

Neutral Citation Number: [2025] EAT 182

Case No: EA-2024-000829-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 October 2025

Before :

BRUCE CARR KC, DEPUTY JUDGE OF THE HIGH COURT

Between :

MS H THOMAS

Appellant

- and -

TINDALL RILEY & CO LTD

Respondent

MS E MARGETTS, appeared for the **Appellant**
MR O HOLLOWAY(instructed by Eversheds) for the **Respondent**

Hearing date: 30 October 2025

JUDGMENT

SUMMARY

Age discrimination

The Appellant brought an age discrimination complaint based on an offer of employment at a total package of £110,000. She refused that offer as she felt that it undervalued her contribution to the Respondent. In due course, the role was offered to her comparator but at a salary of £100,000. However, the Respondent had had to pay an additional £15,000 to a recruitment agency in order to secure the employment of the comparator. The Appellant suggested that this amounted to less favourable treatment of her as the Respondent had incurred a total cost of £115,000 in engaging the comparator but had only been willing to offer £110,000 to her.

Her claim was struck out by the Employment Tribunal (“ET”) on the basis that she had no in fact been subjected to less favourable treatment than her comparator who had been engaged on a lower package than had been offered to her.

Her appeal against the ET’s decision failed on the same basis – it was a necessary requirement of a claim under section 13 Equality Act, to show that she had been less favourably treated than her comparator. Her case was in fact that she should have been still more favourably treated than the comparator and should have been offered employment at a salary of £115,000, that being the overall cost that the Respondent had incurred in recruiting the comparator to the role which the Claimant had turned down.

BRUCE CARR KC, DEPUTY JUDGE OF THE HIGH COURT:

1. In this judgment, I will refer to the parties by reference to the titles they held in the Tribunal. The Claimant in this case has been represented by Ms Margetts, of Counsel, who has recently come on board through the Advocate Scheme, for which both this Tribunal and, no doubt, the Claimant are extremely grateful. The Respondent has also been represented by Counsel, in this case Mr Holloway.

2. The appeal is one from a decision of Employment Judge Nicolle, reached at an open Preliminary Hearing, held on 24 April 2024, in respect of which reasons were sent to the parties, on 7 June 2024. Under that decision, Employment Judge Nicolle (“EJ Nicolle”) struck out most of the claims of age and sex discrimination and victimisation which the Claimant had brought, with one claim of direct discrimination being allowed to proceed, relating to a comment which had been made to the Claimant by a work colleague.

3. The appeal was filed by the Claimant on 8 July 2024. It raised a number of grounds, by reference to particular paragraphs within the Employment Tribunal’s decision. The Notice of Appeal was considered by John Bowers QC, sitting as a Deputy High Court Judge, on 24 September 2024. His conclusion at the sift stage was that most of the points raised by the Claimant were not reasonably arguable. But he was troubled by the decision to strike out the claim that the Claimant had sought to advance by reference to the appointment of another individual, Natasha Sutherland, to a role within the Respondent.

4. He did so, on the basis that his understanding was that “the Claimant was asserting that Ms Sutherland had received a larger package than she had” in relation to the role which the Claimant had turned down, but to which Ms Sutherland was subsequently appointed.

5. It is accepted by Ms Margetts that the premise relied upon by Mr Bowers is not in fact correct. But nevertheless, as I indicated to her during the course of her submissions, that does not mean that the appeal falls automatically to be dismissed on that basis. If she were otherwise able to show that

there was an error of law in EJ Nicolle’s decision, then the appeal would be allowed through notwithstanding the misapprehension under which Mr Bowers allowed the claim to proceed to a Full Hearing. Nevertheless, the absence of any less favourable treatment, as between the Claimant and the comparator, does provide the relevant backdrop, both to the decision of EJ Nicolle and the determination of this appeal.

Procedural History

6. The Claimant had begun proceedings by a Claim Form presented to the Employment Tribunal on 18 September 2023. Attached was a timeline of events, which addressed the fact that the Claimant had been offered a position – a permanent position – with the Respondent at a salary of £100,000, with a sign-on bonus of £10,000, which she rejected, on the basis that she felt that this undervalued her contribution to the Respondent.

7. The narrative then referred to the fact that shortly after this, on 18 April 2023, it was announced that somebody else had been recruited into the role, which had been turned down by the Claimant and with the title, “Head of Talent Acquisition”. That individual, Ms Sutherland, was recruited externally, at a salary of £100,000. But the Respondent had had to incur a recruitment agency fee of £15,000, which the Claimant said produced a “like for like” figure of £115,000, which equated – or which would have equated – to the £100,000 salary and the £15,000 sign-on bonus, which she had previously put forward as a basis for her accepting the role which was eventually taken up by Ms Sutherland. She said that she had been refused the title that had been given to Ms Sutherland, albeit that that matter no longer forms part of this appeal, and that she was significantly more experienced than Ms Sutherland.

