



# EMPLOYMENT TRIBUNALS

**Claimant**

B Royce

v

**Respondent**

Legality (UK Operations)  
Limited

**Heard at:** Reading by CVP

**On:** 28 and 29 November 2024

**Before:** Employment Judge Anderson  
C Grant  
S Dengate

**Appearances**

**For the claimant:** In person

**For the respondent:** S Butler (counsel)

## JUDGMENT

1. The claimant's claim of direct age discrimination is dismissed.

## REASONS

**Background**

1. The claimant was employed by the respondent from 9 October to 20 October 2023. He brings a claim of direct age discrimination against the respondent in that he claims his dismissal on 20 October 2023 was less favourable treatment on the ground of his age. The respondent denies discrimination and states it dismissed the claimant over performance concerns. ACAS early conciliation commenced on 21 October 2023 and ended on 23 October 2023. The claim was field in the employment tribunal on 24 October 2023.

**The Hearing**

2. The parties filed a joint bundle of 233 pages. The claimant filed a witness statement. The respondent filed a witness statement from James Stonehill and a skeleton argument. Both witnesses attended the hearing and gave evidence on oath. Oral judgment was given at the end of the hearing. The

respondent requested written reasons and Mr Butler said the respondent was considering making a written application for costs.

**The Issues**

3. A list of issues was agreed at a hearing before EJ Skehan on 5 September 2024 as follows:

1. Direct age discrimination (Equality Act 2010 section 13)

1.1 The claimant was 51 at the date of dismissal. He compares his treatment with people in the age group 25 to 35.

1.2 It is common ground that the claimant was dismissed.

1.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant says they were treated worse than Emanuel Faruanu or alternatively, the hypothetical comparator.

1.4 If so, was it because of age?

1.5 This is not a case where the respondent relies upon the statutory defence of any treatment being a proportionate means of achieving a legitimate aim.

**Findings of Fact**

4. The claimant was employed by the respondent, a company that uses artificial intelligence to undertake patent searches, as a Senior Software Engineer, from 9 October 2023. The respondent is a small company who, at that time had three employees, including the Chief Technical Director James Stonehill, who was also a director of the company. Employment had been offered to an accepted by a fourth person on 21 September 2023, as a Software Engineer, to commence on 23 October 2023.

5. The claimant's role was as a front end developer for the respondent's business and Mr Stonehill's expertise was as a back end developer. Mr Stonehill interviewed and recruited the claimant. The claimant was 50 at the time he was recruited.

6. On 9 October 2023 the claimant experienced some problems with linking a particular online account to the respondent's systems. He requested

assistance and Mr Stonehill held a telephone meeting with him to go through that.

7. On 10 October 2023 the claimant missed a team meeting scheduled for 10am. The claimant's evidence was that this was his second day of work and configuration of his new laptop involved more work than he could achieve before the meeting commenced, meaning that he did not receive an alert. It was uncontested that his laptop was not configured to receive alerts by 10am on 10 October 2023.
8. Mr Stonehill and the claimant had a further meeting that afternoon to discuss how the respondent's systems worked.
9. On 13 October 2023 the claimant and Mr Stonehill had a 1:1 meeting. Mr Stonehill made a note of that meeting as follows:
  - Notes:*
    - *Going forward, please keep an eye on your calendar and accept calendar invites to confirm you've seen the invite and are planning to attend. I regularly have to move meetings around so it's best not to assume that recurring meetings will always be at the same time.*
    - *As a development point I'd recommend brushing up on git processes like how to revert branches via git and things like that.*
    - *To discuss: mentoring of new FE developer*
    - *Good job pushing the team forward on Slack and suggesting improvements like the service workers and other code based improvements. Please keep this kind of thing up. I'm not a good FE developer so I won't be able to see what we should be doing to keep the code base clean and performant.*
10. The claimant said that he had not seen these notes before they were included in the bundle and the tribunal accepts that evidence. It is also satisfied that the note was made contemporaneously by Mr Stonehill as he refers to it and provides a copy to Stephanie Curcio in an online conversation on 16 October 2023.
11. The claimant agreed that bullet points 1, 3 and 4 were discussed at the meeting. He did not recall any mention of GIT. The tribunal finds that Mr Stonehill did raise with the claimant that he needed to brush up his GIT skills in that meeting. It notes that there was a discussion between Mr Stonehill and the claimant about GIT on 10 October 2023 in which the claimant asks for advice, and evidence that the note was made contemporaneously by Mr Stonehill as he showed it to Stephanie Curcio on 16 October.
12. On the same day, 13 October 2023, Mr Stonehill raised in an online conversation with his business partner and CEO of the respondent, Stephanie Curcio, that he had concerns about the claimant's ability to do his job, as follows:

*JS: I think I made a mistake with Bruce...*

SC: *Lol why??*

JS: *he's just struggling with things I'd expect a senior dev to be able to handle. On the other hand, he's good from a product perspective and has good soft skills... I'll see how the next few weeks go.*

SC: *I think that's a fair point of conversation to discuss in terms of his compensation*

JS: *I think it's tricky to legally reduce someone's salary after they've started. I'd rather just fire him if he's not meeting senior level expectations.*

SC: *Fair enough  
that would be disappointing*

JS: *Yeah we'll see. It's a tough one because he does have some real strengths. But either way it's pretty easy to terminate his employment while he's in his probation period so if it doesn't work it's not the end of the world.*

13. A further team meeting took place on 16 October 2023 which the claimant failed to attend. Mr Stonehill contacted the claimant during the meeting, but he did not respond. The next day he said had just discovered *'that the machine turned off my notifications because I was mirroring the screen.'* He apologised.
14. On 18 October 2023 at 22:59 Mr Stonehill sent a message to the claimant stating that a client had reported an issue with using the respondent's systems. He fixed it and said they could discuss how it arose the next day. It is Mr Stonehill's evidence that this error was caused by the claimant and undermined the respondent's reputation. Furthermore, that it should have been obvious to the claimant that it was his error. The claimant did not address this incident in his witness statement but said in cross examination that the error was not related to his work and was something that Mr Stonehill should have tested. He put it to Mr Stonehill in cross examination there was no proof of reputational damage. Mr Stonehill said proof would have involved disclosing business sensitive documents.
15. The tribunal finds that this incident, which led to a customer of the respondent complaining that the respondent's systems were not working properly, caused Mr Stonehill to be concerned about the respondent's reputation. The tribunal finds that Mr Stonehill believed that the reason the system was not working was because of a change that the claimant had made. He explained in cross examination that he had run a programme to locate the fault, and this led him to undo a change the claimant had made, which fixed the fault. From this he concluded that the fault was caused by the claimant's work. The tribunal makes no finding on whether the claimant was actually to blame.

16. On 19 October 2023 the claimant asked if he could be excused from a meeting with Mr Stonehill on 20 October as he had a GP appointment. Mr Stonehill agreed.
17. On 20 October at 11:41 Mr Stonehill messaged Ms Curcio asking her if she had time to chat. At 12:13 the claimant messaged Mr Stonehill to tell him he was being sent to hospital for an emergency x-ray. Mr Stonehill responded *'Oh shit! I hope you're OK.'* Mr Stonehill then forwarded the exchange to Ms Curcio at 12:15 with the message *'Fuck I was going to fire Bruce today and he just sent me this...'*
18. When the claimant returned to work later that day Mr Stonehill had a video call with him and told him that he was dismissed. The call took place around 16:30 and lasted for 12 minutes. What was said in the call is a matter of dispute between the parties.
19. Mr Stonehill's written evidence is that he decided to dismiss the claimant on the basis of his performance and explained to the claimant in the meeting his reasoning which included that he did not think the claimant had the required level of expertise in using the programme Next.js. He denies that he discriminated against the claimant on the basis of his age. He states that he was unaware that the claimant was claiming age discrimination until he received ACAS forms in the post several months after the claimant was dismissed.
20. The claimant's evidence, as set out at paragraphs 24 and 25 of his witness statement, is that during the call Mr Stonehill said

