6202/11

Case Number: 3102389/2011

EMPLOYMENT TRIBUNALS

Claimant: Mr TC Bartram

Respondent: East Sussex County Council, Claverham Community College

Heard at: Havant **On: 5th & 6th January 2012**

Before: Employment Judge Simpson
Mr J Pearson
Mr R Purkiss

Representation:
Claimant: Miss J Bartram solicitor
Respondent: Ms S Davidson of Counsel

RESERVED LIABILITY JUDGMENT

1. The unanimous decision of the Tribunal is that:
   (a) the Respondent did not directly discriminate against the Claimant on the ground of his age contrary to s.13 of the Equality Act 2010;
   (b) the Respondent did not victimise the Claimant contrary to s.27 of the Equality Act 2010; and
   (c) the Respondent did not indirectly discriminate against the Claimant contrary to s.19 of the Equality Act 2010.
2. All claims by the Claimant are therefore dismissed.
3. The provisional remedy hearing set for 16th April is vacated.

REASONS

1. The Claimant, who was a mathematics teacher, brings claims alleging age discrimination which are denied by the Respondent. The Tribunal heard evidence from the Claimant and from Mr. P Swatton, Principal of the Respondent's Claverham Community College. An agreed bundle of documents was produced.

2. The Claimant was retired from teaching, against his wishes, on reaching the age of 65. The Claimant accepts the Respondent was lawfully entitled to do so and no issue arises out of this. By way of summary, the Claimant contends 2 vacancies for maths teaching posts arose in 2011 and that he was not selected for either because the Respondent pursued a hidden agenda excluding him from consideration as it did not wish to appoint him because of factors relating to his age. The Respondent denies adopting any age related considerations. It asserts that no genuine vacancy occurred as a result of arrangements made with Mrs. Brooks ("the Brooks vacancy") and that when Mr. Pollard resigned ("the Pollard vacancy") it advertised externally and appointed the most able candidate, who was not the Claimant.

3. A pre-hearing review was held by Employment Judge Craft on 13th October 2011. He defined the issues in the following terms [33b]:
   - The Claimant claims that the Respondent directly discriminated against him contrary to s.13(1) of the Equality Act 2010 ("EqA") because it treated him less favorably than it treated others because of his age by;
     - not offering him the new part time job offered to Mrs. Brooks;
     - not offering the full time vacancy created by Mr. Pollards' resignation, before advertising it;
     - treating him differently to the younger candidates for the full time vacancy in its recruitment procedures; and
     - failing to offer him the full time job after the interviews had been completed.
   - He also alleges that the Respondent victimised him for having pursued an application to continue employment beyond the age of 65 and insisting on appealing the Respondent's refusal to do so; and indirectly discriminated against him by applying a provision, criteria or practice ("pcp") which discriminated against candidates of his age who applied for the full time vacancy contrary to s.19 of the EqA.

4. The Claimant was born on 4th April 1946 and attained the age of 65 in April 2011. He worked as a classroom maths teacher for the Respondent from 1st September 2000 to 31st August 2011, being the end of term following attainment of his 65th birthday.

5. Prior to reaching his 65th birthday the Claimant applied to extend his employment but this was refused by the Respondent and communicated to the Claimant in a letter dated 17th December 2010. [49] The letter informed the Claimant of a right of appeal but incorrectly informed him any appeal might be considered by the governors without a personal hearing. The Claimant responded pointing out he had a right to attend an appeal hearing [50] as a result of which a hearing was arranged which the Claimant attended, accompanied by his trade union representative.

6. The appeal was unsuccessful and the Claimant was informed of this by letter dated 7th February 2011 [75], from the Chair of Governors confirming his employment would terminate on 31st August 2011, at the end of the summer term.

7. During 2010, Mr. Swatton, the Principal, was informed his budget for the following year was to be cut by 5% resulting in the need to make savings. He concluded that part of those savings included reducing the maths department by 1 teacher and decided to terminate the Claimant's employment which he was able to do by enforcing the Respondent's retirement policy. This avoided embarking on a complicated redundancy procedure involving other teachers and also meant no redundancy payment would arise, thereby saving the Respondent money.

