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# THE EMPLOYMENT TRIBUNALS

BETWEEN

*Claimant*

*Respondent*

Mr KA Ayodele

AND

Compass Group Plc

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central

ON: 7 June 2010

EMPLOYMENT JUDGE: Mr J Burns

MEMBERS: Mrs A Toyne  
Miss SK Sootarsing

### Appearances

For the Claimant: In person

For the Respondent: Mr N Crighton, E R Director

### JUDGMENT

The unanimous Judgment of the Tribunal is that:

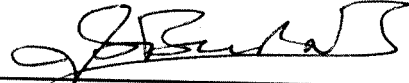
The Claimant was unfairly dismissed.

The reason for dismissal was retirement.

The Respondent must pay the Claimant £16,173.46 calculated as follows:

Basic Award 12 x £192.46		£2,309.00
Compensatory Award:		
Net Pay per year	£10,008	
Less mitigation	(£3,172)	
Adjusted loss per year	<u>£6,836 x 2</u>	£13,672.00
Award Under Paragraph 11(3) of Schedule 6 Employment Equality (Age) Regulations 2006		£192.46
Total		<u>£16,173.46</u>

All other claims are dismissed.



EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

7/6/2010

JUDGMENT SENT TO THE PARTIES ON

7/6/2010

AND ENTERED IN THE REGISTER

R. Nunes

FOR SECRETARY OF THE TRIBUNALS

MS

**THE EMPLOYMENT TRIBUNALS**

BETWEEN

*Claimant**Respondent*

Mr KA Ayodele

AND

Compass Group Plc

**Date of Hearing:** 7 June 2010**REASONS OF THE EMPLOYMENT TRIBUNAL**

1 This is a claim for unfair dismissal and other matters, in particular age discrimination as set out in paragraph 2 of the note of the Case Management Discussion on 4 March 2010.

2 We heard evidence from Ms K Isaac, Mr Lilley and Mr L Bolam on behalf of the Claimant and we then heard evidence on behalf of the Respondent and we then heard evidence from the Claimant himself.

3 The documents were in a joint bundle which was marked R1. The Claimant was employed via an agency but became an employee of the Respondent on 4 January 1999. He was dismissed on 21 January 2008 which was his 65<sup>th</sup> birthday. During his employment with the Respondent he worked as a kitchen porter doing washing up, cleaning and other manual labour.

4 In 2002 the Claimant had brought earlier proceedings for unfair dismissal, namely redundancy under case number 2205506/2002 which was settled on terms that he was re-engaged with continuity of service preserved. He had since had six changes of manager. None of the individuals involved in his dismissal or appeal in 2007/2008 were involved in the earlier matters and there is no evidence of a link between the earlier matters and the eventual dismissal which we are having to consider.

5 In the period 2004-2007 the Claimant had raised a number of issues such as the fact that he had not received a 3% pay rise and was being deprived allegedly of overtime by the head chef. These matters were dealt with when they arose and are not part of the current claim. There is no pattern of an ongoing series of acts against the Claimant which would support any case of victimisation.

6 The Respondent has a retirement policy found at page 57, and this provides for retirement at age 65. It does not include any possible exceptions to this. The policy recites the fact that the company has a duty to consider any request to work beyond

the retirement date but it does not provide any guidance as to how that consideration will be carried out. The Claimant's written contract of employment also provided a retirement date at age 65.

7 The Respondent's HR manager Ms Isaac wrote a letter (page 89) dated 24 September 2007 notifying the Claimant of his retirement on 21 January 2008 and informing him of his right to request working beyond his retirement date. It is conceded by the Respondent that that letter was written just less than four months before the proposed retirement date and thus fell outside the requirements of paragraph 2(1) in Schedule 6 of the Employment Equality Age Regulations 2006 which require such a letter to be written between 12 and 6 months before retirement. The Claimant however made a request to be allowed to continue working beyond his retirement date, and in particular to carry on working for a period of two further years ending on 21 January 2010. He made this request initially orally at a meeting with his manager Mr Lilley on 5 October 2010.

8 Mr Lilley handed the Claimant a written list of answers to frequently asked questions (page 122) and made a very short note of the meeting (page 91). Mr Lilley told us both initially in giving evidence in chief and when recalled towards the end of the evidence to give evidence again on this point that he did not float with the Claimant different options for the Claimant's continuing employment, but rather that he simply informed the Claimant that he would be dismissed on retirement on his 65<sup>th</sup> birthday. Mr Lilley told us very clearly that as far as he was concerned the company's policy had to be applied and there were no exceptions to this, and that the meeting was a formality and there was nothing that the Claimant could either say or do to change the outcome which was pre-determined by the policy and by what he (Mr Lilley) had been told beforehand by HR, namely that the Claimant would be retired when he reached the age of 65, no matter what.

9 The Claimant made a formal written request in writing on 15 October (page 92) and he had a further meeting with Mr Lilley on 2 November of which however no note was kept. The Claimant told us when he was giving evidence that in fact Mr Lilley had floated with him various options, i.e. suggesting that the Claimant could work carrying on doing the same hours or possibly reduced hours but then in the same breath the Claimant told us that Mr Lilley had not offered any options. This very confusing and contradictory part of the Claimant's evidence was repeated several times which is why we called Mr Lilley who gave us the very clear evidence on this point which we have already recorded in the previous paragraph.

10 We find that the Claimant is very confused and mistaken in this area of his evidence and we prefer Mr Lilley's evidence on this aspect. Mr Lilley was quite adamant that no options had been floated and that he Mr Lilley simply rigidly applied the policy which was that the Claimant had to go on his 65<sup>th</sup> birthday. This constitutes our finding of fact on this point.

11 It was however at the second meeting that the Claimant mentioned to Mr Lilley the case of Ms Joan Yearwood (a catering worker then aged about 71 years of age) who had been allowed to stay on by the Respondent beyond her 65<sup>th</sup> birthday.

Mr Lilley told the Claimant he did not regard this as a relevant matter but he did not tell the Claimant why he thought it was irrelevant.

12 On 9 November 2007 Mr Lilley wrote to the Claimant to say that his request for working beyond his retirement date had been refused. No reasons for the refusal were given although the letter stated that the reason for dismissal was retirement and an appeal was offered. The Claimant appealed by letter dated 13 November 2007. Most of the appeal letter contains irrelevant material reiterating old grievances and matters arising from previous years. However, on page 3 of the letter on (page 100) the Claimant made a reference to a relevant matter, namely to the case of Ms Joan Yearwood who had been able to stay on whereas he was not so permitted.

13 The appeal was managed by Mr Bolam. The note kept of that meeting shows that Mr Bolam declined to deal with the Joan Yearwood point stating very briefly that he also regarded it as irrelevant. The rest of the appeal appears to have consisted of Mr Bolam listening to the Claimant reciting his old grievances rather than carrying out any discussion about or considering at all whether or not the Claimant's request to carry on working beyond his retirement date should be acceded to.

14 Mr Bolam told us very clearly that he also had decided before his meeting with the Claimant that the Claimant's request to be allowed to carry on working beyond his 65<sup>th</sup> birthday was to be refused. He agreed (in response to a question put by the Tribunal) that the matter was a "done deal", that "the policy was the policy" and that he had already decided that the policy would apply rigidly before the appeal started. The appeal was a meaningless formality. There was nothing that the Claimant could say or do at the appeal to overturn the decision which had been dictated by the policy that retirement took place at age 65.

15 Mr Bolam informed the Claimant of the unsuccessful outcome of his appeal by letter dated 26 November and by a further letter dated 5 December. In the latter letter, which is rather longer than the first, he repeats his view that the one relevant issue raised by the Claimant (namely Joan Yearwood etc) was irrelevant. At the Tribunal but not before the Respondent's witnesses explained that they regarded the case of Joan Yearwood as being distinguishable because the client (at which both the Claimant and Joan Yearwood worked) had some years before made a particular request that Joan Yearwood would be permitted to stay on beyond her 65<sup>th</sup> birthday.

### The Law

16 Regulation 30 of the Employment Equality Age Regulations 2006 ("the regulations") states that it will not be unlawful to dismiss an employee where: "(1) *The person in question is at or over the default retirement age of 65 and (2) The dismissal was by reason of retirement*" and that whether a dismissal was "by reason of retirement" is to be determined by reference to Sections 98ZA to 98ZF of the Employment Rights Act 1996.

17 A dismissal by reason of retirement is not to be treated as age discriminatory.

18 Section 98(2)(ba) of the Employment Rights Act 1996 ("the Act") provides that a dismissal carried out by reason of retirement is potentially fair.

19 Further relevant provisions of the Act are:

*"98ZB*

*(5) In all other cases where the employer has not notified the employee in accordance with paragraph 2 of Schedule 6 to the 2006 Regulations, particular regard shall be had to the matters in section 98ZF when determining the reason (or principal reason) for dismissal."*

*"98ZF*

*(1) These are the matters to which particular regard is to be had in accordance with section 98ZB(5), 98ZD(5) or 98ZE(7) –*

*(a) whether or not the employer has notified the employee in accordance with paragraph 4 of Schedule 6 to the 2006 Regulations;*

*(b) if the employer has notified the employee in accordance with the paragraph, how long before the notified retirement date the notification was given;*

*(c) whether or not the employer has followed, or sought to follow, the procedures in paragraph 7 of Schedule 6 to the 2006 Regulations.*

*(2) In subsection (1)(b) "notified retirement date" means the date notified to the employee in accordance with paragraph 4 of Schedule 6 to the 2006 Regulations as the date on which the employer intends to retire the employee."*

*"98ZG*

*(1) This section applied if the reason (or principal reason) for a dismissal is retirement of the employee.*

*(2) The employee shall be regarded as unfairly dismissed if, and only if, there has been a failure on the part of the employer to comply with an obligation imposed on him by any of the following provisions of Schedule 6 to the 2006 Regulations-*

*(a) paragraph 4 (notification of retirement, if not already given under paragraph 2).*

*(b) Paragraphs 6 and 7 (duty to consider employee's request not to be retired).*

(c) Paragraph 8 (duty to consider appeal against decision to refuse request not to be retired)."

Relevant provisions of Schedule 6 of the Regulations are as follows:

"2 – (1) An employer who intends to retire an employee has a duty to notify the employee in writing of –

- (a) the employee's right to make a request; and
- (b) the date on which he intends the employee to retire.

Not more than one year and not less than six months before that date."

"4. Where the employer has failed to comply with paragraph 2, he has a continuing duty to notify the employee in writing as described in paragraph 2(1) until the fourteenth day before the operative date of termination.

5. (1) An employee may make a request to his employer not to retire on the intended date of retirement.

6. An employer to whom a request is made is under a duty to consider the request in accordance with paragraphs 7 to 9.

7. (1) An employer having a duty under paragraph 6 to consider a request shall hold a meeting to discuss the request with the employee within a reasonable period after receiving it.

8. (1) An employee is entitled to appeal against –

- (a) a decision of his employer to refuse the request
- (2) A notice of appeal under sub-paragraph (1) shall set out the grounds of appeal.
- (3) The employer shall hold a meeting with the employee to discuss an appeal within a reasonable period after the date of the notice of appeal.

11 (1) An employee may present a complaint to an employment Tribunal that his employer has failed to comply with the duty to notify him in paragraph 2.

(3) Where a tribunal finds that a complaint under this paragraph is well-founded it shall order the employer to pay compensation to the employee of such amount, not exceeding 8 weeks' pay, as the Tribunal considers just and equitable in all the circumstances."

**Conclusions**

20 Our conclusions are as follows:

21 The circumstances are as described in Section 982B(5), by which we are referred to Section 98ZF as particular matters to be considered in deciding the reason for dismissal. The employer has served a notice which complies with paragraph 4 Schedule 6. The notice was given about four months before retirement. The employer has at least purported to follow the paragraph 7 procedure.

22 Both the managers, Mr Lilley and Mr Bolam rigidly applied their understanding of the Respondents retirement policy and made it perfectly clear that this was the reason that they decided to confirm the dismissal of the Claimant. Retirement was indeed the reason for dismissal.

23 In such a case whether the dismissal was fair is determined by section 98ZG(2).

24 The first consideration is whether a paragraph 4 Schedule 6 notice has been given and it was.

25 The second consideration is whether the employer considered the employees request not to be retired. The third consideration is whether the employer considered the appeal against the decision to refuse the request not to be retired.

26 We have considered the extent and scope of the duty on an employer to consider the employees request at the initial meeting and at the employee's appeal, as required by paragraphs 6, 7 and 8 of Schedule 6 of the Regulations.

27 We have noted what is stated on page 107 of the IDS Age Discrimination Handbook issued in August 2006 which reads as follows: *"It is clear that the employer does not have to give reasons for denying the employees request to continue working. This, together with the fact that the requirement found in the draft regulations that employers must consider employees requests "in good faith" does not appear in the final version, effectively gives the employers the green light to turn the whole retirement procedure into a charade if they so wish."*

28 We accept that the wording in the Regulations in paragraph 6, 7 and 8 suggests that a summary process is permissible and that no reasoned decision has to be issued in the case of a refusal. However, we do not find that a completely sham process or a mere charade complies either with the letter or the spirit of the legislation. Even though the express words "in good faith" apparently were deleted from an earlier version of the regulations, that does not in our view mean that a sham or fraudulent process is permissible, because it is implicit without the necessity for express wording that any statutory obligation must be performed in good faith and genuinely.

29 On the facts, we have found both Mr Lilley and Mr Bolam acted on the basis that there was no alternative other than the claimant being retired at 65 no matter what he



had to say. The meetings with Mr Lilley and the appeal with Mr Bolam were therefore meaningless formalities which did not in any real sense involve the employer giving consideration to the Claimant's request.

30 In effect of the regulations is that a discretion is vested in the employer to decide the request and, if it so decides, to refuse it solely with regard to its own interest, but before doing so, it must meet with the employee with an open mind so that the substance of the employee's representations can be considered in a genuine sense. For representations to be considered genuinely, it is necessary that they can potentially have some effect on the outcome. That did not happen here.

31 Hence we find that there has been a failure to comply with paragraph 6, 7 and 8 of Schedule 6 of the regulations and it follows that the dismissal was unfair, although the reason for it was retirement.

### **Remedy**

32 The Claimant obtained another job on his dismissal, however for only two hours a day earning £61 net per week. He has not been able to find any other or additional work despite trying to do so. We accept that he has done his best to mitigate.

33 The Respondent had no problems with the Claimant's work performance nor with his sickness record and there is no evidence of any doubts on its part as to the Claimant's ability to do his work. None of these matters were given any consideration because of the unthinking application of the Respondent's blanket policy. The Respondent has not adduced any evidence before us to suggest that had it given the Claimant's request due consideration, that it would have concluded that the Claimant had to go anyway, or that it would have possibly offered him only part time work. There is simply insufficient evidence before us to show that it is appropriate to apply a **Polkey** reduction.

34 Accordingly, the compensatory award is based upon a loss of two years pay (i.e. the pay for the period of extension he was seeking) less the Claimant's mitigation of £61 per week which comes to £3,172 per year. We therefore award the following sums to the Claimant.

- A Basic Award - He had 8 years of full employment before his dismissal. Because of his age he is entitled to 1½ years for every full year worked i.e. 12 years. His weeks pay was £192.46 – so the basic award is £2,309.
- His net pay per year with the Respondent was £10,008 per year, less mitigation of £3,172 per year. His net loss per year is £6,836 per year and as we award two years losses, it comes to £13, 672.
- Under Paragraph 11(3) of Schedule 6 of the Employment Equality Age Regulations 2006 we are required where there has been a failure to serve the 6-12 months notice in time, to award up to 8 weeks pay. Given the other

sums which we have awarded the Claimant and given the fact that he did not suffer any real prejudice in that regard (because a later notice was served), we award him only one week's pay which comes out at £191.46.

- The total sum we award to the Claimant is £16,173.46.
- All other claims are dismissed.

**Post Script**

35 Having heard the reasons being read out thus far, Mr Crighton complained that he had not had an opportunity to cross-examine on remedy. This is not the case, and given this complaint the Employment Judge deems it appropriate to record the following: The hearing notice dated 26 April 2010 stated that the Hearing on 7 June 2010 would include remedy if appropriate. The claimant read out parts of his written statement to us in chief and then answered questions from the Tribunal judge about remedy, including questions about his attempts to mitigate and his financial losses. He was then exposed to cross examination by Mr Crighton for the Respondent, who asked whatever questions he wanted. Mr Crighton in our view had every opportunity to cross examine and indeed to make submissions on quantum had he so wished.

36 At the beginning of the hearing the Tribunal did not indicate that we were dealing with liability and remedy separately. If there is any original doubt in Mr Crighton's mind about that point (and we do not think there was) that should have been dispelled by the fact that the Tribunal Judge asked detailed questions of the Claimant at some length at the in chief stage about the losses he had suffered and about mitigation matters.

  
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EMPLOYMENT JUDGE

REASONS SIGNED BY EMPLOYMENT JUDGE ON

28/6/2010

.....  
REASONS SENT TO THE PARTIES ON

29 June 2010

.....  
AND ENTERED IN THE REGISTER



.....  
FOR SECRETARY OF THE TRIBUNALS