EMPLOYMENT TRIBUNALS

Claimant: Mr D Taheri

Respondent: Aprite (GB) Limited t/a Westway Nissan

Heard at: Manchester **On:** 11 and 12 September 2019

Before: Employment Judge Franey
Mr J Flynn
Mrs C Clover

REPRESENTATION:

Claimant: In person
Respondent: Mr N Grundy, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of direct race discrimination is dismissed upon withdrawal by the claimant.

2. The complaint of direct disability discrimination fails and is dismissed.

3. The complaint of direct age discrimination fails and is dismissed.

4. The claimant is ordered to pay the entirety of the legal costs incurred by the respondent, including those incurred by its solicitor and by counsel, after 8 February 2019, being such sum as is assessed by an Employment Judge as reasonably incurred pursuant to rule 78(1)(b), such assessment being conducted with or without a hearing as that Employment Judge considers appropriate.

REASONS

Introduction

1. By a claim form presented on 8 June 2018 the claimant complained that his application for a vehicle sales role with the respondent had been rejected in the course of an assessment day on 25 May 2018 in a way which amounted to direct discrimination because of age, race and/or because of disability. His claim form said that he was a disabled person by reason of prostate cancer.

2. The response form of 12 July 2018 defended the complaint on its merits. It said that the decision to terminate the claimant's involvement in the selection day after the first group exercise had been due solely to his behaviour, not to any protected characteristic.

3. The case came before Employment Judge Sherratt at a preliminary hearing on 4 January 2019. He rejected an application by the respondent to strike out the case as having no reasonable prospect of success. He recorded that the respondent accepted that the claimant was a disabled person, but it denied any knowledge of his medical position. Directions were given to bring the matter to a final hearing.

4. The parties were in dispute about whether certain documents should be included in the hearing bundle. Those disputes were resolved by Regional Employment Judge Parkin at a preliminary hearing on 28 August 2019. Because his Case Management Order referred to material which he ruled was inadmissible, this Tribunal did not see that Order nor have any details about what was at issue.

5. In the week prior to the hearing the claimant made an application for it to be postponed because of problems with his health. He supplied a letter from his General Practitioner dated 6 September 2019. One issue was that he could experience frequent and urgent need to use the toilet because of his disability, rendering travel to the hearing very difficult. On 10 September 2019 Employment Judge Holmes refused that application, noting that the doctor’s letter suggested that the claimant would be able to attend at least part of the hearing.

6. The claimant attended our hearing and at the outset we asked him what adjustments we could make to help him deal with the hearing. It was agreed that the Tribunal would not sit beyond 4.00pm in order to enable him to travel home before rush hour to reduce his journey time. It was also agreed that he could have a break upon request, even if at very short notice.

Issues

7. At the start of the hearing we discussed the issues with the parties.

8. The claimant said that he wanted to withdraw his race discrimination complaint. It was dismissed on withdrawal.

9. The remaining complaints were of direct age discrimination and direct disability discrimination.

10. The disability upon which the claimant relied was his prostate cancer.

11. In terms of age, he was aged 58 at the date of the selection day, and for the purposes of section 5 Equality Act 2010 his age group was people in their fifties.

12. The respondent denied that either protected characteristic had any impact on its decision, and did not seek to argue that any age discrimination would be justified.

13. The issues to be determined by the Tribunal that related to liability were therefore as follows:

(1) Can the claimant prove facts from which the Tribunal could conclude that in rejecting his application for employment on 25 May 2018 by terminating his participation in the assessment day the respondent treated him less favourably because of age, and/or because of disability, than it treated the successful candidates who were of a younger age group and/or not disabled, or in the alternative than it would have treated a hypothetical comparator in the same circumstances of a younger age group and/or who was not disabled?

(2) If so, can the respondent nevertheless show that there was no contravention of section 13?

Evidence

14. We had a bundle of documents running to 109 pages. Any reference in these Reasons to page numbers is a reference to that bundle unless otherwise indicated.

15. The claimant pointed out that the bundle contained the response form, and that paragraphs 32 and 33 (page 28) referred to matters which Regional Employment Judge Parkin had ruled were inadmissible. He asked for those paragraphs to be redacted. The Tribunal had already read the response form prior to the commencement of the hearing, but Mr Grundy agreed that the response form should be treated as if those paragraphs were redacted. We did not take them into account.

16. The claimant gave evidence himself pursuant to a written witness statement. He also relied on a statement from the ACAS conciliator, Diane Lawrence, although in truth there was no dispute about the matters set out in her witness statement.

17. The respondent called three witnesses. Nigel Kingswood was a director of DBNK Consultants Limited which organised the assessment day on behalf of the respondent. Simon White was the respondent's Operations Manager and Andrew Buswell the Group Human Resources Manager, both of whom were at the assessment day. Each of those witnesses gave evidence pursuant to a written witness statement.

