



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Campbell

Respondent: Icopal limited

Heard at: Manchester

On: 11 October 2012

Before: Employment Judge Wardle
Mrs P J Byrne
Mr W Haydock

Representation

Claimant: In person

Respondent: Mr E Morgan - Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that this complaint of unlawful discrimination on the ground of the protected characteristic of age is not well founded and that it fails.

REASONS

1. This is a claim of age discrimination brought by the claimant, who at the material time was aged 54. It arises in the context of her application for the position of Internal Sales Manager with the respondent, in respect of which she was made a conditional offer of employment, which offer was later withdrawn following her attendance at the respondent's expense at a company known as Plurafutura specialising in psychological and analytical testing in Berlin for completion of psychometric tests. It is her contention that the respondent became aware of her age arising from her visit to Berlin and that as a result of so learning they withdrew the offer and thereby discriminated against her.

2. By their response it is denied by the respondent that they have discriminated against the claimant because of her age as alleged or at all. They aver that the reason why the claimant was not successful in her application for employment with them was because she did not satisfy the conditions referred to in the conditional offer made to her. In particular she did not score well enough in her psychometric tests. Furthermore they make no admission in relation to the claimant's age and aver that they had no knowledge of it, as it is not a question asked on the application form.
3. The Tribunal heard evidence from the claimant and on behalf of the respondent from Mr Matthew Scoffield, Managing Director, Mr Thomas Dalsgaard, Director of Plurafutura, and Mrs Sureya Landini, Internal Sales Director (Interim). Each of the witnesses gave their evidence by written statements, which were supplemented by oral responses to questions posed. We also had statements made on behalf of the claimant from Mr Ryan Campbell, her son, Mr Craig Budzik, her son's friend, Mr Michael Campbell, another son, and Ms Mary Smith, his girlfriend, to the effect that the claimant had been told on 22 December 2011 that the job was hers. None of the witnesses were present at the hearing and whilst the statements were admitted into evidence, we made clear that the weight that would be attached to them would be limited having regard to the respondent's inability to question them. We also had before us documents in the form of a bundle, which we marked as "R1".
4. Having finished taking the evidence late in the day the parties were made aware that we would be reserving our judgment. In the event in the time remaining to us that afternoon we were able having regard to the evidence, the submissions and the applicable law to reach conclusions on the matters requiring determination by us.
5. Having heard and considered the evidence we found the following facts.

Facts

6. The respondent is a relatively large employer employing some 216 people. Their business is that of the manufacture and sale of roofing and building membranes. In or about November 2011 they were seeking to recruit an Internal Sales Manager for which position the claimant applied via the internet by the submission of her CV, which was at pages 22-24 of the bundle. This demonstrated a career history from 1983 to the present day and her role with Yell Group as Tele Marketing/Sales Manager and resulted in her being shortlisted and contacted by Mrs Landini to attend for a first interview on 30 November 2011 at the Ramada Hotel, Salford Quays.
7. In an interview lasting around an hour and 20 minutes the claimant, who was asked to talk through her CV and career by Mrs Landini, created a favourable impression. She was assessed by her against a scoring framework of 11 different competencies, which was at pages 20-21 of the bundle and given a score of 47 out of 55. In Mrs Landini's notes of the interview she described the

claimant in the following way "great experience, gung ho, positive, hard working, good candidate, in a really tough environment." The claimant was told there and then that she would be put through to the next stage. She was also told that she would have to complete a psychometric test by 4 December 2011, which was sent to her by email and duly completed. Her second interview took place with Mrs Landini and Mr Scoffield on 8 December 2011 at the respondent's premises in Trafford Park. She was again asked to talk through her CV and career to date and to give examples of work situations to substantiate her achievements and management style. This interview lasted about an hour. Her unchallenged evidence was that at its conclusion Mr Scoffield asked if she had any reservations about her ability to do the job; that she was told that she was a very strong candidate and that the successful candidate would be going to Berlin to complete some psychometric tests to ascertain any areas for development of the individual.

8. The claimant was then telephoned by Mrs Landini on 12 December 2011 and informed that they could not choose between her and another candidate, who it transpired had scored more highly than her against the competency framework and that they would like her to attend a third interview with two different people. This was arranged for the following day with Mr David Worth, HR Manager and Mr Tue Vaaben, Operations Director. This interview, which lasted around 45 minutes, followed a similar pattern to the two previous ones and the claimant was again asked if she had any reservations. She was also told again by Mr Vaaben that the job was between two candidates, with the other having manufacturing experience which she didn't but not new business sales experience which she did.
9. On 15 December 2011 Mrs Landini telephoned the claimant to inform her that the company was pleased to offer her the position after having decided that she was a more long term employee than the other candidate. She also told her that they were able to offer her a basic salary of £40k as opposed to the advertised one of £35k, bringing her more in line with her current salary at Yell. She was told too that she would be receiving another psychometric test from a Thomas Dalsgaard in Berlin, which she had to complete by 18 December 2011. In order to access the test online a unique point of reference needed to be used and the claimant was asked by the test provider to enter the date of her birth, which information is allegedly needed by them to work out the norms. The long report of the test known as NEO PI-R, which measures the five major domains of personality, comprising neuroticism, extroversion, openness, agreeableness and consciousness was at pages 72-115 of the bundle.
10. On 16 December 2011 Mr Worth wrote to the claimant in confirmation essentially of Mrs Landini's telephone call. By his letter the claimant was offered the position of Internal Sales Manager at a salary of £40,000 per annum together with participation in the company's management bonus scheme subject to (i) satisfactory completion of a psychometric test at Plurafutura (ii) receipt of satisfactory references and (iii) a probationary period of six months. The letter went on to inform her that the company would meet all reasonable expenses incurred in her travelling to the Plurafutura offices in

connection with the psychometric testing.

11. The claimant arranged to fly out Berlin on 20 December 2011 with an overnight stay there and to fly back to the UK on the evening of 21 December 2011. She was to be collected from her hotel by Mr Dalsgaard at 10.00 a.m. in order to complete further psychometric tests at his company, Plurafutura.
12. On the claimant's account she was taken by him to his residential apartment and was alone with him throughout the tests, which she found uncomfortable. She claimed that within half an hour of her arriving at his premises he was asking questions about her family and specifically asked what year she had left school, which he wrote down on his note pad. She further claimed that he then pointed out that there were 10 years unaccounted for on her CV and asked her what she had done during this period, which upon her explanation led him to state that he understood why it wasn't included in her CV as being irrelevant to the level of role applied for. This claim was, however, only made by way of an amendment to her original statement after having seen Mr Dalsgaard's statement following exchange. She claimed at this point to have noticed a change in his demeanour from friendly and open to quite cold and aloof and that he became reluctant to engage in any conversation. On her further account she completed the tests and at around 3.00 p.m. asked if she could have some feedback, to which he responded affirmatively although he indicated that he would usually ask a candidate for an IT skills test but instead he just asked her about her experience with systems and databases. She claimed that she felt that he could not be bothered with her anymore and she was concerned that he had decided not to ask her to complete the final test. She claimed that aside from a concern he expressed about her not having done well in one test to establish ability in analysing in depth, complex data all other feedback, which was delivered in a dead pan way was positive. The only results she saw, however, were those of her maths test, in which she had only got one answer wrong. She further claimed that at this time she felt that Mr Dalsgaard had had enough of her and wanted her to leave adding that he left her at the door of his premises to find her own way to get a taxi from a hotel nearby, next to where they had had lunch, to take her to the airport.
13. On Mr Dalsgaard's account he met the claimant at her hotel and they walked to his office which was approximately 5 minutes away. He stated that he uses an apartment on a busy business street as an office space, the facilities of which have never drawn complaint from any one including the claimant. He also stated that he had asked her questions about the subjects that she enjoyed most and least at school and what she had dreamt of when moving into adult life but was adamant that at no point did he ask her about her age nor when she left school. He stated that she was only left alone in the test room to complete the tests, which are timed and that after their completion he took her to an Italian restaurant approximately two minutes from the office, from where they walked to the reception of the hotel, which operated in conjunction with the restaurant, when he advised her that she would be able to order a taxi from there to take her to the airport, which latter aspect of his account was agreed by the claimant.

14. In regard to the analytical tests carried out by the claimant Mr Dalsgaard stated that she achieved very low scores and that in respect of one of them she only completed 10 out of 20 tasks. This was a number sequence task, which was at page 49 of the bundle. On the major analytical test, named Raven set 1 & 2, his evidence was that in set number 1, which takes only 5 minutes to complete and is more of a warming up exercise for set number 2, she had 7 out of 12 correct answers and in relation to set 2, which takes 45 minutes to complete, her result was extremely low as she was only able to solve 11 out of 36 tasks correctly. The marks only for the two sets were shown in a document at page 47 of the bundle. In regard to the suggestion of an IT skills test having been dispensed with by him in relation to the claimant he stated that he had never asked anybody to complete such a test in his entire career. Also in the bundle at pages 35-43 and 45-46 respectively were Mr Dalsgaard's contemporaneous handwritten notes and a typed version of his meeting with the claimant. These suggested that the visit to Plurafutura was more akin to an attendance at an assessment centre rather than just to undergo psychometric testing as had been indicated by the conditional offer letter. They also showed that Mr Dalsgaard had reservations about the claimant's suitability for the role in question. In illustration of these he comments at page 46 that the claimant "Does not have the learning potential to operate with an overview and handle the various and very complex Icopal products with hundreds of single product numbers and on top of that a huge scope of possibilities of different combinations. Not able to handle very different people on very different levels both internally and externally. Lacks the ability of abstract thinking and analytical power and intellectual flexibility. Lacks intellectual curiosity and does not have a natural motivation or flair for analysing things."
15. In the feedback session with the claimant Mr Dalsgaard stated that he explained to her that he was not the decision maker but that he regarded her extremely low scores on all the analytical tests as critical.
16. In regard to the major area of dispute in evidence between the claimant and Mr Dalsgaard as to what questions he asked of her that might be deemed as designed to establish her age, we noted that there was a degree of inconsistency in the claimant's versions of events. For example, in her claim form and in her first statement she claimed that within half an hour of arriving at his premises he was asking questions about what year she left school and how old she was when she left school, whereas in her amended statement she claimed that he asked questions about her family and what year she left school and that he then pointed out that there were 10 years unaccounted for on her CV and asked her what she did during this time. We also noted that there was nothing in Mr Dalsgaard's contemporaneous notes of the interview that indicated any enquiry as to the claimant's age, notwithstanding the claimant maintaining that he wrote down on his note pad her answer to his enquiry about when and how old she was when she left school. Having regard to these matters we found ourselves on balance preferring Mr Dalsgaard's evidence that the claimant's age was immaterial to his assessment of her suitability for the role in question and that any questions about her time at school, which he acknowledged asking, were not asked to ascertain her age.

Whilst in relation to her date of birth appearing on the report of the test NEO PI-R, we accepted Mr Dalsgaard's evidence that this was something required by the test provider and that it had not registered with him at the time of his interview with the claimant.

17. On the evening of 21 December 2011 at about 7.00 p.m. Mr Dalsgaard provided Mr Scoffield with feedback on the test results informing him that the claimant had failed on all the analytical tests. Having regard to the fact that the ability to analyse complex data and juggling with a lot of product codes is the critical competence of the Internal Sales Manager's role he stated that they agreed that it would not work and that there would be negative consequences for both the claimant and the respondent. He further stated that during their conversation he did not discuss the claimant's age and that he did not know it.
18. On 22 December 2011 the claimant rang Mrs Landini, having been asked by her to do so. On her evidence, having told her of Mr Dalsgaard's concern regarding the results of the test for analysing in depth and complex data, she was assured by her that she had absolutely nothing to worry about, that there was no complex data to analyse with the job and that she could not understand his focus on it, adding that if there was a problem she would have heard by then herself as Thomas (Mr Dalsgaard) would have rung her as she had dealt with him throughout. She also stated that Mrs Landini asked if she had handed her notice in yet as she was looking for her to start on 9 January 2012 but that if they had to wait until 16 January 2012 this would not be a problem. She described herself as elated and that she finally celebrated her new job role with her family.
19. Mrs Landini's account of the conversation was that the claimant had enthused about the Berlin trip and had stated that she liked Mr Dalsgaard and that despite his having remarked about certain aptitudes she felt that it had been a very good day. She denied giving the claimant any assurance or stating that the job did not entail analysing complex data or asking if she had given her notice in stating that she did not want to be putting herself in a position of unwittingly offering a date at that time.
20. In relation to the dispute in evidence between the claimant and Mrs Landini as to the latter giving the former to understand that she had absolutely nothing to worry about the results of the test for analysing in depth and complex data during their telephone conversation on 22 December 2011 we considered that the fact that Mrs Landini had heard nothing at this stage to indicate any problems with the testing may well have led her to offer some form of reassurance to the claimant and that this was construed by her as indicating that she had cleared the final hurdle.
21. Following this conversation it is the respondent's evidence that Mr Scoffield telephoned Mrs Landini to inform her that having spoken with Mr Dalsgaard the claimant had failed the psychometric tests and that he had decided to withdraw the conditional offer of employment, which decision he asked her to convey to the claimant.

22. On 23 December 2011 Mrs Landini on the claimant's account called to inform her that the respondent was withdrawing the job offer due to the results of the tests for analysing complex data as they felt that she would struggle in the role because of it. According to the claimant, who described herself as absolutely astounded at the reversal of the decision considering the conversation that she had had with Mrs Landini the previous day, she asked her how something that was unimportant yesterday had become so significant overnight to justify withdrawing the job offer, which question she did not answer. Mrs Landini, for her part, denied that the claimant had asked her such question.
23. On 24 December 2011 the claimant emailed Mrs Landini to express how devastated she was on being told of the withdrawal of the job offer and to convey her belief that she was being discriminated against because of her age, stating that it was only during the final interview with Mr Dalsgaard that she asked about age and dates of when she left school and claiming that his demeanour towards her definitely changed at the time. She further asked for copies of all the psychometric tests she had completed in Berlin and indicated that she would be taking legal advice before asking her to forward her email to Mr Scoffield and Mr Worth.
24. On 3 January 2012 the claimant was contacted by Mr Worth asking for two references to accompany their job offer, which required her to explain what had happened before Christmas, to which he responded that he had no idea. During this conversation the claimant repeated her allegation of age discrimination and according to her Mr Worth told her that he would investigate.
25. No response was provided by the respondent to the allegation of age discrimination made in the email, although on 12 January 2012 during the course of inter-parties correspondence concerning the reimbursement of the claimant's expenses in travelling to Berlin Mr Worth stated in response to the claimant's indication that she was intending on the recommendation of ACAS to bring tribunal proceedings on the grounds of age discrimination that age was not a factor in the offer of employment being withdrawn.
26. A claim to the Employment Tribunals was subsequently presented by the claimant on 28 January 2012, which was responded to by the respondent on 24 February 2012.

Law

27. The relevant law for the purposes of this claim is to be found in the Equality Act 2010 (the 2010 Act). Section 4 lists 'age' as one of the protected characteristics covered by the 2010 Act. The scope of the protection accorded is set out in section 5, which at sub-section (1) states that a reference in the 2010 Act to a person who has the protected characteristic of age is 'a reference to a person of a particular age group, and a reference to persons who share that characteristic is 'a reference to persons of the same age

group'. Pursuant to section 5(2) an 'age group' is a group of persons defined by reference to age, whether to a particular age or to a range of ages. This definition allows the claimant to define the disadvantaged age group as s/he wishes.

28. Section 13(1) defines direct discrimination as follows: 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.' It therefore involves the requirement for a real or hypothetical comparator to whom the relevant protected characteristic does not apply and for the purposes of the comparison, pursuant to section 23(1), there must be 'no material difference between the circumstances relating to each case'. Section 13(2) provides that 'if the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim'. Section 136(2) and (3) dealing with the burden of proof 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 he or she did not contravene the provision.
29. Regard was also had to the guidance given by the Court of Appeal in *Igen v Wong* [2005] IRLR 258 CA with regard to the drawing of inferences in discrimination cases from the surrounding facts.

Conclusions

30. Applying the law to the facts as found the Tribunal considered first if the claimant had proved on the balance of probabilities facts from which we could conclude that the respondent had on the grounds of the protected characteristic of age treated her less favourably than others were treated by withdrawing the conditional job offer that they had made to her, noting that in the event of the claimant not proving such facts that her claim will fail.
31. We concluded that she had not for the following reasons. First of all it was common ground that the job offer was conditional - being subject to two conditions precedent - the material one for the purpose of these proceedings being the satisfactory completion of the psychometric test that she was to undergo in Berlin. Secondly the claimant made no complaint about the test itself or the manner in which it was conducted. Thirdly there was no dispute that she failed the test. Fourthly it was clear from the manner in which this recruitment process was handled, involving three separate interviews with different senior employees of the respondent and the referral for assessment by means of psychometric testing of the preferred candidate at the respondent's expense to Mr Dalsgaard in Berlin that this was an appointment that they were anxious to get right. Fifthly there was no suggestion that the other candidates were treated any differently in terms of the process as was evidenced by Mrs Landini's response to the Tribunal questions that the other preferred candidate for the job declined to go to Berlin because she did not think that she would do well with the testing. Sixthly there was our preference

for Mr Dalsgaard's evidence to that of the claimant that his questions of her in relation to her schooling did not extend to his seeking to establish when she left school and at what age. Seventhly given the claimant's test results and the reservations expressed by Mr Dalsgaard as to her suitability for the post it was difficult to see what else the respondent could have done in the circumstances other than to withdraw the conditional offer, as to do otherwise would have meant them ignoring the expertise and advice that they had expressly sought by the commissioning of his services. For these reasons and in the light of the fact that there was no identified comparator real or hypothetical to whom the protected characteristic of the claimant's age of 54 did not apply we could not discern any less favourable treatment of the claimant on this ground.

32. Thus, whilst we could understand how the news of the conditional job offer's withdrawal would have been extremely disconcerting for the claimant in view of the positive indications that she had received to that point and how it would have caused her to question the reason given to explain it, we did not consider having regard to the foregoing matters that she had proved facts from which we could conclude that the respondent had treated her less favourably on the grounds of the protected characteristic of age than they had treated or would have treated others. Accordingly we find that her complaint of age discrimination against the respondent is not well founded and that it fails.

U. Wardle

Employment Judge Wardle

JUDGMENT, REASONS & BOOKLET SENT TO THE PARTIES ON

8/11/12

Peter Hobson

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

