



## EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 8000043/2023**

**Hearing held at Dundee on 26 and 27 July 2023**

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**Employment Judge I McFatridge  
Tribunal Member A Shanahan  
Tribunal Member J McCullagh**

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**Mx Conor (Brook) Marshall**

**Claimant  
In person**

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**University of Dundee**

**Respondent  
Represented by:  
Ms L McArdle,  
Solicitor**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant was not unlawfully discriminated against by the respondent on grounds of age. The claim is dismissed.

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### REASONS

1. The claimant submitted a claim to the Tribunal in which they claimed that they had been unlawfully discriminated against on grounds of age. They (the claimant prefers to use pronouns 'they' and 'them' and we have endeavoured to respect this) stated that they had attended an interview with the respondent and had been asked an inappropriate age related question and that they had been discriminated against by not being offered

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the post having discovered that an older candidate had been successful. The respondent submitted a response in which they denied the claims. A preliminary hearing was fixed for case management purposes during which it was confirmed that the sole issue to be tried was whether the claimant was less favourably treated because of their age (direct discrimination). The hearing took place over two days in July 2023. Three days were originally set down however it was possible to conclude the hearing within the first two. The claimant gave evidence on their own behalf and the respondent led evidence from Mr Keith Mackle, a former Assistant Director of Student Services with the respondent (now retired) and Graham David Nicholson, Director of Student Services with the respondent. A joint bundle of documents was lodged. On the basis of the evidence and the productions the Tribunal found the following essential factual matters relevant to the claim to be proved or agreed.

### 15 **Findings in fact**

2. The respondent are the University of Dundee. In or about 2022 they identified the need to recruit a Student Support and Experience Manager. This followed the retiral of a previous Manager in the Student Services Hub however the post was a new one and the job description was drafted by Mr Keith Mackle an Assistant Director of Student Services. There were delays in obtaining funding and the post was advertised in or about August 2022. The new role involved line managing a team of around eight or nine who primarily worked in the Student Support Services. The job description for the post was lodged (pages 53-56). The post holder would have direct responsibility for the supervision and direction of the work of the Enquiry Centre Team, the Student Support Team and the Residential Life Team.
3. Mr Mackle was aware that the post was likely to be a challenging one. The various teams which were to be managed had undergone a considerable period of disruption and change over the previous few years. There had been other retirals in addition to the retiral of the manager. The job had been an extremely challenging one, particularly during and immediately after the Covid pandemic. Members of the team had been required to continue to attend the University Campus during the pandemic in order to provide support to students. Mr Mackle considered that there

were one or two strong personalities in the team who would require careful management. The job holder would report to Mr Mackle who himself reported to the Director of Student Services.

4. In the latter part of 2022 the claimant was looking for another job. They were employed as the Chief Executive of a youth mental health charity. The charity's target group was young people under the age of 25. As Chief Executive the claimant believed that the charity's staff should by and large fall within the same age profile as the service users. It was their understanding that they were entitled to discriminate on the basis of age given that they were a charity providing specific services to young people. The claimant who turned 31 in July 2023 was concerned that they were no longer within the age group of the service users and that they should start looking for another job. The claimant sent their CV to the respondent and applied for the job through an online portal. The claimant's CV was lodged. (pages 57-59). The claimant was very keen to obtain a job in the higher education sector. They had what they considered to be relevant experience as set out in their CV. In particular the claimant had been the elected Student President of Abertay Students' Association between 2015 and 2017. As such they had set on the Board of Governors of the University. They were Chair of the Board of Trustees of the University. They had also been a Vice President of the National Union of Students and a member of their Executive Committee between 2016 and 2017.
5. Once the closing date for applications had passed Mr Mackle and Shona Johnston another Assistant Director of Social Services went through the applications and created a shortlist. There were around 20 applications and five were shortlisted for interview. The final selection of interviewees was approved by Mr Nicholson the Director of Student Services. In their discussions Mr Mackle and Ms Johnston considered that the claimant was the weakest of the five who were invited for interview in terms of meeting the person specification. At that stage the respondent did not have access to the dates of birth of any of the candidates since this information was not on any of the CVs. It may have been possible for them to work out rough ages from the dates given by candidates in their CV however none of the panel had the time or inclination to do this.