8. The Claimant contends Mr. Swatton was embarrassed by this process and in particular, as a result of the Claimant pointing out his error regarding the appeal procedure, forcing him to hold an appeal meeting attended by the Claimant. He was cross examined about the evidence of Mr. Swatton's embarrassment which he admitted was no more than his perception of some discomfort evidenced by Mr. Swatton's body language and lack of eye contact. He accepted, as does the Tribunal, that Mr. Swatton had been a colleague of the Claimant for 12 years and that it cannot have been a pleasant task for him to communicate to the Claimant the decision to terminate his employment, despite the Claimant's desire to continue beyond the age of 65. The Tribunal accepts Mr. Swatton is a trained teacher and not an HR professional, resulting in an innocent mistake being made about the appeal procedure. When the mistake was pointed out by the Claimant the correct procedure was adopted. There is no evidence to support the contention that Mr. Swatton was so embarrassed or irritated by this mistake that it coloured his attitude to all that followed.

9. The Tribunal is satisfied there was a genuine commercial reason for compulsorily retiring the Claimant which the Respondent was lawfully entitled to take.

10. The Tribunal concludes there was a further reason leading to the Claimant's retirement which was not disclosed to the Claimant at the time and only

became apparent during the evidence of Mr. Swatton. The Claimant believed he was an excellent maths teacher and was regarded as such by both pupils colleagues and management at Claverham Community College. It was clear from Mr. Swatton's evidence that he did not share the Claimant's view and had serious reservations about his teaching ability.

11. Claverham Community College has an excellent reputation for preparing pupils for university, including gaining places at top universities. As Principal, Mr. Swatton was anxious to maintain that reputation by recruiting the best available teachers.

12. Teachers are assessed in observed classes twice per year. In April 2009 the Claimant's observation was marked as *"Satisfactory"* [A31] with some elements being *"Inadequate"*. In October 2009, his observed lesson was marked overall as "Good" [A21] although there were some critical remarks. In June 2010 the observed lesson was marked *"Satisfactory"* [A11] and the same happened in October 2010 [A1].

13. Mr. Swatton produced statistical evidence comparing pupils' attainment in maths with their attainment in other subjects. There are normally 9 sets for maths in each year, graded by ability, and it is the practice of the college annually to rotate teachers so they do not always teach classes of the same ability.

14. The statistics showed that in 2006 the Claimant's maths class performed worst out of all 9 sets being 9th out of 9. The same happened in 2007 when the Claimant's class performed 9th out of 9. In 2008 there were 10 sets and the Claimant's set performed 5th out of 10. In 2009 the Claimant's set performed 7th out of 9 and in 2010 his set was 6th out of 10, although in that year achieving above the average compared with other students. The overall pattern of poor results led Mr. Swatton to have serious issues about the Claimant's teaching ability.

15. It was clear that this evidence came as a surprise to the Claimant and the Tribunal feels it was a pity the Respondent did not reveal its concerns to the Claimant at the time they arose. Not to do so was poor management by the Respondent and led the Claimant to sustaining a belief that his teaching qualities were held in high esteem by his employers, when that was not the case. Whilst it may be speculation, it appears to the Tribunal that the Respondent avoided facing performance issues with the Claimant and may have chosen to ignore them as it knew the Claimant was nearing retirement which would resolve those issues without confrontation.

16. The Tribunal reminds itself that pursuant to s.13 of the EqA direct discrimination occurs where *"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. 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".

17. Section 5 of the EqA deals with age as a characteristic and states *"In relation to the protected characteristic of age – (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group; (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group. A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages".*

18. By s.19 indirect discrimination occurs *"where a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if – (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim".*

19. The burden of proof is defined in s.136 as *"if there are facts from which* [a tribunal] *could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the* [tribunal] *must hold that the contravention occurred"* unless *"if A shows that A did not contravene the provision".*

The Brooks vacancy:

20. Mrs. Brooks was approaching the age of 60, being an age at which she could take her pension. The Teachers' Pension rules permit a teacher to take her pension and continue teaching part time, provided the combined income does not exceed her income prior to retirement. A fact sheet from the Teachers' Pension rules [347] confirm it is permissible for a teacher to return to teaching after taking pension but there has to be a break of *"at least one day from all pensionable employment"* before being able to do so.

21. Mrs. Brooks taught maths and food technology on a part time basis working 0.7 of full time equivalent ("fte"). In December 2010 she wrote to Mr. Swatton [47] giving notice to retire on 30th August 2011 but said she would like to continue working at a reduce rate of 0.4 fte. Mr. Swatton responded [48] saying he was not then able to say whether he could offer Mrs. Brooks what she was seeking but would keep it under review. In June 2011 Mr. Swatton was able to offer Mrs. Brooks a 0.4 fte contract. The basis of this contract was

that she would continue to teach the same amount of maths as previously, but would discontinue teaching food technology.

22. The Respondent contended that Mrs. Brooks and the Claimant were in the same age group on the dual basis (a) that they had both attained the age at which teachers normally retire and draw their pensions, (60 for a woman and 65 for a man); and (b) that the physical ages of 60 and 65 are sufficiently similar to the grouped together. This was not challenged by the Claimant and both contentions are accepted by the Tribunal. It follows that the Claimant is unable to show that he and Mrs. Brooks are in different age groups and therefore were treated disparately because of being in different age groups.

23. The Respondent contended there was a material difference between the circumstances of Mrs. Brooks and those of the Claimant. It asserted it was illusory to suggest a vacancy occurred by Mrs. Brooks' resignation and that the reality of the situation was that Mrs. Brooks continued as a teacher reducing her hours from 0.7 fte to 0.4 fte, achieved by discontinuing her food technology classes. The maths component continued unchanged and her resignation was merely a device required to comply with the requirements of the pension rules. It was therefore a change of form and not one of substance.

24. The Tribunal concurs with those assertions and concludes no genuine vacancy occurred for a maths teacher for which the Claimant could have applied.

25. It is also clear from the Respondent's letter to Mrs. Brooks [48] that it regarded her highly and held no reservations about her teaching capabilities. If any preferential treatment was given to Mrs. Brooks it was because of a perceived difference in the Respondent's regard for her teaching abilities, compared with the Claimant, and not related to age difference.

26. If any discrimination occurred the Tribunal is satisfied it was justified in Mrs. Brooks' case to meet the legitimate aim to permit teachers to draw their pension and continue to work part time in compliance with the Teachers' Pension rules.

The Pollard vacancy:

27. The Claimant makes 3 allegations of discrimination with regard to this vacancy:
    - not offering the full time vacancy before advertising it;
    - treating him differently to the younger candidates for the full time vacancy in its recruitment procedures; and
    - failing to offer him the full time job after the interviews had been completed.

28. Mr. Pollard's resignation came as a surprise to the Respondent. It created a genuine vacancy for a maths teacher which was similar in all respects to the post performed by the Claimant. It was within the power of the Respondent to offer the post internally to the Claimant without advertising it externally.

29. The Claimant alleges the fact he was not 'shoed-in' internally was different from the way the Respondent dealt with the Brooks vacancy. He contends the distinction was because the Respondent, through Mr. Swatton, did not want to appoint him because of a hidden agenda related to his age. The Respondent replies that the decision to advertise externally was because it wanted to ascertain whether there were better teachers available in the external market as it wanted to appoint the best available candidate in order to maintain its excellent reputation.

30. The Tribunal is satisfied Mr. Swatton was not conducting a personal vendetta against the Claimant and did not fail to activate the internal 'shoe-in' route in order to exclude the Claimant. It accepts the Respondent held a genuine desire to fill the post with the most able candidate which could only be achieved by external advertisement. The Tribunal infers that Mr. Swatton's reservations about the Claimant also led him to look at external candidates which was a material difference from the Brooks situation, where no such reservations arose.

31. The Tribunal is also satisfied that the circumstances of the Pollard vacancy were materially different from the Brooks vacancy. The Pollard vacancy was a genuine vacancy for a full time maths teacher, on all fours with the post held by the Claimant, whereas, for the reasons set out above, the Tribunal concludes no genuine vacancy arose as a result of Mrs. Brooks' resignation. It is therefore satisfied the Claimant's age was not a factor leading to the decision to advertise the post externally rather than 'shoe-in' the Claimant.

32. The Claimant contends the Respondent treated him differently from the other external candidates and the disparate treatment was related to age. The evidence does not support any disparate treatment. All candidates were invited to complete a similar application form; all were scored against objective criteria on their application forms leading to the best 5 being invited to interview. All candidates carried out an observed lesson; all had a personal interview with the Head of Maths; all made a presentation and all were interviewed. The Claimant asserted he should have been treated differently in that it was unnecessary for him to 'sell' himself at any of the various stages, as he and his qualities were known to the interviewing/observing panel. He asserted whilst it was necessary for the unknown candidates to impress the Head of Maths, such was not necessary in his case and to have done so would have been artificial. Although all candidates were observed conducting a lesson with a class not known to them, the Claimant asserted a fairer assessment of him would have been to have him teach his own class.

The Claimant contended completion of the application form in conformity with the assessment criteria was also artificial and whilst it may have relevance to unknown candidates, the same did not apply to him.

33. The Claimant's complaints were not complaints that he was treated differently from the external candidates, but were complaints that he should have been treated differently.

34. The Claimant contended that as the other 3 candidates competing with him in the shortlist were all newly qualified teachers ("NQT's") they were inevitably in a different age range from him. No evidence was adduced of their actual ages, but evidence was adduced that all 3 were in their final stages at college and expected to qualify in time to commence employment in September 2011.

35. There was evidence that NQT's are not necessarily youngsters fresh from university/college attending such institutions immediately after finishing school, placing them in their early 20's. Many are mature students who have followed another career before converting to teaching, as was the position in the Claimant's case. Whilst the Tribunal accepted that evidence, it inferred that NQT's were unlikely to have reached state pension age and, even if mature students, were likely to have several years teaching in front of them, otherwise they would not have invested time, effort and money in qualifying as teachers. It therefore accepted the Claimant's contention that all NQT's were in a different age range from the Claimant.

36. The Tribunal concluded there was no evidence from which it could infer the Claimant was treated differently from the external candidates with regard to the recruitment process.

37. The Claimant asserted the Respondent's decision not to offer him the Pollard vacancy was connected with his age and that Mr. Swatton wanted a younger candidate to be appointed to the post. The Claimant made a number of criticisms of the process and pointed to areas where he should have been scored better than was the case. The Tribunal agrees there were some puzzling aspects which were not altogether satisfactorily answered, but for the Claimant to be correct, there would have had to be a conspiracy by all participants in the process to deny the Claimant success in the selection competition.

38. The Claimant pointed to the Head of Maths notating the Claimant's interview with a question mark which was later transformed into the number 4, being the lowest scoring number. (Curiously, the scoring was done on a low score being better than a high one). The Claimant admitted that neither he nor the Head of Maths found much to talk about, as they knew each other well from the Claimant's 12 years of service with the Respondent. It was explained that

the Head of Maths was later required to score the interview using the 1-4 notation and that as the Claimant failed to 'sell' himself and did not participate positively there was no alternative but to give a low score.

39. Some changes were made to the scoring sheets by members of the interviewing panel which the Claimant suggested was evidence of a hidden agenda to produce a result which denied him success in the competition. The Tribunal accepts that all changes were made by the individual panel members without reference to the other members. The Tribunal is also satisfied that if no changes had been made, and the original scores stood, the Claimant's score would still have been significantly inferior to that of the successful candidate. The changes therefore made no difference to the result. The Claimant did not assert that any adjustment of the scoring would have ranked him first in the competition.

40. The Claimant contended that he should have scored higher than NQT's under the headings of experience and discipline as he had 12 years teaching experience compared with their none; and during that 12 years he had been exposed to possible disciplinary proceedings whereas the NQT's had no exposure. The Tribunal shares the Claimant's criticisms of what appears to be an artificial process, as the comparison was made with criteria affecting the application forms only, but this process was used only to determine the shortlist. The Claimant suffered no disadvantage compared with the NQT's as he was shortlisted.

41. When looked at in the round the Tribunal is satisfied that, despite some minor criticisms of individual factors, the selection process was conducted fairly and the reason the Claimant was unsuccessful was because, when viewed objectively, he was not the best candidate. The Tribunal is satisfied that had he been the best candidate, amongst those shortlisted, he would have been selected, irrespective of age considerations.

42. Further, there was no evidence from which the Tribunal could conclude that there was a conspiracy between the selection panel to deny the Claimant success in the competition. There was no shifting of the burden of proof pursuant to s.136 of the EqA.

