



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 8000015/2022

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Employment Judge S Cowen
Ms L Grime
Mr R Henderson

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Held in Edinburgh on 6 and 7 December 2022

Mrs Hogg

Claimant
Represented by
Mr Hogg (Husband)

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Crummock Surfacing Limited

Respondent
Represented by
Mr Nield (Company
Accountant)

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

An oral judgment was given at the hearing on 7 December 2022. A request for
30 written reasons was made by the claimant on 20 December 2022.

REASONS

Introduction

1. By an ET1 filed on 4 August 2022 the Claimant brought claims for Unfair
35 Dismissal and Direct Age Discrimination.
2. The ET3 was filed on 1 September 2022 defending both claims.

3. The hearing was case managed and set down to be heard on 6 and 7 December 2022 in person in Edinburgh. Both parties complied with the orders to prepare for the hearing.

5 4. The Tribunal heard evidence from Mrs Hogg and from Mr Nield on behalf of the Respondent. Both parties made closing submissions and the Tribunal considered their decision before an oral judgment was given to the parties in person on 7 December 2022. A request for written reasons was made on 20 December 2022.

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FACTS

5. The Claimant was 62 years old at the time of her dismissal from the Respondent.

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6. The Claimant's husband (who represents her here) was a senior manager with the Respondent. He retired on 31 March 2022. Towards the end of 2020, the Claimant was asked if she would help out at the Respondent, with some purchase ledger and other administrative work, as Tony Nield, the accountant was under some pressure of his workload. As this work was within the Claimant's skillset, she agreed to help, working at home for the Respondent.

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7. Mr Nield had used the shutdown of the company during the Covid-19 pandemic lockdown to implement a new accounting package. However, the lockdown did not last long enough to fully implement the package, before the company reopened and there was an upturn in work immediately. He found the pressure of work to be immense and required some time off due to a health problem.

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30 8. The Claimant started work for the Respondent in January 2021, taking on some of the tasks previously done by Mr Nield. She processed Goods

Received Notes ('GRN'), Purchase Invoices and queries and amendments to Purchase Orders ('PO').

- 5 9. Her contract was for 21 hours per week and stated that the initial contract was for 3 months - the Claimant understood this to be a probationary period. No-one spoke to her at the end of that period to confirm the contract, nor to discuss any extension to it. The Claimant did not consider it to be a fixed term contract, as no such conversation had occurred. Mr Nield agreed in his evidence that it was not his intention when issuing the contract, that it would be a temporary post.
- 10 10. At first the Claimant asked Paul Blyth, Head of Buying where she had queries of PO. However, she was subsequently able to resolve many of these herself, by her own enquiries and made the relevant appropriate amendments. Thus taking some of the strain from Mr Blyth, as well as from Mr Nield.
- 15 11. In early 2022, the managers meetings decided to hire someone to deal with the administration of the company and started to discuss the hiring of Madison Kennedy, the daughter of Lee Kennedy, one of the Directors. Initially Ms Kennedy was to work part time in an administrative role. This quickly developed into a full time role of being an assistant buyer to Mr Blyth, whose workload was also increasing. Ms Kennedy was also given responsibility for PO.
- 20 12. Mr Kennedy removed himself from discussions about his daughter's employment and was not likely to have been involved in discussion over the redundancy of the Claimant. The Tribunal also accept that Phil Boyes was not yet in post when discussion over the Claimant's redundancy occurred and that Mr Hogg was also unknowingly excluded from such conversation, as it involved his wife's future at the company.
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13. The Claimant was given her notice some 8 days after Mr Hogg retired from his post.
14. The decision to make the Claimant redundant occurred in a conversation
5 between Mr Nield and Mr Blyth. During that conversation Mr Nield explained to Mr Blyth the process of how best to communicate with the Claimant in relation to redundancy. Mr Nield told Mr Blyth to speak to the Claimant face to face.
- 10 15. Mr Blyth did not follow the instructions of Mr Nield and wrote the email (on p2) dated 8 April 22. This email included a reference to Ms Kennedy taking on the task of placing and amending orders and queries and amendments to PC. It also refers to Ms Kennedy ultimately taking on processing GRN. The email also refers (erroneously) to the fact that the Claimant had a temporary
15 contract.
16. In response to the Claimant's phone call to Mr Blyth upon receiving the email, he said to the Claimant that he thought she was nearing retirement in any event.
- 20 17. The Claimant went on holiday for a week after receiving this email. When she returned, she submitted a grievance which included a reference to age discrimination. This was dealt with by the new Managing Director, Mr Phil Boyes, who spoke to Mr Nield about it, but did not take any notes. It is not
25 clear who else Mr Boyes spoke to. He responded to the Claimant on 5 May 2022 saying that her appointment had been on an 'interim basis' to assist Mr Nield. He also erroneously said that Mr Kennedy and Mr Hogg had been party to the decision to dismiss the Claimant. He asserted that the redundancy decision was due to a reorganisation of the business. He did not address her
30 allegation of discrimination in any detail, other than to say that it was denied that any discrimination had occurred.

18. The Claimant responded on 17 May to say that she felt the response did not address her age discrimination point and asked them to do so prior to her issuing a claim. She received no reply.

5 **Law**

19. The only claim which the Tribunal has jurisdiction to decide was under s.13 Equality Act 2010 - direct age 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”.

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20. In accordance with s.13 the Tribunal considered:-

- a. Was the Claimant treated less favourably than a comparator
- b. What was the reason for the treatment - was it because of her age?

