



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr N Dawson

Evans Cycles Ltd

Heard at: London Central

On: 14 – 16 July 2021

Before: Employment Judge Lewis
Ms S Keating
Ms P Slattery

Representation

For the Claimant: Represented himself

For the Respondent: Mr J Bryan, Counsel

JUDGMENT

The unanimous decision of the tribunal is that:

1. The claim for direct age discrimination is not upheld.
2. The claims for age-related harassment are not upheld.
3. The claim for indirect discrimination is dismissed, having been withdrawn.

SUMMARY

1. The respondent company is a chain selling sporting goods. In response to the escalating Covid pandemic, it decided on 16 March 2020 to send home on full pay three categories of employee whom it thought may be at particular risk: anyone with chronic underlying health conditions, pregnant workers and workers over the age of 60. Mr Dawson, who was aged 62, was amongst those sent home the next day. He was a retail assistant at the St Paul's store.

2. Mr Dawson did not want to be sent home. He loved his job and took pride in contributing to the team. It made him feel isolated and anxious about his future employability. After taking out a grievance, he was allowed to return to work on 19 May 2020.
3. Mr Dawson brought claims for direct age discrimination and age-related harassment. The harassment claim simply referred to the company not allowing him to work or volunteer when essential shops started reopening shortly after the initial lockdown.
4. The tribunal did not uphold the claims. It was a difficult case to decide because the tribunal could appreciate both viewpoints. But ultimately, the company was justified in taking the particular steps in order to protect the health and safety of its employees. At that time, matters were escalating very fast. It was an unprecedented and dangerous situation. Although the exact level of danger to those over 60 was uncertain, there was evidence of a correlation between age and serious illness.
5. It is a feature of the country's response to Covid-19, that decisions affecting large groups of people have had to be made in the general interest, even if individuals might feel differently. The respondent's approach was consistent with this general ethos. Its intention to protect the health and safety of vulnerable groups is to be commended. This should not be taken to mean that every decision impacting on a certain age group would be justifiable. We stress that our judgment is based on the particular facts, the timing, and the exceptional circumstances involved.

REASONS

Claims and issues

1. The original claims were for direct age discrimination, indirect age discrimination and age-related harassment under the Equality Act 2010.
2. Mr Dawson withdrew his indirect age discrimination claim as the provision, criterion or practice in question was defined by age, which is direct discrimination. The tribunal said it was willing to decide the claim anyway if Mr Dawson felt uncertain as a litigant in person as to whether he should withdraw his claim, but he was happy to do so. The claim was therefore dismissed on its being withdrawn.
3. The remaining issues were as follows:

Direct age discrimination

- 3.1. Was the failure to allow the claimant to work (apart from a few days) in the period 17 March 2020 to 18 May 2020 less favourable treatment because of his age?
- 3.2. Did that amount to a detriment?
- 3.3. If so, can the respondent show that not allowing over 60s to work at that time was a proportionate means of achieving a legitimate aim?
 - 3.3.1. Was the aim legitimate? The respondent says its aim was reducing the risk of vulnerable, highly vulnerable or otherwise 'at risk' individuals contracting the coronavirus; and
 - 3.3.2. Ensuring it was not acting unlawfully in breach of its non-delegable duty of care, and health and safety duties, towards those workers who were, or could be, at risk of serious illness as a result of the coronavirus.
- 3.4. Was the treatment proportionate?

Harassment

- 3.5. The claimant alleged each of the following acts of harassment:
 - 3.5.1. Telling him on 17 March 2020 that he was not able to return to work as he was over the age of 60.
 - 3.5.2. Telling him on 31 March 2020 that he was a high risk because he was over the age of 60.
 - 3.5.3. Not telling him on 24 April 2020 that he could work at the St Paul's store.

In respect of each of those actions:

- 3.6. Was such conduct unwanted?
- 3.7. Was it related to age?
- 3.8. If so, did it have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 3.9. If it did not have that purpose, did it have that effect, taking into account:
 - 3.9.1. The perception of the claimant
 - 3.9.2. The other circumstances of the case
 - 3.9.3. Whether it is reasonable for the conduct to have that effect.

Time-limits

- 3.10. Were the claims in time, taking account also of discrimination which extends over a period?

- 3.11. If not, is it just and equitable to extend time?

Remedy

- 3.12. Recommendations
3.13. Injury to feelings
3.14. Interest

Procedure

4. The hearing was conducted over a video platform, ie CVP.
5. The tribunal heard from the claimant (Mr Dawson) and, for the respondent, from Mr Brown and Ms Obrastsoff-Rutinsky. There was an agreed trial bundle of 361 pages. Mr Bryan also provided a skeleton argument in writing at the outset and some case law reports.
6. The respondent provided Mr Dawson with a hard copy trial bundle and, on the first day, hard copies of the witness statements and the extra pages of the bundle. He also had all this in electronic form. The respondent's witnesses were happy to work from electronic bundles on a second screen.

Fact findings

7. The respondent company is a retailer of sporting goods within the Frasers Group of companies. Mr Dawson started work for the company on 7 June 2017. At the time of the relevant events, he was working in London's St Paul's store as a retail assistant on 16 hours/week. At that time, he was aged 62 – his date of birth is 23 August 1957. The store primarily sold cycling goods.

The development of the Covid-19 pandemic in the UK

8. On 3 March 2020, the Prime Minister declared the Covid-19 outbreak a level 4 incident and launched the government's 'Coronavirus Action Plan'. 51 people had tested positive for coronavirus in the UK. On 11 March 2020, the World Health Organisation declared a pandemic. A BBC news article on 15 March 2020 reported that 'Every Briton over the age of 70 will be told "within the coming weeks" to stay at home for an extended period to protect themselves from coronavirus'. It was noted in the article that most of the 35 coronavirus-related deaths in the UK had been of people aged over 60 and with underlying health conditions. A BBC news article on 16 March 2020 said the government advised that by the weekend, groups particularly vulnerable to Covid-19 such as those over the age of the 70 would be asked to stay at home for 12 weeks. The article also said that according to the NHS, older people were more likely to become severely ill if they caught coronavirus, and that the NHS said that anyone over the age of 65 was considered an 'older person', but people age at different rates.

9. A report by the Imperial College Covid-19 Response Team on 16 March 2020 has a table of then current estimates of the severity of cases. The table does show an increase in hospitalisation, critical care and death associated with age. Whereas 50 – 59 has 10.2% hospitalisation and 0.6% fatality; 60 – 69 has 16.6% and 2.2% respectively, and 70 – 79 has 24.3% and 5.1% respectively. Under 50s is considerably lower.
10. On 17 March 2020, the government began holding its daily press conferences. On 23 March 2010, the Prime Minister announced a national lock down.
11. An article in the Journal of the Royal Society of Medicine on 21 April 2020 was headed ‘Protecting older people from Covid-19: should the United Kingdom start at age 60?’ It recommended that, to reduce Covid-19 related hospitalisations and deaths, those aged between 60 and 69 were ‘particularly stringent in implementing social distancing and personal hygiene’. In the absence of government guidance, people in that group ‘can make their own decision on how to minimise their risks .. this can include isolating themselves in a similar manner to that recommended by the UK government for people aged 70 and over.’
12. We have taken the above from news reports and research articles which the parties chose to put in the trial bundle.

The company response to the pandemic

13. On 13 March 2020, the respondent sent staff its first communication about coronavirus. It said that people should stay at home if they showed any symptoms, however mild, and they would be paid statutory sick pay during the isolation period.
14. By this stage, the respondent’s managers were reporting to senior management that staff were getting in touch with them, begging not to have to come into work because of their anxieties.
15. On 16 March 2020, a decision was taken across the whole Frasers group, including the respondent, to protect any vulnerable or at risk staff members. Key measures were that anyone aged 60 or over, anyone with chronic underlying health conditions, and pregnant workers would be sent home. They would work from home if possible, but would be at home anyway, until further notice.
16. The rationale for the decision was health and safety. Frasers and the respondent felt that there was a serious absence of information about the risks; many people were clearly frightened by the risks posed to them personally as well as their loved ones should they be forced to attend for work. The government seemed to be instructing those aged over 70 to isolate, but there was little information about why that was. It was felt vital to reduce the risk to vulnerable, highly vulnerable or otherwise ‘at risk’ individuals, and it was accepted at the time (as it still is) that age increases

the likelihood of serious illness. The company also felt the need to ensure it was not acting unlawfully or in breach of its duty of care and health and safety duties towards employees who could be at serious risk. Finally, the respondent felt it needed to find a balance between protecting people and maintaining operations. There was not much time for a detailed analysis as to exactly what age should be selected given the absence of data and that decisions had to be made very quickly.

17. Ms Obrastsoff-Rubinsky, HR Business Partner, was told to contact the line managers of employees who were over 60 or had underlying health conditions and tell them that such employees should be sent home.
18. On 17 March 2020, Mr Dawson's manager, Jack Beetson, was told by Ms Obrastsoff-Rubinsky, that Mr Dawson was 'a vulnerable or at risk staff member' due to being over 60 and that he should remain at home and that he would get full pay. Mr Beetson telephoned Mr Dawson to pass this on. Mr Dawson asked for written confirmation that he would receive full pay.
19. Mr Beetson contacted Ms Obrastsoff-Rubinsky that day and told her Mr Dawson did not want to go home and he thought it was unfair. He said he was not prepared to go home until he received a letter confirming that he would continue to get paid. Ms Obrastsoff-Rutinsky said a letter would be sent.
20. Mr Dawson also emailed the HR team that day as follows:

'I have just been contacted by my manager, Jack Beetson, that I am not required to go into work tomorrow or for the foreseeable future. Can you please tell me what is going on?
I have no health issues, so what exactly is the wording of this suspension? Can you impose this on an employee? Jack was a bit hazy about whether I would be paid or not and in the absence of any written communication I can understand his uncertainty. We are encouraged to think of ourselves as a team, how does this work for the good of St Paul's branch if Jack is now going to have to employ someone else?
I would appreciate a detailed explanation in writing and in the absence of one I shall be turning in to work as usual.'
21. Ms Obrastsoff-Rutinsky telephoned him in response. There was some tension in the conversation. Ms Obrastsoff-Rutinsky was stressed and worried about her family's health and she felt the company was trying to protect its employees, whereas Mr Dawson was objecting.
22. Ms Obrastsoff-Rutinsky had expected a letter to go out from the HR team (it was not her remit to send the letter) that evening or the next day. In the event, no letter went out till 24 March 2020. Ms Obrastsoff-Rutinsky said that the company was very busy on a number of fronts dealing with the crisis, but she accepted in the tribunal that it could have had a standard letter drafted and ready to send straight out.

23. Mr Dawson went in to work on 18 March 2020 as rostered. Mr Beetson agreed that Mr Dawson could work pending any official confirmation that he was not allowed to do so. Neither of them had received the promised letter from HR, and Mr Beetson had in mind that Mr Dawson did not fall into the government's 'at-risk' category.
24. Mr Dawson worked for the rest of the week. Both became concerned at the lack of anything in writing and Mr Beetson chased matters up.
25. Meanwhile, on Monday 23 March 2020, Mr Dawson agreed with the assistant manager, Ms Pasfield, to work overtime for the rest of that week to cover colleagues who were absent for Covid-related issues.
26. On the evening of 23 March 2020, the Prime Minister announced a national lockdown, which meant all of the respondent's stores had to close.
27. On 24 March 2020, Ms Moran in HR emailed Mr Dawson to say:

'Following recent announcements by the government, we have made steps to protect colleagues who fall into the higher risk categories. As of 19/3/20, we ask that you do not attend work, until we receive an update that allows us to reassess your situation and allow you to return to your normal work location. During this period, you will remain on full pay.'
28. Mr Dawson responded by asking how he fell into the higher risk categories. Ms Obrastsoff-Rutinsky replied by email on 31 March 2020 that 'as per our conversation last week, you are deemed to be high risk as you are over the age of 60'.
29. Meanwhile, on 29 March 2020, Mr Beetson posted on the respondent's WhatsApp chat that St Paul's would remain closed, but other stores were looking for volunteers. Mr Dawson put himself forward and Mr Beetson forwarded his details to the Clapham manager and informed the London regional manager, Mr Byrne. The next day, Mr Beetson telephoned Mr Dawson, on Mr Byrne's instructions, to say that unfortunately they could not accept his offer to volunteer for now, and that he should have received an email saying he could not work.

The claimant's grievance

30. On 2 April 2020, Mr Dawson submitted a formal grievance. He said his unfair treatment had a detrimental effect on his mental health, sleep patterns and overall well-being. He said it had led to needless stress for himself and his partner in what was already a crisis situation. He said HR had taken away his freedom of choice and he was left disadvantaged compared with his colleagues who were allowed to work because they were in a separate age category. He also was not allowed to work the extra hours on offer. He said he felt his future employability was also negatively affected as 'high risk' and 'absent' were negative labels to have on his employment record.

31. Mr Dawson added that this was discrimination under the Equality Act 2010. Pending written clarification of the position, which had taken some time, he had done everything he could to support team work and customer service. He had offered to work in the Clapham store and was in discussions, but was denied the opportunity.
32. The respondent appointed Mr Byrne to hear the grievance. Because of the Covid situation, it was proposed to hold the meeting over conference call or on Teams video platform.
33. There were a number of technical problems and on 22 April 2020, Mr Dawson suggested that they speak by phone or deal with the matter in writing. He also emailed HR (Ms Gledhill) to say that Mr Beetson was again asking for volunteers to open the St Paul's store, and asked, 'Am I again going to be refused?' Ms Gledhill replied that she would note down Mr Dawson's wish to unfurlough and Mr Byrne would look into it as part of the grievance process.
34. It was agreed to deal with the grievance in writing and on 24 April 2020, Mr Dawson answered a number of questions posed by Mr Byrne the previous day. Mr Dawson explained again why he felt disadvantaged. Partly in a monetary aspect, in that he had been prevented from working overtime hours. But more importantly in other respects – not being allowed to gain experience of working under social distancing rules; not being given the chance to maintain and establish new customer contacts; fears about the 'high risk' label and future employability; no defined end to the enforced absence; and fear that if he went for a new job he would have to explain why he was not currently working.
35. Mr Dawson told the tribunal he felt excluded. We accept this. It is consistent with his behaviour and what he was saying at the time.
36. As the respondent points out, Mr Dawson did not explicitly state that he had been 'harassed' in his grievance letter or in answering these questions. When the legal definition of harassment was gone through with Mr Dawson at the tribunal, he said he felt his exclusion was offensive and that his dignity had been undermined. We will discuss this further in our conclusions.
37. Mr Byrne also interviewed Mr Beetson, Ms Pasfield and Ms Obrastsoff-Rutinsky as part of the grievance. Ms Pasfield said, 'I truly think that Nick feels like his own free will is being taken away from him by a company he loves to work for. As a highly thought of member of the team, a lot if not all of the store team have felt he is being unfairly treated simply because he is in a certain age bracket. He has always maintained that he is in good health for his age and he has never missed a day of work since I have known him, so for the company to basically try and force him out of the store seems like an unwarranted thing to do.'
38. On 24 April 2020, Mr Dawson emailed Ms Gledhill to seek clarification as the store was opening on Monday and he had put his name down to work. Ms

Gledhill replied that her previous email stood: Mr Dawson could not yet return to work but Mr Byrne would look into it.

39. On 4 May 2020, Mr Dawson emailed Ms Gledhill to ask when he was likely to hear something. Ms Gledhill responded on 5 May that the matter was still being reviewed and she could not give a timescale. On 7 May, Mr Dawson chased again, asking what the 'update' referred to in the 24 March email meant. On 11 May 2020, Mr Dawson emailed again, chasing a reply to his email on 7 May and asking if he was still suspended from work. Ms Gledhill replied that he was not suspended, he was furloughed. On 13 May 2020, Mr Dawson emailed Ms Gledhill:

'I don't seem to be having any luck communicating with you these days, my email questions go unanswered and I mysteriously get cut-off when I try to contact you by phone. My manager (Jack Beetson), is asking for staff to return to work, obviously I want to do that, are you going to prevent that, as you have done in the past?'

Ms Gledhill replied the next day: 'As discussed, Sean will look into your return to work as part of the grievance'.

40. Meanwhile, on 29 April 2020, Mr Byrne emailed Ms Gledhill his outcome statement, commenting that 'Its probably going to cause a bit of trouble, so give me a call before you send it to [Mr Brown] or the lawyers in case I have missed something or got something wrong'. Mr Byrne had concluded:

'In summary, I agree that Nick Dawson has been disadvantaged by his age and against government guidelines relating to vulnerable and at risk people. Sports Direct have done this with the best of intentions, but I believe they have taken away the choice and this is as a direct result of Nick's age.' Mr Byrne felt that as a result of his decision, he should be allowed to return to work if he chose and that 'all colleagues deemed at risk by Sports Direct and against government guidelines, should also be reviewed and allowed the choice to return.'

41. On 7 May 2020, Ms Gledhill sent Mr Byrne the outcome letter and said it had been agreed that he would be able to return once this had been finalised should he still wish to. Mr Byrne objected. His paragraph had been taken out. He said there was no reference to age discrimination but it was very clear that Mr Dawson's grievance was about age. He said he was not putting his name to this.
42. There was clearly some further negotiation. On 18 May 2020, Mr Byrne agreed the letter could go out, though he added: 'Not particularly happy that every reference to age has been removed now but need to put this to bed'.
43. Mr Dawson told the tribunal that, had there been acknowledgement of age discrimination in the grievance outcome letter, he may well not have brought a tribunal claim. Mr Bryan argued that it was legitimate to make the alteration because Mr Byrne did not understand the legal definition of age discrimination or, in particular, that there is a justification defence. If that is the case, we would have thought it better to tackle the matter head on: accept that it was a rule based on age, but explain the reason for it, and that the law allows a justification defence to age discrimination. Mr Byrne's instincts were correct. If

a grievance was about age discrimination, the grievance outcome had to at least address age discrimination. Had Mr Dawson's feelings been acknowledged from the outset together with an early explanation as to why over 60s had been chosen, these proceedings may have been avoided.

44. Mr Dawson was sent the finalised grievance outcome letter on 18 May 2020. Mr Byrne partly upheld the grievance. He said it was somewhat hypothetical as to what overtime Mr Dawson would have worked, but he would uphold grievance that Mr Dawson earned less than otherwise. He said Mr Dawson would have an opportunity to learn about working with social distancing requirements, so he did not uphold that part of his grievance. He said there was no evidence of any negative impact on Mr Dawson's future employment with the respondent, and it was unlikely to affect future employment elsewhere because everyone was remaining at home, and the respondent only supplies standard references anyway. He said Mr Dawson would be allowed to return to work.

The grievance appeal

45. Mr Dawson acknowledged receipt on 24 May 2020. He said he was happy to be back at work and contributing to the future of the company. He was grateful that part of his grievance had been upheld. However, since his grievance was about age discrimination, he was concerned that it was not even mentioned in the outcome letter.
46. The respondent arranged for the Mr Dawson's appeal to be heard by Mr Kirkhope, Retail Director, on 5 June 2020 via Teams video platform.
47. The meeting was duly held. Mr Dawson said it was most upsetting to have had to take out a grievance. When asked whether he was upset about the decision that he could not work, or the way it was communicated, he said both. It was put to him that the policy was so that he could look after himself and not put himself at risk. Mr Dawson responded that he could look after himself. He considered life to be a risk. Mr Dawson said another thing that had concerned him was that there was no return to work date. Nobody's job was certain. Anything that affected his future employability was a concern. Another spike was predicted, so what would prevent this happening again two months down the line?
48. By letter dated 9 June 2020, Mr Kirkhope rejected the age discrimination allegation. He said that the financial disadvantage was hypothetical, as most colleagues were working less than their contractual hours. However, the company would pay the shifts agreed for Clapham as goodwill. Mr Kirkhope said the decision to place vulnerable categories of colleagues onto paid leave was across the Group and was to ensure that they protected staff as much as possible in those unprecedented times. 'This was done with the best interests of our people at heart.' Mr Kirkhope said communication with Mr Dawson regarding why he had been put on paid leave could have been handled better and he did not feel this was correctly explained at the time. He said 'We will learn from this'. Regarding Mr Dawson's concern that this might happen

again, he said they could not predict what would happen and would endeavour to keep their people safe. However he did acknowledge how this had made Mr Dawson feel personally and they would take that into account when making any decisions whether to shield him were they to find themselves in that position again.

49. Meanwhile, Mr Dawson returned to work in the St Paul's store on 19 May 2020.

Law

50. Mr Bryan provided an opening written skeleton argument which included a summary of the law. It is not necessary to reproduce it in full here.
51. Under s13(1) of the Equality Act 2010 read with s5, direct discrimination takes place where, because of age, a person treats the claimant less favourably than that person treats or would treat others.. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.
52. When bringing a direct discrimination claim, there must be a 'detriment' to the claimant. A detriment need not involve any physical or economic disadvantage, but it cannot be an unjustified sense of grievance. The claimant must feel he has been disadvantaged in the circumstances in which he has to work thereafter. The tribunal must then consider whether that opinion was a reasonable one to hold. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285.)
53. Unlike other types of direct discrimination under the Equality Act 2010, there is a potential justification defence to direct age discrimination. This is under s13(2), if the respondent can show its treatment of the claimant was a proportionate means of achieving a legitimate aim.
54. The aim must be a social policy objective, ie of a public interest nature, which is 'distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness. The fact that a particular aim is capable of being a legitimate aim under the Directive (and therefore the domestic legislation) is only the beginning of the story. It is still necessary to inquire whether it is in fact the aim being pursued. Once an aim has been identified, it has still to be asked whether it is legitimate in the particular circumstances of the employment concerned. If the aim is legitimate, the means chosen have to be both appropriate and (reasonably) necessary.... The means have to be carefully scrutinised in the context of the particular business concerned in order to see whether they do meet the objective and there are not other, less discriminatory, measures which would do so. (Seldon v Clarkson Wright & Jakes [2012] ICR 716, SC)
55. Where it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it. There is a distinction

between justifying the application of the rule to a particular individual, which in many cases would negate the purpose of having a rule, and justifying the rule in the particular circumstances of the business. (Seldon)

56. In Seldon (No.2), the tribunal said there was not only one age which would have fulfilled the respondent's aim. A narrow range would eg 64-66. Mr Seldon appealed and asked for the specific age of 68. (The age had been 65.) The EAT said the fact that a tribunal may have identified a different date within very much the same age range but slightly later does not mean there was an error of law.

Harassment

57. Under s26, EqA 2010, a person harasses the claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

Time-limits

58. The relevant time-limit is at section 123(1) Equality Act 2010. Under section 123(1)(a), the tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made. By subsection (3), conduct extending over a period is to be treated as done at the end of the period.
59. If a single act has continuing consequences, the three months is counted from the act.
60. Under s123(1)(b), if the claim is presented outside the primary limitation period, ie the relevant three months, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable. This is essentially an exercise in assessing the balance of prejudice between the parties using the following principles:
61. The burden of persuading the tribunal to exercise its discretion to extend time is on the claimant.

Conclusions

62. We have not found this an easy case to decide. In our view, everyone involved was doing their best in very difficult, frightening and unique circumstances. We have decided the case on the particular facts and particular timing. Nothing we say should be taken as any kind of general

comment on what measures an employer should or should not adopt at various stages of such a pandemic.

Direct age discrimination

63. There was no dispute that failing to allow Mr Dawson to work from 17 March 2020 to 18 May 2020 (apart from a few days) was because of his age, ie being over 60. The key issues were (i) was this a detriment, given that he was paid and that many employees would have been pleased not to have to work in the circumstances; and (ii) could the respondent prove it was a justified decision?

Detriment

64. Mr Dawson felt that failing to allow him to work from 17 March 2020 to 18 May 2020 (apart from a few days) was a detriment. We find that was a reasonable opinion to hold.

65. We note that Mr Dawson's actual and potential financial losses were made good. But a detriment does not need to be economic.

66. It is clear from what Mr Dawson said and wrote at the time, as well as the comments by Ms Pasfield in her statement for the grievance, that Mr Dawson was upset about far more than the procedures followed and any concern about whether he would lose pay. He was naturally concerned about those two points, but that does not detract from his other concerns. Mr Dawson's evidence to the tribunal was also consistent with this.

67. It was important to Mr Dawson to feel part of a team, and the decision to send him home undermined that. He wanted to contribute. He felt being sent home was isolating. He was the only person in his team to be sent home. He was afraid about his job security. He thought it would look bad on his record internally, and would also affect his chances of getting a new job if he lost his job with the respondent. The fact that there was no defined end increased his anxiety. He was worried this could happen again in the future. His mental health and sleep patterns were affected. He usually sleeps like a log, but he lay awake and worried about his job.

68. Mr Dawson took pride in his contribution to the company. As Ms Pasfield observed, he felt his free will was taken away from him by a company he loves to work for. He had never missed a day of work.

69. He wanted to work and he was not allowed to. We find his opinion that being sent home was a detriment was a reasonable one to hold. The fact that some other workers might have been very relieved to be sent home does not make his own perspective unreasonable.

70. The fact that the company's motives were good does not change the fact that he was deprived of an opportunity to work when he wanted to work alongside his colleagues (who were not so deprived) and also does not

change the reasonableness of his view that it might impact on his future employability.

Justification

71. The respondent's aim was to protect the health and safety of employees who they considered to be particularly vulnerable, and also to abide by their health and safety legal duty of care.
72. That aim is legitimate and it is an aim of public interest nature. It did not further the respondent's private interests, eg in order to make money.
73. The key question is whether it was proportionate to impose a blanket rule that those over 60 be sent home (alongside those with underlying health conditions and pregnant women).
74. On the one hand, we considered the discriminatory effect on employees over 60. They were not allowed to work, but they were paid. We have no evidence as to any other on them of this, save to say that none went as far as lodging a grievance about it.
75. We would say it is generally accepted that some employees work only to get paid and by the age of 60 would be happy to be freed from the need to do so. For other employees, they gain enjoyment from work, from a sense of purpose or interest, from social relations with others and from structure. As employees get older, it can also be a source of self-esteem and continued participation in society. Mr Dawson exemplifies that. We can well imagine that people who feel they want to work and contribute to society, but are told they cannot do so because of their age, would be very unhappy.
76. In the particular context, we believe that some employees over 60 may have had feelings of exclusion and experienced an impact on their self-esteem by being told to stay at home, when younger colleagues were being asked to contribute: it is a major social crisis and you are told that you are too old to help out. These were Mr Dawson's feelings and we can imagine that some other 60 year old employees might feel that way. This is supported by our knowledge that restrictions caused by lock-downs are thought to have caused mental ill-health amongst many people.
77. On the other hand, when considering the discriminatory effect, there was no loss of pay and it was only a temporary restriction – albeit of uncertain duration. Most importantly, many people would have been extremely relieved not to have to subject themselves to the risk of contracting Covid.
78. We have to weigh this, complex discriminatory impact, against the company's reasonable needs.
79. Employers have a health and safety duty of care towards their employees. The respondent had to make a very quick decision based on limited data in an unprecedented situation. This was not a small health and safety risk. It

was a very dangerous, frightening and rapidly worsening situation. There was already evidence that the risk of serious disease increased with age, certainly from age 50 upwards in incremental steps, and that the 60s were more at risk than the 50s. Potentially, a large number of people would become ill, seriously ill, have to go to hospital, and may die. Staff were begging their managers not to come in. Matters were moving very fast in those early days.

80. We note that the government had not issued any guidance stating over 60s were particularly vulnerable or that they should be sent home. The government's focus in the lead up to the general lock down was on whether to isolate the over-70s. But there was also media discussion as to whether the government was being sufficiently cautious and moving fast enough.
81. The respondent decided to be careful. There was uncertainty both about the level of risk and about the extent to which employers might be liable under health and safety legislation. The respondent could not protect all its employees because it needed people to run its business. But it selected the three groups which early evidence considered might be the most at risk: those with underlying health conditions; pregnant employees; and employees over 60. In the context that they were not being dismissed and they were being sent home on full pay with no criticism attached from the company's point of view, on balance we find the action proportionate.
82. We add that the company did have a grievance procedure. It was possible for employees who objected to take a grievance asking to return to work and to have that considered. That was what Mr Dawson was successfully able to do. Of course it is to an extent a detriment to have to take a grievance, and it takes time. It does not remove all the detriment. But it is another factor which can be weighed in the balance.
83. It is a feature of the country's response to Covid-19, that decisions affecting large groups of people have had to be made in the general interest, even if individuals might feel differently. The respondent's approach was consistent with this general ethos. Its intention to protect the health and safety of vulnerable groups is to be commended. This should not be taken to mean that every decision impacting on a certain age group would be justifiable. We stress that our judgment is based on the particular facts, the timing, and the exceptional circumstances involved.
84. We have every sympathy with Mr Dawson who is committed to the company and committed to his work. His manager and assistant manager clearly think highly of him. His regional manager understood his point of view. Procedurally, the respondent could have handled the communication much better and that may have prevented this case. But weighing everything together in the unique circumstances, we find that the respondent's actions were justified.

Harassment

85. There are three related alleged acts of harassment. The first is the respondent telling Mr Dawson on 17 March 2020 that he was not able to return to work as he was over the age of 60. The second was Ms Obrastsoff-Rutinsky's email on 31 March 2020, telling Mr Dawson that he was a high risk because he was over the age of 60. The third was telling him on 24 April 2020, in response to his query whether he could work at St Pauls when it reopened on the Monday, that he could not yet return to work. In the latter case, Ms Gledhill said Mr Byrne would look into it as part of the grievance.
86. The respondent accepts that each of the alleged acts of harassment were conduct related to age. It is clear also that they were unwanted. The real question is whether they had the purpose or effect of violating Mr Dawson's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.
87. There is no real suggestion that the respondent had the purpose of violating Mr Dawson's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. It is clear to us that it did not have such a purpose. The respondent's purpose was protecting health and safety.
88. Regardless of the purpose, did any or all of those actions have that effect? Case law has pointed out that the words in section 26 are very serious words. They set a high threshold. Moreover, it is not only a question of harming dignity, but 'violating' it. It is not simply a question of something feeling humiliating or hostile or offensive, but it creating such an 'environment'.
89. Mr Dawson was hesitant in his evidence and in his final comments about whether he felt these words applied. When he suggested some of the words might have applied, his reasons were appropriate for describing a 'detriment' or poor procedures, but not for the high threshold that the section 26 words suggest. For example, when asked about violating dignity, he said he was concerned about the security of his employment. When asked about a hostile environment, he referred to HR's hostile 'approach' in not answering his questions. He did also say that any form of exclusion creates a hostile environment. Again, we accept that this was a detriment, but we do not think it created a hostile environment in the sense meant by section 26, which uses the word 'hostile' along with 'intimidating', 'degrading' etc.
90. Looking also at Mr Dawson's description of his feelings in his grievance and emails at the time, while we believe his concerns fully meet the concept of 'detriment', he did not describe matters in a way which suggests he was perceiving them as creating the sort of environment envisaged in section 26.
91. We also do not think it would be reasonable for the three actions to have had that effect. Mr Dawson knew the context and that the respondent perceived it as a health and safety measure in the context of an unprecedented and dangerous pandemic. Even if he did not agree with being deprived of choice and was uncertain about motives and implications, it would not have been reasonable to perceive any of the alleged acts of harassment

as violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

92. We therefore find that the actions did not, have the unlawful effect and the harassment claims are not upheld.

Time-limits

93. The respondent argues only that the direct discrimination claim was out of time. It accepts that the harassment claims, if upheld, would constitute discrimination extending over a period, the end of which was in time. Moreover, if the harassment and direct discrimination claims were upheld, the direct discrimination claim would form part of that continuing discrimination and would also be in time.
94. Looking purely at the direct discrimination claim, the respondent argues that the failure to allow Mr Dawson to work in the period 17 March 2020 to 18 May 2020 (apart from a few days) amounted to a single decision applied on 17 March 2020 with continuing consequences. If this is correct, the deadline for contacting ACAS under the early conciliation procedure would have been 16 June 2020. The claimant did not contact ACAS until 26 June 2020. Hence the extension of time under the early conciliation procedure would not apply. The claim, presented on 26 August 2020, would be 10 weeks late.
95. Arguably, the decision was not applied to the claimant until he received the email on 24 March 2020, as he was permitted by his local managers and with the knowledge of HR, to continue to work until and including 23 March 2020. However, counting 3 months from 24 March 2020, the claimant would still have been late in notifying ACAS.
96. The direct discrimination claim is therefore out of time. However, we find that the claim was presented within such other period as we find just and equitable. Related events and applications of the policy decision continued to take place right up to when Mr Dawson was permitted to return to work on 19 May 2020. This included not telling him on 24 April 2020 that he could work at the St Paul's store. Mr Dawson attempted to resolve the matter by a grievance. This is not in itself a ground for allowing a late claim, but it is a factor to be considered when analysing why he delayed and the exercise of our discretion overall. Given the circumstances of the pandemic, to attempt to resolve the matter by grievance was perfectly reasonable. It is true that Mr Dawson had taken advice from ACAS, Citizens Advice and at one stage, a lawyer, and he had also done his own research. We would expect him to have been told about time-limits although we can also imagine that, on these facts, when time should be counted from may not have been obvious. In any event, even if he was given clear advice, it is a factor against him, but not in itself conclusive. We were not advised of any prejudice to the respondent caused by the lateness of the claim as opposed to the fact of the claim per se. On the other hand, if we were to disallow the claim, Mr Dawson would lose the right to have his concerns heard. We also bear in mind that the respondent would not have been surprised by the claim. It knew of Mr

Dawson's concerns because he had aired them and raised legal issues. It had taken a long time to provide the grievance outcome while it consulted lawyers and negotiated with Mr Byrne to change his decision. For all these reasons, we consider on balance it is just and equitable to allow the claim.

Employment Judge Lewis
16/07/2021

Judgment and Reasons sent to the parties on:

16th July 2021..

For the Tribunal Office