EMPLOYMENT TRIBUNALS

Claimant: Mr Grimes

Respondent: (1) Tango Networks UK Ltd
(2) Mr Hesketh

Heard at: **Leeds (by video)** **On:** **28 February and 1 March 2022**

Before: Employment Judge Knowles
Mr Shah
Mr Pugh

Representation
Claimant: Mr Gittins, Counsel
Respondent: Mr Murphy, Consultant

JUDGMENT

The unanimous Judgment of the Tribunal is that the Claimant's claims of direct and indirect age discrimination under the Equality Act 2010 are not well founded and fail.

REASONS

Issues

1. The Claimant applied for the position of Channel Account Manager with the First Respondent, a US based company which operates in the telephony industry. He was not appointed. The Respondent favoured a younger candidate. The Second Respondent played a key part of the recruitment process. The Claimant claims that his non-selection was direct and/or indirect age discrimination.

2. The issues for the Tribunal to determine are (as determined at a previous case management hearing) as follows.

Direct age discrimination (Equality Act 2010 section 13)

3. The Claimant's was fifty-seven at the relevant time and compares himself to a hypothetical comparator of and in a lower age group.

4. Did the Respondent fail to recruit him internally to the post he was seeking?

5. Was that less favourable treatment?

6. The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

7. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

8. If so, was it because of age?

9. Did the Respondent's treatment amount to a detriment?

10. Was the treatment a proportionate means of achieving a legitimate aim?

11. The Tribunal will decide in particular:

    a. was the treatment an appropriate and reasonably necessary way to achieve those aims;

    b. could something less discriminatory have been done instead;

    c. how should the needs of the Claimant and the Respondent be balanced?

Indirect discrimination (Equality Act 2010 section 19)

12. A "PCP" is a provision, criterion, or practice. Did the Respondent have the PCP of only appointing candidates for the job for which the Claimant applied from age groups younger than him?

13. Did the Respondent apply the PCP to the Claimant?

14. Did the Respondent apply the PCP to persons with whom the Claimant does not share the same age characteristic, or would it have done so?

15. Did the PCP put persons with whom the Claimant shares the characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share the characteristic?

16. Did the PCP put the Claimant at that disadvantage?

17. Was the PCP a proportionate means of achieving a legitimate aim?

18. The Tribunal will decide in particular:

    a. was the PCP an appropriate and reasonably necessary way to achieve those aims;

    b. could something less discriminatory have been done instead;

    c. how should the needs of the Claimant and the Respondent be balanced?

Evidence

19. This hearing was undertaken remotely using HMCTS's Cloud Video Platform.

20. The parties produced an agreed bundle, 168 pages.

21. The Claimant attended the hearing and gave evidence. He also called Mr Jones, a

former Account Director who has since left the First Respondent's employment.

22. The Second Respondent attended the hearing and gave evidence. The First Respondent called the following witnesses, in addition to relying on the evidence of the Second Respondent:

a. Mr Humble, Partner On-Boarding Manager

b. Mr Bale, Executive Vice President

23. Each witness produced a written witness statement.

24. We were also provided with witness statement from the spouse of Mr Jones. Mrs Jones did not attend the hearing to give evidence.

Findings of fact

25. We made the following findings of fact on the balance of probabilities. This is not an account of all of the evidence that we heard and considered. These are the core findings concerning the matters that we considered were most material to our conclusions.

26. In or around November 2020 the Second Respondent was asked to recruit for a Channel Account Manager with on target earnings of about £100,000 per annum.

27. The Second Respondent asked Mr Jones if he knew anyone that might be interested and it appears that Mr Jones made the Claimant aware of the upcoming vacancy and that the Claimant consequently contacted the Second Respondent through LinkedIn.

28. The Second Respondent has given evidence to the effect that the information set out in the Claimant's LinkedIn profile, coupled with the photograph used on that profile, made the Claimant's age obvious. The Second Respondent provided a sound evidential basis for that opinion.

29. Through those communications, the Second Respondent met the Claimant by video meeting on 10 November 2020. They spoke for more than an hour and got along well. The Second Respondent concluded that he had not yet got sign off for the role but would be in touch when he had.

