



EMPLOYMENT TRIBUNALS

Claimant: Mr J Cook
Respondent: Open University
Heard at: Cambridge Employment Tribunal
On: 12, 13 and 14 February 2025
Before: Employment Judge Davey
Ms L Davies
Ms E Deem

Representation

Claimant: In person
Respondent: Ms A Palmer, counsel

JUDGMENT

The unanimous decision of the Tribunal is that the claimant's complaint of direct discrimination for the protected characteristic of age is not well founded and is dismissed.

REASONS

Introduction

1. The claimant worked at the respondent, a university specialising in flexible and distant undergraduate and postgraduate courses, between 27 March 2023 and 20 September 2023 as a student recruitment and support advisor.
2. The claimant was not directly employed by the respondent. He was supplied by Manpower, an employment agency who was his employer, to carry out work, referred to by the parties as an 'assignment' and was therefore engaged as a contract worker within the meaning of s41 Equality Act 2010 (EqA).

3. The assignment was terminated with immediate effect on 20 September 2023. This followed conversations between the claimant and respondent about its decision not to extend the assignment beyond 6 October 2023, which was the date the claimant had been told the assignment would end.
4. Mr Manu, also a student recruitment and support advisor who commenced work at the same time as a claimant, was offered an extension to his assignment. Mr Manu is in his early 20s and the claimant is over 40. The claimant says the assignment was not extended for him, despite outperforming Mr Manu, because of his age.
5. Early conciliation commenced on 10 October 2023 and ended on 21 November 2023. The claimant presented his claim form on 2 December 2023 for direct age discrimination. The respondent presented a response form on 13 February 2024, defending the claim on the basis the claimant's assignment was not extended and ultimately, terminated early, because of his 'bad attitude'.
6. There was a preliminary hearing on 22 May 2024 before Employment Judge Ord, who confirmed the claim was for a single complaint of direct age discrimination, agreed the issues in the case with the parties and made case management orders.

Evidence and witnesses

7. We heard evidence from the following witnesses who also provided a witness statement:
 - a. Mr Josef Cook (claimant);
 - b. Miss Deborah Hardy (senior operations manager);
 - c. Mr Phillip Daniels (team manager and the claimant's line manager).
8. We had an agreed bundle of evidence totalling 139 pages.

The issues

9. The issues for the Tribunal to determine were as follows:
 - 9.1 What was the reason for the Claimant's placement at the Respondent not being extended?
 - 9.2 Was that decision tainted by discrimination on the protected characteristic of age?
 - 9.3 If so, what compensation is to be awarded to the Claimant?

Findings of fact

10. The relevant facts are set out below. Where the Tribunal has had to resolve any conflict of evidence, we indicate how we have done so at the material point.

Where we have referred to documents in the bundle, we have provided the relevant page number.

11. The claimant began working for the respondent, via Manpower, on or around 27 March 2023 together with 30 temporary agency workers. The respondent uses agency staff for peak periods. After completing training, he (and 10 other agency staff) joined the Faculty of Business and Law (FBL) as a student recruitment and support adviser. The claimant's assignment in the FBL commenced on 19 May 2023.
12. The claimant's line manager was Mr Phillip Daniels, who was a team manager. Mr Daniels' line manager was and still is Miss Debbie Hardy, senior operations manager with the FBL and responsible for managing eight team managers. The respondent operates a duty team manager (DTM) system in student recruitment with different team managers rostered to provide support and guidance to student recruitment and support advisers.
13. Mr F Manu was also a student recruitment and support adviser, commenced his assignment at the same time as the claimant, assigned to the FBL and line managed by Mr Daniels.
14. It was common ground that the claimant was told at the commencement of his period of employment (assignment) the assignment would terminate on 6 October 2023, that there was no guarantee the assignment would be extended and there was no guarantee of permanent employment. The claimant acknowledged this in his oral evidence.
15. On 12 June 2023, both Ms Jade Bayan (DTM) and the claimant brought an incident to Mr Daniels' attention. Ms Banes provided the transcript of a skype conversation between her and the claimant. This had been for advice about what appeared to be an error on the respondent's system about a student. The claimant made a joke about responding to the email with a question mark and Ms Banes responded to say he could but would get a very low email score or he could just go back and answer the question. The claimant responded with 'tell you what. I'll ask one of the other DTMs' (45). The claimant acknowledged Mr Daniels had discussed this matter with him, told him to be careful when making jokes and stated they could come across as unprofessional. The claimant told the Tribunal this response was him disengaging and there was no polite way of doing this though he disputed he had been rude and unprofessional. The claimant stated in his grievance dated 20 September 2023, with reference to this incident 'I cannot remember the date of the incident involving Jade Banes. I remember that I asked Jade a question. She either did not answer or gave an incorrect answer. I told her I would seek the answer elsewhere and did so. I fail to see how this is a demonstration of a bad attitude' (63).
16. Ms Banes acknowledged she was sarcastic in her response to the claimant (107) and Miss Hardy conceded in her oral evidence Ms Banes could have

