

Bury

6378/2 ASU

Case Number: 1200552/2012



EMPLOYMENT TRIBUNALS

Claimant Mr A Osoba
Respondent The Chief Constable of The Hertfordshire Constabulary
HEARD AT: BEDFORD **ON:** 10 October 2012
BEFORE: Employment Judge Bloom
MEMBERS: Ms A Carvell
Ms S B Hills

REPRESENTATION

For the Claimant: Mrs M Cunningham, Counsel
For the Respondent: Mr M Ley-Morgan, Counsel

RESERVED JUDGMENT

1. The Claimant's claims for direct and indirect age discrimination fail and are hereby dismissed.

REASONS

1. The Claimant brought claims of direct and indirect age discrimination.
2. At the commencement of the Hearing it was agreed that the full and proper name of the Respondent was the Chief Constable of the Hertfordshire Constabulary and the name of the Respondent is amended accordingly.
3. The Tribunal heard evidence from the Claimant and Ms Elisabeth Towersey (who was previously employed in the Respondent's Learning and Development Department as a Trainer between September 2008 and July 2012). The Claimant also produced a statement from another police officer, Mr Robert Cooper, who had also been in the Training Department. Mr Cooper, however, did not attend the hearing and consequently the weight attached to his statement was considerably reduced.

4. The Respondent called the Head of its Learning and Development Department, Ms Lesley Pritchard and also Superintendent Andrew McCracken who heard Stage 2 of the Claimant's grievance (internally referred to as 'Fairness at Work Application').

The Facts

5. The Claimant's employment began on 07 March 1982 and ended on 16 April 2012 when his period of notice expired following his resignation on 19 March 2012.
6. The Claimant served in the Royal Ulster Constabulary, as it then was, from 1982 until 16 October 1989 when he transferred to work for the Respondent. Until January 2007 the Claimant worked on 'active service' as a police officer whilst also studying for, and obtaining, a number of additional training qualifications, including a Level 4 teaching qualification. In January 2007 the Claimant joined the Skills Development Team of the Respondent's Learning Development Department. The Skills Development Team is engaged in the training of experienced police officers as well as the training of new recruits and special constables. The Claimant, it was agreed, had an exemplary record of service both in Northern Ireland and in Hertfordshire and had received a number of commendations and an award for bravery.
7. The Claimant was 49 years old at the time of his resignation and, as of 07 March 2012, had served 30 years as a police officer which meant he was eligible to retire and take his full pension.
8. In 2011, along with most local authorities, the Respondent was facing wide ranging financial constraints which included a budget gap of £36,237,000. Civilian staff were being made redundant and a comprehensive review took place in order to identify back office roles, i.e. roles undertaken by police officers not engaged in frontline activities. The Claimant, as a result of a back condition was not engaged in frontline activities and was, therefore, one of the back office staff, in his case, in the Learning Development Department. One outcome of the review was identified as the need to reduce by 50% the numbers of back office police officers and to return them to the frontline. Five of these roles were identified in the Skills and Development Team. There were originally seven officers who undertook training duties but two of them had already given confirmation to the Respondent that they were imminently to retire. From the remaining team of five, the Respondent identified the need to reduce this number to three training officers. Three, therefore, would remain within the department and it was the intention of the Respondent that the other two would be redeployed either to frontline activities or backroom duties if they were, for example, unable physically to undertake frontline duties.
9. The five officers concerned all had exemplary records of service and were all highly regarded by both their peers and management. They each had served over 20 years as police officers, with Claimant being the longest serving officer who, by the end of 2011, had served just short of 30 years.

10. On 19 December 2011, prior to undertaking any selection process in order to identify the two officers who would leave the team, Ms Pritchard wrote an email to each of the officers (pages 100 to 109) in which she informed of the need to reduce the numbers and asked:

In order to plan effectively for this it would be really helpful for me to have an idea of your immediate aspirations: do you wish to remain in your current role as a [job title] or would you consider applying for another role within the Constabulary?

If there are more people wishing to remain in [section] than there are posts, then I will be arranging an appropriate selection process early in the New Year

11. The Claimant received that email (page 109) but his email also stated:

In order to plan effectively for this it would be really helpful for me to have an idea of your immediate aspirations. I know that you will have reached your 30 years' service in April 2012. Have you made a firm decision in respect of retirement? If you are deciding not to retire, do you wish to remain in your current role or would you consider applying for another role within the Constabulary?

12. It is clearly the case that police officers cannot be made redundant and this was not, therefore, a redundancy exercise. The two officers who would eventually be selected to leave the Learning and Development Team would, as we have previously stated, be assigned other duties within the police force.

