the Claimant had not met this 'must have' criteria because his CV, in its training section, indicated that the Claimant had been trained in version 4, first published in 2008. The 'must have' does not require training in the most recent version of the software, it simply requires a candidate to demonstrate advanced skills in it. This is yet another example of Ms King, in order to achieve the result that the Respondent needed, imposing a higher requirement onto the Claimant than the must have required, in order to mark him down. On this competency we conclude that the rationale for concluding that the Claimant did not meet the 'must have', namely that he had experience in a 14 year old version of the software, was related to his age. The comment was not intended by Rebecca King to have had the purpose of harassing the Claimant, as she never intended him to read it. We have to consider whether it had the effect. We find that when the Claimant read this statement that he did not find it to be 'intimidating, hostile, degrading, humiliating or offensive'. He has described the comment as 'time lead'. Whilst we consider this reference to using an older software to be related to age, we also consider the link to age to be more tenuous than the '40 years' experience' conclusion. The more tenuous the link is, the less likely its harassing effect. Mindful of the guidance provided by Elias J that *'Tribunals must not cheapen the significance these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment'* we conclude that the reference to using out of date software, taking into account the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have had a harassing effect, that, in this instance, it did not. In the circumstances this fails as an incidence of age related harassment. There is nothing to suggest this conclusion was in any way related to the Claimant's disability.

50.7 **Team player keen to inspire colleagues.** On this, Ms King concluded that *'from 2005 to present day, Alexander has been remote working on freelance contracts, this would suggest that he has not been part of a consistent team for some time. The nature of this role means that being able to work in a team is vital'*. On this we conclude that Ms King has made an assumption that remote working could be taken to mean that the Claimant has not been part of a consistent team. We conclude that the assumption is likely to be flawed. We do not think it follows that simply because a person works remotely that they are not part of a team. The logic simply does not follow. We conclude that this is consistent with Ms King looking to support the Respondent in her conclusions, however we accept that there is nothing to demonstrate that the conclusion was related to the Claimant's age or his disability. In the circumstances this allegation fails and is dismissed.

50.8 **Excellent oral and written communication skills.** Ms King concluded that *'according to Alexander CV, he is above average IQ and his standard of English and spelling are also above average'*. This answer did upset the Claimant. He read the expression *'according to Alexander's CV ...'* to imply doubt and/or suggest that the CV's assertion regarding his oral and written communication skills had not been demonstrated elsewhere and/or should be doubted or otherwise be taken with a pinch of salt. We understand why the Claimant reacted in that way. The comment could have said *'Alexander's CV confirms excellent oral and written communication skills'* and the introduction of the word *'according to'* does suggest Ms King doubts the assertion. That said, considered broadly the inevitable conclusion on this point is that Ms King had concluded that the Claimant had satisfied this *'must have'*. Furthermore the doubt (if any had been intended to be conveyed by Ms King) about the accuracy of the statement is not related to the Claimant's age or disability. In the circumstances, this allegation fails and is dismissed.

50.9 **Ability to prioritise and manage a fast moving workload to deliver projects on time and on brief.** On this Ms King concluded, '*as Alexander has been remote working on individual projects, it would be hard to be confident of his ability to work across numerous projects, including a multitude of clients under variety of deadlines*'. Our conclusions on this are similar to our 'team player conclusions' above. We conclude that Ms King has made an assumption that remote working could be taken to mean that the Claimant did not have the ability to work across numerous projects, including multiple clients and deadlines. We conclude that the assumption is likely to be flawed. We do not think it follows that simply because a person works remotely that they are not able to work on multiple pieces of work. The logic simply does not follow. We think this is exactly what the DCS scheme is all about, to enable a DCS candidate to attend an interview and explain how and why he/she demonstrates that they have this skill. We conclude that this is consistent with Ms King looking to support the Respondent in her conclusions, however we accept that there is nothing to demonstrate that the conclusion was related to the Claimant's age or his disability. In the circumstances this allegation fails and is dismissed.

50.10 **Graphic design degree level qualified or above.** On this Ms King concluded that '*Alexander attended Liverpool Polytechnic in 1988 to 1992 and obtained a BA with an ordinary / college pass. Not clear what that means. I would expect the grade to be first class honours 2:1, 2:2 etc*'. It is clear that this conclusion is designed to support the conclusion that the '*degree level qualified or above*' 'must have' was not met by the Claimant. The Claimant obtained his degree. It was not an honours degree. He was not given a 1st, 2:1 or 2:2 classification because the Claimant did not complete his dissertation. We were told that the Claimant's father had died and he had been unable to complete it. He was nonetheless awarded a degree which the Claimant candidly described in his CV as a '*ordinary / college pass*' [86]. This is exactly the sort of point that could and should have been cleared up at interview. Yet again we conclude that Ms King imposed a higher pass mark (obtaining

a 1st, 2:1 or 2:2 classification) than the 'must have' required. It sought no more than a degree level qualification. She did this to support the Respondent's case that the Claimant would not have qualified for an interview under the DCS such that no harm was done by his inadvertent exclusion from the application process. That said, this allegation fails as there is no basis whatsoever to conclude that this conclusion was related to the Claimant's age or disability. Accordingly, we dismiss it.

51. Providing a degrading review and feedback of the Claimant's application is also relied on as an act of victimisation following the Claimant's complaint about discrimination made at 1.32pm on 17th April 2023 [114]. We have already concluded that this complaint qualified as a protected act. Was Ms King's negative review of the Claimant's application an act of revenge or retaliation because the Claimant had made a complaint about discrimination? We conclude that it was not. We do so on the following grounds:

51.1 We conclude that Ms King's motivation was to extricate the Respondent from the mess it had got itself into for not considering the Claimant's application at all. It was not, we think, on the balance of probabilities, because a qualifying complaint of discrimination had been made;

51.2 We conclude that the alleged discriminator, Ms King, did not know of the discrimination complaint when she conducted the review, such that she cannot have been influenced by it. The complaint was made at 1.32pm on 17th April 2023. At 3.20pm Ms Boyson asked Ms King to conduct the review [110]. This email made no reference whatsoever to a discrimination complaint having been made. It did not even refer to the Claimant as having made any complaint at all. Ms King completed her review by 4.29pm on the same day [109]. Ms King told us that she did not know of the discrimination complaint, and we accept that evidence in light of the email timings and content, as referred to herein.

51.3 Finally we have upheld this factual complaint as an act of age related harassment, in so far as it relates to marking the Claimant down as his

portfolio examples were considered not to reflect what a candidate of 40 years' experience should have. Pursuant to s212(1) **EqA** the same allegation cannot be both age related harassment and detrimental treatment for making a complaint about discrimination.

52. Accordingly this allegation, as an act of victimisation fails and is dismissed.

Conclusion

53. In conclusion we find that in reaching her finding that the Claimant's portfolio examples did not reflect someone with 40 years' experience, Ms King imposed a higher standard upon the Claimant than the 'must have' for the role. It simply would not have been said of a candidate with 5 years' experience. The downgrading of the Claimant, due to him having 40 years' experience, was plainly related to his age. Whilst it was not intended to harass him, for the reasons stated, we conclude that it did have that effect.

54. For the reasons stated, this upheld claim of age related harassment post dated the Claimant's rejection for interview for the role. Accordingly there can be no 'money loss' or 'lost chance' remedy claim. It appears to us that the Claimant's remedy is likely to be limited to injury to feelings only, which we will now assess.

30th April 2024

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Employment Judge Gidney

Sent to the Parties on:

24 July 2024
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For the Tribunal: