



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103804/2023

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Held in Glasgow on 19 January 2024

Employment Judge L Wiseman
Members R McPherson and A K Smith

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Mr Neir Stirrat

**Claimant
In Person**

Healthworx Hygiene Services Ltd

**Respondent
Represented by:
Ms L Hunter -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The tribunal unanimously decided to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 11 July 2023 alleging he had been subjected to discrimination because of the protected characteristic of age, and that he had been subjected to detriment because of having made a protected disclosure.
2. The respondent entered a response denying the claims.
3. The tribunal, during a discussion with the parties at the start of the hearing, ascertained that in fact the detriments alleged by the claimant occurred prior to the alleged protected disclosure. The claimant agreed this was correct and explained that it was the alleged detriments which had led to him making the alleged protected disclosure. The Employment Judge explained to the

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claimant that in the circumstances his “whistleblowing” complaint could not proceed.

4. The issues to be determined by the tribunal were:

- 5 • was the claim regarding age discrimination presented to the tribunal within the applicable time limit;
- did the respondent (in terms of section 13 of the Equality Act) treat the claimant less favourably than it treated, or would treat, others when (a) it attempted to have him leave the company and/or (b) when Mr Alexander, Director, made snide comments about the claimant retiring;
- 10 • if so, was the reason for the less favourable treatment because of the protected characteristic of age.

5. The tribunal heard evidence from the claimant and from Mr John Alexander, Director. We were also referred to a small number of documents.

15 6. The tribunal, on the basis of the evidence before it, made the following material findings of fact.

Findings of fact

7. The respondent is a small company involved in the uplift and disposal of clinical waste.

20 8. The claimant commenced employment with the respondent in August 2015. He was employed as a part time Installer.

9. The claimant moved to full time hours in 2017 when he took on the role of Service Manager.

25 10. The structure of the company in May 2022 was Mr John Alexander, Director; Janey Alexander (Mr Alexander’s daughter), Office Manager; Ms Bethany Hayes, Accounts Manager; the claimant, Service Manager; and three drivers.

11. Mr Alexander decided in May 2022 to reward the three managers with 4 days additional holiday due to good service. This decision was subsequently

reversed in September 2022 when the holidays were removed because there had been issues with customer service. The additional holidays were removed from the three managers.

12. Mr Alexander decided to restructure the business in the Autumn of 2022 because it was his intention to step back from the business. He decided to employ a General Manager.
13. The claimant, who had had a period of sickness absence from 19 – 30 September 2022 and had then been on holiday from 3 – 14 October 2022, returned from holiday to find a letter informing him of the General Manager role, but he was too late to apply for it.
14. Mr Alexander met with the claimant on 26 October 2022 to inform him of further changes to the structure of the business. The claimant was advised that the role of Service Manager would be deleted because it would be subsumed by the General Manager role. The claimant was offered and accepted the opportunity to return to the role of Service Driver. The claimant was required to return to working 5 days a week, and it was agreed this would start on 1 December 2022. The claimant did not lose any salary as a result of the change to his role.
15. A letter (page 69) was provided to the claimant at the meeting, which set out the above terms. The claimant agreed the terms and signed this letter.
16. Ms Bethany Hayes, Account Manager, was appointed to the role of General Manager.
17. Mr Alexander decided to introduce a Service Co-ordinator Manager role. The claimant was given an opportunity to apply for the role, but he decided not to do so. Mr Aaron Jones was appointed to this role in January 2023.
18. Mr Alexander was advised of an incident between Mr Jones and the claimant where words had been exchanged. Mr Alexander spoke to the claimant about this and suggested he apologise for what had been said. The claimant refused to do so.

19. A second, more serious, incident was reported to Mr Alexander on 29 January 2023.
20. The claimant was, by letter of 3 February 2023, advised there would be an investigation into this incident (page 80).
- 5 21. The claimant commenced a period of sickness absence on 6 February 2023.
22. The claimant attended an investigation meeting on 6 March 2023 (page 84). The claimant was told of the allegations against him and provided with a copy of the statements obtained.
23. The claimant was also invited to attend a welfare meeting. This took place on
10 8 March 2023 and the notes of that meeting were produced at page 100. The claimant was asked to confirm in writing if he wished the disciplinary process to continue. The claimant did not provide a written response to this.
24. The claimant raised health and safety issues with the respondent on 3 April 2023 (the alleged protected disclosure).
- 15 25. The claimant submitted a grievance on 16 May 2023 (page 117). The grievance related to the length of time taken to resolve the investigation; failure to respond to various correspondence; the removal of holidays and a failure to provide him with various policies.
26. Mr Alexander responded on 17 May (page 118). Mr Alexander and the
20 claimant met on 6 July 2023 to discuss the whistleblowing concerns (which had been raised on 3 April 2023) and the grievance. The meeting did not conclude and the claimant was, on 12 July, invited to a follow-on meeting on 19 July 2023.
27. The claimant advised Mr Alexander that he wished an independent person to
25 investigate his grievance. Mr Alexander responded to this by appointing Ms Lesley Robertson (an independent business owner with no connection to the respondent) to chair a meeting arranged for the 17 August 2023.
28. The claimant refused to attend this meeting because he had presented his claim to the Employment Tribunal.

29. The claimant has remained on sickness absence from work. His statutory sick pay was exhausted on 20 August 2023.

Credibility and notes on the evidence

- 5 30. The claimant asserted Mr Alexander had made three “snidey” comments about him retiring. The comments were “are you not due to retire” and “are you ready to retire”. These comments were made in or about August/September 2022. The claimant did not complain about these comments at the time. He told the tribunal he had “never thought much of it”.
- 10 31. Mr Alexander denied making any “snidey” comments to the claimant regarding retirement, and he denied asking the claimant when he was going to retire. Mr Alexander, who had spoken to the claimant about the restructuring of the company and the reasons for it (being him stepping back from the company and planning to spend more time in Cyprus) accepted he may, in that context, have asked the claimant what his plans were for the future.
- 15 32. The tribunal preferred the evidence of Mr Alexander to that of the claimant. The tribunal preferred Mr Alexander’s evidence because (i) he was willing to acknowledge that in the context of discussing his own plans to step back from the business, he may well have asked the claimant what his plans were and
- 20 (ii) I found Mr Alexander to be a credible witness.
33. The tribunal noted the claimant did not cross examine Mr Alexander regarding his evidence. The Employment Judge explained why it was important to test the evidence, but the claimant, whilst maintaining it was “all lies”, declined to ask any questions of Mr Alexander.
- 25 34. The evidence given by the claimant focussed on the unfairness of what had happened and he did not provide any evidence regarding the age group of other employees, how they were or would have been treated in a similar situation and, crucially, he provided no evidence to explain why he believed the alleged less favourable treatment (other than the alleged comments regarding retirement) occurred because of age.
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Respondent's submissions

35. Ms Hunter submitted the claim was timebarred and the tribunal had no jurisdiction to determine it. The comments alleged by the claimant were said to have been made in August/September 2022. The claim was presented on 11 July 2023. The claim had been presented late and no evidence had been put forward to explain or justify why the tribunal should exercise its discretion to allow the late claim to proceed in terms of section 123 Equality Act.
36. Ms Hunter submitted that if the tribunal was not with her on the timebar point, then her secondary position was that the claimant had failed to discharge the burden on him in terms of section 136 Equality Act. The claimant had made reference to a change in title, hours and holidays and asserted these changes had been sprung on him without consultation. Ms Hunter invited the tribunal to prefer the evidence of Mr Alexander and have regard to the meeting which had taken place between Mr Alexander and the claimant to discuss the changes, the letter which had been issued following that meeting and the subsequent summary provided by Ms Hayes.
37. Ms Hunter acknowledged the claimant would no doubt have been irritated by the fact additional holidays had been granted and subsequently removed, but submitted there can have been no discrimination in circumstances where the holidays had been removed from the three managers to whom they had been granted.
38. There was no evidence to support the claimant's assertion that he had suffered age discrimination. He had had an opportunity to apply for the Service Co-ordinator Manager role but refused to do so. Further, the respondent had commenced a reasonable process to investigate the complaints against the claimant and had held a welfare meeting with him.
39. Ms Hunter acknowledged whistleblowing concerns had been raised on 3 April 2023 and a grievance on 16 May 2023, and there had been some delay in dealing with these matters, but this was explained by the fact Mr Alexander had had flu and then been out of the country for the month of June. Mr Alexander did meet with the claimant on 6 July and did agree to have an

independent person investigate the grievance, but the claimant refused to attend.

40. Ms Hunter invited the tribunal to prefer Mr Alexander's evidence regarding the alleged snidey comments.

5 **Claimant's submissions**

41. The claimant decided not to make any submission.

Discussion and Decision

42. The claimant brought a claim in terms of section 47B Employment Rights Act, that he had made a protected disclosure and, because of having done so, he was subjected to detrimental treatment. The tribunal decided to dismiss this complaint because the claimant accepted that the detrimental treatment about which he complained, occurred prior to making the protected disclosure.

43. The tribunal next considered the complaint of age discrimination, which was a complaint brought in terms of section 13 Equality Act. This section provides that a person discriminates against another if, because of a protected characteristic (in this case, age), the person treats that other less favourably than he treats or would treat others. The claimant, in bringing a complaint of direct discrimination must show he was treated less favourably than an actual or hypothetical comparator, and that the reason for the less favourable treatment was because of age.

44. The claimant told the tribunal that he believed Mr Alexander had an agenda to remove him from the company due to his age, and in support of that position, he made reference to the following points:

- being awarded additional holidays and then having them removed;
- his terms and conditions of employment being changed;
- being asked on several occasions when he would be retiring;
- increasing his working week from 4 days to 5 days;

- removing his Service Manager role;
- asking if he wished to move to part time working because of his wife's health condition;
- being invited to a sham investigation meeting;
- 5 • the length of time taken to investigate;
- failing to provide him with the grievance and whistleblowing policies and
- the length of time taken to deal with these matters.

45. The tribunal, in considering the above points, noted there was no dispute
10 regarding the fact additional holidays had been given to the claimant and then removed. The tribunal accepted Mr Alexander's evidence that in fact additional holidays had been given to the three managers employed by the respondent (the claimant, Ms Alexander and Ms Hayes) and that a decision had subsequently been made to remove the additional holidays from the three
15 managers. The claimant, in this respect, has failed to show that he was treated less favourably than others. The evidence demonstrated that he was treated in the same way as the other managers.

46. The tribunal next had regard to the claimant's position that three "snidey" comments had been made by Mr Alexander regarding the claimant retiring.
20 Mr Alexander denied making snidey comments to the claimant about retiring, and the tribunal preferred Mr Alexander's evidence for the reasons set out above.

47. The tribunal next had regard to the fact the claimant's role as Service Manager was deleted from the structure and he was offered the role of Service Driver.
25 The tribunal noted there was no dispute regarding the fact this happened and that there was an increase in the claimant's hours of work from 4 days per week to 5 days.

48. The tribunal asked whether the claimant had, in this respect, been treated less favourably than others (who were not within his age group). The tribunal

accepted Mr Alexander's evidence regarding the reason for the restructure and the decision to remove the role of Service Manager from the structure because it would be covered by the General Manager role.

49. The tribunal accepted Mr Alexander met with the claimant on 26 October 2022 to discuss the changes and agree a date for the increased working week to commence. The letter at page 69 confirmed the reason for the restructure was explained to the claimant, the reason for the removal of additional holidays was also explained and the claimant's request to be given notice of the change from 4 days to 5 days per week was granted and it was agreed this would start on 1 December 2022.

50. The issue for the tribunal is not whether this was "fair" or agreeable to the claimant: the issue is whether the claimant was treated less favourably than someone who was not in his age group. There was no evidence to assist the tribunal with this issue. The tribunal accordingly considered how a hypothetical comparator would have been treated by the respondent. A hypothetical comparator would be someone who was not in the claimant's age group, but who was in the same or similar circumstances to the claimant. The tribunal concluded that the hypothetical comparator would have been treated no differently to the claimant and I say that because the business need to restructure would have been the same and would have necessitated the same changes.

51. The tribunal noted that even if the claimant had been able to show he had been treated less favourably, then the next question would have been whether the less favourable treatment was because of age. The claimant provided no evidence about why he believed age was the reason for his treatment and in fact the evidence available to the tribunal (from Mr Alexander) strongly indicated a desire to retain the claimant in employment due to his experience.

52. The tribunal noted the claimant's assertion that he had been "removed" from the Service Manager role with no intention of him gaining the new position. The tribunal noted the claimant did not apply for the Service Co-ordinator Manager role.

53. The tribunal further noted the claimant was asked if he wished to go part time when he was helping his wife recover from a stroke. This had nothing whatsoever to do with the claimant's age: the offer was motivated by the fact the claimant had had to take time off to help his wife recover.
- 5 54. The tribunal next considered the claimant's assertion the investigation had been a sham, that it had taken too long and that he had not been provided with the grievance and whistleblowing policies. The tribunal could not accept the claimant's assertion that the investigation was a sham because the claimant accepted in cross examination that the two incidents complained of had occurred, but he wished to argue that they had not been his fault.
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55. The tribunal accepted the claimant raised health and safety concerns with Mr Alexander on 3 April 2023. Mr Alexander described the concerns as serious and he wished to investigate them immediately because they could impact on the respondent's licence. Mr Alexander accepted he did not meet with the claimant until July because he had been ill in May and in Cyprus during June. This however did not mean he had not investigated.
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56. The tribunal noted that by the time Mr Alexander met with the claimant on 6 July, there were the health and safety concerns to discuss and the issues raised in the grievance (which were similar).
- 20 57. The tribunal asked whether the claimant had been treated less favourably regarding these issues. There was no evidence to suggest how other concerns had been dealt with by the respondent. The tribunal, in considering how the concerns of a hypothetical comparator would have been dealt with, concluded their treatment would have been no different. We say that because the factors causing the delay (Mr Alexander's availability) would have been the same.
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58. The tribunal concluded the claimant has been unable to demonstrate that he was treated less favourably than others were or would have been treated. Furthermore, even if the claimant had been able to show less favourable treatment, there was no evidence whatsoever to support his belief that the reason for the less favourable treatment was because of age. There was no
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evidence about the age profile in the respondent (particularly in circumstances where Mr Alexander was retiring and the incoming General Manager was aged 60).

59. The claimant did, in the above list, refer to not being provided with relevant policies, however the tribunal heard no evidence regarding this matter.
60. The tribunal decided to dismiss the claim because the claimant has not been able to show there was less favourable treatment and, even if there was less favourable treatment, the claimant has not been able to show the reason for the less favourable treatment was because of age.
61. The tribunal noted an issue of timebar had been raised by the respondent. The tribunal decided, given its decision, that this was not a matter that required determination.

L Wiseman

Employment Judge

21/02/2024

Date

22/02/2024

Date sent to parties