Case No: 1303336/2023

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Hughes**

Respondent: **Science Recruitment Group Limited**

Heard at: **Birmingham (parties attending by CVP)**

On: **22, 23 & 24 January 2025**

Before: **Employment Judge Flood**
Ms Fritz
Mr Davis

Representation
Claimant: In person
Respondent: Mr McNerney (Counsel)

JUDGMENT having been sent to the parties and written reasons having been requested by the claimant in accordance with Rule 60(4) of the Employment Tribunal Procedure Rules 2024 ("ET Rules"), the following reasons are provided:

REASONS

The Complaints and preliminary matters

1. By a claim form presented on 12 April 2023, the claimant brought complaints of age discrimination against the respondent.

2. There was a preliminary hearing for case management before Employment Judge Gaskell on 28 July 2023 where particulars of the complaints the claimant wished to bring were discussed. The claimant was ordered to provide further particulars of the acts he wished to rely upon in respect of the various complaints.

3. A further preliminary hearing was listed and came before Employment Judge Kenward on 6 October 2023. The claimant's case was further clarified and the final list of issues identified at that hearing ("List of Issues") is set out below and referred to throughout the hearing. The claimant was also ordered to provide the respondent with names of

comparators or information from which circumstances could be clarified in respect of his direct discrimination complaint.

4. In advance of the hearing the claimant has asked on many occasions to have an application to strike out the respondent's response considered. This was first raised at the preliminary hearing before Employment Judge Kenward in October 2023 who determined that it would not be proportionate to list the case for a preliminary hearing to consider strike out and the issue would need to be resolved through evidence being heard at a final hearing. Following that hearing the claimant renewed his application for strike out and made further applications either on the basis of a reconsideration of the first decision or on the basis of a fresh application. Employment Judge Kenward determined that his decision not to list for a hearing to consider strike out was not a judgment and therefore not open for reconsideration and in any event was not in the interests of justice to do so. He determined that for any new application for the response to be struck out, it was not proportionate to list for a preliminary hearing to consider this. He also concluded that he was not satisfied that the claimant had many out any grounds in terms of conduct or non-compliance which would suggest strike out is appropriate. The final hearing that had originally been listed for September 2024 was postponed on the application of the respondent and relisted for January 2025.

5. In a series of emails since 9 August 2024, the claimant made further applications for reconsideration of the original case management decisions and further applications to strike out the response. In summary the grounds for both types of applications are essentially contending that the response should be struck out because it has no merit or because of unreasonable conduct. These were referred to Employment Judge Kenward who considered them on 17 January 2025 and made case management orders. He referred to the 'voluminous' correspondence received and the difficulties in ascertaining whether any new matters were raised or whether previous matters were being repeated. Employment Judge Kenward made a further determination that having regard to the overriding objective and the interests of justice, that the evidence needed to be heard and considered at final hearing and that striking out the response would be disproportionate. He further pointed out that any costs application based on the defence having no prospects of success or on the basis of conduct could be considered at the outcome of the current proceedings.

6. Both parties having been sent the case management orders on 17 January 2025, the claimant sent a series of further e mails on 17, 18, 19 and 20 January 2025. Those e mails again sought an order that the response be struck out with the claimant contending that it was a "*litany of lies*" and attaching and making reference to messages from Mr S Arshid which he said undermined the defence of the respondent. He

made allegations about misconduct involving the respondent's representative along with the legal officers and judges at the Employment Tribunal.

7. The hearing came before this Tribunal starting on 22 January 2025. The claimant again renewed his application that the response be struck out and referred to the e mails he has sent in recent days to the Tribunal. The Tribunal determined that it was not in the interests of justice or the overriding objective for it to hear an application to strike out the claim. All parties and witnesses were present and ready for the final hearing with all their evidence in place. It was therefore the time to hear that evidence and submissions and determine the claimant's claim. Depending on the outcome, then any further applications that the claimant wished to make in respect of costs relating to conduct or prospects of success could be considered at the conclusion of proceedings.

8. The Tribunal broke for its reading and started by hearing the evidence of the claimant after lunch on the first day of the hearing. The evidence was heard on days 1 and 2 followed by oral submissions. The Tribunal gave an oral judgment dismissing the claim on day 3. The claimant made a request for written reasons by e mail on the evening of 24 January 2025. On 24 and 25 January 2025 the claimant sent six further e mails making an application for reconsideration of the Tribunal's judgment. That will be addressed separately.

Documents before the Tribunal

9. An agreed bundle of documents was produced for the hearing and where page numbers are referred to below, these are references to page numbers in the bundle. On the evening of the first day of the hearing the claimant sent a number of additional documents consisting of e mails said to have been received from the respondent and also a copy of his qualifications. The respondent did not object to the addition of these documents to the bundle, so they were added and referred to as required.

10. We also had a Cast List and Chronology and a reading list all prepared by the respondent.

The Issues

11. The issues to be determined by the Tribunal were as follows:

1. Time limits

1.1 Given the date the ET1 Form of Claim was presented and the dates of early conciliation, any complaint about something that happened before 26 December 2022 may not have been brought in time.

1.2 Were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010 (‘EQA’)? The Tribunal will decide upon the matters set out below.

1.2.1 Was the Claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the Claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, was any Claim made within a further period that the Tribunal thinks is just and equitable having regard to:

1.2.4.1 the reason the complaints not made to the Tribunal in time;

1.2.4.2 any prejudice to the Claimant or Respondent;

1.2.4.3 any other circumstances relevant to whether it would be just and equitable to extend time?

2. Direct age discrimination (Equality Act 2010 section 13)

2.1 The Claimant was 68 years of age as at 26 February 2023. He compares himself with people in a younger age group.

2.2 Did the Respondent do the following things:

2.2.1 not progressing or responding to the Claimant’s job applications;

2.2.2 Mr [FM] blacklisting the Claimant?

2.3 Did this treatment of the Claimant amount to a detriment?

2.4 Was it less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. Other than age, there must be no material difference between the circumstances of the comparator and the Claimant’s circumstances. If Claimant alleges that he was treated less favourably than actual comparators then he needs to provide the names of these comparators or information from which the circumstances of these alleged comparators can be ascertained.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else (a hypothetical comparator) would have been treated.

2.5 If so, was any less favourable treatment because of age?

2.6 If so, was the treatment a proportionate means of achieving a legitimate aim?

2.7 The Tribunal will decide in particular:

2.7.1 was the treatment an appropriate and reasonably necessary way to achieve any aim relied upon by the Respondent;

2.7.2 could something less discriminatory have been done instead;

2.7.3 how should the needs of the Claimant and the Respondent be balanced?

3. Harassment related to age (Equality Act 2010 section 26)

3.1 Did the Respondent treat the Claimant in the way set out below.

3.1.1 not progressing or responding to the Claimant's job applications;

3.1.2 Mr [FM] having "blacklisted the Claimant";

3.1.3 Mr [FM] having sent teasing e-mails to the Claimant?

3.2 If so, was that unwanted conduct?

3.3 Did it relate to age?

3.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. Remedy for discrimination

4.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant?

Findings of Fact

12. In the judgment, the Tribunal has used initials to identify the people listed below rather than their full names in the interests of brevity. Other terms used may also be defined in a similar manner through the judgment.

Witnesses and other individuals

13. The following people attended to give evidence on behalf of the claimant:

    13.1.1 The claimant ('C')

14. The following people attended to give evidence on behalf of the respondent:

14.1.1 Mr F Malik ('FM'), Senior Consultant – Meditech and Diagnostics UK & Europe at the respondent ('R') until January 2024;

14.1.2 Mrs H Lawence ('HL'), Compliance Manager employed by Carbon60 Limited a group company of R who also supports R in a compliance function from mid-2022.

15. The following individuals were referred to during the evidence:

15.1.1 Mr K Harding ('KH'), a former colleague of C alleged to have made comments about R's view of C;

15.1.2 Mr S Arshid ('SA') a consultant employed by R in 2024;

15.1.3 Ms E Laurenson ('EL'), Team Leader at R;

15.1.4 Ms A McClure ('AM'), Consultant at R;

15.1.5 Ms L Mustafa ('LM'), R's Head of Sector – Medical Technology & Digital Health;

15.1.6 Ms S Popat ('SP'), In house solicitor at Impellam Group Limited, the parent company of R.

Credibility

16. R invited the Tribunal to conclude that C's evidence was lacking in any credibility. It was directed to the comments of the Employment Tribunal in the decision on a claim brought by C against Aardvark Clear Mine Limited (claim reference number 4103151/2023) which concluded that he was an "*unreliable and incredible witness*" and went on to make various adverse findings as to why. This Tribunal reached a similar conclusion on the reliability of C's evidence. His account on a number of matters changed over time and was inconsistent and illogical. His recount of the alleged conversation with KH in particular was an example of this with various differing accounts being given. His suggestion in correspondence and during cross examination that KH had told him in 2021 that FM had been 'taking the mickey' out of him for 2 or 3 years is nonsensical given that C only registered with R in 2020. He is prone to exaggeration. For example he suggested initially that he had received over 1000 e mails from FM, but that number varied up and down variously in his accounts being described as 200, 300, 400 and as high as 1750. In fact only a handful of such e mails were produced. The Tribunal accepted the observation of FM that there is no way he would have been able to find that number of roles for C in the time period. He makes repeated outlandish statements about his own professional standing repeatedly claiming to be 'the most qualified person in the United Kingdom'. There were many examples of inflammatory language in his correspondence with R and the Tribunal. He also took that approach when cross examining FM at times becoming haranguing and repetitive despite being

warned several times about this. The Tribunal had a particular concern about C making entirely unfounded and offensive accusations during these proceedings and in his correspondence with R. He made a baseless allegation that FM had been 'sacked' by R as a result of C's complaints. He also appears to be accusing R's legal counsel SP of being dishonest about her legal qualifications and he made the somewhat incredible suggestion that he had been informed by someone at the University of Derby that she never attended as a student. These are serious allegations and were made without any evidence or basis whatsoever and a little surprising given C's own suggestion in correspondence that he was a qualified lawyer or a legal executive which is untrue.

