

Reserved reasons

# THE EMPLOYMENT TRIBUNALS

BETWEEN

*Claimant*

*AND*

*Respondent*

Mr J Skipper

BP PLC

Date of Hearing: 22 November to 1 December 2011 (2 December 2011 in chambers)

## REASONS OF THE EMPLOYMENT TRIBUNAL

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### Introduction

- 1 This claim was presented on 31 May 2011. In it the Claimant, Mr John Skipper, says that he was subjected to discrimination because of age.
- 2 The Respondent responded to the claim on form ET3 on 31 May 2011 and denied the claims. The ET3 submitted that the claim was out of time because the last incident (reducing the Claimant's performance rating) was on 7 February 2011, more than 3 months before the presentation of his claim. It was also said that if the Claimant was treated differently because of age that treatment was a proportionate means of achieving a legitimate aim.
- 3 In so far as there was any discrimination committed by employees, the ET3 also placed reliance upon the defence that the Respondent had taken such steps as were reasonably practicable to prevent it under section 109 of the Equality Act 2010. This defence was abandoned at the beginning of the hearing before us.
- 4 There was a Case Management Discussion (CMD) on 20 July 2011 before Employment Judge Miss J Wade at which the Claimant was represented by Ms E Misra (counsel) and the Respondent by Mr E Smith (solicitor). The parties had agreed a list of issues which were adopted by Employment Judge Wade as the issues in the case. At that time the Respondent was asking for there to be a Pre-Hearing Review to deal with the time point, with a view to the claim being struck out. The parties were invited to consider how to deal with the time point and to make written submissions. Directions were given and the case was listed for hearing.
- 5 After the CMD both sides agreed that the time point should be dealt with at the full hearing, since it was not appropriate for resolution at an interlocutory stage. *For our resolution of this issue see paragraphs 188 to 192.*
- 6 The agreed list of issues adopted at the CMD set out the manner of the alleged discrimination because of age. These are as follows, with our comments and with a time reference to assist to explain the time issue in the case:-
  - a. "Reducing the Claimant's role and responsibilities (including as to his line reports) for no justifiable reason." This is a reference to the Claimant's responsibilities for Major Projects and for Procurement and Supply Chain Management (PSCM) which were removed from his role. This was the result of a reorganisation which was publicly announced on 29 September 2010. It is agreed between the parties that this change was implemented at the end of December 2010 and that this is the correct time point for the purposes of calculating time. *For our resolution of this issue see paragraphs 31 to 34, 39 and 177*
  - b. "Rejecting the Claimant's applications for roles for which he was clearly capable and suitably qualified to perform and awarding the roles to younger, arguably less qualified candidates (namely Michael Drew for the AGC Developments role and Brad McKim for the AGC Production role)." This is a reference to two Associate General Counsel roles that

the Claimant applied for in October 2010. He was informed on 8 November 2010 that he was not successful in either application.

*For our resolution of this issue see paragraphs 35 to 37, 63 to 96, 121, and 154 to 170*

- c. "Using a flawed selection process for the roles for which the Claimant applied whereby he was not considered against the same criteria as others who were eventually awarded the roles." This refers to a long list of allegations of defective processes the most important of which we set out in our reasons.

*For our resolution of this issue see paragraphs 37, 97 to 105, 106 to 110, 121, 137 to 148, and 187*

- d. "Downgrading the Claimant's performance rating without justification". This refers to downgrading the Claimant's 2010 performance rating from "Exceeds Expectations" to "Meets Expectations". This is a reference to a decision made on about 25 January 2011 by Rupert Bondy who is the Respondent's Group General Counsel to reduce the Claimant's rating. The Claimant was informed of this by his line manager on 7 February 2011. There was then some discussion. There is a dispute as to the date when it was finally confirmed to the Claimant for the purposes of the time for bringing proceedings: the Claimant says 1 March 2011, the Respondent says 14 February 2011.

*For our resolution of this issue see paragraphs 40 to 44, 66, and 171 to 176*

- 7 In his submissions Mr Stiltz on behalf of the Claimant also relied on the Respondent's failure to respond to all the questions in the Equality Act questionnaire within 8 weeks, as a discrete act of discrimination. This is also referred to in the list of issues, where it is suggested that we might draw adverse inferences by reason of the lateness in answering the questionnaire. *For our resolution of this issue see paragraphs 111 to 115, 121 and 187.*

- 8 The Claimant also says that he is entitled to an uplift of 25% in any award. The issues arising from this are set out in the list of issues as:-

- a. Did the Respondent fail to comply with the 2009 ACAS Code of Practice on Disciplinary and Grievance Procedures ("the ACAS Code") in dealing with the Claimant's grievance?
- b. If the Respondent did fail to comply with the ACAS Code was that failure unreasonable?
- c. If the Respondent unreasonably failed to comply with the ACAS Code, is the Claimant entitled to an uplift of up to 25% in any compensation awarded, pursuant to s207A of the Trade Union & Labour Relations Act 1992?

*For our resolution of this issue see paragraphs 194 to 203.*

- 9 The following people gave evidence.

Called for the Claimant:-

Dr Marcus Richards – Group Chief Executive, Dana Petroleum PLC

The Claimant – Assistant General Counsel Exploration & Production Europe  
and Vice-President Legal

Adam Kroloff – Vice President Operations BP America

Also on the Claimant's behalf we received expert evidence given in writing about US discrimination law from Jay P Krupin and Jordan B Schwartz of Epstein Becker & Green, Attorneys At Law, Washington

Called for the Respondent:-

Peter Bevan – former Group General Counsel

Rupert Bondy – Group General Counsel

Iain Conn – Chief Executive for Refining and Marketing, who heard the Claimant's grievance

Robert Fryar – Executive Vice-President for Production

Sarah Ward – at the time, senior HR support for Legal and Compliance

Ian Butcher – partner, MWM Boardroom Consulting LLP

Robert Sharrock – Managing Director Young Samuel Chambers Ltd

Helmut Shuster – Group HR Director

Byron Gate – Group Finance Director

Jack Lynch Junior – Deputy Group General Counsel

- 10 We also received a bundle of documents in four loose leaf files, and one exhibit which was an email from Jack Lynch dated 15 May 2010.
- 11 We heard part of the evidence in private under Schedule 1 Rule 16 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 made under powers in section 10A of the Employment Tribunals Act 1996. However no reference is made in these reasons to any evidence given in private and so no order is made under Rule 32 to restrain these reasons from being entered on the Register.
- 12 The Equality Act 2010 questionnaire questions are at page 1557 of the bundle, and the answers (which are not integrated) are at page 777 of the bundle.

The Law

- 13 We remind ourselves of the definition of discrimination in section 13 of the Equality Act 2010. In this case the Respondent would have discriminated against the Claimant if because of age it treated him less favourably than it treated or would have treated others. But there is no discrimination if the Respondent can show that such treatment was a proportionate means of achieving a legitimate aim.
- 14 Section 39(2) of the Act sets out the cause of action concerned, and provides that an employer must not discriminate against an employee as to the employee's terms of employment or in the way the employee is afforded access, or by not affording him access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service.
- 15 We remind ourselves of the burden of proof provisions in section 136 of the Act. If on hearing the complaint there are facts from which we could decide in the absence of any other explanation that the Respondent had committed an act of discrimination then we would so find unless the Respondent showed that such discrimination did not occur. In other words, if we regard the burden of proof as

shifted in this way we would look to the Respondent to prove on the balance of probabilities that there was no discrimination in any way whatsoever.

- 16 We bear in mind that it is unusual to find direct evidence of discrimination, and that discrimination may be intentional or it may be unintentional. The perpetrator may not even realise that discrimination is taking place. Hence in an appropriate case we may use our powers of inference from the primary facts to regard the burden as shifting to the Respondent.
- 17 The Equality Act 2010 (Commencement No 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 governs whether the Equality Act 2010 applies to this case. Regulation 2 brought into force on 1 October 2010 the relevant provisions in the Act which apply to this case. Regulation 7 (Transitional Provisions) states:  

"Part 9 of the 2010 Act (enforcement) applies where –  
(a) an act carried out before 1 October 2010 is unlawful under a previous enactment; and  
(b) that act continues on or after 1 October 2010 and is unlawful under the 2010 Act.
- 18 The corresponding provisions in the Employment Equality (Age) Regulations 2006 are slightly different but it appears to us having regard to the transitional provisions, that all the claims made in this case are governed by the Equality Act 2010.
- 19 By section 15(4)(b) of the Equality Act 2006 we should take into account any failure to comply with a provision of a code made under the relevant part of that Act, such a code being intended to promote compliance with the discrimination legislation and equality of opportunity. The Equality and Human Rights Commission has issued a code of practice under this provision entitled "Equality Act 2010 Code of Practice - Employment Statutory Code of Practice". In these reasons we refer to this document as the "EHRC Code of Practice".
- 20 By section 138(4) of the Equality Act 2010, we may draw an inference from a failure to answer a questionnaire within 8 weeks of the service of the questionnaire or an evasive or equivocal answer. In this case we are invited to draw an adverse inference because the questionnaire was submitted on 21 April 2011 but was not answered until 5 August 2011 some 15 weeks later.
- 21 These two provisions are relevant both when we consider whether we should regard the burden of proof as shifting to the Respondent as well as when we consider the case overall.

**The basic facts**

- 22 The Claimant was born on 21 September 1956. He is now 55 years of age, and when the alleged discrimination occurred, he had just turned 54.
- 23 The Claimant started with the company on 15 February 1988. At all times, he was based either in Aberdeen or London. From time to time during his career

with the company he had been offered postings elsewhere but he preferred for family reasons to stay either in Aberdeen or London.

- 24 He progressed to his current position Assistant General Counsel Exploration & Production Europe and Vice-President Legal. This role has responsibility for the company's upstream operations in the United Kingdom and Norway. The upstream operations are those concerned with development, exploration and production. The Claimant is also a director of a number of the Respondent's operating companies and subsidiaries.
- 25 We have been shown various internal policy and procedure documents connected with the Claimant's employment. For example there is an Equal Opportunity Policy for the UK on page 348. There is a Code of Conduct on page 1044 which on page 1067 has a Fair Treatment and Equal Employment Opportunity policy. And there is a document entitled Grievance Practice and Procedure UK on page 336.
- 26 In the Respondent company all employees are allocated a Band, and this determines the range of their salaries and other benefits. Band A is the highest grade. There are about 37 Band A and B employees in BP overall, about 100 Band C employees, and about 370 Band D employees.
- 27 The Claimant is in Band D. Band D employees are senior managers called Group Leaders, and in the Legal and Compliance function as at April 2011 there were 22 lawyers who were in Band D, and 6 lawyers in Band C. The most senior of these Band C and Band D lawyers that is, the top 13 lawyers, were members of the Legal Executive Team (the "LET") which made the most important decisions for the Legal and Compliance function.
- 28 The basic factual framework relevant to the claim are that in 2007 Tony Hayward took over as Chief Executive. After taking over, he promoted the "Forward Agenda". These were changes in the company to improve its competitiveness and to streamline its management and human resources processes.
- 29 In May 2008 Rupert Bondy became Group General Counsel, effectively head of all the lawyers in the company. After he joined the company, he made changes corresponding with those introduced for the company as a whole by Mr Hayward. In particular he removed a layer of management between himself and the heads of the specialist groups and reorganised the structure of the legal teams and their executive control.
- 30 On 20 April 2010 there was an explosion on the company's Deepwater Horizon rig in the Gulf of Mexico (known as the "Macondo Prospect"). The company went into "crisis" mode, and staff including the Claimant were temporarily posted to Houston to assist in the management of the disaster and its consequences, in particular a serious oil spill. Potentially the disaster had many legal ramifications and so it impacted directly on the legal teams. In particular, Jack Lynch was assigned full time to the crisis centre. His role at that time was as Associate General Counsel for Exploration and Production. Because of his assignment his

post was filled by Roy Burrows on an interim basis. However, the post was regarded as vacant, and the company began a recruitment campaign to fill it. On 6 September 2010 the Claimant informed Mr Bondy that he wished to apply for this role.

- 31 On 26 July 2010 Bob Dudley took over as Group Chief Executive in place of Tony Hayward. The reorganisation within the company continued. In particular the company's "upstream" business operations were to be split into three: (a) exploration - responsible for exploration for oil and gas and access to new areas of the world; (b) development - responsible for the major projects involved in establishing new production facilities for example the construction of off-shore facilities, and all oil and gas wells worldwide; (c) production - responsible for the ongoing operation of production facilities worldwide. These changes were publicly announced on 29 September 2010 although they had been under discussion since at least May 2010.
- 32 A decision was also made to ally the legal teams to these same three areas (exploration, developments and production), instead of having them joined as before as one legal team. The legal teams provided legal support to the business operations. This decision was made by Mr Bondy soon after the public announcement about the changes in the business operations although it had been under discussion since at least May 2010. The changes to the legal teams was known internally to some people, but was treated as highly confidential until it was publicly announced on 10 November 2010.
- 33 By reason of the changes to the legal teams, three new team head positions were created - Associate General Counsel Exploration, Associate General Counsel Developments, and Associate General Counsel Production.
- 34 These changes meant that the post of General Counsel for Exploration and Production (Mr Lynch's previous post) was to disappear and split into three.
- 35 These changes became known to senior lawyers in the company at a conference of legal managers in Houston which was held on 4 to 6 October 2010. At that conference the Claimant informed Mr Bondy that he would like to apply for the role of Associate General Counsel Developments or Associate General Counsel Production. The Claimant said he would prefer the Production role. His reason was that this was a more senior role (it was intended to be a Band C role, whereas Developments was to be a Band D role).
- 36 So at that time the Claimant had applied both for the role which was known publicly to be vacant, the Associate General Counsel Exploration and Production role, but also for two new roles which were at that time confidential, the Associate General Counsel Developments and Associate General Counsel Production roles.
- 37 The Claimant was asked to attend a psychometric test interview with YSC, and this was conducted on about 26 October 2010. He was asked to attend an interview with external consultants MWM which was conducted on 27 October 2010. The Claimant also had an interview with Robert Fryar the Executive Vice

President on 1 November 2010. Mr Bondy had feedback from all three of these, and following feedback from others and advice from Helmut Shuster Group HR Director, he reached his decision on 3 November 2010 to appoint Brad McKim to the Production post and to appoint Mike Drew to the Development post. On 8 November 2010 Mr Bondy informed the Claimant he had not been successful in his application for either job.

- 38 There was a feedback meeting between Mr Bondy and the Claimant on 8 December 2010. At this meeting there were discussions about the Claimant's future with the company and he was offered the position of General Counsel in Azerbaijan which would have been a promotion.
- 39 At about this time the new legal roles were becoming established and as a result of this some of the Claimant's work was removed from him and transferred to the Development role. This was the Claimant's work on Major Projects and Procurement.
- 40 This was the time of year when the performance ratings were prepared. By 20 December 2010 proposed performance ratings of the employees for whom Mr Bondy was directly responsible (all the senior lawyers) had been prepared. In those provisional ratings the Claimant had an "Exceeds Expectations" rating. The provisional ratings were to be discussed at a meeting of the LET called a "calibration meeting" to be held on 21 January 2011. In advance of the meeting Mr Bondy sent them to Mr Shuster the HR Director, and they were also sent to all members of the LET with a request for them to provide feedback.
- 41 At the meeting the Claimant's rating was discussed, as was the rating of many others. The final decision as to the Claimant's rating was Mr Bondy's and he made his decision about this in the light of the LET discussion. He decided to downgrade the Claimant and also one other to "Meets Expectations" while two people were raised from "Meets Expectations" to "Exceeds Expectations". There were two other changes to the ratings the details of which are not material at this stage of our reasons.
- 42 When the Claimant was informed of his rating on 7 February 2011 by his new line manager Mr McKim, he was unhappy. He had a meeting with Mr Bondy about it on 14 February 2011 and raised a series of objections and reasons why he should have a higher rating.
- 43 Mr Bondy did not tell the Claimant that day that the decision was final. He was anxious to keep the Claimant in the company and was looking for ways to achieve this. He discussed with Human Resources whether this could be achieved by adjusting the Claimant's remuneration package. The Claimant left that meeting in the reasonable belief that he had raised significant issues with Mr Bondy and that the decision would be reviewed.
- 44 But on 1 March 2011 the rating of "Meets Expectations" was confirmed. There was a further meeting about this on 15 March 2011 at which the Claimant made it clear he would be raising a grievance about the matter. At that meeting the Claimant was offered a retention bonus which he rejected.



- 45 On 18 March 2011 through his solicitors, the Claimant raised a grievance alleging age discrimination and this was investigated by Mike Hood who was the HR Director of an associated company. There was a grievance hearing conducted by Jain Conn on 13 June 2011. Although Mr Conn agreed that the recruitment process could have been more robust he did not uphold the grievance of age discrimination and gave the result by letter on 30 June 2011. Meanwhile the Claimant had brought the Tribunal claim. The Claimant appealed against the outcome of the grievance. The appeal was heard on 6 September 2011 by Byron Grote Group Chief Financial Officer, but it was unsuccessful.

**Claimant's claim of ageist culture**

- 46 The Claimant says that there was an ageist culture in the organisation after Mr Hayward took over as chief executive in 2007. In support of this he relies on some anecdotal evidence and some factual matters.
- 47 There are three elements to the anecdotal evidence relied on by the Claimant.
- 48 Firstly a speech made by Lord Browne (the former chief executive) in April 2006 where he pointed out the value of older workers, the inappropriateness of a mandatory retirement age, and the importance of eradicating age discrimination.
- 49 Secondly the responses by employees in the Legal and Global Compliance and Ethics Functions, to questions put to them in August or September 2010 as part of a Diversity and Inclusion survey. This writer of the survey report identified some themes from these responses. One theme was that some employees said they believed that there was a bias "against white males especially over 50" (page 288). We also note that another theme was that some employees believed there was a bias in favour of women, and also a bias in favour of minorities. Also another theme was concerns about the level of external appointments compared with internal promotions, and the lack of transparency in the criteria and processes for appointment and promotion.
- 50 The survey was part of a wider effort to identify those areas in these functions where work was needed on Diversity and Inclusion. There was an earlier report covering the Legal Function in April 2008 (page 35). From May 2008 Mr Rupert Bondy was General Counsel, that is head of the Legal Function, and from that date he took an active part in promoting these studies and efforts to achieve as Mr Bondy put it, "meritocracy and transparency" without discrimination. He took charge of the Diversity and Inclusion steering committee. One of the action points was that all senior employees should undergo Diversity and Inclusion training by the end of 2011. We accept that Mr Bondy was concerned about the need for work in this area and that he genuinely wished to see progress at this time. He wrote to staff on 13 October 2010 (page 1202) about this describing the survey results as "deeply concerning" and undertook to achieve changes in the correct direction.

- 51 The third anecdotal element was the alleged belief of Executive Assistants (as reported to us by the Claimant) that Mr Hayward wanted to "skip a generation": the implication being that older employees would be removed.
- 52 Part of Mr Hayward's "Forward Agenda" involved a reshaping of the establishment of the company, by removing what he saw as unnecessary layers of management. And there were plans to reduce the workforce by 5,000 posts by mid 2009. At the same time Human Resources would ensure that the right people with the right capability were in the right posts then and into the future. This involved a greater emphasis on succession planning, that is, the identification of those employees those who did and who did not have prospects of promotion.
- 53 Various tools were introduced to achieve succession planning, one of which was the 9-box grid form which we need to return to later. This was introduced as a tool to identify those with promotion prospects (those who were thought capable of jumping ahead by one or two bands) and those who did not. On the form, those who did not have such prospects were described as "develop at current level". Colloquially within the organisation they were known as "bed blockers".
- 54 The succession planning was called the "Talent Review" process which required each function within the company to create a "People Plan". This plan would include a "summary of organisational/people issues", Group Leader succession plans, Diversity and Inclusion and the "talent pipeline". These details are all described in a document on page 332.
- 55 Psychometric testing was introduced and all managers were required to take these tests. We heard from more than one witness that these tests were not popular and many employees were unsettled by their introduction.
- 56 The Claimant is of the view that the introduction of these tests favoured the younger employees because reliance upon them meant that the experience of the older employees became less important. What became important was whether the result of the employee's psychometric test showed that he fitted the post.
- 57 The Claimant says that these changes "required a fundamental shift in the age demographics of the company". He specifically refers to such changes in HR itself. We have not been asked to make and we do not make any findings about any change in age demographics in any part of the company other than the company's lawyers. We were not provided with sufficient information to do so.

