

BURY

Case Number: 2514387/2009

5860/48

# THE EMPLOYMENT TRIBUNALS

BETWEEN

*Claimant*

*Respondent*

Mr D Newey

AND

Sainsbury's Supermarkets Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Newcastle upon Tyne

ON: 6 & 7 April 2010  
21 & 22 June 2010

EMPLOYMENT JUDGE J Hunter

MEMBERS: Mr R F Aynsley  
Mr S C King

### *Appearances*

**For the Claimant:** Mrs J Callan of Counsel

**For the Respondent:** Mr R Crabtree, Consultant

### RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

- 1 The claim that the respondent constructively unfairly dismissed the claimant is not well-founded and is dismissed.
- 2 The claim that the respondent unlawfully discriminated against the claimant on grounds of age by subjecting him to a detriment is well-founded. There shall be a Remedies Hearing (half a day allowed).

### REASONS

#### 1 The Issues

##### Unfair Dismissal

1.1 Was the respondent in breach of the implied term that it would not without reasonable and proper cause conduct itself in a manner calculated or

likely to destroy or seriously damage the relationship of trust and confidence between the parties?

1.2 If so, did such breach cause the claimant to resign?

1.3 Did the claimant, by delaying for too long, affirm the contract?

### Age Discrimination

1.4 Has the claimant proved facts from which the Tribunal could conclude that the respondent has on the grounds of the claimant's age treated the claimant less favourably than others would have been treated?

1.5 If so, has the respondent proved that it did not treat the claimant less favourably on the grounds of the claimant's age?

1.6 If not, has the respondent shown that such treatment was a proportionate means of achieving a legitimate aim?

## **2 The Facts**

2.1 The respondent runs a well known supermarket chain with stores throughout the United Kingdom. It is a large employer with significant administrative resources including a human resources function.

2.2 The claimant began his career with Savacentre (partly owned by the respondent) as a Deputy Bakery Manager in 1980 and became the Middlesbrough Store Manager of the respondent in 1999.

2.3 The claimant's date of birth is 17 March 1955.

2.4 Prior to 2004, the claimant was acquainted with Ms L Rees who was also a store manager, based in Durham. Ms Rees provided assistance to managers and she was assigned to help the claimant after he had been rated as under-performing by Mr K Plant, the then Regional Operations Manager.

2.5 In 2004 Ms Rees was appointed as Regional Operations Manager Supermarkets for the north east of England responsible for, among others, the claimant's store.

2.6 Ms Rees says that at this time her relationship with the claimant was fine. The claimant says that he found her stressful, demoralising and negative.

2.7 The Performance and Development Review (PDR) for the claimant dated October 2004, which Ms Rees undertook, shows that there were no problems with the claimant's performance. However, there were issues between the claimant and some of his staff and this resulted in the claimant moving to the Cramlington store in Spring 2005.

2.8 The claimant draws attention to problems at the Cramlington store. He said that it had previously been a Safeways store and the staff were inadequately trained in the respondent's systems; the fridges were inadequate and there was limited floor space; the Council had imposed restrictions on loading times and the store was serviced by a depot in Scotland (Langlands) which had had a record of delivery problems. Nonetheless, when he first went there his PDRs of May and November 2005 and April 2006 showed that he was achieving and he received the maximum bonus. The claimant says that Ms Rees had told him on this occasion that he was lucky to receive his bonus and that if it had been up to her he would not have received it. In fact the decision to award the bonus was made by Ms Rees and we do not believe that she did say this.

2.9 The first problems seem to have arisen in November 2006. The PDR referred to "leadership behaviours". We have seen how these are defined. They deal with the management skills and behaviour expected of the respondent's managers. They are broken into categories and each category is given a name. Within each category there are further sub-divisions and examples are given of both expected behaviour and behaviour that is not acceptable. In the PDR an achievement of the various categories was referred to as "a green". A failure was referred to as "a red".

2.10 In May 2006 Ms Rees gave the claimant three greens and two reds for leadership behaviour; seven greens and nine reds for targets. Her overall assessment was that the claimant was under-performing. Ms Rees considered that of the red targets, two were significant, namely the MCM (Mystery Customer Measure) and MAC (Mystery Availability Check). MCM involved a check by an anonymous shopper who asked staff about products and who made other checks such as whether there were queues at counters. MAC also involved an anonymous shopper who checked to see whether a range of 50 items were available for sale.

2.11 The claimant believed that Ms Rees' evaluation was harsh and unjustified. It is clear to us that the relationship between the claimant and Ms Rees deteriorated from this time and never recovered. The claimant repeated his assertion that Ms Rees was negative. Ms Rees described the claimant as being aggressive and belligerent at the PDR meetings in 2006 and 2007.

2.12 Ms Rees was particularly concerned that during this period the claimant was consistently failing to achieve the MAC target. This is a matter she had taken a particular interest in and she considered herself to be an expert in it. The target was important to her for the obvious reason that if goods were in the store room and not on the shelves, they could not be sold. The respondent's MAC expert, Mr Richard Sharp, had visited the store in March 2007 and his report confirmed that there was indeed a problem.

2.13 In May 2007 the claimant, with others, attended a MAC refresher course run by Ms Rees. During this course she told the participants that it would generally take 12 weeks to turn things round. The claimant suggested that Ms Rees told him that he was to have a further 12 weeks to improve: Ms

2.8 The claimant draws attention to problems at the Clarendon store. He said that it had previously been a Sainsbury's store and the staff were used to being in the respondent's system. The issues were the lack of space and there was limited floor space. The Council had imposed restrictions on loading times and the store was serviced by a depot in Scotland (Lanark) which had had a record of delivery problems. The claimant said that he went there in May and November 2005 and April 2007. He said that he was achieving and he received the maximum bonus. The respondent says that Mr Ross had told him on this occasion that he was likely to receive a bonus and that it had been up to her he would not have received it. It was the decision to award the bonus was made by Mr Ross and we do not believe that she did say this.

2.9 The first problems seem to have arisen in November 2006. The PDR referred to "retarding behaviour". We have seen how Mr Ross was defined. They deal with the management skills and behaviour expected of the respondent's managers. They are broken into categories and each category is given a name. Within each category there are further sub-categories and examples are given of both expected behaviour and behaviour that is not acceptable. In the PDR an achievement of the various categories was referred to as "a green". A failure was referred to as "a red".

2.10 In May 2006 Mr Ross gave the claimant three greens and two reds for leadership behaviour, seven greens and nine reds for targets. Her overall assessment was that the claimant was under-performing. Mr Ross considered that of the red targets, two were significant, namely the MAM (Mystery Customer Measure) and MAM (Mystery Availability Check). MAM involved a check by an anonymous customer who asked staff about products and who made other checks such as whether there were queues at counters. MAM also involved an anonymous shopper who checked to see whether a range of 20 items were available for sale.

2.11 The claimant believed that the PDR evaluation was harsh and unjustified. It is clear to us that the relationship between the claimant and Mr Ross deteriorated from this time and never recovered. The claimant testified the session that Mr Ross was negative. Mr Ross reached the claimant as being aggressive and hostile at the PDR meeting in June and 2007.

2.12 Mr Ross was particularly concerned that during this period the claimant was consistently failing to achieve the MAM target. This is a matter she had taken a particular interest in and she considered herself to be an expert in it. The target was important to her for the obvious reason that goods were in the store room and not on the shelves, they could not be sold. The respondent's MAM expert, Mr Richard Clark, then visited the store in March 2007 and his report confirmed that there was indeed a problem.

2.13 In May 2007 the claimant, with others, attended a MAM refresher course run by Mr Ross. During this course she told the participants that it would generally take 12 weeks to turn things round. The claimant suggested that Mr Ross told her that he was to have a further 12 weeks to improve the

Rees denies this. She says that she had been trying to help him turn things round since October 2006.

2.14 At the claimant's PDR in May 2007, Ms Rees told the claimant that he was improving but that he was still underachieving. The following month (June 2007), given his failings in MAC and MCM, Ms Rees felt only able to award the claimant a discretionary bonus. The claimant appealed this decision to the Zone Human Resources Partner (Ms L Sessions) who felt that the bonus scheme had been fairly applied.

2.15 The claimant considered he had been singled out. He referred to three other managers who had failed MAC but who had received their bonuses. In cross-examination Ms Rees explained the circumstances in which payments had been made to other managers who had been recorded as underachieving. We are satisfied from her explanations that she was exercising her discretion reasonably in each case having regard to the particular circumstances and that the claimant had not been singled out for unfair treatment.

2.16 In July 2007, Ms Rees received a report on MAC results which suggested that the improvements at Cramlington were not as good as the claimant had led her to believe. She decided to hold a disciplinary hearing on 23 July 2007. Mr Sharp had been asked to report and he considered that there were 16 preventable errors which he described as 'own goals'. Ms Rees issued a verbal warning to the claimant. He appealed it and the appeal was considered by Mr A Hall, a Regional Operations Manager. The appeal was dismissed.

2.17 The claimant's next PDR was on 2 August 2007. His MAC was still below target but good progress had been made in other areas. Nonetheless, Ms Rees scored the claimant as underachieving because of the continued MAC failures since October 2006.

2.18 The claimant raised a fair treatment complaint (a grievance) in August 2007. This was also dealt with by Mr Hall. He held a hearing on 25 September 2007. The claimant complained that his failure to achieve MAC could not be fairly said to be a reflection of his performance, particularly since he was achieving other targets. He believed that Ms Rees' method of management was unfair. He believed that other colleagues felt he was being singled out and treated unfairly. He said it was affecting his health. He said it was keeping him awake at nights and he was seeing his Doctor with stress.

2.19 The outcome was that Mr Hall and the HR Manager recommended that Ms Rees should hold four weekly one to one meetings with the claimant and should make four weekly half day visits to the store.

2.20 The first one to one visit took place in October 2007, but shortly after this Ms Rees was transferred to Scotland for nine months to cover maternity leave there. Ian Barlow covered her area.

Rees denies this. She says that she had been trying to get the drug found since October 2006.

At the claimant's PDR in May 2007, the Rees told the claimant that he was improving but that he was still unresponsive. The following month (June 2007), given his ratings in MAC and PDR, the Rees told her to swear the claimant a disciplinary bond. The claimant appealed this decision to the Zone Human Resources Partner (Ms. Sessions) who felt that the bond scheme had been fairly applied.

The claimant considered he had been singled out. He referred to other managers who had failed MAC but who had received their bonuses. In cross-examination Ms Rees explained the circumstances in which payments had been made to other managers who had been recorded as unresponsive. We are satisfied from her explanation that she was exercising her discretion reasonably in each case. There is no evidence that the claimant had not been singled out for particular circumstances and that the claimant had not been singled out for unfair treatment.

In July 2007, the Rees received a report on MAC results which suggested that the improvements or developments at Hamilton were not as good as the claimant had led her to believe. She decided to hold a disciplinary hearing on 23 July 2007. Mr. Stimp had been asked to report and he considered that there were 13 irretrievable errors which he described as 'own goals'. The Rees issued a verbal warning to the claimant. He appealed it and the appeal was considered by Mr. A. Hall, a Regional Operations Manager. The appeal was dismissed.

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The outcome was that Mr. Hall and the HR Manager recommended that the Rees should hold four weekly one to one meetings with the claimant and should make four weekly half day visits to the store.

The first one to one visit took place in October 2007, but shortly after the Ms Rees was transferred to Scotland for nine months to cover maternity leave there. The Rees covered her area.

2.21 The claimant had an operation for a hernia and took leave to recuperate. At a PDR in or around April 2008, Mr Barlow ranked the claimant as under-performing and had decided not to pay him a bonus based on his current performance. Mr Barlow had given the claimant a red for MAC. Mr Barlow spoke to Ms Rees saying that he intended to move the claimant to a smaller store at Northumberland Park. Ms Rees had no objections but made it clear that the decision rested with Mr Barlow. Mr Barlow did not implement the face to face meetings recommended by Mr Hall.

2.22 Ms Rees returned from Scotland in June 2008 and resumed the face to face meetings. In fact by this stage Ms Rees had decided that she would only meet the claimant when she was accompanied by Mr S Little, an HR Regional Partner. The claimant says that Ms Rees told him that he was an under-performer and that he would be an under-performer in four months time at the half year review. Both Ms Rees and Mr Little denied that this was said. Mr Little said that Ms Rees had told the claimant that he had been an under-performer and asked him what he intended to do. We accept that it would have been a bizarre statement for Ms Rees to make, particularly in front of an HR adviser. We prefer the respondent's version of events.

2.23 At a PDR meeting in October 2008, the claimant says Ms Rees said, "Here we go again. When are you going to retire?". Ms Rees, in cross-examination, denied saying that. She says she mentioned his under-performance and asked him about his options in moving forward. She acknowledges that she maybe did refer to retirement as one of his options. We are satisfied that she did.

2.24 The pension rules were changing with effect from April 2010. Prior to that date anyone who had attained the age of 50 could apply for early retirement. After that date only persons over the age of 55 could apply. The company had instructed Managers to draw the change to the attention of persons likely to be affected. In fact the claimant was not affected because he would and did attain the age of 55 in March 2010.

2.25 At the October 2008 PDR Ms Rees marked the claimant as underachieving. Ms Rees told the Tribunal that she would have brought disciplinary proceedings at this stage had she not been forced to take sick leave because of pneumonia.

2.26 Ms Rees invited the claimant to a disciplinary hearing and created a log of events between June 2008 and January 2009 illustrating the claimant's under-performance. The meeting was held on 16 January 2009. The claimant was represented by Mr M Bell. Mr Little was present and took the notes. Ms Rees gave the claimant a formal verbal warning for poor performance. The claimant believed it was a punishment rather than a corrective measure. He appealed and the appeal took place on 3 March 2009. It was heard by Mr Neil Chason. He considered the warning to be justified. The note of the meeting records that he said that the claimant had a responsibility to build up a relationship with Ms Rees and that he wanted to speak to him outside the meeting. The claimant says that Mr Chason said,

"You are 54 years old and if I was you I would be retiring". Mr Chason did not appear to give evidence but a statement from him was tendered. Paragraph 5 of his statement reads as follows:

"I said to him that if he could not or would not change his leadership style and his relations with Liz then he should think about retirement. I was not pressurising him to retire and I only mentioned it because if he would not change then this might be more preferable to further warnings and potentially eventual dismissal. It was for him to take a view. I did not discuss this matter with him again".

2.27 The claimant says that Ms Rees' behaviour towards him remained unchanged. His health continued to suffer and he raised a grievance in April 2009 which was heard by Mr A Freeman, Regional Operations Manager, on 30 April 2009. In summary, his complaints were that he had been bullied into considering retirement or leaving the company; that some of the targets were impossible to achieve; that the visits from Ms Rees were of a bullying nature and that she had failed to support him. Mr Freeman did not uphold any of the grievances.

2.28 The claimant appealed and this was heard by the Zone Managing Director, Dean Clegg, who did not attend to give evidence at the Tribunal. However, we heard evidence from Ms K Seth, the Head of HR for the North, who had also been in attendance at the appeal. The appeal was unsuccessful. Mr Clegg found no evidence to suggest that retirement had been "used as a threatening tool". He upheld the decision and felt it important that the company supported the claimant in rebuilding his relationship with Ms Rees. He suggested a reconciliation meeting.

2.29 The claimant, in his witness statement, said that on receipt of the outcome of the appeal on 11 June he could no longer continue working for the respondent and had decided to resign. He told us that he had spoken to Mr Freeman on 20 June saying that in a confidential discussion some time earlier, Mr Little had told him that he, Mr Little, had felt that the claimant had been unfairly treated by Ms Rees and that retirement was being used as a threatening tool. Mr Little, had he felt, lied about this and had been evasive in his notes. As a result of this he could no longer work for the respondent. Neither Mr Freeman nor Mr Little referred to any such conversation in their statements and neither was cross-examined on it.

2.30 The claimant attended a conciliation meeting on 22 June, but then decided to resign. His resignation letter reads as follows:

"It is with regret, however joy and elation for Liz Rees and Steven Little that I ask you to consider allowing me to take early retirement. I understand that six months notice must be given and I would ask that the six months notice commences as of today Monday 22 June 2009. I would like to leave December 18<sup>th</sup> 2009.



Of the 29 and a half years I have worked for Savacentre and Sainsbury's 26 and a half have been very motivational and rewarding for both parties. The last three years I have been managed by Liz Rees very unfairly, negatively and have found Liz very demotivating. I refuse to work for a manager who has such poor leadership style as portrayed in her own talkback score. A manager who makes pre-determined decisions on managers' futures without factual information. A manager who keeps referring to her time when she was a store manager and the number of threats and disciplinaries she has done. It is the total management team of region 53 that has made us the best region in the company. It is not the leadership of Liz. If anything we could have been further ahead had she allowed managers to manage.

During my last six months with Sainsbury's I will as I have done for the last 29 and a half years give my full support to Sainsbury's.

I will be grateful if you could arrange for the Pensions Department to contact myself to discuss my pension options”.

2.31 The claimant's request for early retirement was granted and he left in August 2009.

### 3 **The Law**

#### **Constructive Dismissal**

3.1 The applicant claimed that he was constructively dismissed. It is for the employee to satisfy the Tribunal that there was a fundamental breach of contract on the part of the employer going to the root of the contract of employment; that the employer's breach caused the employee to resign and that the employee did not affirm the contract by delaying for too long before resigning. A breach of contract by the employer will be regarded as fundamental if it is so bad and so significant that no reasonable employee could be expected to put up with it. **Western Excavating (ECC) Limited v Sharp [1978] ICR221.**

3.2 There is an implied condition of mutual trust and confidence in a contract of employment. It would be a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. **Malik & Another v BCCI [1997] ICR606.**

#### **Age Discrimination**

3.3 The Employment Equality (Age) Regulations 2006 provides as follows:

“Regulation 3(1) –

For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if –

(a) on grounds of B's age, A treats B less favourably than he treats or would treat other persons ...

and A cannot show the treatment ... to be a proportionate means of achieving a legitimate aim".

**Regulation 3 (2)**

3.4 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.

**Regulation 3 (3) (b)**

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

3.6 Regulation 37 provides as follows:

"(1) This regulation applies to any complaint presented under regulation 36 to an Employment Tribunal.

(2) Where on the hearing of this 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 36 applies; or

(b) is by virtue of regulation 25 (Liability of Employers and Their Principles) or 26 (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".

**4 Analysis**

**Constructive Unfair Dismissal**

4.1 Issue 1.1 Was there a fundamental breach of contract?

Having carefully reviewed the evidence, we do not find that the cumulative effect of the treatment which the claimant received was calculated or likely to destroy or damage the relationship of trust and confidence between the parties. There is no doubt that the claimant consistently failed to achieve a target which was objectively determined and which his employer considered to be very important. We accept that the respondent was acting reasonably in

... on grounds of illegality. A person is not lawfully employed if ...  
... and A cannot show the treatment to be a proportionate ...  
... means of achieving a legitimate aim.

Regulation 3 (2)

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

Regulation 3 (3) (b)

3.5 - the reference in paragraph (1)(a) to a case includes a comparison with ...

3.6 - Regulation 37 provides as follows: ...

(1) This regulation applies to any complaint received under ...  
regulation 36 to an Employment Tribunal.

(2) Where on the hearing of this complaint, the complainant proves ...  
facts from which the Tribunal could infer from this regulation ...  
conclude in the absence of any adverse explanation that the ...  
respondent -

(a) has committed against the complainant an act to which ...  
regulation 36 applies; or

(b) is in breach of regulation 35 (Equality of Employment and ...  
their Principles) or 36 (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.

Analysis

Conclusive (and Unassailable)

4.4 - Issue 1.1 - Was there a fundamental breach of contract?

Having regard to the evidence reviewed, the Tribunal has found that the ...  
of the treatment which respondent received was calculated to ...  
of the relationship of trust and confidence between the ...  
parties. There is no doubt that the claimant was treated in a way ...  
which was objectively determined and which the respondent ...  
to the very material. We accept that the respondent was acting reasonably in

viewing this target as important. The respondent expended significant effort in its attempt to secure an improvement in the claimant's performance. Ms Rees gave the claimant verbal warnings to improve. The warnings were scrutinised by others on appeal and were upheld. The claimant was also afforded the opportunity to raise grievances and these were considered and dealt with appropriately.

4.2 We are satisfied that there was a personality clash between the claimant and Ms Rees. Ms Rees was firm and tenacious in her management of the claimant, notwithstanding the difficulties she faced as a result of the claimant's hostility towards her.

4.3 The respondent did on two occasions suggest to the claimant that if he could not or would not change his leadership style and his relationship with Ms Rees then he should think about retirement. We deal with this in our consideration of the age discrimination claim. However, taking this into account and applying the test in **Malik**, we do not consider that the respondent's conduct was such that it can be fairly categorised as a fundamental breach of contract. For this reason the constructive dismissal claim fails and we do not need to consider issues 1.2 and 1.3.

#### Age Discrimination

Issue 1.4 Has the claimant proved facts from which the Tribunal could conclude that the respondent has on the grounds of the claimant's age treated the claimant less favourably than others would have been treated?

4.4 The claimant has satisfied us that on two occasions, namely in October 2008 and March 2009, two different managers suggested to him that he should consider early retirement as an alternative to proceeding through the capability procedures. We are satisfied that this amounted to undue pressure to leave the employment of the respondent prematurely rather than persist with the capability/disciplinary procedures. We compare the treatment the claimant received with that which would have been afforded to a Store Manager who was under-performing in the same way as the claimant, but who was not entitled to take early retirement. The claimant has satisfied us that it is unlikely that such a person would have been encouraged to leave employment prematurely if he could not change his leadership style or his relationship with his line manager. Moreover, the reason for the treatment clearly could be on the grounds of age, since only persons over 50 at the relevant time were eligible for early retirement. We are satisfied in these circumstances that the claimant has established a prima facie case and the burden of proof shifts to the respondent under regulation 37.

Issue 1.5 Has the respondent proved that it did not treat the claimant less favourably on the grounds of the claimant's age?

4.5 The respondent argues that the issue of retirement was raised in the context of a change in the Pension Regulations. We accept that the respondent did provide such information to the claimant and that this did not

viewing this light as important. The respondent explained a general... in its attempt to secure an improvement in the claimant's performance. The... fees have the claimant verbal warnings to improve. The warnings were... sentenced by others on appeal and were upheld. The claimant was also... afforded the opportunity to raise grievances and these were considered and... dealt with appropriately.

4.2 We are satisfied that there was a personal grievance between the... claimant and Mrs Rees. Mrs Rees was firm and tenacious in her management... of the claimant notwithstanding the difficulties she faced as a result of the... claimant's hostility towards her.

4.3 The respondent did on two occasions suggest to the claimant that it... could not or would not change his leadership style and his relationship with... Mrs Rees then he should think about retirement. We believe that in our... consideration of the age discrimination claim. However, taking this into... account and applying the test in *Malik*, we do not consider that the... respondent's conduct was such that it can be fairly categorized as a... fundamental breach of contract. For this reason the constructive dismissal... claim fails and we do not need to consider issues 1.3 and 1.4.

Retirement

Issue 1.4 Has the claimant proved facts from which the Tribunal could... conclude that the respondent has on the grounds of the claimant's age... the claimant less favourably than others would have been treated?

4.4 The claimant has satisfied us that on two occasions, namely in October... 2008 and March 2009, two different managers suggested to him that he... should consider early retirement as an alternative to proceeding through the... capability procedures. We are satisfied that this suggestion to retire... to leave the employment of the respondent prematurely rather than proceed... with the capability procedures. We compare the treatment of the... claimant received with that which would have been afforded to a... stranger who was under-performing in the same way as the claimant but... who was not entitled to take early retirement. The claimant had satisfied us... that it is unlikely that such a person would have been encouraged to leave... employment prematurely if he could not change his leadership style or his... relationship with his manager. However, the reason for the treatment... clearly could be on the grounds of age, since only persons over 50 at the... relevant time were eligible for early retirement. We are satisfied in these... circumstances that the claimant has established a prima facie case and the... burden of proof shifts to the respondent under regulation 37.

Issue 1.5 Has the respondent proved that it did not treat the claimant less... favourably on the grounds of the claimant's age?

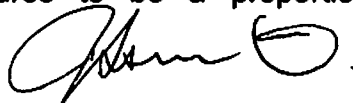
4.5 The respondent argues that the issue of retirement was raised in the... context of a change in the Pension Regulations. We accept that the... respondent did provide such information to the claimant and that the claimant

in itself amount to less favourable treatment. However, on the respondent's own admissions there were at least two occasions (several months apart) in the course of discussions concerning the claimant's poor performance, that two of the respondent's managers suggested to the claimant that he might take early retirement. The respondent found this was not used as "a threatening tool". We accept that it was not used as a threat. However, there can be no doubt that the purpose of the conversations was to act as an encouragement to the claimant to retire as opposed to persisting with the capability procedure.

4.6 It was suggested to us that the respondent's treatment of the claimant was not on the grounds of his age, but on the grounds of his performance. This argument might be valid, if it was the policy of the respondent to encourage managers under 50 to resign in circumstances where they were not performing. The respondent produced no evidence to this effect and the clear inference is that the treatment afforded to the claimant was on the grounds of his age. The respondent has not discharged the burden of proof set out in regulation 37.

Issue 1.5 Has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim?

4.8 It was suggested to us that the aim of the conversations in October 2008 and March 2009 was to assist with staff planning. There was no evidence to support that. Ms Rees did not suggest in her evidence that the purpose of saying to the claimant that he might consider his options was so that she could decide whether and when she would have to find a replacement for the him. We do not believe that this was Mr Chason's intention either. We are satisfied that the respondent's aim was to resolve the issues arising from the claimant's poor performance. That of course is a legitimate aim, but we do not consider that pressure on the claimant voluntarily to leave his employment prematurely as an alternative to completing the capability procedures to be a proportionate means of achieving that aim.



**J Hurter EMPLOYMENT JUDGE**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON** 29 June 2010

**JUDGMENT SENT TO THE PARTIES ON** 14<sup>TH</sup> JULY 2010

**AND ENTERED IN THE REGISTER** 14<sup>TH</sup> JULY 2010 - *M. B. B. B.*

**FOR SECRETARY OF THE TRIBUNALS**

in itself amount to less favorable treatment. However, on the respondent's own admissions there were at least two occasions (several months apart) in the course of the respondent's employment that the respondent had the right to take early retirement. The respondent found that was not used as a "threat" however, there can be no doubt that the purpose of the conversation was to act as an inducement to the claimant to retire as opposed to continuing with the employment procedure.

4.6 It was suggested to us that the respondent's treatment of the claimant was not on the grounds of his age but on the grounds of his performance. The respondent might say that it was the policy of the respondent to encourage managers, within 50 of retirement, to retire when they were not performing. The respondent produced no evidence to the effect that the respondent intended to retire the claimant because of his age. The respondent has not discharged the burden of proof set out in regulation 37.

4.7 The respondent shows that the respondent was a proportionate means of achieving a legitimate aim.

4.8 It was suggested to us that the aim of the conversation in October 2002 and March 2003 was to assist with staff planning. There was no evidence to support that the respondent's suggestion in her evidence that the purpose of saying to the claimant that he might consider his options was so that she could decide whether and when she would have to find a replacement for the claimant. We do not believe that this was the respondent's intention either. We are satisfied that the respondent's aim was to resolve the issues arising from the claimant's poor performance. That in doing so a legitimate aim, but we do not consider that pressure on the claimant voluntarily to leave the employment procedure as an alternative to completing the capability procedure to be a proportionate means of achieving that aim.

1. JUDGE EMPLOYMENT JUDGE

JUDGMENT GIVEN BY EMPLOYMENT

JUDGE ON

JUDGMENT SENT TO THE PARTIES ON

AND ENTERED IN THE REGISTER

FOR SECURITY OF THE TRIBUNALS