EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MR DAVID JAMES	**V**	**COEDFFRANC COMMUNITY COUNCIL**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 20TH 21ST 22ND AUGUST

ON:
BEFORE: EMPLOYMENT JUDGE HOWDEN-EVANS
MS WE MORGAN
MS C WILLIAMS

REPRESENTATION:
FOR THE CLAIMANT: IN PERSON

FOR THE RESPONDENT: MS M BAYOUMI (COUNSEL)

JUDGMENT having been sent to the parties on 28th August 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Mr James applied for a post of park attendant with the council. Mr James was 67 years of age at the date of the interview. The successful candidate "S" was 62 years of age at the date of the interview.

2. The claimant alleges the reason he did not get the post was because of his age. The council allege it was because the claimant scored less on the assessment than the successful candidate.

3. As Employment Judge Davies identified in his order of 29th May 2018, the key issue in this case is "was the reason the claimant was unsuccessful because of his age". Employment Judge Davies noted the respondent is not attempting to say this was a case in which age discrimination was justified; they are not relying on the provisions in s13 (2) Equality Act 2010 ("EqA").

4. So, when you turn to consider direct discrimination (s13 Equality Act 2010):

   4.1. Mr James has identified S as being his comparator;
   4.2. in not selecting Mr James for the post, the respondent has treated Mr James less favourably than it treated S;
   4.3. Was this less favourable treatment because of age?

The Hearing

5. Throughout these proceedings, Mr James has represented himself; Coedffranc Community Council has been legally represented by T Llewellyn Jones Solicitors, and at the hearing by Ms Bayoumi, Counsel.

6. The final hearing (which was to determine liability and remedy) had been listed with a time estimate of 3 days. The hearing took place on 20th to 22nd August 2018 at Cardiff Employment Tribunal. The tribunal had the benefit of an agreed bundle which 189 pages. Written witness statements had been prepared and exchanged for each of the 5 witnesses.

7. On Day 1, before hearing oral evidence, the tribunal read the witness statements and bundle of documents in their entirety. In the morning on Day 1 we heard evidence from Ms Louise Thomas, Clerical Assistant with the Council, who had given Mr James the application form for the post. After lunch on Day 1, we heard evidence from Councillor Wingrave and subsequently from Councillor Davies, who had both sat on the interview panel. On Day 2 in the morning, we heard evidence from Ms Wendy Thomas, Clerk to the Council, who had clerked and was the remaining member of the interview panel. On Day 2 in the afternoon, we heard evidence from Mr James.

8. All witnesses gave evidence on oath. In relation to each witness, the procedure adopted was the same: there was opportunity for supplemental questions from Ms Bayoumi or for Mr James to respond to anything that had been mentioned in the Council witness statements; before questions from the other side; questions from the tribunal; and any re-examination.

9. At the end of Day 2, having finished hearing witness evidence, we heard closing submissions: both Ms Bayoumi and Mr James gave oral submissions. The tribunal took most of Day 3 to consider and discuss their decision on liability. During mid-afternoon on Day 3 we were able to give the parties our decision and reasons orally. Having heard the tribunal's decision on liability, during a short interval, the parties were able to discuss and agree remedy.

Findings of Fact

10. The respondent is a community council representing 8500 residents in Coedffranc area of Neath Port Talbot County Borough Council. It has 17 community councillors, a clerk (who is the responsible financial officer). It

employs 9 full time employees and 3 part time employees. It manages 5 community centres, 2 parks, 3 playgrounds and a cemetery.

11. Mr James background is that

    11.1. for 2 weeks immediately prior to the interview he had been working on his daughter's farm;
    11.2. immediately prior to that he had, for a few months, worked for Creunant School as the relief caretaker / handy man;
    11.3. for 10 years up to 2017, he worked for Neath College as a caretaker;
    11.4. prior to that he had been a prison custody officer for 11 years;
    11.5. prior to that a bus/ coach driver for 3 years; and
    11.6. prior to that a process technician at BP Chemicals for 20 years.

12. On 21st September 2017, the respondent placed an advert for a new role of Park Attendant. An additional attendant was needed, in part because, as Ms Wendy Thomas confirmed in evidence, a park attendant had just retired at the age of 67.

13. This post was advertised as being a 6-month fixed term contract, working 37 hours per week in summer and 20 hours per week in winter. These hours would be during evening and weekends and would be paid £8.18 per hour. Duties included opening and closing the park, cemetery and community buildings, issuing tickets and receiving payments for sports facilities, all aspects of open, closing cleaning and supervising pavilions and sporting activities. The post was subject to an enhanced CRB check and 13-week probation period. The successful candidate needed to hold a current driving licence.