17. The Tribunal took account of the fact that C has been convicted for blackmail, attempting to pervert the course of justice and attempting to obtain a pecuniary advantage by deception and served a prison sentence in 2008 under his previous name of David Casquerio. Even if C is correct that such convictions are now spent for employment purposes, this Tribunal is entitled to have regard to them when assessing C's honesty in giving his evidence today. It also became apparent that C's CV suggested that he was in fact employed and working during the period he was in prison. The Tribunal was not convinced by C's explanation that this was just an error in dates.

18. By contrast the evidence of FM and HL was straightforward, relevant and supported by the admittedly few contemporaneous documents. There was a limited interaction between C and FM and the Tribunal found that FM gave the best account of his recollection of this that he could, making concessions where he could. HL's account was uncontroversial, and all of her evidence was backed up by e mail correspondence in any event.

19. In order to determine the issues, it was not necessary to make findings on all the matters heard in evidence. Findings though have been made not only on allegations made as specific discrimination complaints but on other relevant matters raised as background. These findings may have been relevant to drawing inferences and conclusions. The Tribunal made the following findings of fact on the balance of probability:

19.1 C was 68 years old when he presented his claim.

19.2 R is a subsidiary of the Impellam Group Plc. It operates as both an employment business and an employment agency within the meaning of the Employment Agencies Act 1973. It specialises in the science, engineering, clinical, pharmaceutical, food, renewable, biotech, chemicals and medical devices sectors. When acting as an employment business, it supplies temporary workers to work on assignment under the supervision and direction of its clients.

19.3 It also sources limited company contractors to provide services to clients, often on an off payroll or "*outside IR35*" basis. These individuals were often experienced and senior people with many years of experience with annual earnings in excess of £120,000. Individuals who were seeking to be placed in employment or on assignment with R would register on its database with details of their qualifications and experience, salary expectations etc. Those individuals could make specific applications for roles via phone, e mail, the website or via LinkedIn. The recruitment consultants working for R would also actively seek assignments for candidates that were registered on R's databases.

19.4 C registered with R on 14 August 2020. At page 220 were details of C on R's systems which included the job title he was interested in, location, salary expectations, availability and the like. It had e mail and phone contact details but there was no information as to date of birth, gender, marital status or nationality. The Tribunal was satisfied that C's age would not have been visible from this. FM gave evidence that he was in fact unaware of C's age at any time when he was interacting with him. C did not challenge this evidence but did suggest that it was easy for anyone to google him to find out his age and asserted that this is in fact what FM did. The Tribunal does not find that C has shown on the balance of probabilities that FM did in fact google to find out his age and accepted FM's evidence that he did not t know how old C was at the relevant time.

<u>Practice on references</u>

19.5 R contends that at the time of C being registered with R in 2021, it operated a practice that before placing limited company contractors it would seek references from 2 different companies that any candidate had worked for in the previous 2 years. FM gave evidence that this involved making direct contact with the companies to obtain references. C entirely disputes that his policy existed and contends that R's policy was that references would not be sought by it until after a candidate had been placed with a client. In support of his contention he relies on an e mail he received on 29 July 2024 from SA. The Tribunal was directed to an exchange of messages between C and SA where C had made contact about a potential role and then informs SA who his reference contacts are and asks whether he should contact them to expect a call. To which SA responds,

"Hi [C], we don't require any references, we are an agency so you will only need to show your references when you hired by any of our clients".

19.6 When asked about this e mail, FM responded that he did not know SA but believed he worked as a recruitment consultant in respect of permanent vacancies and not in the placing of limited company contractors like FM did. FM accepted that for permanent recruitment the practice would be for the client to seek references in respect of a candidate only after an offer of employment had been made. He stated

that this was generally because that person could still be in employment at the time any job application was made, and it may cause them difficulties if a reference was sought from their employer whilst they were still employed. He told the Tribunal that for limited company contractors the position was very different as this was a business to business interaction and that where he had not worked with a limited company contractor before, he would seek to have references from client companies that the limited company had been placed with recently to verify that they would be suitable to recommend to their clients. HL also gave evidence that this was the position and that in relation to limited company engagements that R required confirmation of the experience of the candidate limited company contractor before introducing to a client. She gave evidence that this was an entirely different business model than for permanent recruitment when references would be sought once the offer has been made.

19.7 The Tribunal preferred the evidence of FM and HL and find that there was a policy in place at the time of seeking recent references directly from companies that the potential candidate had worked with in the previous 2 years before a limited company contractor would be introduced to a client. This is also confirmed in the e mail sent by FM in October 2021 referred to below. It is also found that a different practice operated at all times in relation to permanent recruitment of seeking references only after an offer of employment was made and this is what SA is referring to in his message to C of 29 July 2024.

<u>Seeking references for C in October 2021</u>

19.8 FM stated that he had been in touch with C about a potential opportunity in October 2021. He explained that as he had not engaged C as a limited company contractor before, he followed his usual practice, and he contacted two companies C had worked with recently to seek references directly from them before putting him forward for the opportunity. He said he obtained the details of the companies to contact from C’s CV. He also stated that given that the industry he worked in is niche, he is aware of and has contacts in most companies within it. He said that he sent an e mail to one of the companies on 26 October 2021 and at page 61 we saw a redacted e mail from FM on that date sent at 15:33 which including the following:

“[*C] has recently got in touch to apply for a vacancy we are recruiting for.*

As part of our process we confirm dates of previous employers. Would you be able to confirm what dates he was working for you?

Would you suggest him to other clients as a consultant/contractor?”

19.9 The Tribunal was then directed to a response to that e mail sent the same day at 16:08 (page 60) which contained the following:

"The Company has no wish to provide a reference for this individual".

FM gave evidence that he also telephoned the CEO of another company referred to on C's CV (he could not recall the name of the company) and when he asked about C, the CEO's response was that he would not use C again. FM said that given that he had not received positive references he took the decision not to put forward C for any assignments or search for positions for him. He explained he was not prepared to put forward someone in respect of whom he had not received positive references as he was concerned about negative feedback that could affect client relationships and that he wanted to focus on candidates that did have positive references that he could place.

19.10 FM thought he briefly spoke to C about this although cannot recall the detail but accepts that he did not inform C that he would not be placing him on assignments moving forward. At page 221 we saw a record of interactions related to C from employees of R which shows that FM manually entered that he had spoken to C on 26 October 2021(the same date as the reference e mails referred to above took place). FM gave evidence that he decided to put a flag on R's system stating,

"do not use speak to [FM]" (shown at page 220)

19.11 C contends that the e mails the Tribunal was taken to were fabricated and were highly suspicious, given that they were redacted. He contends that the e mail chain was effectively "*invented in 2023*" by FM as part of an exercise in "*plausible deniability*". C contends that he gave FM details of different reference contacts to FM in 2021 and mentioned G Tookey of Sight and Sound UK and D Idowu of London Southwark Council. He noted that C's CV as at October 2021 (pages 210-218) included details of C having worked with Mr Tookey (and had an extract of an e mail from Mr Tookey included in it). FM says he has no recollection of being given these references from C and contends that a reference from a local authority would not be relevant in any event. FM did not make contact with either of these named individuals.

19.12 The Tribunal FM's evidence in full about the interactions he had by e mail and by telephone with the two companies he sought references from and the steps he took after receiving the response that he did. There is no evidence at all to support the suggestion that the e mails referred to were fabricated. The e mails are on their face genuine and in the usual e mail format and contain nothing at all suggesting a forgery. The e mail from FM is general in terms and consistent with his evidence that before placing limited company contractors he verified their work experience with a company they had recently worked for. The e mail states quite clearly what its purpose was. The fact that it has been redacted does not make it in any way suspicious as this is a widespread practice in litigation to protect commercial confidentiality. Significantly the email exchange correlates exactly with the other contemporaneous record of an

interaction between C and FM on the respondent's system that same day (page 221) and the evidence of FM that he recalls sending and receiving the e mail on that day was accepted. C has produced no actual evidence to support a contention that these e mails are faked. For the Tribunal to make such a key finding on a serious matter such as alleged forgery of evidence, at least some evidence or steps to find such evidence to have been taken by C would need to be shown. C asks the Tribunal to make a hugely damaging finding of fact that R has forged documents to support its case on the basis of bare assertion only. This would be a perverse finding of fact for the Tribunal to make and it is not prepared to make it.

<u>Alleged conversation between C and KH</u>

19.13 In support of his complaints of discrimination, C relies on a conversation he says he had with KH in October 2021. C says that he came across KH whilst working for a medical devices company in Wales where he was carrying out a temporary role, when KH came in to take that role permanently. In his witness statement C contends that KH told C that FM was "t*aking the mickey"* and was "*sadistically playing with*" C and had "*broadcasted over the internet about his sadistic game*". C also reported that KH told C that FM had said that C was "*too old*", and that R thought he was not commercially viable and that that they would never put him forward to any hiring manager and were just playing with him. FM admitted that he knew who KH was but said that the only conversation he ever had with him was when KH informed FM that C had been "*walked off site*" at the company he had been placed in