managed the situation better though she still thought the claimant's response was unacceptable.

17. On 23 June 2023, Mr Richard Lui (DTM) emailed Mr Daniels copying in Miss Hardy after he had assisted the claimant with an enquiry (47). He provided the transcript of the interaction where the claimant had initiated a conversation with Mr Lui with a query. A former student was asking a series of questions in quick succession. The claimant states in the transcript to Mr Lui he is struggling and getting lost and asks if it can be referred to the reference team. Mr Lui responds to say he would continue to assist the claimant directly. Mr Lui's concern was that the claimant was trying to avoid a difficult task that was part of his remit. Mr Daniels discussed this incident with the claimant, who he thought was defensive though understood what needed to be done with a difficult caller going forward. The claimant's evidence was that he was struggling, was correct that this should be referred to the reference team, was eventually told to do this by Mr Liu and was grateful for his advice.
18. In early July 2023, Ms Jen Hall (DTM) reported a skype call she had with the claimant to Mr Daniels where she described the claimant as being negative, sarcastic and argumentative. The claimant told the Tribunal he remembered Mr Daniels discussing this interaction with him but not the detail of the conversation. This is confirmed in his grievance where he says he can't remember the details as it was a long time ago (63).
19. The claimant did not dispute that Mr Daniels spoke to him about DTM concerns on each of the three occasions referenced above.
20. Following the interactions between the claimant and Mr Daniels after the three DTMs raised concerns, there is no record of any further concerns raised via one to ones, catch ups or conversations with the claimant between early July 2023 and the termination of his assignment and this was supported by the claimant's oral evidence to the Tribunal. Mr Daniels told the Tribunal he would have discussed ongoing concerns with the claimant but could provide no details or dates. He stated he thought the last conversation with the claimant was in August 2023 but could not recall exactly when or the detail. The only documentary record was the one to ones that focus on performance and statistics but not behaviour (43-44).
21. The Tribunal prefers the claimant's evidence that following the feedback provided by Mr Daniels in early July 2023, the respondent provided no further feedback to the claimant about his behaviour, that Mr Daniels did not have any further conversations with the claimant about his behaviour until the meeting between the claimant and Mr Daniels on 18 September 2023 when he told the claimant why the respondent was not extending his assignment. This is because Mr Daniels' evidence about this was vague and there was no documentary evidence to support any conversations between Mr Daniels and the claimant took place during this period

22. On 6 September 2023, Miss Hardy had a meeting with the team managers. Mr Daniels, Ms Hall and Mr Liu were all present at the meeting. One of the matters discussed was whether any of the remaining nine student recruitment and support advisers would be offered an extension to their respective assignments, as these were due to end on 6 October 2023.
23. The Tribunal accepted Miss Hardy's evidence that there was both a budget and a need to offer extensions, in theory, to all remaining advisers though wanted the right people and not just numbers and a priority was 'not having to step in too much'. Miss Hardy told the Tribunal there were no minutes or notes of this meeting.
24. At this meeting, Mr Daniels recommendation was not to extend the claimant's assignment, he stated he had concerns about the claimant's attitude, behaviour and that he had interacted inappropriately with him and other managers. Miss Hardy told the Tribunal this recommendation by Mr Daniels was supported by Mr Lui and Ms Hall and accepted by Miss Hardy. All three team managers reported concerns about the claimant not being open to feedback and being challenging. The basis for this decision was the three reports from the DTMs on 12 June, 23 June and early July.
25. At the same meeting, Mr Daniels recommended Mr Manu's assignment should be extended. We heard in oral evidence, and accepted that whilst Mr Manu's productivity was not as good as the claimants, it was still 'over the line'. i.e. his productivity was good enough and this was not challenged by the claimant. We also heard and accept the respondent had no other concerns about Mr Manu who was described as receptive and open to learning and feedback. The claimant did not challenge that there were other concerns about Mr Manu and stated in his evidence that he did not take issue with Mr Manu's assignment being extended, his issue was that his was not.
26. Mr Daniels told the Tribunal his concerns about the claimant and subsequent recommendation not to extend the claimant's assignment were because of his attitude and behaviour only and had nothing to do with his age.
27. Miss Hardy confirmed in her oral evidence that the claimant's productivity, sickness absence record, lateness record and suitability (being a reference to his English language and IT skills) were all good, as were Mr Manu's. Miss Hardy explained that other factors relied on such as values (open, honest and receptive to feedback) and the claimant's behaviour fell below the standard expected. She was very clear in her evidence that the claimant's age was not a consideration. She also told the Tribunal that due to the nature of the work, the majority of student recruitment and support advisers tended to be younger than the claimant, albeit they were overall a very mixed group.
28. Of the nine remaining student recruitment and support advisers, three had their assignments extended and one of those was older than the claimant.

29. On 11 September 2023, Mr Daniels told the claimant that his assignment would not be extended. Mr Daniels told the Tribunal that the claimant was not told why and appeared to accept this. The claimant told the Tribunal he was told this because it was a 'numbers game' and we only keep the best of the best. Mr Daniels disputes this though conceded he may have said the respondent kept the 'best temps'.
30. The Tribunal prefers the claimant's evidence that Mr Daniels said it was to do with numbers and keeping the best staff as at this stage, we find this was to avoid a difficult conversation about the respondent's reason for not extending the assignment and the fact Mr Daniels had made this recommendation.
31. After a team meeting on 18 September 2023, the claimant had a conversation with Mr Daniels about the decision not to extend his assignment as by this time, he had learned Mr Manu's assignment was being extended and wanted the decision not to extend his assignment to be reconsidered. Mr Daniels told the claimant he was not being kept on because of his attitude and behaviour and the three incidents referred to above were referred to. The claimant stated they were insignificant and told the Tribunal he asked for the transcripts. Mr Daniels agreed to discuss the matter with Miss Hardy.
32. The claimant told the Tribunal he did not say the decision should be based solely on his productivity but that he disagreed with the assessment regarding his 'bad attitude' and that he had outperformed Mr Manu. The Tribunal accepts this to be his position expressed throughout his evidence.
33. The claimant contacted Miss Hardy directly on the same day stating he disagreed he had a bad attitude, was unhappy about this and felt he was being discriminated against. He described how he felt as being 'punched in the gut'. The claimant had a skype call with Miss Hardy at 4.15pm that day. There is not a record of this conversation other than Ms Hardy's notes (59). Miss Hardy agreed to investigate the matter because the claimant's perspective of the feedback from the three incidents was different from Mr Daniels. On the same day, Ms Hardy asked Mr Daniels to provide his notes of one to one meetings and any records he had and actions agreed regarding concerns about behaviour (61). Mr Daniels responded the following day with notes from 'QMs' re development points in one to one meetings though acknowledged he did not make further notes and there was no follow up emails about the claimant's 'attitude or run in with managers that had fed back to me and that is my fault as I should have sent emails to make sure Joe did not misunderstand our conversation' (60). Miss Hardy states in her own notes that Mr Daniels lack of management notes and follow up emails is a learning point for him to safeguard against his decision making (59).
34. Miss Hardy's notes of the interactions and her oral evidence detailed that the claimant made references to being discriminated against due to his personality and was disagreeable throughout the meeting, interrupted her, was challenging and took no account of his actions. The claimant's evidence was that he was upset at the time and he maintained his position that he disagreed with the respondent's assessment of his attitude.

35. On 19 September 2023, the claimant contacted Miss Hardy for an update. Miss Hardy told the claimant 'she had been looking into and reflecting on our discussion from yesterday' and that she will feed back the following morning at 10.30 (59). Ms Hardy decided to end the assignment with immediate effect on the same day but did not communicate this to the claimant.
36. On 20 September 2023, Miss Hardy contacted Manpower and terminated the claimant's assignment. Manpower communicated this to the claimant before his shift was due to start. On the same day, the claimant submitted a grievance to Manpower. He complained about his treatment and the fact he was kept on during the respondent's busy period despite his 'bad attitude'.
37. By a letter dated 19 October 2023, Manpower dismissed the claimant's grievance (76-81). On 20 October 2023, the claimant appealed the grievance outcome and referenced age discrimination for the first time (82-84).
38. The Claimant told the tribunal he had stated in earlier correspondence he had been discriminated against because of his personality. When asked why 'age discrimination' was not in his grievance but in the ET1 he stated he had to raise age as a protected characteristic to get early conciliation started, that his research confirmed he had to tie the discrimination to a PC and when pressed on the point by Ms Palmer he stated 'it had occurred to me Mr Manu was younger'.

Law

39. The relevant sections of the Equality Act 2010 are set out below.

40. Section 5 Age:

(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 to a range of ages.

41. Section 13 Direct Discrimination:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

42. Section 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.

43. Section 41 Contract workers:

- (1) A principal must not discriminate against a contract worker—
 - (b) by not allowing the worker to do, or to continue to do, the work...
- (5) A “principal” is a person who makes work available for an individual who is—
 - (a) employed by another person, and
 - (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

44. Section 136 Burden of proof:

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (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 provisions.

45. Section 13 of the Equality Act 2010 provides that direct discrimination takes place where a claimant is treated less favourably because of a relevant protected characteristic. In Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL Lord Scott stated (at paragraph 110) ‘the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class’.

46. Shomer v B and R Residential Lettings Ltd 1992 IRLR 317, CA provides that the requirement for no material difference of circumstances (save for the protected characteristic) applies equally to hypothetical comparators.

51 Igen v Wong [2005] ICR 931, CA 9 provided guidelines regarding the burden of proof (at paragraph 76). The Tribunal must follow a two stage process. At stage one the claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant. The outcome of the stage one analysis will usually depend on what inferences, if any, can be drawn from the primary facts. If the claimant gets past stage one, the burden of proof shifts to the respondent who must prove s/he did not discriminate against the claimant. Although there are two stages, Tribunals usually hear the all the evidence in one sitting, including the respondent's explanation before decided whether the requirements of each stage are satisfied.

52 In Qureshi v Victoria University of Manchester and anor [2001] ICR 863, the Employment Appeal Tribunal stated that the function of the Tribunal is to find the primary facts from which they will be asked to draw inferences and then "look at the totality of those facts (including the respondent's explanations) in order to see if it legitimate to infer that the acts or decisions complained" were discriminatory. Adopting a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have on the issue" of discriminatory grounds.

53 The Supreme Court in Hewage v Grampian Health Board [2012] UKSC has confirmed:

"The points made by the Court of Appeal about the effect of the statute in these two cases [Igen and Madarassy] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in Martin v Devonshires Solicitors [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

54 In Madarrasy v Nomura [2007] ICR 867, CA (at paragraphs 56-57) where the Court of Appeal said there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the Respondent:

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

55 In Bahl v The Law Society [2004] IRLR 799, the Supreme Court confirmed that unfair treatment will not in and of itself be enough to shift the burden of proof.

56 In Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL, Lord Nichols stated (at paragraph 8):

‘No doubt there are cases where it is convenient and helpful to adopt a two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two are intertwined.’

57 In Stockton on Tees Borough Council v Aylott 2010 ICR 1278, CA, Lord Justice Mummery stated (at paragraph 42): ‘I think that the decision whether the claimant was treated less favourably than a hypothetical employee of the council is intertwined with identifying the ground on which the claimant was dismissed’

Submissions

58 Both parties provided oral submissions. We have not referred to the submissions in any detail unless appropriate to do so but would reassure the parties their respective submissions were considered when reaching our judgment.

Conclusions

59 We refer to the issues.

What was the reason for the Claimant’s placement at the Respondent not being extended?

60 At the time of the decision not to offer the claimant an extension to the assignment, the claimant was 43 and in the age group over 40. He compares himself to Mr Manu who was in his 20s. The claimant’s case is that he was treated less favourably than Mr Manu because of his age.

61 There was a substantial age gap between the claimant and Mr Manu. However, this in and of itself is not enough. There must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the Respondent, there must be ‘something more’ (Madarrasy) from which the Tribunal could conclude the respondent had discriminated against the claimant.

62 The claimant relied on the following facts to support his case from which the Tribunal could potentially draw inferences to support age discrimination:

62.1 His performance was better than Mr Manu’s;

62.2 That there was no reference to or conversation about his behaviour after early July 2023;

- 62.3 Lack of documentary evidence from the respondent about his behaviour;
- 62.4 Being deemed unemployable based on the respondent's views about his attitude;
- 62.5 The age of the decision maker (being younger than him).

- 63 It was common ground the claimant's performance was better than Mr Manu's. It was also common ground that Mr Manu's performance was good enough for him to be offered an extension to his assignment. The claimant's own evidence was that it was not about the extension of the assignment being offered to Mr Manu so much as about it not being offered to him.
- 64 The Tribunal found there were no further conversations with the claimant, about his behaviour, following the three incidents in June 2023 and early July 2023 until the conversation between the claimant and Mr Daniels on 18 September 2023. The Tribunal concluded that it would have come as a surprise to the claimant given the lack of negative feedback from Mr Daniels between July 2023 and September 2023.
- 65 The Tribunal accepts the claimant could have been managed better and provided with better support. However, the fact that the claimant was poorly managed, which was unfair to him, does not justify an inference of unlawful discrimination to satisfy the first stage of the burden of proof shifting (Bahl).
- 66 There was documentary evidence about two of the three incidents in June/early July 2023. It was common ground that Mr Daniels discussed the claimant's behaviours following these incidents. The Tribunal notes that following these incidents, there was no further contemporaneous documentary evidence about the claimant's behaviour until the conversation about the reason his assignment has not been extended between him and Mr Daniels on 18 September 2023, which followed rather than preceded the decision not to extend his assignment.
- 67 This decision not to extend the claimant's assignment (and to extend Mr Manu's) was taken without a paper trail and written feedback. The decision itself was based on verbal feedback from managers in a meeting with no review of documents, notes or other material detailing the behaviours the respondent relied on to make its decision. When the claimant became upset, the ultimate decision to end the assignment early was communicated to the agency despite Miss Hardy agreeing to meet the claimant at 10.30 the following day. The Tribunal accepted it was reasonable for the claimant to be concerned about the lack of contemporaneous evidence. However, the Tribunal concluded the reason the respondent took on agency workers was to avoid resource issues. This was confirmed in Miss Hardy's oral evidence about 'not having to step in too much' with reference to the criteria for extending assignments. The Tribunal concluded the lack of documentary evidence was not something more required to draw an inference that might support the respondent had unlawfully discriminated against the claimant (Madarrasey).

- 68 The claimant worked through the busiest period in the FBU between early July and mid-September with no feedback about his behaviour. The claimant was upset because despite his good performance during this period he was deemed 'unemployable' because of his attitude. We concluded that together with our findings above, there was no requirement to review the various attributes of the student recruitment and support advisers until September 2023, when the budget was confirmed and crucially, because the assignments were due to end. We note the emotive language of the claimant around his employability and the respondent's acknowledgement it would not re-employ him, noting that this, is not a consideration for the Tribunal unless we can draw an inference, which we do not, for the reasons stated above.
- 69 The claimant complains that Mr Daniels was younger than him. This is not a material consideration (s24 EqA). Further, the claimant and Mr Daniels are not in materially the same position (Shamoon).
- 70 Based on our findings, the matters raised by the claimant as supporting evidence to demonstrate a difference in treatment because of age are not sufficient for us to draw any inferences that in the absence of any explanation, the respondent committed an act of age discrimination.
- 71 The claimant has named Mr Manu as his comparator. Mr Manu commenced the assignment at the same time as the claimant, undertook the same role, was in the FBL and managed by Mr Daniels. The claimant is in the age group over 40 and Mr Manu is in his 20s. We heard no evidence that Mr Manu had been subject to reported concerns. Further, Mr Manu had good productivity statistics. The claimant did not challenge this evidence. The claimant and Mr Manu were not in materially the same position due to the reported concerns against the claimant and not Mr Manu (Shamoon). Mr Manu is not an appropriate comparator. The claimant must rely on a hypothetical comparator who would be in materially the same position as him but who does not share his protected characteristic (Shomer). The claimant must rely on a hypothetical comparator who is a younger student recruitment and support adviser where concerns have been raised by management about their behaviour and attitude.
- 72 As the claimant must rely on a hypothetical comparator, we concluded the treatment of a 'hypothetical employee' of the respondent was intertwined with identifying the ground on which the claimant's assignment was not extended (Aylott). Therefore, notwithstanding our findings above, we considered it was appropriate to ask the reason for the treatment, which we should do in any event (Qureshi) and also because of our finding about the appropriate comparator (Shamoon/Aylott).
- 73 The reason provided by the respondent was that the claimant's assignment was not extended was because he was considered difficult to manage. The respondent relies on the three incidents reported to Mr Daniels by DTMs as detailed above and that when the claimant was given advice and feedback by the DTMs and subsequently, by his line manager, Mr Daniels that he had a bad attitude, was not receptive to feedback, was argumentative and did not accept or account for his mistakes. As set out in our findings of fact, it was common

ground these incidents occurred, that Mr Daniels had discussed each incident with the claimant after he received feedback from the DTMs and in his evidence, he disputed he had a bad attitude or that he had done anything wrong and considered the incidents to be insignificant.

- 74 The Tribunal accepts this was the respondent's reason for not extending the claimant's assignment. Notwithstanding this, we will now turn to whether that reason was in any way tainted with age discrimination.

Was that decision tainted by discrimination on the protected characteristic of age?

- 75 It would have come as a surprise to the claimant when told on 18 September the reason his assignment was not extended. This would have been particularly difficult given the timing and the fact the claimant had just worked through the very busy weeks of student enrolment. The claimant expectations were poorly managed. Provided the decision is not tainted with discrimination, it will not matter if the decision was fair, reasonable or correct (Bahl).
- 76 The Tribunal heard and accepted the respondent's evidence that there was the budget and staffing need to extend the assignments of all the student recruitment and support advisers. We also note that one of the three student recruitment and support advisers whose assignment was extended was older than the claimant.
- 77 The Tribunal note that the claimant made no reference to age discrimination following his conversation with Mr Daniels and refers to personality discrimination. He also does not reference age discrimination in his grievance following his assignment being terminated. In fairness to the claimant, these events took place over a three day period and his evidence was that he was upset, he felt 'punched in the gut' which we accept and he may not have had time to look behind the grounds for the decision not to extend his assignment at that stage. Following a conversation with ACAS, he learned he required a protected characteristic to start early conciliation and concluded this treatment was based on age discrimination. He told Ms Palmer it had occurred to him, we assume prior to this, that Mr Manu was younger than him. In his grievance appeal and claim, he references age discrimination.
- 78 The claimant was unable to provide any evidence whereby the Tribunal could conclude, in the absence of an explanation, that age discrimination had occurred. Notwithstanding that and because of the difficulties associated with the two step test when relying on hypothetical comparators (Shamoon), we turned to the respondent's explanation for its decision not to extend the assignment i.e. the reason why is acted as it did.
- 79 Mr Daniels and Miss Hardy denied age discrimination and the evidence does not support that either Mr Daniels' recommendation not to extend the claimant's

assignment and Miss Hardy's acceptance of that recommendation were tainted with age discrimination.

- 80 The Tribunal accepts the respondent's evidence that the decision not to extend the claimant's assignment was because it was concerned about his behaviour and attitude and this decision was not tainted with discrimination.
- 81 The unanimous decision of the Tribunal is that the claimant's complaint of direct discrimination for the protected characteristic of age is not well founded and is dismissed.

Approved by:

Employment Judge E Davey

16 April 2025

JUDGMENT SENT TO THE PARTIES ON

22/4/2025

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision. If written reasons are provided they will be placed online.

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at <https://www.gov.uk/employment-tribunal-decisions> shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. 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:

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