13. By 22 December 2011, Ms Pritchard had received a response from the five members of the team, including the Claimant, that none of them wished to retire or leave the department. She sent an email to the Police Federation representative, Mr Neal Alston, stating:

... we are retaining some posts but losing others. My hope was that we would find the savings through natural movement i.e. retirements and moving to new jobs however this is not happening.

I am just sending you this "heads up" to advise you that both in Driving School (2 PC's down to 3) and the rest of L&D (still working out the numbers but we have more PC's than we will have posts for) we will have to devise an appropriate method of selecting people for the remaining posts.

...

I need to do this in January but plan on mulling it over between now and Christmas.

14. On 23 December 2011 Ms Pritchard emailed all the affected officers, including the Claimant, asking:

... would be really keen to find out what you might be interested in getting involved in (other than your normal day to day areas of activity). We have identified some particular pinch-points:

*e-learning development
Health and Safety training
Core Leadership Programme
Investigative Interview Training (Tier 2/3 etc)
Roads Policing (Traffic Patrol) Training
Making better use of technology in learning ...*

Ms Pritchard requested they respond by 16 January 2012.

15. By the end of December 2011 it was clear to Ms Pritchard that none of the affected five officers was willing to leave the department and she would, therefore, have to proceed to form a selection exercise in order to determine who would go and who would remain.
16. Ms Pritchard decided to use a matrix as the method of selecting those officers. She used the Respondent's '*Reorganization & Redundancy, Policy Number: P60121*' (page 202 to 221). In terms of reducing a number of posts in any given area, the policy (page 208) states:

Where there is a reduction in the number of posts, in the first instance the aim will be to manage the reduction by the process of natural turnover. If this is not practicable, the next stage will be to ask officers to express their preference to either take up a post in the new structure, or to be posted to an alternative role. The expressions of interest will then be duly considered to assess how well they meet operational requirements.

It is with the intention of complying with that part of the policy that we accept Ms Pritchard submitted the email to the Claimant and his colleagues on 19 December 2011.

The policy goes on to state:

If the approaches above do not result in the reduction required, there will be the requirement for a selection process which will be discussed with the Federation. The process to be used will vary depending on the circumstances of the case, but may involve 'scoring' individual officers against a set of criteria, consideration of a paper based application, interview and/or other appropriate assessment methods. This will be communicated to officers and appropriate support offered for example by the Federation, support groups and HR.

17. Ms Pritchard began to devise the appropriate matrix and had discussions with the Police Federation concerning its content and, as a result, Ms Pritchard agreed to remove any reference to officers who had any absence in the preceding twelve month period. Ms Pritchard initially took into account the matrix suggested in the Reorganization and Redundancy Policy which

was to be used in any redundancy case. However, as this was not a redundancy case, she did take those individual factors into account in determining the matrix. She decided to use three relevant factors, namely skills, which she described as being skills required to deliver core business into the future; current PDR ratings for the previous twelve month period and absence records.

18. In identifying the section and parameters relating to Skills, Ms Pritchard initially identified the requirements of the department to deliver core business, i.e. essentially training to officers in the future. Here she made a distinction between what she described as '*nice to do*' courses which although were successfully undertaken, in this case, by the Claimant, she regarded as not falling within the ambit of core business. An example of the so called '*nice to do*' courses was the one run by the Claimant entitled '*Emotional Survival for Police Officers*'. In attempting to score each of the Trainers under the heading of Skills, Ms Pritchard took into account the courses conducted by each of the trainers in the previous twelve month period; the core business training delivered by the Trainers in the previous twelve month period; and some of the '*nice to do*' training courses undertaken by the Claimant over the same twelve month period. She recognized, for example, that recognition should be given to the Claimant in respect of domestic violence training given by him.
19. Ms Pritchard identified a number of courses conducted by the Trainers which she regarded as being core business including the training given to special constables by officers. Ms Pritchard gave credit to those officers who undertook training at the weekends but gave no credit, as it turned out to the Claimant, for the training of special constables given by him on Thursday evenings. The Claimant was not able to volunteer to undertake the training of special constables during the weekends because his partner is a disabled person and he has two young children.
20. We find that, during the course of devising her original matrix, Ms Pritchard decided to give credit to Trainers for providing some areas of non core business training and did not limit the matrix criterion solely to core business. We find the evidence given by Ms Pritchard in this regard both confusing and unsatisfactory insofar as a consistent approach was not adhered to the selection of the affected five officers under this part of the matrix.
21. By 19 January 2012 Ms Pritchard had completed the scoring of the Claimant and his colleagues: the Claimant and one other achieved a score of 28 points whilst the other three officers scored 35, 36 and 44 points respectively. On that basis, being one of the two lowest scoring officers in the Skills Development Team, the Claimant was identified as being selected to move from the Learning and Development Department.
22. The scores included a score of four points being allotted to all officers in respect of their absence records in the previous 12 months but, as we have stated, following consultation with the Police Federation, reference to absenteeism was removed from the matrix.

23. The Claimant was, in fact, one of the two highest scoring individuals in respect of the PDR part of the matrix. It was because he had scored so low in respect of Ms Pritchard's identification of skills that his final score resulted him being one of the lowest scoring individuals.
24. The matrix, as devised initially by Ms Pritchard, was discussed with the Respondent's HR Department after Ms Pritchard had produced her first draft and had carried out her initial scoring.
25. On 30 January 2012 the Claimant had a meeting with Ms Pritchard who was accompanied by a representative from the HR Department. Ms Pritchard went through the matrix with the Claimant and informed him that he had, unfortunately, scored one of the two lowest scores and was, as a consequence, to be selected as one of the two officers to leave the Learning and Development Department. The Claimant, understandably, was distressed to hear this news as he believed that, due to his experience, qualifications and skills, he ought to have survived that exercise. Ms Pritchard gave the Claimant a letter during the meeting informing him that, as a result of his score, he had not been selected to retain a role within the Learning and Development Department. The original matrix scored by Ms Pritchard was provided with the letter. Ms Pritchard informed the Claimant that the scores had been checked but if the Claimant felt they were inaccurate then he was invited to respond within the following week.
26. On 31 January 2012 the Claimant sent an email to Ms Pritchard questioning the scoring and making specific points that he felt he had not been allotted relevant points for some of the training delivered by him. Ms Pritchard reflected on the content of the email and, on 01 February 2012, wrote to him saying that she had decided to award him a further three points in respect of training undertaken by the Claimant to Assistant Investigators. This resulted in a revised score for the Claimant. In fact all five affected officers' total scores had been reduced by four points after it was decided to withdraw any reference to absenteeism. This would have resulted in the Claimant's score being reduced from 28 points to 24 points. Taking into account Ms Pritchard's recognition that the Claimant should be awarded three points in respect of the Assistant Investigator training this then increased his score to 27 points. The overall impact of this adjustment however still meant that the Claimant was one of the two lowest scoring officers.
27. On 08 February 2012, notwithstanding the readjustment to his scores, the Claimant informed the Respondent that he wished to raise his Fairness at Work Application. The first process of this involved a meeting between the Claimant and DS Clare Johnstone. DS Johnstone rejected any complaint made by the Claimant. As a result of this the Claimant proceeded to Stage 2 of the grievance process which involved the appointment of Superintendent Andy McCracken.
28. As we have already stated when initially informed of his selection, the Claimant was upset and distressed. In fact, the Claimant's health substantially deteriorated having heard this news. He became tearful both at work and at home. The Claimant described his feelings as being ones of '*utter humiliation*'. During the weeks that followed the Claimant received an

offer of employment at North Hertfordshire College as a Trainer although it was his wish not to leave his employment with the Respondent.

29. On 08 March 2012, the Claimant received news that there might be an alternative position with the Respondent working within its Harm Reduction Unit based at Stevenage although it transpired this position did not actually become available.
30. On 09 March 2012, the Claimant met with Superintendent McCracken. He was accompanied by Mr Neal Alston from the Police Federation. A general discussion took place as part of the Stage 2 process which was effectively a fact finding exercise undertaken by Superintendent McCracken in order to listen to the Claimant's views and we accept that, by that stage, Superintendent McCracken had not formed any conclusion. As we have said, the Claimant's health began to deteriorate and eventually he took the decision to resign from his employment on 19 March 2012. He declined the opportunity of having an exit interview. The Claimant gave notice and stated that his final day of work would be 16 April 2012 although, taking into account some holiday owed to him, his last actual working day was to be 23 March 2012. The Claimant's mental health unfortunately continued to deteriorate and, in fact, he did not return to his duties after submitting his resignation. The Claimant was diagnosed with depression and was prescribed anti-depressants by his GP.
31. Notwithstanding the Claimant's decision to resign and his deteriorating health, he sent an email to the Respondent on 27 March 2012 asking about the possibility in remaining in employment with it. The Claimant informed the Respondent that another job offer (we find with North Hertfordshire College) had fallen through and as a result he wished to withdraw his resignation. The Respondent replied on 29 March 2012 stating that his resignation had already been processed and that it was not possible to reverse his decision.
32. The offer of employment at North Hertfordshire College was made again to the Claimant and he took up a full time position as a Trainer with them on 23 April 2012. At the time of this Hearing the Claimant continued to be employed at the college and, in addition to receiving a salary from them, was now drawing his police pension.
33. Mrs Cunningham, on behalf of the Claimant, spent a considerable amount of time in cross-examining Ms Pritchard and drew to her attention a number of wide ranging inconsistencies and inaccuracies with her scoring process.
34. Another officer, Ms Lynne Da Silva, had been credited with three points for Achieving Best Evidence Training but Ms Pritchard accepted that, in fact, Ms Da Silva had not actually delivered that training and had been scored, effectively, three points because she had the potential experience to deliver it. She accepted, under cross-examination, that in so scoring Ms Da Silva she had treated the Claimant in a different way because she had disregarded his ability to provide training not actually undertaken by him and his potential to deliver training. She had scored the Claimant only in respect of actual training undertaken by him. It is right to point out that considering such matters, Ms Pritchard accepted to the Tribunal that there was justifiable

criticism of the selection process undertaken by her which, when examined further, was, at best, inconsistent and certainly shambolic in places. However, as we shall go onto determine that is not the issue in this case.

35. Ms Pritchard also accepted that credit should have been given to the Claimant in respect of the training undertaken to special constables by him during the evenings in the week. Ms Pritchard accepted that if she had taken that aspect of the matter into account it would have resulted in the Claimant achieving an additional five points.
36. Ms Pritchard also accepted another error in respect of her scoring process. She accepted that Ms Da Silva should not have been given points in respect of the provision of Tier 2 Training which she accepted had not in fact been undertaken by Ms Da Silva. The errors in this process undertaken by Ms Pritchard resulted in Ms Da Silva achieving an additional six points which should not have been credited to her. These points were conceded by Ms Pritchard.
37. However, throughout this matter, Ms Pritchard stressed to the Tribunal that in undertaking the entire selection process that it was done without '*any malicious intent*'. She told the Tribunal that '*any change in the criteria for selection was done without malicious intent. It never occurred to me that it was done with any malicious intent*'.
38. Superintendent McCracken was extremely busy at the time and, as a result, there was a delay in him concluding Stage 2 of the grievance process. His findings, however, were eventually conveyed in a letter and report sent to the Claimant on 10 May 2012. Superintendent McCracken identified many of the inconsistencies accepted by Ms Pritchard during the course of her cross-examination and concluded that lessons were to be learnt in respect of any future process involving the selection of police officers for redeployment.
39. The Claimant's allegation is that the Respondent, through Ms Pritchard, deliberately set about devising a form of matrix and, in addition, subsequently scoring the Claimant in a way that would lead to the Claimant being one of the two lowest scoring officers thereby resulting in his selection for transfer from the Learning and Development Department. It is the Claimant's allegation that the Respondent, through Ms Pritchard, set about such a process so as to avoid the possibility of the Claimant subsequently deciding to retire sometime after March 2012 and thereby causing difficulties in respect of staffing the Learning and Development Department in the future. Had the Claimant, he alleges, not been approaching a time when he had the ability to retire and take his full pension he would not have been selected. The Claimant also alleges that this intended course of action by the Respondent constitutes an act of both direct and indirect age discrimination.

The Law

40. Claims for direct and indirect age discrimination are brought to Employment Tribunals pursuant to various provisions contained within the Equality Act

2010. As defined by Section 4 of that Act, age is one of a number of protected characteristics.

41. Section 5 of the Equality Act 2010 provides:

5 Age

- (1) *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 person who share a protected characteristic is a reference to person of the same age group.*
- (2) *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.*

42. Section 13(1) and (2) of the Equality Act 2010 defines direct discrimination as:

13. Direct discrimination

- (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.*

43. Section 19(1) and (2) of the Equality Act 2010 defines indirect discrimination as:

- (1) *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.*
- (2) *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.*

44. In bringing a claim for direct age discrimination it is for the claimant to prove facts from which the Tribunal could conclude that the respondent has, because of the claimant's age, treated him less favourably than others were or would have been treated. If the claimant overcomes that hurdle, it is then for the respondent to prove that it did not treat the claimant less favourably because of the claimant's age. If the Tribunal is satisfied that the respondent has proved that it did not treat the claimant less favourably because of his age, then the claimant's claim of age discrimination must fail. This is not a case where the Respondent is submitting that its treatment of the Claimant

2010. As defined by Section 4 of that Act, age is one of a number of protected characteristics.

41. Section 5 of the Equality Act 2010 provides:

5 Age

- (1) *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 person who share a protected characteristic is a reference to person of the same age group.*
- (2) *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.*

