

# THE INDUSTRIAL TRIBUNALS

CASE REF: 237/07

**CLAIMANT:** Thomas John Terence McCoy

**RESPONDENTS:**

1. James McGregor & Sons Ltd
2. Mr Dixon
3. Mr Aiken

## DECISION

The claimant's claim of disability discrimination, having been withdrawn by the claimant in open tribunal without objection, is struck out by the tribunal, without further order. The unanimous decision of the tribunal is that the respondents, on the grounds of the claimant's age, treated the claimant less favourably than they treated other persons. The respondents discriminated against the claimant in the arrangements made for the purpose of determining to whom the respondents should offer employment and by refusing to offer, or deliberately not offering, the claimant employment.

### Constitution of Tribunal:

**Chairman:** Mr J V Leonard

**Members:** Ms Townsley  
Mr Fields

### Appearances:

The claimant was represented by Mr Wolfe, Barrister-at-Law, instructed by the Equality Commission for Northern Ireland.

The respondents were represented by Mr Bunting of Peninsula Business Services Limited

## **INTRODUCTION**

1. By claim form dated 30 January 2007 and received by the Office of the Industrial Tribunals and the Fair Employment Tribunal (“the Office”) on 6 February 2007, the claimant complained of age discrimination in recruitment and also intimated a claim of disability discrimination. That latter claim of disability discrimination was withdrawn on behalf of the claimant by the claimant’s representative at the outset of the hearing without objection on the part of the respondents’ representative and is accordingly struck out by the tribunal, without further order.
2. By response received by the Office on 21 March 2007, the respondents’ representative (with reference to the complaint of age discrimination) denied that the respondents had unlawfully discriminated against the claimant on grounds of age and denied that the claimant had suffered any detriment in relation to his age.

## **THE ISSUE**

3. From the claim and the response thereto, it was apparent that the issue to be examined by the tribunal concerned the arrangements made in regard to the recruitment by the first-named respondent of persons to certain posts of employment, as sales representative, and the process of recruitment. Accordingly, the issue to be determined was whether or not the respondents discriminated against the claimant on the grounds of his age by treating him less favourably than they treated those persons who were appointed to these posts in or about the arrangements they made for the purpose of determining who should be offered employment and/or by refusing to offer or deliberating not offering the claimant employment.

## **THE SOURCES OF EVIDENCE**

4. The sources of evidence considered by the tribunal in reaching determinations of fact included the witness statements (which statements were read aloud before the tribunal and in respect of which there was cross-examination) of the claimant, of Mr Dixon and of Mr Aiken, the latter being, respectively, the second and third-named respondents. The tribunal also had before it a bundle of documents prepared on behalf of the claimant by the claimant’s representative, which bundle was submitted and was placed before the tribunal without objection on the part of the respondents’ representative, and certain other documents were adduced in evidence, by agreement.

## **THE TRIBUNAL'S DETERMINATIONS OF FACT**

5. In consequence of the oral and documentary evidence the tribunal, on the balance of probabilities, determined the following matters of fact:-
  - (a) The claimant was born on 26 January 1948. Accordingly, he attained the age of 59 on 26 January 2007. The material time which concerns this tribunal is late December of 2006 and January of 2007.
  - (b) The first respondent, James McGregor & Sons Ltd (“McGregors”) is a long-established commercial trading company involved in the timber importation

and distribution business, with particular reference to hardwood. At the material time, McGregors employed ten staff including Mr John Dixon, a Director of McGregors. McGregors is a subsidiary company of R & D Aiken Ltd (“Aikens”) of which company Mr Shane Aiken is a Director.

- (c) McGregors, on account of the nature of the trading business, is dependent upon sales being conducted by sales representatives. It seems that two such sales representatives resigned, with little or no notice, from McGregors in December of 2006, apparently in order to set up business in competition with McGregors. The view was taken by Mr Dixon on behalf of McGregors that it was essential that a recruitment should be organised forthwith in order to replace these two sales representatives and to limit or avoid any potential commercial damage to McGregors.
- (d) Accordingly, an advertisement was placed in the Irish News newspaper on 28 December 2006, which advertisement reads as follows:-

*“JAMES MCGREGOR and SONS LTD HARDWOOD IMPORTERS  
EXCITING OPPORTUNITIES for TWO SALES REPRESENTATIVES.  
YOU NEED at least five years experience. Knowledge of the timber  
industry an advantage. Good people skills. Youthful enthusiasm.  
WE OFFER An attractive salary. Company Car. Profit share scheme.  
Pension scheme. Well established customer base. Contact JOHN  
DIXON ....”.*

An advertisement with similar text was also placed in the Belfast Telegraph newspaper at this time; the advertisement also seems to have appeared at this time on a website known as “Loadzajobs”.

- (e) The claimant saw this advertisement both in the Belfast Telegraph and also on the Loadzajobs website. In response to this, he telephoned Mr Dixon on 4 January 2007. After an initial brief telephone discussion, Mr Dixon then telephoned the claimant back that day and a discussion ensued regarding the nature of the job for which the advertisement had been placed. Mr Dixon informed the claimant that there were two posts intended to be filled. He requested the claimant to confirm to him any relevant experience. The claimant detailed to Mr Dixon his working experience which he stated was over 30 years' duration and was with particular reference to the hardwood trade (experience in the hardwood trade being of particular relevance to the post). The discussion between the two then turned to the claimant's then current employment, which was with a local timber recycling business. The claimant indicated to Mr Dixon that, if offered a position, he could commence employment with McGregors immediately.
- (f) There was a conflict in evidence as to what turn the telephone conversation then took. The tribunal would wish to record that it found the claimant's evidence at all times in the case to be entirely credible and consistent. In resolving the conflict, the tribunal for the foregoing reason preferred the evidence of the claimant which was to the effect that Mr Dixon then asked the claimant, “How old are you Terry?”. The claimant confirmed that he was then aged 58. Mr Dixon responded, “You are around the same age as myself - tell me - do you think you still have the drive and motivation to be

successful in this trade?” In response, the claimant confirmed that he most definitely had drive and motivation and that he was very enthusiastic about the prospect of re-entering the timber sales business and in re-establishing contact with persons in that business whom he had met and known over the years. In conclusion of the conversation, it was agreed that the claimant would attend McGregors for interview on 8 January 2007. There was no documentation whatsoever provided by the respondent to the claimant or completed in respect of the claimant's application for employment.

- (g) The claimant called with McGregors on the day arranged and he was interviewed by Mr Dixon alone. In the course of the interview that day, Mr Dixon asked the claimant if he had a curriculum vitae (“CV”) with him. The claimant responded that he did not. He had not been asked for one. As to what transpired further in the course of the interview, again there was a conflict in the evidence between Mr Dixon and the claimant. The tribunal preferred the evidence of the claimant. Mr Dixon stated to the claimant, “Terry you are 58. How can you convince me that you still have the drive and motivation to be successful in this position? Are you still hungry enough to succeed?”. In response to this, the claimant stated that he was very excited about the challenge that lay before him, if he were to be appointed. The claimant then referred to his past employment with certain firms in this area of business, with which firms Mr Dixon would have been quite familiar. The topic of discussion then turned to monthly sales figures that had been achieved in previous employment. It appeared to the claimant that Mr Dixon was satisfied with the claimant's answers in that regard.
- (h) A possible starting salary was then discussed. The claimant's stated salary expectations for the post did not appear, as far as the claimant was concerned, to be unreasonable insofar as Mr Dixon indicated in the course of the interview. Indeed, the claimant's general impression was that he had got on very well with Mr Dixon on a personal level. The interview concluded with a discussion about mutual acquaintances in the timber industry. At this stage in matters the claimant's expectations of achieving success in this job application were high.
- (i) A further interview was then arranged for 10 January 2007. The claimant attended McGregors on that day and he was briefly introduced by Mr Dixon to other members of staff on his way through the main office to the room where the interview was to be conducted. The claimant entered the interview room and he was introduced to Mr Shane Aiken, a Director of Aikens. Upon being introduced, the claimant stated to Mr Aiken that he remembered both Mr Aiken's grandfather and father during their time in Aikens. Mr Aiken stated that that had been some time ago (apparently both had been deceased a number of years).
- (j) The interview room, it appears, was small and rather cramped. The claimant was positioned in front of a desk with Mr Dixon seated at the far side of the desk. There was some conflict in the evidence as to whether or not Mr Aiken was standing throughout the entire course of the interview or was seated. On that, the tribunal prefers the evidence of the claimant which was to the effect that Mr Aiken was positioned standing somewhat to the claimant's left side and out of a direct line of vision (as the claimant was facing forwards

toward Mr Dixon who was located on the far side of the desk). Initially all conversation was directed between Mr Dixon and the claimant. Mr Aiken did not participate at all for the first period of time, believed to be some ten minutes or so.

- (k) The interview began with the claimant being informed that there were three final shortlisted candidates in total for the two sales positions. There was then a general conversation between Mr Dixon and the claimant for some ten minutes or so. On balance, the tribunal accepts the claimant's evidence that Mr Dixon made several references to the claimant's age at that part of the conversation. However, the claimant could not recall the precise words used, for the benefit of the tribunal. Then Mr Dixon requested the claimant to address Mr Aiken directly regarding his career history. The claimant (having to turn around to his left side to do so) then addressed Mr Aiken by outlining details of his career and specific developments in regard thereto. The claimant observed that Mr Aiken's response to his address was what might be termed "passive". The claimant was somewhat disconcerted by this and he felt rather uneasy. The claimant's reading of the situation at the time was that Mr Aiken, for some reason, was reluctant to engage with him in what might be described as a "two-way" conversation.
- (l) When the claimant had finished the process of outlining his career details to Mr Aiken, Mr Dixon then spoke to the claimant. The claimant's evidence was that these words were to the effect, "Terry you are now 58. How can you convince Shane and myself that you have the drive and motivation for this job and that you are hungry enough to succeed?". The tribunal accepts that these words were spoken by Mr Dixon. In response, in an endeavour to answer in a clear and demonstrative fashion, the claimant placed his hand on the desk and stated that he was very anxious to secure the position and he could not wait to get "back on the road". The claimant stated that he had the knowledge and the experience in the trade and that he had no doubt that he would enjoy great success and would be a great asset to the company. The claimant then went into some detail as to what his plans would be should he be successful in securing the post.
- (m) The claimant's salary expectations were then discussed. These appeared to be satisfactory to Mr Dixon and Mr Aiken, as far as the claimant was concerned. Mr Dixon then concluded the interview and stated that the claimant would be contacted the following day to confirm the outcome.
- (n) The claimant did not receive any contact from Mr Dixon notwithstanding what had been promised. Then, some few days afterwards, the claimant received a letter dated 18 January 2007 signed by Mr Dixon. The letter advised the claimant that he had been unsuccessful in the application. In response, the claimant sent an e-mail to Mr Dixon on 22 January 2007. In that, the claimant asked for feedback in relation to the selection process. Mr Dixon replied to the claimant by e-mail also on that date and requested from the claimant details as to how he could help in whatever information the claimant wished to know.
- (o) The claimant responded by e-mail dated 22 January 2007, stating that he was interested in finding out the selection criteria used by Mr Dixon. Mr

Dixon responded by e-mail dated 23 January 2007 stating that the claimant in the initial interview had exhibited extensive knowledge and experience in the timber business but that, in the second interview, in comparison with the other candidates for the post, the others had met Mr Aiken's specifications with regard to motivation and drive more closely than had the claimant.

- (p) In regard to the selection process, there were a total of 19 applicants for the 2 posts, with 3 persons being shortlisted for interview. The 3 persons shortlisted were a Mr Richard Sterritt and a Mr Gary Sowerby, together with the claimant. Both Mr Sterritt and Mr Sowerby submitted CVs as part of their applications. Mr Sowerby's CV had stated his age as being "43". In the case of Mr Sterritt, his CV did not state a date of birth. At some time in the course of the interview or selection process Mr Dixon wrote on Mr Sterritt's CV the following, "DOB 29/5/64". It is therefore material to the case that Mr Sterritt was aged 42 in January of 2007 and Mr Sowerby was aged 43. Mr Sterritt's CV disclosed a work history including the following details:-

**June 2004 to present.** Purchasing and production manager of Hawthorne Timber Fabrications, Newtownhamilton. (That was a managerial post in connection with purchasing for the timber frame construction industry).