**Senior lawyer's age demographics and leavers' statistics**

- 58 There is a striking difference in the ages of Band C and Band D lawyers (that is to say Group Leaders) between the US and the UK. The relevant spreadsheet which is a snapshot as at April 2011 is on page 1432, and the same data is re-sorted on page 1525. The top thirteen people on page 1432 include 13 members of the LET and then further down are those Group Leaders who directly report to the LET members. It is clear from this data that the senior lawyers based the USA are older than those based in the UK. Of the 15 senior

lawyers in the spreadsheet aged over 50 at that time, only 4 were based in this country. There was no senior lawyer based in the UK who was older than the Claimant.

- 59 The Claimant relied on these statistics as showing that there was an ageist culture in the company.
- 60 Mr Stilitz on the Claimant's behalf also relied on the statistics of the ages of lawyers who had been promoted, and those who had left as showing an ageist culture in the company. These showed that 11% (18 out of 158) lawyers promoted to a higher grade since 2007 have been 50 or over (page 778). More than 70% of lawyers who left the company between February 2009 and April 2011 were over 50 at the time (page 1527). And over 40% (80 out of 196) of lawyers who have left the company between 2007 and April 2011 were over 50 (777).
- 61 These figures compare with the ages of Group Leaders overall. As at 3 September 2008, their average age was just over 50. Nearly 50% of the Group Leaders were aged over 50 and 5% were aged 40 or under.
- 62 And in September 2009 there were 586 lawyers (at all levels) in the company of whom 14% were over 55. 32% were aged between 46 and 55. 54% were aged below 46.

**Fact of non-appointment despite being qualified**

- 63 It is said on the Claimant's behalf that:
- (a) despite getting consistently excellent performance ratings; and
  - (b) being qualified for the roles (and arguably better qualified than the candidates who were appointed)
- the Claimant did not succeed in his applications for either of the Associate General Counsel Developments and Associate General Counsel Production roles. It is said that since the appointees were younger than the Claimant, we should regard the burden of proof as shifting to the Respondent to show that there was no age discrimination whatsoever in making these appointments.
- 64 At the time the decision was taken as to who should be appointed to the roles (3 November 2010) the Claimant was aged 54, Mr Drew who was appointed to the Associate General Counsel Developments role was aged nearly 42, and Mr McKim who was appointed to the Associate General Counsel Production role was aged 49.
- 65 It is true that until the final results for the calendar year 2010 the Claimant received excellent performance ratings. In 2007 he received a rating of "110" which was the then equivalent to "Exceeds Expectations". In 2008 he received an "Exceeds Expectations" rating and received acclaim from David Mercer. In 2009 he received an "Exceptional" rating from Jack Lynch. In 2010 he had a provisional "Exceeds Expectations" rating but this was not confirmed and his final rating was "Meets Expectations".

- 66 We need to explain the performance rating system within the company. In most cases there were four possible ratings: "Below Expectations" (BE), "Meets Expectations" (ME), "Exceeds Expectations" (EE), and "Exceptional" (E). Sometimes, when it was considered that someone straddled two ratings, it was possible to use an intermediate category for example "Meets Plus" would be halfway between "Meets Expectations" and "Exceeds Expectations". The performance rating process was carried out annually and was used not only to track an employee's performance but also to support decisions as to an employee's remuneration package. It affected the base salary as well as bonuses. It was capable also of affecting at which level within a particular band the employee would be paid. We heard for example of three salary levels in Band D, lower mid and top.
- 67 A comparison of an employee's annual performance rating in any particular year with previous years, and a comparison of an employee's performance rating against other employees could give some indication of an employee's progress and potential for promotion. But it was not considered a very good indicator of this, and when Sally Potts became Group HR Director in 2008 the performance rating was supplemented with a "Potential" rating as well.
- 68 There were three "Potential" ratings:-
- "Develop at Current Level" – meaning that the employee may be capable of developing into roles of greater complexity, but development is most likely to occur within this role or roles of a similar level during the next 3 years.
  - "Potential for growth (+1 level)" – meaning that the employee is seen as having the potential to take on a more senior role at the next level within the next 3 years, assuming that personal development continues to enable this.
  - "High Upwards Potential (+2 levels)" – meaning that the employee is seen as having the potential to be successful in significantly more complex roles at 2 levels above their current role within 5 years, assuming that personal development continues to enable this.
- 69 The "levels" referred to above equate to the bands referred to earlier and not to the pay levels within the bands. So someone who was regarded as having High Upwards Potential could prospectively move from Band F to Band D.
- 70 The introduction of the "Potential" ratings as well as the performance ratings enabled an employee's status at any one time to be represented by a number between 1 and 9, by using a 9-box grid. A clear example of this is on page 1153 of the bundle, and page 1152 contains the definitions used to place an employee in the correct box. The 9 box grid is formed of a 3 x 3 matrix. The horizontal scale is "In Year Performance". There are three positions on this scale reading from left to right – "Below Expectations" (the left column), "Meets Expectations" (the middle column), and "Exceeds Expectations/Exceptional" (the right column). It can be seen that for the purpose of the 9 box grid, the EE rating is amalgamated with the E rating. The vertical axis is that of "Potential" and reading from top to bottom the positions are "Develop at Current Level" (the

top line), "Potential for Growth (+1 Level)" (the middle line) and "High Upwards Potential (+2 Levels)" (the bottom line).

- 71 The boxes are numbered starting with Box 1 on the top right hand side (this would correspond with "Exceeds Expectations/Exceptional" and "High Upwards Potential (+2 Levels)" to Box 9 on the bottom left hand side (this would correspond with "Below Expectations" and "Develop at Current Level").
- 72 The boxes were given names and each box also has a definition as shown on page 1152. The names for the boxes were:-
- Box 1 – "Next Generation"
  - Box 2 – "High Impact"
  - Box 3 – "Highly Valued"
  - Box 4 – "Growth"
  - Box 5 – "Key"
  - Box 6 – "Effective"
  - Box 7 – "Unrealised Potential"
  - Box 8 – "Under Achieving"
  - Box 9 – "Under Performing"
- 73 The ratings for "potential" were kept secret from employees, although line managers were permitted to discuss parts of the succession planning process with those who reported to them. Although the Claimant did know about the 9-box grid because he would need to rate his own reports, he was not aware of his own position on the 9-box grid until he saw the disclosure in this case. He was aware of his performance ratings, but he was not made aware of his "potential" as perceived by those more senior than he was. This was known only to the members of the LET and to Human Resources.
- 74 The 9-box grid rating for a particular employee would be reached by the following process. It would start with a provisional rating given by the employee's manager, supported by a summary of the employee's strengths, development needs and career options. All the ratings would then be discussed by more senior managers in a meeting. In the case of senior lawyers the discussion would take place in the LET in a meeting called a "calibration meeting". Again such discussions would be confidential and the employee concerned would not be able to attend or provide any further input.
- 75 The Claimant's rating in the 9-box grid in March 2010 (based on 2009 performance) was Box 3 (that is "Highly Valued – Exceeds expectations + Develop at Current Level"). His provisional rating in December 2010 (based on 2010 performance) was the same, however this was changed to Box 6 (that is "Effective – Meets Expectations + Develop at Current Level") after the calibration meeting.
- 76 The Claimant's case is that the 9-box grid was biased in favour of the younger senior lawyers and was not reliable as an objective tool.
- 77 Specifically, looking at the 2010 final ratings on page 1145, the average age of all Band D lawyers given ratings on the grid was 52. Of the 18 lawyers on that

grid, 3 were regarded as then having potential for growth and all three of these were under the age of 50. Of the 15 Band D lawyers who were regarded as "Develop at Current Level" there were only 2 under 50, all the rest were over 50. The average age of the "Develop at Current Level" Band D lawyers was 54 ("Meets Expectations") and 53 ("Exceeds Expectations/Exceptional"), whereas the average age of the "Potential for Growth" Band D lawyers was 47 ("Meets Expectations") and 42.5 ("Exceeds Expectations/Exceptional"). On the face of this, it would appear that the younger lawyers in Band D were regarded as having more potential than the older ones.

- 78 On page 325 the 9-box grid ratings for the Band E lawyers are shown. This shows the same picture. Not all the ages are clear on our copy but it would appear that the average age of the "Develop at Current Level" Band E lawyers was 55 ("Meets Expectations") and 52 ("Exceeds Expectations/Exceptional"), whereas the average age of the "Potential for Growth" Band E lawyers was 48.5 ("Meets Expectations") and 46 ("Exceeds Expectations/Exceptional"), and the average age of the "High Upwards Potential" Band E lawyers was 41.
- 79 The argument that the 9-box grid is biased towards younger senior lawyers is supported by two further things. The first is the use of the words "Next Generation" in the 9-box grid. The natural and ordinary meaning of the words is related to age. The second is that the "Potential for Growth" line refers to people who have the capacity to go up one level "within the next 3 years" and the "Next Generation" box refers to people who have the capacity to go up two levels "within the next 5 years" (these appear in the description of how the 9-box grid works on page 333). So, it would appear on the face of it more difficult for a 60 year old to get into the "Potential for Growth" line, and much more difficult to get "Next Generation" box than it would for a 45 year old, bearing in mind the older employee might be regarded as approaching retirement.
- 80 As for the Claimant's qualifications for the roles, several of the witnesses praised the Claimant's skills as a lawyer and as a negotiator. They also praised him for his contribution to the development of the careers of less experienced lawyers – in this respect on 9 September 2010 Roy Burrows nominated the Claimant for the General Counsel Leadership Awards in the company. The Claimant had a proven record of dealing well with crisis situations and because of this he was asked to accompany Tony Hayward at a hearing of the House of Commons Energy and Climate Change Committee on 15 September 2010.
- 81 We do not agree with the submission made on the Claimant's behalf that the Respondent's witnesses denigrated the Claimant's contribution to the company.
- 82 As for the Claimant's technical ability to perform the roles, it is true as submitted on the Claimant's behalf that from 2000 to 2005 the Claimant had responsibility for the Grangemouth refinery and chemicals complex which was a "downstream" role. He had responsibility for the Respondent's Norwegian team based in Stavanger. And he had formed and managed the team of lawyers who supported the locally based Major Projects and Procurement lawyers in 2007. This was an international team based in Sunbury and Houston. Also between 1997 and 1999 he had headed up the international Gas and Power team while



based in London. This covered all of Europe and other areas such as Algeria. The Claimant also spent two weeks in Houston assisting in the immediate aftermath of the Macondo disaster in May and June 2010. This experience, including international experience was relevant to the roles he applied for.