42. Section 13(1) and (2) of the Equality Act 2010 defines direct discrimination as:

13. Direct discrimination

- (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.*

43. Section 19(1) and (2) of the Equality Act 2010 defines indirect discrimination as:

- (1) *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.*
- (2) *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.*

44. In bringing a claim for direct age discrimination it is for the claimant to prove facts from which the Tribunal could conclude that the respondent has, because of the claimant's age, treated him less favourably than others were or would have been treated. If the claimant overcomes that hurdle, it is then for the respondent to prove that it did not treat the claimant less favourably because of the claimant's age. If the Tribunal is satisfied that the respondent has proved that it did not treat the claimant less favourably because of his age, then the claimant's claim of age discrimination must fail. This is not a case where the Respondent is submitting that its treatment of the Claimant

was a proportionate means of achieving a legitimate aim because it denies the fundamental allegation made by the Claimant namely that his selection constituted less favourable treatment because of his age i.e. he was selected because he attained the age when he would be able to retire on full pension.

45. Insofar as the claim for indirect discrimination is concerned, we must determine whether the Respondent has applied a provision, criterion or practice which is discriminatory in accordance with Section 19 of the Equality Act 2010. In other words, did the provision, criterion or practice adopted by the Respondent apply equally to persons not of the same age or age group as the Claimant and did that provision, criterion or practice put persons of the same age group as the Claimant at a particular disadvantage when compared with other persons and did that provision, criterion or practice put the Claimant at that disadvantage. If so, is the Respondent able to show that the provision, criterion or practice was a proportionate means of achieving a legitimate aim?

The Parties' Submissions

46. We heard both oral submissions from both Counsel and also had the benefit of considering their written submissions. Those were most helpful to the Tribunal.
47. However, the allegation made by the Claimant is a simple one. As we have already identified he makes one allegation and one allegation only, namely that the selection matrix was devised and subsequently used solely as a method of ensuring that he was to be selected for removal from the Learning and Development Department in order to avoid the Respondent's having either then or in the future any difficulty relating to the ability of the Claimant to retire and to take his immediate full pension.
48. This allegation is wholly refuted by the Respondent who, through Ms Pritchard, states that whatever inadequacies and errors there may have been in relation to the process, the method of selection and its implementation this was not the intention of the process.

Conclusions

49. It is clear, as we have found, that there were initially and also accepted at its conclusion by Ms Pritchard considerable inconsistencies and inaccuracies with the scoring process and, in particular, how these scores affected the Claimant. As a result we conclude that the Claimant has proved facts upon which we could conclude that because of the Claimant's age he has been treated less favourably than other persons, i.e. persons who were not able to retire and take their full pension. This conclusion means that it is then for the Respondent to prove that it did not treat the Claimant less favourably because of his age which in the context of this case means that it is for the Respondent to prove that it did not treat the Claimant less favourably because of his imminent entitlement to retire and take his full pension.
50. The Tribunal is firmly of the view that the matrix devised by Ms Pritchard and its subsequent implementation at all stages was shambolic and to some

degree incompetent insofar as the devised matrix had its subsequent impact against the Claimant. However, such a conclusion by the Tribunal does not lead to a conclusion that the Claimant was the victim of unlawful discrimination either direct or indirect. Although we have been severely critical of the approach undertaken by Ms Pritchard in this case, we do not believe that at any time of the process she undertook it with the object of, as alleged, ensuring that the Claimant was to be selected in order to avoid imminent or future difficulties as far as any future retirement was concerned. The Tribunal accepted that Ms Pritchard was an honest witness in eventually accepting the errors in her process but it does accept that there was no discriminatory motive behind her actions.

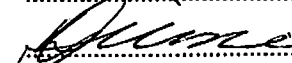
51. As a result the unanimous judgment of the Tribunal is that the Respondent has proved that it did not treat the Claimant less favourably because of his age. The Tribunal also concludes that the selection matrix and its implementation undertaken by the Respondent did not place the Claimant at a particular disadvantage when compared with other persons.
52. The errors contained within the originally devised matrix and its subsequent implementation did not place the Claimant at a particular disadvantage when compared with other persons, i.e. persons who were not approaching a retirement age. The errors and omissions as identified could equally have applied to other serving Police Officers who were not approaching imminent retirement.
53. As a result of these conclusions the Tribunal concludes that the Claimant's claims for age discrimination fail and must, as a result, be dismissed.



Employment Judge, Bedford

JUDGMENT SENT TO THE PARTIES ON

25th October 2012.....



FOR THE SECRETARY TO THE TRIBUNALS