8. In their grounds of resistance, filed on 3 November 2023, the Respondent suggested that further particulars of the Claimant’s discrimination claims were required, in order properly to understand the case that she was advancing. In particular, it was said that the Claimant had failed to

particularise her claim of age discrimination.

9. Later that month, on 30 November 23, a Preliminary Hearing was held, chaired by Employment Judge Davidson. The note of that hearing records that the Claimant required more time to consider her age and religion discrimination claims and to decide whether an application amendment should be made. At paragraph 11, of the case management discussion note, the Judge recorded as follows

“The Claimant will, by 11 December, confirm her position to the Tribunal and to the Respondent regarding any age discrimination claim arising out of the offer of a job to Natasha Sutherland at the same rate of pay that she was offered the job”.

10. A list of issues was appended to the case management order, which had in square brackets the issue of an offer to Ms Sutherland at the same salary, with the words, “Claimant to confirm”.

11. On 6 December 2023, the Claimant sent an email to the Employment Tribunal, attaching, “Full particularisation of the claims in the updated agenda”. Under the heading, “Age Discrimination”, the Claimant wrote as follows:

“NS was hired into the role to replace HT. She was approximately 10 years younger than HT, with 10 years less experience. Yet the cost of hiring her into the role was £5,000 more than TR was willing to pay HT.”

12. No allegation was made with regard to the job title in respect of the role for which Ms Sutherland was recruited.

13. On 9 January 2024, a further Case Management Hearing was held, this time chaired by Employment Judge Smart. In the note of the discussion at that hearing, Employment Judge Smart records that the Claimant’s claims of age discrimination were clarified. A “working draft list of issues” was attached to the Case Management Order and a further hearing fixed for 4 April 2024, at

which the list of issues would be finalised, and the Respondent's applications to strike out or obtain a deposit in respect of the Claimant's claims would be considered.

14. At paragraph 9.2 of the list of issues, under the heading, "Age Discrimination", the following words appeared:

"On April / May 2023, Natasha Sutherland was hired by the Respondent to replace the Claimant. Ms Sutherland is 10 years younger than the Claimant and the Respondent was willing to pay £5,000 more to recruit her from an agency than the Respondent was willing to pay the Claimant in salary."

15. Then at 9.3 is the next question in the list of issues, "Was that – i.e. the appointment of Ms Sutherland – less favourable treatment?"

16. In the event, the Preliminary Hearing took place on 24 April 2024, not 4 April. The Claimant appeared in person; the Respondent was represented by counsel. The decision records that the Claimant's claims of age discrimination were struck out as having no reasonable prospect of success.

17. At paragraphs 3 to 7 of EJ Nicolle's decision, he sets out what I understand to be an uncontroversial summary of the law relating to strike out applications, including the well-known decision of the House of Lords, in Anyanwu v South Bank Students' Union [2001] IRLR 305, in which it was stated that only in the plainest and most obvious cases should discrimination claims be struck out, given that they are highly fact sensitive.

18. In addition, the Employment Judge reminded himself that in a strike out application, the Claimant's case should normally be taken at its highest.

19. At paragraphs 13 to 15, the Judge dealt with the age discrimination issue that had been identified regarding the appointment of Ms Sutherland. At paragraph 14 of his Reasons, the Judge said this:

“(14) The claimant asserts that this constituted less favourable treatment primarily based on Ms Sutherland having 10 years less experienced than her and therefore that any level of equivalence in overall remuneration for Ms Sutherland, to include the overall recruitment costs, would have been less favourable treatment of her given her left giving her additional experience. Mr Holloway says that Ms Sutherland was not paid more than the claimant. She was offered less. He sets out the chronology of events which I need not go into detail, but in summary that in January 2023 Hazel Webb, the HR representative, offered the claimant the head of talent role also incorporating learning and development, at a salary of £115,000 which the Claimant rejected. There were ongoing negotiations and ultimately Ms Sutherland was recruited at what the claimant at what the respondent regarded as the correct benchmark salary of £100,000

(15) I have to consider whether that is capable of constituting less favourable treatment on grounds of age. I find it is not so capable and it has no reasonable prospect of success. I reach that decision because the claimant on her own case was not treated less favourably than Ms Sutherland. Without considering the issue whether any such less favourable treatment could be attributable to the different differential in age, I find that there was no evidence of less favourable treatment. The Claimant’s assertion is in effect that the failure by the Respondent to positively add additional value to her remuneration package, to reflect her additional experience vis-a-vis Ms Sutherland, was inappropriate. However, that cannot constitute less favourable treatment as Ms Sutherland received a package which even on the claimant's best case, was no more advantageous.”