- 83 We turn now to a comparison of the Claimant's qualifications for the roles as compared with those of Mr Drew (who was appointed to the Development role) and Mr McKim (who was appointed to the Production role).
- 84 We concentrate first on the flat performance ratings, that is to say ignoring any rating for potential.
- 85 In 2008 the Claimant was rated as "Exceeds Expectations", whereas Mr McKim and Mr Drew were rated "Meets Expectations".
- 86 In 2009 the Claimant rated "Exceptional" whereas Mr McKim and Mr Drew were rated "Exceeds Expectations".
- 87 So in both those years the Claimant did better in his ratings than the two candidates who were appointed. We also take into account the point made on the Claimant's behalf that Mr Drew was in a lower band than the Claimant.
- 88 In 2010 the provisional ratings were that the Claimant was again better than Mr McKim: the Claimant was provisionally an "Exceeds Expectations" and Mr McKim was a "Meets Expectations". After the calibration meeting the order was reversed, with the Claimant reduced to "Meets Expectations" and Mr McKim raised to "Meets Plus".
- 89 The 9-box grid ratings show a different picture. The rating applicable to performance in 2009 is on page 1148 and shows that Mr Drew was rated in Box 1 for that year at "High Upwards Potential (+2 levels)" and "Exceeds Expectations/Exceptional". Mr McKim was rated in Box 2 at "Potential for Growth (+1 level)" and "Exceeds Expectations/Exceptional". The Claimant was in Box 3 "Develop at current level" and "Exceeds Expectations/Exceptional". We note also that Lesley Billingham who filled the third new role that the Claimant did not apply for (that of Associate General Counsel Exploration), was also in Box 1 in that year.
- 90 In the following year, related to performance in 2010 the provisional ratings on the 9-box grid were the same as in 2010 for Mr Drew, Mr McKim and the Claimant. So at the time that Mr Bondy came to make his decision as to who to appoint to the roles that the Claimant had applied for Mr Drew had been Box 1 for two year's running and Mr McKim had been Box 2 for two years running. The Claimant's 9-box grid rating of Box 3 for two year's running compared unfavourably with these ratings.
- 91 There is an internal document (which was kept confidential and appeared on disclosure in this case) on page 213 in relation to the Claimant where against "Long Term Potential" is marked "n/a". The Claimant's belief that he had been

discriminated against on the grounds of age was naturally fuelled by this disclosure.

- 92 As for the psychometric tests, the Claimant's test was carried out on about 26 October 2010, which was before the decision was made by Mr Bondy as to who would fill the roles. Mr McKim's test was carried out on 30 November 2010 after the decision. Mr Drew's test had been carried out in July 2010.
- 93 The Claimant did do better in these tests in some respects. Comparison is difficult because the reports were not given in respect of the same role. But in particular the Claimant had a better score for "reasoning" than Mr McKim.
- 94 Mr Butcher carried out the MWM interviews. He saw Mr Drew in July 2010 in relation to the then role that Mr Drew was applying for (Associate General Counsel Corporate) which was a Band D role.
- 95 We accept the Claimant had spent a longer time than Mr McKim in Band D, and a much longer time in Band D than Mr Drew. We accept that Mr McKim's international experience was confined entirely to the USA, however this was a major requirement for the new roles.
- 96 Both the jobs the Claimant applied for being Associate General Counsel jobs, involved promotion to the Legal Executive Team and therefore were more senior positions than the Claimant's current job. However the Production job was also intended to be a Band C position.

**Difference in process between the Claimant and Mr McKim and Mr Drew**

- 97 It is submitted on the Claimant's behalf that the Claimant's application for the two roles was not dealt with the same way as the applications made by Mr Drew and Mr McKim. It is said:-
- (a) that these differences arose because in reality the Claimant had been ruled out from the outset, or alternatively because Mr Bondy and Human Resources sought adverse reports on the Claimant which could be used as an excuse to reject his application; and
  - (b) in any case the differences in the recruitment process should lead us to regard the burden of proof as shifting to the Respondent.
- 98 There were several differences in the process between the Claimant's application and those of Mr Drew and Mr McKim. The two most important of these concern Mr McKim and are that:-
- (a) The Claimant was required to attend an interview with Mr Butcher of MWM whereas Mr McKim was not.
  - (b) The Claimant was required to attend a psychometric test and interview with Mr Sharrock of YSC whereas Mr McKim was not, despite his existing YSC report being 29 months' old.
- 99 MWM (MWM Boardroom Consulting LLP) is an external high level executive search business. Mr Butcher is a partner in the business. It is independent from the Respondent, although it does get a lot of business from it. MWM



assists the company in finding external candidates to fill specific roles, and also MWM assesses internal candidates for specific vacancies and for promotions.

- 100 It is true that Mr Butcher of MWM did not see Mr McKim. However he did see the Claimant (on 27 October 2010). Mr Butcher also saw the two internal candidates Roy Burrows (on 14 July 2010) and Mike Drew (on 17 July 2010), and two external candidates. On the face of it, it does seem odd that Mr McKim was not asked to see Mr Butcher, or rather as it was put to Mr Bondy in cross examination, why the Claimant was asked to see Mr Butcher at a time when it was known that Mr McKim was not going to see him, and we would look to the Respondent to explain this difference in treatment.
- 101 YSC (Young Samuel Chambers Ltd) is a leadership development practice which assesses candidates for leadership positions. Mr Sharrock is its Managing Director. YSC is independent from the Respondent, although it does get a lot of business from it. The YSC assessment is a 4 to 4½ hour dialogue with the candidate which includes conducting a psychometric test to test a candidate's intellect and personality traits. A report is then produced giving the candidate's strengths and weaknesses.
- 102 Mr McKim had a YSC assessment on 12 June 2008. This was a development report designed to elicit key strengths and areas of development in the context of a Band-E role in Alaska. It is said that this assessment was out of date and for a different role and therefore Mr McKim should have been assessed again, and it was strange that he was not.
- 103 We don't agree that the report was too old to be valuable. Mr Sharrock considered such assessments had a "shelf life" of around two years, and in his opinion the report would still have been valid. We accept this. And we accept the evidence that the report is largely an assessment of personality which does not rapidly change.
- 104 The Claimant had never been assessed by YSC, and this is why he had to undergo this assessment. Mr Drew was assessed by YSC in July 2010. This assessment of Mr Drew was inevitably for a different role, since at that time the role for which he was appointed was not yet in existence.
- 105 We accept that Mr McKim's report was a less valuable assessment of Mr McKim that it otherwise would have been because it was based on his Band E role. In this respect we note that on page 53 the report states that "you shouldn't compare the ratings of band D with a level E". Mr McKim was applying for a post which was to be on Band D or more likely on Band C. On the face of it therefore there was a difference in treatment between the Claimant and Mr McKim and we look to the Respondent for an explanation of this.

**EHRC Code of Practice or otherwise good practice**

- 106 On the Claimant's behalf Mr Stiltz put to several of the Respondent's witnesses, and also submitted to us that there were a number of instances where the EHRC Code of Practice was not complied with. In particular he said, that there was no job description for the roles that the Claimant applied for and no person

specifications. Whilst we accept that it might be good practice to have such documents prepared for use during a recruitment process, we do not read the Code of Practice as requiring them. Instead, the emphasis of the Code is that if they are used, they should be written in such a way as avoids discrimination (see paragraphs 16.4 to 16.10 of the Code).

- 107 In any case we accept the Respondent's evidence that the descriptions of the three separate roles were well understood by those who were to make the decisions about the appointments and indeed by the applicants for these posts themselves, at least the internal ones. This was facilitated by the fact that the three roles concerned were carved out of one role, for which a job description had been written. Also the "Leadership Framework" was available and understood by all involved. It was effectively a person specification for the leadership aspect of the roles (page 302).
- 108 We accept that the code recommends that job criteria should be capable of being tested objectively (paragraph 16.15), that a standardised process is best to avoid discrimination (paragraph 16.32), that processes are fair objective and consistent (paragraph 16.44) and preferably to use the same members of staff to assess each candidate (paragraph 16.47). Assessments should by reference to a particular job (paragraphs 16.52 and 16.53). And every candidate should take the same test (paragraph 16.53).
- 109 The Code of Practice also recommends that the employer should keep records to justify their decisions (paragraph 16.44), and that such notes should include those of assessors, decision makers and selection panels (paragraphs 16.46 and 16.53).
- 110 There were no notes of interviews and few notes taken of the recruitment process for the roles and decision making in respect of those roles and also in respect of the change in rating from "Exceeds Expectations" to "Meets Expectations". This means that the process was not transparent.

#### **Equality Act questions**

- 111 The Equality Act 2010 questions are in the bundle at pages 1557 to 1575. They were sent to the Respondent by email on 21 April 2011, together with a subject access request under the Data Protection Act 1998. It was agreed in correspondence between the two sides that the due date for the response was 16 June. On 9 June 2011 the Respondent's solicitors wrote back to say that they would endeavour to answer the questions by that date (page 1576).
- 112 However, on 17 June the Respondent's solicitors wrote saying that they noted that the content of section 6 of the questionnaire and the questions in section 8 were very similar to the allegations in the Claimant's grievance, and in the circumstances they regarded it as inappropriate to respond substantively to the questions until the grievance investigations and deliberations had been concluded. They did however, respond to that part of the questionnaire which they did not consider to be part of the grievance process. On 5 August 2011 the Respondent replied to the remaining questions.

- 113 The Tribunal has not been provided with particulars of the complaint made by the Claimant in this respect. We take it that a complaint is made that some of the questions were answered 1 day later than they should have been and the remainder of the questions were answered 7 weeks later than they should have been. Unfortunately we have not been told what questions were answered on 17 June and what questions were answered on 5 August 2011.
- 114 In the bundle on pages 777 to 1026, the answers to questions 23 to 28 appear. The answer to those questions were given partly in words and partly in a large number of spreadsheet pages (the number can be seen from the page numbers above). These answers are undated. We do not know whether these were the answers given on 17 June or 5 August. It is clear, however that there was a considerable amount of work required to produce these answers.
- 115 We do not know whether it was a decision of the Respondent's solicitors not to answer the questionnaire in full by the due date, or whether this was done on instructions, or whether the Respondent was under pressure because of the Macondo incident as submitted on the Respondent's behalf. Irrespective of the answer to this, we do not agree with the view expressed in the Respondent's solicitor's letter of 17 June 2011 that it was inappropriate to respond substantively to the questions until the grievance investigations and deliberations had been concluded. Whilst we appreciate that one process might inform the other, the two processes are separate and there is nothing wrong with the company giving answers to a questionnaire subject to the outcome of the grievance, or giving answers which might have to be amended in the light of the outcome of the grievance. The Claimant's solicitors did not consent to the delay. Indeed, they were not even asked to consent to it. Instead the Respondent's solicitors simply reported their decision not to provide full answers. And the proceedings were well under way, so it was important that the Claimant had the information he sought as early as possible. In the view of the Tribunal, the letter of 17 June 2011 demonstrated a high handed attitude which at first sight, reflects badly on the Respondent.

#### Other matters

- 116 It was submitted that the evidence about the date of the receipt of the YSC report on the Claimant is incredible but we disagree. It does appear to be the case that Mr Shuster, the Human Resources Director, is correct that he had a copy of the Claimant's YSC report in advance of Mr Bondy. We can see that on 3 November 2011 it was sent by Caroline Gadd who is part of the company's internal Human Resources team to Mr Bondy and to Sarah Ward (page 1222). We find nothing strange about this timing. It is understandable that Mr Shuster wanted to remain in control of the procedure and release the report when he was ready to comment upon it.
- 117 It was submitted that the fact that Mr Bondy relied upon discussions with Mr Shuster rather than his own reading of the YSC report to reach his final view, demonstrates that Mr Bondy had already finally made up his mind prior to 3 November. We don't accept this. Mr Sharrock and Mr Shuster were experts in their field. Mr Sharrock had prepared the report and Mr Shuster had read it. Mr Bondy was entitled to listen and accept Mr Shuster's précis of the report.

118 It is said on the Claimant's behalf that there was a striking difference between the amount of enthusiasm expressed by Mr Bondy in reacting to the applications of the Claimant for the Production role compared with his reaction to Mr McKim. Mr Bondy told us in evidence that he was particularly cautious not to encourage the Claimant to the belief that he had got the role already, because he believed the Claimant was capable of such optimism that he might think this. We accept this explanation, and it explains also the terms of the emails at the time. Hence we do not think there is anything in this particular point.

119 There is a reference on page 633 (during Mr Hood's investigations into the grievance) of a discussion between Mr McKim and Mr Bondy as to whether it might be best for the Claimant to leave the company. This discussion was at the time when there were without prejudice discussions between the Claimant and the company. We do not know the content of these discussions, but it could well be that they involved the Claimant's departure from the company. We can see from the email from Mr McKim to Mr Bondy on page 633 that the Claimant had threatened to resign if he received only a "Meets Expectations" rating. Mr Bondy told us, and we accept that they discussed this. At the time Mr McKim was finding it difficult to manage the Claimant, having become his line manager as a result of his promotion to the Production role.

120 It is said to be "telling" that Bernard Looney was not called to give evidence. Mr Looney gave the Claimant glowing reports and he thought very highly of the Claimant's abilities. We do not agree that any significance can be attached to the fact that Mr Looney was not called. It has never been said by the Respondent that the Claimant is anything but a highly skilled lawyer. There was no need to call Mr Looney.

**Whether the burden of proof shifts**

121 In this case we do regard the burden of proof as shifting to the Respondent. The particular facts from which we could decide in the absence of any other explanation that the Respondent had committed an act of discrimination are:-

- (a) The age demographics showing the age differences between senior lawyers in US and UK and the promotion and leaving age statistics.
- (b) While we were not convinced that it is correct that the Claimant was better qualified than Mr Drew and Mr McKim for the roles that the Claimant applied for, we were concerned by the age differences in the 2010 final 9-box grid (page 1145), and by the 9-box grid for Band E lawyers (page 325), by the use of the words "Next Generation" in that grid and by the fact that the Claimant's long term potential was given as "n/a" (213).
- (c) The fact that the Claimant was asked to attend for a YSC assessment and an MWM interview and Mr McKim was not.
- (d) Non compliance with various parts of the EHRC Code of Practice or matters of good practice as set out above.
- (e) The lack of transparency in the 9-box grid system (because the assessment of "potential" was kept secret from the

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employees), lack of transparency in the recruitment process, and in the decision to down rate the Claimant.

- (f) The failure to answer the Equality Act questions on time, and providing an unacceptable explanation for not doing so.

122 We take these above categories as a whole and they are enough for us to regard the burden of proof as shifting to the Respondent.

123 At this point we need to clarify precisely what we are looking to the Respondent to prove. In this regard we remind ourselves of the provisions of s136(3) of the Equality Act 2010 and of the Directive, and we look to the Respondent to prove on the balance of probabilities that there was no discrimination in any way whatsoever.

124 This is not the same, as was at first submitted to us by Mr Stilitz in his final submissions, as deciding whether the Respondent's alternative explanation for its detrimental treatment of the Claimant "stands up". The difference is that it seems to us that an employer might fail to explain some detrimental treatment. It is only if the unexplained detrimental treatment is because of age that the employer fails at this second stage.

125 It is common ground between counsel that it is possible, and possibly also that it is the correct approach where there is more than one act of discrimination alleged, for a tribunal to consider for each such act of discrimination whether to regard the burden of proof as shifting. Therefore, it is said, it is possible to have the burden of proof shifting in respect of some causes of action and not others.

126 In this particular case, the facts which we have found above from which we could decide in the absence of any other explanation that the Respondent had committed an act of discrimination, are prima facie support for the Claimant's allegation that there was an ageist culture in the company and that there was a desire, decision or policy to remove him or to make his life difficult because of age.

127 Because of this, we think it is right to regard the burden of proof as shifting to the Respondent in respect of all four allegations of less favourable treatment. This is because the prima facie case established by the Claimant goes to all those allegations.

128 Again we should clarify what we are looking to the Respondent to prove. We look to the Respondent to prove on the balance of probabilities that there was no discrimination in any way whatsoever. In this particular case, proof of this would also incidentally satisfy us and would probably require proof that there was no desire, decision or policy to remove him or to make his life difficult because of age. But we do not look to the Respondent to disprove that there was an ageist culture in the company. This is not required by the statute and there may be obvious forensic difficulties in attempting to prove this as we explain below.

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### The Respondent's explanations

#### **Age demographics and other statistics**

129 As for the age demographics showing the age differences between senior lawyers in US and UK and the promotion and leaving age statistics (a) above, we certainly think they cannot be ignored but there was some debate in the hearing about how they should be considered.

130 Concentrating on the difference between the ages of senior lawyers in the US and the UK, if it is right to have regard to the UK figures as separate from the US figures then they are more significant because UK senior lawyers are young compared with senior managers in the company as whole. But if they should be considered together then they are less significant because the addition of the more elderly US lawyers make the figures appear to be better balanced. We had evidence which we accept, that recruitment was carried out with a global view, and that the incumbents of these posts were managed globally. Structurally, the specialist teams were all regarded as having global roles, although they would be based in a particular geographical place. Those heads all reported directly to Mr Bondy. Senior managers were recruited for global positions and expected to work wherever their services were required. They had better promotion prospects if they had experience in other countries or had had global roles previously. Also the company structure was global in the sense that the operating divisions had global functions and responsibilities and the legal function was providing support directly to those divisions. These matters may have led us to the view that we should have regard to the overall age demographics of the company and ignore the differences between the US and the UK.

131 However, the Claimant's explanation for the difference was that he thought it was because US discrimination law was more draconian than the law in the UK (the implication being that the company was more careful not to breach those laws but did breach UK laws). The Claimant supported this by expert evidence about discrimination law in the US (a letter from Epstein Becker & Green) the contents of which was accepted by the Respondent and received in evidence. This shows that US discrimination laws were introduced in 1967, whereas in the UK it was 2006. In the last two decades the number of age discrimination claims in the US has increased substantially, and at 23,264 claims in 2010 has almost reached the number of claims brought for sex discrimination as two-thirds the number of race claims. There are subtle differences in the law between the US and UK and more significant difference in the procedure which is followed for such claims.

132 If the Claimant is right, then the UK statistics should be considered separately and this would tend to indicate that there had been some age discrimination occurring. The statistics showing the ages of the senior lawyers who had been promoted and of those who had left would also support this notion. They would appear to be linked, and to have resulted in the picture as at April 2011.

133 However, in evidence the Claimant had another theory about the figures - he thought that the US based lawyers tended to work to an older age for cultural

reasons. We note that this is something raised by Lord Browne in his speech on which the Claimant relied. If this theory is correct then the figures would have far less significance for this case.

134 On the Respondent's side there was evidence that in Mr Bondy's restructuring of the legal teams which involved the removal of a layer of management, four senior lawyers left aged 56, 56, 58 and 50. These were Band C lawyers who he said were just lawyers managing other lawyers. And of the 60 lawyers who left the company between 2009 and 2011, some 43 of these were over the age of 50. It was submitted for this that the reason was that there was a "stampede" to the exit because of changes in UK pension law and company pension arrangements which made early retirement highly beneficial for these leavers. There was evidence to support this proposition. There was also evidence that the company through acquisitions in the US had taken over employees on a variety of pension schemes

135 Despite all the evidence about these statistics we not in a position to determine why there are the differences in the ages of senior lawyers in the company between the US and the UK, nor to say why the vast majority of the lawyers who left were over 50. To test the theory submitted on behalf of the Respondent would have entailed a study of the ages of UK based lawyers over a number of years and a study why they left or why they had not been promoted, together with a study of the various pension schemes, to enable us to understand historically how today's figures had been reached. To test the ageism theory submitted on behalf of the Claimant would have entailed a similar exercise with respect both to the UK and to the US lawyers. This was not identified as an issue in the CMD or by the parties who have concentrated on other parts of the case.

136 This means that we have been left without any explanation (proved on the balance of probabilities) for these statistics. That lack of explanation in itself does not mean that the Respondent has committed the age discrimination alleged.

#### **Differences in process**

137 As for the reason why the Claimant was asked to see Mr Butcher at a time when it was known that Mr McKim was not going to see him, we accept Mr Bondy's explanation for this. This explanation is supported by the evidence of Mr Butcher himself. What happened is that Mr Butcher was engaged at an early stage - in May 2010 - in respect of the senior legal role as it then going to be, that is the Associate General Counsel Exploration and Production. This is the role that was later divided into three separate roles.

138 As part of this assignment Mr Butcher prepared a job description and people specification and set to search for external candidates and to assess the internal candidates.

139 The Claimant had put his name forward for that role, and had been informed by Mr Bondy in an email on 16 September 2010 (page 1173) that he would need to

see MWM. Soon afterwards on 20 September 2010 Mr Bondy's secretary contacted Mr Butcher's office to sort out potential interview dates.

140 Mr Butcher found two external candidates and interviewed them for the Associate General Counsel Exploration and Production role. He also interviewed Roy Burrows for that role, and interviewed Mike Drew for that role and another role which he was interested in, Associate General Counsel Corporate. Mr Burrows and Mr Drew were both internal candidates.

141 There came a point during this recruitment assignment when Mr Bondy made a final decision that the role for which Mr Butcher was recruiting, would in fact be split into three so that it was allied with the new divided upstream business operations in exploration, development and production. This final decision was made soon after the public announcement about the business re-organisation which was on 29 September 2010. However, within the company these changes to the legal function were kept highly confidential. Thus to the outside world the recruitment for the Associate General Counsel Exploration and Production role was going ahead. Mr Butcher did know about the proposed changes, but the changes were not officially confirmed to him until 5 November 2010 and were formally announced on 10 November 2010.

142 The Claimant did not see Mr Butcher until 27 October 2010. On that date they both knew that it was unlikely that the Associate General Counsel Exploration and Production role would be proceeded with. Nevertheless the interview proceeded as one for that role. The reason why Mr Bondy allowed the MWM interview with the Claimant to proceed in these circumstances was threefold. Firstly he wanted everybody who had applied for the Associate General Counsel Exploration and Production role to go through the same process, so that they were all treated in the same way. This was particularly important bearing in mind there were external candidates who had applied for this role. Indeed as it turned out, it was the two external candidates that were shortlisted for this role. Secondly he did think that Mr Butcher's opinion on the Claimant and a comparison with the other candidates would be useful when considering the Claimant for the two jobs in Development and Production. Thirdly, by the time a decision had to be made about whether to allow the MWM interview to go ahead Mr Bondy had already had some adverse feedback about the Claimant's people and leadership style and he wanted this to be assessed by an expert who was independent of the company.

143 The reason why Mr McKim was not put through the MWM interview process was that Mr McKim's application was not for the role than MWM was dealing with. He applied for the Production role in mid-October 2010 after it became known to senior lawyers on a confidential basis that the Associate General Counsel Exploration and Production role would be split into three. So he never applied for the Associate General Counsel Exploration and Production role. We take into account here that the MWM interview was role specific, so it would have been strange to have sent Mr McKim to see Mr Butcher for assessment for the wrong role. This was especially so bearing in mind that Mr McKim was an internal candidate only so he was not being measured against external candidates. A further reason for Mr Bondy's decision not to send Mr McKim for



an interview with Mr Butcher was that unlike the Claimant he had not had any feedback about issues with Mr McKim's inter-personal skills.

- 144 On the question why Mr McKim's YSC assessment was not re-done bearing in mind it was more than two years' old and was referable to development in a Band E role, Mr Bondy's decision not to put Mr McKim through another assessment was based on advice from Human Resources. From that advice Mr Bondy assumed that the existing YSC report was sufficient. Mr Bondy understood the rule to be that all candidates should have a YSC assessment. He had the existing report for Mr McKim already, although it was not ideal. As it turned out, that advice from Human Resources was incorrect. As soon as Sarah Ward came back from her leave this error was corrected and Mr McKim was asked to undergo a further YSC assessment. This was necessary because he had been (or was about to be) promoted from Band D to Band C, and a fresh YSC report was required for all such promotions. By that time he had already been appointed to the role, although the re-grading of the role to Band C was put on hold until the YSC assessment was done.
- 145 We do not agree with the submission made on the Claimant's behalf that Mr Bondy and Human Resources, having already decided that the Claimant was too old for the role, influenced Mr Butcher and Mr Sharrock to produce adverse reports on the Claimant which could be used as an excuse to reject his application.
- 146 It is said that this is supported by evidence that at some stage the Claimant was "ruled out" for the job. We do think that Sarah Ward said this to Mike Hood who interviewed her during the grievance process (page 554). But we are unable to see the "stage" that she is referring to from the context of this statement in the interview. It was submitted that, from the context, it was when Mr McKim would otherwise have seen Mr Butcher. We are somewhat doubtful about this since as we have said above it would have been inappropriate for Mr Butcher to see Mr McKim. But even if this was the time when the Claimant was "ruled out", this was very late in the process, just a few days before the final decision was announced. It certainly does not indicate that the Claimant was ruled out at the outset as has been submitted on his behalf.
- 147 In any case we do accept that anything was said to Mr Butcher and Mr Sharrock by Mr Bondy or Ms Ward which was designed to influence them or was capable of doing so. And we cannot see that anything said could have had any effect upon the results of the psychometric testing carried out by Mr Sharrock since in these tests the results were produced automatically from the Claimant's answers.
- 148 Mr Bondy's final decision on these appointments was not made until 3 November 2010. We do not accept that his final decision was made any earlier, although he did favour Mr McKim for the Production role earlier than this.

**Ages of people in the 9-box grids**

- 149 As for the differences in ages of the people in the 9-box grids on page 325 for Band E lawyers and on page 1145 for Band D lawyers, it is true that the words

"Next Generation" have an ordinary meaning which is age related. We accept the Respondent's evidence that these words were not used intentionally to encourage age discrimination, but we think little thought was given to this as a possible result. It would appear that the words were used by Human Resources in their more technical sense of a group of people capable of taking over from current incumbents in the higher positions. We do agree with the submissions made on the Claimant's behalf that the 9-box grid system does have an age bias, because it is natural that as someone approaches retirement age it will be more difficult for them to be regarded as having future potential in the way this is defined for the purposes of the grid. This is a natural result of succession planning carried out at such high levels where the employees are naturally older than the average age of all employees. This case is not about whether there is any justification for the 9-box grid. It was one of the things which caused us to regard the burden of proof as shifting to the Respondent, and we have naturally taken it into account when considering whether the Respondent had discharged that burden.

150 However, the 9-box grid rating was not an absolute decider of applications, but instead it was used as an important tool in deciding who was to be placed in particular roles. This is clear from the serious consideration that was given to the Claimant's applications for the two roles despite the fact that he had been Box 3 on the 9-box grid for two years (compared with Mr Drew and Mr McKim being Box 1 and 2 respectively for two years). It is said that the consideration of the Claimant's applications was merely window dressing, but we do not accept this. We accept the Respondent's evidence that his application was given serious consideration and it was not contrived.

151 As for the document on page 213 showing the Claimant's "Long Term Potential" as "n/a", again this was an unfortunate use of words. "N/a" was inserted because the Claimant was rated as "Develop at Current Level". It meant as explained on page 333 that although the employee may be capable of developing into roles of greater complexity, at that time and in the next 3 years the Claimant was most likely to develop within his existing role or a role of a similar level.

152 As for the lack of transparency in the 9-box grid system because the assessment of "potential" was kept secret from employees, lack of transparency in the recruitment process, and lack of transparency in the decision to down rate the Claimant, this is largely accepted by Respondent.

153 The Respondent offered an explanation for some of the defects in processes, that is that things may not have been done as well as they should have been because of the crisis situation in the company because of the Macondo disaster. However, this cannot explain the lack of transparency.

**Reason why the Claimant was not appointed**

154 We turn now to the reason why the Claimant was not chosen to fill either the Associate General Counsel Production or the Associate General Counsel Development roles despite being qualified for these roles. The final decision in both cases was made by Mr Bondy.

- 155 As far as the Production role is concerned, we accept Mr Bondy's explanation why he appointed Brad McKim for this role and not the Claimant. While he regarded the three main contenders (the Claimant, Brad McKim and Roy Burrows) as broadly comparable in terms of their experience and technical competence, he did value more highly Mr McKim's extensive US experience, which the Claimant did not have since his experience was mainly in the North Sea. This was because the principal legal challenges likely to be faced in the role were in the US.
- 156 As far as the Development role is concerned, we accept Mr Bondy's explanation why he appointed Mike Drew to this position and not the Claimant. He regarded the Claimant and Roy Burrows to have more experience and technical expertise than Mr Drew. However Mr Drew had a good track record of rapid learning and his international experience including the UK, Russia and Canada was a plus factor. Mr Bondy took the views of Bernard Looney about whether Mr Drew or the Claimant should be considered for this role. Mr Looney met Mr Drew for this purpose but he already knew Roy Burrows and the Claimant well. Mr Looney preferred either Mr Drew or the Claimant over Mr Burrows, and whilst he thought there were "issues" with the Claimant he thought these were "coachable".
- 157 Mr Bondy took into account the feedback from Anne Drinkwater Head of the Canadian business, who was very positive about Mr Drew's leadership and teamwork skills. Whilst Mr Bondy was aware of Mr Butcher's view that Mr Drew was not ready for promotion to a role which reported to the LET, Mr Bondy considered that things had moved on since Mr Butcher had seen Mr Drew in July 2010.
- 158 Mr Bondy considered Mr Drew's YSC report on July 2010 which was much stronger than the Claimants in the "energising people" aspect of the Leadership Framework ratings which he regarded as especially important for the role in question.
- 159 The main reason why the Claimant was not appointed to either role was that by reason of his personality he was considered not to be readily capable of working collaboratively and working in a team. This was central requirement for both roles in order to provide the legal services effectively. This is a requirement referred to in the "Leadership Framework" which was a known specification for all leaders. There was a need for teamwork within the LET itself and with the other senior teams, and many other people and organisations. The appointee would also need to be a role model for their own staff. To appoint the right person therefore entailed a judgement of each candidate's natural ability to work and mix with others, whilst at the same time to command the respect of the team.
- 160 Mr Bondy thought that of all the candidates for the two roles, Mr McKim was the strongest candidate in this area. His impression of the Claimant was that he had a strong sense of self-worth and entitlement and that he was not necessarily prepared to listen to others. Mr Bondy thought also that Roy

Burrows had weaknesses in this area. These were Mr Bondy's own views knowing the Claimant and the other candidates as he did.

- 161 In making his decision as to which person to appoint, Mr Bondy took into account the views of other people too. Jack Lynch who used to manage both the Claimant and Mr McKim, recommended Mr McKim over the Claimant for the Production role because Mr McKim's international experience suited it better and because of doubts about the Claimant's collaborative and leadership skills. He did not recommend to Mr Bondy that the Claimant should be appointed to either role.
- 162 Bob Fryar was most positive about Mr McKim and least positive, indeed negative about the Claimant when giving his view to Mr Bondy. He formed his view after fairly long interviews with them both. His reason for his view was firstly that Mr McKim had a broader understanding of different geographical regions than the Claimant, secondly that Mr McKim had experience in Alaska which he thought was going to be very valuable in the new role, and finally that his personality better suited the role.
- 163 Jeff Heller, Head of Global Employment Team, had a significantly negative impression of the Claimant's behaviour. This arose from an incident when (according to Mr Heller) the Claimant had been rude and offensive about Jo Pawley of the Employment Team and that subsequently in February 2010 when he spoke to the Claimant about this, the Claimant had made inappropriate comments to him and showed no contrition.
- 164 Sarah Ward of Human Resources reported to Mr Bondy that a number of people including herself, had found the Claimant's behaviour at the Houston conference in early October 2010 to be arrogant and dismissive and that the Claimant had acted in a disruptive fashion by undermining Roy Burrows in front of his team in a leadership session. She reported that Maryann Clifford who was a member of the LET had asked "who on earth is that guy?", and said that the Claimant had been derailing and dismissive in sessions including a Diversity and Inclusion session.
- 165 Mr Bondy was aware that Mr Sharrock who made the YSC report did not regard the Claimant as the best candidate for either of the roles. Whilst Mr Sharrock found the Claimant to be direct and clear thinking he did not think he was skilled at working with and through others. In particular the Claimant did not have good listening skills, something necessary in a leadership role at the level concerned. Mr Sharrock described some of the results of the psychometric tests as quite "extreme".
- 166 Mr Butcher conducted the MWM interview and sent his assessment to Mr Bondy on 29 October 2010 (page 1217). Of all the individuals to assess the Claimant Mr Butcher held the strongest views about him. He found the Claimant to lack self awareness and that he came over as very self-important. This was so stark that Mr Butcher was surprised that the Claimant had lasted with the company for so long. He felt strongly that the Claimant was not suitable for the role for which he was assessing him (the Associate General Counsel Exploration and

Production role). He recommended to Mr Bondy that the Claimant should not be shortlisted for this role.

167 Mr Shuster the Group HR Director did not know any of the candidates well, but he read the available assessments and the YSC report on the Claimant and then spoke to Mr Bondy. He recommended that Mr McKim should be appointed to the Production role and Mr Drew to the Development role. He had been "alarmed" by certain themes in the Claimant's YSC report. It was troubling that he wanted to be "centre stage", and there appeared to be a lack of self-awareness and self-management which was necessary for leaders to possess. He considered that the Claimant needed to develop his skills in motivating and inspiring others to succeed, fostering effective teamwork and collaboration and listening for and integrating diverse prospective. These were all key requirements for the roles concerned.

168 In so far as we have heard from those who expressed views about the Claimant's personality and suitability for a senior leadership role to Mr Bondy we accept their evidence and accept that they held genuine views. We found nothing in this evidence which tended to show that the view was held because of age.

169 In accordance with our findings, Mr Bondy's decision would appear not to be "because of age". However we remind ourselves that we have not had a full explanation for some of the things which caused us to regard the burden of proof as shifting to the Respondent. Whilst the standard of proof that the Respondent has to meet remains that of "the balance of probabilities" we must balance the quality of the Respondent's evidence showing that there was no discrimination whatsoever, with the fact that some of the things remain fully unexplained.

170 And we also remind ourselves again that discrimination can be unconscious. There may be inner held views which cause a person to act in the way they did. We have considered this, but we rule it out because of the number of people in the organisation who genuinely held the same view as Mr Bondy – Mr Lynch, Mr Fryar, Ms Ward and Mr Shuster, and those from outside the organisation who also held the same view: Mr Sharrock and Mr Butcher.

#### **Change of 2010 rating**

171 As for changing the Claimant's rating for 2010 from "Exceeds Expectations" to "Meets Expectations", this was a direct result of the discussion in the calibration meeting of 21 January 2011 in which the senior Group Leaders participated. The meeting was designed to discuss whether the provisional ratings assigned to particular employees were correct. At the meeting, Mr Heller expressed ongoing concerns about the Claimant's behaviour, and Mr Lynch expressed his concerns about the Claimant's relationship with the UK Employment Law team. Sarah Ward expressed concerns about things that had happened in the Houston conference in October 2010. Because of the concerns about the Claimant's behaviour the tenor of the meeting was that he ought not to be rated as "Exceeds Expectations" but he should be reduced to "Meets Expectations". This also tied in with the desire of the meeting to raise two people from "Meets



Expectations" to "Exceeds Expectations" for their excellent work for the company over the year. There was a quota for each rating category called the Guided Distribution for Ratings. The quota was suited to the function concerned. Legal and Compliance had a quota of 38% of Group Leaders in "Exceeds Expectations" or "Exceptional" ratings. Mr Shuster's approach as Group HR Director was that these quotas should be kept to. Since the meeting wished to recommend that those two people should have their rating increased, it meant that two would have to have their rating reduced in order to stay within the quota.

172 The calibration meeting was only advisory. Mr Bondy had the final say with the assistance of Human Resources.

173 We note that in the years leading up to 2010 the Claimant had always been above "Meets Expectations". It was therefore unfortunate that he should receive a lower rating in a year when he had achieved some very good results. It is also unfortunate that the behavioural issues which resulted in his reduction in rating were never raised with him directly, except by Jack Lynch on two occasions. On the other hand we appreciate that the Claimant was aware of concerns expressed about his behaviours by those who reported to him in the 2008 360° report, which he discussed with them and tried to deal with.

174 We also note that in his email of 9 February 2011 Mr McKim (who had by that time become the Claimant's line manager) stated that he was impressed with the Claimant (page 1397). However in the same email we note that Mr McKim supported the result of the re-calibration, bearing in mind the work that others had done as referred to above.

175 The Respondent's explanation has satisfied us that the decision to reduce the Claimant's rating was not because of age. But there is something other than the Respondent's explanation of what happened here which demonstrates that the decision to change the ratings was not to do with age. One other aged 48 was also reduced from "Exceeds Expectations" to "Meets Expectations" and so was younger than the Claimant who was aged 54. Two had their ratings increased from "Meets Expectations" to "Exceeds Expectations" and they were aged 49 and 56 respectively and so one was older than the Claimant. And the only Group Leader to achieve an "Exceptional" rating in 2010 was Jack Lynch aged 59.

176 We agree that there was no explanation why Mr McKim's 2010 performance rating was increased from "Meets Expectations" to "Meets Plus" after the calibration meeting. We take that into account but it does not alter our view of the matter.

#### **Removal of some responsibilities**

177 We accept the Respondent's evidence that the removal of the Major Projects and Procurement work from the Claimant's existing role was a natural result of the restructuring of the business. It was not part of any desire, campaign or policy to cause detriment to the Claimant. And we are satisfied that the decision was not because of age.

**Other considerations**

- 178 There are other things which have emerged in the evidence other than the Respondent's explanation of what happened here which also tend to demonstrate that none of the claims of unfavourable treatment were because of age.
- 179 The first is that the information about candidate's age was not promulgated to the decision makers and advisers. In particular Mr Bondy was not aware of the age of any of the candidates for the Development and Production roles including the Claimant. Whilst we would expect Mr Bondy to have made a fair guess at their ages, the fact that he didn't bother to find out their ages tends to support the view that he was not concerned about that.
- 180 This point is more important in the case of Mr Shuster the Group HR Director who formed a clear view from the assessments who was more suited to the roles. He was fairly new to the organisation and he didn't know any of the candidates well. He did not know their ages.
- 181 Mr Sharrock who carried out the YSC assessment on the Claimant was not aware of his exact age, but he assumed an age for the purpose of the test (there is an age correction on the ability test which was in the Claimant's favour).
- 182 Mr Fryar who interviewed both the Claimant and Mr McKim, and recommended Mr McKim to Mr Bondy thought they were both in "their fifties".
- 183 The second is that Mr Bondy demonstrated that he took Diversity and Inclusion seriously. He led the steering group and pressed ahead with the survey. When the survey showed certain "themes" which should the perception of some employees was that the company was not operating in accordance with modern thinking, he described the results as "deeply concerning" and undertook to deal with the matters raised (page 1204).
- 184 The third is that Mr Bondy promoted senior lawyers on other occasions when they were roughly the same age or older than the Claimant. An example is Jack Lynch who was promoted to Associate General Counsel for Exploration and Production and Integrated Supply and Trading, and General Counsel to the Board of BP America. Mr Lynch was aged 56 at the time. And Mr Bondy appointed Mr McCormack to the position of head of the Global Group Compliance and Ethics team, at the age of nearly 57 at the time of appointment. He promoted Jim Neath age 51 and Jeff Heller age 52 to head specialist teams, and Mark Snell to Associate General Counsel for Alternative Energy at age 52. And he promoted Maryann Clifford to join the LET and to take on additional responsibilities at the age of 60. Mr Bondy's favoured external candidate for the Associate General Counsel Exploration and Production role was aged 56. The Claimant's answer to all the above is that most if not all of these appointments and promotions were based in the US, but in fact there is nothing to show that Mr Bondy was treating US based lawyers any differently from those in the UK.

185 In the letter written to the Claimant and which gave him his final 2010 ratings, Mr Bondy wrote as follows:-

"John

Thank you for the significant contribution you make & you are a real asset to BP and long may it continue.

All the best

Rupert"

We think this rubric adds support to the Respondent's case that there was no intention, desire or policy to try to remove the Claimant from their employ.

186 In addition to the above we think it is significant that on 15 March 2011 the Claimant was offered a retention bonus worth 50% of his annual salary. The nature of this bonus was that it provided benefits to the Claimant but only if he stayed with the company for three more years. This indicates that the company was anxious to retain his services for that length of time and tends to show there was no desire, campaign or policy to act unfavourably towards him to try to remove him from the company.

187 For completeness we add that we do not regard any of the differences in the processes through which the candidates for the roles that the Claimant applied for as having happened because of age. And no omissions or errors in the recruitment process which we refer to above, were less favourable treatment because of age. We think that these omissions and errors came about because of the urgency of the reorganisation in the light of the Macondo disaster, and lack of care over the processes to be followed. Further, we do not think that the failure to answer the Equality Act questions in time was because of age: instead we regard this decision as a regrettable error of judgement.

#### The time issue

188 In order for the Tribunal to have jurisdiction to hear the claim it must not be brought after the end of a period of 3 months starting with the date of the act to which the complaint relates. This is provided by section 123(1)(a) of the Equality Act 2010. However, by section 123(1)(b) we can change the period of 3 months to such period as we think is just and equitable.

189 Section 123(3) and (4) provide as follows:-

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

190 Having made our findings as above we are able to resolve the time issue as follows. We take the acts to which the complaint relate in the same order as in the list of issues:-



- a. The reduction of the Claimant's role and responsibilities was implemented at the end of December 2010 and the parties agree that this is the time date which we should use for the purpose of calculating time. The claim was therefore brought more than 3 months after the date of this act.
- b. The Claimant was informed on 8 November 2010 that he was not successful in his applications for either the AGC Developments role or the AGC Production role and the posts had been filled by this date. The claim was therefore brought more than 3 months after the date of the failure to appoint him to these roles.
- c. The selection process for these roles ended on 3 November 2010 when Mr Bondy made his final decision who should be placed in these roles. The claim was therefore brought more than 3 months after the date of the allegedly flawed selection process.
- d. The Claimant was informed on 7 February 2011 that his performance rating was to be "meets expectations". We have found that he left the meeting of 14 February 2011 reasonably of the view that the rating was to be reconsidered, but that the rating was confirmed on 1 March 2011. However there is no evidence that the Respondent actually did reconsider the rating between 14 February 2011 and 1 March 2011. It seems to us that for the purpose of deciding when the time limitation clock starts, it is the reasonable understanding held by the employee as to whether a decision is being reconsidered that is of prime importance. Approaching the question in that way avoids forensic difficulties arising from the tribunal having to decide whether the employer actually did reconsider the decision. And it avoids the risk that an employer might mislead an employee by pretending that a decision is being reconsidered yet having no intention to do so. In our view this approach is in line with **Cast v Croydon College** [1998] IRLR 318 where the Court of Appeal emphasised that it was the terms of the communication to the employee which is important. Accordingly we find that the date of the act to which this complaint relates is 1 March 2011 because this was the promulgation to the Claimant of the final decision about his rating. Accordingly this claim was not brought more than 3 months after the date of this act.

191 The fourth allegation is therefore in time. As for the other allegations, there is no doubt that the dates of the acts of which complaint is made are as set out above and that they do not extend beyond these dates by reason of section 123(a). This is because we have found as a fact that there was no desire, campaign or policy to act unfavourably to the Claimant because of age and so the subsection cannot come into play any further than it has already in our considerations.

192 However it is our view that in respect of these other allegations, it is just and equitable to enlarge the 3 month period so as to validate these claims. Our reasons are as follows:-

- (a) There is a valid claim which is in time, which on the Claimant's case was the final act (amongst other acts) of a desire, campaign or policy to treat him unfavourably because of his age. If he had been right about this, the earlier acts would have been in time by the operation of

section 123(a). The delay in bringing proceedings was an understandable error therefore, viewed from the Claimant's position.

- (b) There was a delay in dealing with the Claimant's grievance. He raised the grievance on 18 March 2011, yet he was not called to the meeting until 18 May 2011. The meeting was not held until 13 June. Meanwhile the time clock was ticking.
- (c) We are aware of without prejudice discussions between the parties to deal with the Claimant's grievance while the time clock was ticking although we have no knowledge of the contents of these discussions.
- (d) We accept that while discussions are taking place and a grievance is being dealt with a claimant might be reluctant to bring proceedings and would hope with some justification that matters can be resolved without needing to do so, and that this would particularly be the case where the claimant is still an employee.
- (e) The Respondent suffered no prejudice by the delay in bringing the claims.
- (f) Against the above points is that the Claimant was represented throughout by experienced solicitors who would be expected to keep an eye on the clock.
- (g) And some evidence did disappear, possibly as a result of the delay. These were some encrypted emails which we heard may have been automatically removed from the system after a period of time. However oral evidence was given of the gist of these emails and their disappearance was not crucial to the case.

#### **Final conclusion**

193 In the circumstances set out above we find that none of the less favourable treatment relied on was because of age. Accordingly we dismiss the claims.

#### **The uplift issue**

194 Since we have received evidence and submissions on this matter it is right that we should deal with this in case the matter goes further.

195 Section 207A of the Trade Union & Labour Relations Act 1992 states as follows:-

If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

- (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
- (b) the employer has failed to comply with that Code in relation to that matter, and
- (c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

196 The relevant provisions of the ACAS Code on Discipline and Grievance Procedures 2009 are

32. Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.
38. Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken.
39. Where an employee feels that their grievance has not been satisfactorily resolved they should appeal. They should let their employer know the grounds for their appeal without unreasonable delay and in writing.
40. Appeals should be heard without unreasonable delay and at a time and place which should be notified to the employee in advance.
43. The outcome of the appeal should be communicated to the employee in writing without unreasonable delay.

197 We have also taken into account the Respondent's own Employee Guidelines which provide that the employee should normally be advised of the decision and the reasons for it within 10 working days of the hearing (page 345).

198 The grievance was raised on 18 March 2011. The preliminary investigation report (page 1375) was not produced by Mike Hood until 16 May 2011. It was necessary for him to interview a number of high ranking officers in the company in a confidential setting. We did not receive any evidence from Mr Hood, but we can see from the documents in the bundle that the Claimant was informed on 5 April 2011 (page 1340) that the investigation was being commenced although he was not informed of any delays. We can see that the interviews were carried out by Mr Hood starting in the second week of April 2011. Once the interviews started they were carried out with reasonable expedition but clearly there were some unexplained delays in producing the investigation report.

199 The original scheduled date of 24 May 2011 for the grievance hearing had to be postponed because there were no available flights due to a volcanic dust cloud. Eventually the hearing was held on 13 June 2011. This was the first available date for the postponed hearing because the grievance officer Mr Conn, who is very senior in the company, was in India for a week following 24 May 2011 and the Claimant was travelling to Houston during the first week in June.

200 The time between 13 June 2011 and the outcome of the grievance letter on 30 June 2011 was not wasted. Over this time, Mr Conn met with some of the people concerned and prepared the grievance outcome in draft.

201 When considering the delays, we have taken into account the seriousness of the allegations, the length of the period of employment that they covered, the seniority of the people involved, the number of people who had to be spoken to, the detail that was required, and the follow up matters which had to be dealt with. Our view is that once the investigation started it was completed expeditiously, and once the grievance hearing was organised the grievance was dealt with expeditiously. There is no doubt that there was a delay which arose because the investigation was not started immediately (a delay of nearly 4

weeks). However, because of the seniority of the people involved, it was necessary for someone senior to carry out the investigation (Mr Hood was an HR Director in one of the company's business areas). There was an unavoidable delay of 3 weeks when the original grievance hearing had to be postponed. Overall, it is our view that the time taken to deal with the grievance was not unreasonable in this particular case.

202 The Claimant's appeal was lodged on 4 August 2011. Because of the seniority of the people involved, including the grievance officer Mr Conn, there were only two people who could have heard the appeal – Byron Grote and the Chief Executive of the company Bob Dudley. In the view of the Tribunal it was reasonable that Dr Grote heard the appeal. He was on holiday at the time the appeal was lodged, and so he did not get the papers till his return on 30 August. The appeal hearing was held on 6 September. Dr Grote then made his own enquiries which the Tribunal thinks was a reasonable thing to do. The appeal outcome letter was dated 23 September 2011. Overall we take the view that the time taken to deal with the appeal was not unreasonable in this particular case.

203 In the circumstances, if we had moved on to deal with remedy we would not have applied any uplift in the award on the grounds of a failure to comply with the ACAS guidelines.

  
**Jeremy Gordon**  
**EMPLOYMENT JUDGE**

**REASONS SIGNED BY EMPLOYMENT JUDGE ON**  
**21 December 2011**

**REASONS SENT TO THE PARTIES ON**

.....  
**AND ENTERED IN THE REGISTER**

.....  
**FOR SECRETARY OF THE TRIBUNALS**