Appeal No. UKEAT/0012/14/MC
UKEAT/0013/14/MC

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 31 July 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

NSL LTD & NSL SERVICES GROUP — APPELLANT

MRS L MILLER — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID MITCHELL (of Counsel) Instructed by: NSL Limited 4th Floor Westgate House Westgate London W5 1YY
For the Respondent	MRS LORRAINE MILLER (The Respondent in Person)

SUMMARY

AGE DISCRIMINATION

HARASSMENT

UKEAT/0012/14/MC – Liability Appeal

Harassment related to age – **Equality Act 2010 section 26**

The Employment Tribunal had reached findings that were open to it on the evidence and adequately engaged with the Respondent's case and gave sufficient reasons for rejecting it. The conclusion reached, that the Claimant had suffered harassment related to age, did not "cheapen the significance" of the protection (per Elias LJ in **Land Registry v Grant** [2011] ICR 1390); this was not a trivial act nor had the upset been minor.

Direct age discrimination – **Equality Act 2010 sections 13(1) and 39(1)(c)**

The Employment Tribunal had again sufficiently engaged with the Respondent's case and adequately explained its reasons for rejecting it. Whilst it might have been better if the Tribunal had stated in terms that it disbelieved the evidence Ms Plummer gave in the internal investigation, that it did so was sufficiently clear from its Reasons. Moreover, there was no procedural irregularity in the approach adopted by the Tribunal in respect of the documentation. It was entitled to have regard to the material put before it by the Respondent and had expressly recalled the Respondent's witness to address the documents in question. The parties had not sought to make further submissions and the Tribunal reached conclusions that were open to it on that material.

UKEAT/0013/14/MC – Remedy Appeal

Issues raised on remedy

The reasons given by the Employment Tribunal on remedy were inadequate for either party to understand why it had won or lost on the points in issue. Having considered the factors in **Sinclair Roche Temperley v Heard** [2004] IRLR 763, it was appropriate to remit the case to the same Tribunal for rehearing the question of remedy

HER HONOUR JUDGE EADY QC

1. In giving this Judgment I refer to the parties as the Claimant and the Respondent, as they were below. The appeal is that of the Respondent against two Judgments of the London (Central) Employment Tribunal chaired by Employment Judge Davidson, sitting with members on 3 May 2013 (the Liability Hearing) and on 29 July 2013 (the Remedy Hearing); the Judgments being sent to the parties on 10 July 2013 and 28 August 2013 respectively.

2. The Tribunal upheld the Claimant's claims of age discrimination and harassment and awarded her £20,000, comprising £16,000 loss of earnings and £4,000 injury to feelings.

The Background Facts

3. The Respondent is a company that supplies Civil Enforcement Officers (traffic wardens) for the London Boroughs of Camden and Westminster. The recruitment process operated by the Respondent for such positions was as follows. First, candidates would complete an online application form, giving details of previous employment and skills, qualifications or experience. There would then be an online PAPQ test, and candidates who passed the online process would then be invited for an assessment carried out by testing relevant literacy and numeracy skills. Those who scored more than 80% in the assessment would then be interviewed.

4. The Claimant applied for a job as a Civil Enforcement Officer with Camden Council. She carried out the steps I have outlined above and was invited to be interviewed after she had successfully completed her assessment, the interview to take place on 21 September 2012. Although the Respondent's Ms Plummer was running the process - and indeed carried out most of the interviews - she asked one of the experienced Civil Enforcement Officers, Mr Adekunle,

to carry out some interviews that day, including that of the Claimant. The Claimant's contended that, at the conclusion of the interview, Mr Adekunle had said that she was "the right colour, the right sex, and the right nationality" but that she was "too old and blonde for the position." She said that when she challenged him about this comment, he went on to say that "people of her age do not have the stamina and leave after three weeks on the job" and that he would not recommend her for the job.

5. For its part the Respondent denied that those words were used. It did not call Mr Adekunle to give evidence before the Employment Tribunal, but he had provided his account of the interview in the Respondent's internal investigation, and the Respondent relied on that before the Tribunal. From that record the Tribunal observed that it was agreed that there had been some discussion regarding stamina - which was a relevant criterion for the job - but Mr Adekunle had denied any link being drawn between stamina and age.

6. On that crucial conflict on the evidence, the Tribunal accepted the Claimant's account. The Tribunal noted Mr Adekunle's evidence, in the internal investigation, that he had in fact recommended the Claimant for the job. It did not, however, accept that. First, because it found the Claimant to be a credible witness whose account remained consistent when tested under cross-examination. Second, because its assessment of the documentary evidence suggested that Mr Adekunle had not concluded with a positive statement in the Claimant's case, which he had done for the documentation he had completed for other, successful, candidates. Third, he had not completed the scorings on the Claimant's interview form, whereas he had done so in the cases of those he had put forward for Ms Plummer to consider.

7. The Tribunal accepted that it was Ms Plummer, who was Mr Adekunle's senior, who made the final selection, but it found that, as the Claimant was not put forward by Mr Adekunle - a conclusion, as I have said, based on the fact he had not included any scores for the Claimant on the interview form, and given negative comments at end of her form - that was irrelevant: Ms Plummer did not exercise any form of selection regarding the Claimant.

8. The Tribunal further found that the Claimant was sufficiently affected by what Mr Adekunle had said that she went to her doctor and, the next day, contacted the Citizens' Advice Bureau (evidenced by the Claimant's contemporaneous notes). After religious holidays which then fell, the Claimant sent a complaint to the Respondent and that was investigated by the Respondent's account manager for Camden, Mr Orezzi. Mr Orezzi interviewed Mr Adekunle and Ms Plummer, but apparently did not cross-reference their accounts against the documentation. Mr Orezzi concluded that there had been no discrimination.

The Employment Tribunal Hearings and Reasoning

9. The Employment Tribunal heard evidence from the Claimant and Mr Orezzi. The main protagonists on the Respondent's side - Mr Adekunle and Ms Plummer - were not called. They had left the Respondent's employment subsequent to the events in question (but, the Respondent has said, not because of those events). The Respondent said that it was unable to provide a full set of the documentation concerning all of the candidates assessed in the recruitment round in question, because some of the material had been inadvertently shredded during an office move. The Claimant observes that the Respondent had been put on notice of her complaint from an early stage and so there was no good reason for not retaining the documents. The Tribunal also noted that there were various redactions of information in the documentation which meant that it could not be readily cross-referred.

10. The Liability Hearing lasted a day. Evidence and submissions were completed relatively quickly and the Tribunal then took time to deliberate. During the course of its deliberations in the afternoon, the hearing was briefly resumed as the Tribunal recalled Mr Orezzi to give evidence. He was asked various questions by the Employment Judge relating to the documents.

11. The parties were not invited to make further submissions, but, equally, they did not seek to do so. The Tribunal then continued its deliberations before, somewhat late in the day, resuming the hearing to orally announce its Judgment and Reasons.

12. The Tribunal concluded that the Claimant was not offered the job because Mr Adekunle did not put her forward. His reason for not doing so related to her age. He assumed that the Claimant would not last as a Civil Enforcement Officer because she would not have the stamina to do so. He made that assumption based on her age (see paragraph 21).

13. Although he had noted the Claimant's lack of experience on the form, the Tribunal found that the real reason in Mr Adekunle's mind was evidenced by his comments at the interview, that she was too old, and by the exchange regarding her stamina. That was unwanted conduct relating to the Claimant's age, violating her dignity and thus amounted to harassment.

14. Having announced its decision at the end of the Liability Hearing, the Tribunal set the matter down for a Remedy Hearing. Meanwhile, it sent out its Written Reasons for its Liability Judgment, albeit that those were not received by the Respondent until it attended at the Remedy Hearing on 3 May 2013.

15. At the Remedy Hearing, the Tribunal again heard evidence from the Claimant and Mr Orezzi. It rejected the Respondent's contention that the Claimant would not have completed her probationary period. It found that she would. Equally, however, it was not persuaded that the Claimant would then have necessarily remained in the job for ten years, as she had claimed. It also considered that the Claimant had not made sufficient attempts to mitigate her loss and that, after a year out of work, she should have been able to find alternative employment, concluding that she would be able to do so once the case was behind her. Accepting the Respondent's figures as to the net earnings for this position, the Tribunal awarded the Claimant one year's net pay (£16,500) less £500 for earnings that she had received during the year.

16. As for the Claimant's injury to feelings, the Tribunal concluded that the discrimination had impacted on the Claimant and caused her to suffer injury to feelings at the higher end of the lowest **Vento** bracket. It awarded £4,000.

The Appeal

17. The grounds of appeal fall to be considered separately in respect of liability and remedy. On the liability appeal, seven grounds were put forward.

18. Ground 1, was that the reasons were not Meek-compliant; that is, referring to **Meek v City of Birmingham DC** [1987] IRLR 250, and/or did not meet the requirements of Rule 30(6) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004,** Schedule 1.

19. Ground 2 was that there was a failure on the part of the Employment Tribunal to address the Respondent's case.

20. Ground 3 is that the Tribunal had failed to explain the basis for its finding that the Claimant's dignity was violated for the purpose of section 20(1)(b)(i) of the **Equality Act 2010.**

21. By Ground 4, the Respondent complained that - in considering whether it had discriminated against the Claimant for the purposes of section 39(1)(c) of the **2010 Act** - the Tribunal had failed to engage with the point that the decision whether or not to employ the Claimant was taken by Ms Plummer and, thus, Mr Adekunle's failure to recommend her would not be the end of the narrative.

22. By Ground 5, the Respondent contended the Tribunal erred in its assessment of the credibility, making findings adverse to Mr Adekunle and Ms Plummer when neither had been called as witnesses before it and without apparently taking into account the full documentary evidence relevant to the Mr Adekunle's comments and/or the view formed by Mr Orezzi.

23. In Ground 6, the Respondent averred that the Tribunal had erred in its application of the burden of proof, failing to properly consider the Respondent's explanation.

24. Ground 7 was a complaint of procedural irregularity, that the Tribunal sought to piece together the evidence from incomplete documentary material without making it clear to the parties what it was doing and without giving them the opportunity to make representations.

25. Four grounds were raised by the remedy appeal. The first repeated the first ground of the liability appeal. The second raised an objection that the Tribunal's Reasons were not **Meek**-compliant in respect of the loss of earnings award. Third, the Respondent argued that the award for injury to feelings was outwith **Vento**, the sum of £4,000 being disproportionate to the discriminatory conduct in issue and/or inadequately reasoned. Fourth, the Respondent made a further complaint of procedural error, this time in respect of the medical evidence, which was only provided in unredacted form to the Employment Judge and no reasons were provided to explain what, if any, view had been formed by the Tribunal in that regard.

The Relevant Legal Principles

26. Harassment is defined at section 26 of the **Equality Act**:

> **"(1)A person (A) harasses another (B) if—**
>
> **(a)A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b)the conduct has the purpose or effect of—**
>
> **(i)violating B's dignity, or**
>
> **(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **....**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a)the perception of B;**
>
> **(b)the other circumstances of the case;**
>
> **(c)whether it is reasonable for the conduct to have that effect.**
>
> **...**
>
> **(5) The relevant protected characteristics are:**
>
> **age; ..."**

27. Direct discrimination is defined by section 13 of the **Equality Act 2010**:

> **"(1) 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.**

(2) 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."

28. As for the reason given by an Employment Tribunal, under Rule 30(6) of the **Employment Tribunal Rules 2004** the Tribunal was required to make findings of fact relevant to the issues in the case (see r 30(6)(c)) and to demonstrate how the relevant findings of fact and applicable law have been applied in order to determine the issues (see r 30(6)(e)). That said, Rule 30(6) was not a straitjacket. If those matters could be reasonably spelled out from the Tribunal's decision, there would be no error of law simply because it had failed to recite the rule in terms (see per Buxton LJ in **Balfour Beatty Power Networks Ltd v Wilcox** [2007] IRLR 63 at paragraph 25). Moreover it is trite that an Employment Tribunal is not required to make detailed findings of fact in relation to each and every aspect of evidence (see per Lord Phillips MR in **English v Emery Reimbold and Strick Ltd** [2003] IRLR 710). Whilst a Tribunal must consider all that is relevant, it need only deal with the points seen to be controversial relating to those issues, and then only to the principal important points (see per Peter Gibson LJ paragraph 24 of **High Table Ltd v Horst & Ors** [1997] IRLR 513).

29. A Tribunal's findings of fact need to provide an outline of the story and to be sufficient to enable the parties to know why they have won or lost, thus meeting the requirements set down in **Meek**. It should, however, be borne in mind that those reasons are primarily directed at the parties, who can be taken to know the detail of the issues and the arguments in the case. They do not come as strangers to it (see per Keene LJ, paragraph 32 of **Derby Specialist Fabrication Ltd v Burton** [2001] IRLR 69).

Submissions

The Respondent's Case

30. Taking first the liability appeal, Mr Mitchell complained that the reasons were not **Meek**-compliant and/or did not meet the requirements of Rule 30(6) of the **ET Rules 2004**. In particular, he said it was left unclear as to what were the offending words found to have been said by Mr Adekunle. The Tribunal had found a number of remarks to have been made, not all of which related to the Claimant's age. Two remarks might have been relevant to the question of age discrimination, but the Tribunal then only concluded that it was one comment that violated the Claimant's dignity but did not specify which. The Respondent contended that this was fatal to the finding on the harassment claim. As it could not be sure what the relevant conduct was, the first limb of section 26(1)(a) could not be said to have been made out.

31. Mr Mitchell submitted that was particularly important, as the Claimant's case - on the remarks said to have been made - had varied. Accepting that the substantive gist of what she was alleging had remained constant throughout, Mr Mitchell complained that there was some inconsistency in terms of the expansion of what she said. For example, she had not added that Mr Adekunle had referred to others not lasting three weeks in her witness statement, whereas she had said that in her original complaint to the Respondent and in her ET1.

32. The Respondent also complained that, at paragraph 9, the Tribunal had used the pronoun "he" without it being clear to whom it was referring. Mr Mitchell accepted that it was only Mr Adekunle who could have been referred to as making the offensive remarks in question. He also accepted – in any event - that whether the "he" referred to the Respondent generally, or to Mr Orezzi's conclusion on the investigation, or to Mr Adekunle's evidence in the investigation, the Tribunal had correctly summarised the Respondent's point.

33. Additionally, in a submission made in the written Skeleton Argument but not expanded orally, the Respondent complained that the Tribunal erred in not considering how old the Claimant was as compared to Mr Adekunle and/or Ms Plummer. That (it was argued) would have been a relevant issue in considering the likelihood that the offending remark was made.

34. Turning to ground 2, the Respondent complained that there was a failure on the part of the Tribunal to address its case. First, the Tribunal did not explain the rationale for finding that the words attributed to Mr Adekunle were actually said by him. The Respondent said it was inherently implausible that he would (as the Claimant alleged) have stated, at the beginning of the interview, that he was black. It also noted that this had not been an allegation made by the Claimant in her earlier statements of complaint to the Respondent and in her ET1.

35. Second, Mr Mitchell submitted that the Tribunal just did not address its primary submission that the Claimant's case was inconsistent and that she had given contradictory accounts.

36. As for ground 3, the Respondent contended that the Tribunal had failed to explain the basis for its finding that the Claimant's dignity was violated for the purposes of section 26(1)(b)(i) **Equality Act 2010**. In this regard the Respondent placed reliance on the Judgment of Elias LJ in **Land Registry v Grant** [2011] ICR 1390, where he stated as follows:

> **"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."**

37. The Respondent contended that, in cross-examination, the Claimant was asked whether she had been upset after the interview with Mr Adekunle and that she had responded "not at all". In those circumstances, it was argued, the Tribunal needed to explain how it had reached

the conclusion that it did. Although the Reasons made reference to the Claimant having attended her GP, it seemed that the Tribunal had wrongly read the entry in the medical record and was in fact referring not to the entry for the day in question, 21 September 2012, but to a later entry for 27 March 2013, which was the date of the CMD hearing in these proceedings.

38. On ground 4, in considering whether the Respondent had discriminated against the Claimant for the purposes of section 39(1)(c) of the **2010 Act**, it was contended that the Tribunal had failed to engage with the point that the decision whether or not to employ the Claimant was taken by Ms Plummer. Although the Tribunal knew that Ms Plummer had made the decision (see the opening sentence of paragraph 17), the Respondent complained that it apparently ignored the implication of this by stating, "The criteria adopted by Ms Plummer, therefore, are not relevant to this claim". The Respondent contended that the Tribunal's finding that the Claimant was not offered the job because she was not recommended by Mr Adekunle "ignores the possibility that, even had he put her forward for the job, Ms Plummer might still have rejected her." It further complained that, although the Tribunal apparently impugned Ms Plummer's account at paragraph 17, it did not expressly find that she had been untruthful in her account to Mr Orezzi or that she was actuated herself by unlawful discrimination based on the Claimant's age and thus not to give her the job.

39. Finally, on this ground, the Respondent objected to what it saw as the Tribunal's failure to engage more fully with its case, relying on a comparator of a similar age to the Claimant, who had been offered a job.

40. Related to those objections was the Respondent's case on ground 5, in respect of which it complained that the Tribunal had erred in its assessment of credibility. Mr Mitchell's

submission was that the Tribunal had made findings adverse both to Mr Adekunle and Ms Plummer when neither had been called as witnesses before it and without the Tribunal apparently engaging with the full documentary evidence and/or the view formed by Mr Orezzi, who had interviewed both and who did attend to give evidence at the Tribunal.

41. Specifically the Respondent objected that the Tribunal had failed to have regard to the positive aspects of the Claimant's interview form as completed by Mr Adekunle and to the evidence relating to Mr Adekunle's equal opportunities training. Also, given that there no challenge to Mr Orezzi's evidence, it was submitted that it was then unfair of the Tribunal to reject his finding as to the credibility of Mr Adekunle and/or Ms Plummer. As an alternative way of putting those points, by ground 6, the Respondent contended that the Tribunal had erred in its application of the burden of proof, failing to properly consider the Respondent's explanation and simply accepting the Claimant's case.

42. Ground 7 also went to support the objections under grounds 4 and 5. Here the Respondent complained of a procedural error in the Tribunal apparently seeking to piece together the evidence from the incomplete documentary material without making it clear to the parties what it was doing and giving them the opportunity to make representations on the point. The documentary evidence before the Tribunal was incomplete and in part redacted; it was not safe for the Tribunal to undertake this exercise. Further, if the Tribunal was going to draw any inference from that material, then it should have made that clear to the parties and given them the opportunity to make further submissions.

43. Turning to the remedy appeal, Mr Mitchell accepted that the first ground merely replicated the first ground in the liability appeal. The second ground made the same point: i.e

that the Reasons were inadequate in respect of the loss of earnings award made. Whilst accepting that the Tribunal would have been entitled to reject Mr Orezzi's evidence regarding the Claimant's suitability for the role, it was submitted that it was obliged to provide some reasons for so doing. Here, the reasons did not demonstrate any engagement with either side's case.

44. This point also went to the question of mitigation. The only evidence of the Claimant looking for alternative work was after the Liability Hearing. The Respondent had put in various documents showing other opportunities that the Claimant could have applied for, but the Tribunal made no finding on this. The £500 for which the Tribunal did give credit was in fact earned before the interview with the Respondent, so it did not even make sense for that sum to have been taken into account; although, on the Respondent's case, the Claimant should have been awarded nothing because of her failure to mitigate.

45. The third ground of appeal on the Remedy Judgment related to the injury to feelings award, and the Respondent argued that the Employment Tribunal had misdirected itself as to **Vento**, contending it was simply not proportionate to make an award of £4,000 for injury to feelings for a one-off incident and that the sum was manifestly oppressive when compared to other award in age discrimination cases on not wholly dissimilar facts, as summarised in *Harvey on Industrial Relations and Employment Law*.

46. The fourth ground was a complaint of procedural error in respect of unredacted medical evidence which had been shown only to the Employment Judge. The Respondent could not see anything in the Reasons to explain what, if any, influence this had had on the decision reached by the Tribunal. It could not know what, if any regard had been had to this evidence.

The Claimant's Case

47. For her part the Claimant objected to the Respondent's failure to maintain the relevant documents and to call the relevant witnesses. She did not feel that the explanations that had been given in this regard had been consistent or satisfactory. She did not see why the Tribunal should have accepted Mr Orezzi's evidence when he had not engaged with the documentary material. As with various assertions made by the Respondent - for example as to Mr Adekunle's experience - she said that was simply not proved by the Respondent. What had been established was that Mr Adekunle was not an experienced interviewer. Tested against the documents, the evidence given by Mr Adekunle in the internal investigation process was inaccurate.

48. As to her manner of presentation before the Tribunal, she considered that supported her case and not that of the Respondent, in particular as to whether she would have passed her probationary period and stayed on in this employment. She further observed that it was a matter of fact that the Respondent had taken on a 19-year-old candidate who had no experience. The fact that it had also taken on a 50-year-old with lots of experience did not undermine that point or the Claimant's case. She believed that the Respondent was seeking to drag this case out as long as possible when the reality was that Mr Adekunle had said the words in question.

49. On the Remedy Judgment, she could only say that she believed that she would have passed the probationary period and would also have stayed ten years, as she had previously stayed in other jobs over long periods of time. As for her injury to feelings, when she realised that the comments made by Mr Adekunle were not part of the interview, she was very much hurt by that. She felt that the Respondent should have accepted the consequence of Mr Adekunle's comments and it actions, and should not have pushed the case to this stage.

Discussion and Conclusions

50. The acts of harassment and discrimination that lie at the heart of this case took place over a fairly short period, albeit with the potential for a more long-lasting impact. The harassment complained of related to words spoken at the conclusion of a job interview; the discrimination was the failure to put the Claimant forward for employment after that interview. That is precisely the kind of dispute that Employment Tribunals – sitting, as here, as a fully constituted industrial jury - are best placed to resolve. The fact that it did so over two relatively short hearings is also entirely in keeping with the Tribunal fulfilling its function. It would be wrong of me to interfere with the findings made by such a first-instance Tribunal unless there is a real error of law material to the conclusions reached. Equally, it would be wrong of me to pick closely through the reasons given, looking for faults, rather than standing back and allowing the broader picture to emerge.

51. With those injunctions in mind, I turn to the individual grounds of appeal before me.

52. I first consider grounds 1-3 on the Liability Appeal, which each relate to the finding on the Claimant's harassment claim. I consider the Tribunal's findings to be very clear in this respect. The Tribunal accepted the Claimant's evidence as to the exchange with Mr Adekunle at the end of the interview. That included his comment that she was the right colour, sex and nationality but "too old and too blonde", and then, in response to her challenge (because she thought this was still part of the interview process), that people of her age did not have the required stamina. The Tribunal's conclusion in this respect is quite plain. It is certainly clear to me, coming to this matter afresh; it must be all the more so to the Respondent, which was present at the Tribunal hearings and familiar with the case against it.

53. To simply refer to the use of the singular comment in the penultimate sentence of paragraph 22 is: (1) nit-picking, and (2) failing to read it in the context of the rest of that paragraph and the earlier findings. Further, to the extent that the Tribunal used an unspecific "he" at paragraph 9, that is immaterial to the force of the findings and to the conclusions reached. It does not detract from the clear finding that it was Mr Adekunle who made the offending remark. At that stage the Tribunal is simply recording the Respondent's case, and it makes no difference whether the "he" is read as the Respondent or Mr Orezzi or Mr Adekunle. Whichever way it is read, it is an accurate summary of the Respondent's case.

54. For completeness I also address the complaint made by the Respondent in the Skeleton Argument to the effect that the Tribunal erred in not considering how old the Claimant was compared to Mr Adekunle and/or Ms Plummer, suggesting that would have been a relevant issue in considering the likelihood that the remark was made. The point was not pursued in the oral submissions before me and rightly so. It is a bad one. It is for the Employment Tribunal, as the industrial jury, to determine what was said on all of the evidence before it. It is entirely a matter for the Tribunal as to what weight to give different parts of the evidence. Whether the alleged discriminator shared the relevant protected characteristic with the complainant may be of very little relevance; being of the same sex or race, for example, does not mean that people do not discriminate because of that shared protected characteristic. Here the Tribunal apparently did not consider it relevant. It was entitled to that view. There is no error of law.

55. As for the complaint that the Tribunal failed to explain its rationale for finding that the words attributed to Mr Adekunle were said by him, I reject that submission. It is apparent to me that it did adequately explain its reasons. First, it accepted the Claimant's evidence and explained why. First, because the context made sense: the Claimant had initially thought the

comments were part of the interview, designed to challenge her (as Civil Enforcement Officers may be challenged when doing their job on the streets). Second, because the Tribunal found the Claimant to be an entirely credible witness, whose evidence in all material respects was consistent and held firm under cross-examination.

56. As for the complaint that the Tribunal did not address the Respondent's primary submission - that the Claimant's case was both inconsistent and inherently implausible - again I disagree. First, it found that - on the contrary - her account remained consistent *in all material respects* (see paragraph 10). Having gone through her original complaint to the Respondent, her ET1 and her witness statement and having heard the Claimant giving evidence, as tested in cross-examination, it was entitled to reach that conclusion. To support its finding as to her credibility, it could have added that there was also evidence of her seeing her GP the same day and seeking advice from the CAB the next. There was certainly sufficient evidence and sufficient reasoning to support the conclusion reached.

57. On the question as to whether the Claimant's account was inherently implausible, particularly as to Mr Adekunle having stated that he was black at the beginning of the interview. This as simply nit-picking. The Tribunal's focus was on age-related comments. It was not required to focus on the other remarks made.

58. As for the fact that that particular remark had not been recorded in the Claimant's earlier complaint and ET1, those earlier documents do not give a full account of the interview. They focus on the concluding remarks, not the opening comments. That question of inconsistency was simply not at the heart of the case the Tribunal had to decide. It was entitled to conclude that the Claimant's evidence was consistent in all material respects. Moreover, just because the

Respondent's forensic deconstruction of her evidence raised a point did not mean that the Tribunal was obliged to deal with it. It adequately addressed that which was material to its Judgment. True it is that, in forming that judgment, the Tribunal did not have the advantage of hearing from Mr Adekunle, but that was more a matter for the Respondent than the Claimant or the Tribunal. I am certainly not aware of any application having been made for a witness order or any other step taken by the Respondent to ensure his attendance.

59. In any event, the Tribunal was careful to take into account what Mr Adekunle had said in the internal investigation. When it sought to check that evidence against the documentary evidence, however, it found inconsistencies. If he had - as he suggested - put the Claimant forward, why had he not put any scores on her form as he had for the others he had apparently interviewed and put forward? Although he said he had recommended her, the final comment he had made was negative in terms of her experience, and that contrasted with the positive concluding remarks he had made about other candidates who went forward for selection.

60. All of those points were matters for the Employment Tribunal. No error of law is demonstrated and no inadequacy in the reasons provided.

61. As to the related criticism that the Tribunal failed to explain the basis for its finding that the Claimant's dignity was violated for the purposes of section 26(1)(b) of the **2010 Act**. Whilst I accept the statement of Elias LJ in **Land Registry v Grant**, I do consider that this case falls into the trap that he referred to. Being told that you are assumed not to have the stamina to do a job because of your age is not a trivial act. As to whether it caused minor upset to the Claimant, although notes of evidence have been agreed or put before me, I am prepared to accept what Mr Mitchell has said that, in cross-examination, when asked whether she had been

upset after the interview, the Claimant had responded "Not at all". On anyone's case, however, that was simply part of the evidence. The Tribunal apparently also had regard to the Claimant's evidence as to the impact upon her (see paragraph 18):

> **"Following the interview the Claimant thought about what Mr Adekunle had said and was upset."**

62. She might not have had that reaction immediately the comments were made in the interview, but people do not necessarily react straight away, particularly when in the course of being interviewed for a job and thinking it might be a question designed to challenge the candidate. The Tribunal obviously had evidence before it as to the impact of the comment on the Claimant after the interview. It also had the evidence of her visit to the GP that day and her evidence as to why she went to the GP. Whether or not it had managed to confuse some of the dates in the medical entry does not detract from the overall strength of that point. On the Claimant's evidence (as corroborated by the medical records), the reason she went to her doctor that day was because she was upset by the remarks that had been made to her in the interview. On the evidence before it, the Tribunal again reached a conclusion entirely open to it.

63. I turn, then, to grounds 4-7, which relate to the claim of direct discrimination in the failure to offer the Claimant employment. In this regard, I do not accept that the Tribunal failed to engage with the point that the decision whether or not to employ was taken by Ms Plummer. To so suggest simply ignores the Tribunal's finding that Ms Plummer did not get to make the selection, because Mr Adekunle did not put the Claimant forward (see paragraph 17).

64. The Respondent contends that the Tribunal's finding that the Claimant was not offered the job because she was not recommended by Mr Adekunle "ignores the possibility that even had he put her forward for the job Ms Plummer might still have rejected her". That is incorrect.

If the Tribunal found that the Claimant was not appointed because she was not put forward for consideration, then the cause of action was complete at that point. The only relevance of Ms Plummer's possible decision in assessing the Claimant's losses would be in respect of remedy.

65. The better point raised by this part of the Respondent's appeal was that, although the Tribunal apparently impugns Ms Plummer's account at paragraph 17, it does not expressly find that she was untruthful in her account to Mr Orezzi. Ms Plummer's account in the internal investigation (which was before the Tribunal and was also recounted by Mr Orezzi), was that Mr Adekunle had put the Claimant forward but that she, Ms Plummer, had not selected the Claimant because the Claimant had insufficient experience. The Tribunal does not spell out in terms that it rejected that account. It was not, however, bound to accept the findings of the internal investigation. Moreover, the adequacy or the correctness of the conclusions of that investigation was not at the heart of the case before the Tribunal. This was just part of the material before it, and paragraph 17 makes clear that the Tribunal did not accept the evidence that Ms Plummer had given in the internal interview. It had various reasons for not doing so. First, because it had the benefit of hearing the Claimant and it accepted her account. Second, because the account given by Ms Plummer was plainly viewed with some scepticism: rejecting the Claimant because of her lack of experience was simply not consistent with the fact that others were appointed without any experience including a school leaver.

66. As for the Tribunal's apparent reliance on the form completed by Mr Adekunle, the Tribunal did not view this in isolation but compared it to forms that it reasonably inferred must have been completed by Mr Adekunle in the case of two other candidates. The Tribunal's view as to the negative final comment was one that it was entitled to reach. In saying that, I allow that the Tribunal did not specifically refer to the positive comments in the form that related to

A the Claimant. I do not, however, consider that that undermines the force of its finding. Taking the Judgment in its entirety, it is clear that the Tribunal concluded that Mr Adekunle went through the interview questions with the Claimant, during which process, no doubt, positive B comments may have been entered on the form, perhaps demonstrating why she was qualified for the appointment. At the end, as the Tribunal found, he effectively vetoed her going forward for entirely impermissible age-related reasons. So the Tribunal were entitled to look at and emphasise the final negative comment. It was entitled to have regard to the fact Mr Adekunle C did not then provide a summary of his scores, as he had in the other cases. The Tribunal was entitled to take the view that he would have completed that exercise if he was in fact putting the Claimant through for possible selection by Ms Plummer.

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67. Standing back, and looking at the picture painted by the Tribunal's findings, it is clear that the Tribunal rejected the accounts given in the internal investigation and that it was entitled to do so on the evidence before it.

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68. For completeness on this point, I do not agree that there was a procedural irregularity. The Tribunal was doing its best on the evidence that had been provided. It did not just accept F the Claimant's evidence, however compelling it found her as a witness. It did not simply reject Mr Adekunle's account even though he was not in attendance and his account in the internal investigation had not been tested. The Tribunal tested the case against the documents provided by the Respondent. It made that clear by resuming the hearing and recalling Mr Orezzi. Had G the Respondent then asked to make further submissions on the evidence, there is no reason to think that that would not have been allowed. There was no such application. The parties were put on notice that the Tribunal was specifically looking at the documentation. Having done so, H it apparently drew inference that it was entitled to do. There was no procedural irregularity.

69. Finally, on the question of the Respondent's objection to the Tribunal, as it put it, failing to engage more fully with its case of a comparator of a similar age to the Claimant, who was offered a job on the basis of superior experience. The Respondent again ignores the Tribunal's express findings in this regard. First, its finding that - entirely inconsistently with the Respondent's case - a school leaver with no experience was taken on. Second, its finding that the comparator relied on by the Respondent had many years of experience in precisely this role and was simply such an obvious candidate as not to be a comparator: employers do not negate a finding of discrimination by pointing to the fact that a stand-out candidate sharing the relevant protected characteristic was appointed. The question is how a comparator in like circumstances - that is, having the more standard qualifications and experience of the Claimant – would have been treated. The Respondent did not put forward any such direct comparator in this case.

70. For those reasons I dismiss the liability appeal.

71. Turning then to the appeal on remedy. The first ground simply falls away, given the view I have formed on that ground under the liability appeal heading.

72. As for the other grounds, it seems to me that the real point is as to adequacy of reasons; a point that could be taken by both sides. For my part, I would not find the Respondent's evidence (given via Mr Orezzi) as to why it says the Claimant would not have passed the probationary period (because of her demeanour in the Employment Tribunal), in any way compelling and I would not criticise the Tribunal for rejecting it. I accept, however, that the Tribunal has not explained what view it formed or its reasons for so doing. In these circumstances, it is not for me to provide my own view or to try to second-guess the Tribunal in this regard. It is necessary for the Tribunal to explain its own position. The same point goes

for the rejection of the Claimant's case that she would have lasted some ten years given her previous employment history. It is a point that also arises in respect of the question of mitigation and for the credit for earnings apparently received before the discriminatory act in question. On all those points, I have to agree that the reasons provided are not **Meek**-compliant. They do not enable the parties to know why they won or lost on any particular point.

73. That concern also holds true for the award for injury to feelings. I do not necessarily accept the Respondent's submission that it would not be proportionate to make an award of £4,000 for a one-off incident. It may be a one-off series of remarks in the interview, but the discrimination was in not giving the Claimant a job and that can be far more serious than just a harassing comment. These matters have to be viewed in terms of their effect on the feelings of the complainant. What would be disproportionate in one case may not be disproportionate in another, even if the discriminatory act was itself the same.

74. The better point is that relating to the adequacy of the reasons. Even if one reads the Remedy Judgment in the light of the fuller reasons provided Liability, it is not possible to work out what held sway with the Tribunal in terms of making this award.

75. I have seen the Claimant's witness statement for the Remedy Hearing. There may have been evidential basis for finding £4,000 to be the right figure and it may be that the medical records that the Employment Tribunal saw but the Respondent did not would also be relevant. I simply do not know, and neither do the parties. £4,000 might also seem overly high. Again, however, that cannot be tested without knowing the Tribunal's reasoning.

76. For those reasons, I therefore allow the remedy appeal.

77. Having given my Judgment in this matter, I received further representations from the parties on the question of disposal. I am not in a position to simply substitute my view for that of the Employment Tribunal. The matter therefore has to be remitted for reconsideration. The Respondent urges me to remit the matter to a new Tribunal. It submits that, without criticising the previous Tribunal members, the Remedy Judgment was so flawed and gave so little regard to either side's case that it would not be safe to send it back to the same panel; the extent of error means that it should be heard by a fresh Tribunal. The hearing itself would be short; another Tribunal could easily pick it up. Sufficient time had gone past as to mean that a new Tribunal would be in no worse position. There was always a concern with sending a matter back to the same Tribunal, that it would simply confirm the view it had reached previously.

78. For her part, Mrs Miller, whilst daunted by the prospect of this litigation continuing, says that the hearing should go back to the same Tribunal. Just as the Respondent felt it important to be represented by the same Counsel with familiarity with this case, she considers it important that the same Tribunal, with familiarity of the background to this matter, should continue to determine the issues in this matter.

79. I have regard to the factors set out in **Sinclair Roche Temperley v Heard & Fellows** [2004] IRLR 763. This was a relatively short hearing and some time has passed, and it may be that the Tribunal members do not have complete recollection of all the points. Such criticisms as I have made, however, relate to adequacy of reasons. I have not criticised this Tribunal in terms of its approach more generally and I have not suggested that it would not be entitled to reach the conclusions it did.

80. That being so, it seems to me that there is no particular reason why it should not go back to the same Employment Tribunal and I think there is force in the point made by Mrs Miller as to the benefit of familiarity with the background to the case and the way in which the evidence played out at the original Liability Hearing. I am persuaded by her that that is the appropriate course. To the extent that that is still practical, I order that this matter be remitted for fresh consideration by the same Employment Tribunal.