**October 1997 to June 2004** Buyer and shop manager at JP Corry, Portadown. (That was a shop-based job).

**March 1992 to September 1997** Working as a building contractor with the firm of E Sterritt & Sons.

**May 1989 to March 1992** Sales representative with Haldane Fisher, Newry. (This was a timber and building supplies sales job to the trade).

**January 1988 to April 1989** Sales representative with E McEntyre & Sons. (That job involved selling power tools in the trade).

**March 1986 to January 1988** Sales representative with JP Corry, Belfast.

**June 1982 to February 1986** Sales representative with JS Fisher, Newry. (That was a timber and hardware sales post).

- (q) In respect of Mr Sowerby, his CV disclosed a work history including the following details:-

**2004 to November 2006** Cranwood Industries Ltd. (That post involved the position of sales representative concerning hardwood and softwood sales with some emphasis placed on medium density fibreboard ("MDF") sales of mouldings and other such timber products).

**2000 to 2004** W Howard Ltd (Manchester). National sales manager in respect of MDF Mouldings.

**1996 to 2000** Stanton's Metsa Prima. Key accounts manager of softwood sales.

**1996** International Timber. (Hardwood and softwood sales).

**1991 to 1996** Howarth Timber Importers. (Softwood sales).

**1984 to 1991** John Ashworth Timber (Hardwood and softwood sales).

**1979 to 1984** Poco Homes. (Apprentice bricklayer).

Mr Sowerby's CV generally emphasised that applicant's senior position as a National Sales Manager of an English concern prior to Mr Sowerby's moving to Northern Ireland in 2004. Mr Sowerby's recent career disclosed a particular emphasis on MDF wood products.

- (r) The claimant's career details were not committed by him to a CV for the purposes of his application but were outlined by the claimant in some detail both in the course of the first and the second interviews and also to the tribunal as follows:-

**1960's** - Full apprenticeship in carpentry and joinery for 5 years.

**1968 to 1972** - Booth Concrete (Draughtsman).

**1972 to 1994** - McKelvey Sinclair, Belfast (Sales manager in firm of timber importers with responsibility for sales of imported timber and timber products. Completed Timber Engineering Course, "TRADA", whilst in that post).

**1994 to 2004** - J T O'Mahoney & Sons, Dublin (timber sales and stock procurement).

**2004 to 2005** - James McMahon, Dublin (Sales representative with responsibility for timber sales and sheet materials, specialising in hardwood sales).

**2005** - Timber Recycling Eco Enterprise ("TREE"), Belfast - (General manager of timber recycling firm).

The claimant stated to the tribunal, and the tribunal accepted, that he had detailed in the course of the interviews his own extensive experience, experience which had a particular concentration and emphasis placed on commercial sales experience in connection with the timber industry in general and hardwood in particular.

- (s) The recruitment exercise as arranged by Mr Dixon and as conducted by Mr Dixon and by Mr Aiken on behalf of McGregors did not involve the applicants being given written job descriptions or person specifications. McGregors however did employ a document consisting of an interview rating sheet ("the

Form"). That Form had been devised and supplied to McGregors by Peninsula Business Services Limited. The Form provided a space for the insertion of the name of the particular job applicant and the job title, together with the name of the interviewer and the date of the interview. Beneath that there was a matrix providing for the entry of specific information in respect of six characteristics designed to be tested at interview. Included under the six categories were (1) "appearance/disposition", (2) "education/qualifications/training", (3) "skills/knowledge", (4) "experience", (5) "personality" and (6) "special circumstances". The Form permitted the provision of scoring in respect of each of these six categories on a rating from 1 to 5. There was also a space next to each of the six categories for writing in comments connected to the rating of these six characteristics. Underneath this on the Form there was a space for further information to be entered. There was a memorandum on the Form that the weighting of the scores should be amended to suit the requirement of the vacancy to be filled "as detailed in the job specification", as it was put. Thus the Form was evidently intended to be used in conjunction with a job specification.

- (t) These Forms were used both by Mr Dixon himself for the first interview in each case and by Mr Dixon on behalf of himself and Mr Aiken for the second interview in each case. Various written comments for both interviewers were noted on the back of the Forms. These written comments, so the tribunal understands, were recorded either during the course of the interviews or immediately after conclusion by Mr Dixon.
- (u) Material to this case, the following scoring and comments were recorded by Mr Dixon in respect of Mr Sowerby's first interview:-
  - (1) "appearance/disposition" - 5
  - (2) "education/qualifications/training" - 5
  - (3) "skills/knowledge" - 5
  - (4) "experience" - 3
  - (5) "personality" - 4
  - (6) "special circumstances" - 4
- (v) The following scoring and comments were recorded by Mr Dixon in respect of Mr Sowerby's second interview:-
  - (1) "appearance/disposition" - 5
  - (2) "education/qualifications/training" - 4
  - (3) "skills/knowledge" - 4
  - (4) "experience" - (no score) (but the comment was made "good but slightly limited hardwood").
  - (5) "personality" - (no score) (but a comment was made, "Pleasant - English accent!!!")
  - (6) "special circumstances" - (no score)

On the reverse of the Form Mr Dixon had written the comment, "limited hardwood".

- (w) The following scoring and comments were recorded by Mr Dixon in respect of Mr Sterritt's first interview:-

- (1) "appearance/disposition" - 4
- (2) "education/qualifications/training" - 5
- (3) "skills/knowledge" - 5
- (4) "experience" - 5
- (5) "personality" - 5
- (6) "special circumstances". - (no score) (but with a comment made about Mr Sterritt as follows, "Health Issues ??? "overweight").

There was a written comment made by Mr Dixon noted on the reverse of the Form that Mr Sterritt was 42 years old.

- (x) The following scoring and comments were recorded by Mr Dixon in respect of Mr Sterritt's second interview:-

- (1) "appearance/disposition" - 4
- (2) "education/qualifications/training" - 4
- (3) "skills/knowledge" - 4
- (4) "experience" - 4
- (5) "personality" - (no score)
- (6) "special circumstances" - (no score)

On the reverse of the Form Mr Dixon had recorded that Mr Sterritt was a "big lad" and was "over weight", as he put it, with a query about Mr Sterritt's potential health.

- (y) The following scoring and comments were recorded by Mr Dixon in respect of the claimant's first interview:-

- (1) "appearance/disposition" - 4
- (2) "education/qualifications/training" - (no score)
- (3) "skills/knowledge" - 4 (with the comment "30 years experience – excellent")
- (4) "experience" - 4 (with the comment "plenty")
- (5) "personality" - 3 (with the comment "good but a little reserved")
- (6) "special circumstances". - (no score)

Below that was written the comment "no CV". On the reverse of the Form Mr Dixon had recorded, "age 59 – health good – question of motivation".

- (z) The following scoring and comments were recorded by Mr Dixon in respect of the claimant's second interview:-

- (1) "appearance/disposition" - (no score) (but with the comment "Good – Mature")
- (2) "education/qualifications/training" - (no score)
- (3) "skills/knowledge" - (no score)
- (4) "experience" - (no score - but the comment "good")
- (5) "personality" - (no score) (but the comment, "Question of drive + commitment??")
- (6) "special circumstances" - (no score)

On the reverse of the Form Mr Dixon had placed a plus and minus sign above two columns. Under the plus sign Mr Dixon had recorded the claimant's experience and the fact that he was good and mature and possibly the word "image". Under the negative column appeared the word "motivation??" . There was also a reference to the following: "(Shane's comment. That lad would put me to sleep)".

## THE APPLICABLE LAW

6. The statutory provisions with which the tribunal is concerned in this matter have their source in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("the Framework Directive"). The objectives of the Framework Directive in terms of age are set out in the recitals and are stated to include "*the need to take appropriate action for the social and economic integration of elderly and disabled people*" (Recital 6). Thus the Employment Equality (Age) Regulations (Northern Ireland) 2006 ("the 2006 Regulations") have been implemented to give effect to that part of the Framework Directive concerning discrimination on grounds of age. The 2006 Regulations, insofar as material to this case, provide at Regulations 3, 7, 26, 27, 41 & 42 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) -

(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.

### **Applicants and employees**

7. —(1) It is unlawful for an employer, in relation to employment by him at an establishment in Northern Ireland, to discriminate against a person—

(a) in the arrangements he makes for the purpose of determining to whom he should offer employment;

(b) in the terms on which he offers that person employment; or

(c) by refusing to offer, or deliberately not offering, him employment.

(2) -

### **Liability of employers and principals**

**26.** —(1) Anything done by a person in the course of his employment shall be treated for the purposes of these Regulations as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.

(2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of these Regulations as done by that other person as well as by him.

(3) -

### **Aiding unlawful acts**

**27.** —(1) A person who knowingly aids another person to do an act made unlawful by these Regulations shall be treated for the purpose of these Regulations as himself doing an unlawful act of the like description.

(2) For the purposes of paragraph (1) an employee or agent for whose act the employer or principal is liable under regulation 26 (or would be so liable but for regulation 26(3)) shall be deemed to aid the doing of the act by the employer or principal.

(3) -

### **Jurisdiction of industrial tribunals**

**41.** —(1) A complaint by any person ("the complainant") that another person ("the respondent")—

(a) has committed against the complainant an act to which this regulation 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,

may be presented to an industrial tribunal.

(2) -

(3) -

(4) -

### **Burden of proof: industrial tribunals**

**42.** —(1) This regulation applies to any complaint presented under regulation 41 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) -

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”.

The foregoing provisions of the 2006 Regulations echo other discrimination statutes. Here the tribunal is, by virtue of Regulation 3(2) of the 2006 Regulations, invited to carry out a comparative exercise. The situation of the claimant is to be compared with that of another person (the "other persons" mentioned in Regulation 3(1) (a) of the 2006 Regulations and the "another person" mentioned in Regulation 3(2)). Thus under Regulation 3 (2) the tribunal is to examine the issue of whether or not the relevant circumstances in the one case (the person designated as "B") (in other words the claimant) are the same or not materially different in the other (the "other persons" - that is to say the comparator for the statutory purpose - and of course there can be more than one comparator and the comparator can be a real or a hypothetical person). Furthermore, Regulation 42 of the 2006 Regulations, in respect of the matter of the burden of proof also is similar to other statutory provisions, for example, such as are observed in sex and race discrimination. These burden of proof provisions have their origins in the implementation of the Burden of Proof Directive (Council Directive 97/80/EC).

The leading guidance as to how tribunals should deal with such cases has been for some time now what is termed the "Barton guidance". This derives from the decision of the EAT in England in the case of ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332 EAT***. The Barton guidance has been approved by the Court of Appeal in England in the case of ***Igen Ltd (formerly Leeds Careers Guidance) and others v Wong [2005] IRLR 258 CA***, with certain modifications. That modified Barton guidance provides that, at the first stage, it is for a claimant who complains of unlawful (in this case age) discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant. Essentially, what a claimant has to prove is less favourable treatment, and further, that such treatment was on the grounds of the prohibited factor, which in this case is age.

Less favourable treatment has of necessity to be with reference to a comparator. There must be a comparative exercise conducted and there must be a comparator (real or hypothetical) for that exercise to be conducted. A leading authority is the judgement of the House of Lords in the case of ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11***, where Lord Nicholls, emphasised that the use of the words "treats her less favourably" (in regard to sex discrimination, but equally applicable to age discrimination and to the contemporary usage in discrimination statutes of the comparative designations, "B" and "other persons") invites a comparison which is at the heart of the statute. Thus it is fundamental that the comparative exercise must be conducted and the "relevant circumstances" mentioned in the 2006 Regulations must be carefully examined by the tribunal in any case. There must be a comparison of the relevant circumstances of "B" and the "other persons", these being persons deemed to be in the same or not materially different circumstances to "B". That comparison might lead to a finding of less favourable treatment of B in comparison to the

comparator or comparators. If that finding of less favourable treatment is made by the tribunal, then there is required to be made an examination of the reason for that less favourable treatment. There may possibly be a reason that is entirely innocent or blameless. However, if that does not appear to be the case, then the tribunal is tasked with establishing if the reason arises from the prohibited ground. In determining the reason, the tribunal is entitled to consider all of the surrounding circumstances (see ***Anya v University of Oxford [2001] IRLR 377 CA***).

The modified Barton guidance, and Regulation 42 of the 2006 Regulations, then provide that if the claimant has proved on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful, the burden of proof shifts to the respondent to prove that the respondent's treatment of the claimant was in no way connected with unlawful discrimination.

## **THE TRIBUNAL'S DETERMINATION**

7. In the matter the tribunal has had the benefit of very detailed and helpful submissions made orally upon conclusion of the hearing on the part of both the claimant's and respondents' representatives. The tribunal is grateful for the detail and the helpful nature of these submissions. The claimant's representative referred the tribunal to the following cases:-

**Saunders v Richmond Upon Thames Borough Council [1977] IRLR 362**

**Horsey v Dyfed County Council [1982] IRLR 395**

**Brennan v J H Dewhurst Ltd [1983] IRLR 357**

**Tower Hamlets London Borough Council v Rabin [1989] ICR**

**James v Eastleigh Borough Council [1990] IRLR 288**

**Madharassy v Nomura International Plc [2007] IRLR 246**

8. The claimant's representative submitted that the claimant's case is that there were firstly, arrangements for recruitment and selection which were discriminatory and unlawful on foot of Regulation 7 (1) (a) of the 2006 Regulations. Secondly, there had been unlawful discrimination by refusing to offer, or deliberately not offering, the claimant employment, thereby infringing the provisions of Regulation 7 (1) (c) of the 2006 Regulations. Failure to select the claimant for one of the two sales posts is the less favourable treatment afforded by the discriminator, "A" (the respondents) to the person discriminated against, "B" (the claimant) as is specified in Regulation 3 of the 2006 Regulations. This discrimination is expressed in Regulation 3 as being in comparison to "other persons". Mr Sterritt and Mr Sowerby are the "other persons", and thus the comparators. It is submitted that these two are appropriate comparators in that their relevant circumstances are the same or not materially different to those of the claimant. Thus the circumstances of Mr Sterritt and of Mr Sowerby are properly comparable to those of the claimant. On that comparison, the claimant, firstly, suffered unlawful discrimination, as discriminatory arrangements were made in his case, but not in respect of the two comparators. Secondly, the claimant did not succeed in the selection process, whereas the other two comparators were chosen to fill the posts. It is submitted on the claimant's behalf that, but for his age, the claimant would more probably than not have been selected for one of the two posts. In all of this, the respondents discriminated

against the claimant. That discrimination was unlawful in that it was on grounds of the claimant's age.

9. The respondents' representative made a submission upon the evidence and facts inviting the tribunal to conclude that the claimant did not suffer unlawful discrimination as there were no discriminatory arrangements made in the matter. Further, the claimant had himself first raised the issue of his age, not the respondents. Parts of the claimant's evidence were contended simply not to be true. It was the respondents' assessment of the three candidates (based entirely on reasons that were not discriminatory in regard to the 2006 Regulations) that resulted in the view being taken that the other two candidates had more motivation and drive to succeed than had the claimant. Thus it was submitted on behalf of the respondents that the selection was nothing to do with the claimant's age and the respondents had thus not unlawfully discriminated against the claimant. The representative did not endeavour to raise any of the statutory defences available under the 2006 Regulations (see Regulation 26 (3) and Regulation 27 (3) of the 2006 Regulations).
10. Looking at the facts of the matter, the tribunal's task is to ascertain, as a first stage, whether or not the claimant has proved facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondents had committed against the claimant an act or acts of unlawful discrimination as specified in Regulation 3 of the 2006 Regulations. The tribunal notes here the case of ***Igen v Wong*** mentioned above and the case cited by the claimant's representative, ***Madharassy v Nomura International Plc***, also mentioned above, which latter case provided further guidance on ***Igen***. The tribunal also notes the Northern Ireland Court of Appeal's judgement in ***Colin Simpson Arthur v Northern Ireland Housing Executive and SHL (UK) Ltd [2007] NICA 25*** which provides (in the context of a disability discrimination case) a useful commentary by the Northern Ireland Court of Appeal upon the application of ***Igen***. In regard to the matter of ***Igen*** and the burden of proof, the tribunal has regard to the well-accepted proposition that it is often difficult to prove cases of unlawful discrimination. Bias and prejudice are often subconscious; the party responsible will invariably be reluctant to admit to discrimination or to accept that bias or prejudice might exist (see for example ***Glasgow City Council v Zafar [1998] ICR 120 HL***, per Lord Browne-Wilkinson, "...claims (brought under discrimination statutes) present special problems of proof.... since those who discriminate on grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them"). Accordingly the law provides that a tribunal is entitled to consider all of the evidence and all of the circumstances. The tribunal is particularly entitled to consider matters of inference such as might materially be drawn from the facts.
11. In this case, the tribunal attaches significance to the following:-
  - (a) The job advertisement was drafted by Mr Dixon and was placed in the press (and on the website) and that was framed in such a manner as to employ the expression "youthful enthusiasm". Certainly, the tribunal did hear on behalf of the respondents some evidence to the effect that that expression was intended to be a mere term of popular usage. The tribunal was invited in submissions made on behalf of the respondents to draw no adverse conclusions therefrom. However, the tribunal

regards this usage of terminology as being rather unfortunate when it is seen in the particular context of this case. Looking at all of the evidence on this point, the tribunal regards it as legitimate to consider the drawing of an inference from the usage of the particular term, "youthful enthusiasm", when set alongside certain other evidence in the case. In that regard (in the absence of any reported cases in this jurisdiction being drawn to the tribunal's attention) the tribunal notes the Irish case of **Equality Authority v Ryanair DEC-E/2000/14**. The Republic of Ireland has had a statutory code which has prohibited age discrimination for some time now, consequent upon that jurisdiction's implementation of the Framework Directive. The applicable law is to be found in the Employment Equality Act, 1998 and in the Equal Status Act, 2000. In **Ryanair** the Irish Equality Tribunal dealt with a case taken by the Equality Authority under Section 10 of the Employment Equality Act, 1998 which provides that :-*"A person shall not publish or display or cause to be published or displayed, an advertisement which relates to employment and which (a) indicates an intention to discriminate, or (b) might reasonably be understood as indicating such an intention"*. In that case the respondent had advertised a vacancy for the position of "Director of Regulatory Affairs" and indicated in its advertisement that it required *"a young and dynamic professional"*. The respondent maintained in its defence that its use of the word "young" did not in fact refer to chronological age, particularly as it did not specify any particular age group. However, the Equality Officer found that the use of the word 'young' indicated, or might reasonably be understood to indicate, an intention to exclude applicants who were "not young", in other words applicants who were 'middle-aged' or 'old'. The company in this case was ordered to pay compensation by the Tribunal and to review its procedures.