30. They communicated again on or around 24 November 2020; the Second Respondent confirmed that the vacancy was live and sent the Claimant a link to the application.

31. There were around 29 applications for this job, but the Claimant was the only candidate who had a pre-application discussion with the Second Respondent.

32. Around 16 candidates were removed from the process by the Second Respondent through pre-screening. The Claimant was selected for interview, along with around 12 others.

33. The Second Respondent interviewed the Claimant and the other candidates who had been put through to this next stage. The Claimant's interview took place on 3 December 2020. The Claimant was successful at the interview stage. The Second Respondent put the Claimant through to the next stage; a second interview with Mr Humble. The Claimant was one of three candidates that the Second Respondent put through to the next stage interview.

34. Mr Jones has given evidence that after the Claimant's interview, the Second Respondent telephoned him on 4 December 2020. He states that the Second Respondent told him that the Claimant was a strong candidate who could certainly do the job. Mr Jones

states that the Second Respondent queried the Claimant's age, to which he replied the Claimant was 56-57, following which the Second Respondent's attitude towards the Claimant changed. Mr Jones states that the Second Respondent commented that the Claimant did look older in his LinkedIn photo and that he wanted someone younger for the role.

35. Mr Jones' evidence is a material part of the Claimant's claim. It is rare to have an eye (or ear) witness to age discrimination.

36. Mr Jones has not established credibility in our conclusion. His account is more likely than not to be untrue. Mr Jones has provided various accounts of the conversation with the Second Respondent, but they are not consistent. He explains this by suggesting that the message is the same. That is a convenient answer, whilst the general tenet it of an age discriminatory nature, the account is inconsistent.

37. Mr Jones produced what he described as a note of the conversation which he took at the time, having stopped his car after the discussion which took place whilst driving. The asserted contemporaneous note (page 126) is a photograph of a page in a notebook, showing only a brief paragraph. The entry in the notebook causes questions, because the other notes on the page are hidden. The content is not squarely consistent with Mr Jones' evidence.

38. Mr Jones produced the photograph only a matter of 2 weeks or so before the hearing. In the meantime he states that he has lost the notebook. He suggests that a family member may have mistakenly taken it. He provides no account of what steps he has taken to recover the notebook. The absence of the original notebook diminishes the weight that can be attached to it.

39. Mr Jones states that he showed the notebook to his wife. In her statement she states that he did not.

40. Mr Jones has cause to be disgruntled. He became aware by one of his work colleagues, during his employment, that a meeting invitation was on the First Respondent's systems for Friday 18 December 2020 in which the Second Respondent had written that they would like to make job offers for the position of Channel Account Manager to the final two candidates (despite there being only one vacancy being advertised) "on the provision that we move [Mr Jones] on very early in Jan 21" (page 51). Mr Jones was subsequently subject to a performance improvement plan, which he failed to succeed under. These matters have been the subject of internal grievance procedures instigate by Mr Jones. This is understandable; in our conclusion he was clearly being subject to predetermined dismissal processes. In these proceedings, we consider him to be a disgruntled witness.

41. The Second Respondent has disputed Mr Jones' account of their conversation on 4 December 2020. He states that he only commented about being disappointed that all of the candidates at that stage were white, middle aged men and that he would have preferred the process to generate a more diverse pool of candidates.

42. The Second Respondent's evidence has in our conclusion been consistent and he has established credibility. His account is more likely than not to be a true account of what transpired. His actions are inconsistent with the allegation against him of overt, express discrimination. He took time to nurture the Claimant's application.

43. Only the Claimant had a lengthy pre-interview one-to-one with the Second Respondent. The Second Respondent interviewed the Claimant and put him forward to the next stage. Had he not wanted the Claimant to have the opportunity to succeed, given that the Second Respondent did not have authority to hire, it would be extraordinary to put him through to the next stage where another person would have control over the appointment.

44. Mr Humble interviewed 3 candidates for the role, including the Claimant. The Claimant's was ranked third and Mr Humble did not put the Claimant through to third interview with Mr Bale.

45. Both Mr Humble and the Second Respondent have provided an explanation of why the Claimant ranked third amongst the three interviewed by Mr Humble. The Claimant does not challenge their assessment of the deficiencies in his candidacy for the role of Channel Account Manager. From the three candidates before them, they preferred the ones with more specific mobile telephony background because that was where they saw the future for their business.

46. Mr Bale has given evidence concerning his decision making, but this is not relevant. The Claimant was not put forwards for third interview with him, he was only considering the final two candidates.

47. Part of the Claimant's case has concerned the fact that the First Respondent, at the end of the interview process, made offers to the final two candidates for the role of Channel Account Manager. One recipient of the offer declined. The Claimant draws our attention that once that offer was refused, he was not offered the position as the third candidate in line. However, in our conclusion, the evidence points towards the Respondent never having intended to make two appointment unless that was for the two final candidates. The Claimant had not made it through to the third interview. The 18 December 2020 meeting note (page 51) is explicit in creating budget for appointing two people, by moving Mr Jones along, to bring in the two final candidates. We read nothing in to the fact that the Claimant was not contacted when one of those candidates declined, the Respondent was already not interested in the Claimant.

48. Subsequent to these internal processes, the Respondent did advertise another Channel Account Manager position. The Claimant draws our attention to the fact that he was not approached concerning that vacancy. However we found that the Respondent's witnesses have provided evidence why that vacancy differed from the original vacancy, in terms of skills required and the level and remuneration for the role. We note that the candidate appointed to that vacancy was of a similar age to the Claimant; the Claimant suggesting that this was a move undertaken by the First Respondent to deflect his claim. Whilst we appreciate the circumstantial link the Claimant invites us to make, we do not consider this subsequent appointment relevant to the Claimant's claim at all.

49. In the round, we preferred the evidence of the Respondents compared to the Claimant and Mr Jones.

Submissions

50. The Respondent and Claimant made submissions solely centred upon the evidence and the findings of fact that they would invite us to make. We took those submissions fully into account. Our findings of fact are set out above.

The Law

51. Section 13(1) of the Equality Act 2010 provides that "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".

52. The burden of proof has specific provision in the Equality Act 2010, Section 136. This provides that "*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*" unless "*A shows that A did not contravene the provision*".

53. These provisions were enacted because direct discrimination is often covert or concealed.

54. The standard of proof is on the balance of probability, i.e. more likely than not to have occurred.

55. In ***Igen v. Wong [2005] IRLR 258 CA*** the guidance issued by the EAT in Barton v. Investec Henderson Crosthwaite Securities Ltd was approved in amended form:

"(1) Pursuant to section 63A of the 1975 Act, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the claimant. These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. 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".

(4) In deciding whether the claimant has proved such facts, it is important to remember that 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.

(5) It is important to note the word "could" in section 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is

adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

56. In ***Madarassy v. Nomura International Plc [2007] IRLR 246 CA*** it was held that the statutory burden of proof provisions "*required the complainant to prove the facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination, and not that the respondent could have committed such an act … the burden of proof did not shift [through the Claimant] establishing the facts of a difference in status and a difference in the treatment of her. Those facts only indicated a possibility of discrimination and would not, without more, enable a tribunal to conclude on the balance of probabilities that the respondent had committed an unlawful act of discrimination*."

57. The guidance given in these cases was supported by the Supreme Court in ***Hewage v Grampian Health Board [2012] IRLR 870***.

58. In ***Laing v Manchester City Council and another*** it was held that the two stage approach need not be followed in all cases and that a tribunal may proceed on the basis of stage two alone, such as "*where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator-whether there is a prima facie case-is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in* ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337***…".

59. Further it was noted that "*The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race*".

60. Similary it has been emphasised that the tribunal may consider all of the evidence at the first stage, and that a tribunal should not ignore evidence adduced by the Respondent.

61. Section 19 of the Equality Act 2010 provides the following in relation to indirect discrimination:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

…

sex;

…."

62. "*The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic*". See Baroness Hale, ***Chief Constable of West Yorkshire Police and anor v Homer 2012 ICR 704, SC***.

63. In ***Dziedziak v Future Electronics Ltd EAT 0271/11*** Mr Justice Langstaff "*the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it disadvantaged women generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming. Only then would the employer be required to justify the provision, criterion or practice, and in that sense the provision as to reversal of the burden of proof makes sense; that is, a burden is on the employer to provide both explanation and justification*".

64. In relation to PCPs, in ***Ishola v Transport for London [2020] EWCA Civ 112*** it was held that "*however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one*".

65. Under 23(1) of the Equality Act 2010 '*on a comparison of cases for the purposes of [S.19] there must be no material difference between the circumstances relating to each case'*.

66. The ECHR Employment Statutory Code of Practice states the following. The Code does not impose legal obligations nor is it an authoritative statement of the law. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

"4.5

The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications

or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision.

…

4.9

'Disadvantage' is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, is something that a reasonable person would complain about – so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently.

4.15

Once it is clear that there is a provision, criterion or practice which puts (or would put) people sharing a protected characteristic at a particular disadvantage, then the next stage is to consider a comparison between workers with the protected characteristic and those without it. The circumstances of the two groups must be sufficiently similar for a comparison to be made and there must be no material differences in circumstances.

4.26

If challenged in the Employment Tribunal, it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision, criterion or practice was applied. If challenged, the employer can set out the justification to the Employment Tribunal.

4.27

The question of whether the provision, criterion or practice is a proportionate means of achieving a legitimate aim should be approached in two stages:

• Is the aim of the provision, criterion or practice legal and non discriminatory, and one that represents a real, objective consideration?

• If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?"

Conclusions

67. In relation to the Claimant's claim of direct age discrimination, there appears to be no dispute between the parties that the Respondents failed to recruit him to the post of Channel Account Manager and that was less favourable treatment compared to the two younger candidates who were made job offers.

68. However, in our conclusion the Claimant has not established that there are no material differences between him and the two other candidates.

69. In our conclusion the Claimant mounts no material challenge to the Respondents' account of why they preferred the other two younger candidates to him, or how they explain why they would be preferrable recruits to their business.

70. The Claimant's case is essentially that he was not selected because of his age. However his key witness supporting this contention, Mr Jones, has not established

credibility. We do not accept his evidence that the Second Respondent indicated any hostility towards the Claimant because of his age.

71. The Claimant's case concerning him not being approached after one of the job offer recipients rejected the offer, and concerning the failure of the Respondent to approach him concerning the later vacancy, have in our conclusions been the subject of explanation from the Respondent which are to be preferred to the Claimant's opinion.

72. The Claimant has not established fact from which we could conclude, in the absence of another explanation, that direct discrimination occurred. The core facts upon which he bases his claim are not likely to be true.

73. Were we wrong on that, we find that the Respondent has established, on the balance of probabilities, that the decisions to make job offers to two other candidates was in no sense whatsoever on the grounds of age. We find that the Respondent has established that the two other candidates were made job offers on the grounds of their applications on their own merit regardless of their age.

74. The Claimant's claim of direct age discrimination is not well founded.

75. In relation to the Claimant's claim of indirect age discrimination, we found no evidence whatsoever of the Respondent having a policy, criterion or practice of appointing candidates for Channel Account Manager from age groups younger than the Claimant.

76. This part of the Claimant's claim appears to have been reliant to a great degree upon the evidence of Mr Jones.

77. We have considerable sympathy for the circumstances that Mr Jones faced.

78. But his evidence concerning the asserted comments made by the Second Respondent are not likely to be true.

79. The Claimant has not established facts from which we could conclude, in the absence of another explanation, that the Respondent applied a policy criterion or practice of appointing candidates for Channel Account Manager from age groups younger than the Claimant.

80. Were we wrong on that, we find that the Respondent has established, on the balance of probabilities, that the offers of employment made to the two final candidates were made on their own merit regardless of their age.

Employment Judge Knowles
14 April 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

19 April 2022