EMPLOYMENT TRIBUNALS

Claimant: Mrs H Parker

Respondent: Neerock Limited

Heard at: Manchester **On:** 13-15 November 2024

Before: Employment Judge Phil Allen
Mr B Rowen
Dr H Vahramian

REPRESENTATION:

Claimant: In person
Respondent: Miss A Ahmad, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of direct age discrimination is not well-founded and is dismissed.

2. The complaint of indirect age discrimination is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent from 29 November 2021 until 22 May 2023, following her resignation on 25 April 2023. She was a People Assistant. The claimant alleged that she was discriminated against directly and indirectly by the respondent because of age. The respondent denied the allegations.

Claims and Issues

2. A preliminary hearing (case management) was conducted on 13 February 2024. The case management order made following the preliminary hearing

contained a list of issues. Save for one amendment, at the start of this hearing the parties confirmed that was the agreed list of issues.

3. In an email of 11 November 2024, the claimant sought to amend the PCP as described in the list of issues, for her indirect age discrimination claim. In correspondence and at the very start of this hearing, the respondent opposed the application to amend. We decided that we would consider the claimant's application after we had undertaken reading. On our return at the start of the afternoon on the first day, the respondent's counsel (very sensibly) indicated that the respondent did not object to the amendment being made to the list of issues, provided that the respondent would be able to ask the witnesses it called some additional questions to address the amendment. Accordingly, the list of issues was amended as the claimant proposed.

4. This hearing was listed to determine the liability issues only and not any remedy issues.

5. The list of issues (as amended and containing only the liability issues) is appended to this Judgment.

Procedure

6. The claimant represented herself at the hearing. Miss Ahmad, counsel, represented the respondent.

7. The hearing was conducted in-person with both parties and all witnesses attending in-person at Manchester Employment Tribunal.

8. An agreed bundle of documents was prepared in advance of the hearing. The bundle was 566 pages. Where a number is referred to in brackets in this Judgment, that is a reference to the page number in the bundle. We read only the documents in the bundle to which we were referred, including in witness statements, or as directed by the parties.

9. We were also provided with witness statements. On the first morning, after an initial discussion with the parties, we read the witness statements, the documents referred to, and the documents we were specifically invited to read.

10. We heard evidence from the claimant, who was cross examined by the respondent's representative, before we asked her questions. The claimant's evidence was heard from lunch time on the first day until mid-morning on the second.

11. For the respondent, we were provided with witness statements for the following: Mr Chris Duckworth, People Advisor; Mrs Michelle Plummer, People Manager; Mrs Aleksandra Atwell, People Manager; and Ms Danielle Stott, People Specialist. The first two of those witnesses attended, confirmed their evidence under oath, were asked limited additional questions, were cross-examined by the claimant, and we asked questions. They gave evidence from mid-morning on the second day until the end of the second day (which finished early). The fourth witness (Ms Stott) did not attend. We were told that she has left the respondent's employment. The third witness (Mrs Atwell) attended on the first day but was unwell on the second

and, as a result, the respondent decided not to call her. We were also told that she has left the respondent's employment. The evidence of both of the witnesses who were not cross-examined, was given lesser weight where it conflicted with the evidence of those from whom we heard (and who were cross-examined).

12. After the evidence was heard, each of the parties was given the opportunity to make submissions. We heard submissions on the morning of the third day. Both parties provided a written submission. Each of the parties also made additional submissions orally.

13. In her closing submissions, the respondent's counsel proposed that the comparator (from whom we did not hear evidence) should be referred to in our Judgment by her initials only. The claimant agreed to that approach. We were mindful of the need to give full weight to the principles of open justice, but nonetheless agreed that the comparator did not need to be named in the Judgment in applying that principle and we, accordingly, have referred to her by initials.

14. We reserved our decision and, accordingly, our Judgment and the reasons for it, are provided in this document.

Facts

15. The claimant was fifty-two years old when she commenced employment with the respondent and fifty-three years old when it ended. KS, her comparator, was considerably younger.

16. The claimant has a degree and had historically obtained considerable experience working in HR, but prior to working for the respondent she had spent a number of years working in teaching. She did not have a CIPD qualification. The claimant applied for and obtained a role with the respondent as a People Assistant. That was an entry-level position which required no relevant qualifications or experience. The claimant commenced working for the respondent on 29 November 2021.

17. At approximately the same time, KS also commenced working for the respondent in a People Assistant role. She had no degree and no relevant experience (unlike the claimant).

18. The respondent is a subsidiary of Wm Morrison Supermarkets Limited. We were told that both the respondent and the parent company follow the same policies and procedures. Some of the material to which we were referred applied to the parent company and the wider group, not just the respondent itself.

19. We were provided with the job profile for People Assistant (227). That said that the person was responsible for supporting the people team in carrying out administrative tasks and acting as first point of contact for colleagues as well as managers. We were provided with the claimant's contract of employment (92) We were also provided with the respect in the workplace policy and the grievance policy.

20. In March 2022, two degree apprentices were suspended following an incident involving a rabbit at University. We were provided with disciplinary hearing notes (329). The people involved were not dismissed. The notes recorded what Ian

Mallard, the site manager, had said. In the notes he was recorded as having identified to one of them that the apprenticeship scheme offered them more of a chance to become a leader than any other scheme and he emphasised that this was one of the biggest opportunities that the individual had in front of them. In her evidence, the claimant said no formal action was taken as a result. She explained to us that she read the relevant pages when she scanned them and retained copies. In her statement for this hearing, she quoted from what Mr Mallard said.

21. In October 2022 the claimant spoke to Ms Moody (her line manager at the time) and said she wished to progress.

22. On 11 November 2022 the claimant had a career development chat via Teams with Catherine Morgan. The claimant was not offered a mentor and did not request one. The claimant was unaware that this was something which was offered until 19 February 2023.

23. Around the same time, KS also had a career development chat. KS was sent an email by Ms Morgan to say that she had been paired with a mentor. In her interview undertaken as part of the investigation into the claimant's grievance, KS was recorded as having said that she did not ask for a mentor.

24. On 18 November 2022, the claimant spoke to Ms Moody. She said that she was the person who remained in the office and completed all the scanning. She contrasted that with KS, who she said spent substantial time out of the office. Ms Moody reassured the claimant that it would be looked into.

25. The claimant was involved in a project. The respondent contended that was an opportunity to develop. The claimant considered it to be almost entirely scanning and filing. Following the career development conversation, the claimant was also offered the opportunity to take on a project regarding neurodiversity (across sites), but she declined as she did not believe that it benefitted the site at which she worked, and she wished to focus more on those employed there for whom English was their second language.

26. It was the claimant's evidence that she raised her concerns, about the contrast between her opportunities and those given to KS, with Ms Moody again on 19 December 2022. In her witness statement, the claimant described how she had burst into tears over the situation and told Ms Moody "*that I have a degree, had run departments and now I spent most of my days scanning and doing extremely basic admin task and it was soul destroying and humiliating*". She said that she explained that she was aware that someone always had to remain in the office, but the claimant said that was always her, as KS was always out.

27. Later on the same day, Ms Stott and Ms Woods had a meeting with the claimant. They discussed the claimant's allegation of difference in treatment. In her witness statement the claimant described that:

> "*I agreed that I my nature was quieter than* [KS] *but that did not mean I wasn't keen or capable … and it wasn't the first time I had raised the issues. Being quiet was* [not] *a reason to be denied opportunities or be overlooked. They assured that things would be more equal"*

28. The claimant told us in evidence that she hoped that the new year would be a fresh start.

29. The claimant's line management changed to Mr Duckworth in January 2023. We heard evidence from Mr Duckworth. The claimant did not put to him any questions that asserted that he had treated the claimant less favourably due to age. That was raised with the claimant at the end of her cross-examination of him, and she confirmed that she was not asserting that he (personally) had discriminated against her. He line-managed the claimant until the end of her employment. It was his evidence that he allocated work to the claimant during that period (and it appeared that someone else primarily allocated work to KS).

30. On 11 January 2023, an individual visited the office where the claimant and KS worked. The claimant was not in the office that day. KS was. It was arranged that KS would visit the other site to assist with the matter which had led to the enquiry. She did so initially on 12 and 13 January and, subsequently, on 8 and 9 February 2023.

31. We were provided with some tables which showed the bookings of rooms, which contained a notable number of entries by KS and none from the claimant. Mr Duckworth was not able to explain why there were no room bookings for the claimant as he emphasised that she would book her own rooms. It may have been the case that the claimant was on leave for some of the period covered by the booking sheets based upon her leave in March 2023, but that was unclear as the room booking sheets were not clearly dated.

32. Ks had some meetings with her mentor. Although we did not hear evidence from KS, it was the claimant's perception that KS was told by her mentor to visit other sites. In any event, KS arranged to visit other sites. Save for one visit to Hillmore House in April 2023, the claimant did not do so.

33. We were provided with a personal development plan for the claimant (180). The document recorded the outcome of meetings between October 2022 and March 2023, with the last update being in March with content added by Mr Duckworth. It was not possible from the table to see what had been entered on each occasion. The document recorded discussions about what the claimant could do in response to listed areas of strength or development.

34. On 5 February 2023, the claimant submitted a flexible working request. She asked to condense her working hours into a four-day working week and to work one of those days from home. Meetings took place on 15 February and 3 March 2023 with Mr Duckworth and Ms Wood. At the second meeting, the claimant was informed that her request to work four days would be accommodated on a three-month trial but, at that stage, her request to work one day from home was not granted. A third meeting took place on 17 March 2023, after there had been further investigation and consideration into the claimant's work and whether it would be possible for sufficient work to be done from home. At that meeting it was agreed that there would be a trial of what the claimant sought, initially for four to six weeks. We were provided with notes from those meetings. In the last meeting it was recorded that Ms Woods said the following (368):

> "*Also want to pick up concerns you raised with Chris regarding workload/opportunities that have been shared with KS, raised that you felt KS had been given more opportunities than you had with the types of meeting she had shadowed or held. Explained that when looking at calendars there was a clear difference.*
>
> *I have looked at the calendars and recently KS has picked up more or been in more meetings so we need to ensure going forward to make conscious effort to talk about workload, this hasn't been done intentionally so you aren't picking up meetings. Katie/Chris be aware ensuring both of you have opportunities to sit in different types of meetings and learn from them"*

35. Mr Duckworth's evidence was that the claimant spoke to him informally in the week commencing 13 March 2023 about a disproportionate allocation of tasks between herself and KS. Access was given to Ms Woods to the claimant's calendar to look at this. Mr Duckworth's evidence was that he had not been aware of the claimant being given disproportionate opportunities prior to the conversation and it was not in any event because of age. It was also his evidence that, after the meeting, he made a conscious effort to give the claimant more tasks.

36. It was also Mr Duckworth's evidence that, in or around March 2023, there had been a decision to pause the People Assistants conducting absence/attendance review meetings. His witness statement explained that this was due to their complexity and there being more appeals coming through due to errors being made. People Assistants continued to conduct other welfare meetings. We were shown some documents which included the claimant's name as an attendee at meetings after this. Mr Duckworth said that KS had raised concerns around that time, but it was not the reason why the People Assistants were prevented from conducting absence review meetings.

37. We were provided with a limited number of documents which recorded meetings conducted with other employees, which the claimant had attended (or was recorded as being due to attend), in February, March and April 2023 (373).

38. The claimant arranged a visit to Hillmore House on 15 March 2023. The claimant aspired to work at Hillmore House, as she was interested in employee relations and that work was centred at that location. The meeting was cancelled as a member of the people team was starting maternity leave the following day. The claimant told us in her witness statement that, following the cancellation of the meeting, she looked at the respondent's website and what was said about the requirements for apprentices and Graduate recruits. She did not raise the issue of what was said about the requirements to undertake the Graduate scheme which she had seen with anyone at the time. She did not refer to it in her resignation letter or grievance. She did not apply for a graduate recruit role/scheme.

39. We were provided with a number of messages exchanged between the claimant and Ms Moody which were clearly friendly in nature. Notably, on 11 April 2023 (385), the claimant told Ms Moody that it was definitely time to get out (it appeared from her employment with the respondent), following a message in which she referred to KS as having gone home early and having been off-site. At the end of her submissions (but not at any time during evidence), the claimant referred to an

undated exchange of messages with Ms Moody (556) in which the claimant asked Ms Moody about her personal position and whether she was doing the degree apprenticeship or a graduate apprenticeship and was told that she was not.

40. On 13 April 2023, the claimant visited Hillmore House. She spoke to somebody there who advised the claimant to get a mentor. On her return, she spoke to Ms Stott and asked if she could have a mentor. Ms Stott agreed, but it then slipped her mind, and she did not do anything as a result. Ms Stott highlighted that the claimant did not remined her about what had been agreed.

41. On 28 March 2023, one of the People Advisers at the Gadbrook site working with the Produce department, resigned. Mrs Plummer told us that business needs and demands meant the role had to be filled quickly. The role was advertised the following day, with a closing date of 18 April. The central resourcing team received the applications, filtered them, and provided any applicants considered suitable to Mrs Plummer. It was her evidence that all internal applicants should have been deemed suitable automatically. A large number of applications were received, including eighteen in the first week. On 5 April 2023 Mrs Plummer shortlisted four candidates (two external and two internal, including KS).

42. We were provided with the document about the People Advisor role (410). That recorded that what a candidate needed to have was (amongst other things) "*CIPD (or working towards) or equivalent. With up to date knowledge of employment relations and employment law and how to apply this*". It was Mrs Plummer's evidence that she considered this to be a desirable and not an essential requirement, but she could not point to any document which said so. KS, who was appointed to one of the available People Advisor roles (but not the one to which the claimant had applied and for which Mrs Plummer undertook the recruitment), did not have a CIPD qualification (albeit she was working towards it at that time).

43. KS applied for two People Advisor roles at Gadbrook, being the one in Produce and another one in Logistics. Mrs Plummer interviewed four applicants for the produce role on 11 and 19 April 2023, including KS. She did not appoint KS. She appointed another candidate. It was Mrs Plummer's evidence that, because she had shortlisted strong candidates and given the timescale, she did not access the system again to look at other candidates. She sent an authorisation to offer to her line manager on 20 April and the successful candidate was appointed on 25 April 2023.

44. On 16 April, the claimant applied for the role at Gadbrook (produce). That is, she applied before the closing date but (unbeknownst to her) after Mrs Plummer had shortlisted for interview and undertaken some of the interviews. The claimant was provided with an email on 18 April which said her application was with the relevant hiring manager. When the claimant applied for the role, she was asked to provide her date of birth (324). It was Mrs Plummer's evidence that the person responsible for undertaking the recruitment was not provided with that information and did not know the age or date of birth of the candidates. She believed the information was sought for data purposes.

45. On 24 April the claimant sent an email asking for feedback on her application, albeit to an email address with which Mrs Plummer was not familiar. On 25 April, she

received a rejection email. It was the claimant's evidence that she felt totally humiliated.

46. Mrs Plummer was subsequently asked about the claimant's unsuccessful application. She established that the claimant's application was never put through to her as the hiring manager. It was Mrs Plummer's evidence that that was as a result of an administrative error. It was Mrs Plummer's evidence that, had she received the claimant's application, she would have invited her to an interview. Mrs Plummer did not see the application. She stated that the claimant's age played no factor in the failure to invite the claimant to interview.

47. KS was successful in being appointed to the Logistics role. The claimant did not apply for that position. KS's successful appointment was announced on 24 April.

48. On 25 April 2023, the claimant resigned in a letter to Ms Stott (390). In her letter, the claimant said that since November 2022 she had approached management on at least two occasions regarding the work she was undertaking and the contrast with KS. She alleged that there was a substantial difference in the opportunities offered and said it was "*down to ageism*". She referred to the lack of a mentor. She stated a significant number of visits to other sites had been arranged for KS. She asserted that a reason for the difference in treatment was Ms Stott's friendship with KS or the fact that KS' Aunt worked as an Area Human Resources Manager. She went on to say:

> "*Clearly, my function was to carry out all the routine work to ensure that* [KS] *had sufficient free time to carry out the tasks that would-enable her to grow, develop and seek promotion. (Clearly it had been decided that due to my age, I did not want to progress or learn and would just carry out basic tasks until I retired.) Now, following her promotion, my flexible working will cease, and I will continue to perform basic administrative tasks for the foreseeable future, as I believe was intended all along…I am therefore left with no choice but to resign due to ageism and clear nepotism that is demonstrated within this organisation and site. I have made several attempts to allow this situation to be rectified but it is now almost 6 months since I first raised my concerns, and nothing has changed"*

49. The claimant's resignation was the first time that she had complained that the difference in treatment between herself and KS was because of age. In her resignation, the claimant did not make any reference to the requirements advertised by the respondent for applications to either the Apprenticeship scheme or to the Graduate scheme.

50. In her witness statement, Mrs Atwell explained that she was asked to look into the claimant's resignation and, due to the nature of what was said in it, she treated it as a grievance. She commenced undertaking an investigation.

51. The claimant completed a formal grievance (418) and submitted it on 2 May. She said that her grievance was about "*Age Discrimination, Nepotism, Unsubstantiated/unagreed completion of Performance Review Docs*". It contained a lengthy statement of the claimant's grievance.

52. On 11 May, the claimant attended a grievance meeting with Mrs Atwell. Handwritten notes of the interview were provided (447). Within that interview, the claimant was recorded as having said that she had applied for the available role just to see what would happen, because she thought KS was being lined up for it.

53. We were provided with the notes of the investigatory interview undertaken by Mrs Atwell with Ms Moody on 17 May 2023 (478). Amongst other things Ms Moody said:

a. That the claimant was better at attention to detail than KS, whereas KS had picked up certain tasks quickly. She said that if you looked at the split of tasks, the claimant did more data tasks and KS was better with engagement;

b. She thought the claimant ended up with more filling logs and doing data, because those were her strengths (the more difficult things would be dealt with by her);

c. The claimant had shared her frustrations with Ms Moody over Christmas, when she had told her that she did not have the same opportunities and was looking to leave;

d. In December, the allocation of meetings had been disproportionate, but it had not been done maliciously, but it had been a case of who shouted the loudest got heard; and

e. After December, Ms Moody thought the allocation had been more balanced, but probably not one hundred percent.

54. We were provided with the notes of the investigatory interview undertaken by Mrs Atwell with Ms Woods (a People Specialist) on 17 May 2023 (484). Amongst other things Ms Woods said:

a. The claimant had first raised the distribution of opportunities in December;

b. Ms Woods said she wouldn’t have described it as disproportionate, but the two were doing different things. They were both People Assistants, but KS was being more engaged with colleagues, and the claimant was doing more data things, which Ms Woods believed she enjoyed;

c. The claimant had said during a flexible working request meeting that part of the reason for the request was because the claimant didn’t want to be there (which had shocked Ms Woods);

d. KS spent a lot of time off site and, once the claimant became aware that she was, she requested a visit to Hillmore House. KS was off site between four and six times, the claimant was off site once; and

e. She thought that KS had had a call with Ms Morgan who had mentioned a mentor, and she was given one. The discussions with her

mentor had prompted her to look elsewhere, if there was something she wanted which was available.

55. We were provided with the notes of the investigatory interview undertaken by Mrs Atwell with KS on 25 May 2023 (502). Amongst other things KS said:

a. She had not known anything about HR when she had started with the respondent;

b. She replied no, in answer to a question about whether the mentor was something she had asked for, and said that she had got an email from Ms Morgan after their call to say she had paired KS with one;

c. She had self-funded her CIPD qualification;

d. She had spoken to Ms Wood about workload in March and had told her she was bored because there was not much stretchy work and she was looking for another job;

e. She believed that the reason why the booking diary looked like she attended more meetings than the claimant was because she booked meetings for others; and

f. She did not know whether the opportunities given had been consistent, but she said opportunities were always there you just needed to reach out for them.

56. We were provided with the grievance outcome letter signed by Mrs Atwell (512). Mrs Atwell said in her witness statement that she believed it had been posted to the claimant (albeit that the date of 16 June recorded on it was wrong, as she did not believe it had been posted until on or around 19 June). The claimant did not receive it. It did not uphold the grievance. It addressed the points raised. The letter said that Mrs Atwell did not believe that there had been any differentiation due to the claimant's age. In answer to one point the letter said:

> "*It is acknowledged as part of my investigations that we should have progressed your request for a mentor in a more expedient manner, however this was due to an oversight due to volume of activity and not due to discrimination with regards to your age"*

57. We were provided with documents which outlined the pathway to level two manager (226). That appeared to have no age or qualification criteria.

58. In the respondent's on-line document for degree apprenticeships (274) it said that candidates were required to have recently gained or be predicted a minimum of 112 UCAS points.

59. In the respondent's on-line document for the people graduate scheme (276) it said that what a candidate would need (amongst other things) was to currently be in their final year of their degree/masters or have graduated in the last two years. The claimant also provided a document from UCAS which contained no equivalent recent

requirement for when a degree had been undertaken for those who wished to study for a Masters.

60. We were provided with a detailed breakdown of those employed by the respondent in various training and development schemes and the claimant had analysed the date provided (147). Those undertaking what was described as early careers were 14% under twenty years of age, 75% between twenty and twenty-four, and nobody was aged over thirty-four. For Pathways Level two, the age range was wider, with 6.5% aged over fifty in logistics and 8.89% aged over fifty in manufacturing. The largest percentages were aged between thirty and thirty-four and forty to forty-five in logistics (both 23.91%) and aged between thirty and thirty-four in manufacturing (31.11%). For the pathways team management, 6.67% were aged over fifty, with a significant proportion being aged between thirty and forty (but only 2.67% aged under twenty-five). For pathways Level three, 8.7% were aged over fifty, with the majority aged between thirty-five and forty-four (and none aged under twenty-five). In a summary table produced by the claimant, she showed that only 3.34% of all the population in training and development schemes was aged fifty or over.

61. We were provided with a WhatsApp chat involving the claimant and others (529) which Mr Duckworth believed had been exchanged after a team axe throwing session or another team event. KS and others (including Mr Duckworth and Ms Stott) were involved. The messages included the following:

> "KS – *2 youngest in the team together*
>
> Mr Duckworth – *versus the two oldest*
>
> Ms Stott – *Exactly, inexperienced so more likely to fail*
>
> KS – *Old=slow"*

62. We heard evidence that the claimant, KS and Ms Stott had been friendly enough to have arranged a holiday together during the time when they were employed by the respondent. In an undated exchange of WhatsApp messages involving the claimant, the following was said (535):

> "KS – *Oh great*
>
> *So granny fanny is coming?*
>
> Ms Stott – *No strictly work people*
>
> The claimant – *Who is granny fanny? Me?* [crying laughing emoji]
>
> KS – *Noooooooooooo* [five crying laughing emojis]
>
> *Bens Partner*
>
> [Unclear] – *I'm now laughing out loud*
>
> The claimant – *In that case I'm great granny fanny* [smiling emoji]

KS – *Bens girlfriend it's the Nick name me and Danielle call her*

[Unclear] – *I'd like to say I don't think I've ever called her that* [crying laughing emoji]

The claimant – *You must now refer to me as The GGF*

KS – *Ok fine I just call it her then"*

63. We heard a lot of evidence. This Judgment does not seek to address every point about which we heard or about which the parties disagreed. It only includes the points which we considered relevant to the issues which we needed to consider in order to decide if the claims succeeded or failed. If we have not mentioned a particular point, it does not mean that we have overlooked it, but rather we have not considered it relevant to the issues we needed to determine.

The Law

64. A direct discrimination claim relies on section 13 of the Equality Act 2010 which provides that:

> *"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."*

65. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

66. Section 5 of the Equality Act 2010 provides that:

> *"1. In relation to the protected characteristic of age –*
>
> *(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;*
>
> *(b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.*
>
> *2. A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or a range of ages."*

67. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> *"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.*

> *(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".*

68. At the first stage, we must consider whether the claimant has proved facts on a balance of probabilities from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that she has been treated less favourably than her comparator and there was a difference of age. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage we do not have to reach a definitive determination that such facts would lead us to the conclusion that there was an act of unlawful discrimination, the question is whether we could do so.

69. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof, as it shifts to the respondent. We must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

70. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the ground that the claimant had the protected characteristic. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined. Sometimes we may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason?

71. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act (the respondent relied upon **Onu v Akwiwu; Taiwo v Olaigbe 2016 ICR 765** when highlighting that, as well as referring to **Reynolds v CLFIS (UK) Ltd [2015] ICR 1010** and **Page v Lord Chancellor [2021] ICR 912**). Determining that can sometimes not be an easy enquiry, but we must 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). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his or her motive. The respondent's representative submitted the question was what consciously or unconsciously was their reason? She emphasised **Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065** and **R (on the application of E) v Governing Body of JFS [2010] IRLR 136**. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

72. We need to be mindful of the fact that direct evidence of discrimination is rare, and that Tribunals frequently have to infer discrimination from all the material facts. Few employers would be prepared to admit such discrimination even to themselves.

73. The difference in treatment must be because of the protected characteristic (the respondent's counsel relied upon **Qureshi v London Borough of Newham**

[1991] IRLR 264, Zafar v Glasgow City Council [1998] IRLR 36 and **Bahl v Law Society [2004] IRLR 799** as well as referring to **Amnesty International v Ahmed [2009] ICR 1450**). The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.

74. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different age would have been treated reasonably.

75. Uniquely, for age discrimination, it is possible to justify direct discrimination. However, in this case, the respondent did not contend that any alleged direct discrimination was justified, so we were not required to consider those provisions (for the direct discrimination claim).

76. The way in which the burden of proof should be considered has been explained in many authorities, including: **Nagarajan v London Regional Transport [1999] IRLR 572; Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332**; **Shamoon v Chief Constable of the RUC [2003] IRLR 285; Hewage v Grampian Health Board [2012] ICR 1054; Igen Limited v Wong [2005] ICR 931; Madarassy v Nomura International PLC [2007] ICR 867; Ayodele v City Link Ltd [2018] ICR 748;** and **Royal Mail v Efobi [2021] UKSC 33**.

77. Section 19 of the Equality Act 2010 says the following regarding a claim for indirect discrimination:

> *"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim."*

78. The respondent's counsel highlighted the following said by Baroness Hale in **Chief Constable of West Yorkshire Police v Homer [2012] ICR 704**:

> "*The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic"*

79. When considering a claim of indirect discrimination, it is necessary to consider the statutory test in stages. The first stage is to establish whether the respondent did apply the provision, criterion or practice (PCP) relied upon. If we are satisfied that the PCP contended for has been or would be applied, the next step is the analysis of whether there is a particular disadvantage for those with the relevant protected characteristic when compared to those that do not share the protected characteristic. The comparative exercise must be in accordance with section 23(1) of the Equality Act 2010. We must consider whether the claimant herself was subject to that disadvantage. We must then consider whether the PCP was a proportionate means of achieving a legitimate aim.

80. The phrase provision, criterion, or practice is capable of covering a wide range of conduct and should be construed widely. The respondent said that the PCP should be defined so as to focus specifically on the measure taken – that is, the thing or things done – by the respondent which result in the disparate impact complained of (**HM Land Registry v Benson [2012] IRLR 373** and **Kraft Foods UK Ltd v Hastie [2010] ICR 1355**). The respondent also submitted that the PCP relied upon could not be broken down into a series of PCPs, in order to generate a PCP, relying upon **Onu**.

81. The group disadvantage relied upon must be identified first and then we must consider whether the claimant as an individual suffered the disadvantage identified.

82. Disadvantage means whether a reasonable worker would or might take the view that she had been disadvantaged in the circumstances (**Shamoon**). An unjustified sense of grievance cannot amount to a disadvantage, but particular disadvantage does not denote any particular level or threshold of disadvantage. Statistics are not required (**Homer**), albeit the respondent submitted that, where they exist, they remain important material (relying upon **Games v University of Kent [2015] IRLR 202** – the respondent also relied upon **McCausland v Dungannon District Council [1993] IRLR 583** on statistical analysis). In her submissions, the respondent's counsel also relied upon two cases on particular disadvantage, **Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] ICR 1699** and **London Underground Ltd v Edwards (No.2) [1999] ICR 494**. The latter case highlighted that Employment Tribunals do not sit in blinkers and the members are selected in order to have a degree of knowledge and expertise in the industrial field generally, something which we considered and applied (as explained below).

83. The claimant must show that the respondent applied the PCP to her and the material time at which it applied the PCP to her. An employee cannot bring a claim challenging anticipatory indirect discrimination which has not actually been invoked against the individual (**Meade-Hill v British Council 1995 ICR 847**).

84. The burden of proof applies to indirect discrimination as it does to direct discrimination. The respondent emphasised that the claimant must prove both the

group particular disadvantage as well as the individual group disadvantage, before the burden is reversed (**Dziedziak v Future Electronics Ltd EAT0271/11** and **Lord Chancellor v McCloud [2019] ICR 1489**).

85. In **MacCulloch v ICI [2008] IRLR 846** the Employment Appeal Tribunal set out the following legal principles with regard to justification:

> *"(1) The burden of proof is on the respondent to establish justification: see* Starmer v British Airways [2005]IRLR 862 *at [31].*
>
> *(2) The classic test was set out in* Bilka-Kaufhaus GmbH v Weber Von Hartz *(case 170/84)* [1984] IRLR 317 *in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see* Rainey v Greater Glasgow Health Board *(HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.*
>
> *(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it:* Hardys & Hansons plc v Lax *[2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].*
>
> *(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context:* Hardys & Hansons plc v Lax [2005] IRLR 726, CA*."*

86. On justification, the respondent's counsel in her submissions quoted from the EHRC Employment Practices Code, **Homer, R (Elias) v Secretary of State for Defence [2006] I WLR 3213**, **de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] I AC 69, Rainey v Greater Glasgow Health Board [1987] ICR 129, Barry v Midland Bank [1999] ICR 589, Seldon v Clarkson Wright & Jakes [2012] ICR 716, Fuchs v Land Hessen [2012] ICR 93, BAE Systems (Operations) Ltd v McDowelll [2018] ICR 241, Hardy v Hansons plc v Lax [2005] ICR 1565** and **Cadman v Health and Safety Executive [2004] IRLR 971**, and quoted the following from the **Elias** Judgment:

> "*the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving and be necessary to that end. So, it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group".*

87. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which

the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it. If out of time, we need to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble [1997] IRLR 336**. Subsequent case law has said that those are factors which illuminate the task of reaching a decision, but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** confirmed the breadth of the discretion available to the Tribunal, but also said that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases. The Employment Appeal Tribunal in **Concentrix CVG Intelligent Contact Ltd v Obi [2022] 149** set out the correct approach to considering the just and equitable extension when applying it to incidents which together were a course of conduct, but which were out of time.

Conclusions – applying the Law to the Facts

88. We did not start by considering the first issue in the list of issues. We left the issues of time and jurisdiction to be considered after we had considered the other issues in the case.

89. We considered each of the claimant's allegations of direct age discrimination as set out in the list of issues in turn and considered each of the questions asked in the list as they applied to each of those allegations.

The first allegation of direct discrimination

90. The first direct discrimination allegation was that the respondent assigned a mentor to KS on or around 11 November 2022. KS was assigned a mentor. The claimant was not assigned a mentor. There was therefore a difference in treatment. It appeared from the evidence, that both the claimant and KS met with Catherine Morgan (a senior people manager – chilled) on or around 11 November 2022. She assigned a mentor to one person and not the other.

91. We found that not being assigned a mentor was less favourable treatment. The reason why somebody is assigned a mentor is to assist them, and therefore it is less favourable to not have one assigned. The respondent's counsel submitted that a mentor may not be good or helpful and therefore not to be assigned one was not less favourable treatment. Whilst obviously the quality of mentors may vary, we did not accept that submission, and found that not being assigned a mentor was less favourable treatment. We also noted that once the claimant became aware of the possibility of being assigned a mentor, she asked for one, and that supported our

decision that not being assigned a mentor was less favourable treatment when looking at the treatment of the claimant as compared to her identified comparator.

92. We then turned to the question of whether that less favourable treatment was because of age? In determining that question, we applied the burden of proof in the way which we have set out in the section on the law above. We considered whether the claimant had proved facts on the balance of probabilities from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent had committed the alleged unlawful act of discrimination. We considered whether the claimant had shown the "*something more*" required to prove age discrimination (before the burden of proof reverts to the respondent). As we have explained when addressing the law, purely a difference of treatment and a difference in age is not sufficient to reverse the burden of proof.

93. Applying the burden of proof, we did not find that the claimant had shown the "*something more*" required to prove that the less favourable treatment of not being allocated a mentor was because of age.

94. We did specifically consider whether certain matters about which we heard evidence did provide (either individually or collectively) the "*something more*" required. Those were potentially of application to all of the direct discrimination allegations made, but we considered them first for the first allegation and have set them out only once in this Judgment.

95. The claimant placed reliance upon two degree apprentices not being dismissed in March 2022 following an incident involving a rabbit at University (for which they had been suspended) and what was said to them by Mr Mallard, the site manager, in the notes provided (329). In the notes he was recorded as having identified to one of them that the apprenticeship scheme offered them more of a chance to become a leader than any other scheme and he emphasised that this was one of the biggest opportunities that the individual had in front of them. We did not find that decision made or what was said was sufficient to provide the "*something more*" to reverse the burden of proof in the claimant's allegation. The decision made and what was said was focussed on the relevant individual and the implications of that person's actions as part of a one-to-one discussion and did not in our view demonstrate age discrimination or provide the "*something more*" required when considering not providing the claimant with a mentor.

96. We considered the messages which we were provided and to which the claimant referred in her witness statement. We noted that the claimant, KS and Ms Stott were close friends and the messages exchanged between them were clearly those between friends of a friendly nature. In the exchange following the social event (apparently axe-throwing) (529) a distinction was drawn between the older and younger teams and KS did state that old equalled slow. There was a reference to "*granny fanny*" in a message exchange (535) by KS, which appeared to be a name given to somebody outside the workplace (and not the claimant), in which the claimant responded with crying laughing emojis and went on to appear to refer to herself with a similar label (refer to herself as "*The GGF*"). The messages clearly showed the claimant involved in making a joke about what had been said. The key messages were from KS, not a manager. We did not find that what was said in those

messages was sufficient to provide the "*something more*" to show that the claimant not being given a mentor was because of age.

97. The claimant, in her statement, emphasised that the respondent used photos of younger workers in materials which advertised certain roles (297). She also relied upon what the website said about the degree apprenticeship scheme and the need for recently gained or predicted UCAS points (274), and about the requirements for the people management graduate scheme and the need to be in the candidate's final year or have graduated in the previous two years (276). There was also website information provided for parents of potential candidates. We noted that the people in the photographs did appear to be relatively young, but did not find that that, in and of itself, shifted the burden of proof. What was said about recent qualifications and the focus upon likely applicants for apprenticeships and graduate roles was what we would expect (subject to what we say below when considering the indirect discrimination claim and justification). We did not find that those materials, or what was said, did provide the "*something more*" in the claimant's direct discrimination complaint.

98. On 13 April 2023, the claimant visited Hillmore House and was advised by someone there that she should get a mentor. It was not in dispute that, upon her return, the claimant asked Ms Stott for a mentor. It was Ms Stott's evidence that it slipped her mind, as recorded in the grievance investigation interview (496) and in her statement for this hearing. There was no reason given for us to disbelieve that explanation. As we have said, we found that the claimant not being allocated a mentor was less favourable treatment. That less favourable treatment continued even after the claimant had asked Ms Stott to be allocated one. However, for the limited period from 13 April until the claimant's resignation on 25 April 2023, the reason why the claimant was not allocated a mentor was because it had slipped Ms Stott's mind (it was not because of the claimant's age).

The second allegation of direct discrimination

99. The second direct discrimination allegation was that the claimant alleged that the respondent failed to take action in response to a complaint she made in November or December 2022. The evidence which we heard was that the claimant raised the issue of the discrepancy between the work she was undertaking, and the work undertaken by KS, on 18 November 2022 and, again, on 19 December 2022. Following raising the issue on 19 December, Ms Moody mentioned it to Ms Stott and Ms Wood and a meeting took place between the claimant, Ms Stott and Ms Wood on the same day. Ms Stott also said in her statement that she sat down with Ms Moody and Mr Duckworth and explained the concerns. In January 2023, Mr Duckworth took over the claimant's line management and it was his evidence that thereafter he allocated tasks to the claimant.

100. What was alleged as the less favourable treatment in the list of issues was that the respondent failed to take action. The respondent did take some action because they held meetings at which work allocation was discussed. The claimant was allocated some work which fell outside the normal tasks of a People Assistant. We found Mr Duckworth to be a genuine and credible witness and, once he became line manager, he clearly took steps to allocate work to the claimant (and, in any

event, the claimant did not contend that he had discriminated against her on grounds of age).

101. Based upon the evidence which we heard, we did find that the respondent took only limited action in response to the claimant's complaints in November in particular, but also to an extent in response to the complaint in December 2022. The respondent did some things, as we have said. At some point, Ms Stott involved the claimant in a project (albeit the claimant questioned the value of that project for her personal development). We also heard that the claimant turned down a potential project on neurodiversity which it appeared would have played to her strengths and background and would have been across the organisation. From January 2023, we accepted Mr Duckworth's evidence that he regularly delegated tasks for the claimant to conduct.

102. We considered whether the respondent only taking limited action was because of age. With regard to the limited actions in response to complaints, we did not find that the claimant had shown the "*something more*" required to demonstrate that any lack of response was as a result of her age (for the same reasons we have already explained for the first allegation of direct discrimination). From January 2023, the person primarily responsible for delegating tasks to the claimant was someone who she did not allege had personally discriminated against her on grounds of age. We would also observe that even had we found that the reason for the unfavourable treatment was age, it was difficult to see how this could have been less favourable treatment of the claimant as compared to her identified comparator, KS, as (for this allegation) KS was not in materially the same circumstances as the claimant.

The third allegation of direct discrimination

103. The third alleged direct age discrimination was that the respondent provided KS with more, and a greater variety of, Employment Relations meetings than the claimant in the period November 2022 to February 2023. In determining this allegation, we took particular note of what was recorded in the documents made at or close to the relevant time. In the record of the flexible working meeting on 17 March 2023 (368) Ms Wood was recorded as saying that, having looked at the calendars, KS had picked up more or been in more meetings at that time. Ms Moody, in her interview during the grievance investigation on 17 May 2023 (481), said that in December 2022 the work allocation was disproportionate (she ascribed that to being a case of the person who shouted loudest got heard) and after December 2022 (482) that, whilst it was more balanced, it was still not one hundred percent. Based upon that evidence, we did find that KS was involved in more, and a greater variety of, meetings in the period alleged. Looked at from the claimant's point of view, that was less favourable treatment of her in a context where both the claimant and KS wished to go to meetings as part of their development. We would observe that the documents (376) did demonstrate the claimant being involved in meetings from March 2023.

104. As with the first two allegations and for the same reasons, we found that the claimant did not show the "*something more*" required, to evidence that the less favourable treatment was on grounds of age.

The fourth allegation of direct discrimination

105. The fourth alleged less favourable treatment was that the respondent held fortnightly mentoring sessions with KS from 22 December 2022. The evidence was that there were four mentoring meetings held with KS, not the number asserted. This allegation in practice followed the first allegation. As KS was allocated a mentor, meetings with the mentor were conducted. Our findings were the same as for allegation one: not having a mentor and meetings with her were less favourable treatment; but the claimant had not shown the "*something more*" required to shift the burden of proof when determining whether that less favourable treatment was because of age.

The fifth allegation of direct discrimination

106. The fifth allegation of direct age discrimination was that the respondent sent KS to various sites on 12 and 13 January and 8 and 9 February 2023 as development opportunities. The evidence we heard about those visits were that they occurred because KS had been the person in the office on 11 January when the manager visited. The claimant was not in work that day. The request was for urgent cover/support. To the extent that KS visited a different site and/or undertook meetings, it was less favourable treatment of the claimant that the claimant did not do so on those occasions, looked at from the claimant's point of view. However, the reason for the difference in treatment was because KS happened to be the person in the office on 11 January, it was not because of age.

The sixth allegation of direct discrimination

107. The sixth allegation was that the respondent stopped the claimant's Employment Relations meetings (but not those of KS) on 10th March 2023 following a complaint by KS about her workload. We did not find that what occurred was accurately described in this allegation (as recorded in the list of issues). It was not all meetings that were stopped. The decision made, as evidenced by Mr Duckworth, was to pause the People Assistants conducting absence review meetings (albeit they could continue to attend and shadow the conduct of such meetings and could conduct welfare meetings). The claimant was not treated less favourably as both her and her comparator were treated in the same way. The reason was also not because KS had complained about workload. KS had not complained about workload, she had complained that she was not being given sufficiently stretching work. The reason for the decision was not, in any event, anything to do with KS raising issues. We accepted Mr Duckworth's evidence that the reasons were due to concerns about, and appeals resulting from, the conduct of such meetings. As a result, we also did not find that the decision made was because of age.

The seventh allegation of direct discrimination

108. The final allegation of direct age discrimination was that the respondent failed to interview the claimant for a People Advisor role on 11 April 2023. KS was interviewed for the People Advisor role, whilst the claimant was not. That was less favourable treatment.

109. We accepted Mrs Plummer's evidence about why she interviewed KS and not the claimant. Initially, she did so because KS applied earlier, and Mrs Plummer made a decision to interview four candidates before the claimant applied (and before the deadline for applying). She also made the decision to appoint one of those four to the role for which the claimant applied (albeit not the comparator, who Mrs Plummer decided not to appoint; the comparator was successful in her application for a role for which the claimant did not apply). The real reason why Mrs Plummer did not interview the claimant was because of an administrative error which meant that she was not aware of the claimant's application until later. Mrs Plummer confirmed in her evidence that she would have interviewed the claimant had she been informed of her application at the time. That meant that the real reason for the difference in treatment between KS and the claimant was the administrative error in Mrs Plummer not being made aware of the claimant's application. We found that the reason for the difference in treatment was the administrative error in the process, it was not because of age. The claimant had not shown the "*something more*" required to shift the burden of proof. We would add that we accepted the claimant's submission that the recruitment process undertaken by the respondent was unfair, as was appointing to a role before the end of the period for which applications were sought, but we did not find that unfairness was because of age.

Indirect age discrimination

110. We then considered the claimant's indirect age discrimination complaint. She contended that the respondent had a PCP of applying eligibility criteria for its degree and/or graduate apprenticeship programmes that favoured recent academic qualifications over skills acquired through experience and/or less recent academic qualifications. As the respondent's representative highlighted in her submissions, the PCP relied upon included both an asserted PCP and a statement about the asserted impact of that PCP. As a result, that made the indirect discrimination claim more complex and difficult to consider. However, we focussed upon the eligibility criteria which the respondent applied to its recruitment of those applying for the people management graduate scheme, as stated on its website (276). It stated that an applicant to that scheme had to be undertaking a degree or have graduated in the last two years. That was the PCP applied and that clearly was a PCP.

111. We found that the PCP applied resulted in a group disadvantage for older workers including those in their fifties. It was a PCP which applied equally to all, and as the respondent contended it did not differentiate between a person in their twenties who had recently graduated and someone in their fifties who had also recently graduated (who would equally have been able to apply). However, we accepted the broad proposition that a requirement that a potential candidate must either be undertaking a degree or have recently completed a degree, was a requirement with which a significantly greater proportion of graduates in their twenties (particularly early to mid-twenties) would be able to comply, when compared with graduates in their fifties. We reached that decision relying upon our experience as a Tribunal panel based upon what we see as the norm in the UK when considering those undertaking degrees and in the job market. As a result, we found that the requisite group disadvantage applied.

112. We accepted that, as the respondent's representative submitted, we had no genuine evidence which showed who was interested in applying for the graduate

people management scheme/roles and therefore we did not know what proportion of people who might have been interested in applying for graduate roles were able to comply within the relevant criteria (and therefore who were actually disadvantaged). We found that such an analysis over-complicated the issue we were being asked to determine and was not necessary for us to find group disadvantage resulting from the application of the PCP.

113. In its amended grounds of response and in its submissions, the respondent argued that we must look at all the strands of the pleaded PCP together and therefore needed to consider not just the graduate scheme in isolation, but all of the development schemes offered by the respondent together. We understood that submission based upon the PCP as pleaded. We heard evidence about the Pathways Programme. That was the internal programme which did not require an applicant to have any specific qualifications. There was no evidence that showed that younger workers were advantaged, and the evidence showed those to whom it was applied were spread across age groups. We considered the schemes to be different and found group disadvantage for the graduate scheme even though progress through the Pathways Programme was available. The existence of an alternative pathway to career development which had no adverse age impact, did not preclude us from finding that the criteria applied to a specific pathway (the graduate scheme) did have an adverse group disadvantage for older workers/those in their fifties.