*'24. ...while he had "no obligation to explain" he had made the decision based on his assumption that "people over 50 are generally more vulnerable to flu and disease" which he claimed was apparent in my case he specifically referenced my age bracket in relation to perceived health vulnerabilities.*

*25. Mr Stonehill then explicitly stated his preference to hire a young "out-of-uni" developer even if the younger replacement would only be at a mid-level of experience.'*
21. In cross examination it was put to the claimant that Mr Stonehill had not said those things and the claimant said that he did. The claimant put to Mr Stonehill in cross examination that he had told the claimant he did not need to give a reason for dismissing him. Mr Stonehill denied that he had said that. It was not put to Mr Stonehill that he had made comments about the claimant's age and propensity to be ill, or that he wanted to hire someone cheaper.
22. Shortly after the meeting Mr Stonehill confirmed the dismissal in writing by email giving the following reason:

*As just discussed on our call, I've made the difficult decision to end your probation period early as I do not feel you have demonstrated the skills*

*necessary to succeed in the role long term. I understand this will be disappointing news and I'm sorry for that.*

23. The claimant responded in an email on 21 October 2023. He referred to having been unfairly dismissed and contacting ACAS in order to start a claim in the employment tribunal. In a section entitled 'Feedback' he set out at length his criticisms of the respondent's onboarding/new starter process. In a section entitled 'conclusion' he states:

*Initially, you were reluctant to provide concrete rationale for my dismissal. However, I take the view that upon my insisting request for an explanation, you invented the brand-new underperformance allegation, which even if was a factor it unfairly overlooks the lack of proper onboarding, training, and support provided.*

24. The claimant was asked why he had not referred to the alleged comments about age in this lengthy email or given an indication that his claim was about discrimination. He said that this was implicit in his use of the phrase 'breach of my statutory rights' and that he had hoped his email would force Mr Stonehill into admitting in writing what he had said.
25. On 22 October 2023 Mr Stonehill emailed the claimant to say that he would follow up later in the week reiterating the reasons for dismissal and recapping what had been said in the meeting. The claimant responded the same day telling him it was now too late to do so.
26. Where there were only two witnesses to the conversation on 20 October 2023 and the witnesses have different accounts of the conversation, the tribunal has considered the contemporaneous documentation as well as the written and oral evidence of the witnesses in making its findings of fact.
27. The tribunal has taken into account that immediately after the meeting Mr Stonehill wrote to the claimant confirming his dismissal on performance grounds and that in the claimant's email response of 21 October 2023 he addresses deficits in the respondent's onboarding process at length (i.e. setting out that any issues he had were due to the respondent's lack of assistance to him as a new starter) and also refers to Mr Stonehill giving underperformance as a reason. It has taken into account that Mr Stonehill clearly did have concerns about the claimant's performance as evidenced by the notes of the 1:1 meeting on 13 October 2023 and his conversations with Ms Curcio. It notes that Mr Stonehill actively recruited the claimant and would have been aware from the claimant's claimed 25 years of experience in software engineering of his approximate age at the time of recruitment. On the claimant's brief absence on 20 October 2023, the tribunal notes that the claimant was readily granted leave to attend a GP appointment and Mr Stonehill showed concern when the claimant was sent to hospital for an x-ray. The tribunal notes that Mr Stonehill told Ms Curcio that he was intending to dismiss the claimant before he knew that the claimant needed to have an x-ray.