6. The respondent have a fairly set procedure for interviews and that was followed in this instance. In advance of the interview Mr Mackle and Ms Johnston produced an interview and scoring grid. This was lodged (pages 40-43). Candidates would be asked to make a presentation to the approach they would take to implement and supporting new initiatives including the EmilyTest Charter and the Recurring and Enduring Circumstances Policy and support for students identified as at risk by the attendance monitoring system. This was to last 10 minutes. The candidates would then all be asked the same nine questions which were designed to give them the opportunity to expand upon how they met the person specification for the job.
7. The interviews were conducted by Mr Mackle, Mr Nicholson and Ms Johnston. At the end of the day only four of the candidates turned up for interview. The other candidates who had an existing connection with the University decided not to proceed. Of the other three candidates apart from the claimant one was a successful applicant (who we will refer to as M), the other two were currently working in Student Services. One of those was already doing a very similar role to the post on offer but the panel's perception was that that person did not do well at interview.
8. The claimant made an extremely good impression at interview. They answered the questions well. The panel were impressed by their presentation. The first question which they were asked which was by way of being an ice-breaker question was
- “What interests you about this job and why now in your career?”*
9. The Tribunal considered it was entirely possible that what the claimant meant to say was that they considered that it was appropriate for them to start looking for another job because they were no longer within the age range of the charity's target group and was not within the range of service users. The Tribunal was satisfied however that the claimant did not

mention the word service user and that the panel members took the claimant's answer as suggesting that they were too old for a job which involved managing only young people.

5 10. Mr Nicholson saw this as being something of a "*red flag*". He was concerned that if the claimant was saying that they felt uncomfortable working with employees of a certain age then this could be an issue given that Student Support Services has employees of a wide range of ages. Towards the end of the interview Mr Nicholson asked the claimant a question designed to give them the opportunity to expand on this. 10 Mr Nicholson asked the claimant whether they would be comfortable managing employees of a wide and diverse range of ages. The claimant gave an answer to this which the panel members were happy with. The claimant indicated that although in their current role members of staff were under 25 they had previously managed staff with a diverse range of ages 15 when working as a Team Leader in Asda and also when working within Abertay Students Association.

11. For the avoidance of doubt the Tribunal did not find that Mr Nicholson said to the claimant

20 *"You're young for a manager, tell us how you would get your staff to respect you".*

The Tribunal also found that the claimant did not challenge this question in any way as they had previously indicated in their ET1. They did not give any impression to the other panel members of being "stunned" as they stated in their ET1 application. None of the panel members noted 25 anything out of the ordinary and indeed they considered that the claimant had answered the question well.

12. Once all of the candidates had been interviewed the panel stayed in the room and then compared their own notes and the scores which they had awarded to each candidate on the interview scoring grid. All three had 30 initially scored M the successful candidate as the highest. The claimant was scored second highest. There was a brief discussion regarding each of the candidates. With regard to the claimant Mr Mackle and Mr Nicholson had a concern regarding their possible management style.

In their CV the claimant had quite correctly made reference to an award they had received by being named one of Scotland's 100 Disruptors by the Hunter Foundation. Mr Mackle and Mr Nicholson were both concerned that whilst being a disruptor would often be regarded as a good thing and a reason for appointing someone to a post, in the particular circumstances of this post and this particular team both considered that a disruptor was the last person needed. Both of them considered that the team would require some careful nurturing and rebuilding. They had had a number of challenges over the last few years. Mr Nicholson and Mr Mackle who would require to work with the post holder on a day to day basis and also with the team were absolutely clear that what the team needed was a period of 'steady as she goes' rather than disruption or new initiatives. At the end of the day however they considered that they were extremely impressed with the claimant's answers and their confident manner. Both considered that they were eminently appointable to the role but felt that the successful candidate M scored higher because he was a much better fit for what they wanted.

