EMPLOYMENT TRIBUNALS

Claimant: Mr O Ogedegbe

Respondent: JM Hall Couriers Limited

Heard at: Middlesbrough **On:** 27 and 28 November 2025 and 6 February 2026

Before: Employment Judge Aspden

Appearances

For the claimant: in person
For the respondent: Mr Breen, counsel

JUDGMENT having been sent to the parties on 13 February 2026 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. Mr Ogedegbe says the respondent discriminated against him by failing to progress his application for engagement as a driver. He complains this was direct discrimination on the grounds of his age and his race, specifically his skin colour; he describes himself as black and at the time of these events he was 75 years old.

2. It is not disputed that the claimant applied for engagement as a driver and that, at the time the claimant brought his claim, the respondent had not progressed that application. The respondent denies that the reason for this was the claimant's age and/or his race. In any event, the respondent's case is that its actions are outside the scope of the Equality Act 2010 for the following reasons:
   2.1. The claimant was not applying for employment with the respondent, he was applying for the opportunity to become a partner of an LLP. Therefore the respondent was not an 'employer' for the purposes of section 39 of the Equality Act 2010, as that term is defined in section 83.
   2.2. Furthermore, the respondent itself was not the LLP, nor a partner of the LLP, and nor was it a 'proposed LLP' for the purposes of section 45.

Evidence and facts

3. I heard evidence from the claimant himself and I also heard evidence from two witnesses on behalf of the respondent: Ms Slater and Mr Heaton. I was directed to various documents and file of documents. I have taken into account all the documents that I was referred to.

4. These are the facts as I found them to be, taking into account that evidence.

5. Before he made an application to work with the respondent the claimant had worked as a courier for some time. He had his own van. At the relevant time he lived in Hartlepool. Before moving to Hartlepool he worked as a delivery driver for Amazon in London. At the time of the events that I am concerned with the claimant had been doing delivery work for a company based in Carlisle.

6. The respondent is a company which describes itself as a fleet courier and logistics business. It contracts with Amazon to deliver goods and it does that via arrangements with individual drivers. The respondent operates across 14 depots in the UK. Its head office is in Leeds where Mr Heaton is based and it's from there that recruitment of drivers is coordinated. Mr Heaton oversees the recruitment team. His responsibilities include those that are set out in paragraph 5 of his witness statement.

7. Some of the drivers who work with the respondent own their own vehicle which they use for deliveries. Others use a rental vehicle. The respondent has arrangements in place with vehicle rental companies who supply vehicles to those who do not have their own vehicle. Rental vehicles can also be used by owner-drivers if their own vehicle is out of use for some reason. Arrangements are in place for insurance cover for the rental vehicles. The insurers will not provide insurance cover for anyone below the age of 19. Mr Heaton and the recruitment team are aware of that. The insurers do not have an upper age limit for their insurance policies and nor did Mr Heaton believe they did.

8. The respondent has in the region of 300 drivers. Turnover of drivers is quite high. The respondent recruits drivers via what were referred to in these proceedings as 'open days' but which were referred to in text messages to applicants as 'interviews'. The respondent advertises for drivers, including with a company called 'Indeed'. People who are interested in becoming drivers can get in contact with the respondent via Indeed and provide some information including their name, address and CV. The respondent may then invite them to one of their open days. Those who are involved in recruitment do not always review CVs or speak to candidates before making a decision as to who to invite to an open day; sometimes they simply invite everyone who has expressed an interest.

9. Although the respondent describes these recruitment events as 'interviews' in invitations sent to applicants, the events (or 'open days') did not include interviews in any traditional sense of that word. Rather, the respondent invites numerous applicants to attend at the same time, whereupon they will be met by one or more individuals who attend on behalf of the respondent. Those who attend on behalf of the respondent company are there to talk about the role and answer questions from applicants, and also to gauge whether individual applicants appear to be a good fit. The question of 'fit' is not assessed in any formal way in that there is no script or list of questions that those attending for the respondent follow.

10. At the respondent's 'open days' applicants are also handed numerous documents. If an individual wishes to take their application forward they are asked to complete and sign the various documents. The respondent's evidence was that the documents that are given to applicants to complete and sign are those that were included at pages 67 to 95 of the file of documents. The claimant said he did not think the documents at pages 67 to 95 were the ones he was given to sign when he attended his open day. One of the reasons the claimant gave for saying these were not the documents he was given was that he said he had filled in a document with his age and he said the documents at those pages did not ask for someone's age. I do not accept the claimant's submission. The very first document in that 'pack' asks for the applicant's age and date of birth. The claimant also suggested for the first time when cross-examining Mr Heaton that he filled in a form which asked for information about his ethnic origin. That was not any part of the claimant's own witness evidence, however. I find it more likely than not that: at its 'open days', the documents the respondent routinely gives applicants to complete and sign are those that were included at pages 67 to 95 of the file of documents; those are the documents the claimant was given to sign; and they did not include any documents seeking information about ethnic origin or any other aspect of 'race'.

11. It is not the respondent's usual practice to give an applicant who fills in the documents copies to take home with them. The documents are sent to head office. A decision is then made as to whose applications to take forward. That decision is taken having regard to, amongst other things, feedback from those present on behalf of the respondent at the open day.

12. One of the issues that the recruitment team takes into account in deciding whether to take on an individual as a driver is where the applicant lives in relation to the depot that is going to be their starting point for deliveries and the territory they are recruited to deliver within. I accept the evidence given by Mr Heaton, and find, that his team is mindful of the number of driving hours a driver is likely to have to undertake on their delivery routes and the need to guard against the risk of excessive driving hours and ensure the law in this regard is complied with. They take into account that the number of hours the driver may be driving in a day is likely to be affected by where the driver lives because the driver has to get to the depot at the start of the shift and then drive home after their last delivery; that last delivery can itself be some distance from the depot and from the driver's home, particularly if the driver lives outside the territory they are driving within and especially if the territory covers a large area. I accept Mr Heaton's evidence, and find, that the recruitment team generally prefers not to recruit people who live more than half an hour's drive from the depot. However, Mr Heaton did not suggest that this was a strict rule the respondent had and I find that it was not.

13. If the respondent decides to take an individual's application forward following an open day, their information is also added to the system used by Amazon and the driver receives an email from Amazon saying that they are invited to create an account. The email contains a link to an online system. If the driver wants to take matters forward they create an account via this link. The respondent's recruitment and compliance team complete background checks, including the driver's licence. If there are no problems with that the driver may then be sent what was described by Mr Heaton as an 'LLP pack'. Whatever that pack contains was not included in the file of documents.

14. If somebody is not successful in their application, or if the respondent decides to take forward their application but the individual does not create an account with Amazon or decides not to progress matters, the forms the individual has completed at the open day are shredded and information on digital systems is deleted; that is because the respondent considers it necessary to do that to comply with data protection legislation.

15. It was the respondent's case that, in relation to the recruitment exercise in which the claimant participated, the respondent was not seeking to enter into a contractual relationship directly with any drivers. The impression given by the content of Mr Heaton's witness statement is that, at least in the recruitment exercise the claimant was a part of, the respondent was only recruiting drivers to engage with via an LLP. However, when being questioned at this hearing Mr Heaton readily accepted that the respondent does contract directly with drivers and being a member of an LLP was not the only route by which the respondent engages drivers. Mr Heaton referred in particular to owner-drivers in this context. The fact that this was not mentioned in Mr Heaton's witness statement caused me some doubt that as to how reliable his evidence may be regarding other matters. However, when asked direct questions about the position, Mr Heaton did very readily acknowledge that a willingness to join an LLP was not a requirement. Although that information was not volunteered by Mr Heaton's witness statement, it was given so readily in response to questions that I am of the view that, in omitting to mention this in his witness statement, Mr Heaton was not deliberately seeking to conceal this fact or mislead the tribunal.

16. Turning back to the recruitment exercise that is relevant for this case, the respondent placed an advert with Indeed. The claimant makes the point that that advert was not disclosed by the respondent as part of the disclosure process. It was he who disclosed it to the respondent. That advert said, amongst other things, 'We're seeking reliable hardworking people who can succeed in a fast paced environment and join the fastest growing most stable industry to be in.' The organisation seeking to recruit was described as 'JMHC Logistics.' The advert said that one of the driver's responsibilities would be to 'Represent the ever growing JMHC brand.' It said they were 'looking for an individual who is driven to help the business progress within the logistics industry.' The advert said the company offered, amongst other things, career progression, the freedom of being self-employed, a full time position 5-6 days per week, flexibility within the working week. The advert set out certain requirements which included an ability to work nine hour shifts and flexibility to work any day throughout the week including at least one day at weekends. The advert also made it clear that owner drivers were welcome to apply.

17. The claimant contacted Indeed saying he was interested in the position. As part of this process of expressing an interest the claimant provided his address and his CV.

18. The respondent sent the claimant a text messages inviting him to attend what was described in the text as an interview session. The first invitation was for a recruitment event on 29 August 2024 but the claimant did not attend. The claimant was invited to another recruitment event on 5 September but did not attend. He was subsequently invited to a third event on 26 September 2024 which he did attend. On this occasion the respondent was looking to recruit drivers to work out of its Gateshead depot, which would be the driver's starting base each day. The territory

the respondent was seeking to recruit for covered the area north of Gateshead as far as the Scottish border.

19. The claimant attended this event on 26 September. It took place at an Amazon depot. Seven other individuals interested in working with the respondent attended that day. They were all given the same time to attend. The claimant in his witness statement said that the other applicants who attended the recruitment event were ‘mostly white’ and that there were two other applicants whom the claimant described as black. Given the claimant’s age, I find it more likely than not that the other applicants who attended were younger than him.

20. Present at the open day was Ms Slater. She was a lead driver and member of an LLP engaged in providing services for the respondent. The claimant and Ms Slater have given differing accounts about what happened on the day.

    20.1. The claimant said a female manager (that would be Ms Slater) asked him why he was applying to work with the respondent and introduced that question by saying ‘I heard you’ve been doing the rounds’; that Ms Slater then gave a presentation; and that at the end Ms Slater told those present that she would be sending out emails the following day detailing the next steps for the recruitment. The claimant‘s evidence was that he told Ms Slater he applied because he wanted to drive his own van and was currently working in Carlisle as a courier and it was too far to travel from his home in Hartlepool; and that they had a discussion about travel distances. The claimant’s evidence was that he did not bad mouth or criticise any other company; did not say they had not given him work because of his skin colour or his age; and did not allege they had refused to give him work for an unfair reason.

    20.2. Ms Slater’s evidence was very different. She said that when the claimant arrived the other applicants were already present and sitting around a table with a manager called Michael who was talking to them. She said she asked the claimant to sit at another table and he immediately began criticising and ‘bad mouthing’ another company, that company being one which had people doing a similar recruitment event in the same room. She said the claimant pointed his finger towards the people from the other company and in an ‘angry tone’ accused them of having refused him a job because of his age and race. She said the claimant then went on to criticise another company in a similar vein when two managers from that company walked into the room. Ms Slater denied saying that she had heard the claimant was ‘doing the rounds’. She said she does not recall the claimant talking about wanting to work somewhere closer than Carlisle. Ms Slater said she did not do a presentation; rather, Michael spoke with the other seven applicants (who, she said, had arrived before the claimant). Ms Slater denies telling the claimant and other attendees that she would send an email the following day; she said it was not her responsibility to contact applicants and she was not involved in that side of the recruitment exercise.

21. Mr Heaton was not present but his evidence was that, after the event, he and Ms Slater spoke and she expressed concern about the claimant’s attitude and behaviour at the event, describing that the claimant had criticised people from other companies for not giving him a job and had accused them of refusing to give him work because of his age and because he is black. He said he also spoke with the manager Michael

and that Michael expressed concern about the attitude demonstrated by the claimant towards people from other companies whom the claimant would be likely encounter at the depot if he was taken on. His evidence was that it was the responsibility of his team, not Ms Slater, to contact applicants to take forward their applications.

22. I accept Ms Slater's evidence, supported by the evidence of Mr Heaton, that she was not involved in the administrative side of the recruitment exercise and that it was not her responsibility to contact applicants after the recruitment event. That was the responsibility of Mr Heaton's team. It was his team (and in this case Mr Heaton personally) in conjunction with the manager Michael who made the decision as to who to recruit, and Mr Heaton's team who were responsible for contacting applicants after the event. That being the case, it would have been surprising if Ms Slater had said to the claimant or anyone else that she would be in touch the next day. I find it is more likely than not that Ms Slater did not say she, or anyone else, would email the applicants the following day as alleged by the claimant.

23. As for whether the claimant criticised individuals from other companies, the respondent's case that the claimant made allegations of race and age discrimination against third parties at the recruitment event is supported by the fact that the claimant was very quick to attribute discriminatory motives to those involved in the respondent's own recruitment process. The claimant contacted ACAS for early conciliation a mere 11 days after the recruitment event. I have found that the claimant was not told that he would be sent an email the day after the recruitment event. Therefore, the fact that the claimant had not heard anything further about his application just 11 days after the event was not something that, viewed objectively, would arouse suspicion. I note that the claimant contacted Mr Heaton four days after the event and Mr Heaton had not responded seven days later when the claimant contacted ACAS. However, the claimant cannot possibly have known what Mr Heaton's workload was or whether he was even at work at this time. So again, viewed objectively, this is not something that would reasonably cause suspicion absent some predisposition towards attributing discriminatory motives to others. Yet even at such an early stage, I infer from the fact that the claimant contacted ACAS that he assumed, or at least suspected or alleged, that the respondent had decided not to progress his application and that the reason was his race and age. There is no suggestion that the respondent said or did anything at or before the recruitment event that was related to the claimant's, or anyone else's, skin colour or ethnic or national origins. I acknowledge that the respondent asked for all applicants' age in a standard form completed at the recruitment event, and that might have caused the claimant to be suspicious about the respondent's motive for so doing, but to then assume or suspect or allege after only 11 days that the respondent had decided not to recruit him and this was due to his age (and race) suggests to me a readiness to attribute discriminatory motives on scant evidence.

24. What I found happened, on the balance of probabilities, is as follows.

    24.1. When the claimant arrived at the event, other applicants were already present and sitting around a table with Michael who was talking with them. Ms Slater asked the claimant to sit at another table. Another company was conducting a similar recruitment event in the same room at the time and there were two people from that company present. The claimant pointed his finger towards the two people from the other company and, in a tone of voice that Ms

Slater considered to be aggressive and angry, accused them of having refused him a job because of his age and race. The claimant then went on to criticise another company in similar terms when managers from that company walked in. Until then Ms Slater had no knowledge that the claimant had applied for work with other companies. She did not say 'I hear you've been doing the rounds'; she may well, however, have had said something in response to the claimant's outburst along the lines of 'it sounds like you've been doing the rounds'.

24.2. It is also entirely plausible that Ms Slater asked the claimant why he wanted to work for the respondent given that that is the sort of question a recruiter might ask an applicant at this kind of event. On balance I find it more likely than not that the claimant did talk about how he had been working in Carlisle and wanted to be based somewhere nearer to where he lived in Hartlepool. I find it more likely than not that Ms Slater simply did not recall this part of the conversation and that the more memorable part of their interactions, from her perspective, was the claimant's criticisms of the people from other companies.

25. What is not in dispute is that on this day the respondent gave the people who attended some forms to complete and sign and the claimant completed and signed the ones he was given. As recorded above, I find it more likely than not that the documents the claimant filled in were those at pages 67 to 95 of the file of documents. I accept Ms Slater's evidence that those were the documents provided.

26. It is notable that the documents include what is described as an 'LLP Driver Service Level Agreement.' The document was pre-completed with signature of Mr Heaton, described as 'office manager'. In that document there was a space for the signature of the driver themself. The agreement was expressed as an agreement between the respondent and the driver themself, not the respondent and an LLP or the respondent and the driver acting in the capacity of an LLP member. Indeed the document contained few references to an LLP and no LLP was referred to by name. There was no evidence before me that if, as the respondent contends, the intention was that drivers would become a member of an LLP, that LLP existed at the time applicants were asked to sign the document.

27. Although in her witness statement Ms Slater said she was at the recruitment day to explain the structure of how the LLP worked, in response to questions it was apparent that it was not her practice to do that at all at these recruitment days and that in fact she understood very little about the structure of any of the LLPs. As far as she was concerned the LLP was just the body via which drivers would be paid. I find Ms Slater said little if anything about the LLP to the claimant. As recorded above, Mr Heaton's evidence, contrary to the respondent's pleaded case and what Mr Heaton appeared to be saying in his witness statement, is that it was not in fact the case that applicants, if successful, had to become a member of an LLP. On the contrary he said drivers did not have to be part of an LLP, that they always gave the drivers a choice, and that that drivers could work for the respondent even if they did not belong to an LLP, and that such drivers would invoice the respondent direct for work they did.

28. One of the forms the claimant filled in asked for the claimant's age and date of birth. At least one of the forms contained the claimant's address. Ms Slater did not say

anything to indicate that she believed the claimant lived too far away from the depot in Gateshead.

29. After the event on 26 September Ms Slater spoke to Mr Heaton and the contract manager Michael. She told them what the claimant had said about the other companies, describing his behaviour as aggressive, and said he seemed more interested in criticising the individuals from other companies than finding out about the respondent.

30. Ms Slater was not involved thereafter in decisions as to who should be recruited. That decision was taken by Mr Heaton and Michael. The two of them spoke again. Michael expressed concerns about taking the claimant on giving the behaviour Ms Slater had described. The claimant had not created a good impression and Michael told Mr Heaton he would not want anyone on his team to deal with the type of attitude that the claimant demonstrated, especially if the claimant may encounter people from those two other companies that were criticised at the depot. A decision was taken at that stage not to take the claimant's application forward. It was described as a 'preliminary decision' by Mr Heaton in his witness statement. It was a decision nonetheless. At that time Mr Heaton had not received the paperwork completed by the applicants but he received it shortly afterwards.

31. On 30 September, four days after the open day, the claimant texted the respondent chasing up the response to his application. Mr Heaton's evidence is that he does not recall seeing the text as he was very busy at that time.

32. Within seven days of the interview Mr Heaton and Michael spoke again and made their final decisions as to whose application would be taken forward. As recorded above, they had already decided not to take the claimant's application forward following their previous discussion about the claimant's attitude at the event. Since then, Mr Heaton had received the forms filled in by the claimant and had become aware that the claimant lived in Hartlepool. This was outside the territory the respondent was seeking to recruit for and Mr Heaton believed the claimant was not an ideal candidate given that and the time it could take the claimant to drive to the Gateshead depot at the start of the shift.

33. By 7 October, 11 days after the recruitment event, the claimant had not had a reply to his text and he contacted ACAS that day to start early conciliation. The claimant was aware that he needed to take this step before bringing a tribunal claim because he has brought employment tribunal proceedings in the past. ACAS contacted the respondent. Mr Heaton became aware of this and referred the matter to those he described at the hearing as 'higher rank managers'. Because the claimant had contacted ACAS and more senior people were dealing with the matter, Mr Heaton thought it would be inappropriate for him to get involved further by contacting the claimant to tell him his application was unsuccessful.

34. The claimant put in evidence an email he received from ACAS on 21 November in which ACAS copied to the claimant the contents of a letter or email the respondent's solicitors had sent to ACAS. I infer that at some point before early conciliation ended on 18 November the respondent's solicitor sent that email to ACAS with the intention that it be communicated to the claimant. In it the respondent's solicitor said '…it is

not correct that a decision was made not to offer the Claimant employment, rather that due to current workloads our client has been unable to respond to him with regards to the next step. In the circumstances it is denied the claimant has been discriminated against, either on the basis of age or race and whether alleged, or at all.' The statement that the respondent had not made a decision not to offer employment was not correct: a decision had been made by that time. I accept, however, that that email/letter was not drafted by Mr Heaton and he had, by this stage, referred the matter on to 'higher rank managers'. The email/letter also referred to the respondent being aware the claimant had sought to bring similar claims against at least four other courier/delivery companies. I infer that at some point before sending that email, managers of the respondent believed the claimant had applied for jobs and brought claims against other companies. Mr Heaton's evidence was that Michael had become aware of this from conversations he (ie Michael) had with other managers at the Amazon depot and had passed the information on.

35. On 18 November ACAS issued an early conciliation certificate. On 25 November the claimant brought his claim to the Tribunal.

36. There has been a suggestion in these proceedings that the claimant was not genuinely interested in the job and had no genuine intention of taking up the job if it had been offered to him. The respondent points to the fact that the claimant waited only 11 days from the open day and only seven days from texting Mr Heaton before contacting ACAS. I accept, as noted above, that the claimant was very quick to contact ACAS. I accept that this could indicate that the claimant was looking for an opportunity to bring a tribunal claim. On the other hand the job the claimant applied for was one he was qualified for and was the type of work he had been doing for some time. He also had good reason to want to move from his Carlisle based job given the distance from his home. I conclude, on balance, that it is more likely than not that the claimant was genuinely interested in the position and would have accepted a position if offered.

<u>Legal framework</u>

'Employment'

37. It is unlawful for an employer to discriminate against a person in the arrangements the employer makes for deciding to whom to offer employment and/or by not offering that person employment: section 39(1) Equality Act 2010.

38. The terms 'employment' and 'employer are defined in section 83 as follows.

> (2)'Employment' means—
>
> (a)employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;
> …
> (4)A reference to an employer or an employee, or to employing or being employed, is (subject to section 212(11)) to be read with subsections (2) and (3); and a reference to an employer also includes a reference to a person who has no employees but is seeking to employ one or more other persons.

39. It follows from these definitions that 'employment' entails a direct contractual relationship between the alleged employer and employee. That contract may be a contract of employment (ie a contract of service) or a contract personally to do work.

40. The concept of a 'contract personally to do work' encompasses but is wider than the concept of a contract of service. Identifying whether a particular contractual relationship falls within the concept of employment involves looking not just at the terms of contract but at all the relevant factors to ascertain whether the relationship was of a kind which Parliament intended to be covered by the rights and obligations contained in the Equality Act 2010 (and other statutory rights that confer protection on 'workers'): Uber v Aslam [2021] UKSC 5; [2021] ICR 657. As the Supreme Court held in Uber: 'The vulnerabilities of workers which created the need for statutory protection were subordination to and dependence upon another person in relation to the work done. A touchstone of such subordination and dependence was the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a 'worker' who was employed under a 'worker's contract'.' The Supreme Court was there addressing the concept of worker status within the Employment Rights Act 1996, the National Minimum Wage Act 1998 and the Working Time Regulations 1998. However, it has been established that the concepts of 'worker' status in that legislation and 'employment' status in the Equality Act 2010 are the same: Uber, Pimlico Plumbers Ltd v Smith [2018] UKSC 29, [2018] ICR 1511.

41. In light of the conclusion I reached on employer status, which is set out below, I do not need to say anything about sections 45 and 46, which deal with the position of Limited Liability Partnerships.

'Discrimination'

42. Section 109 of the Equality Act 2010 provides that the acts of the employer's other employees are treated as acts of the employer provided they are done in the course of employment. Similarly, an employer is responsible for acts that are done for them, with their authority, by an agent. This is the case even if the employer neither knows nor approves of the acts in question.

43. Section 13 of the Equality Act 2010 provides that it is direct discrimination to treat an employee less favourably because of race than the employer treats or would treat others. The concept of 'race' is defined in section 9 and includes skin colour.

44. Section 13 of the Equality Act 2010 also provides that it is direct discrimination to treat an employee less favourably because of age than the employer treats or would treat others, unless the employer shows that the treatment is justified as a proportionate means of achieving a legitimate aim.

45. In determining whether there is direct discrimination it is necessary to compare like with like. This is provided for by section 23 of the Act, which says that in a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

46. For a claim of direct discrimination to be made out, the conduct complained of must be because of the protected characteristic (the claimant's race and/or age in this case). However, the protected characteristic need not be the only reason for the detrimental treatment, provided it had a material influence on the outcome.

47. The burden of proof in relation to complaints of discrimination is dealt with in section 136 of the 2010 Act as follows:

> *'136 Burden of proof*
> *…*
> *(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3)But subsection (2) does not apply if A shows that A did not contravene the provision….'*

48. Section 136 provides a two-stage test. At the first stage, the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. It is only if such facts have been made out (on the balance of probabilities) that the second stage is engaged.

49. At the second stage the burden shifts to the respondent to prove (on the balance of probabilities) that the treatment in question was 'in no sense whatsoever' because of the prohibited reason: Igen Ltd v Wong [2005] EWCA Civ 142; [2005] ICR 931 CA.

50. As for what is required to discharge the burden at the first stage, the following principles have been established.

    50.1. It is important to bear in mind in deciding whether the claimant has proved facts from which the tribunal could conclude that there has been discrimination that it is unusual to find direct evidence of discrimination: few employers would be prepared to admit such discrimination, even to themselves and in some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in.' The outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal: Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258; Nagarajan v London Regional Transport [2000] 1 AC 501 HL.

    50.2. All the evidence as to the facts before the tribunal must be considered, not just evidence adduced by the claimant. However, facts and explanations should be carefully distinguished from each other since s 136(2) requires that any explanation provided by the employer should not be taken into account at this first burden-shifting stage: Efobi v Royal Mail Group Ltd [2021] UKSC 33, [2021] IRLR 811, [2021] ICR 1263.

    50.3. There must be something more than a difference in the relevant protected characteristic and a difference in treatment: Madarassy v Nomura International plc [2007] ICR 867, CA. The 'something more' required at the first stage need not, however, be a great deal: Deman v EHRC [2010] EWCA Civ 1279.

50.4. A finding that an employer has behaved unreasonably, or treated an employee badly, will not be sufficient, of itself, to cause the burden of proof to shift. As Lord Browne-Wilkinson explained in Glasgow City Council v Zafar [1998] ICR 120, at 124B:

> *'… the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer, he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant 'less favourably'.'*

50.5. That said, whether the putative discriminator would treat all employees in 'the same unsatisfactory way' is not something that will be established by mere assertion. Sedley LJ noted in Anya v Oxford University and anor [2001] EWCA Civ 405: 'whether there is such an explanation … will depend not on a theoretical possibility that the employer behaves equally badly to employees of all [relevant characteristics] but on evidence that he does.' Absent such evidence, the inference of discrimination comes not from the unreasonable treatment, but from the absence of any (consistent) explanation for it: see Law Society v Bahl [2004] IRLR 799, per Peter Gibson LJ, and Veolia Environmental Services UK v Gumbs UKEAT/0487/12 per HHJ Hand QC.

50.6. In determining whether an inference could be drawn from the facts established by the complainant, a tribunal must bear in mind that the relevant protected characteristic need not be the only reason for the decision in issue, it would be sufficient that it was a significant or material influence: Nagarajan v London Regional Transport [2000] 1 AC 501 HL.

50.7. The tribunal is also required to consider any parts of the Equality and Human Rights Commission Code of Practice for Employment) that appear relevant.

<u>Conclusions</u>

Employer status

51. I consider first whether the respondent was not an 'employer' for the purposes of section 39 of the Equality Act 2010, as that term is defined in section 83.

52. I reject the respondent's submission that, in relation to the recruitment exercise in which the claimant participated, the respondent was not seeking to enter into a contractual relationship directly with any drivers, for the following reasons:

52.1. Mr Heaton readily accepted that a willingness to join an LLP was not a requirement for recruitment, that the respondent does contract directly with drivers, and that being a member of an LLP was not the only route by which the respondent engages drivers. Mr Heaton referred in particular to owner-drivers in this context and the advert the claimant responded to said owner drivers were welcome and made no mention of an LLP. The claimant had his own van and was looking to be an owner driver. In any event there was no mention of an LLP.

52.2. Applicants were asked to sign various documents, including a service agreement, not as LLP members. The service agreement was an agreement purporting to be between the driver themselves (not in the capacity of LLP member) and the respondent. There was no evidence any LLP that an individual might join even existed at the time applicants were asked to sign that agreement.

52.3. The application pack made very few references to any LLP and the respondent's own witnesses knew very little about any LLPs or how they operated.

52.4. I infer that if the respondent had decided to take forward the claimant's application the claimant would have been given the opportunity to engage directly with the respondent. He would not have been required to joint a limited liability partnership.

53. The option to engage directly with the respondent would, I find have been an option to enter into a contract with the respondent personally to do work, for the following reasons:

53.1. There was no suggestion that those engaged had free rein to substitute others to do the work they agreed to do.

53.2. The terms in which the advert was framed, the terms of the agreement that applicants were asked to sign, and the numerous policies the applicants were expected to agree to abide by indicate that drivers were embedded within the respondent's organisation and surrendered to a significant degree of control by the respondent, even though they were treated as self-employed for tax purposes.

54. I conclude that the respondent was an employer within the meaning of section 39, read with section 83 of the Equality Act 2010.

Whether respondent discriminated against the claimant

55. It is clear that a decision was made not to progress the claimant's application after 26 September up until the date he made his claim. In fact Mr Heaton and the manager Michael went beyond merely failing to progress the application; they made a positive decision not to offer the claimant a position as a driver.

56. The respondent submits that the respondent was not responsible for the decision not to progress the application/offer engagement because that was a decision made by Mr Heaton and Mr Heaton was not employed by the respondent company but by a different company in the group. I reject that submission. In deciding not to offer the claimant employment Mr Heaton was clearly acting on behalf of the respondent. Even if he was not an employee of the respondent he was plainly the respondent's agent and was authorised to- and did- make decisions on its behalf. Mr Heaton's name even appeared on the service agreement individuals were invited to sign, as signatory for the respondent. Similarly, the joint decision-maker, Michael the manager, was acting on behalf of the respondent. It is not suggested he was not an employee of the respondent but, again, even if he was not an employee he was clearly acting as the respondent's agent.

57. There has also been a suggestion in these proceedings that the claimant was not genuinely interested in the job and that there would have been no discrimination from the claimant had no genuine intention of taking up the job. That submission fails on the facts: I have found the was genuinely interested in the position and would have accepted a position if offered.

58. I turn to the reason the claimant was not offered the job.

59. With regard to the complaint of age discrimination, I consider there are facts from which I could decide, in the absence of any other explanation, that the respondent's decision not to take the claimant's application forward and offer him employment was influenced at least in part by his age. Those facts are as follows:

    59.1. The respondent specifically asked applicants at the recruitment day to provide their age and date of birth. In the absence of any other explanation I could infer that the respondent considered age relevant to its decision.

    59.2. At 75, the claimant was of a relatively advanced age and I have found it likely that he was the oldest of the applicants, meaning any successful recruits were younger than him.

60. Therefore, the burden shifts to the respondent to disprove discrimination. I accept that the respondent has discharged that burden. In this regard I find as follows:

    60.1. I accept the only reason the respondent asked all applicants for their age and date of birth was because the rental vehicle insurers would not insure anyone below the age of 19. I take into account what the claimant says about him not needing insurance because he was planning to be an owner driver and would therefore have insured his own van. However I accept Mr Heaton's evidence, and find that, even some owner drivers may need or wish to drive a rental vehicle on occasion if their own vehicle isn't available. I accept that was the reason the respondent asked all applicants for that information. I accept the reason the claimant and other applicants were asked for their age was not to identify older workers but to identify younger workers who would not be covered by vehicle insurance if they were to use a rental vehicle. The insurers did not impose any upper age limit on insurance and nor did Mr Heaton think there was any insurance problem with older drivers.

    60.2. The reason the claimant was not offered a position was because of what he had said to Ms Slater at the recruitment day about people from other companies having failed to offer him a job because of his age and race, and the manner in which he made those criticisms, which Ms Slater perceived to be aggressive due to the tone in which the claimant voiced his criticisms. There is no suggestion, let alone evidence, that any other applicant behaved in a similar way to the claimant. I am more than satisfied that if a younger applicant had behaved in the same way the respondent would not have recruited them either.

    60.3. I accept that the decision not to offer the claimant employment was in no sense whatsoever because of his age.

61. For those reasons the age discrimination claim fails.

62. With regard to the complaint of race discrimination, I have considered whether there are facts from which I could decide, in the absence of any other explanation, that the respondent's decision not to take the claimant's application forward and offer him employment was influenced at least in part by his race. In this regard I note the following:

    62.1. The claimant alleges that the respondent destroyed evidence of the ethnicities of unsuccessful applicants. I reject that allegation. I have found as a fact that the respondent did not collect that information in the first place.

    62.2. The claimant asserts in his claim form that the respondent' employed the other drivers who are white'. That is merely an assertion. There is no evidence that the respondent only took forward the applications of candidates whom the claimant considered to be white and, on questioning, the claimant acknowledged that this was simply an assumption he had made.

    62.3. The respondent told the claimant via ACAS that no decision had been made when in fact a decision had been made. However, it was not Mr Heaton who told the claimant that; I have found that he passed the matter on to 'higher managers' to deal with. Therefore, I do not consider this incorrect and potentially misleading information to be of significance in deciding whether the burden of proof has shifted.

    62.4. The claimant points to the fact that the respondent has referred in these proceedings to the distance between the claimant's home address and the Gateshead depot and territory. He says this information was available to the respondent from his CV and the forms he completed and handed to Ms Slater at the recruitment event and nobody took issue with it at the time. I have found, however, that the recruitment team did not always consider CVs before inviting candidates to a recruitment event and that the responsibility for ensuring drivers could comply with rules on working time lay with the recruitment team not Ms Slater. Therefore I do not consider the fact that this was not raised as an issue at or before the recruitment day to be of significance.

    62.5. In deciding whether the burden of proof has shifted I must consider the position of a hypothetical applicant in the same material circumstances as the claimant. Those circumstances include the way claimant behaved at the interview. There was no suggestion or evidence that anybody else on the day behaved in the same manner as the claimant.

63. I have concluded that there are not facts from which I could decide, in the absence of any other explanation, that the respondent's decision not to take the claimant's application forward and offer him employment was influenced at least in part by his race and that the respondent would have taken forward the application of a similarly qualified applicant who had behaved in the same way at interview if they were white (or not black).

64. For those reasons the complaint of race discrimination also fails.

65. Even if I had concluded that burden of proof had shifted, I accept the respondent has shown that the colour of the claimant's skin played no part at all in its decision not to offer the claimant a driving role. The reason the company did not offer the claimant a job was what he said about other companies at the recruitment day and the manner in which he said it, which was perceived to be aggressive. I am satisfied that they would have had the same concerns if a white person had behaved as the claimant did and had made allegations of race and age discrimination in a way perceived as aggressive. I am also satisfied that Mr Heaton did genuinely believe the claimant was not an ideal candidate due to where he lived in relation to the territory and depot. I consider, however, that this concern simply reinforced the decision that had already been made not to recruit the claimant due to his behaviour at the recruitment event.

66. In conclusion, the respondent did not discriminate against the claimant. The claimant's claims are not well founded.

Employment Judge Aspden

6 May 2026