14. Ms Wendy Thomas explained she had used an application form that she had been provided by Neath Port Talbot CBC a number of years ago. This form included a space for candidates to fill in their date of birth.

15. The claimant saw the advertisement and collected a form from Mrs Louise Thomas. It had previously been suggested that during this conversation Louise Thomas had commented that this could lead to a permanent role. In evidence she explained she did not have authority to discuss things like this. In fact, we believe that both witnesses were being truthful in their account of this conversation. By closing submissions, it was clear that the claimant's use of the word permanent was meaning a "rolling fixed term contract" ie a contract that could be extended beyond 6 months. We don't think this is a particularly contentious description of the contract – Mrs Wendy Thomas has included in the opening remarks that she read out at the start of each interview that the position "was fixed term for 6 months which may be renewed if your work is satisfactory". In fact, S's contract has actually been renewed for a further fixed term period.

16. Thirteen applications were received for the post. A panel was convened to undertake a shortlisting exercise. The panel that undertook the shortlisting

process was the same panel that undertook the interviews: the clerk (Mrs Wendy Thomas), Councillor Wingrave and Councillor Davies.

17. The panel had sight of dates of birth on the application forms. In response to questions from the tribunal, to her credit, Ms Wendy Thomas honestly admitted that she had made a note of candidate's ages at the shortlisting stage, as it was something she was used to doing. With hindsight Ms Wendy Thomas has acknowledged it is not best practice for the panel to have sight of dates of birth. The tribunal has seen the dates of birth for all thirteen applicants. We accept that the applicants that were not shortlisted were younger than the claimant.

18. Four candidates were invited to interview on 16th October 2017. Witnesses all agree that at interview there were 2 candidates that were much stronger overall – the claimant and S. This is also borne out by the marks each candidate achieved – there is a substantial gap between the claimant and S's marks and the next highest scorer.

19. Ms Wendy Thomas had a script she read out at the start of every interview. She then asked candidates the same 12 questions with the 12th question being "do you have any questions?"

20. Once her 12 questions had been answered, Ms Thomas would then ask Councillor Davies whether he had any questions. Councillor Davies asked the same 3 questions of every candidate

21. Finally, Councillor Wingrave had an opportunity to ask questions. Councillor Wingrave did not have set questions. Instead, she would ask questions that seemed relevant to her, perhaps picking up on an earlier answer and asking questions about that.

22. Ms Thomas explained she had devised a selection assessment form. This was the first time it had been used. At the start of the form there was an assessment rating key; for each question a candidate would receive up to 4 marks based upon the evidence that has been demonstrated in their answer to the question. It refers to a person specification but there wasn't a person specification used for this post.

23. We accept that Ms Wendy Thomas was genuinely trying to improve their systems to introduce objectivity and consistency. However, it came out in evidence that there was a lack of training on how this process should work. The interview panel did have a chat about this new system before the interview began, but then there was a lack of understanding of the matrix.

24. Each person on the panel would put scores down as the candidate answered questions. Ms Wendy Thomas thought the highest score would win. Councillor Wingrave said they went on to have a discussion and compare information after the inteviews. Councillor Davies said it wasn't necessarily the highest score that won – they would have chance to look back and comment on the candidate to decide who was best for the job.

All three members of the interview panel agreed it was very close between the claimant and S. Ms Thomas thought S was appointed as he scored the highest mark overall. Councillor Davies and Councillor Wingrave thought S was appointed as they thought he was more suitable as he had "worked at Margam Park" or because he had experience of handling money (he had sold tickets for a ride at Margam Park).

25. The claimant's evidence was that he thought his interview was going well right up until the part where Councillor Wingrave asked her questions. He said she asked how long he had lived in Skewin and about people they each knew living in the area. At this point Councillor Wingrave was looking at his application form and said "*I've just noticed how old you are"*. She then asked if he intended to only stay in the job for a year or so as there would be specific work-related training such as first aid and paddling pool water quality maintenance." The claimant asserts that when he said he was aware the job would be extended, Cllr Wingrave enquired *"How's your health anyway".* The claimant perceived the atmosphere changed when these remarks were made. He also gave evidence that driving home he was increasingly upset at these remarks.

26. In evidence the other witnesses deny Councillor Wingrave made any age-related comments. They do not recall her making these remarks. Ms Wendy Thomas explained earlier in the interview the panel had agreed the claimant was very fit and commented they wished they felt so fit. Councillor Davies recalled the claimant was laughing and joking with Councillor Wingrave when she asked her questions. Councillor Wingrave recalled discussing the area in which the claimant lived as she knew the area well. She also said there were comments about how fit the claimant was and that he put her to shame as she should be more active.

