EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no: 4107147/2023

Final Hearing Held in Aberdeen on 24 - 26 June 2024

Employment Judge A Kemp
Tribunal Member A Atkinson
Tribunal Member K Pirie

Mr Michael Healy	**Claimant** **In person**
Aberdeenshire Council	**First respondent** **Represented by:** **Mr M McLaughlin, Solicitor**
Kay Hopwood	**Second respondent** **Represented by:** **Mr M McLaughlin, Solicitor**
Karen Wiles	**Third respondent** **Represented by:** **Mr M McLaughlin, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that

1. **the first respondent did not breach sections 13 or 26 of the Equality Act 2010,**
2. **the claim for matters said to have occurred prior to 9 July 2023 are in any event outwith the jurisdiction of the Tribunal, and**
3. **the Claim against all respondents is accordingly dismissed.**

REASONS

Introduction

1. This was a Final Hearing into claims made by the claimant for

   (i) direct discrimination on grounds of age under section 13 of the Equality Act 2010, and

   (ii) harassment in relation to age under section 26 of that Act.

2. The claimant is a party litigant and the respondent is represented by Mr McLaughlin. The claimant was accompanied by his trade union representative at the hearing, but she did not appear for him.

3. A Preliminary Hearing was held on 20 January 2024. Case management orders were made. The claimant had thereafter sought to amend his claim which the Tribunal did not accept by messages sent on 28 May and 6 June 2024.

4. The claimant explained that he wished to rely on the transcript of a grievance hearing, which the respondent objected to on the basis of its lack of relevance. Although the claimant had produced it in the exchange of documents under the case management orders the respondent had not included it in the single Bundle. The Tribunal decided that the extract could be referred to under reservation as to its relevance, on which submissions could be made. It was added to the documents accordingly.

5. As the claimant is a party litigant the Judge explained about how the hearing would be conducted, that all relevant evidence required to be given at the hearing, including as to remedy, and about evidence in chief, cross examination to challenge matters not considered accurate, or which the witness knew but had not addressed, and about re-examination. He explained about submissions. He further explained that the Tribunal could assist a party to an extent under the overriding objective in Rule 2, including by asking questions to elicit facts under Rule 41, but not so as to act as if the party's solicitor.

The issues

6. At the commencement of the Final Hearing the Judge proposed to the parties that the following were the issues in the case. The parties confirmed agreement to them, and they are the following:

1 Is any matter prior to 9 July 2023 outwith the jurisdiction of the Tribunal and in that regard (a) was there conduct extending over a period to or beyond that date and if not (b) is it just and equitable to extend jurisdiction?

2 Did the first respondent subject the claimant to less favourable treatment because of his age contrary to section 13 of the Equality Act 2010 ("the Act")?

3 If so, was that objectively justified under section 13(2) of the Act?

4 Did the first respondent harass the claimant by subjecting him to unwanted conduct related to his age contrary to section 26 of the Equality Act 2010?

5 If either claim under sections 13 or 26 of the Act is established are either the second or third respondents, or both of them, liable forthat under section 110 of the Act?

6 If any claim is successful to what remedy is the claimant entitled?

The evidence

7. The parties had provided a Bundle of Documents, most but not all of which was spoken to in evidence. Further documents were added during the hearing, without opposition.

8. Evidence was given by the claimant, who did not call any witnesses and by the second and third respondents on their own behalf and on behalf of their employer the first respondent. The second respondent did not attend to hear the evidence of the claimant, and the third respondent did not attend to hear the evidence of the claimant or second respondent.

Facts

9. The Tribunal considered all of the evidence led before it. The Tribunal found the following facts, material to the issues before it, to have been established:

Parties

10. The claimant is Mr Michael Healy. His date of birth is 13 May 1956.

11. The first respondent is Aberdeenshire Council. It is a local authority.

12. The second respondent is Mrs Kay Hopwood. She is the HR Manager of the first respondent, and the claimant's line manager.

13. The third respondent is Mrs Karen Wiles. She is Head of Legal and People of the first respondent and the second respondent's line manager.

Background

14. The claimant has had a lengthy career in Human Resources and related matters. Prior to joining the first respondent his career included senior roles in HR in substantial companies in the private sector, including as HR Director.

15. The claimant is employed by the first respondent as a Team Leader. He works in the Learning and Development department of the respondent. His service started on 11 June 2011.

16. The first respondent does not have a Retirement Policy, nor an employer justified retirement age. It operates a pension scheme for its employees under which access to the accrued pension can be taken from age 55.

17. In 2017 the second respondent became the claimant's line manager. She spoke to him informally on a number of occasions then and in the years thereafter about her view of his style of acting with some of the first respondent's employees, which some regarded as patronising and arrogant, what she thought was a lack of engagement with the HR team of which he was a part more akin to an external consultant than an employee within the team, and of a lack of collaboration with the team and others. No written notes were kept of those conversations. On average they were held about once per annum.

18. On 18 January 2021 the second respondent emailed the claimant to ask his views about applications for voluntary severance by two colleagues. He responded on the following date with his comments. She then replied on same date saying "They can retire but cant lose the posts at the moment". She did so as if there was voluntary severance agreed funding for the post would not continue, but it would if either retired. She wished both to remain with the first respondent, and in discussion agreed with the claimant that that was their joint preference.

19. In March 2021 the claimant had a personal performance plan meeting with the second respondent. A document was produced for it. No performance concerns were expressed by the second respondent but she mentioned greater collaboration with the Service Manager, meaning her.

Secondment

20. In and around October 2021 the parties had discussion about a seconded role for two years for the claimant. The claimant agreed to do so believing that it was on the basis that he would return to his substantive post thereafter. The second respondent asked the claimant at that stage about his plans to retire. She did so in the context of considering the future shape and structure of the team she managed. He did not give a clear answer to the question in her view.

21. On 2 November 2021 the third respondent, who is the second respondents line manager, emailed the claimant with a draft profile for a role as Programme Manager which he was being considered for at that time, and said:

> T would welcome a chat with you about how you feel about it and what your intentions would be over the coming few years. I'm conscious that retirement might be in your thoughts though so tying you down to a couple of years might suit us but not you. Would you be happy to speak to me about your career thoughts?"

22. On 3 November 2021 the claimant exchanged messages with the second respondent regarding the third respondent. The claimant said "I think she also wants some reassurance that I am not retiring. I am happy to give that reassurance whether I am in the PH role or not." That message was not passed on to the third respondent.

23. The claimant sought to arrange a meeting with the third respondent on 3 November 2021. Her PA was on sick leave at the time and it did not take place. The claimant and third respondent exchanged messages about that and other matters and the claimant proposed a new date for the meeting, which was accepted.

24. The claimant met the third respondent on 12 November 2021. She asked him whether he had any plans to retire. He replied by asking her whether she had any plans to retire. She said that she had not. He replied to the effect of There you go then".

25. The claimant was thereafter offered and took up the rote- as Programme Manager for a programme called Learning Opportunities (LO) in November 2021. His line manager remained the second respondent. The claimant and second respondent agreed that he would not attend team meetings during his secondment.

26. The role remained within the first respondent and was for a period of two years. Helen Milne acted up as Team Leader during the claimant's secondment. The second and third respondent were members of a Steering Group that managed the process. The Director of Education and Children's Services Laurence Findlay who was the sponsor of the

programme announced that the claimant would be the Learning Organisation Programme Manager by email on 22 November 2021.

27. The claimant took up that role under the first respondent's secondment policy, under which he was guaranteed a return to his role as Team Leader at the end of the two year period.

2022

28. In 2022 [no more specific date was given] the claimant was diagnosed with hypertension.

29. No personal performance review meeting took place with the claimant in 2022 as the second respondent forgot to do so.

30. The Steering Group approved in principle the progressing of an After Action Review process that the claimant had proposed.

31. On 21 November 2022 the claimant sent an email to the CE Chief Officers headed "Lessons Learned following floods" referring to an After Action Review process and invited the completion of an AAR form. There were about 50 recipients of that email. The Chief Executive replied to the claimant on the same day to refer to lessons learned reviews being a part of the resilience and emergency response work, and that the claimant may wish to familiarise himself "with the working arrangements already embedded and in place".

32. The second respondent received messages from some of those who had received that message both that the Chief Executive was concerned at whether the claimant could lead the project and from others concerned at the lack of collaboration prior to making reference to AAR. The person responsible for another existing process called Lessons Learned was concerned that he had not spoken to her about it. The second respondent raised those issues with the claimant at an informal meeting around that time.

2023

33. In around early 2023 Helen Milne announced that she would retire in September 2023. The claimant and second respondent had a meeting in

February 2023 to consider his return to his substantive role as Team Leader when the secondment ended, after which the claimant emailed the second respondent with his thoughts.

34. In around May 2023 the claimant was spoken to by one of the team members who was very concerned that Ms Milne was to be returning and the claimant returning to the team. The second respondent spoke to the team members. Three of them made complaints about the claimant's performance and behaviours, including a feeling of being belittled or ignored, and making decisions without consultation, a feeling that his style and behaviour damaged the reputation of the team with customers, and a feeling of being patronised. One person spoke about not sleeping well, and drinking too much. One was considering leaving the team if he returned. Of the remaining three members of the team one indicated that the behaviours referred to had been seen but did not wish to give a statement, another had seen and heard them and would give a statement if they were repeated and a third could not believe such behaviours were tolerated but was close to retirement and not prepared to make a statement.

35. The second respondent took notes of each conversation with the six members of the team [which were not before the Tribunal].

May 2023

36. The claimant held an online meeting with the second respondent on 15 May 2023 who said "I see that you have had another birthday" or words to that effect.. She said that the Programme Manager role was to end in October or November 2023 and asked if he had thought about that. He said that he would return to his substantive post.

June 2023

37. In around June 2023 Ms Coleen Henderson spoke to the second respondent about a Conference that had been organised. It was the first major conference after the Covid-19 pandemic with a large number of attendees. She intimated criticisms of the claimant's role in that.

38. The second respondent also spoke to Mr Findlay who expressed concerns at the claimant's performance as Programme Manager.

July 2023

39. The claimant met the second respondent online on 27 July 2023. She told him that she was instituting procedures with regard to his performance. She explained the reasons for doing so. [No note of that meeting was before the Tribunal]

40. The second respondent sent him an email that day with regard to their meeting. She set out three areas as to concern over his performance. She stated that she expected an improvement in performance during the period of secondment. She attached a link to the first respondent's Work Performance Ability Procedure.

41. The Work Performance Ability Procedure referred to a Competency Framework document. It referred to an informal process, and steps in a formal process that inciuded the following stages:

1. Meeting with the employee
2. Counselling
3. Review Meetings
4. Work Performance Hearing
5. Appeal
6. Redeployment
7. Dismissal
8. Appeal

42. The claimant responded by email of 31 July 2023. He indicated a willingness to learn, and sought specific examples of the issues that the second respondent had raised. He did not raise an allegation of age discrimination. The second respondent did not reply to that email.

August 2023

43. The claimant and second respondent met on 1 August 2023. The claimant asked again for specific examples. The second respondent mentioned the email that the claimant had sent on the After Action Review, which led to

the Chief Executive questioning whether the ciaimant could lead the Learning Organisation. The claimant sought guidance and support. There was a discussion as to a Performance improvement process.

44. The claimant and second respondent met again on 8 August 2023. The second respondent referred to setting matters out in a competency framework document.

45. On 9 August 2023 the second respondent sent the claimant an email headed "work performance" with the competency framework document from the first respondent and a draft completed in part in relation to the claimant. The email requested that he review the improvement plan and include what he will do to address underperformance in the column of the draft headed "Action Employee will take to improve." She also referred to making a referral to Occupational Health.

46. The document had headings for "Evidence of areas requiring development/improvement" "Evidence/behaviours to demonstrate improvement" and "Support and/or training". The second respondent provided commentary in those columns providing an indication in general terms of what she considered as evidence of areas of under performance. In some areas she confirmed that he met expectations.

47. The claimant did not complete the document. He did not believe that the document was a valid one and he did not accept that his performance was inadequate.

48. On 10 August 2023 the second respondent emailed her team in relation to People and Organisational Development (POD). It included that "Helen [Milne] will remain as acting team leader until her retirement on the 15th September. Mike [the claimant] will remain in his secondment until further notice but will be attending team meetings from now on."

49. The claimant and second respondent had one to one meetings about fortnightly during August and September 2023, at one of which he intimated to her that he did not regard the Competency Framework document as valid.

50. An Occupational Health report was issued in relation to the claimant on 18 August 2023. It noted stress from the performance procedure and recommended that it be halted temporarily pending GP review, and that there be another referral in 4-6 weeks.

51. On 21 August 2023 the second respondent sent an email to her team confirming the grades for a new organisation to be named POD. That for Team Leader was unchanged at Grade M.

52. On or around 21 August 2023 the claimant sent an email to the second respondent [which was not before the Tribunal] asking for the role profile of the Team Leader role. She replied apologising for not having done so, and stating that she would [again not before the Tribunal]. She did not. She did not send the role profile to other Team Leaders save Ms Milne who had assisted her. The role was subject to further job evaluation after she sent the email on 21 August 2023, which has not completed. The POD organisation has not been introduced.

53. The claimant met the second respondent on 12 September 2023. She commented that the report was less than helpful. There was a discussion as to his participation in team meetings but that he would not rejoin the team at that stage.

Grievance

54. The claimant intimated a grievance on 18 September 2023. It was not before the Tribunal. It did not give specific details of the nature of the grievance but referred to direct discrimination on grounds of age and harassment related to age.

55. A further occupational hearth report was issued after a meeting on 26 October 2023. The report suggested that the grievance be completed before he returned to his substantive role.

56. The claimant provided a more detailed statement of grievance on or around 19 January 2024 in which he alleged age discrimination in asking him as to retirement plans, and harassment related to age by the raising of issues of his performance. That was the first occasion on which he had raised that issue with the first respondent.

57. The second and third respondents spoke at a meeting on 26 January 2024 in relation to the grievance. An extract from the transcript of that meeting, held by Teams, is accurate.

58. The grievance was later rejected, as was the claimant's appeal [details of the decision on both aspects were not before the Tribunal],

Other matters

59. The claimant was on sick leave from October 2023 to March 2024. He then asked for a phased return to work. The respondent placed him on paid special leave in March 2024, on which he remains.

60. The claimant suffers from tinnitus which on occasion affects his ability to hear clearly, and is exacerbated by stress.

61. The claimant had a Linked-In account, in which he referred to his role as Programme Managerat a "Scottish Local Authority" from October 2021 to October 2023, but not naming the first respondent or referring to his earlier employment with the first respondent.

62. The claimant commenced early conciliation on 9 October 2023 and the certificate was issued on 20 November 2023. The Claim Form was presented on 28 November 2023.

Submissions

63. Written submissions were helpfully provided by both the claimant and Mr McLaughlin for all respondents. Mr McLaughlin also spoke to his submission. As their positions were set out largely in writing they are not repeated in detail.

64. In basic summary the claimant argued that there had been direct discrimination on the basis of his age contrary to section 13 of the Act, and separately that there had been harassment under section 26. He argued that there had been repeated enquiries about his retirement plans, exclusion from meetings, a sudden imposition of performance procedures after he had asserted his intention not to retire, a failure to consult on the changes to his job role and preventing him from returning to the role of Team Leader after secondment. He alleged primarily that the second

respondent created conditions to force the retirement he did not agree to do. He asked the Tribunal for a declaration and award for injury to feelings.

65. Again in basic summary the respondents argued that the claim should be dismissed. The allegations of direct discrimination and of harassment were denied. There had been appropriate questions asked about retirement plans for workforce planning purposes. There had been few of them, and they were not less favourable treatment. They were justified. The performance issues had been raised for years beforehand, which had not been challenged, and the performance issues were appropriately addressed. Doing so was not related to age in any way. The evidence of the second respondent as to what was done, why that was, and what the circumstances were should be accepted. There had been no evidence as to a comparator. The claim should be dismissed.

The law

66. The Equality Act 2010 ("the Act") provides in section 4 that age is a protected characteristic. Age is further addressed in section 5 and refers to an "age group".

67. Section 13 of the Act provides as follows:

> "13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim……"

68. Section 23 of the Act provides

> "Comparison by reference to circumstances
>
> (1) On a comparison of cases for the purposes of sections 13,14 and 19 there must be no material difference between the circumstances relating to each case…."

69. Section 26 of the Act provides

“26 Harassment

(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;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are

….age…..”

70. Section 39 of the Act provides:

“39 Employees and **applicants**

.....

(2) An employer (A) must not discriminate against an employee of A’s (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

.....”

71. Section 109 of the Act provides:

"109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A’s employment must be treated as also done by the employer…..”

72. Section 110 of the Act has provisions in relation to liability of employees.

73. Section 123 of the Act provides

> "123 Time limits
>
> (1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.....
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it,"

74. Section 136 of the Act provides:

> **"136 Burden of proof**
>
> If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

75. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). Provisions as to the effect Early Conciliation has on timebar are found in Schedule 2 to the Enterprise and Regulatory Reform Act 2013, which creates section 140B of the 2010 Act. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 give further detail as to early conciliation. The statutory provisions provide in basic summary that within the period of three months from the act complained of, or the end of the period referred to in section 123 if relevant, EC must start, doing so then extends the period of time bar

during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable, but there remains the possibility of a just and equitable extension where it has taken place albeit late.

Jurisdiction

76. Whether there is conduct extending over a period was considered to include where an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant - *Barclays Bank pic v Kapur* ***[1989] IRLR 387,*** The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period ***(Hendricks*** *v Metropolitan Police Commissioner,* ***[2003] IRLR 96).***

77. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant ***(Robertson v Bexley Community Centre [2003] IRLR 434).***

78. hi ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** the Court of Appeal held:

> "First, it is plain from the language used ('such other period as the employment tribunal thinks just and equitable') that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see ***British Coal Corporation v Keeble [1997] IRLR 336),*** the Court of Appeal has made it clear that the

> tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR BOO,* para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see *Dunn v Parole Board [2008] EWCA Civ 374; [2009] 1 WLR 728,* paras [30]-[32], [43], [48]; and *Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72,* para [75],
>
> That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

79. That was emphasised more recently in *Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23,* which discouraged use of what has become known as the *Keeble* factors as form of template for the exercise of discretion. Section 33 of the Act referred to is in any event not a part of the law of Scotland.

80. Some cases at the EAT held that even if the tribunal disbelieves the reason put forward by the claimant for delay it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: *Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278, Pathan v South London Islamic Centre UKEAT/0312/13* and *Szmidt v AC Produce Imports Ltd UKEAT/0291/14.*

81. The EAT decided that issue differently in *Habinteg Housing Association Ltd v Holleran UKEAT/0274/14.* There it was held, in brief summary, that a failure to provide a reasonable explanation for the delay in raising the claim was fatal to the issue of what was just and equitable.

82. In *Rathakrishnan.* there was a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal

case of *London Borough of Southwark v Afolabi [2003] IRLR 220,* in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act, an English statute in the context of a personal injury claim, provided that no significant factor is omitted. There was also reference to *Dale v British Coal Corporation [1992] 1 WLR 964,* a personal injury claim, where it was held to be to consider the plaintiffs (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded

> "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see *Hutchison v Westward Television Ltd [1977] IRLR 69)* involves a multi-factoral approach. No single factor is determinative."

83. In *Edomobi v La Retraite RC Girls School UKEAT/0180/16a* different division of the EAT (presided over by a different Judge) in effect preferred that approach, with the Judge adding that she did not "understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the tribunal can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay."

84. In *Weils Cathedral School Ltd (2) Mr M Stringer v (1) Mr M Souter (2) Ms K Leishman: EA-2020-000801* the EAT did not directly address those authorities but stated that, in relation to the issue of delay, "it is not always essential that the tribunal be satisfied that there is a particular reason that it would regard as a good reason". A more recent authority from the EAT - *Concentrix CVG Intelligent Contact Ltd v Obi [2022] EAT 149,* supported that same conclusion, although that authority is another at the same level as those in the *Habinteg* line, such that it does not resolve the matter finally.

85. In *Accurist Watches Ltd v Wadher UKEAT/0102/09* the EAT stated that, whilst it is good practice, in any case where findings of fact need to be

made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents.