114. We then turned to consider individual disadvantage. The respondent denied that the PCP did put the claimant personally at the disadvantage. In her submissions, the respondent's counsel said that the fact that the claimant did not make enquiries about the scheme of those actually running it, or even try to apply, meant that she had no evidence of disadvantage. It was emphasised that without applying or expressing an interest to those responsible, the claimant did not know what would have happened had she applied, as she may have succeeded or she may have been able to challenge a rejection, we simply did not know. She said that the only possible disadvantage was the claimant reading the guidelines. It was stated that the claimant had not identified an individual disadvantage.

115. We found that the claimant was not placed at a disadvantage by the PCP, individually, because she had not applied for the role/scheme. Her simply seeing the criteria on a website was insufficient to establish individual disadvantage. The claimant could have applied, but did not do so. Notably, she neither raised it in her resignation nor her grievance. She did not establish with the respondent whether it was in fact applying to an internal applicant what had been said on its external-facing website. We found that the claimant did not suffer any individual disadvantage as a result of the PCP applied and therefore her claim for indirect discrimination did not succeed.

116. As a result of our finding on individual disadvantage, the outcome of the respondent's argument that the PCP was a proportionate means of achieving a legitimate aim or aims was not material to the outcome of the claim. However, had we need to have done so, we would not have found that the criteria set down on the website was a proportionate means of achieving the aims relied upon.

117. The contended legitimate aims relied upon were set out in the amended grounds of response at paragraph 55 (84). There were two. They were stated to be as follows (albeit in fact what was said mixed together the aims relied upon and why it was that the PCP was said to be a proportionate means of achieving that aim):

> "*a. the requirement for employees to be suitably qualified for and to receive the appropriate further training for the roles they apply for and are recruited to fulfil and perform. Accordingly, it is the Respondent's position that those who are suitably qualified for a particular role or training scheme, have other options with suitable training pathways, or if they do not meet the suitability for any role, it is proportionate not to recruit/appoint them; and*
>
> *b. the requirement for employees to be suitably qualified to meet a general qualification, knowledge and skills standard, allowing the Respondent to establish expected and or minimum attainment levels and to standardise training schemes based on expected attainment and achievement"*

118. We found that the aims relied upon (when focussing on the aims themselves and not the argument included), were legitimate. In summary, if the aim of the requirement that either a degree was being undertaken or had been undertaken in the last two years was to ensure that applicants were suitably qualified and able to undertake the role, those aims were legitimate.

119. However, when looking at the proportionality of a PCP which precluded anyone from applying who had completed their degree more than two years prior, we did not find that criterion was a proportionate means of achieving that aim. We accepted that for some skills and roles a candidate's learnt skills could decay or date quickly (as may, for example, be the case in some areas of IT), but a blanket two-year rule applied to all degrees and circumstances (and/or to HR), was not proportionate and we considered it to be a very short period. We heard no evidence from the respondent about why it considered that approach to be proportionate and, absent any such evidence, we did not find that it was.

Time/jurisdiction

120. The last thing we considered was the first issue in the list of issues, which was the issue of time/jurisdiction. In the light of our findings, we decided that we did not need to consider that issue further. Some of the allegations were entered in time. On the face of it and unless part of a continuing series of events, others were not. It was the respondent's submission that anything prior to 1 March 2023 was out of time. The claimant argued that they were all part of a continuing series of events. It was not necessary for us to determine what we might have found had we found for the claimant on some allegations and not others. We also did not need to decide whether (or for which allegations) we would have found it to have been just and equitable to extend time for any allegation entered out of time (and not part of a continuing series of events).

Summary

121. For the reasons explained above, we did not find for the claimant on the allegations which she brought.

Employment Judge Phil Allen
19 November 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 28 November 2024

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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

Annex
List of Issues

Time limits

- Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
  - If not, was there conduct extending over a period?
  - If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
  - If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
  - Why were the complaints not made to the Tribunal in time?
  - In any event, is it just and equitable in all the circumstances to extend time?

Direct age discrimination (Section 13 of the Equality Act 2010)

- Did the Respondent do the following things:
  - Assign a mentor to KS on or around 11 November 2022?
  - Fail to take action in response to a complaint made by the claimant in November or December 2022?
  - Provide KS with more, and a greater variety of, Employment Relations meetings than the claimant in the period November 2022 to February 2023?
  - Hold fortnightly mentoring sessions with KS from 22 December 2022?
  - Send KS to various sites on 12 and 13 January and 8 and 9 February 2023 as development opportunities?
  - Stop the claimant's Employment Relations meetings (but not those of KS) on 10th March 2023 following a complaint by KS about her workload?
  - Fail to interview the claimant for a People Advisor role on 11 April 2023?
- Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated less favourably than someone else was treated. There must be no material difference between the comparator's circumstances and the Claimant's except for the protected characteristic. The Claimant says she was treated worse than KS who is in the under 50's age group.

- If so, was the less favourable treatment because of the Claimant's age? Or does the Respondent have a non-discriminatory explanation for any less favourable treatment that is found?

2. Indirect age discrimination (Section 19 of the Equality Act 2010)

- A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP(s) asserted by the Claimant:
    - apply eligibility criteria for its degree and/or graduate apprenticeship programmes that favoured recent academic qualifications over skills acquired through experience and/or less recent academic qualifications?
- If so, did the Respondent apply the PCP to persons not of the same age or age group as the Claimant, or would it have done so?
- If so, did the PCP put or would it/they put persons of the Claimant's age or age group at a particular disadvantage when compared to other persons?
- Did the PCP put, or would it have put, the Claimant at that disadvantage? The disadvantages relied on by the Claimant are:
    - The reduced opportunity for promotion and fast tracking.
    - The reduction in confidence for applying for roles.
    - The reduced opportunity to diversify.
    - The lack of growth for potential, self-fulfilment and skill development.
- Was the PCP a proportionate means of achieving a legitimate aim? The Respondent says that its aims were [as set out at paragraph 55 of the amended grounds of response].
- If so, were they a proportionate means of achieving those aims?
- The Tribunal will decide in particular:
    - Was the PCP an appropriate and reasonably necessary way to achieve those aims;
    - Could something less discriminatory have been done instead; and

- How should the needs of the Claimant and the Respondent be balanced?