43. The Claimant contended that 2 internal emails from the Respondent were evidence of improper motives by Mr. Swatton. The 1st was an email from Mr. Swatton on 18th May to Mrs. Buckwell, HR officer, [331] saying that the Claimant had applied for the Pollard vacancy and asked *"what sort of things do I need to consider if I don't call him for interview or is it safer to interview and then look at strengths and weaknesses on the day?"*. Mrs. Buckwell replied by email on 25th May [332] in which she said *"I would suggest that you do call Trevor Bartram to interview, to avoid an age discrimination claim"*.

44. Mr. Swatton said he made the decision to proceed with including the Claimant in the shortlist for interview prior to receiving Mrs. Buckwell's reply, which is accepted by the Tribunal. The Tribunal also accepts that he was included in the shortlist on merit based on the initial 'sift' of the applications and not as a device to counter a potential age discrimination claim.

45. Mr. Swatton is not an HR professional but was aware of the potential for an age discrimination claim, if he proceeded incorrectly. It was perfectly proper for him to recognize that potential and prudent of him to seek professional HR advice. In fact, he proceeded before he received that advice and included the Claimant in the competition. If, counter to the Tribunal's finding, there was any age discrimination, it was positive discrimination to the Claimant's advantage resulting in no detriment being suffered.

46. For all the above reasons the Tribunal concludes the Respondent did not directly discriminate against the Claimant in the procedure it adopted to fill the Pollard vacancy.

47. The Claimant asserted he was victimised by the Respondent. The basis of this claim was that Mr. Swatton was irritated/embarrassed by the Claimant appealing the initial decision to terminate his employment; pointing out his mistake in believing an appeal decision could be made without holding a hearing and forcing a hearing resulting in Mr. Swatton being adversely influenced by these factors when considering the Claimant for the Pollard vacancy.

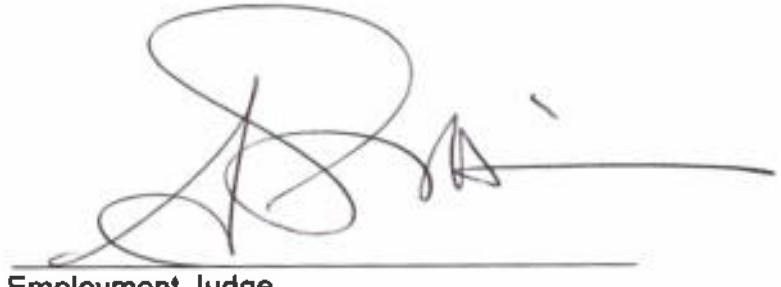
48. Based on the Tribunal's above findings it is satisfied there is no evidence of any causal link between the appeal process, relied on by the Claimant, and the process leading to filling the Pollard vacancy. The Tribunal therefore rejects the claim of victimisation.

49. In her submissions, Miss Davidson submitted that there was no evidence of any pcp applied by the Respondent which affected the Claimant. Miss Bartram produced a well constructed written skeleton argument forming the basis of her final submissions. She does not advance any argument supporting the claim for indirect discrimination, nor does she identify the pcp relied on. There was no evidence of any pcp which could form the basis of an indirect discrimination claim and therefore the claim for indirect discrimination is rejected.

50. The Respondent raised a time point contending the Claimant's claim was out of time and the Tribunal had no jurisdiction to hear the various claims. This was predicated on the originating application being presented on the 2nd August 2011 which would result in the act(s) relied on occurring not earlier than the 3rd May 2011, unless they were of a continuing nature. The Respondent's case was that time ran from the decision to advertise the

Pollard vacancy externally, which was on an unspecified date in April, and not from the date the advertisement appeared in the Times Educational Supplement, on 12th May (a date which would validate the application).

51. To her credit Miss Davidson, whilst not formally conceding the issue, did not pursue the point with any vigour. For the avoidance of doubt the Tribunal adopts the view advanced by Miss Bartram and is satisfied time runs from the date the Pollard post was advertised. Further, the selection process was part of continuing acts by the Respondent all of which occurred within 3 months prior to the originating application being presented. Were the Tribunal to be wrong about this it would, in the circumstances, have extended time under the just and equitable principle, so as to validate the claims.



Employment Judge

JUDGMENT & REASONS SENT TO THE PARTIES ON
19 JANUARY 2012

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS