



EMPLOYMENT TRIBUNALS

Claimant: Mr M Middleton

Respondent: HCM Electrical Limited

Heard at: Nottingham (in public, hybrid) **On:** 29 and 30 June 2026
and 1 July 2026

Before: Employment Judge Quickfall
Sitting with non-legal members:
Mr A Beveridge
Mr M Alibhai

Representation

Claimant: Mr J Lewis-Bale, counsel

Respondent: Mr K Zaman, counsel

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1. The complaint of direct age discrimination contrary to section 13 of the Equality Act 2010 is well-founded and succeeds.

REASONS

Written reasons

1. These are the written reasons for the Tribunal's judgment delivered orally at the conclusion of the final hearing on 1/7/25. The written reasons are provided in response to a timely application in accordance with Rule 60 of the Employment Tribunal Rules 2024 made by the respondent on 6/7/26. The request for written reasons was referred to the judge the same day.
2. Numbers in brackets refer to page numbers in the hearing bundle.

Introduction

3. The claimant sought work as a self-employed health and safety advisor (“HASA”) from the respondent via a recruitment agency (“the agency”). When he did so, the claimant was aged 73 years. The agency offered work with the respondent on 6/3/24 which was due to start on 11/3/24. On 8/3/24, the respondent decided that the claimant would not be permitted to start work on 11/3/24.
4. The claimant referred a complaint of age discrimination against the respondent and the agency to ACAS on 28/3/24. The ACAS early conciliation certificate was issued on 16/4/24. A claim form was presented against the respondent and the agency on 23/4/24. There are no time limit issues.
5. The agency responded resisting the claim on 19/6/24. The respondent resisted the claim on 20/6/24.
6. On 29/8/24, the matter came before Employment Judge Hutchinson for case management. It was listed for judicial mediation on 13/1/25.
7. Subsequently, the parties declined to mediate the matter.
8. On 19/8/25, Employment Judge Welch dismissed the complaint against the agency on withdrawal by the claimant.
9. The complaint of direct age discrimination against the respondent proceeded to final hearing on 29/6/26. It was determined in person over 3 days by an Employment Judge sitting with two non-legal members (“the Tribunal”).

Preliminary matters

10. At the outset of the final hearing, Employment Judge Quickfall notified the parties of a potential conflict issue, namely that he has previously been instructed by the respondent’s solicitors, and he has ongoing instructions from that firm. The matter was adjourned while the parties decided whether they wished to apply for Employment Judge Quickfall to recuse himself.
11. Following a short adjournment, as neither party made a recusal application and both parties indicated that they were waiving their rights in relation to any such conflict issue, the Tribunal proceeded to determine the complaint of direct age discrimination against the respondent.
12. The Tribunal was provided with a 180-page hearing bundle. The Tribunal indicated to the parties that it would only consider documents to which it was referred by the parties.
13. The Tribunal received oral and written evidence from the claimant on his own behalf. In relation to the respondent, the Tribunal received oral and written evidence from Mr Kyle Wadsworth (“KW”), a Project Manager for the respondent, and Mr Peter Dawson (“PD”), a Project Site Manager for the respondent.

The complaint

14. The claimant pursues a single complaint of direct age discrimination contrary to

section 13 of the Equality Act 2010 ("EqA") against the respondent in relation to a decision of the respondent on 8/3/24 that the claimant would not be starting work as a self-employed contractor working as a HASA at its Bristol site with effect from 11/3/24.

The issues

15. The parties agreed that the Tribunal would deal in the first instance with liability issues in relation to the above complaint and that the following issues would be determined:

15.1. Was the claimant protected by the EqA as a prospective independent contractor? The respondent accepted that the claimant was protected by the EqA in his capacity as an prospective independent contractor.

15.2. The claimant's age was 73 years at all material times.

15.3. The claimant compares himself with people younger than him.

15.4. Did the respondent do the following things:

15.4.1. On 8/3/24 refuse or withdraw the offer of a contract as a self-employed contractor due to start on 11/3/24?

15.5. Was that less favourable treatment?

15.5.1. The Tribunal will decide whether the claimant was treated worse than someone younger than the claimant would have been treated in the same circumstances as the claimant.

15.5.2. The claimant relies on a hypothetical comparator younger than himself with similar qualifications and experience, the same mobility issues, and who would have said the same things in the same way as the claimant did at the meeting with the respondent on 8/3/24 if that comparator had attended the same meeting.

15.6. If so, was the less favourable treatment because of age?

15.7. Are there facts from which age discrimination can be inferred?

15.8. If so, the burden shifts to the respondent to prove the reason for the less favourable treatment per s. 136 EqA.

15.9. The parties agree that if the Tribunal determines that there was no less favourable treatment because of age, it is unnecessary for the Tribunal to determine whether the treatment was a proportionate means of achieving a legitimate aim.

15.10. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

15.10.1. Having a health and safety advisor on site all day checking that all tradesmen were working safely.

- 15.10.2. Having a health and safety advisor able to climb scaffolds, stairs and walk roughly 8 miles per day.
- 15.10.3. Having a suitable health and safety advisor to ensure the safety and efficiency of operations on site and maintain the trust and satisfaction of clients.
- 15.11. The Tribunal will decide in particular:
 - 15.11.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;
 - 15.11.2. could something less discriminatory have been done instead;
 - 15.11.3. how should the needs of the claimant and the respondent be balanced?

Findings of fact

- 16. The Tribunal has made the findings of fact set out below on the balance of probability, having considered all the evidence given by the witnesses during the hearing, together with the documents referred to by them and counsel for the parties. Any failure to mention any specific part of the evidence should not be taken as an indication that the Tribunal has failed to consider it.
- 17. The Tribunal has only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.
- 18. The claimant left school on 16/7/65 and started work 2 weeks later, on 2/8/65.
- 19. The claimant retired in July 2023 after working for 58 years in the construction industry in various senior engineering and health and safety roles. His last role was refurbishing a school. His last consulting role was in 2020 in relation to an offshore wind turbine project.
- 20. In February 2024, the Claimant decided to come out of retirement to help with a perceived shortage of skilled and professional qualified people who had taken retirement following COVID. The claimant had his career details on LinkedIn.

6/3/24

- 21. On 6/3/24, KW was looking for a HASA for the respondent's site near Bristol to start on 11/3/24.
- 22. At 08.08 am on 6/3/24, KW emailed Mr Jack Fenney, Divisional Manager, Power, Energy and Industrial Engineering ("JF"), at the respondent's recruitment agency ("the agency") to request a HASA to start on 11/3/24.
- 23. At 09.15 am the agency emailed the claimant with a job advert for the respondent's HASA role at its construction site near Bristol. The advert listed the start date as 11th March 2024 and set out the working duties for the role and requirements. It

encouraged the Claimant to get in touch if interested. The claimant assumes that the agency obtained his details from LinkedIn.

24. At 9.58 am, the claimant got a call from the agency following up on the email, asking about his availability and asking for his CV, qualifications, certificates and cards.
25. At 10.08 am the agency followed up the verbal telephone request for the claimant's paperwork with an email request for the same.
26. At 10.23 am, the Claimant emailed his documents to the agency and confirmed he was available immediately. None of the documents initially provided by the claimant referred to his age.
27. At 10.50 am, JF emailed the Claimant's CV and certificates to KW and confirmed the claimant was available.
28. At 16.03, JF informed KW that another HASA was not interested and asked if KW wanted the claimant lining up for 11/3/24 instead.
29. At 16.06, KW said that he did.
30. At 16.19, the agency emailed confirmation to the claimant that he was to start on 11/3/24. The agency stated: "*pleased to confirm your start with HCM Electrical on Monday 11th March 2024*". The email gave specific details of the start time, workplace address, site contact and rates of pay. The email requested documents relevant to the claimant's right to work (such as his passport) and how he wished to be paid, 2 names and numbers for references and next of kin details.
31. At 16.57, JF emailed KW and stated: "*[the claimant] has confirmed for Monday [11/3/24].*"
32. At 16.58, KW emailed JF back with: "*That's great, Thank you*".
33. We find that, with effect from 6/3/24, based on the above email exchanges, a contract existed that the claimant was to start work with the respondent as a self-employed HASA on the terms set out in the email sent to him at 16.19 on 6/3/24 from the respondent's agent (83).
34. The contract was not conditional on the claimant passing any kind of physical assessment or evaluation process. Based on the oral evidence of KW, we find that typically self-employed contractors are assessed after they have started on site, not before. We find that, on 6/3/24, the respondent offered (via its agent) the claimant work with effect from 11/3/24 as a self-employed HASA with the respondent which the claimant accepted the same day. The result was that a contract for work from 11/3/24 came into existence on 6/3/24 between the claimant and the respondent.
35. At 19.37, the claimant purchased tradesman liability insurance.

7/3/24

36. On 7/3/24, at 9.51 a.m., the agency called the claimant to repeat its request for the claimant's additional documents, which included his passport.
37. At 11:24 am, the Claimant emailed with his required certification, two references, his passport and next of kin details as requested.
38. On receipt of the passport confirming the claimant's age, JF called KW asking if the claimant's age would be an issue. KW said that his physical abilities would need to be assessed given the size of the site.
39. At 12.22, the agency informed the claimant that he would need to attend the site. The agency did not say why. The claimant assumed the visit may be for a site induction. The claimant said he could not visit the site that day but could do so the following afternoon at 15.00. The claimant asked for the site manager's phone number.
40. JF confirmed to KW that the claimant could visit the next day.
41. On 7/3/24 or 8/3/24, arrangements were made between KW and PD that the claimant would attend site on 8/3/24.

8/3/24

42. At 10.28, the agency provided the claimant with the site manager's number.
43. At 10.55, the claimant thanked the agency for the number and said he would contact the site manager on arrival.

Site visit involving the claimant and PD

44. Based on KW's witness statement, we find that this was an informal discussion about the claimant's new role at site which was due to start on 11/3/24.
45. The Claimant attended the site at 14.30. He called PD at 14.32 from his car. He was met and then walked approximately 100 yards from the car park to a bench by the welfare area outside the main construction site.
46. We find that the welfare area was outside the PPE (Personal Protective Equipment) zone of the site because the claimant was not required to wear his PPE during the meeting.
47. In relation to the timing of the meeting, we have relied on the unchallenged evidence of the claimant's call logs (115) and the timed emails where the timings differ from the evidence of PD.
48. The markers we have used to make findings in relation to the timings of the meeting are the call from the claimant to PD at 14.32 stating that he had arrived on site and the email from the agency at 15.17 stating that the claimant was unsuitable for the role.
49. During this 45-minute period, the claimant was walked to and from his car and the welfare area by PD, there was a discussion between the claimant, PD and PD's supervisors about the role, after that meeting, there was a discussion between PD

and his supervisors about the claimant's suitability for the role, there was a discussion between the respondent and the agency about the claimant's suitability for the role and the agency communicated the respondent's concerns about the claimant to him by email.

50. Based on the above, we find that the meeting with the claimant was short and it probably lasted no more than 15 to 20 minutes.
51. At or about 14.40, PD met the claimant at his car. The two of them walked to the welfare area and made small talk on the way about where they were from.
52. At or about 14.45, the claimant and PD arrived at a picnic table in the welfare area and were joined by two of the respondent's site supervisors: Jason Edwards and Ben Thackerey.
53. During the meeting, a worker passed by the gathering and said: "*Mother's meeting today, then?*".
54. During the meeting, PD asked why the claimant wanted to carry on working. He replied that he had plenty of time to rest once he had passed. He wanted to keep his mind and body active. PD replied to say he understood what the claimant meant and told the claimant he was 64 years old. PD asked the claimant if he planned to keep working and this was confirmed. The claimant's response was: "*well yeah, I'm fit enough.*"
55. The claimant asked about options for accommodation near the site. One of the workers told him that he was staying at the Poachers pub down the road. In response, the claimant asked if he had tried the Somerset Cider. The claimant joked that: "*it'll put hairs on your chest*", and: "*I'll show you lads where to go*".
56. Discussion between the claimant and PD included how the project had become quite large and that there had been two previous HASAs who had not quite come up to scratch. One had apparently only appeared at the site sporadically, and the other would not walk around the site to inspect operations. The claimant agreed with PD that that would not do, and that people should show some loyalty to their employer and to their team, and that what was expected of the two previous HASAs was just a part of the job.
57. There was a discussion about the role, what the claimant had done in the past and where he had worked. PD explained that the role was not desk-based, and was hands-on, requiring the claimant to walk many miles a day as the factory was approximately half a mile long and included 19 levels at one point. The claimant did not seem put off by this and said he was fit enough. The claimant's fitness for the role was not explored further.
58. The Claimant showed PD his CSCS card and was told that he did not need to see it. Although PD denied seeing the card before us, we find that he was shown it by the claimant in the meeting because there is reference to it having been seen in the evaluation form (87).
59. During the meeting, an operative walked past wearing a hard hat. The claimant asked why he was wearing a hard hat. This query is referred to in the evaluation form. Although PD told us he was surprised and concerned by the

claimant's question as the claimant, as an experienced HASA, should have appreciated that the operative was wearing PPE because he was in a PPE zone, we have found that the operative was not in a PPE zone as he was in the welfare area.

60. We have also found that this comment was not a reason for withdrawing the offer of the contract to start work on 11/3/24. We have accepted the written evidence of KW at paragraph 22 of his witness statement that:

"The decision not to offer the claimant the role was based entirely on his suitability for the physical demands of the position."

61. PD informed the claimant that there would be a toolbox talk at 7 am on 11/3/24. The claimant offered to lead the talk and was told to observe. The claimant was asked to attend the site at 6.45 on 11/3/24 for the site induction before the tool talk commenced.

62. Following the meeting, PD walked the claimant back to his car.

63. While the two were walking, the site supervisors observed the claimant to be unsteady on his feet. This was not something which PD observed.

64. When PD returned to the supervisors in the welfare area, they expressed concern to PD that the claimant may not be up to the physical demands of the HASA role given the size of the site, and the need to access ladders and scaffolding over several floor levels, to check that the operatives were working safely.

65. All PD had perceived was that the claimant had walked slowly.

66. We find that the claimant was unsteady on his feet because he had had Rickets as a child and he therefore had a tendency to walk slowly and bow-legged.

67. The claimant's lack of suitability for the role, was the first reason given for not appointing the claimant on the evaluation form (87). It was the only reason given by KW at paragraph 22 of his witness statement.

68. We find that that the evaluation form was completed later as there was insufficient time to produce it before PD contacted KW and we have accepted the evidence of the claimant that it was not produced during the meeting itself.

69. PD called KW to tell him the claimant would not be starting on 11/3/24 because he was not physically up to it. We reject that PD gave any other reasons.

70. KW contacted the agency to state that the respondent considered that the claimant was not physically capable of performing the role.

71. At 15.17, the agency sent an email to the claimant standing him down for 11/3/24. The email stated: *"Bit of a weird one, I've had a call from the project manager and they don't think your [sic] right for the job due to the size of the project. Will be going up and down a lot of ladders / scaffolding / stairs etc."*

72. At 15.21, the agency called the claimant to confirm the email it had just sent and to say that he was no longer to attend the site to start work on 11/3/24 as the respondent did not think he *"was up to it"*. The claimant asked for KW's telephone number.
73. At 15.33, the claimant called PD and left a message complaining that he was no longer allowed to start and that he would be taking the respondent to court over it.
74. At 16.08, the agency emailed the claimant with KW's telephone number.
75. At 16.27, the claimant called KW and accused him of 'backtracking' on his decision that the claimant should start work on 11/3/24. The claimant stated that he had had it confirmed in writing and verbally that he was to start working for the respondent on 11/3/24, that he was capable of doing the role and had done it in the past. The claimant offered to do the role on a temporary basis while a permanent HASA was found. KW said he would think about it and would let the claimant know on Monday (11/3/24). The claimant asked about reimbursement of his expenses. His request was declined. We reject the claimant's evidence that there was any mention of his age, or any references to anyone being a laughing stock or having egg on their faces if the claimant was appointed.

11/4/24 and thereafter

76. On 11/3/24, the agency provided the respondent with the CV of another HASA who had worked for the respondent before and who was able to start on 13/3/24. KW therefore decided that the claimant was not needed. KW called the claimant to decline his offer of taking up the role while a new HASA was found. The conversation was friendly.
77. At 14.25 on 11/3/24, the claimant accused the agency of ageism, which he alleged was a criminal offence.
78. On 12/3/24, PD sent an email setting out why the claimant was unsuitable. He stated that: *"after a meeting amongst ourselves, we had genuine concerns about the claimant's physical ability."* There was no mention of the hard hat comment, or of the claimant's general demeanor or any other comments the claimant had made during the interview.
79. On 13/3/24, the claimant informed the respondent's client and the agency that he had contacted the police in relation to the matter.
80. On 28/3/24, the claimant contacted ACAS. On 16/4/24, ACAS issued the claimant with a conciliation certificate. On 23/4/24, the claimant presented his complaint to the Tribunal.
81. On 6/3/24, the respondent contracted with the claimant to start work with effect from 11/3/24 as HASA at its Bristol construction site.
82. On 7/3/24, the claimant sent his passport to the respondent's agent which revealed his age which resulted in the respondent deciding to assess his physical suitability for the HASA role.

83. If it had not been for the claimant's age, the claimant would have started work on 11/3/24 in line with his contract to do so. Because of his age, the claimant attended a site visit on 8/3/24 at which there was no formal assessment of his physical fitness for the role. If it had not been for the respondent's supervisors observing the claimant walking back to his car, the claimant would have started working for the respondent on 11/3/24.
84. We accepted the evidence of KW that the normal practice of the respondent is that self-employed contractors start on site if they are considered suitable for the role on the basis of their paperwork, they are not invited for an assessment of their physical suitability for the role. Any assessment of physical suitability would happen 'on the job'.
85. The submission of the claimant of his passport showing his age on 7/3/24 resulted in the contract for services being withdrawn on 8/3/24. But for the claimant's age, he would have started work on 11/3/24 in line with the contract.
86. The claimant was treated less favourably than a younger comparator in the same circumstances because of his age. A younger comparator would not have been invited to attend site on 8/3/24. The offer would not have been withdrawn from the younger comparator because they would not have been invited to site before the start date so they would have started on the start date.
87. The reason the claimant did not start on 11/3/24 was because of his age. Age materially influenced the decision to withdraw the offer.
88. The welfare area was not within the PPE zone. If it had been the claimant would have had to have been wearing his PPE. The claimant's query as to why someone was wearing a hard hat in the welfare area was therefore not the red flag that PD subsequently alleged it to have been. If it had been, PW would not have considered whether to permit the claimant to start on a temporary basis pending the start of a replacement HASA.
89. On becoming aware that the claimant was 73, the respondent decided it needed to be satisfied of the claimant's physical fitness to achieve its aims of having a HASA fit enough to get about a large site, to climb ladders and to access scaffolding to check on the safety of workers.
90. The respondent did not assess the claimant's physical suitability for the role fairly. He was unaware that his fitness was being assessed as he walked to his car after a site visit that he assumed was no more than a site induction. Observing the claimant walking back to his car was not a fair method of assessing his ability to climb ladders, access scaffolding or negotiate a large site on foot.
91. Withdrawing the offer of work was not a proportionate means of the respondent achieving the aims of having a HASA fit enough to access the site. A fair assessment of the claimant's fitness would have been a more effective and less discriminatory means of achieving the aims.

Relevant law

92. Section 13(1) EqA provides as follows:

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.

93. Section 13(2) EqA provides as follows:

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.

94. Direct discrimination assumes a comparison between the treatment of different individuals.

95. Section 23 EqA provides that the other person (the comparator) may be real or hypothetical but must be in the same circumstances.

96. In this case the claimant seeks to compare himself to a younger hypothetical comparator.

97. The claimant must therefore establish that he has been treated less favourably than a younger person in the same circumstances would have been treated.

98. In this case, the comparator is agreed. It is a younger person with similar qualifications and experience, the same mobility issues, and who would have said the same things in the same way as the claimant did at the meeting with the respondent on 8/3/24 if that comparator had attended the same meeting.

99. Section 136 EqA reverses the burden of proof if the claimant can establish facts which call for an explanation. If the claimant can do so, then the burden is on the respondent to provide that explanation.

Causation

100. In this case, the less favourable treatment must be on the ground of the claimant's age. Per *Amnesty International v Ahmed* [2009] IRLR 884, the test is the reason why test: age must be a reason for the treatment.

101. Age need not be the sole or only reason for the less favourable treatment (*Nagarajan v London Regional Transport* [1999] IRLR 572). Age must have had a 'significant influence' on the outcome.

102. The crucial question is why the claimant received the less favourable treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830).

103. It is not an objective "but for" question of causation, it is a subjective question of identifying whether age was one of the reasons operating on the mind of the decision-maker.

104. We have been assisted by the helpful summary of the relevant authorities set out by Linden J in *Gould v St John's Downshire Hill* [2021] ICR 1, EAT, regardless of whether the 'but for' test is satisfied, or the protected characteristic is an important part of the context, the protected characteristic must materially impact on the thinking of the decision-maker, it must be a reason for the less favourable treatment.

Proportionality

105. If age is a reason for the less favourable treatment, it is necessary to consider whether the less favourable treatment is justified pursuant to section 13(2) EqA. It must not only pursue a legitimate aim, it must also be a proportionate means of achieving it.
106. Proportionality requires a balancing exercise. The importance of the aim must be weighed against the discriminatory effect of the treatment. In *Chief Constable of West Yorkshire Police and another v Homer* [2012] ICR 704, SC, it was emphasised that for the treatment to be proportionate, it must be both an appropriate means of achieving the aim and reasonably necessary to do so. The EHRC Employment Code states makes the point (in the context of proportionality in relation to indirect discrimination) that for a PCP to be necessary, it need not be the only way of achieving the aim, but less discriminatory measures would not achieve the same aim.
107. In most cases, an employer will be expected to adduce cogent evidence in its attempt to justify direct age discrimination (*Pitcher v Chancellor, Masters and Scholars of the University of Oxford and another* [2022] ICR 338, EAT; and *Air Products plc v Cockram* [2018] IRLR 755, CA).

Conclusions

108. The respondent has accepted that the claimant was protected by the EqA in his capacity as a prospective independent contractor.
109. The claimant was aged 73 years at all material times. He compares himself with a hypothetical younger comparator with similar qualifications and experience, the same mobility issues, and who would have said the same things in the same way as the claimant did at the meeting with the respondent on 8/3/24 if that comparator had attended the same meeting.
110. The claimant relies on the less favourable treatment of the withdrawal on 8/3/24 of a contract for services as a self-employed contractor due to start on 11/3/24 ("the withdrawal").
111. In relation to whether the withdrawal was less favourable treatment, we have to decide whether the claimant was treated worse than his comparator.
112. We have decided he was. A younger person in the same circumstances would have started work on the 11/3/24.
113. On 6/3/24, the respondent offered the claimant work with effect from 11/3/24. If he had not submitted his passport on 7/3/24 showing his age, he would not have been invited to a meeting to assess his physical suitability for the role. The claimant was treated less favourably than the younger comparator because the claimant was asked to attend a meeting to assess his suitability for the role. The younger comparator would not have been asked to attend such an assessment. The claimant's offer of work was withdrawn before he started. The younger comparator would have started work on the Monday and therefore would not have had the offer of work withdrawn on 8/3/24.

114. The next issue we have to decide is whether the claimant has established facts from which age discrimination can be inferred. We have decided that there are facts calling for an explanation. If the claimant had not submitted his passport showing his age, and the respondent's agent had not asked the respondent whether the claimant's age was an issue, the claimant would have started work on 11/3/24 in line with the offer and acceptance of work on 6/3/24.
115. The burden is therefore on the respondent to show the reason or reasons they withdrew the offer of work on 11/3/24 and that they were not materially influenced by the claimant's age.
116. The respondent stated that the offer was withdrawn because they considered the claimant to be unsuitable for the role because of his alleged physical frailty when he returned to his car, and the way he conducted himself during the meeting on 8/3/24. They did not admit that they were influenced by the claimant's age. However, that is not unusual. Decision-makers will rarely admit to discriminatory conduct.
117. We have to decide whether the claimant's age materially influenced the decision of KW to instruct the recruitment agency on 8/3/24 to withdraw from the claimant the offer of work which he was due to start on 11/3/24.
118. We have no doubt that, but for the claimant's age, the offer would not have been withdrawn because the claimant would not have been invited to attend the site on 8/3/24 if KW had not been concerned about the claimant's age when it was drawn to his attention by JF. However, we recognise that that is not the appropriate test.
119. We have to decide whether the claimant's age materially influenced the decision to withdraw the offer. We are unanimously of the view that the claimant's age materially influenced that decision. The claimant was invited to attend an evaluation meeting because of his age. KW was concerned that the claimant may not be physically capable of undertaking the role because of his age. When KW was made aware of the claimant's alleged physical frailty immediately after the meeting, he decided and/or agreed with PD that C was not physically up to the job.
120. We are unable to find that the claimant's age did not materially influence KW's thinking. KW accepted before us that the claimant would not have been invited to the site before his start date if he had not had concerns about the claimant's physical capabilities to perform the role because of the claimant's age. Since those age-related concerns were confirmed after the site visit, we are unable to find that KW's decision to withdraw the offer was not materially influenced by the claimant's age.
121. We therefore find that this is one of those cases which satisfies both the 'but for' and the 'reason why' tests of causation. The claimant's age was not merely a substantial part of the context, but it materially influenced the decision to withdraw the offer of work which the claimant would otherwise have started on 11/3/24.

Proportionality / justification

122. The question we have to decide is whether the withdrawal of the offer on 8/3/24 was an appropriate and reasonably necessary way of achieving the aims of having a health and safety advisor on site who was able to climb scaffolds, stairs and walk

roughly 8 miles a day so that he could check that all the tradesmen were working safely to ensure the safety and efficiency of operations on site and to maintain the trust and satisfaction of clients ("the aims").

123. The legitimacy of the aims have not been challenged.
124. We have to decide whether the withdrawal of the offer was an appropriate and reasonably necessary way of achieving the aims or whether something less discriminatory could have achieved the aims, balancing the need of the claimant to work and the need of the respondent to have someone sufficiently fit to achieve its aims.
125. We have concluded that to achieve the aims, the respondent needed someone sufficiently fit to do the job. It was therefore entitled to assess the claimant's physical fitness for the role. However, withdrawing the offer following an assessment of the claimant's fitness which he did not know had occurred was not an appropriate or reasonably necessary way of achieving the aims.
126. A more appropriate and less discriminatory way of achieving the aims or assessing the claimant's physical fitness for the role, particularly after having offered the claimant the role, would have been to have been open with the claimant about their concerns before a decision was taken. The respondent could and should have asked the claimant to take part in an assessment of his physical suitability for the role. They could have asked him to walk about the site over an extended period and/or to climb scaffolds, ladders and/or stairs, making clear to him why they needed to be satisfied that he was sufficiently fit for the role. Such measures would have given the opportunity to the claimant to prove himself. They could and should have made clear that the offer may be withdrawn if they were not satisfied as to the claimant's fitness for the role.
127. Cogent evidence is usually necessary to show that the measure was reasonably necessary and appropriate to achieve the aims. Here there was no evidence that the walk to the car justified withdrawal of the offer of work to achieve the aims of having a sufficiently fit HASA. The respondent led no evidence that withdrawing the offer was necessary to achieve the aim of having a fit HASA.
128. We have concluded that inviting the claimant to an assessment of his physical suitability for the role and being clear to him the purpose of the assessment and why it was necessary would have been less discriminatory and it would have achieved the respondent's aims. It would have more properly balanced the needs of the claimant and the respondent. Withdrawing the offer without a fair assessment of the claimant's physical fitness for the role was also inappropriate because it risked refusing work to someone who may have been fit enough to do the role if only he had been fairly assessed.
129. For these reasons, we are unanimously of the view that the complaint of direct age discrimination is well founded and succeeds.

Approved by:

Employment Judge Quickfall

20 July 2026

REASONS SENT TO THE PARTIES ON

.....14 August 2026.....

.....

FOR THE TRIBUNAL OFFICE