- (b) Of course this tribunal is dealing with a different domestic statutory code than was being considered by the Equality Tribunal in the **Ryanair** case. In the instant case, the claimant's representative did not go so far as to submit that the advertisement used by the respondents was of itself an "arrangement" but, rather, the representative invited the tribunal to draw an inference of discrimination from the wording used in the advertisement. The tribunal gave consideration to the arguments and, on balance, was of the view that it was appropriate to draw such an inference.
- (c) The tribunal has no doubt from the weight of the evidence that Mr Dixon, in the initial telephone conversation with the claimant, did allude to the claimant's age. It has been suggested, both in the evidence and in the submissions, that the claimant himself had initiated the raising of the matter of age. The tribunal does not accept that as a matter of fact. There was a clear linkage being made in Mr Dixon's mind at the time between the concepts of "age" and "energy", "enthusiasm" and "motivation", hence the usage of "youthful enthusiasm" in the advertisement ("youth" being synonymous with "enthusiasm").
- (d) The first interview for the post was conducted by Mr Dixon, alone, with the claimant. For the third time (the first and second being, respectively, the advertisement and the earlier telephone conversation), the topic of

age emerged at Mr Dixon's behest. Whilst the conversation itself was certainly quite amicable, Mr Dixon stating to the claimant that he was somewhat of an age with the claimant and thereby perhaps demonstrating a degree of empathy, nonetheless there was once again an illustration of a linkage being made by Mr Dixon, expressed in the course of the conversation, between age and the issue of enthusiasm, energy, and drive or motivation. In regard to the matter of age and the conduct of interviews, the tribunal notes the Irish case of **Hughes v Aer Lingus DEC - E/2002/049** where the Irish Equality Tribunal found that an employer had discriminated against a 50 year old woman applying for a cabin crew post by asking her how she would respond to being given instructions by younger people and starting at the bottom of the ladder. Again, the tribunal is conscious that the Irish tribunal was applying different statutory provisions. However, in this matter we are dealing with the subject of inferences. Any age-related question potentially may carry with it an inference that the employer has taken into account the age of the applicant for employment in a way that is possibly unlawfully discriminatory.

- (e) By the time the claimant's second interview took place with Mr Dixon and Mr Aiken, whilst the claimant himself was rather optimistic as to his prospects of success on account of what had occurred before, nonetheless the claimant was met with what he certainly interpreted as being a rather unenthusiastic participation in the interview process and a distinct lack of personal rapport or response on the part of Mr Aiken. That fact may possibly carry an inference of resistance on Mr Aiken's part to the claimant's application for employment.
- (f) Mr Aiken commenced the encounter with the claimant by what could possibly be interpreted as a rather brusque rejection of the claimant's initial endeavour to connect with Mr Aiken by alluding to the claimant's encounters of some years before with both Mr Aiken's father and grandfather. Perhaps not too much ought to be read into that however, as the claimant in his evidence did not appear to attach much significance to that. What is certainly more significant is that Mr Aiken entirely declined to engage with the claimant for a substantial part of the early section of the interview, indeed at least ten minutes. That lack of interaction continued when the claimant was expressly invited by Mr Dixon to address Mr Aiken regarding his experience. It appears that Mr Aiken did not request specific details from the claimant nor in any manner endeavour to open up a two-way exchange or process of communication between the two. He remained passive, perhaps aloof, as far as the claimant was concerned, and disinterested. The tribunal had no explanation afforded to it for that seemingly unusual conduct on Mr Aiken's part.
- (g) Amongst the two CVs which were submitted by the two other shortlisted candidates, one (Mr Sterritt's) did not state a date of birth. Subsequently that CV had Mr Sterritt's date of birth written in by Mr Dixon ("DOB 29/5/64"). When questioned in the course of the tribunal hearing, Mr Dixon was unable to provide any rational explanation to the tribunal as to why he had taken that step.

- (h) Notwithstanding that the Form clearly anticipated that, there was no job description nor any person specification. The process of marking and scoring of the interviewees using the Form was what might be best described as "opaque". It was entirely unclear as to why the candidates had been scored as they had been (or in some cases not scored at all) in certain categories. Insofar as the tribunal could understand the scoring process at all, the marking was inconsistent. Here, the tribunal noted the point made in that regard by the claimant's representative that Mr Sterritt had been scored in respect of the fourth category, "experience", respectively, in the first interview "5" and in the second "4". The claimant, who it was submitted possessed considerably more relevant experience than Mr Sterritt, had been scored in respect of the fourth category, "experience", "4" (with the comment "plenty") in the first interview, and in the second, no score, but with the comment "good". It was submitted that this certainly appeared to be irrational. The tribunal concurred with the view that the scoring appeared rather difficult to comprehend. It seemed to the tribunal as if the two interviewers had composed the scoring as they went along on what seems to have been an entirely ad hoc basis. There were certain manifest inconsistencies in the scoring. In general terms the scoring was characterised by a lack of transparency and by obscurity. Perhaps that is not surprising when it is noted that the interview process was conducted by Mr Dixon and by Mr Aiken without such reference points as might have been available from a properly designed and detailed job description and person specification.
- (i) At its most basic level, the comments noted by Mr Dixon in respect of the three persons concerned did not demonstrate to the tribunal in any clear sense why the other two candidates had been successful and why the claimant had failed to be selected. It is evident to the tribunal that the claimant had a very considerable measure of experience in the very area of the timber industry where McGregors were seeking to employ sales representatives.
- (j) There was some mention made of the claimant's lack of enthusiasm both in the oral evidence of the respondents and also noted in the Form. There was even the rather bizarre comment recorded on the Form relating to the claimant's second interview as being attributable to Mr Aiken, "...*that boy would put you to sleep*". However, the claimant's evidence to tribunal was that he was forthright, enthusiastic and demonstrative during the course of the interview; he "sold" his experience and expertise well. The tribunal had no reason to doubt the objective basis for the claimant's own subjective assessment of his interview performance.
- (k) The comments made on the Forms clearly display an express linkage between the claimant's age and the notion of energy, motivation and enthusiasm. Here the tribunal noted the written comment recorded by Mr Dixon on the Form relating to the claimant's first interview, "*Age 59 - health good question of motivation*". The claimant's representative in submissions referred to that as being "the smoking gun", as he put it, thereby suggesting that this express linkage of age and motivation on

Mr Dixon's part ought to permit the tribunal conclusively to determine the issue, when taken with the weight of the other evidence.

- (l) The tribunal was invited by the claimant's representative to note two other issues emerging from Mr Aiken's evidence. Firstly, the respondents, it was submitted, in emphasising how much Mr Sterritt and Mr Sowerby had impressed the interviewers, had referred to the illustrations or analogies that they stated were employed by the two men, "fishing" and "family". Thus one interviewee had stated that he was an enthusiastic angler and that achieving a sale was to him like catching a fish. The other interviewee impressed by stating how he was a family man and he endeavoured to provide the very best for his family, as he would do also for the company. These two men had left such a profound impression on Mr Aiken (the claimant's representative stated somewhat sardonically), that Mr Aiken in his witness statement had actually got the two persons mixed up - he had got it back to front. Furthermore, Mr Aiken's evidence which was to the effect that the claimant had been requested on at least three occasions to provide a CV was plainly and demonstrably false as no such request had been made at any time. Thus, it was submitted that the tribunal ought not only to have a very large measure of circumspection concerning the respondent's evidence in general, and Mr Aiken's in particular, but the tribunal on account of that should also be entitled to draw an appropriate inference of discrimination based upon the respondents' endeavour to distort the facts.

In view of the lack of any clear and logical process underlying the scoring in particular and the selection process in general, and the other matters mentioned in submissions, the tribunal is now left to determine whether or not it is entitled to draw inferences as to whether considerations of the claimant's age did play a part in the decision to select Mr Sterritt and Mr Sowerby and in the claimant's corresponding lack of success.

12. Faced with that task, on balance the tribunal accepts the submissions made on behalf of the claimant and the tribunal concludes that inferences of discrimination on grounds of age can properly be drawn from the facts. Further, that being the case, the tribunal's determination is that the claimant has proved facts from which the tribunal could conclude that the respondents unlawfully discriminated against the claimant on grounds of age in the course of making the arrangements for selection and in the selection of the two successful candidates and in determining that the claimant would not succeed in the interview process. Accordingly, the tribunal could conclude, in the absence of an adequate explanation, that the respondents had committed unlawful discrimination against the claimant on grounds of age.
13. That being the case, the burden of proof "shifts" on foot of Regulation 42 of the 2006 Regulations to the respondents. Thus the respondents are required to satisfy the tribunal that there was no discrimination whatsoever on grounds of age. The tribunal has heard the respondents' representative's submissions in that regard. The respondents have argued that no adverse conclusions are properly to be drawn from the wording of the initial advertisement, nor from the written notes and comments made in the Forms, nor from the oral comments made by Mr Dixon in the course of the initial telephone discussions and the first interview, nor from the

further comments made in the course of the second interview. The respondent's representative has submitted that the tribunal ought not to accept the claimant's evidence that Mr Aiken did not engage with him at interview and remained distant and seemingly uninterested or aloof in the process. The tribunal does not accept that submission.

14. The claimant has been portrayed as a person whose interview performance was lacklustre and uninspiring; it "would put you to sleep". The explanation has been afforded that the two successful candidates were more "enthusiastic" or "dynamic" than was the claimant. It is denied that age played any part whatsoever in the selection process.
15. The claimant, of course, has no way of ascertaining precisely how the other applicants stood in terms of actual interview performance in comparison to his own performance for the reason that of course he was not present at these interviews. He is reliant therefore upon the tribunal's own assessment as to whether or not there is anything in the respondents' representative's argument in that regard. The difficulty which the tribunal faces is that the tribunal is reliant upon an explanation being afforded to the tribunal on the part of the respondents which is dependent very much upon subjectivity, for example such subjective observations by the interviewers of characteristics like "enthusiasm" or "motivation". There is a suggestion in the notes made by Mr Dixon that the selection involved some manner of personality or motivation assessment. That type of personality assessment would be permissible in any recruitment exercise if a proper structured system were to be devised in order to avoid the risk of unconscious age discrimination occurring in adjudging whether the applicants for any post are properly motivated and have proper personal characteristics, behaviours and attributes for any post.
16. The claimant's representative (indicating to the tribunal that there was not to date a equivalent publication issued by the Equality Commission in respect of age discrimination) referred the tribunal to the literature produced by the Equality Commission in respect of the topic of sex discrimination, the Equality Commission's "*Code of Practice - Removing Sex Bias from Recruitment and Selection*". The representative referred to Section 9 of the Code which contains the following:-

**" 9.1 It is recommended that all interviews should be conducted in a fair and consistent manner and that they should be structured and systematic. .... All the relevant, job-related evidence should be examined and conclusions should be based on facts, and judgement of the responses, rather than on hunches or on stereotyped assumptions. .... 9.4 It is recommended that a standardised scoring system should be devised and used throughout."**
17. The claimant's representative argued that, whilst this Code was not in any way binding upon the operation of the jurisdiction conferred on foot of the 2006 Regulations, by analogy the same principles ought properly to be transposed into the field of age discrimination as guiding principles, especially when it came to the tribunal considering the drawing of inferences. The representative also referred the tribunal to the Equality Commission's publication, "*Age Discrimination in Northern Ireland, a Guide for Employers*" and the tribunal noted that Guide and especially the sections thereof (from 5.20 onwards) concerning recruitment and selection for employment and referring to "Advertising" (5.27) and "Interviewing" (5.32). That

Guide of course is not a code of practice and does not of itself impose legal obligations.

18. In terms of the comparisons made at interview, obviously it is a difficult task for the tribunal to assess interview performance in the absence of a properly structured recruitment process incorporating methodical and systematic scoring methods upon which reliance might be placed. The tribunal would have difficulty in assessing such subjective characteristics as seem to have been largely employed in this case. Faced with this difficulty, the tribunal must inevitably fall back upon the facts which are set out above in order to assess and to answer the question in this case. That question is whether or not, on balance, there was no discrimination whatsoever on grounds of age on the part of the respondents (as no unlawful discrimination whatsoever is permissible under the terms of the Framework Directive and the 2006 Regulations). Further, the revised Barton Guidance at paragraph 10 (renumbered in **Igen** 11) reads as follows (in respect of sex discrimination and the Burden of Proof Directive but nonetheless still applicable):-

*“(10) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever” is compatible with the Burden of Proof Directive”.*
19. The respondents' evidence has stressed the empathy between Mr Dixon and the claimant as the two were both of a relatively similar age. However, motivation is not a necessary component of proving age (or sex etc.) discrimination and is therefore of no consequence in reaching a determination (see **Reg. V Birmingham City Council, ex parte Equal Opportunities Commission [1989] IRLR 173 HL** or **James v Eastleigh Borough Council [1990] IRLR 288 HL**).
20. Looking at all of the evidence, the tribunal determines, on the balance of probabilities, that the respondents did indeed take account of the factor of age as being a relevant factor in the selection process. The respondents took steps to ascertain, as a relevant factor, the claimant's age and also the age of the comparators, Mr Sterritt and Mr Sowerby, the two successful candidates.
21. Age was clearly a factor taken into account by the respondents in a number of ways. That process of taking age into account of course commenced with the description of the persons invited to attend for interview, the “youthful enthusiasm” so expressly required by the job advertisement. Where age was not recorded in the CV or the Form documentation, Mr Dixon ensured that any omission was corrected by it then being ascertained and recorded in aid of the respondents' determination. That step on Mr Dixon's part was not accidental or incidental, but was designed for some purpose. There was clearly a linkage intended to be made between the concept of age and the desired qualities of energy and of motivation; the respondents wanted someone that was possessed of “youthful enthusiasm”.
22. It will be recalled that the first limb of the claimant's representative' argument related to Regulation 7 (1) (a) of the 2006 Regulations which makes it unlawful for an employer to discriminate against a person in the arrangements he makes for the purpose of determining to whom he should offer employment. As mentioned earlier it was not submitted that the advertisement was an “arrangement” as such (possibly on the authority of **Cardiff Women's Aid v Hartup [1994] IRLR 390** which case

goes against that proposition - although that was not expressly mentioned by the representative) but rather that the fact of the advertisement should go towards the matter of inferences. Thus, the employer must make "arrangements" and these must be discriminatory and any discrimination that occurs in the employer's operation of the arrangements will thus be encompassed within Regulation 7 (1) (a).

23. The tribunal concludes that both Mr Dixon and Mr Aiken made a linkage between the issue of age and the concept of what has been variously referred to in the case as "enthusiasm", "motivation" and "drive", together with other epithets. Upon that basis, both persons made the assumption and approached the selection process with the notion that the claimant would be potentially less of an asset to McGregors than would be his younger co-interviewees. Thus the claimant was asked age-related questions. He was presented with tests. Queries were raised with him regarding such matters as his drive and motivation at the age of 58. These particular tests and queries, on the evidence (and that was not controverted) were not applied to either Mr Sterritt or to Mr Sowerby. Thus began a process whereby the claimant was subjected to a detriment which ultimately led to his not being selected for employment.
24. The claimant's representative cited the cases of **Saunders v Richmond Upon Thames Borough Council**, **Brennan v J H Dewhurst Ltd** and **Tower Hamlets London Borough Council v Rabin**, mentioned above, in support of that part of the submission concerning Regulation 7 (1) (a) of the 2006 Regulations. The EAT case of **Brennan** (in respect of the analogous English sex discrimination provisions) suggested that the legislature in designing the statutory provisions was looking at the discriminatory operation of the arrangements, not the discriminatory making of the arrangements. That has been the basis of the argument advanced in this case on behalf of the claimant on this point. Having considered the arguments, the tribunal concludes that the foregoing testing process and the questions asked of the claimant, which process and which questions were not applied or put to the two comparators, constituted "arrangements" for the purpose of the 2006 Regulations. These arrangements operated in a manner that was unlawful and that was discriminatory. Thereby the claimant's considerable experience and personal attributes, qualities which ought to have more probably than not secured his success, were set to one side and the attributes of persons who were of a younger age but who (insofar as the tribunal can glean from any facts to be derived from the evidence) were probably less suitable, were favoured for selection, notwithstanding that they did not possess such an obvious level of experience and of demonstrable achievements in the particular sector of the timber industry where the respondents sought to recruit.
25. In summary, the making of these arrangements and the failure to select the claimant for one of the two sales posts is the less favourable treatment specified in Regulation 3 of the 2006 Regulations in comparison to "other persons". Mr Sterritt and Mr Sowerby are the "other persons" These two are appropriate comparators. Their relevant circumstances are the same or not materially different to those of the claimant (see **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*"). The "protected class" is a person of the claimant's age given the protection of the 2006 Regulations. The two comparators are properly comparable, but of a different age. Thus the claimant did not succeed in selection

and the two comparators were chosen to fill the posts. But for his age, the claimant would more probably than not have been selected for one of the two posts. In all of this, the respondents treated the claimant less favourably than they treated other persons and thus discriminated against the claimant. That discrimination was unlawful in that it was on grounds of the claimant's age.

26. In regard to that discrimination as it is referable to Mr Dixon and to Mr Aiken, the tribunal notes Regulations 26 and 27 of the 2006 Regulations. The tribunal also notes the recently-reported case of *Allaway v Reilly [2007] IRLR 864*. In that latter case the EAT in England held (in regard to the equivalent in English sex discrimination law to Regulation 27 of the 2006 Regulations on the topic of aiding unlawful acts) that a fellow employee does not have to have intended discrimination nor does that have to be his motive. It is enough that the conclusion can be drawn by the tribunal that discrimination as a probable outcome was within the scope of the employee's knowledge at that time. On that basis the tribunal concludes without difficulty that the first-named respondent is liable on foot of Regulation 26 of the 2006 Regulations for the acts of Mr Dixon (and very probably for Mr Aiken also). Furthermore, the second and the third named respondents, on foot of Regulation 27 of the 2006 Regulations, knowingly aided the first respondent in doing acts that are unlawful on account of the 2006 Regulations. Therefore the second and the third named respondents are to be treated as themselves doing these unlawful acts. Thus the tribunal's finding of discrimination is against all three respondents.
27. The foregoing decision is the unanimous decision of the tribunal. The tribunal shall now reconvene to determine the matter of remedy.

**Chairman:**

**Date and place of hearing: 22-24 October 2007, Belfast**

**Date decision recorded in register and issued to parties:**