86. There is a further matter to consider, which is the effect of early conciliation on assessing when a claim was commenced. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). Provisions as to the effect Early Conciliation has on timebar are found in Schedule 2 to the Enterprise and Regulatory Reform Act 2013, which creates section 140B of the 2010 Act. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 give further detail as to early conciliation. The statutory provision provide in basic summary that within the period of three months from the act complained of, or the end of the period referred to in section 123 if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable, but there remains the possibility of a just and equitable extension where it has taken place albeit late.

Direct discrimination

87. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagarajan v London Regional***

Transport [1999] IRLR 572. In some cases, such as ***James,*** the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagarajan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15.*** The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) - as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

Less Favourable Treatment

88. In ***Glasgow City Council v Zafar [1998] IRLR 36,*** a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

89. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285,*** also a House of Lords authority it was held that an unjustified sense of grievance could not amount to a detriment. In ***R (ex part. Birmingham) v EOC [1980] AC 1155*** it was held that it was not enough for the claimant to believe that there had been less favourable treatment. The test is not an entirely subjective one - ***Burrett v West Birmingham Health Authority [1994] IRLR*** 7. It is a question of fact, and the perception of the employee is relevant.

Comparator

90. In ***Shamoon*** Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as s/he was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed

ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

91. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in *Balamoody v Nursing and Midwifery Council [2002] ICR 646.*

92. The EHRC Code of Practice on Employment, which the Tribunal took into account so far as relevant, states at paragraph 3.23 that the circumstances of the claimant and comparator need not be identical but nearly the same, and it provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

Substantial, not the only or main, reason

93. In *Owen and Briggs* v *Jones [1981] ªCR 618* it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In *O'Neill v Governors of Thomas More School [1997] ICR 33* it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In *Igen v Wong [2005] IRLR 258* the test was refined further such that it part of the reasoning that was more than a trivial part of it couid suffice in this context: it referred to the following quotation from *Nagarajan*

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts

had a significant influence on the outcome, discrimination is made out/

94. The Court considered arguments as to whether an alternative wording of no discrimination whatsoever was more appropriate, and the wording of EU Directives. It concluded as follows:

> "In any event we doubt if Lord Nicholls' wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial. "

95. The law was summarised in *JP Morgan Europe Limited v Chweidan [2011] IRLR 673,* heard in the Court of Appeal.

Justification

96. There is a potential defence of objective justification under section 13(2) if the respondent can show that the treatment of the claimant was a proportionate means of achieving a legitimate aim, normally referred to as objective justification. It is not treated in exactly the same way as other such similar defences in the Act. The Equal Treatment Framework Directive 2000/78/EC which the Act implemented has different wording for the justification tests in indirect and direct discrimination. In relation to direct age discrimination, article 6(1) provides that treatment will not be discriminatory if it is:

> "objectively and reasonably justified by a legitimate aim including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary."

97. *Seldon v Clarkson Wright ana Jakes (and Secretary of State for Business innovation and Skills, and Age UK - intervenors) [2012] IRLR 590;* heard in the Supreme Court, reviewed the Court of Justice of the European Union case law on justifying direct age discrimination. Direct discrimination may only be justified if the relevant treatment or provision seeks to achieve a legitimate aim of a public interest nature related to employment policy, the labour market and vocational training, the legitimacy of which member states must establish rather than individual

employers. Lady Hale summarised the position as to justification as being of two kinds, the first being inter-generational fairness the second as to dignity.

98. Lord Hope stated that steps taken in the employer's best interests may nevertheless be directly related to what is regarded as a legitimate social policy, stating:

> ''There is a public interest in facilitating and promoting employment for young people, planning the recruitment and departure of staff and the sharing out of opportunities for advancement in a balanced manner according to age. These social policy objectives have private aspects to them, as they will tend to work to the employer's advantage. But the point is that there is a public interest in the achievement of these aims too. They are likely to be intimately connected with what employers do to advance the interests of their own businesses, because that is how the real world operates. It is the fact that their aims can be seen to reflect the balance between the differing but legitimate interests of the various interest groups within society that makes them legitimate."

99. In *MacCulloch v ICI [2008] RLR 846* the EAT set out four principles as to justification, later approved by the Court of Appeal in *Lockwood v* ***DWP [2013] IRLR 941*** as follows:

> (I) The means to achieve the aim must correspond to a real need for the organisation
> (ii) They must be appropriate with a view to achieving the objective
> (iii) They must be reasonably necessary to achieve that end
> (iv) The Tribunal is to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and make its own assessment of whether the former outweigh the latter.

100. The Supreme Court summarised the law in relation to justification in *Bank Mellat* v *HM Treasury (No. 2) [2015] AC 700* on a similar basis.

Harassment

101. Guidance was given by the EAT in ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336,*** in which he said that it is a 'healthy discipline' for a tribunal to go specifically through each requirement of the statutory wording, pointing out particularly that (1) the phrase 'purpose or effect' clearly enacts alternatives; (2) the proviso in sub-s (2) is there to deal with unreasonable proneness to offence (and may be affected by the respondent's purpose, even though that is not *per se* a requirement); (3) 'on grounds of is a key element which may or may not necessitate consideration of the respondent's mental processes (and it may exclude a case where offence is caused but for some other reason); (4) while harassment is important and not to be underestimated, it is 'also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'.

102. Para 7.9 of the Equality and Human Rights Commission Code of Practice states that the provisions in section 26 should be given 'a broad meaning in that the conduct does not have to be because of the protected characteristic'. This was applied in ***Hartley v*** *Foreign and Commonwealth Office* ***UKEAT/0033/15*** where it was held that whether there is harassment must be considered in the light of all the circumstances; in particular, where it is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording. The test for "related to" is different to that for whether conduct is "because of' a characteristic. It is a broader and more easily satisfied test - *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another EAT 0039/19.*

103. There can be harassment under this provision arising from an isolated incident; for an example, see *Lindsay* v *London Schoo! of Economics [2014] IRLR 218.* It is not necessary for the claimant to have expressed discomfort or air views publicly *Reed and Bull Information Systems Ltd v Steadman [199] IRLR 299.*

Burden of proof

104. There is a two-stage process in applying the burden of proof provisions in discrimination cases, arising in relation to whether the decisions challenged were "because of' the relevant protected characteristic, as explained in the authorities of /gen v *Wong [2005] IRLR* 258, and *Madarassy v Nomura International Pic [2007] IRLR 246,* both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. In *Hewage v Grampian Health Board 2012 IRLR 870* the Supreme Court approved the guidance from those authorities.

105. Discrimination may be inferred if there is no explanation for unreasonable behaviour *(The Law Society v Bahl [2003] IRLR 640* (EAT), upheld by the Court of Appeal at *[2004] IRLR 799.*

106. In *Ayodele v Citylink Ltd [2018] ICR 748,* the Court of Appeal rejected an argument that the *Igen* and *Madarassy* authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant, at the first stage. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn, at the first stage, was then confirmed in *Royal Mail Group Ltd v Efobi [2019] IRLR 352* at the Court of Appeal, and upheld at the Supreme Court, reported at *[2021] IRLR 811.* The Supreme Court said the following in relation to the terms of section 136(2):

> " s 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not 'there are facts etc'. I agree that this is what s 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was already what the old provisions required as they had been interpreted by the courts. As discussed at paras [20]—[23] above, it had been authoritatively decided that, although the language of the

> old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case."

107. The Court said the following in relation to the first stage, at which there is an assessment of whether there are facts established in the evidence from which a finding of discrimination might be made:

> "At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account."

108. In /gen *Ltd v Wong [2005] ICR 931* the Court of Appeal said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established, the second stage of the process if the burden of proof passes from the claimant to the respondent:

> "To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever is compatible with the Burden of Proof Directive."

109. The Tribunal must also consider the possibility of unconscious bias, as addressed in *Geller v Yeshurun Hebrew Congregation [2010] ICR 1028,* It was an issue addressed in *Nagarajan*

Observations on the evidence

110. There were in a number of respects a sharp conflict in the evidence between the claimant and second respondent. For example she alleged that she had raised with him issues to do with his style and effect on others, which he simply denied. We therefore required to assess the

extent to which we accepted the evidence of the witnesses before us as credible and reliable.

111. The **claimant** we considered gave evidence he believed was truthful. We had some concerns in relation to the reliability of his evidence. We considered that in some respects he had difficulty in recalling matters. He explained that he suffered from tinnitus which affected his ability to hear, increasingly so when suffering stress, and it is possible that on some occasions what the second respondent said she had said during a meeting he had not properly heard. There were however also a number of occasions on which the claimant could not recall matters, which included a meeting with Ms Hopwood referred to in an email he sent in February 2023. He said on a small number of occasions that he was confused about the detail, and he asked for the question to be repeated on a small number of occasions so that he could understand it, although the question had been a short and simple one.

112. There were some parts of his evidence that we did not regard as the kind of behaviour that would normally be expected. For example, firstly when Ms Wiles asked him about his plans for retirement, which had been foreshadowed by an email to him, he replied only to ask her whether she had plans for retirement. He thought that she would understand from that that he did not wish to be asked the question, but we did not consider that that was at all obvious from his response. In any event, it was not in our view an appropriate way to speak to one's line manager's line manager. It was an example of what was described In another context as being "tone deaf' in our view. Secondly Ms Hopwood's emails in January 2021 as to voluntary severance requests by two staff did not bear the meaning he sought to ascribe to it. She merely mentioned retirement as an option for them, but she wished to keep them and not lose the two posts which granting voluntary severance would have done.

113. Thirdly when Ms Hopwood sent him the Competency Framework document on 9 August 2023 he did not reply in writing to set out his position in relation to it, but did say that he did not regard it as valid. It was however on the face of the document provided to him one that the respondent had introduced, its role included performance management,

and the email stated in terms that the process was an informal one, prior to a formal process being initiated. It did not therefore need a policy, as it was an informal process before a forma! one, as the email itself stated specifically. The claimant refused to engage in it as he feared doing so may have led him to accept the allegations, but he could have replied to that effect had he wished to, and had he a genuine desire to resolve issues as his email of 31 July 2023 intimated. That he did not return the document or respond to it to state his position in writing was, for someone of his experience and CV, surprising in our view and was not a matter he was able to explain.

114. Fourthly his overall position was that the comments made by Ms Hopwood in that form were not genuine ones, and his belief was in effect that they had been made up to get him out of the organisation when he did not agree to retire. We did not consider that at all likely, for reasons set out further below.

115. Fifthly he argued that after his birthday had been referred to in a meeting in May 2023 matters moved quickly. But it was on 27 July 2023 that the issue of performance management was raised in an email, the first time on which that had been done in written form. It did not appear to us that such a period of time was indicative that age discrimination was occurring, as he contended. It was not a comment on retirement, and there had been a period from November 2021 since the question of retirement plans had last been raised. We considered that the attempt to rely on that was at beast an exaggeration of what had happened.

116. Sixthly his notes of meetings we did not regard as fully comprehensive or accurate. They were partial in our view with an additional element from his own standpoint and interest. He said that he had taken notes during the meeting, from which he shortly afterwards prepared an extended handwritten version from recent memory, which later were transcribed so as to be legible for this hearing.

117. Some of the language he had placed in quotation marks we considered unlikely to have been used where that was challenged by the second respondent. For example in his note of the meeting on 15 May 2023 it was alleged that she had expressed frustration that she would have to

redo her budget. His belief was that she had prepared it on the basis of his retirement with Mr Nicholson being transferred into his role as Team Leader. She explained however that that was not the case, and that the budget had not been prepared on such a basis, but further that any role that became vacant was not filled in such a manner because of budgetary constraints. It required a process to justify it, at the least. She denied making the comment as to budgets, and we considered her evidence on that more reliable. That example was not the only one, and overall it called into question the accuracy of the notes the claimant presented.

118. Another example is his note of the meeting with Ms Wiles on 12 November 2021, when after he asked her about her own plans for retirement his note said “KW didn’t really respond". Ms Wiles in her evidence said that she did respond, stating that she did not have any plans, and that the claimant had said “there you go then” or words to that effect, which she took as him meaning that he did not plan to retire. We preferred her evidence on this matter, which was clearly given, to that in the note. It was also instructive that the note made comments as to how the claimant felt and that he did so as he had told the second respondent of his plan, but firstly that is not a note of the meeting but of his feelings and secondly the third respondent was unaware of the separate conversation.

119. **The second respondent** was we considered generally a credible and reliable witness. She candidly acknowledged some shortcomings in how matters had been managed by her. She was candid about her view of the claimant, and that she had found managing him difficult, and that she had been somewhat intimidated by him. She said that the ideal outcome for her was if he had retired after the secondment, and that that is what she had been hoping for. That was we considered obviously honest, candid and not seeking to hide matters. She had also met with him to discuss a return to his substantive role, she had started a performance management process which could have led to him returning to it, she had not commenced the formal part of the process and she had included him in team meetings to an extent. These are not the acts of someone simply out to remove a person because of their age, as was the effective allegation, in our view. Her recollection of meetings and the position in general was most often good, and although not always could she recall the detail that

was reasonably rare. Her explanations for what she did and why we generally accepted. Whilst some may not have been in accordance with our view of best practice that is not the test that we apply. We considered that where there was a dispute on fact with the claimant we preferred the evidence of the second respondent.

120. The third respondent gave more brief evidence, which we considered credible and reliable. As discussed above we preferred her evidence on the meeting of 12 November 2021 to that of the claimant. We also accepted her evidence that the claimant did not appear to her in any way upset by the query she had emailed him about on 2 November 2023, and that he had then arranged the meeting, then re-arranged it. He appeared to her relaxed during the meeting, contradicting his suggestion that the enquiry had upset him as it raised retirement.

Discussion

121. The Tribunal came to an unanimous decision. It dealt with each of the issues identified above as follows:

Jurisdiction

122. Given our decision on the merits below the issue of jurisdiction does not require substantial consideration. There were some aspects of matters that related to acts both before and after the effective "cut-off' date of 9 July 2023 (earlier than that suggested by the respondents because of the effect of early conciliation), and so far as raising performance issues are concerned initiated by the email on 27 July 2023 were after that date and therefore within jurisdiction.

123. We did not consider that the events which related to the claimant's performance were related to any extent to his age, for the reasons given below. We considered that the questions as to retirement plans which were asked in 2021 were therefore not within the jurisdiction of the Tribunal as conduct extending over a period. There was no such conduct in that regard. The last matter was the meeting in May 2023 when a comment was made about a birthday having taken place, and a query made in effect as to retirement plans after the secondment. That was prior to the cut off period, and there was nothing later we considered could be

conduct extending over a period. Age did not feature in a discussion thereafter, save that the claimant believed that it lay behind the decision to raise performance, as he did not intend to retire. For reasons we come to, we did not consider that that was the case to any extent at all.

124. In relation to the test of what is just and equitable this is a claim which failed on the merits, and having regard to that and the circumstances overall we did not consider it just and equitable to allow within jurisdiction. The reason for delay that the claimant gave was not wishing to rock the boat with the first respondent, but we did not consider that a good explanation. Whilst our view of the law is that delay is not a conclusive issue in itself we did not consider that the failure to mention alleged age discrimination, or his concern over being asked about retirement plans as he claimed in evidence, at the time was reasonable. He is a very experienced HR practitioner, who has operated previously as an HR Director.. The claim for events prior to 9 July 2023 was not within the jurisdiction of the Tribunal.

Was *there less favourable treatment of the claimant because of his age contrary to section 13 of the Equality Act 2010?*

125. The first question is whether or not the claimant has established a *prima facie* case such as leads to the burden of proof shifting to the first respondent. He argued that he has suffered less favourable treatment in a number of respects, but which may be grouped into two sections. The first section related to whether he had retirement plans and in particular:

(i) The second respondent mentioning retirement in relation to two candidates for voluntary severance in January 2021.

(it) The second respondent asking him as to retirement plans in October 2021.

(iii) The third respondent asking him as to his plans in November 2021.

(iv) The second respondent mentioning that he had had a birthday at an online meeting on 15 May 2023 and then asking about his plans after secondment.

126. The second section was in relation to work performance, which he alleged was created by the first respondent to put pressure on him to leave when

he indicated in May 2023 that he did not intend to retire after the secondment ended. He also alleged that he had been excluded from team meetings during secondment, was not sent a job profile for team leader as the budget did not include his continued employment, and comments allegedly made by the second respondent to the effect that she and the third respondent had expected him to retire. He also alleged that he was not allowed to return to his role as team leader. All of these issues he alleged were related to his age and the fact that he did not wish to retire.

127. The first question is: are any of these less favourable treatment? It seems to us that the first section issues are not. The first matter was not about the claimant at all. Mentioning retirement for two other employees was simply stating the possibility that those employees, then around the age of 60, could choose to retire. It was not inferring that it was desired by the second respondent that they should, indeed the opposite was the case. It was not suggesting that the claimant should retire. There was we considered nothing at all in the first point.

128. Asking whether someone has a plan for their retirement is we consider in general terms something that might be less favourable treatment, but it all depends on the circumstances. In particular it depends on how the matter is raised, and why Asking in an open way whether the employee has any plans as to retirement in an appropriate way is we consider not less favourable treatment. The answer may be yes or no, it may be to retire in the short term or longer term, but the employee can say what he or she wishes. Comparing that to someone on maternity leave for example, or asking if someone has plans to start a family, part of what the claimant did and argued for, is not comparing like with like. It is not we considered evidence of a mindset against increased age, as the claimant argued.

129. The claimant argued that the issue was raised repeatedly. It was a question asked more than once, but not in a manner of with a frequency that we regarded as placing any form of pressure on the claimant so as to amount to less favourable treatment for that reason. It was simply to ask him if he had any plans on three occasions. Two were at the time when he was considered for a two year secondment. Whilst the second and third respondents might have co-ordinated matters more effectively we

accepted the third respondent's evidence that she was not aware of what the claimant had said in a message to the second respondent that he was not intending to retire. Those plans were clear at that stage, and when the second respondent asked about matters again in May 2023 they might or might not have changed, and she asked that at a time when performance issues had come to the fore for reasons addressed below. Helen Milne was to be retiring in September 2023, and with the secondment due to end in November 2023. In that context it is we considered not less favourable treatment to ask as she did. What happened on these occasions is very different to trying to promote retirement actively on several occasions, or seeking to cajole a person into retiring on one or more occasions. The questions were asked in an appropriate way and in an appropriate context for an appropriate reason.

130. The comment about having had a birthday in May 2023 was not perhaps the best way to start the meeting as the second respondent acknowledged, but it was not less favourable treatment in terms of the Act. The fact was that the claimant had had a birthday. It was a passing comment, and birthdays happen to all employees of course. The claimant argued that it was not a greeting, but carried an implication of his increasing age. That was we considered putting a spin on it that it did not deserve.

131. In conclusion, the first section of matters we did not consider were collectively or individually less favourable treatment.

132. We turn to the second section and the issue of the commencement of work performance processes by the email of 27 July 2023, followed by the meeting on 1 August 2023 and the email of 9 August 2023 with the Competency Framework Document attached to it. It was less favourable treatment, in that it intimated critical comments about the claimant in various respects which he was upset by and did not agree with.

133. We accepted that not simply being returned to his Team Leader role as he had had it before, and that referring to him continuing in the secondment in the email on 21 August 2023 might also amount to less favourable treatment.

134. We did not accept that the claimant was excluded from meetings as he alleged, as we accepted the second respondent's evidence that that had been agreed with him. We accepted her evidence as to why the team leader profile was not sent to the claimant, and that it was not sent to other team leaders save Ms Milne who had been helping her on the POD development.

135. We then considered that the less favourable treatment we have found was because of the claimant's age. The respondent argued that age and retirement are different, as is the case. Retirement however is a step taken in later life. The third respondent spoke about access to pension at age 55. It appeared to us that if the claimant was right that the discussion as to work performance and related issues was because he did not agree to retire, to any significant extent as explained in authority, that would be direct discrimination unless objectively justified.

136. We concluded on the evidence we heard that the sole reason for what we have found was less favourable treatment was the view of the second respondent that there had been underperformance and inappropriate conduct in a number of respects as reported to her by at least three of her team and which she had herself experienced, which was exacerbated by Ms Milne's announcement of her plan to retire in September 2023, the comments of the team given to her in May 2023, the comments by Coleen Henderson in June 2023 in particular as well as those by Laurence Findlay, and the impending end of the secondment in November 2023.

137. The claimant alleged that this was all in effect made up as a ruse to put pressure on him to make him leave the organisation because he did not agree to retire. It is true that he had not had matters raised in a formal sense with him before 27 July 2023, although that was also still informally done. It is also true that we did not have sight of any written record of any conversation raising such issues before then, nor of the notes taken by the second respondent when she spoke to her staff in May 2023. It is also true that she did not include those notes in a subject access request made by the claimant. But we accepted her evidence about that, and did not believe the suggestion that it had been simply manufactured.

138. The claimant relied on messages of support from some senior managers of the first respondent. He referred to his being an Associate Director, and Fellow, of the Institute for Collaborative Working to suggest that he did work collaboratively. The second respondent alleged that he lacked self-awareness, and that although some employees of the first respondent worked well with him, others had the perceptions of his being arrogant, and although she did not use this word what could amount to bullying of them. We were satisfied that those aspects of her evidence were her genuine beliefs, based on what she had herself experienced and what she had been told by a number of others. She explained that she had felt intimated by him, and accepted that she had not managed matters as well as she realises, with hindsight, she could have. What happened in the email of 27 July 2023 was, in our view, her finally grasping the nettle to address what was becoming an increasing issue with a combination of the prospective retirement of Ms Milne, and the ending of the claimant's secondment, which caused consternation within her team at least to an extent.

139. We did not consider that the claimant had set out a prima facie case that the work performance matters amounting to less favourable treatment were because of age to any extent at all. His email of 31 July 2023 did not challenge the assertion by the second respondent in her email of 27 July 2023 that she had raised issues of performance over the years. We accepted her evidence that she had done so informally on about five occasions from 2017 to 2022 therefore about once per year, that she had done so in November 2022 after the email from the Chief Executive in response to his on the AAR, and about Ms Henderson's comments. We accepted her evidence that she had been given details of complaints from three of the team members, and that of the remaining three one recognised the issues but did not wish to give a statement, one was to retire and did not wish to give a statement, another recognised them and would call them out if they were later repeated.

140. The claimant in his reply of 31 July 2023 did not allege that the reason for the work performance issue being raised was because he had not agreed to retire, or matters connected to the earlier discussions as to his plans. Given that the context was of allegations against him, albeit at the informal

stage but with reference to a later formal stage as a potential to pursue, we considered that omission to be significant. If he had not wished to "rock the boaf as he put it earlier, the situation had materially changed by the terms of the email of 27 July 2023.

141. The claimant alleged that the Competency Framework document sent to him on 9 August 2023 was not a valid process. We rejected his evidence on that. Firstly the email of 27 July 2023 stated in terms that the second respondent was proceeding informally, and that it would move to a formal process later if required. It was therefore informal, and did not require any policy. Secondly there was reference to the Competency Framework in the Work Performance Ability Procedure. As it was referred to in that policy, it appeared in our view to be part of that policy by implication from that reference. Thirdly there was a document in relation to the Competency Framework explaining that process, as well as a blank form for completion with pre-populated parts, which was capable of being used in matters of performance. We were entirely satisfied that this was a valid document and a reasonable way for the second respondent to have proceeded. Indeed given her evidence of the earlier matters and lack of improvement in the performance matters raised, she could have commenced the formal process under the formal Policy at that stage.

142. The claimant did not co-operate with it at all. He was we consider not acting appropriately in failing to do so. His argument that, it did not have evidence attached to it is we consider not to be accepted. Evidence was referred to within the document, and was given even if in general terms and without specifics of who did what, when and in what circumstances. The form did not necessarily require specifics. It did not require separate documented details. They could have been provided, but they were not essential particularly given the informality of the process.

143. The claimant could have replied to the form stating his position. It was not the trap to get him to admit failures he disputed, as he said in evidence. It was an attempt to improve his performance and correct what the second respondent perceived, from the information given to her by others as well as her own experience and observation, were a number of performance and behavioural issues. It was not because of his age to any extent at all.

144. The second respondent said, in answer to questions from the Judge, that at the meeting on 27 July 2023 she had given the claimant specifics of what two of the team, whom she named, had alleged about him. That however was not recorded in her email later that day, and it had not been put to the claimant in cross examination. We did not therefore consider it appropriate to accept that evidence in light of the claimant not having had an opportunity to comment on that That is not to say that we disbelieved it, simply that as it had not been put to the claimant we could not make a finding about it.

145. We did not find any matter related to age after the 15 May 2023 meeting, save the claimant's belief that the work performance issues were being raised against him because of the retirement discussion and his not agreeing to do so.

146. We did not consider that the fact of earlier conversations about whether he had plans to retire or mentioning a birthday was sufficient when added to the other evidence to raise a prima facie case that age was a significant factor in the raising of performance matters in that email and thereafter. Taking all of the evidence we heard we did not consider that the claimant had established a *prima facie* case. On that basis the claim of direct discrimination fails.

147. Even if the burden of proof had passed to the first respondent, which we considered it had not, we would have found that the first respondent had discharged it, for the reasons given above. The sole reason for the commencement of the informal work performance process was the second respondent's belief that his performance had to be improved before he returned to the team as otherwise the well-being of some of the team might have been threatened. She was concerned at how he would act in the team given the earlier behaviours, and sought to change them positively. Age in no way whatsoever influenced the decision to commence the informal but written performance management process that started on 27 July 2023.

148. For completeness we should say that although there was not much evidence as to a comparator, a matter on which the respondents founded, firstly that is not essential as addressed above and secondly we were able

to make the findings that we have for the reasons we have just given. In any event we were entirely satisfied that an hypothetical comparator, in the same general circumstances as the claimant but in a younger age bracket, would have been treated in the same way as the claimant in relation to the work performance issues identified.

If so was it objectively justified?

149. We answer this question lest we are wrong on the issue of less favourable treatment but in the context only of the asking about retirement plans. The first respondent, correctly, did not seek to argue justification if we were against it on the work performance issues.

150. The aim in relation to asking about retirement plans founded on was workforce planning. That is a legitimate aim as the authority above makes clear. In our view the means by which it was handled were proportionate. The issues relate primarily to asking about retirement plans rather than age more widely, as we did not consider that matter (i) could properly be less favourable treatment at all. But the manner in which all issues were raised was in our view entirely appropriate, unobjectionable assessed against how it would be viewed by a reasonable person, and met the statutory test for proportionate means explained in authority referred to above.

151. We did not consider that a less intrusive means of raising the issue was realistically available, as it was handled as sensitively and appropriately as was in our view reasonably practicable, and balancing the interests of the first respondent against the discriminatory effect on the claimant we considered that the balance came down heavily in favour of the first respondent. The question was not asked solely in the context of workforce planning as that is normally understood, but also as there had been concerns over the performance and behaviour for a number of years beforehand, and if the claimant had intended to retire after secondment that would have provided an easy solution to those issues.

152. The first respondent had therefore met the burden of proof to show that there had been objective justification in the event, contrary to our findings above, that there had otherwise been a breach of section 13 in this regard.

153. If therefore there had been jurisdiction for the Tribunal for matters before 9 July 2023, and for those occurring after that date, the claim did not succeed on its merits for all these reasons and no breach of section 13 had occurred. That claim is therefore dismissed.

Did the first respondent harass the claimant by subjecting him to unwanted conduct related to his age contrary to section 26 of the Equality Act 2010?

154. We consider this in two groups of issues, the first related to questions as to retirement plans and the second as to performance issued.

155. We did not consider that the questions in relation to his plans of retirement met the definition in section 26. Retirement was a matter related to age, but that is not sufficient. We did not consider that it was unwanted conduct. Nothing was said by the claimant to the first respondent at the time. That is in our view instructive. But more than that, the third respondent gave evidence of how the claimant arranged and re-arranged the meeting she had invited him to, and then was relaxed and jocular, as she put it, during their meeting. We did not accept the claimant's evidence that he had been upset by that being raised at the time. He had engaged in the discussions, and we did not consider that the claimant had met the burden of proving unwanted conduct in this regard. Having rejected his evidence in relation to the events in and around November 2021 we did not consider his evidence on the events in May 2021 in this regard to be reliable.

156. Even if we had done so, and considered that it had the purpose or effect within the section, we did not consider that the claimant had proved that he did have such a perception at the time, but also that even if he did such a perception we did not consider that it was reasonable for the claimant to have had such a perception. We took into account all the circumstances relevant to these matters. In short, asking about retirement plans in the manner that the first respondent did and in the circumstances that they did so when they did so was not harassment under section 26, in our view. The same conclusion was reached in relation to the comment about there having been a birthday at the meeting on 15 May 2023 and then as to plans. Had these issues been within the jurisdiction of the Tribunal they failed on the merits under section 26.

157. When issues of performance were raised we considered that they were unwanted conduct. We accepted that for the claimant they created an intimidating, hostile, degrading, humiliating or offensive environment for him. He did not agree with them, and argued that they were raised because he had not agreed to retire.

158. The question therefore became whether they were related to age. We did not accept that they were, to any extent. We considered that the evidence of the second respondent on this was to be preferred, and accepted. Her rationale for it was clear, and compelling. It was solely because of the concerns she had as to his performance and the effect of it on her team, of which she had had comments to the effect that if the claimant were to return to his Team Leader post they would consider leaving. It was, she explained, solely because of that and not related to any extent to his age.

159. As noted above, if she had wished to remove him for the sole reason of age she would not have included him in team meetings as she did by her email of 21 August 2023, or give him the informal process that she did. She would have undertaken the formal process straight away. That she did not, but proceeded less stridently by an informal process seeking to encourage improvement was we considered a contra-indicator to the argument that it was related to age. That was fortified by her evidence on the two candidates for voluntary severance. They were both around 60 years of age, but she wished to retain them as she agreed was the case with the claimant at that time.

160. There were other aspects that the claimant alleged which we did not accept. For example he alleged that he had been excluded from the team after saying that he did not intend to retire, but we accepted the second respondent's evidence that they had agreed that he would not attend meetings during the secondment. He alleged that she had not sent a role profile for team leader to him, as if evidence that she was not intending to retain him in the expectation of retirement, but we accepted her evidence that after sending an email on 21 August 2023 there was a further aspect of job evaluation of the role, and that she had not sent the profile to other team leaders, save only Ms Milne. The claimant argued in summary that he was prevented from returning as a team leader. We did not agree.

Firstly he went off sick before the end of his secondment. Secondly he was not replaced as team leader, rather the second respondent intended to act in that role along with him when Ms Milne retired, Ms Milne having been the acting Team Leader during his secondment, so as to protect her staff given their concerns over their well-being as told to her. The claimant's submission of a hostile work environment we did not accept. There was a difficult working relationship between the claimant and second respondent but that is not the same.

161. The claimant argued that the third respondent's comments at a grievance hearing in January 2024 indicated treating the protected characteristic of age less seriously compared to others. In our view it did not. We accepted her evidence on that. She also explained that she would ask any employee of any age about career plans for purposes of workforce planning. She explained that she would not ask an employee if they intended to start a family or have further family as that was a private and personal matter for them, and explained that workforce planning around the possibility of retirement was different. We agree.

162. It is not therefore necessary to consider whether the effect under section 26(1)(b) met the tests in sub-section (4). If the unwanted conduct is not related to the protected characteristic founded on that is fatal to the claim under this section.

163. We do not consider that section 26 of the Act has been breached by the first respondent. That claim is dismissed.

164. It follows that we dismiss the claim as directed against the first respondent.

165. For completeness we add that we considered all of the authorities referred to in the claimant's submission in the context of the claims under both sections 13 and 26. Two, /gen and *Selsdon,* are referred to above. Others were Employment Tribunal decisions and are not binding on us. We did not consider them of assistance or as persuasive, as their facts and circumstances were substantially different to those before us. *Tapping* was not a discrimination claim. *Jones* had very facts, and the analysis of the law was not as we have set it out above.

166. The claimant also referred in his written submission to Co// v *Bayer Pic* the citation for which he gave in a later email as [2010] UKEAT/0104/09/SM. Despite searching in the website of EAT decisions, Bailli, and elsewhere the Judge was not able to find the case. The claimant later stated that he did not wish time to try and provide a copy and that the decision could be taken on the basis of the other submissions. In his earlier email he had said in relation to that case that "The source stated this case highlighted that age-related comments and actions by employers, if unjustified, can constitute direct discrimination under the Equality Act." The basic principle to which that email refers is correct. The questions addressed above are whether what was said did amount to less favourable treatment, if so whether that was because of age (for direct discrimination) or related to it if the circumstances were otherwise those of harassment and if the former whether it was justified. These are all addressed above.

Are the second and third respondents liable under section 110?

167. It follows from the dismissal of the claims against the first respondent that neither the second nor third respondent can have a personal liability. The claim as directed against them is dismissed also.

If any claim is successful to what remedy is the claimant entitled?

168. This issue does not now arise.

Conclusion

169. The Claim is therefore dismissed, primarily on the merits but partly also as to jurisdiction for issues prior to 9 July 2023.

170. We are conscious that the claimant remains in the employment of the first respondent, and in light of that we have confined our comments to those required to address the Claim before us.

5

Employment Judge: A Kemp
Date of Judgment: 3 July 2024
Entered in register: 3 July 2024
and copied to parties