19.14 The Tribunal on the balance of probabilities that this conversation between C and KH did not take place as alleged by C in particular the mention of age. This finding is made firstly because C's account of this conversation has changed significantly throughout these proceedings. The first mention comes in the complaint e mails sent by C on 25 and 26 March 2023 (pages 63 and 64). He mentions that a person who he will name told him he had been "*blacklisted by FM*" and that FM was "*making fun of him*". When HL asked for further information about this when she started investigating (page 65), C gave further information on 27 March 2023 (page 66), stating that, "*in a conversation with a professional that speaks to [FM] he said that [FM] has blacklisted me mostly on age*". This is the first time any mention of age being referred to is brought up. When asked for further information by HL he stated that the comments were made by a "*contractor who [FM] once engaged and put forward younger than me – he said so before a General Manager in my presence*". He then gave a more detailed account by e mail on 27 March 2023, stating that he had heard a conversation between KH and the General Manager where C was mentioned and it was the General Manager who then reported the conversation back to him stating that KH had told him that C had been blacklisted and that he was in his 60s. When asked about it in the hearing, C stated again that it was KH that had told him this in a

lowered voice in the kitchen and went on to state that KH told C that FM had been taking the mickey out of him for the last 2 years.

19.15 C's account is confused and as submitted by Mr Mc Nerney "*all over the place*". The comments start out by being made by KH directly to C, then move to being made to C from the General Manager recounting what KH said and the nature and content changes significantly over time, with any mention of C's age only intermittently appearing in the account. The fact that C now alleges that KH told him that FM had been taking the mickey out of him for 2 or 3 years back in 2021 (when FM had been in contact for just 1 year) illustrates the highly unreliable nature of this evidence. C has chosen not to call KH to give evidence to the Tribunal or even to seek any sort of written confirmation from KH about what he is alleged to have said. The only evidence we have is a confused and inconsistent account and for these reasons and in light of the comments about C's credibility above, the Tribunal finds that this conversation did not take place as alleged and this account was invented by C to try and create some evidence of a discriminatory motive in hindsight.

<u>E mails sent to C from October 2021 to 2023</u>

19.16 C complains about the e mails he received from R from October 2021 onwards contending that these amounted to harassment related to age. In his witness statements he describes the generality of the content of such e mails stating that they referred to R having an urgent requirement for a particular role and to let FM know if he was interested. C contended that he replied to this to state he was interested and available. C alleged that FM sent him "*maybe 1500 e mails*" and that he replied, "*maybe 1000 times*". Whilst the amount of e mails sent is disputed by R, it does accept that C was sent e mails relating to job opportunities during from 2021 onwards. Examples of such e mails were as follows:

19.16.1 E mail sent on 28 February [year not clear] regarding QARA permanent vacancies mentioning 4 possible roles in the London and Slough area and asking recipients that if any roles were of interest to get in touch (page 222);

19.16.2 E mail sent on 25 October 2021 mentioning 3 contract opportunities asking receipients to get in touch if any availability and also including a message *"please let me know if you would like to unsubscribe*" (page 223)

19.16.3 E mail sent on 16 April 2021, which is clearly marked,

"*Hi <ClientContact.PersonName>*",

in relation to a project role with an immediate start (page 224);

19.16.4 E mail sent on 14 July 2021 re a supplier quality engineer contract role (page 225);

19.16.5 E mail sent on 15 June 2021 re 3 contract vacancies (in additional documents supplied by C);

19.16.6 E mail sent on 9 January 2023 re 2 contract vacancies (in additional documents supplied by C); and

19.16.7 E mail sent on 28 February 2023 re 4 permanent vacancies (in additional documents supplied by C).

19.17 R does not dispute that the above e mails were sent in FM's name and accepts that other e mails were also sent. It contends that these e mails were sent via its semi-automated IT system called Bullhorn. This allows consultants to send details of roles to a large number of candidates who have registered their interest with R. Bullhorn sends that e mail as a mailshot to those candidates whose details match the requirements for the role or type of role in question. FM estimated that the e mail could be sent to any number of candidates up to a couple of thousand. FM stated that he was unaware that e mails had been directly sent to C as he had changed his e mail address on the system after he had made the decision that he would not refer C for any positions due to the lack of a positive reference being received. However as C had at least four different registrations on R's website under slightly different names, he received these e mails inadvertently. The Tribunal entirely accepted this evidence of how these e mails came to be created and sent to C. It is quite clear and obvious from the face of the emails themselves and the style they are written in that they are generic e mails to a group of people rather than individual targeted e mails. In particular it is noted above where the e mail has a mail merge type header where the name and title of the individual on a list would be automatically generated when the e mail is distributed and the reference to someone being able to 'unsubscribe'. On the record of interactions relating to C at pages 219 and 220, the vast majority of entries are recorded as "*Mailshot*" entries which the Tribunal accepts were sent automatically to a distribution list including C rather than directly and individually to C.

19.18 R accepts that in respect of any of the mailshot e mails that C responded to, it did not take his application further and contends that this was due to the decision of FM not to introduce him to clients because of the lack of positive references. The Tribunal accepted this evidence and indeed C's case is based on the premise that it was the decision of FM that led to him not being put forward for any role (albeit he alleges that this was for a different reason than C).