28. The tribunal notes that the claimant makes no mention of comments about his age in his subsequent communications with Mr Stonehill. Those alleged comments are shocking, and the tribunal finds that if they had been made they would have been the focus of the email of 21 October 2023 as well as being front and centre in the grounds of claim. They were not referred to at all in the email of 21 October and only obliquely in the grounds of claim. The tribunal does not accept the claimant's explanation that he was hoping to provoke Mr Stonehill into making an admission in writing. That makes no sense.
29. For all of these reasons the tribunal finds that Mr Stonehill did not make any comments about the claimant's age in the meeting of 20 October 2023 or say that he preferred to employ someone younger and cheaper, and told him that the reason he was being dismissed was because he did not have the skills required to do the job. It finds that Mr Stonehill may have been reluctant to set out the reasons in detail but when an explanation was demanded by the claimant, he gave the reason as underperformance.
30. ACAS conciliation began on 21 October 2023 and ended on 23 October 2023. This claim was filed in the tribunal on 24 October 2023.

### **Submissions**

31. Mr Butler, for the respondent, relied on his skeleton argument. In oral submissions he said that it was clear from the oral evidence that Mr Stonehill had been doing his level best to explain the dismissal and his reasons for the dismissal. What it was alleged he had said in the meeting was not put to him, but he had explained with reference to documents in the bundle why his concerns about performance were well founded. Mr Butler noted that that was not strictly speaking the issue for the tribunal which was whether age played a part in the decision to dismiss. In contrast the claimant was not directly answering questions and there were a number of occasions on which he failed to give straight answers and a number of times where questioning got near the crux of the claim, and he was at pains to avoid answering. Much of what he said was implausible. The claimant's case is that he was discriminated against because of his age in the things that were said to him at the dismissal meeting. That is flatly inconsistent with his own record made the day after, about why the dismissal was unfair. Had these comments been made it is far beyond the balance of probability that they would have been referred to in the email. They are not referred to because they were not made. The claimant was not a credible witness.
32. The claimant said that he had been a software engineer for over 26 years and worked 30 years in the industry in general. He said that his record of employment before this job and after show that he had been doing well and he had had the opportunity and luck to work for well established businesses as well as startups. He had been excited to join the respondent. He had been working in legal technology for six to seven years prior to this, and with patent lawyers in America, and he understood the requirements of the business. He thought he could bring all of these years of experience to the business. He had understood during the interview with Mr Stonehill that Mr Stonehill was

not in a position to understand many things about front end development. He had not understood that within two and a half days of his starting work after a recruitment process of a month, Mr Stonehill had already decided to get rid of him before giving him an opportunity. If there had been any real issues Mr Stonehill should have given him an opportunity to fix them and told him what they were. He decided he disliked the claimant from early on. It was not about his work. There was not enough time for him to do anything in two and a half days. The respondent claimed that he did not attend two meetings, that he made a critical mistake and that he did not know Next.js. The claimant said he had proven that apart from the two meetings he missed due to setup problems there was no documentary evidence to show that he made any mistakes. Before the dismissal meeting, he had prepared a whole set of documentation from his own resources to come up with a solid plan to improve the respondent's product's function and to make it look expensive. When Mr Stonehill said he was going to dismiss the claimant, he initially thought he was joking but then saw that the Mr Stonehill had a straight face. When he asked why, Mr Stonehill said that he did not need to give him a reason. He demanded a reason and Mr Stonehill said that people over fifty were more vulnerable to flu and disease so best to terminate his contract early, and he was going to take on a 'fresh out of university' developer. The claimant said the performance issues had not been mentioned in those words. As he had been sick and gone to the doctors the respondent saw this as a good opportunity to get rid of him. The claimant said that there was no reputational damage arising from the incident on the 18 October. The respondent had failed to provide any documentary evidence, though it could easily have done so.

### Decision and Reasons

33. The claimant brings a claim of direct discrimination under s13 Equality Act 2010 which defines such discrimination 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.'*

34. For all the Equality Act 2010 claims the burden of proof provisions as set out in section 136 apply. Section 136 reads:

*(1) This section applies to any proceedings relating to a contravention of this Act.*

*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

*(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*



35. The tribunal must make findings of fact and apply the legal tests to those facts. The tests for direct discrimination were discussed in *Igen v Wong [2005] ICR 931*. The test is: is the tribunal satisfied, on the balance of probabilities that this respondent treated this claimant less favourably than they treated or would have treated a younger employee.
36. If the tribunal is satisfied that the primary facts show less favourable treatment because of age, the tribunal proceeds to the second stage. At this stage, the tribunal looks to the employer for a credible, non-discriminatory explanation or reason for such less favourable treatment as has been proved. In the absence of such an explanation, proved to the tribunal's satisfaction on the balance of probabilities, the tribunal will conclude that the less favourable or unfavourable treatment occurred because of age discrimination.
37. The tribunal has made a finding above that the comments alleged to be made by Mr Stonehill in the meeting of 20 October 2023 about age and employing a younger, cheaper replacement, were not made. It has, however, gone on to consider whether there are any other primary facts from which it could conclude that the claimant suffered less favourable treatment (i.e. dismissal) because of age.
38. It was the claimant's written evidence that Mr Stonehill's reaction to his request for a few hours off to visit his GP, was 'Oh shit!', which gave him cause for concern that Mr Stonehill was unhappy, and he felt he should offer to make up the time. It is clear from the documentary evidence that the claimant was readily granted leave to see his GP, then told Mr Stonehill that he had to go for an x-ray and Mr Stonehill's response was 'Oh shit! I hope you're ok.' There is nothing in these facts, which were not properly represented in the claimant's witness statement, from which it could be concluded that the request for leave due to illness led to the dismissal, whether because of the claimant's age, or any other reason.
39. It is the claimant's case that there is no evidence that he was underperforming or that this was addressed with him and therefore this cannot have been the reason for his dismissal, and age must have been the reason. Even if the reason was not performance, this would not point to the reason being age without facts to support that conclusion. However, the tribunal has found that there is clear evidence that Mr Stonehill believed that the claimant was underperforming, in the minutes of the meeting of 13 October 2023 and the conversations he had with Stephanie Curcio.
40. The tribunal agrees with the claimant that the respondent's performance concerns were not clearly communicated to him before 20 October 2023 as being a major concern. It accepts his evidence that the respondent's onboarding or new starter process was patchy, that no clear performance improvement targets were set and he was not given a chance to improve in any areas in which the respondent felt he was deficient. The tribunal accepts that the claimant was genuinely shocked to be dismissed on 20 October 2023 over performance issues without alternative courses such as a warning or an improvement plan having been put in place. However, these are matters

which would be relevant to the fairness of a dismissal and this is not an unfair dismissal claim.

41. On comparators, the claimant said at the hearing that he no longer relied on Emanuel Faruanu (the software engineer engaged by the respondent before the claimant started work, but who did not start work until after the claimant's dismissal) as a comparator. He said that he relied on a hypothetical comparator. This was determined to be a Senior Software Engineer, newly appointed and who had taken time off for a medical appointment, but who was in the age bracket 25 to 35. Mr Stonehill's oral evidence, when asked by the claimant if he would dismiss a thirty year old for taking leave or make assumptions about their health was that he would not. However, there was no evidence that Mr Stonehill had dismissed the claimant because he had taken leave or made assumptions about the claimant's health.
42. As the claimant has not shown on the primary facts that he has suffered less favourable treatment because of his age, the burden of proof does not shift to the respondent to show a non-discriminatory reason for the dismissal, and the claimant's claim fails at this point.
43. The claimant's claim of direct age discrimination is dismissed.

---

Employment Judge W Anderson

Date: 29 November 2024

Sent to the parties on: 03/01/2025

For the Tribunal Office