Case Number: 1306316/2023

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Hughes**

Respondent: **Alten Ltd**

Heard at: **Birmingham** **On:** **31 March and 1 April 2025**

Before: **Employment Judge Edmonds**
Mr D Faulconbridge
Miss S Fritz

Representation
Claimant: In person
Respondent: Mr R Katz, litigation consultant

JUDGMENT having been sent to the parties on 14 April 2025 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

1. This is the unanimous decision of the Tribunal

Introduction

2. The claimant was an applicant for employment at the respondent, an engineering outsourcing company. ACAS conciliation started on 3 October 2023 and ended on 4 October 2023, with the claim form being submitted to the Tribunal on 4 October 2023.

3. This claim relates to whether or not the claimant was offered employment by the respondent which was subsequently withdrawn. The claimant says that this was an act of both age and disability discrimination (relying on an alleged disability of gum disease leading to loss of teeth). The claimant also says that there was a failure to make reasonable adjustments during the interview process.

4. The respondent's position is that no job offer was made to the claimant, and that the decision not to make a job offer to him was unrelated to his age or any disability. The respondent also denies that the claimant was disabled at the relevant time and denies any failure to make reasonable adjustments.

Claims and Issues

5. The claims and issues, as recorded in the Record of Preliminary Hearing dated 4 July 2024 (and updated to include the comparators that the claimant referred to following that preliminary hearing), are set out below.

6. In relation to the question of disability, before evidence commenced the Tribunal drew the claimant's attention in particular to the issues relating to disability and the legal test for disability, making clear to him that the test as to whether he was disabled would consider in particular the impact on him as an individual. This was because the claimant had submitted in evidence certain articles which referred to tooth loss as a disability and relied on them to assert that he was therefore disabled.

7. In addition, the Tribunal made it clear to the respondent's representative that it would be considering the impact of the impairment (if found) on the claimant without his denture: the Tribunal noted this because in correspondence the respondent had suggested that the claimant was not disabled because the denture minimised the impact of the impairment, when in reality this appeared to be a measure used to treat or correct the impairment which would therefore not prevent it amounting to a disability.

8. The issues were as follows:

1. Time limits

It is agreed that there is no issue in relation to time limits in relation any of the complaints.

2. Wrongful dismissal / Notice pay

2.1 Did the parties enter into a contract of employment?

2.2 If so, what was the Claimant's notice period? The Claimant says it was three months.

2.3 Was the contract terminated by the Respondent?

2.4 If so, was the Respondent in breach of contract by failing to give notice to the Claimant?

2.5 If so, what compensation should he be awarded as a result?

3. Disability

3.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the Claim is about, that is in October 2023? The Tribunal will decide:

3.1.1 Did he have a physical impairment, namely gum disease leading to loss of teeth?

3.1.2 If so, did it have a substantial adverse effect on his ability to carry out normal day-to-day activities? The Claimant relies on his speech being impaired and/or an accumulation of saliva which sprays on to others when he is speaking, creating embarrassment and a reluctance to speak.

3.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

3.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

3.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

3.1.5.1 Did they last at least 12 months, or were they likely to last at least 12 months?

3.1.5.2 If not, were they likely to recur?

4. Direct age or disability discrimination (Equality Act 2010 section 13)

4.1 The Claimant was age 69 at the time of the relevant events. His alleged disability is as set out above.

4.2 Did the Respondent do the following things:

4.2.1 By Rafael Kirsten, in October 2023, withdraw a job offer previously made verbally to the Claimant by Mr Jocelyn De Sousa.

4.3 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The claimant relies on both the hypothetical comparator and the specific individuals below:

- *Rafael Kirsten*
- *Alexander Rayner*
- *Eric Guichard*
- *Savan Patel*
- *Anas Shoabib*
- *Marcelo Tomazela*

4.4 If so, was it because of age and/or disability?

4.5 In relation to the complaint of age discrimination, the Respondent does not argue that the treatment was a proportionate means of achieving a legitimate aim.

5. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

5.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the alleged disability? From what date?

5.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

5.2.1 Requiring attendance at an interview/meeting (or a further interview/meeting) as part of the process of recruitment.

5.3 Did the PCP put the Claimant at a substantial disadvantage compared to persons who are not disabled, in that he was unable to communicate clearly at the last interview/meeting and was also embarrassed by his appearance (a wide gap in his front teeth)?

5.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

5.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

5.5.1 Delaying the interview/meeting.

5.5.2 Repeating the interview/meeting.

5.6 Was it reasonable for the Respondent to have to take those steps?

5.7 Did the Respondent fail to take those steps?

6. Remedy for discrimination

6.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

6.2 What financial losses has the discrimination caused the Claimant?

6.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

6.4 If not, for what period of loss should the Claimant be compensated?

6.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that? The Claimant says there is no claim for personal injury.

6.6 Is there a chance that the Respondent would not have offered the Claimant employment in any event? If so, should his compensation be reduced as a result?

6.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.8 Did the Respondent or the Claimant unreasonably fail to comply with it?

6.9 If so, is it just and equitable to increase or decrease any award payable to the Claimant?

6.10 By what proportion, up to 25%?

6.11 Should interest be awarded? How much?

Procedure, Documents and Evidence Heard

9. This hearing was originally scheduled to take place over three days (including 2 April 2025), however in the end the evidence was completed by the end of the first day, and therefore it was possible to have submissions, deliberation and oral judgment and reasons provided on the second day of the hearing. This was fortunate as the respondent's witnesses transpired only to be available on the first day of the hearing, despite the clear timetable set out at the preliminary hearing on 4 July 2024 from Employment Judge Faulkner indicating that they would give evidence on the second day of the hearing. The Tribunal indicated its dissatisfaction at this state of affairs: we did not indicate what our position would be in the event that all of the evidence could be heard on the first day, as in the end this did not arise.

10. The Tribunal heard evidence from the claimant on his own behalf, and from Mr Rafael Kirsten and Mr Felix Bailey on behalf of the respondent. Mr Bailey's involvement with the claimant was in 2024, which postdated the issues in the List of Issues and therefore at the outset of the hearing we clarified the relevance of his evidence. It was confirmed that the issues with which Mr Bailey was involved were part of the background evidence which the claimant relied on to support his allegations about what happened in 2023, rather than him seeking to bring a claim about those matters specifically. This had been confirmed at the preliminary hearing on 4 July 2024. Each of the witnesses had prepared a written witness statement, and the claimant had also prepared a separate impact statement on disability (page 49) along with photographs showing the gap in his teeth.

11. The respondent's representative requested permission for the respondent's witnesses to provide supplementary evidence to address some of the points raised by the claimant in his evidence. In relation to Mr Kirsten, the claimant objected to this on the basis that he felt he should ask his questions first which he said would cover the topics in question and then the respondent could address any further matters in re-examination. I decided that any further questions could be addressed in re-examination. In relation to Mr Bailey, no objection was raised by the claimant and Mr Bailey gave additional evidence prior to cross examination to explain that the role that

he was recruiting for was a different role with a different customer to the one which forms the subject matter of this Tribunal claim. He also clarified one point from his witness statement (which had suggested that Mr Bailey did not respond to an email from the claimant on 2 May 2024, when in fact his oral evidence was that he had).

12. We were provided with a file of 106 pages, and page references in these Reasons are to the relevant page of that file. We were also provided with an email dated 30 March 2025 from the claimant, attaching two pages of documentation from articles about the condition of tooth loss. Later on the first day, as he was about to commence his evidence, the claimant informed the Tribunal that he had just sent a further email to the Tribunal, attaching a picture which he wished to use as evidence. Before the Tribunal reviewed that email, arrangements were made for it to be sent to the respondent's representative, who confirmed they did not object to it being added to the evidence and on that basis we agreed to allow this into evidence.

13. In addition, during the hearing the claimant showed the Tribunal his denture which he placed on the desk. He indicated that he preferred to give evidence without it as he found it uncomfortable (which of course the Tribunal had no objection to). After evidence had been concluded, both parties gave detailed oral submissions to the Tribunal. During the claimant's submissions, the claimant at one stage entered into a form of role play using the respondent's representative as a hypothetical CEO of a company. Whilst the Tribunal allowed this to continue for a brief period, ultimately we requested that the claimant refrain from role play and instead explain his position (which related to him having to either refrain from eating or remove his denture if food was served at a meeting).

14. It is also relevant to note that the Tribunal disclosed at the start of the hearing that Miss Fritz had previously sat as a panel member on a case involving the claimant but with a different respondent, relating to a different job application that he had made through that respondent. The parties were asked to put forward any questions or concerns about this, and both parties informed the Tribunal that they had no objection to Miss Fritz continuing to sit on this case. The Tribunal indicated that Miss Fritz would continue to sit on the basis that the fair-minded and informed observer would not consider there to be a real possibility of bias. We considered that although both claims involved job applications, they were different applications to a different respondent and there was not overlap on a material issue of fact or law. We noted in particular that the other claim was not a disability discrimination claim and therefore there had been no determination of whether the claimant was disabled. In any case, the claimant had confirmed he did not object to Miss Fritz continuing to sit on the case.

15. The claimant had also previously applied for strike out of the respondent's response, on the basis that the claimant felt that it was inappropriate for the respondent to dispute whether the claimant was disabled and that he felt that the respondent should have appointed an expert dentist to provide a medical report on the claimant. The respondent's position was that it was not required to do so. We decided not to strike out the respondent's response: we found that it was for the claimant to decide what medical evidence to obtain in relation to the question of disability and that the

respondent was entitled to dispute whether he was disabled. This was also something that we reiterated later in the hearing when the claimant objected to the respondent cross examining him about the topic of disability. We did not find that the manner in which proceedings had been conducted by the respondent was scandalous, unreasonable or vexatious, nor did we find that the response had no reasonable prospect of success under Rule 38 of the Employment Tribunal Procedure Rules 2024. We also found that the respondent was actively pursuing its defence of the claim (although we did criticise the respondent in relation to the witnesses not being available on the second day of the hearing).

16. The claimant had also indicating that he was seeking costs from the respondent before the hearing. We informed the claimant that this would be something that the claimant could request once the case had been decided, as we needed to first consider the position in relation to disability. We asked him to raise this at the end of the hearing if it was something that he wanted to pursue. In the end, as we decided that the claimant was not disabled, this was no longer relevant to consider and the claimant did not request that we do so at that stage.

17. The claimant had also prepared a Schedule of Loss amounting to over £200,000 (although in his closing submissions he suggested that compensation should be in the region of £1million). We decided that remedy would be considered separately in the event that the claimant's claim was successful.

Facts

18. The claimant is 70 years old and was 69 at the time the incidents in this claim occurred. The claimant is an experienced Lead Auditor who has previously worked at Rolls Royce, about which he is very proud. He has also previously lived abroad.

Tooth loss / Denture

19. The claimant has tooth loss and has a partial denture. We saw no medical evidence specific to the claimant, although we were provided with generalised articles by email dated 30 March 2025 from the claimant about tooth loss from medical journals. In these journals the word "disability" appeared in connection with tooth loss, and in particular in relation to whether tooth loss was associated with onset of disability.

20. The claimant finds the partial denture painful and does not always wear it. At the time when the relevant events occurred, the claimant was not able to wear a denture because another tooth had come out and it was being repaired or replaced. During the Tribunal hearing we found that the claimant articulated himself clearly despite not wearing his denture throughout the hearing.

21. In fact, the claimant's position appears to be that it is the denture which causes him specific difficulties, notably in accumulation of saliva, not being able to eat with it in and facial pain. His claim however is that the disability itself causes an accumulation of saliva which sprays onto others and/or

impaired speech. He says that it makes his vowels and consonants unclear. We saw no accumulation of saliva nor did we see any medical evidence suggesting how the claimant experiences this. We bear in mind however that the relevant date at which disability is to be assessed was in 2023.

22. On balance of probabilities we do not find that the claimant had impaired speech due to his denture and/or when not wearing the denture at the relevant time (or at any other time). In his witness statement the claimant says that his denture affects his food intake, and in his oral evidence he said that he can no longer enjoy the normal process of eating food. We heard in submissions (but not in evidence) about how he says it would be embarrassing to eat in front of people because he would need to take his denture out, which the claimant sought to demonstrate by way of role play in his submissions.

23. We accept that the claimant's tooth loss and/or use of a denture on balance of probabilities would have had some effect on his manner of eating in September and October 2023. We do not consider that it prevented him from eating, but we do accept that chewing was on balance of probability more difficult and/or caused some embarrassment.

Background

24. The respondent is an engineering outsourcing company, with offices in several UK locations and employing over 1000 people across the UK. It has a global business.

25. We heard about two different role types which are relevant for the purposes of this claim:

    a. Engineers and technical experts. These roles are recruited to match a particular client's needs. As well as a series of meetings with the respondent to assess suitability, a technical document is required to be prepared, and ultimately the respondent sends details of any suitable candidates to the client who makes the decision. Once an individual is appointed to the role, they are seconded to that client. Their employment is with the respondent and is on a permanent basis, so when that client secondment comes to an end it is for the respondent to try to find the individual alternative work. We however accept the respondent's evidence that they require a specific client project in order to recruit an individual in the first place. The claimant has suggested that, in the absence of a specific UK project, he could have been assigned abroad. Even if he could work abroad, the respondent's position is that specific projects are required in order for a job offer to be made and we accept that was the position.

    b. Business managers or other recruitment personnel, which includes both of the respondent's witnesses in this claim. Those roles are recruited without reference to any particular client and are again permanent roles. For these roles the recruitment process generally takes around 4 weeks.

Initial application through Mr D'Souza

26. Towards the end of July 2023, Mr D'Souza of the respondent conducted an interview with the claimant with a view to potentially placing him with a particular client. Mr D'Souza has since left the respondent and the respondent says that it cannot get hold of him so we did not hear from him. We accept that the respondent was not able to contact him and that this was why he did not give evidence.

27. We do not know exactly why Mr D'Souza got in touch with the claimant, but it appears that Mr D'Souza reached out over LinkedIn or other social media, and we find on balance of probabilities that this is a recruitment method used by the respondent.

28. A second interview was arranged for 9 August 2023, which was conducted by someone called "Alex R" according to the documentary records we saw (page 91). Communications then moved back to Mr D'Souza and another colleague called "Anushka" however the main communications about the potential role were with Mr D'Souza. It is clear that the claimant was of sufficient calibre to progress through the interviewing stages including the interview with Mr D'Souza and we saw in a later communication that Mr D'Souza was complimentary about the claimant, so we take it from that that the claimant was a viable candidate after those interviews.

29. The claimant says that he was told that he would have a third and final interview with Mr Kirsten, who would present him with a formal job offer as long as he passed that final stage. On 5 September 2023 the claimant emailed Mr D'Souza saying "*If the medical devices client reacts positively you want me to meet with the client. And if the feedback is successful you would agree to a Stage Three interview for a final job offer*" (page 91).

30. The respondent's position is that in fact the role that the claimant was being considered for did not materialise in the end and that actually what happened was that that process came to an end but an alternative business manager Mr Kirsten, may have had another opportunity that the claimant was to be put forward for. We accept the respondent's position on this, which is supported by the documentary timeline produced by the respondent once it became aware that the claimant was unhappy at a later stage (page 90). Whilst that document was prepared at a stage where dispute had arisen, it quotes directly from internal communications and the claimant did not dispute the accuracy of various points when put to him in evidence.

31. What happened was that on 15 September 2023, after Mr D'Souza wrote to the claimant to tell him that there was no progress, the claimant replied saying "*Can I read between the lines that you will permit we move to Stage 3 and formulation of job offer*…" (page 92) Mr D'Souza replied (page 88) saying "*What I would like to do is get you into the business. But I want to discuss the process and what it could look like…I don't have all the answers. So part of the discussions will be to help you understand that process*". The claimant submits that this represented a job offer. We find that it did not: what it did was indicate that Mr D'Souza's aspiration was to find an opportunity for the claimant – this aligns to the fact that the specific

role that Mr D'Souza had been recruiting for did not appear to be materialising.

32. The claimant says that he had a verbal agreement with Mr D'Souza that he would be recruited into a role on £55k per annum. However, in the communications we saw (dated 15 September 2023, page 92) the claimant was asking if they would move to stage 3 and formulation of job offer. In addition, he was asking about where the role was to be located. Therefore, there cannot have been a job offer by that point, even if there was a discussion about salary expectations.

33. On 18 September 2023 the claimant emailed Mr D'Souza (page 92), saying "*I accept entirely and the need to find the suitable project given my seniority status*". We find from this that the claimant is aware at this stage that no suitable project has materialised and that he is accepting of the position that a suitable project would need to be found before things moved forward.