<u>Treatment of purported comparators</u>

19.19 C provided the names of 12 alleged comparators in October 2023 (page 162) and the Tribunal accepted the unchallenged evidence of HL that she reviewed this list but in was not possible to identify some claimed comparators as (a) some were identified by first name and there were a

number of individuals with the same first name; (b) there were number of named comparators where there was no record of the individual being placed on assignment by R; and (c) a number of individuals where full names were provided had definitely not been placed on assignment at all – specifically R Husain; G Williams; M Pinkney; and B Dorey who were all employees of C60, a group company of R. We further accepted the evidence of HL and FM that 10 individuals over the age of 55 were placed into assignment by FM into senior roles.

C's complaint to R about FM in March 2023

19.20 C sent a number of e mails to R to complain about the matters that now form part of the Tribunal claim. The first such e mail appears to have been sent directly to FM on 24 March 2023 (page 228) -and the Tribunal believes this is the e mail C was looking for during the hearing but was unable to find – this asked for an explanation of why he had not been put forward for any of the 400 jobs he said he had applied for. He then sent further e mails on 25 March 2023 to the general R e mail and again to FM and the general e mail on 26 March 2023 (pages 63 and 64). FM did not reply to C but forwarded the e mails on to HL who then commenced an investigation into C's complaints. It is notable that in his e mail of 26 March 2023 he accused FM of acting as a "*racist against good British nationals and also race discriminate against good British professionals white and not Indian or from Pakistan*". This allegation of race (and not age) discrimination was not pursued in the Tribunal.

19.21 HL acknowledged C's complaint quickly and informed him she would be investigating and there followed a significant amount of correspondence between the two where HL tried to ascertain some of the facts behind the allegation and find supporting evidence (page 65-92). During this correspondence, C suggested that he was a lawyer and very experienced and suggested that lengthy litigation would follow, and R would incur substantial legal fees. On 31 March 3023 HL e mailed FM with the outcome of her investigation (page 93) attaching a copy of an investigation report (pages 96-98). This concluded that C had failed to provide sufficient evidence to support the allegations and that no action was required. C continued to send e mails to R making threats of litigation and disputing their findings (pages 99 onwards). He made allegations of malice and nastiness on the part of FM and again alleging race discrimination at various points suggesting that FM was insane; had dementia; was evil and had a "*psychopathic impulse to destroy C*". In an e mail sent on 20 September 2023 in response to the case management orders of Employment Judge Gaskell he made racist comments about those of Pakistani nationality. He further accused HL of conducting a bogus investigation and threatened making a costs order directly against HL. The tenor of this correspondence which made very many threats in the event that R did not make an offer of settlement was wholly unreasonable and inappropriate.

The Relevant Law

20. The relevant sections of the EQA applicable to this claim are as follows:

4 The protected characteristics

The following characteristics are protected characteristics: …
Age;..”

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”.

23 Comparison by reference to circumstances
(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case.”

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.”

123 Time limits
(1) [Subject to [sections 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.

136 Burden of proof
(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 subsection (2) does not apply if A shows that A did not contravene the provision.

21. The relevant authorities which we have considered on the direct discrimination complaints are as follows:

Anya v University of Oxford & Another [2001] IRLR 377 **-** it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Igen v Wong and Others [2005] IRLR 258.

The employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

Madarrassy vNomura International Ltd 2007 ICR 867 - the bare facts of the difference in protected characteristic and less favourable treatment is not "*without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent*" committed an act of unlawful discrimination". There must be "*something more*".

In Efobi v Royal Mail Group Ltd [2021] IRLR 811, the Supreme Court confirmed

"… the claimant has the burden of proving, on the balance of probabilities those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. This is not the whole picture since, as discussed, along with those facts which the claimant proves, the tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. But that does not alter the position that, under s.136(2) of the 2010 Act … the initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent."

In Edwards v Unite the Union and ors [2024] EAT 151 the EAT summarised the authorities and concluded,

"….at the first stage, the question the tribunal must ask is: on these facts, could we conclude that discrimination/victimisation took place? The question is not would we so conclude, or should we so conclude. It is simply could we so conclude from the proven primary facts or from inferences we could draw from those primary facts.

51. If the answer to that question is negative, that is the end of the matter: the complaint has not been made out. If, however, the answer to that question is in the affirmative, the complaint may succeed (albeit he or she may not). That is because the Tribunal can now consider any explanation provided. Importantly, however, at this point, the Tribunal must recall that the burden has shifted to the alleged discriminator/victimiser. That means that doubt should be resolved against the Respondent and in favour of the Claimant. The Respondent's task is to prove (on the balance of probabilities) that no discrimination whatsoever occurred. If, having considered all the evidence, including the proffered explanation, the Tribunal has doubt about that issue, the complaint succeeds. That is the consequence of the shifting burden of proof. If however, the Tribunal is satisfied, on the balance of probabilities, that the respondent has proved that there was no discrimination whatsoever, again the claim fails"

22. In relation to harassment the following authorities were relevant:

Richmond Pharmacology V Miss A Dhalliwell [2009] ICR 724. There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that the respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so. A respondent should not be held liable merely because his conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as the claimant felt, about the treatment in question, and the claimant must, additionally, subjectively feel that their dignity has been violated, etc.