27. There is a direct contradiction between the evidence of the claimant and the respondent's witnesses.

28. We note the Claimant quoted his remarks in his letters of complaint of 24th October and 1st November 2017. We note that none of the letters of response provide an alternative account or specifically deny the comments were made by Councillor Wingrave.

29. Councillor Wingrave's evidence is particularly important. She explained that she was putting scores down whilst candidates answered and that, when the interviews were completed they compared their information and each score individually. She repeatedly said very clearly in evidence, "my choice was the claimant. I had scored him higher than the others but then my colleagues had other opinions and we discussed it all and S got the job." She was very clear she had scored C the highest.

30. When we looked at the scores awarded, 2 errors came to light – unfortunately these had not been detected during the interview process:

    30.1. Councillor Wingrave had given a score for question 12 for both the claimant and one other candidate (not S). She had not given a

score to question 12 for S or the 4th candidate. Councillor Davies agreed with the tribunal's understanding that Councillor Wingrave appeared to have awarded scores for the 3 questions he had asked of each candidate.

30.2. The scores on Councillor Wingrave's sheets for S had been added up incorrectly – the scores actually total 42 but 46 was written at the top of S's sheet. Without this error, the claimant would have been on 128 and S would have been on 126: the claimant would have received the top score overall.

31. As it was on the day, when the panel's marks were combined, the claimant had 128 and S was on 130. Between the candidates the scores awarded by each of the panel was as follows:

31.1. The Clerk (Ms Thomas) gave the claimant 42 and S 42;

31.2. Councillor Davies gave the claimant 44 (the maximum marks available) and S 42;

31.3. Councillor Wingrave gave the claimant 42 (or if you deduct the Q12 marks 38); and she gave S 46 (or if you correct the error 42 marks).

32. What is clear is Councillor Wingrave did not give the claimant the highest marks – Councillor Davies gave him the maximum marks and Wendy Thomas gave him the same marks as Councillor Wingrave. Councillor Wingrave gave S more marks that than the claimant – so her evidence on this does not reflect the contemporaneous documents.

33. Councillor Wingrave evidence was that she did not write the 46 at the top of her marksheet for S. She believed the Clerk had totalled the scores on Councillor Wingrave's sheet. Councillor Davies and the Clerk thought they had each totalled their own sheets (ie Councillor Wingrave had written the 46 on her own scoresheet) although they were not totally sure. We believe that it is more likely than not that Councillor Wingrave wrote 46 on this document.

34. On Councillor Wingrave's scoring sheet for the claimant there is a number 67 handwritten in small writing by his name; on Councillor Wingrave's sheet for S there is a handwritten number 62 that has been circled. On her scoring sheets for the other candidates there are no numbers handwritten next to their names. In cross examination, Councillor Wingrave admitted that she had handwritten the ages of the claimant and S next to their names and admitted she had only done this for the claimant & S (the 2 oldest candidates).

35. We have found Councillor Wingrave's evidence was inconsistent – she told us in evidence that the claimant had been her preferred candidate and that she had scored him the highest when the evidence demonstrates that Councillor Davies had given the claimant full marks and Cllr Wingrave had

either given him the same marks as the Clerk or had given him fewer marks than the Clerk. Her score sheet for S contains a number of “4”s whereas her score sheet for the claimant contains a number of “3”s.

36. We acknowledge that Councillor Wingrave’s account of her conversation with the claimant is supported to some extent by Councillor Davies and Ms Thomas, but this was the very end of the interview and this conversation was more between Councillor Wingrave and the claimant; they may not have been as focused on the conversation as the participants were. They have not been able to clearly describe the questions asked at this stage of the interview. They did not deny the claimant’s detailed account of the conversation in correspondence shortly after the interview. If that account had struck them as being inaccurate, they would have responded with words to the effect “we do not recall that being said in the interview”. Instead they responded with flat denials that there had been age discrimination.

37. We find that the claimant has been consistent in his account of the questions he received from Councillor Wingrave, in evidence and in the contemporaneous documents. He clearly described the change in atmosphere and his growing sense of injustice driving home. His evidence that Councillor Wingrave was concerned how long he would undertake the role, given there would be training requirements, is something we think Councillor Wingrave was likely to say; in evidence she explained how she, quite rightly, exercised great care in spending the council’s money. He struck us as being consistent and fair, both as a witness and as an advocate. We accept his account of the comments made by Councillor Wingrave during her part of the interview.

The Law

Age Discrimination

38. The Tribunal considered section 13 Equality Act 2010, subsection 1, which provides:

    “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.”

39. The protected characteristic relied upon by the claimant is age. In relation to age discrimination, section 5 EqA provides:

    "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 persons who share a protected characteristic is a reference to persons 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."