20. Whilst the reference to the Claimant being offered the position of Head of Talent at a salary of £115,000 appears to be in error – in that she was offered a package worth £110,000 – the reasoning is unaffected in that the Judge proceeded on the basis that Ms Sutherland had been offered a lower salary (£100,000) than the Claimant and it was on this basis that he concluded that there had been no less favourable treatment of the Claimant when compared to Ms Sutherland.

The Appeal

21. In her Notice of Appeal, the Claimant suggests that EJ Nicolle has misunderstood the facts and not taken into account the fact that she was offered a salary of £100,000 and did not take into account the overall hiring cost of Ms Sutherland, which was £100,000 plus recruitment fee of

£15,000, as against £100,000 plus £10,000 bonus for the Claimant. The Claimant says:

“This makes the offer to Ms Sutherland more favourable. The Respondent was willing to pay a higher amount to Ms Sutherland.”

22. The ground of appeal then reads as follows:

“Why did the Respondent choose to hire an unknown candidate, instead of myself, and pay her a higher total cost for her, especially with 10 years less experience and no experience in the role, unless there were other factors behind the scenes keeping me in the business and recruiting me into the position?”

23. In her skeleton argument in submissions, Ms Margetts makes broadly the following point: she emphasises the disinclination of Employment Tribunals to strike out discrimination claims and the need in such cases for a proper exploration of the factual matrix. She suggests that the offer of £100,000 to Ms Sutherland and the £15,000 agency fees was age discrimination against the Claimant, and that the case will turn on evidence from the Respondent’s witnesses as to the rationale and decision-making process that led to that result. She suggests, therefore, that the case needs to be fully examined at a Final Hearing before a proper determination can be made.

24. In response, Mr Holloway submits broadly as follows: firstly, that the act of less favourable treatment relied on is the offer to Ms Sutherland of employment at a salary of £100,000; albeit that that came with the additional cost to the Respondent of £15,000, which went to an agency, rather than to Ms Sutherland, herself.

25. Mr Holloway then submits that the Claimant's case was not that she had been treated less favourably than Ms Sutherland, but that she should have been treated more favourably and should have been engaged at a package that amounted to £115,000. The Claimant's case, said Mr Holloway, was that she should have been given that amount because that was the total cost that had been incurred

by the Respondent in the recruitment process relating to Ms Sutherland. The issue, says Mr Holloway, is whether what the Claimant was alleging was capable of amounting to less favourable treatment of her, when compared to the treatment of Ms Sutherland, and that taking the Claimant's case at its highest, given that the Claimant was given a more favourable package, there was no prospect of her showing that she had been treated less favourably than Ms Sutherland. The Judge was, says Mr Holloway, entitled to conclude that this was not a possible basis on which direct discrimination on the grounds of age could be established.

26. It seems to me that the Respondent's submissions and, therefore EJ Nicolle's decision, must be correct. The legislation set out in section 13 of the Equality Act 2010, at section 13(1), is clear and states 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.”

27. It is, therefore, clear from the wording of section 13 that it is contingent on a claimant being able to establish less favourable treatment. There is no basis on which the Claimant can say that she was less favourably treated than Ms Sutherland. Her case is not only that she was treated more favourably but that she should have been treated yet more favourably, i.e. should have been offered not simply a sign-on bonus of £10,000 but the bonus of £15,000 for which she contended.

28. Whilst she is entitled to feel a sense of grievance about the fact that the Respondent was prepared to incur an overall cost of £115,000 in recruiting Ms Sutherland, the difficulty that she faces is that her treatment, when compared to that of Ms Sutherland, does not found a basis on which she can say that she has been less favourably treated than her identified comparator within the scope of section 13.

29. I am, therefore, unable to identify any error of law in the conclusions reached by Employment Judge Nicolle. It is at this point that one reverts back to the suggestion, made by Mr Bowers, that the

Claimant's case was that the package to Ms Sutherland was more favourable. Once that factor is removed from consideration for the purposes of this appeal – as indeed it must – the basis of the appeal collapses, as the Claimant is unable to identify any less favourable treatment as between herself and her comparator relating to the decision to appoint that comparator to the role of Head of Talent Acquisition.

30. Therefore, for those reasons, I am driven to dismiss the appeal, on the basis that it does not disclose any error of law in the decision made by Employment Judge Nicolle.

31. I should also add that I entirely accept that it would have been difficult for the Claimant to present her case as a lay person, who was also dealing with other significant issues in her life. But at the end of the day, the Employment Tribunal has to deal with a case as best and fairly as it can, on the basis on which it is put before them, and that it seems to me is what Employment Judge Nicolle – and indeed the other Employment Judges who have been engaged in earlier Case Management Hearings – have done in this case.