Inadmissible Material

18. In the course of the initial discussion the claimant raised some concerns about whether he would be questioned about other cases he had brought. The consequence of the ruling of Regional Employment Judge Parkin was that the bundle contained the Judgment and Written Reasons from a decision of an Employment Tribunal chaired by Employment Judge Horne which sat on 19 and 20 December 2018 ("the Horne Tribunal"). There was also a reconsideration Judgment

from Employment Judge Horne from February 2019. The Horne Tribunal Reasons referred to at least one other case which the claimant had brought. Mr Grundy said he wanted to cross examine the claimant about the number of other cases he had brought but no details would be raised save for the case considered by the Horne Tribunal. It was necessary for the Tribunal to monitor the questions closely to ensure that evidence did not stray into matters which Regional Employment Judge Parkin had ruled inadmissible.

19. The witness statement of Mr Kingswood provided to the Tribunal with its copy of the hearing bundle contained two paragraphs which had been crossed out but which remained visible on the page. This was a printing error, and Mr Grundy was able to supply us with a copy of the witness statement which did not contain those tracked changes. The Tribunal did not read the tracked changes version, but only the version supplied by Mr Grundy omitting those paragraphs entirely.

Relevant Legal Principles

20. The claims were brought under the Equality Act 2010. Section 39(1)(c) prohibits discrimination against a person by not offering him employment. The characteristics protected by these provisions include age (section 5) and disability (section 6).

21. Amongst the forms of prohibited conduct is direct discrimination which is defined in section 13 as follows:

> **"(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."**

22. The term "less favourably" requires some form of comparison, and section 23 provides as follows:

> **"(1) On a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case."**

23. Where the act in question is not inherently discriminatory, the question for the Tribunal is whether the protected characteristic had any material influence on the mental processes, conscious or subconscious, of the decision maker. The claim will succeed even if the protected characteristic was not the sole or principal reason.

24. Where a decision is made by more than one person, the mental processes of each participant must be considered.

25. Section 136 deals with the burden of proof. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person contravened the provision, the Tribunal must hold that the contravention occurred. However, subsection (3) says that this does not apply if the respondent shows that in fact it did not contravene the provision. The effect of this is that the claimant bears the burden of proving facts from which the Tribunal could properly conclude that (in this case) his age and/or his disability had a material influence on the decision to reject his application. If he proves those facts, the burden shifts to the respondent to show that those protected characteristics in fact had no influence on the decision.

26. The Court of Appeal gave guidance to Tribunals on how to apply the burden of proof provisions in **Igen v Wong [2005] EWCA Civ 142**. We had regard to that guidance. In general terms the burden of proof will not shift simply because the claimant shows that he was treated less favourably than someone who does not possess his protected characteristic. The claimant will need to establish something more before the burden shifts to the respondent to explain that difference in treatment: **Madarassy v Nomura International PLC [2007] ICR 867**.

27. However, we also bore in mind that in some cases it may be appropriate for the Tribunal to assume that the burden of proof has shifted and just proceed to the second stage of asking whether the respondent has shown that there was no contravention of section 13. Further, if the Tribunal is in a position to make a positive finding as to the reason for a decision the burden of proof provision does not assist: **Hewage v Grampian Health Board [2012] UKSC 37**.

Relevant Findings of Fact

28. This section of the Reasons sets out the broad chronology of events. There were some disputes about primary facts which we had to resolve and these will be addressed in the discussion and conclusions section below.

Background

29. The respondent trades as Westway Nissan, which is a large motor retail group. It regularly recruits sales staff, and instructs DBNK Consultants Limited ("DBNK") to organise recruitment events.

30. At the end of April 2018, the claimant saw an advert for jobs as a Sales Executive ranging from junior trainee at entry level up to senior vacancies. The advert appeared at pages 34-35. It made clear that no previous experience was required. There would be an assessment day at a hotel in Stockport on 25 May 2018. It said that the successful candidates would demonstrate communication skills and the ability to work in a team environment.

31. The claimant applied for that vacancy through a Jobs Website. His CV appeared at pages 36-37. It showed a range of experience going back to 1990, much of it in a sales environment. It gave the impression that he had been employed continuously since 1990. That was not the case.

32. The CVs were to go to DBNK rather than to the respondent. However, on 4 May 2018 the claimant emailed his CV direct to the respondent at an email address for its payroll. He said he would like to attend the assessment day and he attached his CV, pointing out in the email (page 38) that he had car sales experience in the USA. Two days later Mr Buswell forwarded the email to Mr Kingswood of DBNK.

33. Mr Buswell and Mr Kingswood both told us that neither of them had read the claimant's CV before the assessment day. Mr Buswell confirmed that CVs ordinarily went straight to DBNK and he just forwarded it on without looking at it. Mr Kingswood said that it was a colleague at DBNK who looked at all the candidates' CVs in order to prepare a spreadsheet giving the name of the candidate and an email and telephone number. Mr Kingswood then contacted the candidates and invited them to attend the assessment day.

34. There was no filtering of candidates by CVs. There were over 150 applicants for the post and all of them were permitted to attend the assessment day if they wished. In the event more than 30 people attended. The claimant was one of them.

Assessment Day

35. The programme for the assessment day appeared in a booklet at pages 30-42. Following an introductory session there was a presentation by the respondent giving an overview of its business, and then the first exercise in the form of a group discussion. It was an exercise based upon a coach crash in a remote part of Africa where under time pressure the group had to select ten key items from a list of 40 to help them survive. The booklet said that the respondent was looking for:

> **"Persuasive skills, reasoned logic, dominance, humour, charisma, ability to communicate and timekeeping."**

36. The events of the morning preceding the decision to reject the claimant's application can be divided into three stages. There was a dispute of fact about each stage.

Stage 1 – Before the Presentation

37. The first stage was before the presentation began when it is common ground that the claimant spoke to Mr Kingswood asking him if he could turn down the air conditioning.

38. The claimant's case was that he introduced himself, made a polite request, and explained that he suffered from prostate cancer. He said he spoke to Mr Kingswood only once.

39. Mr Kingswood, however, said that the claimant spoke to him in a rude and abrupt manner, made no mention of any medical condition, and then about ten minutes later approached him a second time in a confrontational manner. We will return to that dispute in our conclusions.

40. Mr Kingswood was concerned by what he saw from the claimant and spoke to his colleague, Mr Marriott, who had greeted candidates and signed them in. He asked Mr Marriott if anything had happened when the claimant arrived which might account for his demeanour.

Stage 2: During the Presentation

41. The second stage was the presentation given on behalf of the respondent by Mr White. It was common ground that the claimant asked a couple of questions during that presentation. The dispute was about whether he asked polite questions for clarification, as he maintained, or whether he interrupted Mr White in a manner which (according to Mr White) lacked any kind of tact or diplomacy.

Stage 3: Group Exercise

42. The third stage was the group exercise. The respondent's case was that the claimant behaved in a confrontational, dismissive and intimidating manner towards the other members of his group, causing concern amongst the assessors.

43. The claimant accepted that he had tried to steer the group. He had had military experience in Africa which he felt was relevant, and described himself as "leading from the front". However, he did not accept that there had been anything untoward about his behaviour in the group environment.

Decision

44. Following the group exercise Mr White and Mr Buswell had a discussion about the claimant.

45. At shortly after 11.00am the claimant was called in to see them. He was told that he was no longer participating in the exercise. The claimant accepted that he said words to the effect of:

> **"You think I am too strong – I've been to this type of event before and I am not what you are looking for – you only want sheep."**

46. It was also accepted that the claimant said he thought that his age was the real reason for the decision. He maintained that he also said it was due to his disability (and to his race), but that was not accepted by Mr Buswell and Mr White. We will return to that issue in our conclusions.

47. The claimant went and sat in his car outside the venue and ate his lunch. Whilst he was there he saw two candidates of Asian appearance emerge. He formed the view that they had been the second and third people to be ejected from the assessment day. In fact, they had left voluntarily, as people were free to do throughout the day.

48. In total 11 candidates were successful. There was no information as to whether any of them were disabled. As far as their ages were concerned, the youngest was 18 and the two oldest were aged 42 and 48. None of them were 50 or above.

49. A few minutes after 1.00pm that day the claimant sent a text message to Mr Kingswood. It said:

> **"Nigel, please pay me £100 for my time or else I will have no option but to contact ACAS. Kind [regards]. David Taheri"**

4 June 2018

50. By 4 June the claimant had contacted ACAS. The conciliator, Diane Lawrence, sent an email to the respondent that day (page 61). It mentioned a claim of age and disability discrimination. There was no mention of race discrimination.

51. That same day Mr Kingswood sent to Mr Buswell and Mr White the text message he had received on 25 May. He referred it as an attempt

> **"to blackmail myself into giving him £100".**

6-8 June 2018

52. According to the witness statement of Ms Lawrence, on 6 June she spoke to Mr Buswell and he made it clear that no offers would be made to resolve any claim as they felt it was vexatious. She conveyed this to the claimant on 8 June and issued the early conciliation certificate.

53. The claimant telephoned Mr Kingswood on 8 June. According to Mr Kingswood the claimant said he wanted £20,000 from the respondent and Mr Kingswood should ensure that they paid otherwise he would come after Mr Kingswood for that sum. The claimant disputed this and said that he never mentioned £20,000. We will return to that issue in our conclusions.

54. Mr Kingswood terminated the call, and the claimant then sent a text message (page 55) at 13:10 which said:

> **"You didn't even have the courtesy to reply, how rude and unprofessional."**

55. The claimant presented his claim form that same day. It appeared in our bundle at pages 1-13. In box 9.2 on page 8 the claimant was asked to say what compensation he was seeking, and he wrote:

> **"At least £25,000."**

10 June 2018

56. On Monday 10 June Mr Kingswood emailed Mr Buswell and Mr White about the claimant. He attached a statement of events updated to reflect the telephone call. Mr Kingswood had been asked to do the statement by Mr Buswell, no doubt because the respondent had been informed by ACAS in the email of 4 June at page 61 that the claimant was seeking to bring a discrimination complaint.

57. His email said:

> **"You will see that he has asked for £20,000 and said that I should ensure that you pay otherwise he will come after me for the £20,000. The reason was for age discrimination and the flawed recruitment process, I think that this actually shows that the process works as he quite clearly was just a bully."**

58. The statement of events attached to his email appeared at page 59a-59b. It recorded the claimant having approached him twice about the air conditioning at the start of the recruitment day, the second time in a confrontational and rude manner. As for the presentation, it recorded that:

> **"David Taheri said he couldn't hear as he had a hearing problem which was strange as he had heard everything before, but he had not made anyone aware of his alleged hearing disability."**

59. It also recorded Mr Taheri behaving in a truculent way, shouting down other candidates and being aggressive with them during the group exercise. It ended by recording the conversation in which the claimant had sought £20,000.

Police Report

60. Mr Kingswood subsequently spoke to other people about what happened and conducted some internet research about the claimant that caused him to report the claimant's approach to the police. He emailed Mr Buswell on 20 June 2018 (page 60) to confirm this, identifying the Derbyshire Police Officer and the incident number. The police told Mr Kingswood that they would have a record in case there were any further threats from the claimant. In the event nothing happened and the claimant was never contacted by the police. He was not aware that this report had been made.

Horne Tribunal December 2018

61. On 19 and 20 December 2018 the claimant attended the hearing of a claim he brought against Perry Motor Sales Limited in case number 3304326/2018. It was heard by a Tribunal chaired by Employment Judge Horne.

62. The Judgment of the Horne Tribunal dismissing the claimant's race and age discrimination complaints, and ordering him to pay £1,000 costs, appeared at pages 68-69. Written Reasons for that Judgment appeared at pages 70-91, and a Judgment and Reasons rejecting the claimant's application for reconsideration appeared at pages 92-99.

63. The Written Reasons showed a marked similarity between the events which gave rise to that case and the events in this case. The Horne Tribunal noted that the claimant had sent a deliberately misleading CV to that respondent (page 72) prior to attending a one-day assessment for a sales role with a multi-site car dealer. The assessment centre in that case took place on 20 December 2017. There was an introductory presentation followed by a group exercise based on the same or a similar scenario about the need to select items from a list when stranded in a remote part of Africa. On that occasion the claimant had also been rejected following the first group exercise on the basis that the assessors formed the view that he dominated the discussion and had been overbearing. The Tribunal recorded (page 75) that the claimant had seen himself as ideally placed to lead that group discussion because he had served in the Armed Forces, been to Africa and had received survival training. He had decided to "lead from the front". The conclusion of the Horne Tribunal was that the claimant's race and age played no part in the decision to reject him. It was a decision made because of his behaviour during the group exercise.

Submissions

64. At the conclusion of the evidence each side made an oral submission to help us make our decision. This is a brief summary of the position taken on each side.

Respondent's Submission

65. Mr Grundy submitted that this was a case which turned upon a dispute of fact but that the Tribunal should find that the claimant was a dishonest witness. He relied on the consistency between the facts as found by the Horne Tribunal and what the respondent said about how the claimant behaved on their selection day, the claimant's readiness to make sweeping allegations of discriminatory behaviour by

the three witnesses in the past and in the future when he had only met them once briefly on 25 May 2018, and the claimant's mindset as shown by the allegations of race discrimination made in the ET1, albeit subsequently withdrawn. He also suggested that the evidence from the time showed that the claimant had proposed a settlement of £20,000, and that the claimant was lying when he denied having done so.

66. Further, Mr Grundy suggested that the claimant's case was a fallacy. The claimant had repeatedly said that he thought he was viewed as a troublemaker. That was correct and it had nothing to do with age or disability. The disability discrimination claim was hopeless because the claimant had not told anyone about his prostate cancer. The claim should be dismissed because the reason for terminating his participation in the recruitment day had nothing to do with any protected characteristic.

Claimant's Submission

67. The claimant began by emphasising the difficulties of being a litigant in person when the other side were represented by experienced counsel. He accepted the similarity of the events set out in the Horne Tribunal decision, but denied that he had attended the selection day simply to set up a possible claim. He emphasised the accuracy of his version of events in the three key stages of that day. Any discrepancies in his CV were not serious and should not be held against him. He had not given his evidence in a clear way to the Horne Tribunal and their conclusion on inaccuracies in his CV was not correct. Nor should any behaviours during this hearing count against him because this was a very different environment from a recruitment day. He accepted he had tried to lead by example in the Africa exercise and felt that the respondent did not want an experienced and authoritative person. When pressed on the connection between this and his age and/or disability, he said that they had been a major contributory factor in the perception of him as a troublemaker who would not suit the organisation.

68. There was no reason why he would have approached Mr Kingswood to ask for £20,000. Mr Kingswood was a consultant, not part of the respondent. The note prepared by Mr Kingswood at pages 59a-59b was not accurate. There had been discrimination because his age and his disability had contributed to the perception that he was not a person who the respondent could mould once it employed him.

Discussion and Conclusions

69. The issue in this case was whether the claimant's age or his disability in the form of prostate cancer had any material influence, consciously or subconsciously, on the decision to reject his application for a post with the respondent by ending his involvement on the selection day on 25 May 2018.

70. The role of the Tribunal was to determine what the relevant facts were and then to apply the law to those facts.

71. In this case there were a number of disputes of primary fact which we had to resolve, and for that reason both parties addressed us on the respective credibility of each side's case.

Credibility of the Claimant

72. There were three matters which caused us significant concern about the reliability of the claimant's evidence.

73. Firstly, and most importantly, there was a dispute about whether he spoke to Mr Kingswood on the telephone on 8 June 2018 and asked for a payment of £20,000 either from the respondent or from Mr Kingswood. The claimant accepted that there was a telephone call that day but denied that he made any mention of that figure. However, Mr Kingswood made a record of that in an email sent the following Monday and in a note which accompanied it. We noted also that the telephone call occurred on the day on which, according to the witness statement of Diane Lawrence, the claimant had been told by ACAS that the respondent was not going to pay him anything and it was also the same day that he presented his claim form, seeking compensation of "at least £25,000".

74. The claimant said there were two discrepancies in Mr Kingswood's note. The first was that the number attending the selection day differed from the number given in his witness statement. The note at page 59a said there were 32 and the witness statement said there were 27. Mr Kingswood said that there had been 32 at the start and that five, apart from the claimant, left voluntarily during the day. The scoring sheets that appeared in the bundle were not entirely clear, not least because a candidate Luke Howarth appeared on them twice, but we were satisfied that there was no reason for Mr Kingswood to invent or distort the numbers. The discrepancy was not material.

75. The second discrepancy relied upon by the claimant was the reference on the second page of Mr Kingwood's note to an alleged hearing disability. That phrase did not appear in Mr Kingswood's witness statement. It was plain from the note itself that Mr Kingswood was saying was that he did not think the claimant had mentioned anything of that kind. That rang true: it was consistent with the claimant having raised a problem with hearing what was said during Mr White's presentation, but not having said anything when he first spoke to Mr Kingswood at the start of the day about the air conditioning.

76. We concluded that neither of those points impaired the credibility of Mr Kingswood's account as recorded in that note which he had completed by 10 June.

77. Overall, we were satisfied that Mr Kingswood's account was to be preferred to that of the claimant. We were satisfied that Mr Kingswood completed the note accurately. He had no reason to make anything up. We found it accurately recorded the exchange with the claimant that day. The claimant did demand £20,000 from the respondent, or failing that from Mr Kingswood, on 8 June 2018 in that telephone call. It was a last-ditch attempt to get a settlement, having been told by ACAS the respondent would not pay him anything. The amount was in the same "ball park" as the figure he put in his ET1 the same day.

78. Further, and importantly, we did not find it credible that the claimant had forgotten this or was mistaken. We accepted Mr Grundy's proposition that this must be a matter about which the claimant was being dishonest. Unpalatable as it might be, we concluded unanimously that the claimant lied to this Tribunal about the telephone call on 8 June 2018.

79. That did not necessarily mean that everything else the claimant has said was to be disbelieved, but as a consequence the Tribunal was very cautious about accepting his account where not supported by contemporaneous documents and particularly where others gave differing accounts.

80. Secondly, we considered the question of whether the claimant had mentioned a race discrimination complaint in May and June 2018. The claimant said he told ACAS that he was complaining about race discrimination as well as age and disability. The respondent said that race discrimination was not mentioned in the discussion on the day or thereafter.

81. It was significant in our judgment that the ACAS email at page 61 opening discussions as part of early conciliation referred only to age discrimination and disability discrimination. The legal basis for a proposed complaint is at the heart of the early conciliation process; it is not an ancillary matter which is likely to be overlooked or omitted by the conciliator. There was no reason for the conciliator to fail to represent the full extent of the proposed claims the claimant was bringing. We were satisfied the claimant was wrong about that: he did not tell ACAS there was a race discrimination complaint. At that stage the only complaints in his mind were age discrimination and disability discrimination.

82. Thirdly, there was a marked similarity between the way the claimant behaved at the Perry Motors selection day on 20 December 2017 as found by the Horne Tribunal, and the way the respondent's witnesses in this case said he behaved some six months later at their selection day in May 2018. In particular we noted that when Mr Kingswood prepared his account in June 2018 he could not have been aware of the Horne Tribunal Judgment as that was not issued until the end of the year or early 2019.

Credibility of Respondent's Witnesses

83. We noted of course that the claimant mounted his own attack on the credibility of the respondent's witnesses. We explained above why we did not think his criticisms of Mr Kingswood's evidence are well-founded.

84. As for Mr Buswell, it is correct to note that he did explain in his witness statement that the response form contained an error in asserting the claimant had sought the sum of £20,000 through ACAS. Mr Buswell's witness statement explained that in fact that figure had been sought through Mr Kingswood rather than through discussions with ACAS. The tribunal was satisfied that was a genuine error. For reasons explained above, we found that he claimant did seek £20,000. It was around the time that Mr Buswell had been speaking to ACAS about the possibility of resolving the case by agreement. There was no reason to pretend it came through ACAS as that was irrelevant. We found that it was a genuine error and Mr Buswell's credibility on other matters was not undermined by that mistake.

85. Overall the Tribunal was unanimously satisfied that the respondent's witnesses were honest and genuine, and their evidence was credible. In contrast we found the claimant lied about the proposal to settle the matter for £20,000 and his evidence was to be treated with caution.

Findings of Fact

86. Having made that determination as to the respective credibility of the parties we made findings of fact about the three stages of the assessment day.

87. Stage one was the air conditioning discussion. The Tribunal accepted the account given by Mr Kingswood in his note at pages 59a-59b. We were satisfied the claimant approached him twice about the air conditioning, not just once. We found as a fact that the second time the claimant behaved in a way that was confrontational and rude, and invaded Mr Kingswood's personal space. We accepted that Mr Kingswood was sufficiently concerned by this to speak to his colleague, Mr Marriott, about whether anything had happened as the claimant came into the selection day because the claimant seemed to him just to be there to cause a disruption.

88. We also had to make a determination about whether during these exchanges the claimant told Mr Kingswood he had prostate cancer. We were satisfied that was not mentioned. We found as a fact that information was not conveyed to Mr Kingswood. We based that finding on our views of their respective credibility, and because we were satisfied that had it been mentioned Mr Kingswood would have recorded it in his note at pages 59a and 59b. He did in that note make reference to an alleged hearing disability and we were satisfied that he would have recorded prostate cancer had that been raised with him. We also thought that it was inherently unlikely that the claimant would inform a stranger of so personal a matter in this situation.

89. Stage two was the presentation made by Mr White. In his note at page 59b Mr Kingswood recorded the claimant saying that he could not hear. There is no specific criticism in that note of the way the claimant made that intervention although in his witness statement Mr Kingswood said that it was done in an inappropriate manner. The claimant accepted that he did raise a couple of points with Mr White during the presentation but he said that these were pertinent questions raised in a polite manner by putting his hand up and saying "Excuse me". He also told us he said that he could not hear the answer due to the air conditioning.

90. It followed that on the primary facts there was really no dispute that he claimant put a question or two to Mr White during the presentation: the issue was really whether the respondent witnesses genuinely perceived his manner as inappropriate, and if so whether that was a perception tainted in some way by his age. We will return to that in our conclusions.

91. Stage three was the group exercise involving the African coach crash scenario.

92. Mr Buswell in his witness statement described the claimant as behaving in a way that was disruptive and which created difficulties for the group. He said he was inappropriately aggressive, he would shout down other candidates, he made hostile comments, undermined the contributions of others and said that others in the group found the claimant's behaviour intimidating.

93. Mr White in his witness statement said the claimant was extremely confrontational, raised his voice and acted in a way that was dismissive and intimidating, making comments verging on the abusive.

94. Mr Kingswood recorded in his note at page 59b that the claimant displayed a truculent attitude, shouting down other candidates and being very aggressive. He provided a concrete example of a comment made by the claimant to the group which was:

> **"Have you ever done this before, well I have so I know what I'm talking about."**

95. In contrast the claimant's account of this group exercise in his witness statement was that he was polite and professional and trying to lead the group to a positive conclusion. He rejected any suggestion he was rude, abrupt or violent in the way he behaved. In cross examination he explained that he had been to Africa and done military service there and he felt his experience was relevant to the scenario with which the group was faced. He said he was trying to steer the group and he thought having a strong personality would be a positive attribute. Later on in his cross examination he said he was leading from the front, trying to lead by example and guiding the younger candidates. He explained he thought they needed guidance because they were younger than him, and with age comes wisdom. He said he thought that the respondent did not like someone taking the lead.

96. In terms of the primary facts we found that he claimant did try to lead the group as he himself describes. We accepted that he made the comment recorded by Mr Kingswood in his note at page 59b and we were satisfied that the claimant did think that displaying a strong personality would be a positive attribute in that group exercise.

Applying the Law

97. Having made those findings of primary fact we sought to apply the law summarised above.

98. We were satisfied that the primary decision makers in this case were Mr White and Mr Buswell, informed by the feedback from other managers of the respondent who observed the selection day. We were satisfied that Mr Kingswood played no part in the decision to exclude the claimant from the remainder of the assessment day.

99. The question for the Tribunal, therefore, was whether the claimant's age or disability played any part, consciously or subconsciously, in the mental processes of Mr Buswell and Mr White when they decided that the claimant should play no further part in the exercise.

100. In relation to disability discrimination we set out above why we concluded that they did not know he had prostate cancer and did not know that he was a disabled person. That fact cannot have played any part in their reasoning. The claimant has failed to prove facts from which the Tribunal could conclude that there was any direct disability discrimination. That complaint was dismissed.

101. As for age discrimination, the claimant's date of birth was not known to the managers but of course they had seen him in person during the course of the morning. He has also shown in this case that no-one in their fifties got through that selection exercise: the oldest of the successful candidates was 48. The figures showing that approximately 26% of the respondent's sales staff are aged 50 or over

are of limited weight: they do not show how long the individuals in that age group have been employed.

102. However, we were satisfied that even if the claimant had shifted the burden of proof through those facts, the respondent has shown that the decision was solely because of his behaviour on the day and not related in any way to his age. The claimant was seen as a troublemaker due to the manner of his interactions with Mr Kingswood over the air conditioning, the way in which he interrupted Mr White's presentation and (most importantly) the way he behaved in the group exercise as observed by all three of those witnesses. We noted that the respondent's job advert at page 35 emphasised that an ability to work in a team environment would be required. We were satisfied that during this selection day the claimant behaved in the same way as he had six months earlier at the Perry Motors selection day, and the perception of him formed by this respondent's managers was the same: he lacked the personal skills they were looking for and was having an adverse effect on the rest of his group during that exercise.

103. The Tribunal was unanimously satisfied that his age played no part in that assessment. Anyone behaving in that way, whatever his age, would have gone no further during that assessment process. The age discrimination complaint was dismissed.

Costs Application

104. After we delivered judgment with oral reasons Mr Grundy applied for costs on behalf of the respondent. He had prepared a bundle of documents running to 19 pages which contained correspondence between the respondent's solicitor and the claimant from 4 February 2019 onwards. The correspondence from the respondent was marked "without prejudice save as to costs". A number of the claimant's replies were marked "without prejudice".

105. We allowed an adjournment for the claimant to consider that bundle, and on resumption he agreed, after discussion with the Tribunal, that the bundle could be admitted for the purposes of costs. There was no risk of the Tribunal's decision on liability being prejudiced because of course that decision had already been made and announced.

Ability to Pay

106. We heard evidence on affirmation from the claimant and made the following findings of fact.

107. He is currently reliant on income from Jobseeker's Allowance of £62 per week. He had not been able to carry out any self-employed work selling windows for some three months, and last received a commission payment some two months ago. He had no other source of income.

108. His outgoings on monthly household expenses including utilities, council tax and his mobile telephone came to approximately £110 per month. On top were costs for food and general living expenses. He lives alone but has four cats, and vet's bills are incurred from time to time.

109. In terms of annual costs, he has to pay his TV licence of £154 per annum, car insurance of £450, car service costs of £500 per annum, and vehicle excise duty of £220.

110. His current account has a balance of just under £700. He has two small savings accounts totalling approximately £100, and a cash ISA of £2,260.

111. The claimant is the sole owner of his house. It is free of mortgage. It has been on the market since February 2019 at an asking price of £95,000. He intends to move to Pembrokeshire once it is sold. He has not had any offers yet. It is unlikely it will go for the asking price. He has no other property save for his car which is an old Mercedes vehicle worth approximately £5,500.

112. The claimant has one significant debt which is a credit card balance of £6,500 which he pays off at approximately £70 per month. He uses up to eight other credit cards for monthly living expenses but pays them off in full each month.

113. The claimant has yet to pay a costs award in the sum of £1,000 from the Horne Employment Tribunal, and is considering paying two deposit orders made by Employment Tribunals in other cases for the total sum of £1,350.

Respondent's Application

114. Mr Grundy submitted that the case had been one with no reasonable prospect of success from the outset, and that in any event it had been unreasonably pursued since the claimant received the Judgment of the Horne Tribunal in January 2019. It has also been vexatiously pursued. There was no proper legal basis for pursuing the race discrimination complaint, as the claimant had effectively acknowledged by withdrawing it. The Tribunal found as a fact the claimant had not mentioned prostate cancer on the day, and therefore the disability discrimination complaint had been based on a lie. Finally, the claimant should have realised that the age discrimination complaint was doomed to failure because his behaviour at the assessment day had meant that he was viewed as a troublemaker: as the Horne Tribunal also found, this had nothing to do with age. He reminded us that we had also found that the claimant had lied to us about the proposal to settle for £20,000.

115. Mr Grundy then took the Tribunal through the costs bundle showing repeated attempts by the claimant to settle for figures between £150 and £350, and a repeated insistence by the respondent's solicitors that no payment would be made. They had, however, given the claimant numerous opportunities to withdraw the case without any costs order being sought, up until August 2019.

116. Mr Grundy said that he claimant had capital in his house which could satisfy any costs order when the house was sold.

117. He invited us to make a costs award of £20,000 which is the maximum the Tribunal can award as a specified sum under rule 78. There was no detailed breakdown available but we were told that solicitors' costs were £11,600 and counsel's fees £5,500. With the addition of VAT at 20%, the total costs incurred exceeded the £20,000 sought.

Claimant's Response

118. The claimant began his response by turning to the respondent's witnesses who were behind him and saying to them in a threatening manner that "The ball is still rolling". This was, we inferred, a reference to a further case against them which arises out of a recent unsuccessful job application. Mention of that appeared in one of the emails towards the end of the costs bundle.

119. When addressing the Tribunal, the claimant said he disagreed with our decision and considered the amount sought disproportionate. The total bill of the respondent in the Horne Employment Tribunal had been only £7,000. He has no means to pay any substantial award.

120. At the request of the Tribunal he then addressed the question of whether he had acted unreasonably. He pointed out that Employment Judge Sherratt had not struck out his case. It was the respondent's decision to be legally represented. He had conducted himself professionally and believed he had a genuine claim. Any costs order would not help his health. He was not able to run up a massive credit card bill to meet any significant award. He had made the offers to settle for £250 only to avoid the stress of another hearing.

121. Understandably the claimant emphasised that he was not able to dispute the amount being claimed in respect of solicitors' fees without a detailed breakdown. If the Tribunal was minded to make any award exceeding the amount of counsel's fees he wanted to be able to challenge the figures.

Relevant Legal Framework

122. The power to award costs is contained in the 2013 Rules of Procedure. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party. Rule 75(1) provides that a Costs Order includes an order that a party makes a payment to another party "in respect of the costs that the receiving party has incurred while legally represented".

123. The circumstances in which a Costs Order may be made are set out in rule 76; rule 76(1) provides as follows:

> **"A Tribunal may make a Costs Order or a Preparation Time Order and shall consider whether to do so where it considers that**
>
> **(a) A party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
>
> **(b) Any claim or response had no reasonable prospect of success."**

124. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

125. Rule 84 concerns ability to pay and reads as follows:

> **"In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party's (or where a wasted costs order is made the representative's) ability to pay."**

126. It follows from these rules as to costs that the Tribunal must go through a two-stage procedure. The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; and secondly if so, to decide whether to make an award and of what sum.

127. The case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) include confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in **Gee v Shell UK Limited [2003] IRLR 82**.

128. If there has been unreasonable conduct there is no requirement for the Tribunal to identify a precise causal link between that unreasonable conduct and any specific items of costs which have been incurred: **McPherson v BNP Paribas (London Branch) [2004] ICR 1398**. However, there is still the need for some degree of causation to be taken into account as the Court of Appeal pointed out in **Barnsley Metropolitan Borough Council v Yerrakalva [2012] IRLR 78**:

> **"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case, and in doing so to identify the conduct, what was unreasonable about it and what effects it had."**

129. The cases that concern awards were made where parties are found to have lied, which include **Daleside Nursing Home Ltd v Mathew UKEAT/0519/08/RN, Nicolson Highlandwear Ltd v Nicolson [2010] IRLR 859** and **Arrowsmith v Nottingham Trent University [2011] EWCA Civ 797**, demonstrate collectively that there is no absolute rule that an award of costs should follow from a finding that a party has not told the truth to a Tribunal, but that it is necessary to look at the nature, the gravity and the effect of the lie.

130. As to the question of means or ability to pay, in **Arrowsmith v Nottingham Trent University [2012] ICR 159** the Court of Appeal commented in paragraph 37 that it was not inappropriate for a Tribunal to make an award which was more than the paying party appeared able to pay as long as it had had regard to that party's ability to pay in deciding what level of order to make. The Court commented in that case of the paying party that:

> **"Her circumstances may well improve and no doubt she hopes that they will."**

Decision

131. The first matter we considered was whether the Tribunal had power to award costs. We acknowledged that the decision of Employment Judge Sherratt not to strike out the claim at the hearing on 4 January 2019 could be seen as an indication that the claim had reasonable prospects of success. However, a decision made by an Employment Judge at a hearing of that kind is inevitably based on very limited information. In contrast the facts which are now known to the Tribunal are ones which the claimant has known about since May 2018. Further, the arrival of the detailed Written Reasons for the Judgment of the Horne Tribunal was a clear signal

to him that this litigation was very likely to meet the same fate. He had no more evidence available to him in this case than he did in that case. Finally, the consequences for him of pursuing the case were very clearly set out in the letter from the respondent's solicitors of 4 February 2019, which made clear (in block capitals and bold print) that no payment would be made to him in connection with these proceedings. It also put him on notice that the costs to be incurred at the conclusion of the case could exceed £12,000 plus VAT.

132. In our unanimous judgment the claimant acted unreasonably in pursuing this case any further following receipt of that letter. The only reasonable course of action, given what he knew about his own behaviour on the assessment day, was to have taken up the offer to withdraw without any costs by 4.00pm on 8 February 2019. In principle, therefore, his unreasonable conduct had caused the respondent to incur the whole of its legal costs since that date.

133. We then considered whether to make an award, and if so how much. We took into account the claimant's ability to pay. Although we had some reservations about the veracity of his evidence about income, as it was difficult to see how his monthly expenditure could be maintained without significant debts being accrued, we accepted that he would not be able to satisfy any substantial costs award from income alone. We also accepted that it would be unfortunate if he were required to dispose of his car to meet any award since that would inhibit him from obtaining employment when he is well enough to do so.

134. However, we noted that the claimant's house is already on the market for a substantial sum. It is free of mortgage. It seems that in the reasonably near future (depending on whether he is willing to reduce the price) he is going to be in possession of a significant sum of money. Although we acknowledged that the proceeds of the sale are earmarked for the purchase of an alternative property, we still considered it in accordance with the overriding objective to make the claimant liable for the whole of the legal costs incurred by the respondent since 8 February 2019.

135. We were unable to assess those costs for ourselves because the respondent had not provided a detailed breakdown. Nor would it be fair to the claimant to do so when he wanted to challenge the amount. We considered it appropriate to take advantage of the power in rule 78(1)(b) to have the detailed assessment of those costs conducted by an Employment Judge trained in such matters.

136. Accordingly, once this Judgment has been promulgated the file will be referred to the Regional Employment Judge to appoint an Employment Judge to carry out that costs assessment.

Case Management Orders

137. The Tribunal made two Case Management Orders in relation to costs which were as follows:

(1) By 4.00pm on **Friday 27 September 2019** the respondent must have provided to the Tribunal and to the claimant a detailed breakdown of the costs it seeks in these proceedings.

(2) By 4.00pm on **Friday 25 October 2019** the claimant must have provided to the respondent and to the Tribunal any representations he wishes to make as to the reasonableness of the sums which are claimed.

138. The Employment Judge conducting the assessment of costs will decide whether a further hearing is needed, taking into account any representations which the parties wish to make.

Employment Judge Franey

11 October 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

14 October 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.