Grant v HM Land Registry & EHRC [2011] IRLR 748 CA emphasised the importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading,
humiliating or offensive environment was created: "*Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."*

Pemberton v Inwood [2018] EWCA Civ 564. Underhill J *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was*

reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).

Conclusion

EQA, section 13: direct discrimination because of age

23. In order to decide the complaints of direct age discrimination, the Tribunal had to determine whether the respondent subjected the claimant to the treatment complained of (which is set out at paragraphs 2.2.1 and 2.2.2 of the List of Issues above and then go on to decide whether any of this was 'less favourable treatment', (i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances). It had to decide whether any such less favourable treatment was because of age.

24. The two-stage burden of proof was applied. The Tribunal first considered whether the claimant had proved facts from which, if unexplained, it could conclude that the treatment was because of age. The next stage if the burden of proof passed was to consider whether the respondent had proved that the treatment was in no sense whatsoever because of age. The conclusions on these matters for each allegation listed in the List of Issues above are set out below with reference to each paragraph number where the allegation is listed:

Paragraph 2.2.1 – not progressing or responding to the claimant's job applications

25. The Tribunal refers to its findings of fact above. The respondent admits that it did not progress any of the claimant's job applications or put him forward for any roles with its clients so in essence the detrimental treatment is admitted. The issue remaining for this Tribunal whether that amounted to less favourable treatment by the respondent of the claimant on the grounds of age. The conclusion reached is that it was not for the following reasons:

25.1 There is no evidence of any less favourable treatment at all. The claimant made reference to a number of comparators during the preparation for this litigation, but it was not possible to identify those individuals, what their circumstances were or whether there was any difference in treatment. In terms of a hypothetical comparison, an appropriate comparator would be someone who.

(a) had registered for a role as a limited company contractor with the respondent;

(b) for whom the respondent had not received positive references in response to a direct enquiry from its

consultants to companies they had recently worked with; and

(c) was younger than the claimant.

There is no evidence at all that such a comparator would have been treated any differently than the claimant. On the contrary it is highly likely that they also would have been not put forward for roles in precisely the same manner as claimant was.

25.2 In addition, the claimant has not produced any credible evidence for the Tribunal to find any facts to show that his age could have been the reason for decisions made by FM or any other employee of R. The evidence of FM was accepted that he did not know how old C was and to an extent, this brings an end to the matter. Whatever the reason for any treatment, it therefore cannot have been because of C’s age. The Tribunal was unable to make an inference from the fact that C’s age is discoverable by google that FM did in fact google to find out C’s age and therefore knew of it.

25.3 Even if FM had known or guessed C’s age, the claimant had adduced no other credible evidence for the Tribunal find any facts upon which it could conclude that age could be the reason why he was not put forward for roles. The Tribunal found that his account of the conversation with KH was false. The claimant himself appears to suggest that reasons other than age were the reason why he was not put forward, suggesting at various times that this was because of his race or because FM was insane, had dementia or was evil.

25.4 For these reasons, the burden of proof has not shifted to R to explain the reason for the treatment, but even if it had, R would have discharged it. The Tribunal accepted the reason given by FM as to why he did not put C forward for any roles. FM was not satisfied with the response he received from the two companies he contacted to get a reference in respect of C. That is effectively the end of the matter. C’s arguments about his own exceptional qualifications, experience and other references did not change the fact that the two companies that FM contacted to ask them to provide a reference for C refused to give one. That was clearly and plainly the reason why C was not put forward for any jobs.

25.5 The evidence produced by C of his e mail exchange with SA does not “*demolish*” the explanation given by FM. It is not in dispute that in respect of permanent vacancies, the policy was not to seek references until after an offer of employment was obtained. However FM was not at the relevant time dealing with a potential permanent role, but a contract role and his policy as evidenced by the clear e mail sent was that he required some verification of the candidates experience before even putting the candidate forward for a contract position. The logical explanation that

there were two entirely different recruitment models at play is fully accepted.

26. The complaint of direct age discrimination is dismissed.

Paragraph 2.2.2 – FM blacklisting the claimant.

27. In essence this is the same complaint about not putting forward the claimant for any positions and we note that FM did put a flag on R's system to indicate that other consultants should not use the claimant and to contact him to discuss. This is highly likely to have meant that the claimant was in effect prevented from being put forward for roles. However for exactly the same reasons as already explained in paragraphs 25 and 26, it is concluded that his was not less favourable treatment because of age. There is no evidence to suggest that any other person in the same circumstances who was not of the claimant's age would have been treated in a different manner. Age was not the reason for this treatment (and could not have been given that FM was unaware of the claimant's age) and thus the complaint of direct discrimination on the grounds of age is dismissed.

EQA, section 26: Harassment related to age.

28. The claimant also makes complaints of harassment in relation to three acts of conduct. In order to determine these complaints, the Tribunal had to decide whether the claimant was subject to unwanted conduct of the type described; then determine whether the conduct was related to age. It was then required to consider whether the conduct had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. We set out our conclusions on each matter below:

Paragraph 3.1.1 – not progressing or respondent to the claimant's job applications.

Did the conduct occur?

29. The findings of fact above are referred to and again it is clear that the respondent did not progress the claimant forward for any roles from October 2021 onwards and it is not disputed that this was detrimental treatment.

Was this unwanted conduct?

30. As the claimant expressed an interest in at least some of the roles, that not progressing him for such roles was unwanted conduct.

Did it relate to age?

31. The Tribunal is clear that for similar reasons as are set out above in relation to the complaint of direct age discrimination, not progressing the

claimant forward for roles was not in any sense related to age. The legal test is a different one than for a direct discrimination complaint, but the Tribunal could find no relationship at all with age in what the respondent did. FM did not know how old C was and there was no express or implied mention of age or to link to age in any way at all. The claimant was not progressed due to R not receiving positive references for him upon requesting these from the two companies that FM did in October 2021. That is the beginning and the end of it and age had no connection or relationship at all to this conduct.

Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

32. Given that there was no relationship at all with age, the Tribunal is not required to go on an consider whether failing to progress the claimant's applications, FM's purpose was to violate dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. However for completeness it is concluded that this was not his purpose. FM's purpose in not progressing C was because he was not prepared to put forward someone in respect of whom he had not received positive references as he was concerned about negative feedback that could affect client relationships and that he wanted to focus on candidates that did have positive references that he could place (see above).

If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

33. Again the Tribunal did not need to consider whether the conduct had the proscribed effect taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have had that effect. However given the findings and conclusions about the reason why the claimant was not put forward for roles i.e. due to lack of positive references, it would not be unreasonable conduct for R to have done what it did in these particular circumstances.

34. This complaint of age-related harassment is not well founded and is dismissed.

Paragraph 3.1.2 – FM blacklisting the claimant.

Did the conduct occur?

35. The conclusions at paragraph 27 are referred to in relation to this same allegation made as one of direct age discrimination. The facts behind the conduct complained of occurred and it is not disputed that this was detrimental treatment.

Was this unwanted conduct?

36. For the same reason as at paragraph 30 it is concluded that the conduct was unwanted.

Did it relate to age?

37. For precisely the same reasons as above, the conduct was not related to age and thus that brings an end to the complaint. For completeness for the same reasons as above it is also concluded that the conduct did not have the purpose nor the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. This complaint is dismissed.

Paragraph 3 1.3 Mr [FM] having sent teasing e-mails to the Claimant?

Did the conduct occur?

38. Our findings of fact above are referred to and again it is concluded that R did send the claimant a number of e mails from October 2021 onwards. Such emails although addressed as coming from FM were sent to the claimant by R as part of a 'mailshot' sent to many other people at the same time in a semi-automated manner. None of the e mails were in any way 'teasing' and were straightforward e mails informing those on the circulation list for those e mails of potential vacancies for permanent roles and contract positions.

Was this unwanted conduct?

39. It could be said that given the claimant's continued registration with the respondent, that receiving such e mails was not in fact unwanted at all. However given that the claimant appeared to object to these, at least in 2023, the Tribunal concluded on balance that they were unwanted.

Did it relate to age?

40. For similar reasons as are set out above none of the e mails sent to the claimant had any connection at all to age. These e mails were not even sent directly and solely to R. They were generic mailshot communications to potentially hundreds or even thousands of people informing them of potential vacancies they may wish to apply for. The age distribution of that database is (presumably) wide and there is nothing mentioning or even obliquely referring to or implying any connection to age in any of the e mails. For this reason alone, the claim for age related harassment must fail.

Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

41. Given that there was no connection at all with age, it was not necessary to go on an consider whether by sending those e mails, the respondent's purpose was to violate dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Plainly and obviously it was not. FM did not even know the claimant was included on such mailshots as he believed he had been removed from the mailing list (see above). These were generic inoffensive e mails providing information to a large circulation list and there is simply no

evidence at all of a malicious intent of anyone at R involved in sending them.

If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

42. It is also concluded that it was unreasonable for the claimant to have taken these e mails received as violating his dignity or creating an intimidating hostile degrading humiliating or offensive environment. It is plain from the face of the emails what they are. These are the sorts of e mails sent to those registered on job search and recruitment agency websites on a daily basis. The claimant's purported offence at such e mails appears only to have arisen once he decided he would be making a legal complaint in 2023. The Tribunal is not satisfied that any such offence is particularly genuine and even if it was, it was entirely unreasonable in all the circumstances, for the conduct to have had that effect.

43. Given that none of the complaints for direct discrimination or harassment have succeeded, it is not necessary to go on to consider whether there was conduct extending over a period and if not, whether the claims were made within a further period that the Tribunal thinks is just and equitable. All the claims failed having been considered fully on their merits.

Employment Judge Flood

Approved on 28 January 2025

Notes

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/