

THE INDUSTRIAL TRIBUNALS

CASE REF: 1093/12

CLAIMANT: Charles Daniel Taylor

RESPONDENTS:

1. Reeds Rains Limited
2. Ryan Andrews
3. Kate Knipe

DECISION

The unanimous decision of the tribunal is that the claimant is entitled to an award of £6451.07 in respect of direct age discrimination. His claims relating to indirect age discrimination, victimisation, and harassment are dismissed.

Constitution of Tribunal:

Chairman: Mr S A Crothers

Members: Mr D Hampton
Mr H Fox

Appearances:

The claimant was represented Mrs Taylor.

The respondents were represented by Miss Clarke, Barrister-at-Law, instructed by Mr Welsh Solicitor of Solutions Legal Solicitors.

The Claim

1. The claimant claimed that he had been unlawfully discriminated against on the ground of his age contrary to the provisions of the Employment Equality (Age) Regulations (Northern Ireland) 2006 ("the Regulations"), as reflected in the issues before the tribunal detailed below. The respondents denied the claimant's allegations in their entirety.

Issues before the Tribunal

2. The issues before the tribunal, were as follows:-

Legal Issues

1. Whether the claimant was subjected to direct discrimination contrary to Regulation 3 of the Regulations.
2. Whether the claimant was subjected to indirect discrimination contrary to Regulation 3 of the Regulations.

3. Whether the claimant was victimised, contrary to Regulation 4 of the Regulations.
4. Whether the claimant was subjected to harassment contrary to Regulation 6 of the Regulations.

The claimant confirmed during the hearing that all outstanding bonuses had been paid relevant to the above claim.

Sources of Evidence

3. The tribunal heard evidence from the claimant and from the first respondent's Regional Operations Director, Richard Sealey, together with Ryan Andrews, Area Manager for the first respondent at the material time, and Kate Knipe, Head of Human Resources for first named respondent ("Reeds Rains"). The tribunal was not impressed by the fact that elementary yet fundamental errors were made in the witness statements of Ryan Andrews and Kate Knipe relating to the ages of certain of the claimant's comparators and scoring of certain interviewees. These had to be corrected part way through the hearing. The tribunal was also presented with a bundle of documentation together with other documents from both parties. It took into account only those documents referred to in the course of the hearing.

Findings of Fact

4. Having considered the evidence insofar as same related to the issues before it, the tribunal made the following findings of fact on the balance of probabilities:-
 - (i) When the claimant presented his claim to the tribunal on 14 June 2012, he was 59 years old (date of birth 29 May 1953). His comparators included Chris McLean (29), Fiona Cotter (29), Barry McMachan (30) and Nadine Savage (31) who was offered a part-time role as Branch Manager - Valuer ("BMV") outside the formal interview process a few days prior to the "restructuring" interviews held for BMV posts on 2 May 2012 ("the May interviews"). The restructuring meant that there would no longer be individual valuers or individual office based managers within Reeds Rains offices in Northern Ireland as these two roles were being combined within the BMV designation. The remainder of the claimant's comparators were Eamon Hunt (35) who was interviewed and given the role of BMV several months after the restructuring had taken place and therefore after 14 June 2012. In any event, his role was advertised on line by Reeds Rains. The claimant could have applied for this post but failed to do so. The claimant's last comparator was Johnny Watson (39). The claimant alleged that he (the claimant) was moved from the Bangor Office to the Newtownards Office specifically to make way for Johnny Watson whom Ryan Andrews had "head hunted" and appointed without any formal interview process having been carried out. It was not disputed that Ryan Andrews and Johnny Watson, who had worked together in a professional capacity previously, were Facebook friends. However there was insufficient evidence before the tribunal to prove, on the balance of probabilities, that this friendship was a personal friendship as suggested by the claimant.
 - (ii) The claimant sold his estate agency business in Bangor to Halifax Property Services in 1997. The tribunal was shown undated documentation signed by both the claimant and a Halifax manager in which the following paragraph is found:-

“Having completed the above, please answer the following questions by circling the appropriate reasons:

- (i) Do you consider this employee suitable for the position in which he/she is employed? YES/NO.

If NO please give details. CT must become more dynamic and lead the team from the front. He is liked by the staff but they will respect him more if he shows more urgency and willingness to tackle problems and take responsibility.”

- (iii) It was not disputed that the claimant enjoyed carrying out valuations and meeting people. He held the position of Estate Agency Partner with Halifax prior to being transferred to Reeds Rains on 20 September 2010 under the Transfer of Undertakings Regulations. The tribunal was shown an unsigned ‘Amendment to contract of employment form’ following the claimant’s transfer to Reeds Rains which records his job title as still being Estate Agency Partner. Despite holding certain other designations subsequently, it was not disputed that the claimant’s salary and allowances remained the same prior to 14 June 2012. However he claimed that he had been demoted on a number of occasions by Reeds Rains. He maintained that, upon transfer from Halifax to Reeds Rains as Estate Agency Partner, he not only carried out valuations but had man-management responsibilities when the relevant manager was absent from the office. Reeds Rains disputed that he had any man-management responsibilities in this role. On the evidence before it, the tribunal is satisfied that the claimant did have some limited man-management responsibilities when the Branch manager was absent from the Branch.
- (iv) The issue of job titles and the roles they carried was a source of considerable confusion by and between the parties and for the tribunal throughout the hearing. Kate Knipe clarified during her evidence that in Great Britain there were five designations only, namely Branch Manager – Valuer, Senior Negotiator, Negotiator, Lettings Valuer, and Lettings Negotiator. None of these designations had specific salary scales and salaries were negotiated individually with appointees. The designation of Estate Agency Partner was also unknown in Great Britain, as was the designation of Senior Valuer afforded to Johnny Watson following his appointment to the Bangor Office of Reeds Rains prior to the claimant’s transfer from that branch to the Newtownards Branch effective from 1 September 2011. The amendment to the claimant’s contract on that occasion showed the title of “Valuer” which, on reflection (in May 2012), the claimant considered to be indicative of a demotion. Reeds Rains however maintained that it was simply an administrative error, which on the evidence, the tribunal accepts. Subsequent to the May interviews the claimant received another amendment to his contract designating him as Senior Sales Negotiator. Kate Knipe maintained that this role was of paramount importance and was not tantamount to putting the claimant into a lesser role than what he had previously held. The claimant maintained that this role was a junior role and that he felt degraded and humiliated when past clients, colleagues, friends and builders visited the office and found him at the front desk in what he described as a “meet and greet” position. He also described how his health had been affected, although the tribunal was not presented with any medical evidence.

- (v) The tribunal was also directed to relevant sections of Reeds Rains Equal Opportunities Policy and Grievance Policy. Reeds Rains relied on what was described as a competency based interview which had been agreed with the Trade Unions and Senior Management. The Recruitment and Selection section of the Equal Opportunities Policy includes the following:-

“● Selection criteria and tests

Short listing should be based on competencies, skills and experience, which closely match the requirements of the job. Selection tests should relate specifically to job requirements and measure an individual's ability to the job or train for the career.”

- (vi) It is clear from the evidence that Ryan Andrews liaised with Kate Knipe in appointing Johnny Watson to the hitherto unknown position of Senior Valuer in the Bangor Office. Kate Knipe was also involved in a meeting with Nadine Savage and Ryan Andrews prior to her appointment as a part-time BMV in the Portadown Office. She had held the position previously of an office based manager which did not carry valuation responsibilities. She was moved to the Portadown Office following an application for flexible working hours after her return from maternity leave. The claimant however never indicated an interest in the Portadown position which had been vacant for a considerable time. As a result of the May interviews Barry McMachan, who scored highest with 13 points, became BMV of the Glengormley Office. Fiona Cotter, who scored 11.5 points was appointed to the Newtownards Office, and Chris McLean who scored 12 points was appointed to the Lisburn Road Branch in Belfast when that position became available. The claimant scored 9.5 points out of the maximum of 15 and was ranked fourth out of the five candidates interviewed. The remaining candidate was 55 year old Rosaleen Welsh who, like the claimant, was offered and accepted the position of Senior Negotiator. It was common case that the claimant and Reeds Rains had agreed prior to the May interviews that, in the event of the claimant being unsuccessful, he would be offered the position of Senior Negotiator. According to the chronology produced by the respondents' representatives, Johnny Watson was appointed as BMV in the Bangor Branch between late April and 2 May 2012, again, as with Nadine Savage, just before the May interviews took place.
- (vii) The main aspects of the claimant's complaints are articulated by him in a grievance letter to Mrs Shenna Ollerton, Human Resources Services Manager of Reeds Rains dated 8 May 2012, as follows:-

“Dear Mrs Ollerton

Re: Mr Charles Taylor, Valuer, Newtownards, N. Ireland

I wish to raise a formal grievance regarding my new appointment to Reeds Rains Ltd, Glengormley, Belfast as a senior negotiator in the Lettings department.

I was moved last September from being an Assistant Manager in Bangor to a Valuer in Newtownards. See attached confirmation paperwork to confirm this. I transferred to my lower position within the company, without complaint, although I lost out both financially with loss of bonuses for several months and

in self-esteem. I heard later that I had been replaced in Bangor by a personal friend of my Area Manager, Ryan Andrews.

To be demoted a second time, within 7 months, can only be down to discrimination on my age. I am 59 years of age. I have spoken to Ryan Andrews about my dissatisfaction.

My move cannot be down to poor work performance as I am presently in the top 2 performers in N. Ireland for both Fees and Listings. I have never been spoken to regarding any negative aspect of my work ability.

I was interviewed last Wednesday by Ryan Andrews and Kate Nipe from your office. At the outset of the interview I was told by Kate that I had no right of redress or appeal from any decisions they made. On hindsight, I should have queried this statement. However at no time did I consider a demotion. My younger colleague from Newtownards, who is also a valuer, who I was asked to train, has now been offered promotion to Manager in Belfast. Another young employee has been offered Manager in Newtownards.

Age discrimination at work is "unlawful". I should not be treated any differently to my colleagues because of my age. In the past, I have successfully managed offices in Carrickfergus, 2 branches in Bangor, Ballymena and Bangor. I was not currently looking for promotion but again I most certainly was not contemplating a demotion.

Please investigate my work performance and objectively justify why I have now been demoted for a second time. The Equality Act protects me from indirect discrimination and being disadvantaged because of my age.

I would welcome your feedback on this issue. I am presently taking advice from The Advisory Conciliation & Arbitration Service and considering contacting an employment solicitor.

Yours sincerely".

- (viii) The claimant does not refer in his grievance letter to the allegation he made in his claim form to the tribunal and in his witness statement that during his interview with Kate Nipe and Ryan Andrews, they both "chuckled" after asking the question "where do you see yourself in five years time?", and then said to the claimant that he didn't "have to answer that!". Furthermore, no reference is made to the subsequent allegation that, when Ryan Andrews informed him of the outcome of the interview he made an age related comment by referring to an elderly relative who had been made redundant from a bank and stated that the claimant should appreciate that he was still in work. The claimant furnished an original statement together with a supplemental statement and the tribunal observed the inconsistencies in the statements as highlighted by the respondents' counsel in her cross examination of the claimant. The tribunal also took into account the claimant's explanations. It is satisfied that remarks of the nature suggested in his evidence were made during and after his interview. The tribunal is also satisfied that following his unsuccessful interview when he was appointed a Senior Negotiator, the claimant did contemplate a constructive dismissal claim but, on advice, decided to stay with Reeds Rains and present a claim to the tribunal.

- (ix) The tribunal is also satisfied that the claimant was clearly of the view, following remarks made by Kate Knipe at the beginning of his interview, that he had no right of redress or appeal from any decisions made. Kate Knipe insisted that the claimant misunderstood what she said to him and that she meant that there was no right of appeal against the scoring process being used to select successful candidates as opposed to the outcome of the interview itself. The tribunal is not convinced by Kate Knipe's evidence on this point, as she could easily have clarified what she meant at the time of interview, instead of having to apologise in her witness statement for any confusion caused to the claimant.
- (x) The tribunal also considered the correspondence in reply to the claimant's grievance together with his further correspondence in connection with the grievance appeal hearing, including the grievance appeal outcome letter forwarded by Richard Sealey to him dated 6 June 2012. The tribunal considers it appropriate to set out the contents of this correspondence as follows:-

"Dear Charles

I am writing in response to your formal appeal against the change to your job role following a recent restructure, additionally, you also allege that you have been subject to age discrimination which you lodged with the company by letter dated 8 May 2012. We formally met to hear your appeal on Friday 25 May 2012 at the Reeds Rains Wilmslow Branch. The hearing was chaired by myself and Nicky Martin, Head of HR, Your Move took notes. You chose not to have a representative present but were informed of your rights to be accompanied prior to the meeting.

I have now had the opportunity to investigate fully the circumstances surrounding the change to your job role and your allegation that the outcome was linked to age. Also, I have had the opportunity to investigate if you have been treated unfairly or discriminated against directly or indirectly on the grounds of age.

This is the crux of your appeal and all my investigations are designed to determine if the course of action that the Company took was that of a fair and equitable process. As discussed at the beginning of the hearing we numbered your appeal letter paragraphs 1 to 6 and will answer following that format.

I would like to address these points in turn so that I can fully explain the company's position. In summary your points are:-

1. You have been transferred to a lower position last September and your line manager replaced you with a personal friend thus affecting your self esteem.
2. You believe that this is linked to age discrimination.
3. You have never been on performance management.
4. You were told that you have no right of appeal and been passed over by a younger colleague.

5. You feel that you have been treated differently because of your age when compared with your colleagues.
6. You feel you have suffered indirect age discrimination.

Please see my findings below:-

1. I have spoken to both Ryan Andrews, Regional Director and HR administration in Chorley Head office and can confirm that as suspected during the hearing the changes to your job role in September 2011 was that of an administrative error. I can confirm that your role was that of an Assistant Branch Manager and the change to a Valuation Manager was a mistake. Your job title should have remained as an Assistant Branch Manager and therefore I can only apologise for this oversight. I have spoken to Ryan Andrews to ensure that this does not happen again when raising 'change of employment terms' in the future as I know that these errors can cause unwanted anguish for the employee. However, as there had been no change to your other terms and conditions, and more importantly your pay package, I feel that you have not suffered any detrimental financial loss apart from any exchanges that you have not been paid on. I agreed to check this for you and can confirm that you will be paid the following in Junes pay – Exchanges September £236.62, October £85.05, November £123.75. Total £445.42.

Once you have received these monies I am satisfied that no further action needs to be taken to resolve this matter. Perhaps if you had raised this issue at the time of receipt it would have been resolved swiftly and not caused you any further concern.

During the hearing you alluded to that fact that your self esteem had suffered as a result of the recent change to your job role. You felt that you no longer had the respect of the team that you had previously worked with when you were a manager based in the same branch. You gave an example of asking your colleagues to undertake some adhoc work on your behalf and they asked you to check and confirm with the Branch Manager first. This I find acceptable and is standard practice in most branches. Ultimately the responsibility of the Branch Manager is to ensure that all branch staff are undertaking the role and responsibilities expected of them as they are all accountable for their own results. It is up to the Branch Manager to allocate tasks to the team to ensure that all the daily tasks are complete from the morning meeting. That means that they have to ensure accountability for the job and the branch results and it is only right that any instructions are issued by the Branch Manager. I understand how this may make you feel however, I think that it is not intentional.

I have also spoken with Ryan Andrews regarding the appointment of 'a personal friend' – Johnny Watson. I can confirm that Ryan did know Johnny Watson however, this was only ever in a professional capacity. Ryan had worked previously with Johnny and had actively head hunted him to join the Company as he was rated as a valuable Estate Agent. I am satisfied that you were not moved solely to create a vacancy for

Johnny Watson to be recruited by Ryan and confirmed that the relationship is that of a professional colleague.

2. As above I have established that the change to your job role was an administrative error therefore you have not been demoted twice in 7 months as you allude to, although I can appreciate how this has been deduced. You confirmed during the hearing that your terms and conditions and job tasks remained the same and the only change that affected you was the job title change. I believe that the process undertaken by Ryan Andrews and Kate Knipe was an equitable process and was applied equally to all employees involved in the restructure. All affected employees were given the same opportunity to apply for the job roles and were put through the same standard interview process. Therefore I do not find that you have been discriminated against either directly or indirectly based on the grounds of age. You also provided no specific evidence to suggest that you had during the hearing relating to this appointment.
3. I can confirm that further to my investigation you have never been on capability management and have never been subject to an underperformance review. The restructure was as a result of change needed to the area, for it to be more streamlined in terms of resource and to be in a position to deliver for the future based on the predicted market conditions. This is the reason all candidates were subject to the same interview process which was not based solely on results of key income streams. Again, I am satisfied that this process was applied equitably.
4. It is accepted that during the interview process Kate Knipe did state that there was no right of appeal. Having spoken to Kate she confirms that she was referring to the scoring process for the interview and not the whole process. It was a decision taken by the management team to appoint all the affected employees into the positions as reasonably practical so as not to cause unnecessary unrest in the area. I accept that perhaps Kate Knipe was not clear as to what she was referring to but I can assure you that the Company takes any grievance or appeal raised by any employee, at any time, under any circumstances seriously. As you have raised an appeal and it is being investigated only demonstrates this fact. I trust that you feel that you have been treated fairly during this process and have had an opportunity to raise all your concerns fairly and openly. I can only apologise for the lack of clarity and will ensure that this does not happen again in the future.

All appointments made were based on who performed and scored the highest during the interview process. I disclosed to you during the hearing the scores of the other employees and also gave you a copy of your interview notes. I gave you reasonable time to review and digest the interview notes and I asked you for comments to identify if any significant information you provided during the interview was not detailed. Whilst you made some comments, in my opinion, there was nothing significantly missing to question or raise concerns that the interview process was flawed. I have also compared the scoring to that of your interview and can confirm that the same questions were asked for all candidates at the interview. I accept that you were asked the question

relating to your future and where you saw yourself in 5 years, however this question was asked of each employee. Your response was captured in full despite the fact that you felt that both Ryan and Kate acted inappropriately when asking the question, I am satisfied you had nothing else to add that would have resulted in the any rescoring.

5. During the hearing you were asked if you had ever been subject to any discrimination outside of this process. Your response was a comment made by a trainer 3 years ago referring to you as a grey haired gentleman. As this comment was what seems an isolated event and 3 years ago it is difficult to comment on. However, you were not able to give me any other specific incident that would support your statement. Therefore, I am confident to conclude that I do not believe that you have been discriminated against in any way and am satisfied that you have been fairly treated.
6. Having investigated your complaint fully I can confirm that I have not uncovered or have been provided with any specific evidence to suggest or support your statement that you have been discriminated, either directly or indirectly during this process or throughout your employment in general, on the grounds of age. I am disappointed that you feel that you have; however hopefully, I have been able to answer some of your questions and concerns raised during the hearing.

At the beginning of the hearing we did discuss with you whether your letter constituted a grievance or an appeal and it was decided that we would decide this only once you had provided us with the information to be able for us to make an informed decision. I can confirm that as the majority of the hearing focused on the process and as to [the] reason why you felt that you had been subject to this process in the first place it was appropriate for the appeals process to apply. Namely, the fact that also there were no other incidents relating to or referring to any discrimination apart from the interview process itself. Therefore my decision is to not uphold your appeal and my decision is final. This now concludes the Company internal process. I appreciate that you may find my response disappointing; however I hope that this clarifies my position on the above.

However, on a final point I have discussed with Ryan the concerns raised at the appeal hearing regarding the location of your base branch and the travel time that it is taking for you to get to work. This coupled with you being personally uncomfortable in the branch due to an incident that occurred some time ago. I have discussed this at some length and it has been decided that you will be offered the opportunity to change branches to the Newtownards Branch as a Senior Negotiator with the responsibility for sales and lettings business as all negotiators do in this branch. Please note that there is a Lettings Manager [] in place in this location who will be able to provide you with the support that you need and provide you with the additional training as discussed. You will also have the opportunity to undertake valuations as the business dictates, this will be agreed with Ryan Andrews.

Therefore can I ask that you contact Ryan to make the necessary arrangements once you have had an opportunity to digest my response. Ryan is expecting your call.

I trust that you will find this satisfactory and I wish you all the best in your role. Should you have any concerns please do not hesitate to contact me.

Kind regards.

PP Richard Sealey
Regional Operations Director
For on and Behalf of Reeds Rains”

- (xi) Kate Knipe acknowledged that the claimant had a lot of experience but considered that he lacked the necessary management skills to drive and deliver the expectations of Reeds Rains going forward. She also considered that the claimant did not have or give evidence of an understanding of broader issues relating to the requirements of the company or the requirements of the region. She was of the view that the successful candidates also had a better understanding of financial services and the need to develop income streams and had knowledge of areas such as conveyancing. Kate Knipe was however unable to remember what the five candidates did before the interview, which surprised the tribunal particularly in light of the claimant’s claims before the tribunal in relation to his experience, and his analysis of Chris McLean, Fiona Cotter, Barry McMachan, and Rosaleen Welsh in his witness statements and oral evidence. He also made the specific claim in his evidence before the tribunal that he should have been successful in obtaining a BMV post as he considered that he had fulfilled all of the areas described in the interview notes.
- (xii) Ryan Andrews, whilst acknowledging that Chris McLean was an negotiator “on paper”, confirmed that his (Chris McLean’s) manager had approached him (Ryan Andrews) to have Chris McLean take over 50% of the valuations, which in fact he had taken up at the time of the May interviews. However, when asked in cross examination as to what management experience the interviewers were looking for, Ryan Andrews stated that the panel were looking for “all rounders”, who knew about income streams and could demonstrate an ability to run a branch and to discuss areas without being prompted. When asked how Chris McLean had the ability to run a branch, Ryan Andrews replied by stating that he demonstrated an ability to do this better than the claimant. Significantly, however, he also confirmed that Chris McLean had never managed people before but that this did not mean that he had no ability to do so.
- (xiii) The tribunal fails to understand how a competency based interview for the new combined role, which had sections in the documentation before the panel entitled ‘biographical’ “sales – market share”, “sales – personal achievement”, and ‘people management’ (with several questions under each heading), could avoid coming to the conclusion that Chris McLean, one of the successful candidates, had no man management experience and only limited valuation experience - and reflect this in the scoring. In the same context, the tribunal accepts that the claimant had some man management experience before joining Reeds Rains and, although he had limited man management experience thereafter, he did have extensive and in depth valuation experience. He had also trained Chris McLean in valuation after moving to the Newtownards branch in September 2011, before Chris McLean had had 50% of the valuations allocated to him prior to the May interviews.

- (xiv) The tribunal is satisfied that there is no substance in the claimant's claim that Reeds Rains failed to provide him with essential training. He referred to Lana Montgomery who was in the Newtownards Office. The claimant transferred to this office from Glengormley on 14 June 2012. He did not, on the evidence, put himself forward for any such training and in any event he did not provide any evidence as to Lana Montgomery's age during the hearing.
- (xv) Furthermore, although the tribunal has reservations regarding the manner of Johnny Watson's appointment outside any formal process, to the position initially, of Senior Valuer, the fact that Miss Sarah Taylor as office based manager in the Bangor Office decided not to compete for the role, indicates that Johnny Watson was a competent individual who could assist the business. Furthermore a vacancy had arisen in the Newtownards Office for a valuer/listener. The role had been filled but the person who accepted the job decided not to proceed and the vacancy had to be filled as a matter of urgency. The claimant, who lived four to five miles away and knew the market in the Ards area was considered the most suitable choice at a time when the business was losing considerable money, and was accordingly moved to that office in September 2011. This also made business sense and the tribunal is satisfied on the balance of probabilities, that the claimant's age was not a factor in this context.

The Law

5. (1) Regulations 3, 4, and 6, of the Regulations provide as follows:-

“Discrimination on grounds of age

3.—(1) For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if —

- (a) on the grounds of B's age, A treats B less favourably than he treats or would treat other persons, or
- (b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but—
 - (i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and
 - (ii) which puts B at that disadvantage,

and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.

(2) A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.

(3) In this regulation—

- (a) “age group” means a group of persons defined by reference to age, whether by reference to a particular age or a range of ages; and

- (b) the reference in paragraph (1)(a) to B's age, includes B's apparent age.

Discrimination by way of victimisation

4.—(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if he treats B less favourably than he treats or would treat other persons in the same circumstances, and does so by reason that B has—

- (a) brought proceedings against A or any other person under these Regulations;
- (b) given evidence or information in connection with proceedings brought by any person against A or any other person under these Regulations;
- (c) otherwise done anything under or by reference to these Regulations in relation to A or any other person; or
- (d) alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of these Regulations,

or by reason that A knows that B intends to do any of those things, or suspects that B has done or intends to do any of them.

(2) Paragraph (1) does not apply to treatment of B by reason of any allegation made by him, or evidence or information given by him, if the allegation, evidence or information was false and not made (or, as the case may be, given) in good faith.

Harassment on grounds of age

6.—(1) For the purposes of these Regulations, a person ("A") subjects another person ("B") to harassment where, on grounds of age, A engages in unwanted conduct which has the purpose or effect of—

- (a) violating B's dignity; or
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect."

Burden of Proof Regulations

6. Regulation 42 of the Regulations deals with the burden of proof and provides:-

"Burden of Proof: industrial tribunals

42. – (1) This regulation applies to any complaint presented under regulation 412 to an industrial tribunal.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this regulation, conclude in the absence of an adequate explanation that the respondent -

- (a) has committed against the complainant an act to which regulation 41 (jurisdiction of industrial tribunals) applies; or
- (b) is by virtue of regulation 26 (liability of employers and principals) or regulation 27 (aiding unlawful acts) to be treated as having committed against the complainant such an act,

the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act.”

- (i) In **Igen Ltd (formerly Leeds Carers Guidance) and Others v Wong, Chamberlains Solicitors and Another v Emokpae**; and **Brunel University v Webster [2006] IRLR 258**, the Court of Appeal in England and Wales set out guidance on the interpretation of the statutory provisions shifting the burden of proof in cases of sex, race and disability discrimination. This guidance is now set out at Annex to the judgment in the **Igen** case. The guidance is not reproduced but has been taken fully into account, as it also applies to cases of discrimination on the ground of age.
- (ii) The tribunal also considered the following authorities, **McDonagh and Others v Hamilton Thom Trading As The Royal Hotel, Dungannon [2007] NICA**, **Madarassy v Nomura International Plc [2007] IRLR 246 (“Madarassy”)**, **Laing v Manchester City Council [2006] IRLR 748** and **Mohmed v West Coast Trains Ltd [2006] UK EAT 0682053008**. It is clear from these authorities that in deciding whether a claimant has proved facts from which the tribunal could conclude in the absence of an adequate explanation that discrimination had occurred, the tribunal must consider evidence adduced by both the claimant and the respondent, putting to the one side the employer’s explanation for the treatment. As Lord Justice Mummery stated in **Madarassy** at paragraphs 56 and 57:-

“The Court in *Igen v Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

“Could conclude” in s.63A(2) must mean that “a reasonable Tribunal could properly conclude” from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory “absence of an adequate explanation” at this stage..., the Tribunal

would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.”

- (iii) The tribunal received valuable assistance from Mr Justice Elias’ judgement in the case of ***London Borough of Islington v Ladele and Liberty (EAT) [2009] IRLR 154***, at paragraphs 40 and 41. These paragraphs are set out in full to give the full context of this part of his judgement.

“Whilst the basic principles are not difficult to state, there has been extensive case law seeking to assist Tribunals in determining whether direct discrimination has occurred. The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:

- (1) In every case the Tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport* [1999] IRLR 572, 575 – ‘this is the crucial question’. He also observed that in most cases this will call for some consideration of the mental processes (conscious or sub-conscious) of the alleged discriminator.
- (2) If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p.576) as explained by Peter Gibson LJ in *Igen v Wong* [2005] IRLR 258, paragraph 37.
- (3) As the courts have regularly recognised, direct evidence of discrimination is rare and Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:-

'Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer.'

If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal *must* find that there is discrimination. (The English law in existence prior to the Burden of Proof Directive reflected these principles save that it laid down that where the prima facie case of discrimination was established it was open to a Tribunal to infer that there was discrimination if the employer did not provide a satisfactory non-discriminatory explanation, whereas the Directive requires that such an inference *must* be made in those circumstances: see the judgment of Neill LJ in the Court of Appeal in *King v The Great Britain-China Centre* [1991] IRLR 513.)

- (4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson pointed out in *Zafar v Glasgow City Council* [1997] IRLR 229:-

'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in *Bahl v Law Society* [2004] IRLR 799, paragraphs 100, 101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself – or at least not simply from that fact – but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the

prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

- (5) It is not necessary in every case for a Tribunal to go through the two-stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC* [2007] IRLR 259 paragraphs 28-39. The employee is not prejudiced by that approach because in effect the Tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.
- (6) It is incumbent on a Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in *Anya v University of Oxford* [2001] IRLR 377 esp paragraph 10.”
- (iv) The tribunal also received considerable assistance from the judgment of Lord Justice Girvan in the Northern Ireland Court of Appeal decision in ***Stephen William Nelson v Newry and Mourne District Council* [2009] NICA 24**. Referring to the ***Madarassy*** decision (supra) he states at paragraph 24 of his judgment:-
- “This approach makes clear that the complainant’s allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the Tribunal could properly conclude in the absence of adequate explanation that the respondent has committed an act of discrimination. In *Curley v Chief Constable* [2009] NICA 8 Coghlin LJ emphasised the need for a Tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the Tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The Tribunal’s approach must be informed by the need to stand back and focus on the issue of discrimination”.
- (v) In the context of justification the tribunal considered the Court of Appeals decision in ***Woodcock v Cumbria Primary Care Trust* (2012) IRLR** which held that the justification test applied was the same in direct discrimination as for indirect discrimination. However the Supreme Court in the case ***Seldon v Clarkson Wright and Jakes (a partnership)* (2012) IRLR 591** held that the defence for justifying direct age discrimination is narrower than for justifying

indirect discrimination. In the case of **Homer v Chief Constable of West Yorkshire Police (2012) IRLR 601**, the Supreme Court held that the range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. However cases of **Seldon and Homer** were remitted to the Employment Tribunal to reconsider justification.

Burden of Proof – Indirect Discrimination

7. (i) As previously set out indirect discrimination consists of a number of elements, namely:-
- (a) that the employers applied to the employee a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as the claimant, but
 - (b) which puts or would put persons of the same age group as the claimant at a particular disadvantage compared with other persons;
 - (c) which puts the claimant at that disadvantage; and
 - (d) which he cannot show to be a proportionate means of achieving a legitimate aim.

It is difficult to strictly apply the two stage process as referred to in the guidelines set out in **Igen v Wong**. The tribunal considers it necessary to find that it could conclude that the first, second and third elements referred to above have been satisfied by the claimant and, if so satisfied, to find that the burden of proof has shifted, requiring the respondent to justify the provision, criterion or practice.

- (ii) Once the provision, criterion or practice (“PCP”) has been established it is necessary for the claimant to show that he is at a particular disadvantage, which equates to the concept of a “detriment”. However the claimant has also to show that the PCP disadvantages persons within the same “age group” as himself. Neither the regulations, nor to date the case law, has provided any guidance in relation to this issue of “age group”.

In *Discrimination and Employment, Tucker and George, in paragraph H3.011*, suggested that:-

“The relevant provision, criterion or practice, must be applied to the claimant as well as others who are not of the same “age group”. Regulation 3(3)(a) defines “age group” as a group of persons defined by reference to age, whether by reference to a particular age or a range of ages.

However the concept of an “age group” remains something of a nebulous one. It appears that an age group can be either a group of people of a particular age (eg people aged 50), or, a range of ages (eg people aged 18-30). However, on the face of the Age Regulations 2006 it is not clear how precise the reference to age must be. There appears to be no reason why an age group could not, for example, be a group such as

“retired persons”. More contentious perhaps might be groups described as “older employees” or “junior staff”.

The difficulty with such “loose” definition is that they present problems in defining accurately limits of any particular age group ...”.

- (iii) In relation to harassment the necessary elements are threefold:-
- (1) Did the respondent engage in unwanted conduct?
 - (2) Did the conduct in question either:-
 - (a) Have the purpose; or
 - (b) The effect of either:-
 - (i) violating the claimant’s dignity; or
 - (ii) creating an adverse environment for him – the proscribed consequences?
 - (3) Was the conduct on a prohibited ground?
- (iv) In relation to victimisation, whether a particular act can be said to amount to victimisation must be judged primarily from the point of view of the alleged victim, whether or not they suffered any “detriment”, rather than from the point of view of the alleged discriminator; (**St Helens Metropolitan Borough Council v Derbyshire (2007) IRLR540 HL**). Furthermore, once the tribunal has established a protected act it has to explore whether this had a significant influence on the outcome, and, if so, discrimination is made out. (**Nagarajan v London Regional Transport (1999) IRLR 572 HL**, and **Villalba v Merrill Lynch and Co Inc (2006) IRLR 437 EAT**). A person is treated less favourably than others because he has done one of the protected acts (**Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830 HL**).

Submissions

8. The tribunal carefully considered the written submissions submitted by the party’s representatives which are annexed to this decision. It also carefully considered oral submissions made before it on 1 March 2013.

Conclusions

9. The tribunal, having carefully considered the evidence together with the submissions and having applied the principles of law to the findings of fact, concludes as follow:-
- (1) The tribunal is not satisfied that the claimant has proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the claimant has been harassed in accordance with the definition in the Act.
 - (2) In relation to victimisation, there was insufficient evidence laid before the tribunal in relation to any alleged protected act and, in any event, even if he were to prove such an alleged act, it could not be satisfied that a causal nexus

had been established by the claimant between the fact of having done any such protected act and the alleged decision by any of the respondents to impose less favourable treatment.

- (3) As reflected in the findings of fact, considered in light of the analysis of the law on indirect discrimination, the tribunal is satisfied that the claimant has not established a basis for any such claim.
- (4) In relation to the direct age discrimination claim, the tribunal is satisfied that the claimant has proved facts from which the tribunal could conclude, in the absence of an adequate explanation that discrimination has occurred on the ground of age. The burden therefore shifts to the respondents who can only discharge the burden by proving on the balance of probabilities that the detriment was not on the prohibited ground of age. Having considered the whole relevant factual matrix both before, during, and after the May interviews, including the findings of fact in relation to Chris McLean in paragraph 4 (xii), and in (xiii), the tribunal is not satisfied that the respondents have provided a satisfactory non-discriminatory explanation for the claimant's treatment during the interview process, and subsequently in his appointment as a senior negotiator. In light of the foregoing, an inference of unlawful discrimination must be drawn. Age was a significant reason, in the sense of being more than trivial, for the treatment of the claimant.

Remedy

10. (1) The issue to be determined by the tribunal relates to the claim for injury to feelings from 2 May 2012.
- (2) The guidelines for awarding compensation for injury to feelings is set out by the Court of Appeal in the case of **Chief Constable of West Yorkshire Police v Vento (No 2) [2003] IRLR 102 CA**, as updated by the Employment Appeal Tribunal decision in **Da'bell v NSPCC (2010) IRLR 19 EAT**. The bottom band is increased from £5,000 to £6,000; the top of the middle band is increased from £15,000 to £18,000; and the top of the higher band is increased from £25,000-£30,000. The tribunal did not have the benefit of any medical evidence in this case relating to the claim for injury to feelings.
- (3) Under the Industrial Tribunals (Interest on Awards in Age Discrimination Cases) Regulations (Northern Ireland) 2006, a tribunal may include simple interest on an award made and shall consider whether to do so without the need for any application by the parties. Any interest awarded under the discrimination legislation for injury to feelings is from the date on which the discrimination began, in this case, on 2 May 2012.
- (4) The tribunal considers it appropriate to add simple interest at the rate of 8% per annum on the compensatory award from 2 May 2012 until the day of calculation.

A. Injury to Feelings

- Lower band *Vento* [2002] EWCA Civ 1871,
As updated by *Da'Bell v NSPCC* [2010] IRLR 19 = £6000

Add interest of 8% per annum from 2 May 2012

Total award for injury to feelings to include interest = £6451.07

11. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Chairman:

Date and place of hearing: 25-28 February 2013 and 1 March 2013, Belfast.

Date decision recorded in register and issued to parties:

Summation of claimant – Charles Taylor

Case Number 1093/12

Did the respondents treat the claimant less favourably on the grounds of his age compared to others in breach of the Employment Equality (Age) regulations (N.Ireland) 2006

In the transfer of the claimant from Bangor to Newtownards upon the appointment of Johnny Watson. The new employee was given a position with the first respondent's company which had never existed before, that of senior valuer. Mr Watson was allowed to choose which office to operate from which resulted in the claimant being asked to transfer to a harder market area and start afresh to list and sell properties. This caused the claimant a loss of bonus income of approx. £300 per month.

In the rebranding of the claimant's title from estate agency partner to valuer.

At the interview process with the appointment of 3 junior colleagues to positions of branch manager/valuer in a restructuring process. There was a "striking difference" in the successful candidates ages to that of the claimant. The claimant is 59 years of age with over 20 years of managerial experience and over 30 years of valuation experience. The successful candidates were aged 30, 29 and 29 years of age. One of the successful candidates was a negotiator/valuer who the claimant had been asked to train in valuation on moving to Newtownards. Chris McLean had no actual managerial experience when appointed.

In the appointments of Johnny Watson and Nadine Savage to positions of branch manager/valuer, without any formal interview process. Nadine Savage had no valuation experience.

In the placement of the claimant in a front of house, junior role. The claimant's new position is perceived as a much lesser role by members of the public, staff, builders, vendors etc and it has given the perception that the claimant has been found guilty of a serious misconduct or has been demoted for poor performance. The claimant has found adjusting to a junior role to be a huge change emotionally, physically and mentally. He has felt humiliated and degraded. He feels strongly that he should have been considered for one of the managerial roles. The claimant has always enjoyed good health. However since moving to the Glengormley branch office in a "front desk" role it has caused him to have digestive problems and stress which has affected his sleep patterns. He is now on medication.

He cannot understand from any aspect why he was not successful. The conclusion appears to be the new policy for young managerial staffing which is surely discrimination against older employees.

Did the respondents treat the claimant to unlawful discrimination for a reason related to his age in breach of Regulation 3 (1) and 3 (11) of the Employment Equality (Age) Regulations (N.Ireland) 2006 in the following manner:

In subjecting the claimant to comments and mannerisms in the course of his interview for the position of branch manager/valuer and in a telephone conversation post interview when advising the claimant he had been unsuccessful.

In unilaterally imposing a different title on the claimant without his consent.

Was the claimant subjected to harassment contrary to Regulation 6 (1) of the Employment Equality (Age) Regulation (N. Ireland) 2006 and contrary to Reeds Rains Equal Opportunity Policy in that a person acting in a position of authority created an intimidating, degrading, humiliating and offensive environment for the claimant.

The respondent did not conduct a thorough investigation into the claimant's issues of grievance regarding a flawed recruitment process which had promoted the interests of younger colleagues. In amending the claimant's contract to valuer, on his transfer to Newtownards. In not re-investigating the matter of new issues, raised by the claimant to Richard Sealey, regarding the appointment of a candidate, without interview.

Mr Ryan Andrews, the claimant's area manager, gave his former work colleague/friend preferential treatment. He was given opportunities within the respondent's organization which were not opportunities presented to the claimant.

The claimant wishes to confirm that he did transfer to Newtownards in August 2011 in good faith as he had done so on many former occasions on the instruction of his area manager. He did not pursue his query as to his amendment of contract to "valuer" from estate agency partner as his salary and working conditions remained the same. However, after the interview process, in May 2012, where he was unsuccessful against young less experienced colleagues, he realised that he had been the victim of discrimination. On hindsight the claimant realised that when he was asked to move in August 2011 it had been a demotion to "valuer". Now he was a senior negotiator and back to the birth of his career. The claimant advised his line manager that he was not happy with the decision and sent a grievance letter to Head Office. A grievance meeting was held on 25.05.12 in England and the reply did not uphold his appeal. The claimant took legal advice on whether to take the route of constructive dismissal as he felt Reeds Rains were pressurising him to retire. He was advised to remain in employment and complete a tribunal application.

The fact remains that there were 5 "branch manager/valuer" positions in Bangor, Newtownards, Glengormley, Lisburn Road and Portadown.

The fact remains that the claimant, per salary in payment was the most experienced member of staff for this "branch manager/valuer" position.

The fact remains that the 5 positions were filled by younger members of staff.

The fact remains that the 2 unsuccessful candidates, Rosaleen Welsh and the claimant were aged 55 and 59 years of age respectively.

Rosaleen Welsh an unsuccessful candidate in the interview process did not have any valuation experience. However Nadine Savage who became BMV in Portadown, without interview, was in a similar position with no valuation experience. Nadine is 31 years of age.

The fact remains that Reeds Rains have an Equal Opportunity Policy which all managers are obliged to uphold.

Authorities

Case of Terence McCoy –v- James McGregor & Sons (10.01.08)

Terence McCoy from Newtownards brought a case of ageism as he was turned down for a job of salesman with Belfast timber firm James McGregor and Sons. Mr McCoy, then 58, said he felt as if he had been “flung on the scrapheap”. “I know that my experience and knowledge of the timber trade made me a strong candidate for one of the posts on offer. I was convinced that I was passed over because of my age”.

Mr McCoy had applied for one of two salesmen posts with the firm and, after two interviews, was told he was unsuccessful. It was concluded that there was a link made between the issue of age and the concept of what has been variously referred to as “enthusiasm”, “motivation” and “drive”.

The tribunal determined that the company, and those involved in the recruitment, took account of Mr McCoy’s age as being a relevant factor in the selection process, and that this constituted unlawful discrimination. This empathises the need for everyone involved in recruitment exercises to guard against making decisions based upon assumptions that the age of applicants might mean they would be less likely to have certain qualities.

Achim Beck –v- CIBC (30.12.09)

Mr Beck, an investment banker, sued his employer for sacking him because the company wanted a “younger” person to do his job. While it appeared his position was being made redundant as part of a restructuring process, the tribunal found that the company was in the processes of hiring head hunters “seeking younger more entrepreneurial profile staff”.

Gross –v- FBL Financial Services Inc.

Mr Gross, 54 years of age, was demoted from a vice president position. He was among a dozen employees demoted on the same day. All were older workers and all were high performers. But Gross alone decided to sue his employer for age discrimination. “Once you file suit against your company, you’re pretty much persona non grata. I felt like I was crossing enemy lines”. The ostracism made him sick with stress, but he stayed on the job. Gross eventually won in lower court.

THE INDUSTRIAL TRIBUNALS (CONSTITUTION AND RULES OF
PROCEDURE) REGULATIONS (NI) 2005 (AS AMENDED)

BETWEEN:

CHARLES TAYLOR

CLAIMANT

AND

1. REEDS RAINS LIMITED

2. RYAN ANDREWS

3. KATE KNIPE

RESPONDENTS

SKELETON ARGUMENT FOR THE FIRST NAMED RESPONDENT

Contents:

- 1) List of Authorities.
- 2) The Arguments of the First Named Respondent.

LIST OF AUTHORITIES:

Statute Law:

1. The Employment Equality (Age) Regulations 2006.

Textbooks:

1. Tolley's Employment Handbook, 26th edition, 2012.

Caselaw:

1. James v Eastleigh Borough Council [1990] 2 AC 751.
2. Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.
3. RUC Chief Constable v A [2000] NI 261 at page 273.
4. Nelson v Newry and Mourne District Council [2009] NICA 24.
5. Laing v Manchester City [2006] IRLR 748.
6. Balgobin v Tower Hamlets London Borough Council [1987] ICR 829, EAT.
7. Igen Ltd and others v Wong [2005] EWCA Civ 142.
8. Madarassy v Nomura International Plc [2007] IRLR 246.

RELEVANT LAW:

1. The Claimant claims that the Respondent has discriminated against him on the grounds of age contrary to the Employment Equality (Age) Regulations 2006.
2. The discrimination comprises four distinct forms:
 - a. Direct discrimination as per Regulation 3(1)(a) of the Employment Equality (Age) Regulations 2006.
 - b. Indirect discrimination as per Regulation 3(1)(b) of the Employment Equality (Age) Regulations 2006.

- c. Victimization as per Regulation 4 of the Employment Equality (Age) Regulations 2006.
- d. Harassment as per Regulation 6 of the Employment Equality (Age) Regulations 2006.

3. The Claimant has identified his comparators as being:

- a. Mr. Johnny Watson.
- b. Mr. Barry Mc Machan.
- c. Ms. Fiona Cotter.
- d. Mr. Chris Mc Clean.
- e. Ms. Nadine Savage.
- f. Mr. Eamonn Hunt.

DIRECT DISCRIMINATION:

1. According to Regulation 3(1)(a) of the Employment Equality (Age) Regulations 2006, "a person ("A") discriminates against another person ("B") if on grounds of B's age, A treats B less favourably than he treats or would treat other persons.
2. According to Regulation 3(1)(b) of the Employment Equality (Age) Regulations 2006, "a comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.
3. The traditional two-stage approach is to identify whether the claimant was treated less favourably than comparators; then to consider the grounds for any less favourable treatment.
4. According to the above legislation, to constitute a comparator, a person must be of a different age to the claimant but aside from this their circumstances must be "...the same, or not materially different.." to those of the claimant.
5. On behalf of the Respondent, it is submitted that:
 - a. The Claimant has failed to identify a suitable comparator.
 - b. The Claimant was not treated less favourably than a comparator.
 - c. The Claimant was not treated less favourably than a comparator on the grounds of age.
6. It is not accepted by the Respondent that 'but for' the Claimant's age, he would have been treated more favourably (**James v Eastleigh Borough Council [1990] 2 AC 751**).

INDIRECT DISCRIMINATION:

1. According to Regulation 3(1)(b) of the Employment Equality (Age) Regulations 2006, "a person ("A") discriminates against another person ("B") if A applies to B a provision, criterion or practice which he applies would apply equally to persons not of the same age group as B but which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and which puts B at that disadvantage, and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.
2. According to Regulation 3(1)(b) of the Employment Equality (Age) Regulations 2006, "a comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.
3. On behalf of the Respondent, it is submitted that:
 - a. The Claimant has failed to identify a suitable comparator.
 - b. The Respondent did not apply a provision, criterion or practice which applies equally to persons not of the same age group as the Claimant but which put him or person of the same age group as the Claimant at a particular disadvantage when compare with other persons.

VICTIMISATION:

1. According to Regulation 4 of the Employment Equality (Age) Regulations 2006, "a person ("A") discriminates against another person ("B") if he treats B less favourably than he treats or would treat other persons in the same circumstances, and does so by reason that B has:
 - (a) Brought proceedings against A or any other person under or by virtue of these Regulations;
 - (b) Given evidence or information in connection with proceedings brought by any person against A or any other person under or by virtue of these Regulations;
 - (c) Otherwise done anything under or by reference to these Regulations in relation to A or any other person; or
 - (d) Alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of these Regulations,

or by reason that A knows that B intends to do any of those things, or suspects that B has done or intends to do any of them".

2. It submitted by the Respondent that they and/or their servants or agents did not victimise the Claimant contrary to the above legislation.

HARASSMENT:

1. According to Regulation 6(1) of the Employment Equality (Age) Regulations 2006, "for the purposes of these Regulations, a person ("A") subjects another person ("B") to harassment where, on the grounds of age, A engages in unwanted conduct which has the purpose or effect of:
 - (a) Violating B's dignity; or
 - (b) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
2. According to Regulation 6(2) of the Employment Equality (Age) Regulations 2006, "conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.
3. It submitted by the Respondent that they and/or their servants and agents, did not harass the Claimant contrary to the above legislation.

BURDEN OF PROOF:

1. According to Regulation 42(2) of the Employment Equality (Age) Discrimination Regulations 2006, "where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this regulation, conclude in the absence of an adequate explanation that the Respondent:
 - (a) Has committed against the complainant an act to which regulation 41 (jurisdiction of industrial tribunals) applies; or
 - (b) Is by virtue of regulation 26 (liability of employers and principals) or regulation 27 (aiding unlawful acts) to be treated as having committed against the complainant such an act,

The tribunal shall uphold the complaint unless the respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act.

2. The Respondent would submit that the Claimant has failed to discharge the burden of proof.

AUTHORITIES:

1. According to **Shamoon v Chief Constable of the Royal Ulster Constabulary**, mentioned above, where, from Lord Scott: (the comparator must be) "... in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class").
2. According to In **RUC Chief Constable v A** [2000] NI 261 at page 273, Carswell LC] stated;-

"[3] Discrepancies in evidence, weakness in procedures, poor record keeping, failure to follow established administrative processes or unsatisfactory explanations from an employer may all constitute material from which an inference of religious discrimination may legitimately be drawn. But tribunals should be on their guard against the tendency to assume that every such matter points towards a conclusion of religious discrimination especially where other evidence shows that such a conclusion is improbable on the facts."
3. According to the Northern Ireland Court of Appeal in **Nelson v Newry and Mourne District Council** [2009] NICA 24 cited with approval the comments of Elias J in **Laing v Manchester City** [2006] IRLR 748 when he stated;-

"74 The focus of the tribunal analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose conscious or unconscious racial discrimination that is the end of the matter. It is not improper for a tribunal to say in effect "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it is nothing to do with race."

4. As cited at paragraph 10.14, page 139 of Tolley's Employment Handbook, it is the treatment itself rather than its consequences which must be different and less favourable (**Balgobin v Tower Hamlets London Borough Council** (1987) ICR 829, EAT).
5. According to **Bloxham v Freshfields** - Peter Bloxham, former head of restructuring at Freshfields Bruckhaus Deringer, one of the big five firms of city solicitors in London, brought a 4.5 million pound age discrimination claim. He claimed Freshfields had used an overhaul of their pension fund as a clandestine means of forcing out old partners. The Tribunal dismissed the claim. The Tribunal recognised that, unlike other forms of discrimination, such as sex or race, age discrimination law permits employers to adopt policies that could lead to some people losing out simply as a result of their

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age – so long as they can demonstrate these policies were a “proportionate means of achieving a legitimate aim”. The Tribunal were satisfied the Freshfields policies “not merely met but comfortably passed this crucial test”.

6. See guidance in relation to the burden of proof which is set out in the Annex of *Igen Ltd and others v Wong* [2005] EWCA Civ 142.
7. According to the Court of Appeal in *Madarassy v Nomura International Plc* (2007) IRLR 246:

“The burden of proof does not shift to the employer simply on the Claimant establishing difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicated a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal ‘could conclude’ that, on the balance of probabilities the Respondent had committed an unlawful act of discrimination”.

ARGUMENTS OF BEHALF OF THE FIRST NAMED RESPONDENT:

1. The Claimant has sought to argue that he was demoted twice on account of his age. Firstly, when he was moved from Bangor to Newtownards and relies upon the change in his job title to Valuer; Mr. Johnny Watson’s appointment at Bangor and his move to Newtownards.
2. Secondly, when he was made Senior Sales Negotiator following his unsuccessful application for Branch Manager Valuer and was placed at Glengormley.
3. The Claimant has also sought to argue that he was subjected to age related comments during his interview and by Mr. Ryan Andrews when he informed him of the outcome of his interview and offered him the role of Senior Sales Negotiator.
4. The Respondent submits that the error in job title from EAP to valuer was an administrative error. This is supported by the fact that there was no change to his role, salary, other terms of contract which is accepted by the Claimant. Also, the Claimant admitted during the grievance meeting, that he thought it was a “typing error” and that his role stayed the same.

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5. The Claimant has also alleged that he was moved specifically to make way for Mr. Watson. The Respondent submits that it was perfectly entitled to 'head hunt' and interview someone from outside the business and the fact that Mr. Johnny Watson was good (otherwise he would not have been head hunted in first place) was evidence in itself that the decision to take him on and put him in Bangor was not motivated by any age related factors but ability. In any event, the Claimant alleges that Mr. Andrews recruited Mr. Watson because they were friends.
6. As regards the second limb of the Claimant's claim: there is no evidence that the restructure was anything other than genuine. The business decided to merge roles of EAP and Office Based Manager into one role called Branch Manager Valuer (BMV).
7. The Claimant was presented with a possible promotion opportunity i.e. to apply for BMV which he did.
8. The interview process was fair because it was standardised and competency based and applied to all the candidates (and therefore not age related) with a transparent scoring matrix. Furthermore, Ms. Knipe gave evidence to the effect that it had been approved by senior managers and trade unions as a fair way of marking.
9. The Claimant was not successful in that process and he asserts that he should have been successful because of his experience, amongst other issues raised at the hearing.
10. As planned, the Claimant was offered the Senior Sales Negotiator which he accepted and again his terms and conditions on his contract of employment remained unaltered. The Claimant did not resign or treat himself as being constructively dismissed.
11. Moreover, the role of Senior Sales Negotiator was not a lesser one to EAP, a role which had in any event disappeared as a result of the restructure. The Respondent submits that it was in fact the next best position after BMV under the new structure and was considered suitable alternative employment for any candidate who was not successful.

12. The Claimant's pay and all other terms of contract and duties remained the same save he no longer performed valuations, but that was because they were now covered by the Branch Manager Valuer. That said, the Respondent gave him overflow valuations owing to the fact that he liked this aspect of the job.
13. The Respondent would submit that there were good business reasons based upon his ability for making Mr. Johnny Watson Branch Manager Valuer without involving him in the round of interviews. The interviews were for a role and not a role at a particular branch.
3. Ms. Nadine Savage was offered a part time role as BMV at Portadown prior to the restructure which is borne out by documents in evidence.
4. Mr. Andrew's evidence which was not challenged during cross - examination was that this role had been vacant for some time prior to restructure and that the Claimant did not apply for that role pre-restructure.
5. Mr. Eamon Hunt was interviewed and given his role as BMV, several months after restructure and in any event after 14th June 2012. The role was advertised online by the Respondent. The Claimant could have applied but didn't. This part of the evidence was not challenged by the Claimant in cross - examination of Mr. Andrews.
6. The age related comments during the interview are denied as are the comments attributed to Ryan Andrews. We finally say that the Claimant's grievance was dealt with thoroughly and that those who conducted it did everything in their power to resolve issues for the Claimant.
7. The Claimant missed out on a promotion which he feels he should have achieved based on experience. The Claimant did not perform as well as others who scored in the top 3 in the Competency Based Interview process and that was the evidence of Ms. Kate Knipe and Mr. Ryan Andrews.
8. The Claimant's complaint has no age element to it; it is all about his failure to achieve BMV promotion based on objective CBI assessment. The entire case was about the Claimant not accepting the assessment of his capabilities to take on the BMV role.
9. Ms. Rosaleen Welsh who is in her late 50s is doing great (in evidence) and she went through exactly the same process as the Claimant. There were no complaints made by her.
10. The age related allegations were not put to Ms. Kate Knipe.
11. The Respondent submits that the grievance was upheld and further that the Claimant has not provided any evidence of loss or injury to feelings

in this case, other than the oral evidence of the Claimant. Therefore, no award should be made to the Claimant.

13. The Claimant accepted during evidence that he failed to state in his grievance letter of 8th May 2012, that he suffered direct discrimination, harassment or victimisation.
14. The Respondent respectfully submits that indirect discrimination should be the only alleged category of discrimination considered by the Tribunal in this instance.
15. It is also submitted by the Respondent, that the Claimant agreed during evidence that he had wrote on his claim form that the last alleged incident of discrimination took place on 9th May 2012. The Claimant also accepted that he did not tick the "ongoing" box.
16. The Respondent therefore submits that the Tribunal should not look beyond 9th May 2012 for alleged acts of discrimination in this case.
17. The Respondent would also submit that the Claimant's evidence to the Tribunal was blighted with inconsistencies and that this should be borne in mind by the Tribunal when coming to their conclusions.

CONCLUSION:

In conclusion, on the evidence in the round, the Claimant has failed to prove basic facts from which the Tribunal could reasonably conclude that direct discrimination, indirect discrimination, victimisation or harassment have occurred. The Claimant has therefore failed to discharge the burden of proof and his claim for age discrimination should be dismissed.

Summation of claimant – Charles Taylor

Case Number 1093/12

Did the respondents treat the claimant less favourably on the grounds of his age compared to others in breach of the Employment Equality (Age) regulations (N.Ireland) 2006

In the transfer of the claimant from Bangor to Newtownards upon the appointment of Johnny Watson. The new employee was given a position with the first respondent's company which had never existed before, that of senior valuer. Mr Watson was allowed to choose which office to operate from which resulted in the claimant being asked to transfer to a harder market area and start afresh to list and sell properties. This caused the claimant a loss of bonus income of approx. £300 per month.

In the rebranding of the claimant's title from estate agency partner to valuer.

At the interview process with the appointment of 3 junior colleagues to positions of branch manager/valuer in a restructuring process. There was a "striking difference" in the successful candidates ages to that of the claimant. The claimant is 59 years of age with over 20 years of managerial experience and over 30 years of valuation experience. The successful candidates were aged 30, 29 and 29 years of age. One of the successful candidates was a negotiator/valuer who the claimant had been asked to train in valuation on moving to Newtownards. Chris McLean had no actual managerial experience when appointed.

In the appointments of Johnny Watson and Nadine Savage to positions of branch manager/valuer, without any formal interview process. Nadine Savage had no valuation experience.

In the placement of the claimant in a front of house, junior role. The claimant's new position is perceived as a much lesser role by members of the public, staff, builders, vendors etc and it has given the perception that the claimant has been found guilty of a serious misconduct or has been demoted for poor performance. The claimant has found adjusting to a junior role to be a huge change emotionally, physically and mentally. He has felt humiliated and degraded. He feels strongly that he should have been considered for one of the managerial roles. The claimant has always enjoyed good health. However since moving to the Glengormley branch office in a "front desk" role it has caused him to have digestive problems and stress which has affected his sleep patterns. He is now on medication.

He cannot understand from any aspect why he was not successful. The conclusion appears to be the new policy for young managerial staffing which is surely discrimination against older employees.

Did the respondents treat the claimant to unlawful discrimination for a reason related to his age in breach of Regulation 3 (1) and 3 (11) of the Employment Equality (Age) Regulations (N.Ireland) 2006 in the following manner:

In subjecting the claimant to comments and mannerisms in the course of his interview for the position of branch manager/valuer and in a telephone conversation post interview when advising the claimant he had been unsuccessful.

In unilaterally imposing a different title on the claimant without his consent.

Was the claimant subjected to harassment contrary to Regulation 6 (1) of the Employment Equality (Age) Regulation (N. Ireland) 2006 and contrary to Reeds Rains Equal Opportunity Policy in that a person acting in a position of authority created an intimidating, degrading, humiliating and offensive environment for the claimant.

The respondent did not conduct a thorough investigation into the claimant's issues of grievance regarding a flawed recruitment process which had promoted the interests of younger colleagues. In amending the claimant's contract to valuer, on his transfer to Newtownards. In not re-investigating the matter of new issues, raised by the claimant to Richard Sealey, regarding the appointment of a candidate, without interview.

Mr Ryan Andrews, the claimant's area manager, gave his former work colleague/friend preferential treatment. He was given opportunities within the respondent's organization which were not opportunities presented to the claimant.

The claimant wishes to confirm that he did transfer to Newtownards in August 2011 in good faith as he had done so on many former occasions on the instruction of his area manager. He did not pursue his query as to his amendment of contract to "valuer" from estate agency partner as his salary and working conditions remained the same. However, after the interview process, in May 2012, where he was unsuccessful against young less experienced colleagues, he realised that he had been the victim of discrimination. On hindsight the claimant realised that when he was asked to move in August 2011 it had been a demotion to "valuer". Now he was a senior negotiator and back to the birth of his career. The claimant advised his line manager that he was not happy with the decision and sent a grievance letter to Head Office. A grievance meeting was held on 25.05.12 in England and the reply did not uphold his appeal. The claimant took legal advice on whether to take the route of constructive dismissal as he felt Reeds Rains were pressurising him to retire. He was advised to remain in employment and complete a tribunal application.

The fact remains that there were 5 "branch manager/valuer" positions in Bangor, Newtownards, Glengormley, Lisburn Road and Portadown.

The fact remains that the claimant, per salary in payment was the most experienced member of staff for this "branch manager/valuer" position.

The fact remains that the 5 positions were filled by younger members of staff.

The fact remains that the 2 unsuccessful candidates, Rosaleen Welsh and the claimant were aged 55 and 59 years of age respectively.

Rosaleen Welsh an unsuccessful candidate in the interview process did not have any valuation experience. However Nadine Savage who became BMV in Portadown, without interview, was in a similar position with no valuation experience. Nadine is 31 years of age.

The fact remains that Reeds Rains have an Equal Opportunity Policy which all managers are obliged to uphold.

Authorities

Case of Terence McCoy –v- James McGregor & Sons (10.01.08)

Terence McCoy from Newtownards brought a case of ageism as he was turned down for a job of salesman with Belfast timber firm James McGregor and Sons. Mr McCoy, then 58, said he felt as if he had been “flung on the scrapheap”. “I know that my experience and knowledge of the timber trade made me a strong candidate for one of the posts on offer. I was convinced that I was passed over because of my age”.

Mr McCoy had applied for one of two salesmen posts with the firm and, after two interviews, was told he was unsuccessful. It was concluded that there was a link made between the issue of age and the concept of what has been variously referred to as “enthusiasm”, “motivation” and “drive”.

The tribunal determined that the company, and those involved in the recruitment, took account of Mr McCoy’s age as being a relevant factor in the selection process, and that this constituted unlawful discrimination. This emphasises the need for everyone involved in recruitment exercises to guard against making decisions based upon assumptions that the age of applicants might mean they would be less likely to have certain qualities.

Achim Beck –v- CIBC (30.12.09)

Mr Beck, an investment banker, sued his employer for sacking him because the company wanted a “younger” person to do his job. While it appeared his position was being made redundant as part of a restructuring process, the tribunal found that the company was in the processes of hiring head hunters “seeking younger more entrepreneurial profile staff”.

Gross –v- FBL Financial Services Inc.

Mr Gross, 54 years of age, was demoted from a vice president position. He was among a dozen employees demoted on the same day. All were older workers and all were high performers. But Gross alone decided to sue his employer for age discrimination. “Once you file suit against your company, you’re pretty much persona non grata. I felt like I was crossing enemy lines”. The ostracism made him sick with stress, but he stayed on the job. Gross eventually won in lower court.