13. The panel noted that M appeared to have genuine relevant experience and was able to give clear examples at what Mr Nicholson called the "granular" level. When asked about supporting staff who were dealing with students who may have come to them in harrowing circumstances the successful candidate M was not only able to say what he would do but also relate this back to specific experience he had had whilst managing a pastoral team in his previous job. Whilst the claimant's answers were good and they came over as a very confident engaging individual all three considered that M's answers on the day were better. The panel unanimously agreed that the job would be offered to M. They also agreed that despite their misgivings about them being a 'disruptor' the claimant was eminently appointable and could be offered the job if M decided not to accept. Mr Mackle was tasked with telling the unsuccessful candidates. He delayed contacting the claimant for a few days since if M had for whatever reason turned the job down then the job would have been offered to the claimant.

14. Having been advised that they were unsuccessful the claimant emailed the respondent's HR department asking for feedback. Unfortunately there was a delay in the HR department passing on the request to Mr Mackle. Mr Mackle received the claimant's request for feedback on or about  
5 1 November.

15. Mr Mackle's usual practice with interview notes and scoring sheets was that he would retain these for a few weeks after the interview so that he could deal with any requests for feedback and then confidentially destroy them. His understanding was that this was in accordance with the  
10 university policy which required such records to be confidentially destroyed once they were no longer of use. Mr Mackle had therefore unfortunately destroyed the interview notes a few days before he received the claimant's request for feedback from HR on 1 November.

16. The University policy was in fact that interview notes like this should be  
15 kept for six months and then confidentially destroyed. Mr Mackle had been entirely unaware of that policy.

17. On 1 November Mr Mackle emailed the claimant to advise that he had just received the request for feedback from HR. He asked the claimant if they would prefer an email or a Teams chat. The claimant responded stating

20 *"Thank you for getting in touch – by email would be perfect, it's greatly appreciated."*

This email exchange was lodged (page 45). On 2 November Mr Mackle emailed the claimant providing feedback in a short email. He stated

25 *"Dear Brook*  
*You gave a very good interview and the panel were impressed, particularly me. Your presentation and answers were very good. I don't know if this helps or not but it was a close thing between you and the successful candidate.*  
*In the end we chose the person that we thought would fit in best*  
30 *with the wider team.*  
*As I say though it was close and we very much appreciated meeting you and hearing from you at interview.*

*Best wishes*

*Keith”*

The claimant responded stating

5                    *“Thank you so much for taking the time to respond, I appreciate the feedback. I hope the selected candidate is fitting in well, and thank you again for the opportunity.”*

18.    In providing feedback Mr Mackle felt that there was not really much he could say about the claimant’s interview skills. The fact was that he considered that the claimant had performed extremely well at interview and there was nothing he could say that would help them improve. His remark about the successful candidate being ‘the person that we thought would fit in best with the wider team’ was a reference to the fact that this person had a skillset and experience which matched the person specification better than the claimant. He had been able to give answers to the questions which scored better because he had actually done things which were more closely linked to the job. Basically, if the claimant had been up against less strong competition then they would have succeeded since the panel considered that the claimant was appointable. The panel would not have appointed any of the other two since they did not consider that to be the case.

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19.    The claimant then wrote a letter of complaint to the university. The letter is lodged at pages 46-47. Although undated the letter was received by the university on 29<sup>th</sup> September.

20.    The claimant referred to the interview and referred to the feedback they received and went on to state

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*“I can certainly understand the need to appoint a candidate who is a good cultural fit. However, I have since learned that the individual who was appointed to the role is significantly older than me. When this information is considered together, I felt even more uncomfortable about the discriminatory question I was asked”*

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The claimant then referred to making a Subject Access Request and discovering that the interview notes were not included. They went on to state

5                   *“It’s now clear to me that in this instance a ‘better cultural fit’ in the opinion of your staff means someone about 15 years my senior.”*

21. The respondent’s HR department investigated the complaint. On 13 December 2022 they met with Mr Nicholson. A note of the meeting was lodged (pages 48-49). Mr Nicholson gave the explanation he gave to the Tribunal. On 14 December 2022 they met with Mr Mackle. The note of this interview was lodged (page 50).

22. On 26 January 2023 the respondent’s Dr Jim McGeorge the University Secretary & Chief Operating Officer wrote to the claimant confirming the result of their complaint. The letter was lodged (pages 51-52). The respondent denied discrimination. The letter stated

15                   *“... So, it is not accepted that the question in and of itself represents direct discrimination. However, I would say that the University accepts that the question could and should have been better phrased and contextualised and for that we would apologise for any misunderstanding or annoyance this has caused you.”*

20 This form of words is fairly standard in responding to complaints. The complaint handler will confirm the University’s position but go on to say that they apologise for any misapprehension or upset caused. Mr Nicholson’s position was that he understood at the time that he had adequately contextualised the question by referring back to the answer given by the claimant. It was clear however that the claimant had not understood this at the time and he readily accepted that if that was the case then it would have been better to contextualise it further. The University noted that the notes had been destroyed and that this was contrary to their policy but indicated they were satisfied there had been no malice involved. They went on to say that they had asked that further training be provided by HR to remind interviewers of their responsibilities in respect of the University’s data retention policies. The University went

on to confirm that the decision had been made on the usual criteria entirely free from discrimination.

23. Following this Mr Nicholson arranged for the issue of retention of interview notes to be mentioned at various meetings. Mr Mackle retired from the University in December and was not involved in any other interviews.

24. The CV of the successful candidate suitably anonymised was lodged (pages 60-66). The successful candidate M had direct experience as a Training Officer. He had been Lead Chaplain at a large University for a period of 13 years and had direct experience of offering pastoral care, support and counselling to the students and staff as well as managing staff and supporting staff involved in these activities. On the basis of his CV the panel had considered him worth interviewing albeit they had believed that he was number four on the list. He was given the job on the basis of his interview performance.

15 **Matters arising from the evidence**

25. The Tribunal considered both of the respondent's witnesses to be entirely credible and reliable. They answered the questions put to them thoughtfully. They made appropriate concessions. It was clear to the Tribunal that the accusation of discrimination had shocked both of them. Both of them referred to their various training courses they had been on including unconscious bias training. It was clear to the Tribunal that they had thought deeply about whether they had in any way been discriminatory in this case. The Tribunal was entirely satisfied that the reasons for making the decisions they did had nothing to do with age.

26. On the key issue of whether Mr Nicholson did ask the claimant *"You're young for a manager, tell us how you would get your staff to respect you."* the Tribunal were in no doubt that this was not in fact said. The Tribunal was not prepared to accept the claimant's evidence regarding this and preferred the evidence of Mr Nicholson and Mr Mackle.

27. The claimant's position in evidence was that they had been extremely shocked when the question had been asked. In evidence they said they had a stock answer which they used whenever the issue of their young

age was mentioned. Although the wording of this varied during their evidence but essentially they said that they had been taken by surprise but was used to this type of question as a young leader and that their response was pretty rehearsed by now. They said that it normally starts  
5 by saying there is a correlation between age and experience not a causation and that they did not see age as a detriment. They indicated that they had given an answer along those lines and that the interview had then got back on track. This evidence did not align with what they had said in their claim form where they say that they

10 *“... politely, but assertively, challenge the question at the time, asking why my age matters if I have the skills and competencies required”.*

It did not coincide with what they said in their impact statement at page 37 where they state

15 *“I was taken aback and asked myself ‘did he just ask that?’ In that moment, I did not know whether to challenge him or be positive and move forward. I opted for the latter despite it being quite jarring.”*

28. During cross examination the claimant did accept that they had raised the issue of their age in answer to the first question relating to why they did  
20 not wish to leave their current job. They indicated that what they had meant by this was that they were too old to be a service user and that given their policies they felt it would be appropriate to move on and give someone else a chance. They did accept that their answer may well have come over as them simply saying that they felt they were too old for the  
25 job. As noted the claimant lodged an Impact Statement which they spoke to briefly (pages 35-39). In this they indicated that they had experienced long term severe and enduring mental health difficulties since they were a teenager and had been diagnosed with borderline personality disorder with comorbid anxiety and depression. They indicated that as a result of  
30 this incident and being turned down for the job they lost all confidence and that there had been a sharp decline in their mental health. They indicated that this had affected other interviews which they had attended although they indicated they had now found other employment. We have not made

any findings of fact regarding this since we did not consider we required to make them given we found no discrimination had taken place. In any event, we were somewhat reluctant to accept the claimant's unsupported evidence regarding medical matters when there was absolutely no medical evidence provided. The claimant indicated that they had not actually seen their GP during this period. They said that they were in touch with a Community Mental Health Team through attending a horticultural activity on Thursday evenings and that they had asked the Community Mental Health worker to assist them and the Community Mental Health worker had arranged for a prescription of Sertraline to be provided by their GP and that appeared to be the height of the medical involvement in the matter.

29. The tribunal was concerned that the claimant several times mentioned that the letter from Mr Mackle referred to the claimant not being a good "cultural fit" for the team. It is clear that this is not what it says but it appeared that the claimant had persuaded themselves that the words used could have no other meaning than a discriminatory one. The tribunal felt that this detracted from the claimant's overall credibility. We felt the claimant could well have brooded upon the result of the interview and whether consciously or unconsciously changed the words used so as to create a discriminatory meaning. The claimant also made a number of statements which indicated that they believed age discrimination to be endemic in higher education. The tribunal felt that they were seeing a discriminatory motive where there was no evidence for it. We were satisfied that they were giving truthful evidence about how they saw things but we felt that their recollection and the conclusions they had reached were mistaken.

## **Discussion and decision**

### *Issues*

30. The sole claim being made was one of direct discrimination in terms of section 13 of the Equality Act 2010. The sole protected characteristic relied upon being age. The claimant sought to compare themselves with a hypothetical comparator. An agreed list of issues had been lodged at the preliminary hearing (page 33). The two matters relied on were first of

all whether Mr Nicholson had asked the claimant the alleged question at the interview. The second was whether the respondent had selected another applicant instead of the claimant for the role of Student Support and Experience Manager based on their age.

5 31. The claims of direct discrimination are claims to which the reverse burden  
of proof rules apply as provided for in section 136 of the Equality Act 2010.  
The precise application of these rules in discrimination cases has been  
considered in the case of **Barton v Investec Henderson Crossthwaite**  
**Securities Ltd [2003] IRLR 332 EAT** and by the Court of Appeal in the  
10 case of **Igen Ltd v Wong [2005] IRLR 258 CA**. This makes it clear that  
there is a two stage process. The first stage requires the claimant to prove  
facts from which the Tribunal could conclude in the absence of an  
adequate explanation that the respondent has committed or is to be  
treated as having committed the unlawful act of discrimination against the  
15 claimant. At this stage although the evidential burden is on the claimant  
the Tribunal is entitled to take into account all of the evidence heard by the  
Tribunal. If the claimant fails to prove facts from which the Tribunal could  
conclude that the respondent has committed the unlawful act then that is  
the end of the matter. If not then the second stage, which only comes into  
20 effect if the claimant has proved those facts, requires the respondent to  
prove that it did not commit or was not to be treated as having committed  
the unlawful act. If the second stage is reached then the burden is on the  
respondent to show that the claimant's treatment was in no sense  
whatsoever on the basis of a protected characteristic. In this case the  
25 Tribunal was entirely satisfied on the evidence that the claimant had failed  
to establish facts from which an inference of discrimination could be  
drawn.

32. With regard to the first point the Tribunal was absolutely satisfied that the  
comment alleged by the claimant was not made. The comment which was  
30 made was not made to the claimant on the basis of their age but because  
the panel quite correctly wished to give the claimant the opportunity to  
comment on one of their answers where they had indicated that they felt  
too old for their current job. The claimant was the person who first raised  
the subject of their age. It was not unfavourable treatment to ask them to

clarify what they meant by this. There was no evidence before the Tribunal from which we could conclude that if the claimant had been a different age the question would not have been asked. On the contrary the Tribunal's view was that if any candidate had raised the subject of their age then they would probably have been questioned about it.

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33. With regard to the second point the Tribunal was in absolutely no doubt that the decision to award the job to the other candidate was made solely on grounds which had no relationship to the claimant's age. The other candidate was appointed because he performed better at interview than the claimant. It therefore follows that the claim must be dismissed. It is appropriate for the Tribunal to indicate that we very much appreciated that the claimant, though not a qualified lawyer credited themselves well at the Tribunal. They conducted themselves with dignity in making a claim which it is clear they passionately believed in but where we have considered that their view was entirely unjustified.

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**Employment Judge: I McFatridge**  
**Date of Judgment: 17 August 2023**  
**Date sent to parties: 18 August 2023**