40. The Tribunal considered whether the treatment of the claimant was "because of" the protected characteristic. The Equality Human Rights Commission Code of Practice states that:

"Whilst a protected characteristic needs to be a cause of the less favourable treatment, it does not need to be the only or even the main cause."

Burden of Proof

41. S136 Equality Act 2010 establishes a "shifting burden of proof" in a discrimination claim. If the claimant establishes facts, from which the tribunal could decide, in the absence of an adequate explanation, that there has been discrimination, the tribunal is to find that discrimination has occurred, unless the employer is able to prove that it did not. In the well-known cases of *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332 and *Igen Ltd & others v Wong & others* [2005] IRLR 258, the Court of Appeal gave the following guidance on how the shifting burden of proof should be applied:

    41.1. It is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant that is unlawful. These are referred to below as "such facts".
    41.2. If the claimant does not prove such facts their discrimination claim will fail.
    41.3. It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.
    41.4. In deciding whether the claimant has proved such facts, remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
    41.5. It is important to note the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
    41.6. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
    41.7. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a questionnaire….

41.8. Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

41.9. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of [age], then the burden of proof moves to the respondent.

41.10. It is then for the respondent to prove that he did not commit that act.

41.11. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of [age], since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

41.12. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [age] was not a ground for the treatment in question.

41.13. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

42. In *Madarassy v Nomura International plc* [2007] IRLR 246, the Court of Appeal warned against allowing the burden to pass to the employer where all that has been shown is a difference in treatment between the claimant and a comparator. For the burden to shift there needs to be evidence that the reason for the difference in treatment was discriminatory. It is also well established that treatment that is merely unreasonable does not, of itself, give rise to an inference that the treatment is discriminatory.

43. It is also established law that if the tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then it is not improper for a tribunal to find that even if the burden of proof has shifted, the employer has given a fully adequate explanation of why they behaved as they did and it had nothing to do with a protected characteristic (see *Laing v Manchester City Council* 2006 ICR 1519).

44. Very little direct discrimination is overt or even deliberate. The tribunal should look for indicators from the time before or after the decision, which may demonstrate that an ostensibly fair-minded decision was, or equally was not affected by discriminatory bias. (see *Anya v University of Oxford* [2001] ICR

45. The Tribunal applied the burden of proof in *Igen v Wong & Others* [2005] IRLR 258 confirmed by the Court of Appeal in *Madarassey v Nomura*

International PLC [2007] IERLR 246: we had to consider whether the claimant raised facts from which the Tribunal could conclude that the claimant had been treated less favourably on the grounds of age and whether or not if that was the conclusion the burden shifted to the respondent to refute the allegations of the claimant. The Tribunal considered the totality of the evidence in looking at this matter - this included evidence of the interview processes, the post advertised, the circumstance of the candidates that applied, the scoresheets each panel member had completed and each panel member's account of their decision.

Conclusions

46. The Tribunal, having heard evidence and submissions over two days, was able to use most of the third day for deliberations. We were able to reconsider the witness statements, documents, notes of evidence taken, the law applicable and the submissions made. The judgment was given orally during the afternoon of the third day. The conclusions reached are as follows:-

47. The Tribunal has found that:

    47.1. comments, regarding age were made by Cllr Wingrave;
    47.2. Cllr Wingrave had deliberately noted the ages of only the 2 older applicants;
    47.3. Cllr Wingrave had actually circled the age of the successful candidate

    from this we can properly infer that the age of the claimant was a matter that she bore in mind when making her decision. We also note that she was concerned about the length of time the claimant would be able to undertake the role, given the role would require training for which the council would incur a cost.

48. The tribunal found Cllr Wingrave's decision was a game changer in the decision to appoint S – without her scores the Claimant had scored the top marks with both Cllr Davies and Wendy Thomas.
49. The tribunal were satisfied the claimant had proven on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of age discrimination. We turned to consider whether the respondent had proven that the decision not to appoint the claimant was in no sense whatsoever on the grounds of his age.

50. Whilst we accept that one factor that may have been influential in the decision was S's Margam Park experience and his experience of collecting money (albeit the claimant had similar experience handling money), the claimant's age was certainly a factor in Cllr Wingrave's decision making and did affect the overall decision. We cannot say that the decision had nothing to do with the claimant's age. The respondent has not been able to discharge this burden.

51. For the sake of completeness, the tribunal wish to note that we read the complaints and equalities policies. We have not set out their contents in this judgment. The respondent agrees that the complaints and equalities policies were not fit for purpose; we acknowledge that both policies are now being reviewed.

52. Having provided oral reasons on liability, parties were able to agree remedy.

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Employment Judge L Howden-Evans

Dated: 6th October 2018

REASONS SENT TO THE PARTIES ON

11 October 2018

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FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS