EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr. D Schroder Tesco Stores Limited

Heard at: Watford (via hybrid) **On**: 28, 29 & 30 June 2021

Before: Employment Judge Loy Members: Mr D Sagar
Miss S Hamill (by CVP)

Appearances
For the Claimant: In person (via CVP)
For the Respondent: Ms Goodman, counsel (by CVP)

UNANIMOUS LIABILITY JUDGMENT

The judgment of the Tribunal is that the claimant's claim of age discrimination is not well-founded and is therefore dismissed.

Introduction

1 These written reasons were requested by both parties.

2 The claimant has been continuously employed by the respondent since 22 May 2015 and he remains so employed. He is a Twilight Customer Assistant at the respondent's Waltham Abbey store. He has over 30 years of service with the respondent when aggregating all his separate periods of service with the retailer. He claims that the respondent's refusal to offer him employment as an internal transfer/promotion to a Dotcom driving position was direct age discrimination. Dotcom driver is essentially the supermarket's delivery to customer service hubs in stores. The date on which the claimant was told he would not be offered the position was 6 December 2019 when he was informed that he had failed his driving assessment. The respondent employs people of all ages. At the time relevant to the issues, the claimant was 61. He says that his age, which placed him in an older age range of workers at the respondent, was the reason why the Dotcom driving role was not offered to him.

3 The claimant notified Acas under the early conciliation procedure on 22 January 2020 and the certificate was issued on 22 February 2020. The Claim Form was

presented on 5 March 2020. The Response Form was received on 9 April 2020. The claim is essentially about why the respondent did not offer the Dotcom driving job to the claimant and how it handled a subsequent grievance. The claimant says that there has been age-related collusion between the Dotcom Manager at the Waltham Abbey store (Miss Eaton) and the driving assessor based at a site in Enfield (Mr. March). The claimant is adamant that he passed the driving assessment and that the only explanation for his failure is that it was engineered by the manager and assessor. The respondent says that there was no collusion. The claimant passed the interview but failed the driving assessment. Passing that assessment was a precondition to being offered the driving role. This was the only reason the claimant was not offered the job and it is age neutral. The respondent says there has therefore been no discrimination.

Claims and issues

The claims

4 The claimant has brought claims for age discrimination contrary to s13/39 of the Equality Act ("the EqA"). As set out at paragraph 3 above, the claimant alleges that respondent colluded for age-related reasons in the arrangements it made for deciding to whom to offer employment and/or the way it afforded him access to opportunities for transfer/promotion; in the decision not to offer him employment; and by failing to action a grievance brought by the claimant arising out of these circumstances.

The issues

5 At a case management hearing on 7 December 2020 before Employment Judge Lang, the claimant confirmed that he was relying on matters that took place in or around November 2018 as background to the live allegations of discrimination that the claimant contends took place in and following November 2019. In those circumstances, Ms Goodman confirmed to the Tribunal that no issue of time limitation was to be taken by the respondent. Ms Goodman also said that the respondent was no longer relying on any justification defence. The respondent's entire case is that there was no discrimination in the first place, so there is nothing to justify.

6 The issues that now fall to be determined by the Tribunal is whether the respondent has subjected the claimant to the following treatment:

6.1 The claimant applied for the Dotcom driver's job in November 2019 and submitted a written application to Claire Eaton but this was ignored by her and he was not invited to an interview at that stage.

6.2 Claire Eaton interfered with the driving assessment process to engineer a "fail".

6.3 The claimant raised a grievance on 10 January 2020 against Mr. March (driving assessor) and sent a copy of the grievance to dotcom Enfield on 3 February but the respondent failed to action that grievance.

6.4 The respondent failed to appoint the claimant to the Dotcom driver's position following his interview on 25 November 2019 and his driving assessment on 2 December 2019.

6.5 Was the treatment less favourable treatment, i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.

6.6 If so, was this because of the claimant's age and/or because of the protected characteristic of age more generally.

The procedure followed

7 We heard evidence from the claimant who produced a witness statement and was cross-examined by Ms Goodman. The claimant called no additional witnesses.

8 We heard evidence and the respondent produced witness statements from (in this order): Mr. Neil March (Driver Safety and Compliance Officer based mainly at the Enfield Customer Fulfilment Store); Ms Sharon Wilkins (Checkout Manager at the Waltham Abbey Store); Miss Claire Eaton (Dotcom Manager Waltham Abbey Store until Easter 2020 and latterly Team Manager at the Roneo Corner Store in Romford); and Mrs Nikki Kirby (People Partner for 6 stores across Hertfordshire and Essex). Each witness was cross-examined by Mr Schroder.

9 There was a Tribunal bundle of approximately 230 pages including some additional pages that were inserted during the course of the hearing.

Fact-Findings

The November 2018 driving roles

10 The respondent is a well-known retailer. It has over 3,400 stores in the United Kingdom employing over 300,000 people to whom it refers as colleagues.

11 On 11 November 2018 the claimant applied (page 51) for an internal vacancy as a Dotcom driver which had been advertised at 19.5 hours per week (page 50). The role was subsequently split in two by Miss Eaton, the manager of the Dotcom part of the respondent's business at Waltham Abbey. There was a dispute about why that was done. The claimant said it was designed to exclude him as a candidate for the role. Miss Eaton said it was so that she had more flexible hours available to her. We prefer Miss Eaton's evidence for the reasons we set out below.

12 Miss Eaton's evidence was that around the same time that this vacancy was advertised, another driver (Driver D) asked to drop his Friday shift for personal reasons. Driver D had wanted to drop this shift for some time. Driver D was operating his own independent business (as a landscaper) as well as driving for the respondent. Dropping his Friday shift would allow him time to put more time into that business. Miss Eaton said if these hours were added to the 19.5 hour vacancy it

would become a role working 24 hours per week. She explained that the vacancy was to be offered on a flexible contract which gave the respondent the contractual right to require the driver to top up his or her hours to a maximum of 36.5 hours per week. A 24 hours per week contract would provide Miss Eaton with 12.5 hours of flexibility. However, if she split the role into two roles, one at 13.5 hours per week and the other at 10.5 hours, she would have 49 hours of flexibility available to her across those two positions cumulatively.

13 Miss Eaton's evidence was that the additional flexible capacity of 36.5 hours (49 minus 12.5) was the sole reason she decided to split the roles. The claimant disputed this. He said that Miss Eaton would have known that he would not be able to take either of the split roles because of the sixteen hour working tax credit rules which meant that he could not lawfully take either of the two positions. He said that this rule was common knowledge in the business not least because of the prevalence of part time working within the respondent's stores. At that stage the claimant was not alleging that Miss Eaton's decision to exclude him involved any consideration of age. He complained to Mr. O'Brien the Store Manager but he did not raise a formal grievance. In his witness statement the claimant also said that Miss Eaton's attempt to explain why she split the role did not make sense because she was referring to working time directives.

14 We accepted Miss Eaton's evidence because her explanation made sense from a management perspective. The flexible contract was being introduced for new roles only. An existing driver asking to reduce driving hours was not, as a condition, expected to agree that his whole contract would be converted into a flexible contract. We could see why that was so, not least because a reduction in hours on a flexible basis would mean that the existing driver could be required by the respondent to work 36.5 hours with the counter-productive result that an existing driver looking to reduce hours would end up in a position where he or she could be contractually required to work more than the maximum number of weekly hours they were looking to reduce. We also accepted Miss Eaton's evidence that she explained her rationale to the claimant. We were alive to the possibility that the claimant may have misunderstood Miss Eaton's explanation when he thought she was referring to time directives rather than additional available flexible driving hours.

15 There was also a dispute about how the claimant's application for the original 19.5 hours driving role came to be withdrawn. The claimant says it was withdrawn by Miss Eaton. Miss Eaton said that when she discussed the split with the claimant, he made it very clear that he could not take either role due to the fact that neither role involved 16 or more hours. This she interpreted as an effective withdrawal of interest in either of the two positions. We did not consider it necessary or helpful to decide who in these circumstances "withdrew" the application for the originally advertised 19.5 hour role. It was common ground that the claimant did not wish to be considered for either of the split roles for the reasons that the claimant gave in his evidence and that made it apparent to Miss Eaton that he did not wish to be considered. Whether that was a withdrawal by the claimant or a decision not to consider the claimant further does not appear to us to make any material difference, at least as far as these proceedings are concerned.

16 Driver S, who was considerably younger than the claimant, applied for and was appointed to the 10.5 hour driving role. She was the only applicant. We noted that it

was the claimant's position during the hearing that this job was unsuitable for a young person, although he did not explain why he thought that. Driver S subsequently worked additional hours for a period of between 1 and 2 months while the 13.5 hour role remained unfilled. Driver S was then given the 13.5 hours in addition to her 10.5 hours with the effect that Miss Eaton's available flexible hours became 12.5 hours. We did not however accept the claimant's contention that the splitting and re-joining of the roles was part of a deliberate plan to ensure that he was not appointed to a 24 hour per week role. We accepted that the reason that Driver S got these additional hours was because she was already by then a Dotcom driver who had passed the driving assessment, whereas the claimant remained a Twilight Customer Assistant and still uninterested in a role of less than 16 hours per week.

The November 2019 driving role

17 In November 2019, the claimant applied by letter (page 54) for another Dotcom driving vacancy which the respondent had advertised on the staff whiteboard. The claimant's evidence was that he made the application on 8 November 2019. The letter of application appears to be dated 9 November 2019 but nothing turns on which of the two dates the application was made. For present purposes we have treated the application as having been made on 8 November 2019. There was a dispute whether this application was handed to Miss Eaton or placed in her pigeonhole. However, we did not consider that anything of substance turned on the point. Miss Eaton recalled that she told the claimant that she had received his application which was also disputed by the claimant. However, the parties did agree that at some point Ms. Wilkins did become aware of the claimant's application before the claimant's interview with Ms. Wilkins on 25 November 2019.

18 The claimant filled in an on-line application for the same role. The claimant initially claimed that it was not him but Miss Eaton who had made this on-line application and she had somehow hacked into his personal on-line account in order to do so. That was a very serious allegation which the claimant eventually withdrew when it became clear to him that Miss Eaton had done no such thing.

19 We found the claimant's evidence on this issue confusing and inconsistent. The claimant at different times had argued both that (1) Miss Eaton had hacked into his personal on-line account and effectively forged an application in his name; and (2) that Miss Eaton had deliberately omitted to tell him that he needed to make an on-line application. The claimant said that Miss Eaton failed to tell him this because she knew it would frustrate his application for the role. We accept that an on-line application was an essential part of the application process to enable the respondent's head office to carry out the necessary checks that were a precondition to a job offer in a driving role. We do not find that there was any deliberate omission on Miss Eaton's part. It would have been open to the respondent to correct any administrative oversight at a later stage, such as at interview or at the point of any job offer. It is also inconsistent on the part of the claimant to have accused Miss Eaton of making an on-line application on his behalf when the claimant's main case is that Miss Eaton was conspiring to prevent him for getting the job at all. We do however find the allegation indirectly relevant to the issues in dispute in the sense that it illustrates the degree of hostility that the claimant feels towards Miss Eaton.

20 The claimant also said in his witness statement that on 17 November 2019 his wife got an online alert about the November 2019 driving job six days after the post had closed. He said he found this puzzling. We accept the evidence of Miss Eaton and Ms. Wilkins that the reason why the job was advertised online was to permit Head Office to undertake checks, a function that had been relatively recently centralised. There was no suggestion of this being to the claimant's detriment not least because an online advert would be available for all to see (including the claimant) if he were to log on. To the extent it may be being suggested, we reject any implication that the respondent may have been canvassing more candidates for the role in order to frustrate the claimant's application.

21 The claimant says he was "forced to apply online" due to the length of time that had passed (12 days) since he had expressed an interest in the job and he said that Ms. Wilkins had no knowledge of his application other than through his online application which is at page 55 of the bundle. We find that it is more likely than not that Miss Eaton passed on the claimant's letter of application to Ms. Wilkins. We do not find that there is anything more than the claimant's speculation to support the contention that Miss Eaton was ignoring or declining to pass on his application. Many of the things that the claimant relies on to suggest that there are irregularities in the process – such as the delay of 12 days without hearing back from Miss Eaton and the job vacancy being advertised online six days after the post had closed – are either in our judgment unremarkable (the alleged delay) or explained by the respondent for entirely coherent managerial reasons (the reason why the job was advertised online). We did not find anything to support the allegation that Miss Eaton was acting out of any ulterior motive.

22 There was no dispute that the claimant was interviewed by Ms. Wilkins for the driving role on 25 November 2019 and no dispute that Ms. Wilkins passed the Claimant at that stage of the process. This is reflected on page 69 of the bundle where Ms. Wilkins has ticked the box on her interview record to indicate that an offer should be made to the claimant. There was, however, a condition to this offer and that was that Dotcom drivers have to pass an internal driving assessment. As that document also reflects, the offer is made "on passing Dot.com driving test". That remark is hand written immediatrely adjacent to the ticked "offer" box. Beneath that remark there is another handwritten entry, "Failed test Dot.com driving so reject please."

23 The claimant disputed whether or not he needed to take a driving assessment in the first place due to his previous experience as a Dotcom driver for the respondent. Ms. Wilkins's explanation, which we accept, was that where there is a gap of more than 3 months since last driving for the respondent, further assessment is required. The claimant's gap was several years. This matter was also looked into by Mrs. Kirby as part of the claimant's grievance against Mr. March and she came to the same conclusion. We therefore found that the requirement of a driving assessment applied to the claimant because, amongst other things, the internal logic of the rule made objective sense.

24 The claimant's driving assessment was undertaken by Mr. March on 2 December 2019. The claimant failed that assessment and the record of that failure is

at page 71 of the bundle. The claimant was absolutely adamant in his evidence that he did not fail the assessment. He says that his driving standards both generally and on the day of his assessment were of an unquestionably high standard. Mr. March's evidence is that the assessment was carried out in good faith following his normal procedure and that the claimant performed poorly over the 22 minutes of his assessment. Mr. March made clear that he cannot and does not make any judgment about the claimant's driving standards generally. His only concern was how the claimant drove on 2 December 2019 while he was being assessed.

25 It is the claimant's case that there has been a concerted conspiracy against him orchestrated by Miss Eaton and that Miss Eaton engineered in collusion with Mr. March that he would fail his driving assessment with the result that he would not be offered the Dotcom driving job. We were not convinced that there was any meaningful evidence, direct or indirect, which supported that contention. We were satisfied that Mr. March properly and independently carried out his duties as a driving assessor on 2 December 2019 and that he assessed the claimant in the same way as he would have assessed any other driver. Mr. March's paperwork did not appear robust, but the Tribunal was satisfied after enquiry that he had made unintentional transcription errors which nevertheless left his assessment of the claimant as a "fail" safe and secure.

26 We came to this conclusion because of several clear evidential indicators in the evidence of Mr. March and Miss Eaton. We accepted that there was nothing more than an occasional working relationship between the two witnesses. They do not know each other outside of work. They interacted only infrequently at work because they worked at different sites. At the relevant time, Miss Eaton worked at the Waltham Abbey store and Mr. March worked at the Enfield Customer Fulfilment Centre. Further, Miss Eaton only had reason to contact Mr. March's site when she needed a driving assessment to be arranged and Mr. March only had reason to contact Miss Eaton when delivering feedback on those assessments. This was a distant working relationship and Mr. March had nothing whatsoever to gain (and potentially a considerable amount to lose) from colluding with Miss Eaton.

27 It appeared from page 72A that three of the eight drivers who had assessments on 2 December 2019 had hit a kerb but only two (including the claimant) had failed. This was despite Mr. March's evidence that hitting a kerb was an automatic fail. Page 72A is a table prepared for this hearing of the outcomes of the eight assessments that Mr. March made on 2 December 2019, including the claimant. There were five fails and three passes. Mr. March provided additional documents (pages 72B to 72E) which explained this apparent discrepancy. It was clear after examining these additional documents carefully that Mr. March had made a transcription error and accidentally pasted another driver's feedback (the fifth row of the table) into the row of Driver VS (the sixth row of the table). We therefore found it more likely than not that Mr. March had inaccurately cut and pasted the comments from the driver five into the comments box for Driver VS when preparing the table at page 72A, because the commentary, "HAD NOT DRIVEN A VAN BEFORE AND IOT (sic) SHOWED HIT KURB (sic), AND GENERAL LACK OF CONTROL" is character for character identical in rows five and six. That commentary is not reflected in the original documents prepared by Mr. March on the day of the assessments. The original documents show that Driver VS is not recorded as hitting a kerb and his

feedback summary actually reads, "Good clean drive good use of mirrors throughout also good at manoeuvres in and out of the yard." We were therefore satisfied that, on further and detailed enquiry, that the apparent discrepancy in the evidence had been adequately explained.

28 We consider it considerably more likely than not that the claimant did not perform at his customary standard during the 22 minutes of his assessment on 2 December 2019 rather than, as the claimant contends, that Mr. March acted in bad faith at the behest of Miss Eaton and failed him to ensure that he was not offered the job as a Dotcom driver.

29 On 6 December 2019 the claimant was informed by Miss Eaton that he had failed his driving assessment. The claimant responded that that was "impossible". We acknowledge that the claimant is unlikely ever to accept that the outcome of his driving assessment on 2 December 2019 is justified. However, we find that Mr. March's decision to fail the claimant was one made in good faith and on objective grounds. We also find that it is the claimant's utter disbelief that he could conceivably have failed the assessment which is the pivotal reason why he sees a conspiracy against him. As we have already said, we find no evidence of such a conspiracy,

30 On 11 December 2019, the claimant raised a 17 point grievance against Miss Eaton. None of those 17 points raised allegations of age-related treatment. The grievance was heard by Ms. Wilkins on 22 December 2019 and 10 January 2020. By a letter dated 20 January 2020, the claimant was informed that his grievance had not been upheld.

31 On 29 January 2020, the claimant appealed the outcome of his grievance. His grievance appeal meeting was held on 13 November 2020. By a letter dated 14 December 2020, the claimant was informed that his grievance appeal had been unsuccessful.

32 On 10 January 2020, the claimant made a written complaint against Mr. March which was formalised into a grievance dated 3 February 2020. Some parts of that grievance, primarily the parts related to driving, were dealt with as part of the on-going grievance against Miss Eaton. In so far as those parts are concerned the Tribunal does not accept they were not actioned. One matter that was investigated was whether or not the claimant should have been asked to have a driving assessment at all given he had already passed a driving assessment with the respondent four years previously. As found at paragraph 23 above, it is the respondent's policy to require a fresh assessment in circumstances where there has been a gap of more than three months in a person's driving history with the respondent. The claimant was therefore legitimately asked to sit a further assessment as part of the November 2019 recruitment process.

33 As Mrs. Kirby said in her evidence (her witness statement paragraph 5), certain other parts of this grievance were assertions by the claimant that "he did not hit kerbs", "I always indicate", "I am a better driver than Neil March himself". Understandably, Mrs. Kirby did not see how she could investigate those matters.

34 Mrs. Kirby candidly accepted that the remainder of the grievance against Mr. March had not been handled as well as it should have been. The respondent's

explanation, which we accepted, was that the remit to investigate the remainder of the claimant's grievance against Mr. March had been misunderstood by Wendy Caruana (a Team manager with the respondent) who wrongly thought that she was only being asked to interview Mr. March, which she did on 14 December 2020. This was a plausible explanation. The grievance had been going on since 3 February 2020 and the matter had become fragmented.

The relevant law: direct age discrimination

35 The claimant brings claim of direct discrimination because of age discrimination. Thus, the claim was made under sections 13 and 39 of the Equality Act 2010 ("EqA 2010").

36 Section 13 provides:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

37 As noted at paragraph 5 above, Ms Goodman clarified at the outset of this hearing that the respondent no longer relies on section 13(2). The respondent's case is that no discrimination occurred and so none falls to be justified as a proportionate means of achieving a legitimate aim.

38 In the course of determining a claim of direct discrimination within the meaning of section 13, section 136 of that Act applies. The latter provides:

> "(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."

39 When applying that section it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's explanation for the treatment. That is clear from the line of cases discussed in paragraph L[807] of *Harvey*, as follows:

> "Whether considering, then, the legacy legislation or the Equality Act burden of proof provision, the two-stage process remains the starting point. In the first place, the complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. According, to the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246, [2007] ICR 867, CA, 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it (also restated in *St Christopher's Fellowship v Walter-Ennis* [2010] EWCA Civ 921, [2010]

EqLR 82). That means that the claimant has to 'set up a prima facie case'. In *Madarassy* it was held that a difference of status and a difference of treatment was not sufficient to reverse the burden of proof automatically; Underhill P in *Hussain v Vision Security Ltd and Mitie Security Group Ltd* UKEAT/0439/10, [2011] All ER (D) 238 (Apr), [2011] EqLR 699 warned that this must not be given the status of being a rule of law. Whether the burden has shifted will be a matter of factual assessment and situation specific. The second stage, which only applies when the first is satisfied, requires the respondent to prove that he did not commit the unlawful act. A note of caution, however, is necessary against taking from *Igen* [i.e. *Igen Ltd v Wong* [2005] ICR 931] a mechanistic approach to the proof of discrimination by reference to RRA 1976 s 54A. In *Laing v Manchester City Council* [2006] IRLR 748, [2006] ICR 1519 Elias P observed as follows:

> ''71. We would add this. There still seems to be much confusion created by the decision in *Igen v Wong*. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.
>
> 72. The courts have long recognised, at least since the decision of Lord Justice Neill in the *King* case to which we have referred, that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate explanation. *Igen v Wong* confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination, whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has been achieved as a result of the burden of proof directive, as Peter Gibson LJ recognised in *Igen*.
>
> 73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865 (at para 17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.''
>
> In *Commissioner of Police of the Metropolis v Maxwell* UKEAT/0232/12, [2013] EqLR 680 it was emphasised that particularly in cases where there are a large number of complaints the tribunal is not obliged to go through the two stage approach in relation to each and every one."

40 Nevertheless, in some cases, the best way to approach the question whether or not there has been direct discrimination within the meaning of section 13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred. That is the effect of the decision of the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.

Conclusions

Issue 1: The claimant applied for the dotcom driver's job in November 2019 and submitted a written application to Claire Eaton but this was ignored by her and he was not invited to an interview at that stage.

41 Having found that the respondent neither ignored the claimant's job application nor delayed offering him an interview, we must conclude that the claimant was not discriminated against on either ground. The Tribunal reminded itself that by 25 November 2019 the claimant had been told that he had passed the interview stage of the job application process, a period of just over two weeks after he had submitted his application.

42 As we have noted at paragraph 17 above, the claimant applied for the Dotcom driving job on 8 November 2019. That letter of application was either put in Miss Eaton's pigeonhole or handed directly to her by the claimant. Either way, it was in Miss Eaton's possession or control by 8 November 2019. It was agreed between the parties that the claimant was interviewed for the job by Ms Wilkins on 25 November 2019.

43 Given the size of the respondent organisation, the intervening period of 17 calendar days does not seem to us to be in any way out of the ordinary. In these circumstances, it remained unclear to us in exactly what way it is alleged that Miss Eaton "ignored" the claimant's application or that he was not invited to an interview "at that stage". We have found that Miss Eaton made Ms Wilkins aware of the claimant's application without any undue delay, either by telling her about it verbally or by passing his letter of application to her. That letter is only a few lines long, so this was not an application that needed to be made in a formal or detailed way. Miss Eaton brought the claimant's interest in the job to Ms Wilkins's attention precisely so that she (Ms Wilkins) could progress his application by setting up an interview for him, which is exactly what she did. By so doing, Miss Eaton was facilitating rather than ignoring the claimant's job application.

44 The claimant contended that Miss Eaton had not contacted Ms Wilkins on his behalf at all, and that it was only because a fortuitous on-line application made by the claimant made its way to Ms Wilkins that he came to be interviewed. We reject that contention. In their evidence both Miss Eaton and Ms Wilkins recall Miss Eaton's involvement in informing Ms Wilkins about the claimant's application and both gave clear evidence about the circumstances surrounding that interview. This included their recollection that since Ms Wilkins (who was on a return to work programme after a period of sick leave) was also carrying out interviews at that time for temporary staff for the Christmas 2019 busy period, it made sense that she should also interview the claimant for the Dotcom driving vacancy. The Tribunal drew no negative inference from the fact that neither Miss Eaton nor Ms Wilkins could remember whether Miss Eaton passed the claimant's letter of application to Ms Wilkins or whether she just told her about it verbally. If anything, the evidence of these witnesses appeared all the more truthful and reliable because neither witness sought to embroider their recollection by claiming a greater degree of certainty of recollection than they

actually have. The important points are that we find the allegation that Miss Eaton ignored the claimant's application to be factually incorrect and we find that the claimant was interviewed at the respondent's earliest convenience. It follows that the claimant has not proved either of the facts from which we might otherwise have concluded, in the absence of explanation, that the Claimant has been discriminated against.

45 We also find that what happened between 8 and 25 November 2019 to be inconsistent with the claimant's central submission that Miss Eaton was orchestrating a conspiracy designed to prevent him from getting the Dotcom driving job. Miss Eaton, as Dotcom manager, was perfectly entitled to conduct the interview herself. Had she had any ulterior motives, it would have made far more sense for her to have kept control of the decision-making rather than handing it over to Ms Wilkins, someone that the applicant does not contend was involved in the alleged conspiracy and who went on to pass the applicant at the interview stage. Also in that regard, it was Ms Wilkins's evidence, which we accepted, that she was responsible for the reappearance on 30 November 2019 of the Dotcom driver's job advert at a time when the claimant had passed his interview but was awaiting his driving assessment. Ms Wilkins's evidence was that this was an error on her part which she corrected shortly afterwards.

46 Since we reject the claimant's contention that Miss Eaton was orchestrating an age-related conspiracy against him, we would not in any event have found that the claimant had been less favourably treated than a hypothetical comparator from a younger age group. If there was, contrary to our primary conclusion, any failure by Miss Eaton to address the claimant's application or to organise an interview timeously, we would not have concluded that age-related concerns had played any part in any such shortcomings.

Issue 2: Claire Eaton interfered with the driving assessment process to engineer a "fail".

47 Having found as a fact that Miss Eaton did not interfere with the driving assessment, we must conclude that the claimant was not discriminated against as alleged.

48 We have found as a fact that Mr. March carried out his driving assessment duties both properly and independently. This was a finding that we came to only after careful consideration, not least because a potentially significant inconsistency in Mr. March's evidence was identified by the claimant in cross-examination. We refer to our findings at paragraphs 25 to 28 above in this regard.

49 Despite the claimant's protestations to the contrary, we have found that Mr. March's decision to fail the claimant on his driving assessment on 2 December 2019 was a decision made in good faith, entirely free from any influence (or attempt at influence) from Miss Eaton and based only on the observations made by Mr. March on the day.

50 We also note when coming to this conclusion that there is nothing particularly exceptional about a candidate failing the respondent's driving assessment. The

table at page 72A shows that out of the eight candidates on 2 December 2019, more failed than passed. It also appeared unlikely to us that Miss Eaton, if minded to be conspiratorial, would seek to influence not the interview stage of the recruitment process conducted by a relatively close working colleague, but an objective skills-based part of the process carried out by a driving assessor she barely knew.

51 It follows from our findings that the claimant has not been treated less favourably than a person from a younger age group would have been treated in materially the same circumstances. A person from a younger age group who performed in the driving assessment in the same way as the claimant performed on 2 December 2019 would also have been failed by Mr. March.

52 The claimant towards the end of the hearing introduced a new allegation for the first time to the effect that Mr. March was more likely to fail older workers than younger workers out of greater fear of physical intimidation from younger drivers were they to be failed. Quite apart from the lateness of this allegation and the fact that no evidence was called to substantiate it, Mr. March nevertheless dealt effectively with it. He explained that he does not give pass/fail feedback personally after assessments regardless of the age of those being assessed. It is his standard practice to tell the referring manager the outcome of the assessment and for that manager then to feedback to the person who has been referred. In that way, negative reaction is avoided at the point the assessment is completed. Indeed, it was Miss Eaton in this case and not Mr. March who told the claimant on 6 December 2019 that he had failed.

Issue 3: The claimant raised grievance on 10 January 2020 against Mr. March (driving assessor) and sent a copy of the grievance to dotcom Enfield on 3 February but the respondent failed to action that grievance.

53 We have found at paragraph 32 above that certain aspect of this grievance were dealt with as part of the on-going grievance against Miss Eaton. We have also found that other parts of the grievance were assertions made by the claimant which were not susceptible to being dealt with by way of a grievance (also at paragraphs 32 above) and so we do not criticise the respondent for failing to action those matters.

54 Mrs. Kirby candidly accepted that the remainder of this grievance was not handled as it should have been. We accepted Mrs. Kirby's explanation that the only reason why things went awry was a miscommunication with Wendy Caruana who mistakenly thought she was only required to interview Mr. March which she did on 13 December (bundle pages 195-198). We were satisfied that this explanation was genuine and that the error had been honestly made.

55 We do not in these circumstances consider that a person in a younger age group than the claimant would have had the remainder of their grievance actioned. The same mistake would have been made regardless of any age-related considerations.

Issue 4: The respondent failed to appoint the claimant to the dotcom driver's position following his interview on 25 November 2019 and his driving assessment on 2 December 2019.

56 It is common ground that the respondent did not appoint the claimant to the November 2019 Dotcom driver position. We have found at paragraph 28 above that there is a very straightforward explanation why the claimant was not so appointed. This was because, and only because, he failed a driving assessment on 2 December 2019, passing which was a precondition of the Dotcom driving job being offered to him.

57 We reminded ourselves that it was the claimant's case that he had undoubtedly passed the driving assessment but had been marked as a fail in bad faith. His case therefore stands or falls with his allegation that there was a conspiracy against him involving collusion between Miss Eaton and Mr. March. We have rejected the contention that there was any such conspiracy (see paragraphs 25 to 29 above) and concluded that no consideration other than the failed driving assessment, whether related to age or otherwise, was taken into account when deciding not to offer the claimant the Dotcom driving position.

58 Having considered each of the issues separately and together we do not find that the claimant has proved facts from which the Tribunal could conclude that he had been discriminated against because of his age. We do not find that the claimant's application was ignored and we do find that he was interviewed without any delay. We do not find that Miss Eaton interfered with the driving assessment process and we were satisfied that Mr. March's inconsistency on page 72A was adequately explained. We were satisfied that the failure to action certain parts of the claimant's grievance was genuinely explained on the basis of a miscommunication between Mrs. Kirby and Wendy Caruana and we were satisfied that the only reason the claimant was not offered the November 2019 Dotcom driving job was because he failed a driving assessment which had been conducted in good faith by Mr. March. In these circumstances we found that the claimant's claims for age discrimination were not well-founded and should be dismissed.

Employment Judge Loy

Date: 23 August 2021

Sent to the parties on: 27/8/2021

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For the Tribunal Office

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