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21. The Tribunal were asked to consider Ms Kennedy as a comparator, as she is 22 years old. The Tribunal took into account *Shamoon v Chief Constable of the Royal Ulster Constabulary* ([2003/ UKHL 11](#), [\[2003\] IRLR 285](#), *ICR 337*): ‘the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim save that he, or she, is not a member of the protected class.’

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22. The Tribunal also had regard to the fact that they must consider how a hypothetical comparator would be treated even where the Claimant has only identified real comparators in the claim.

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23. The Tribunal were reminded of *London Borough of Islington v Ladele*, upheld by CA ([\[2010\] IRLR 211](#)), which referred to *Nagarajan v London Regional Transport* ([\[7999\] IRLR 572](#)), where it was said that the tribunal had to determine the reason why the claimant was treated as he was. Lord Nicholls put it in *Nagarajan* “this is the crucial question”. He also observed that in most

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cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

24. The Tribunal were aware that it is not necessary in every case for a tribunal
5 to go through the two-stage procedure in *Igen v Wong* [2005] IRLR 258. In
some cases it may be appropriate for the tribunal simply to focus on the
reason given by the employer and if it is satisfied that this discloses no
discrimination, then it need not go through the exercise of considering whether
the other evidence, absent the explanation, would have been capable of
10 amounting to a prima facie case under stage one of the *Igen* test: see the
decision of the Court of Appeal in *Brown v Croydon LBC* [\[2007\] EWCA Civ
.32, \[2007\] IRLR 259](#)

25. The Tribunal were satisfied that in this case, the facts themselves showed the
15 reason why the decision to make the Claimant redundant was taken.

Decision

26. The Tribunal considered that the Claimant gave her evidence in an open and
honest way and accepted that that Claimant was genuinely shocked and
20 upset by her dismissal. It was her honest belief that she was being dismissed
due to her age.

27. To consider whether the Claimant was subject to unlawful discrimination, the
Tribunal considered the reason why she was dismissed for redundancy.
25 Following the decision in *Nagarajan v London Regional Transport* [\[1999\]
IRLR 572](#), and upheld by the Court of Appeal in *London Borough of Islington
v Ladele* [\[2010\] IRLR 211](#)

28. The Claimant said that she was dismissed due to her age. In evidence she
30 said that having considered the email of Mr Blyth and knowing she was not in
fact on a temporary contract, as he had suggested, she could see no other

reason than a younger woman being asked to do her job. She believed that this amounted to age discrimination.

5 29. The Tribunal also recognised that Mr Nield was an honest and open witness. He made concessions in his evidence where appropriate.

10 30. The Tribunal considered Mr Nield's evidence that he decided that he would take back his role with regard to GRNs and purchase ledger and that Ms Kennedy could pick up a small part of the work the Claimant had been doing which fitted with Ms Kennedy's assistant buyer's role. In those circumstances there was no role left for the Claimant to do.

15 31. The Tribunal considered that this was a genuine business reason for the redundancy. The need for the Claimant to do the work she was doing was diminishing due to a reorganisation of the business. The Tribunal accepted that Mr Nield had not considered the Claimant retiring and that he had not spoken to her about it. Mr Nield's reason for taking back his work was due to the fact that the installation of the new accounts software was complete and his workload was more manageable, as well as his health being restored.
20 These are non-discriminatory reasons and not linked to the Claimant's age.

25 32. The Tribunal were satisfied that the decision to make the Claimant redundant was taken by Mr Nield with Mr Blyth. We noted that Mr Hogg was not involved in the redundancy decision and that Mr Kennedy was not involved in meetings where the work of Ms Kennedy was discussed. This occurred before Mr Boyes was in post and therefore the decision was taken between only these two managers.

30 33. The Tribunal also accepted the evidence of Mr Nield that he had told Mr Blyth to speak to the Claimant face to face and what process to use, but that Mr Blyth had not followed this advice and had drafted his own email which Mr Nield did not see before it was sent to the Claimant. The Tribunal were

satisfied that this email did not reflect the discussion between them and the reasons for the decision to make the Claimant redundant.

- 5 34. Whilst it was understandable that the Claimant concluded that age was a factor, due to this miscommunication of the Respondent's reasons, she was placed under a misapprehension by Mr Blyth's email.
- 10 35. The Tribunal considered whether Mr Blyth may have been influenced by age when making the decision with Mr Nield. We concluded that there was no evidence to suggest this had been part of their conversation, nor that Mr Blyth had used this to decide that the Claimant should be made redundant.
- 15 36. The Tribunal considered Mr Nield's evidence to be genuine and straightforward on this point. His acceptance that Mr Blyth had not mirrored his instructions accurately in the email of 8 April led us to conclude that Mr Blyth had added these details, along with his mistaken view of the Claimant's contract being temporary, after the decision to dismiss had been taken.
- 20 37. For the sake of completeness, the Tribunal also considered the issue of Ms Kennedy as a comparator and whether the Claimant was treated less favourably. We concluded that Ms Kennedy was not a suitable comparator as her role was materially different to that of the Claimant, who undertook work on behalf of Mr Nield (accounts work), whilst Ms Kennedy's work was in admin and buying as an assistant to Mr Blyth.
- 25 38. We also considered a hypothetical comparator, who did the same role as the Claimant, on the same contract terms, but who was younger. We concluded that in these circumstances, a younger version of the Claimant would also have been made redundant due to the business reorganisation of work.
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39. For these reasons, the Tribunal concluded that the Claimant was not subject to age discrimination and the claim was dismissed.

Employment Judge: S Cowen
Date of Judgment: 23 January 2023
Entered in register: 24 January 2023
and copied to parties