34. The claimant says that during his interviews with Mr D'Souza he did not wear his denture because of the tooth loss issue and therefore Mr D'Souza was aware of his tooth loss and the gap in his front teeth. We did not hear from Mr D'Souza but on balance of probabilities we accept that the claimant was not wearing a denture. We do not go as far as to say that Mr D'Souza would have therefore seen the gap in his teeth: whilst the claimant did not wear his denture during this hearing, it was not obvious to the panel that he had a gap in his teeth.

35. In addition, he says in his impact statement (para 8) that he mentioned his disability to Mr D'Souza. Whilst we do not find that the claimant specifically referred to himself as disabled in the interview, we find on balance of probabilities that he referenced the fact that he was not wearing his denture because he was self conscious about it.

36. No adjustments were made during the interview process. The claimant has said in oral evidence that the adjustment that should have been made was to allow him to repeat himself until he was understood fully. We note that in the List of Issues the stated adjustments he says should have been made are delaying the interview or repeating the interview. We find that the claimant did not request any adjustments during the interview process, and Mr D'Souza would not have been aware that there were any potential adjustments to be made. The claimant said in evidence that he did not in fact repeat himself during the interview. In any case, the claimant performed sufficiently well at the interview that Mr D'Souza remained interested in hiring him should a suitable role become available; we find therefore that the claimant did not struggle to articulate himself clearly and make himself understood at the interviews.

Subsequent role through Mr Kirsten

37. Mr D'Souza became aware that Mr Kirsten had a potential opportunity that could be suitable for the claimant. Mr Kirsten sent an introductory email to the claimant on 19 September 2023 (page 58), saying that he got his contact details from the recruitment team and there is a challenging project he would like to discuss with him. This supports our finding that Mr Kirsten

had a different project to the one that Mr D'Souza had been exploring. They arranged to speak on 20 September 2023. This challenging project was in the defence sector.

38. Mr Kirsten was a business manager at the respondent between October 2021 and January 2025. He was 36 when he started in the role. He is Brazilian and previously lived in Brazil but this role was UK based. The claimant was under the impression that Mr Kirsten had worked at Rolls Royce however we accept his evidence that he had not. Mr Kirsten did not work in an engineering role. The claimant clearly admires Mr Kirsten, so much so that he said in his submissions he adores him. It is clear to the Tribunal that the claimant holds no animosity towards Mr Kirsten and his blame for what happened lies elsewhere.

39. Mr Kirsten and the claimant had a call on 20 September. The claimant says his camera was on and that it is always on, and he has a back up in case it fails. Mr Kirsten's evidence was that the claimant's camera was off, that he asked the claimant to turn it on but the claimant said he had technical issues. Mr Kirsten said in oral evidence that he had never seen the claimant until the day of this hearing. On balance of probabilities, we accept Mr Kirsten's evidence: we found him to have been genuinely surprised by the allegation being put and honest in his statement that he had not seen the claimant before the day of the hearing. We also accept Mr Kirsten's evidence that the claimant did not refer to any impairment during their call, either generally or as a disability. We also accept Mr Kirsten's evidence that the claimant sounded clear and fluent during their discussion.

40. Mr Kirsten was happy with how the meeting had gone and after the meeting there were a series of emails between the claimant and Mr Kirsten with a view to the claimant preparing a technical document. Mr Kirsten refined that document for the claimant before it was sent to the potential client. We find that by spending the time refining the document, this indicates that Mr Kirsten genuinely wanted the claimant to be successful in securing a position, by increasing the likelihood that the client would want to move forward with the claimant.

41. On 20 September 2023 the claimant had also emailed Mr D'Souza (page 63), expressing how delighted he was with Mr Kirsten. In this email he said "*he would like to bring me in a full time permanent*". We find again that no role has actually been offered at this stage.

42. Mr D'Souza forwarded that email to Mr Kirsten saying "*the guy is great, and has his own unique style. Think you'll like him*" (page 63). This reflects the high regard that Mr D'Souza had for the claimant.

43. On 24 September 2023 the claimant sent an email to Mr Kirsten about the role and said in it "*The agreement I had in place with Jocelyn de Souza was full time permanent employee at £60.000 Senior Consultant"* and a reference to a start date of 1 October 2023 (one week away) (page 66). We note the reference to £60,000 which is at direct odds with the claimant's position that in fact a salary of £55,000 had been agreed.

44. From the wording used by the claimant, we find that the claimant had misunderstood the position in some way and thought that there was an agreement in place. On balance of probabilities what we think did occur was that the claimant and Mr D'Souza had had a conversation around salary expectations if the role proceeded.

45. Mr Kirsten did not reply directly to that email and does not remember why. Whilst unfortunate that he did not respond to clarify the position, we do not find that by him not responding this in any way endorsed what had been said or created any kind of agreement.

46. On 25 September 2023, when emailing the claimant about having refined the technical document, Mr Kirsten told the claimant (page 68) that he had sent the information to the client, and "*as soon as I get a feedback I will let you know the next steps*". It is therefore clear that feedback is required from the client before anything can move forward.

47. The claimant emailed Mr Kirsten on 29 September 2023 saying that he was under the impression a job offer would be confirmed as he must tender his resignation at Biosynex (page 75). The fact that he refers to being under the impression a job offer would be confirmed indicates that none had been. This also indicates that the claimant is still employed elsewhere and has not as yet handed his notice in in that role.

48. The claimant emailed Mr Kirsten again on 1 October, saying that according to Mr D'Souza he was to expect a job offer, and asks where he stands as he has to resign. In the email he said "*Your last words to me were that 1 I would prepare the technical documents 2 We would then have a Teams to finalise and confirm the job offer"*. This again shows no job offer had as yet been made.

49. On 2 October 2023 the claimant emailed Mr Kirsten again, this time in Portuguese (page 78). In the email he said he was waiting for the promised job offer.

50. Mr Kirsten emailed him on 3 October 2023 clarifying the recruitment process (page 77). In this email, he explained that the client had replied to say that it was trying to reorganise its permanent team and that this was a short term project so Mr Kirsten could not recruit him. He said that if he identified other opportunities that fit he will be in touch. He clarified in red "*At no time it was promised a job offer to you, and if you had that impression I am very sorry for the miscommunication*". We accept that the email accurately conveyed what had happened with the client.

51. On 3 October 2023 the claimant emailed Mr D'Souza, Ms Pane and Mr Kirsten (page 79), alleging that a job offer was made and referring to a potential Tribunal claim. Mr D'Souza replied to the claimant saying that he did not understand. The claimant replied saying ACAS early conciliation had started. Whilst the claimant alleged that a job offer had been made, he did not make any allegations that any treatment related to his age or a disability / impairment.

52. We saw a series of internal emails within the respondent where they

attempted to unpick what had happened, and it is in this context that the timeline we have referred to was prepared. When elements of the timeline were put to the claimant in cross examination, he accepted that the contents were accurate. What is clear from this is that the respondent's employees on the email chain were genuinely surprised at the claimant's allegations.

53. During evidence, the claimant was asked specifically about who he thought had discriminated against him because his position seemed to be that he continued to respect and admire Mr Kirsten. The claimant confirmed that was the case, and says that his position is that "corporate" had blocked him from getting the role. He says that "corporate" have a policy that no one over around 30-35 (although he extended this to 36 in light of Mr Kirsten's evidence about his own age at the point of recruitment) be employed by the respondent, and relies on LinkedIn images he has seen which he says show that the employees are all young. He says that "corporate" did not want to employ him with his disability.

54. The claimant has also named a number of comparators. (page 57), alongside Mr Kirsten himself who he also says is a comparator. The claimant described them as engineers, however Mr Kirsten clarified that this was not the case and the named comparators were either Business Unit Managers, Divisional Director, Senior Manager or Office/ Facilities Manager. Importantly, they all worked directly for the respondent in non engineering roles and were not seconded to clients. We accept Mr Kirsten's evidence on this point: whilst the claimant suggested that they were employed in similar roles to his own, he did not provide any evidence to support that and we consider Mr Kirsten to be better placed to comment on what the individuals did (noting in particular that the claimant was mistaken about Mr Kirsten's own role and employment history).

Subsequent role recruited by Mr Bailey

55. In April 2024, the claimant and respondent were in contact again about another potential opportunity. There was a dispute about whether the respondent reached out to the claimant, or vice versa. It is clear that at some stage the claimant had correspondence directly with the respondent's representative about it. We do not consider anything turns on who made the contact on this occasion.

56. The claimant says it is for the same role that he says he was offered. We find that it was for a different client and the recruitment process was being undertaken by Mr Bailey, another business manager. Mr Bailey was not aware of the claimant's history and ongoing Tribunal proceedings. The claimant was invited to a Teams meeting with Mr Bailey to discuss the opportunity on 2 May. Initially the claimant said that he would not attend it (page 100), on the basis of his previous experience with Alten. He said that Alten "window shops and never makes job offer". This supports our finding that no job offer was made. Mr Bailey responded to say that he was still keen to speak if the claimant was. The claimant did ultimately dial into the call, albeit slightly late. The claimant's camera was on, but no mention was made of any impairment.

57. Mr Bailey says that during the meeting the claimant was argumentative with a poor attitude. Given the claimant's ongoing Tribunal proceedings and view of what had happened previously, we find on balance of probabilities that the claimant did express some frustration during the call. We have seen nothing to suggest that the claimant referenced discrimination, only what he saw as the lack of job offer.

58. Despite his impression of the claimant, Mr Bailey still put forward the claimant's profile to the potential client. The potential client was also looking at another individual, and ultimately decided to go with that other individual. Therefore this again did not materialise into a job offer for the claimant.

Law

Disability

59. Section 6 of the Equality Act 2010 ("the Equality Act") provides that:

> *(1) A person (P) has a disability if –*
> *a) P has a physical or mental impairment, and*
> *b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

60. This comprises four separate questions for the Tribunal (**Goodwin v Patent Office 1999 ICR 302, EAT**):

1. Did the claimant have a mental and/or physical impairment?
2. Did the impairment affect the claimant's ability to carry out normal day-to-day activities?
3. Was the adverse effect substantial?
4. Was the adverse condition long term?

It is for the claimant to satisfy the Tribunal, on the balance of probabilities, that they were disabled at the relevant time (i.e. when the alleged discrimination took place). It will not be an error of law if the Tribunal does not follow these in rigid consecutive stages, so long as all relevant matters are addressed (**J v DLA Piper UK LLP 2010 ICR 1052, EAT** and **Sullivan v Bury Street Capital Ltd 2022 IRLR 159, CA**)

61. Appendix 1 to the Equality and Human Rights Commission Equality Act 2010 Statutory Code of Practice" ("the EHRC Code") makes clear that there is no need for a claimant to show a medically diagnosed cause for the impairment: what is important is the effect of the impairment not the cause. The effects of medical treatment or other corrective aids should be disregarded (Schedule 1 to the Equality Act, at paragraph 5).

62. "Substantial" means "more than minor or trivial" (section 212(1) Equality Act). The Tribunal should compare the claimant's ability to carry out normal day-to-day activities with the ability the claimant would have if not impaired. The focus should be on what the person cannot do, or can only do with difficulty, rather than on what they can do (paragraph B9 of the Guidance on matters to be taken into account in determining questions relating to the definition of disability").

63. “Normal day-to-day activities” are “activities which are carried out by most men or women on a fairly regular and frequent basis. The term is not intended to include activities which are normal only for a particular person or group of people...” (Appendix 1, EHRC Code).

64. Under paragraph 2(1) of Schedule 1 to the EA, the effect of an impairment is long-term is it has lasted for at least 12 months, is likely to last for at least 12 months, or is likely to last for the rest of their life. Likely means “could well happen” (**Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056, HL**. The question is not whether the impairment is likely to last 12 months, but whether the substantial adverse effect is likely to last for at least 12 months. An impairment will be treated as continuing to have a substantial adverse effect if it is likely to recur.

Direct discrimination (age and disability)

65. Section 13 of the Equality Act provides that:

> *(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.*

66. Section 23 of the Equality Act goes on to provide that:

> *(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.*

67. In the House of Lords decision of **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285, ICR 337**, it was held by Lord Scott that “*the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim save that he, or she, is not a member of the protected class”*.

68. The test as to whether there has been less favourable treatment is an objective one: the claimant’s belief that there has been less favourable treatment is insufficient. Likewise, the treatment must be less favourable, not merely different. Unreasonable treatment is not sufficient, although it may be evidence which supports an inference if there is no adequate explanation for the behaviour (**Anya v University of Oxford and anor 2001 ICR 847, CA**).

69. Where there is less favourable treatment, the key question to be answered is why the claimant received less favourable treatment: was it on grounds of the protected characteristic or for some other reason (**London Borough of Islington v Ladele [2009] ICR 387**). As Mr Justice Linden said in **Gould v St John’s Downshire Hill 2021 ICR 1, EAT**

"The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective…For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision…[and] the influence of the protected characteristic may be conscious or subconscious."

70. In **Nagarajan v London Regional Transport 1999 ICR 877, HL**, Lord Nichols said that

"discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds…had a significant influence on the outcome, discrimination is made out"

71. Often there will be no clear direct evidence of discrimination on the grounds of a protected characteristic and the Tribunal will have to explore the mental processes of the alleged discriminator and draw inferences. The claimant will need to prove facts from which a Tribunal could properly conclude that the respondent had committed an unlawful act of discrimination, and this can include the drawing of inferences (see burden of proof section below). However, simply establishing a difference in status is insufficient: there must be "*something more*" (**Madarassy v Nomura International plc [2007 EWCA Civ 33** and **Igen Ltd v Wong [2005 ICR 931]**). Likewise, unreasonable conduct alone is insufficient to infer discrimination.

Burden of Proof

72. Section 136 of the Equality Act (burden of proof) states that:

(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 provision.

73. Put simply, the claimant must show facts from which the Tribunal could infer that discrimination took place, in the absence of other explanation. If the claimant cannot do that, the claim fails. If the claimant does show such facts, then the burden shifts to the respondent to show that discrimination did not take place (**Igen v Wong, above**, **Royal Mail Group v Efobi [2021] UKSC 33**). In deciding whether the burden has shifted, the Tribunal should consider all of the factual evidence provided by both parties (although not the explanation for those facts).

74. In **Madarrassy v Nomura International [2007] ICR 867 CA**, Mummery LJ stated that "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."

75. Something more than a finding of less favourable treatment is required in order to shift the burden of proof to the respondent, however the "something" need not be considerable (**Deman v Commission for Equality and Human Rights and others [2010] EWCA Civ 1276***)*. Unreasonable behaviour alone is not evidence of discrimination (**Bahl v The Law Society [2004] IRLR 799**) but can be relevant to considering what inferences can be drawn (**Anya v University of Oxford & anor [2001] ICR 847***)*

76. Where the burden has shifted to the respondent, it is then for the respondent to prove on the balance of probabilities that the less favourable treatment was not because of race.

77. Although the burden of proof is a two stage test, there are cases where an Employment Tribunal can legitimately proceed directly to the second stage of the test (see, for example, **Laing v Manchester City Council and anor 2006 ICR 1519, EAT**).

Reasonable adjustments

78. Section 20(3) of the Equality Act 2010 provides that:

> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

79. Section 21 of the Equality Act 2010 provides that:

> *(1) A failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments.*
>
> *(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*

80. The burden is on the claimant to show the application of a provision, criterion or practice, and the substantial disadvantage suffered by him because of it. Substantial means "more than minor or trivial". If that is done the burden shifts to the respondent to show that the adjustment in question was not reasonable. A one-off act can amount to a PCP where there is an indication that it would be repeated if a similar situation arose in future (**Ishola v Transport for London [2020] EWCA Civ 112, CA***)*.

81. The duty to make reasonable adjustments does potentially require an employer to treat a disabled person more favourably than others (**Archibald v Fife Council [2004] ICR 954**

82. Paragraph 6.28 of the EHRC Code sets out some of the factors that might be taken into account when deciding what is a reasonable step: it is wise for the Tribunal to consider the factors although there is no duty to consider each and every one (**Secretary of State for Work & Pensions (Job Centre Plus) v Higgins [2014] ICR 341, EAT [58]**). What is reasonable is considered objectively having regard to all the circumstances. The steps are:

a) Whether taking any particular steps would be effective in preventing the substantial disadvantage;

b) The practicability of the step;

c) The financial and other costs of making the adjustment and the extent of any disruption caused;

d) The extent of the employer's financial or other resources;

e) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

f) The type and size of the employer.

83. The test of reasonableness is objective and will depend on the circumstances of the case.

84. The duty to make reasonable adjustments will only arise if the disabled person is put at a substantial disadvantage. The purpose of the identification of a provision, criterion or practice is to identify the matter that causes the disadvantage (**General Dynamics Information Technology Ltd v Carranza 2015 ICR 169, EAT**) and this disadvantage must not equally arise in the case of someone without the claimant's disability (**Newcastle upon Tyne Hospitals NHS Trust v Bagley UKEAT/0417/11**). It is for the claimant to show substantial disadvantage (**Bethnal Green & Shoreditch Educational Trust v Dippenaar UKEAT/0064/15**, and **Hilaire v Luton BC [2023] IRLR 122**). However, it is not necessary for the claimant to show that the disadvantage arises because of his disability, provided they have shown substantial disadvantage in comparison with persons without the disability (**Sheikholeslami v University of Edinburgh UKEATS/0014/17**).

85. In **Project Management Institute v Latif 2007 IRLR 579, EAT**, Mr Justice Elias (who was then president of the EAT) said:

In our opinion, the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement which causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be

necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not".

86. The test of reasonableness is an objective one (**Smith v Churchills Stairlifts plc 2006 ICR 524**). The Tribunal should look at the proposed adjustment from the point of view of both claimant and employer to make an objective determination of whether or not it would be a reasonable adjustment (**Birmingham City Council v Lawrence EAT 0182/16**). The Tribunal should also consider the business needs of the employer (**Griffiths v Secretary of State for Work & Pensions [2017] ICR 160, per Elias LJ**, and **O'Hanlon v Commissioners for Inland Revenue [2007] ICR 1359**).

87. A key question when assessing reasonableness is whether or not the proposed adjustment would be effective in preventing the substantial disadvantage. There does not have to be a good or real prospect of the disadvantage being removed, it is sufficient if there would have been a prospect of the disadvantage being alleviated (**Leeds Teaching Hospital NHS Trust v Foster EAT 0552/10**).

88. The duty to make reasonable adjustments will only arise if the respondent not only knows, or ought reasonably to have known, of the disability but also that the individual is likely to be placed at the substantial disadvantage. Schedule 8, Part 3, paragraph 20 of the Equality Act provides that:

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –

a) …..

b) that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

c) ….

Breach of contract

89. In order for a contract to be formed, there must be an agreement (known as offer and acceptance) made with the intention of creating legal relations, with consideration (a benefit for each party). A contract can be written or verbal, and the terms can be express or implied.

Conclusions

90. We address our conclusions by reference to the issues set out in the List of Issues, however in relation to some issues we group them and address them together.

Wrongful dismissal / notice pay

2.1 Did the parties enter into a contract of employment?

91. There was no contract of employment. Whilst there had been some discussions about the potential for a role with particular clients, those roles did not materialise for all the reasons we have set out. The claimant himself in his communications refers to an expectation that a job offer would be made to him, rather than that one already had been made. We conclude that there was no written or verbal, express or implied, contract of employment. Therefore the claim for notice pay must fail.

Disability

92. We refer to the section on Disability in the List of Issues above for the questions to be considered, although we do not repeat them here.

93. The relevant period for the purposes of establishing whether or not the claimant was disabled at the relevant time is September and October 2023.

94. The claimant has suffered from tooth loss. We have seen no medical evidence as to what caused that tooth loss, however we conclude that he does have an impairment relating to loss of teeth.

95. As to the effect of that impairment on his ability to carry out normal day to day activities, the claimant relies on his speech being impaired and/or an accumulation of saliva which sprays onto others when he is speaking, creating embarrassment and a reluctance to speak. “Substantial” in this context means more than minor or trivial.

96. We have not found that the claimant’s impairment has a significant impact on the amount of saliva he produces. We saw no medical evidence or other evidence to support his assertion that in October 2023 he had issues with accumulation of saliva spraying onto others when he is speaking. There were no visible signs of this during the Tribunal hearing, nor in fact did the Tribunal notice the impairment. Whilst we recognise that the relevant period was September and October 2023, we nevertheless consider this to be relevant as there was no suggestion from the claimant that his condition had improved since that date (save that he now had a different denture which in any case he chose not to wear during the hearing) and in fact the claimant referred to the current impact of his condition as though that were consistent with the impact in September and October 2023. Even if the claimant did have an accumulation of saliva, we also did not see any evidence which would lead us to conclude that the extent of this was such as to constitute a substantial impact on the claimant’s ability to carry out day to day activities.

97. The one point which we did find was that the claimant’s condition would impact on how he eats. As to whether that is a substantial adverse effect, whilst eating is of course vital, we do not consider the impact of the impairment to have been substantial in this case. We recognise that he suffers discomfort when using the denture, however we do not consider that this reaches the threshold of substantial, even taking into account that this means more than minor or trivial. His solution is to remove the denture when eating, which resolves the practical issue although he says that this then causes embarrassment. Again we do not consider that this meets the threshold of “substantial”.

98. We do not conclude that there were any other substantial impacts on his ability to carry out day to day activities. For the avoidance of doubt, whilst the claimant referred to pain and discomfort, this appeared to be pain and discomfort caused by the denture and not the impairment.

99. We have considered whether the claimant had medical treatment or took other measures to treat or correct the impairment, and whether the impact would have been substantial without that treatment or measures. The treatment / measure in question here is the denture: however the claimant's evidence was that the denture causes pain and discomfort and in fact that other than hiding the tooth loss visually, the denture did not assist him. He was also not using that denture at the relevant time in September and October 2023. Therefore we conclude that the impairment would still not have had a substantial adverse effect on his ability to carry out day to day activities even without the denture.

100. We accept that the impact of the impairment is long term. However, in light of our conclusion that there was no substantial adverse effect on his ability to carry out day to day activities at the relevant time, we conclude that the claimant was not disabled at the relevant time. The claimant's claim for disability discrimination therefore fails, although we do nevertheless also reach conclusions on the specific allegations below for completeness.

Direct age or disability discrimination

4.2 Did the Respondent do the following things:

4.2.1 By Rafael Kirsten, in October 2023, withdraw a job offer previously made verbally to the Claimant by Mr Jocelyn De Sousa.

101. We have not found that any such job offer was made. There was therefore no job offer to withdraw. What Mr Kirsten did was inform the claimant that the client was not progressing and that therefore the role he was interested in could also not progress.

4.3 Was that less favourable treatment?

102. We have nevertheless assessed whether there was less favourable treatment in relation to what we have found happened.

103. In relation to the comparators relied upon by the claimant, they must be in circumstances not materially different to the claimant save for the protected characteristics. Whilst they are all younger than the claimant, and as far as we know do not have tooth loss (although we heard no evidence on that), they all work in different roles. As we have found, there are separate recruitment processes for the different roles. Therefore they are not appropriate statutory comparators.

104. As to the hypothetical comparator, that person would be an engineer or technical specialist, who is younger than the claimant and/or who does not have tooth loss. That comparator would be applying for a role which would

involve a client placement. In those circumstances we consider that the comparator would only be offered a role if the client wanted to offer a role to the comparator. In circumstances not materially different to the claimant's, the client would not be proceeding and in those circumstances we find that the comparators would also not be taken forward to a job offer.

105. Therefore the claimant has not shown any less favourable treatment. In addition, the claimant has not shown facts from which, in the absence of other explanation, it could be concluded that discrimination has occurred. We draw no inferences from the fact that Mr D'Souza was not there to give evidence given the explanation given for his absence. We also draw no inference from the fact that the claimant says that LinkedIn pages of the respondent showed younger people. We did not see visual evidence, and we did not hear anything to explain what proportion of the employees are on LinkedIn anyway or what roles those people are in.

106. We do however draw inferences from the fact that:

    a. Mr D'Souza put the claimant forward to Mr Kirsten
    b. Mr D'Souza complimented the claimant to Mr Kirsten
    c. Mr Kirsten spent time assisting C with his technical document
    d. The claimant himself respects Mr Kirsten and does not accuse Mr Kirsten of discrimination
    e. The claimant's emails themselves (save for the one referencing an agreement) talk about a future potential job offer, not one already made.
    f. The claimant believes that some higher "corporate" authority orchestrated the removal of the job offer. If that were the case, and that was the respondent's policy as he says, it would make no sense for Mr Kirsten and/or Mr D'Souza to have progressed the claimant's application to the stage they did, when they would surely have known it could go no further.
    g. We also note that when raising complaint internally, he did not allege discrimination.

107. Therefore, even if there were in some way less favourable treatment, we would not find that the burden of proof had shifted to the respondent to show that discrimination had not taken place. If it had, they have shown that the reason the offer was not made was because of the client needs.

108. The direct discrimination complaint fails (both in relation to age and disability discrimination).

<u>Reasonable Adjustments</u>

5.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the alleged disability? From what date?

5.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

109. This complaint must fail as the claimant was not disabled at the relevant time. However, for completeness, we also conclude as follows in relation to knowledge of disability and the disadvantage at which the claimant was placed.

110. The claimant referenced his denture issue to Mr D'Souza. Mr D'Souza therefore had knowledge that the claimant had a denture and was waiting for a replacement one. We do not conclude that this meant that he knew that the claimant suffered any adverse effects from his denture or lack of teeth. Mr Kirsten had no knowledge of the tooth loss or any adverse effects caused by it.

111. The respondent did not know and could not reasonably have been expected to know that the claimant was likely to be placed at a disadvantage, given that the claimant did not reference any such disadvantage and there was no visible disadvantage other than him referencing his lack of denture to Mr D'Souza. We also conclude that there was in fact no disadvantage given that the claimant appears to have performed sufficiently well at the interviews that, if a role was available, he was considered to be suitable for it.

5.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

5.2.1 Requiring attendance at an interview/meeting (or a further interview/meeting) as part of the process of recruitment.

112. This PCP did exist.

5.3 Did the PCP put the Claimant at a substantial disadvantage compared to persons who are not disabled, in that he was unable to communicate clearly at the last interview/meeting and was also embarrassed by his appearance (a wide gap in his front teeth)?

113. The claimant was able to communicate clearly and in fact did so to a level where his application progressed and where Mr Kirsten had no knowledge of any issue at all. Whilst we accept that the claimant may have had some personal embarrassment at his appearance, this was not a substantial disadvantage, bearing in mind that this means more than minor or trivial.

5.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

5.5.1 Delaying the interview/meeting.

5.5.2 Repeating the interview/meeting.

5.6 Was it reasonable for the Respondent to have to take those steps?

5.7 Did the Respondent fail to take those steps?

114. In relation to delaying the meeting, we assume that the claimant means waiting for his denture to be repaired / replaced before interview: the

claimant did not request this, nor was it required given that he passed the interview in any case.

115. In relation to repeating the interview / meeting, given that the claimant passed the interview and the reason why he did not receive a job offer was for unrelated reasons, we do not see what benefit this would have had.

116. In those circumstances, it was not reasonable for the respondent to have to take those steps and for all of the reasons set out above, the complaint of failure to make reasonable adjustments fails.

Approved by
Employment Judge Edmonds
23 April 2025