Appeal No. UKEAT/0167/14/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28 October 2014

Before

THE HONOURABLE MRS JUSTICE SIMLER

(SITTING ALONE)

MRS Y EVBENATA — APPELLANT

SOUTH WEST LONDON & ST GEORGE'S MENTAL HEALTH NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS BARBARA ZEITLER (of Counsel)
For the Respondent	MR IAN SCOTT (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

UNFAIR DISMISSAL - Retirement

The Tribunal addressed the fairness of a "retirement" dismissal under ordinary unfair dismissal principles pursuant to section 98 **Employment Rights Act 1996** (ERA) and failed to consider whether or not there was compliance with the continuing notification duty in paragraph 4 of Schedule 6 of the **Employment Equality (Age) Regulations 2006** (now repealed), and if so, whether the dismissal was automatically unfair under section 98ZG(2)(a) **ERA 1996**. This was a material error of law. The Employment Appeal Tribunal held that the notification duty under paragraph 4 carried with it the same strict duty to refer expressly to paragraph 5 of Schedule 6, as the Court of Appeal has held is imposed by paragraph 2: see **R & R Plant (Peterborough) Ltd v Bailey** [2012] EWCA Civ 410 (CA). Accordingly, there was a failure to notify under paragraph 4 Schedule 6 and the dismissal was automatically unfair. The parties agreed that the Employment Appeal Tribunal should substitute this finding with a basic award only in light of the Tribunal's remaining findings.

THE HONOURABLE MRS JUSTICE SIMLER

1. This appeal concerns the now repealed retirement dismissal provisions of section 98ZG(2)(a) of the **Employment Rights Act 1996** ("ERA") and Schedule 6 to the **Employment Equality (Age) Regulations 2006** ("the Age Regulations"). These provisions provided a scheme to be followed by an employer who wished to retire an employee fairly at his or her retirement age. The scheme required the employer to notify the employee of the intention to retire him at a particular date and afforded the employee the right to request continuing employment beyond retirement age. The scheme provided for mandatory consideration of such a request by the employer, for a decision in writing responding to such a request and for the opportunity to appeal against any adverse decision.

2. The short question on this appeal is whether the Employment Tribunal properly addressed the requirements of that scheme or not in coming to a conclusion that the Claimant was not unfairly dismissed in this case.

3. The decision appealed from is a decision of the Employment Tribunal sitting at London (South) with Employment Judge Martin presiding. In a reserved Judgment with Reasons sent to the parties on 27 January 2014 the Tribunal unanimously dismissed claims for unfair dismissal and breach of contract made by Mrs Yolanda Evbenata against her employers, the South West London and St George's Mental Health NHS Trust. That decision followed a hearing that took place over a number of days in December 2013. No challenge is made to the finding that there was no breach of contract or to any of the other findings in relation to unfair dismissal beyond the finding that there was no unfair dismissal by reference to section 98 of the Act rather than a decision made by reference to section 98ZG **ERA** as it then stood.

4. I refer to the parties as the Claimant and the Respondents, as they were before the Employment Tribunal. The Claimant appeared by Counsel, Miss Zeitler, and the Respondent by Counsel, Mr Ian Scott, both of whom appear before me on this appeal. I have been assisted by their submissions, both oral and in writing.

The Facts

5. The Tribunal's findings of fact in relation to termination of the Claimant's employment are set out at paragraphs 73 to 87 of the Reasons. They can be summarised by reference to those paragraphs as follows. Faced with the prospect of having to make £40 million in savings, a proposal was made by management of the Respondents to enforce a retirement policy that had not previously been actively enforced. The proposal was that all staff aged 65 or approaching that age or over that age would be sent compulsory retirement notices. The rationale was that those over 65 would have the benefit of retirement pensions, whereas if there were forced redundancies, those made redundant may have nothing to fall back on in terms of savings. 85 people were sent retirement notices including the Claimant. The Tribunal found that there was urgency recognised by the Respondents in relation to this proposal because the law was due to change on 1 October 2011, with retirement being removed as a potentially fair reason for dismissal.

6. The Claimant, who had been employed by the Respondents as a Band 6 nurse from 1 February 1999 until her employment came to an end on 30 September 2011, went on sick leave on 14 September 2009 and did not return to work. By late 2010, when the proposal to issue compulsory retirement notices was being considered, the Claimant had been absent through illness for some time. She was continuing to submit sick certificates and had not indicated that she was fit to return. Once the proposal was approved, compulsory retirement notices were sent

to staff in batches. The Tribunal found that the Claimant was treated in the same way as the other 84 people written to, namely she was sent a notice setting out the Respondents' retirement policy. Critically, at paragraph 77, the Tribunal found that the notice sent to the Claimant (by letter dated 6 January 2011) set out the presumption that the employee concerned would retire on her retirement age unless a form was completed by that employee indicating a wish to continue working after retirement age. The notice enclosed the form that could be completed by the affected employee, but as the Tribunal found, it "did not specifically specify that it was made under Regulation 5 to Schedule 6 of the Regulations as required." Although the Tribunal referred to "Regulation", it is clear that the intention was to refer to paragraph 5 of Schedule 6 of the **Age Regulations**, and the Tribunal was here finding that the notice did not expressly state that the right to make a request to work beyond retirement age arose under paragraph 5 and that the request to continue working would also have to be made expressly by reference to paragraph 5.

7. The date given to the Claimant for her compulsory retirement was 30 June 2011. This was less than the required minimum period of six months' notice, but as events transpired, the Claimant's retirement date was extended to 30 September 2011, so that she was given the requisite six months' notice required by the **Regulations**. An argument was advanced by Miss Zeitler to the effect that the original date of 30 June 2011 was the operative date of retirement. That argument makes neither legal nor practical sense in circumstances where the date of retirement was expressly extended. It is accordingly rejected.

8. The Claimant responded by completing the form, stating that she wished to continue working until 31 March 2013, and as a consequence she was offered a meeting in May 2011. There is a typographical error in the Tribunal's Reasons at paragraph 78, and it is clear that the

Tribunal found that she did not attend on either date offered during May 2011. She was contacted and told how important it was that she attend a meeting to discuss her request, but nevertheless failed to do so. The Tribunal found that the Claimant was due to attend Occupational Health on 23 May 2011 and as a result of that information, by letter dated 12 May 2011. The Respondents offered her that date as a date for a meeting to discuss her request. She was told that she could bring a trade union representative or a work colleague, and if she did not attend she could instead send written representations. Occupational Health assessed her as fit to attend management meetings, whilst nevertheless not confirming that she was fit to work at that time.

9. At paragraph 80 the Tribunal found that the Claimant was unhappy about the suggestion made in the letter dated 12 May 2011 and alleged that the Respondents were using the retirement policy to get rid of her because she had made protected disclosures. She did not attend the meeting suggested for 23 May 2011 and nor is there any suggestion that she did make written representations. The Tribunal found that a further letter dated 8 June 2011 offered a final opportunity on 16 June 2011 to meet to discuss her impending retirement and her request to continue working. She was told that if she did not attend, the meeting would go ahead in her absence and would consider the information she had provided in the form requesting continuing employment beyond the age of 65. The Tribunal found that the Claimant responded in writing by letter dated 14 June 2011, saying she would not attend a meeting without first seeing a copy of the retirement policy. The meeting went ahead on 16 June in her absence, and her request to work beyond retirement age was refused. The decision was confirmed in writing by Miss Keogh, a senior HR manager.

10. The Claimant appealed. There was a hearing on 15 July 2011 by a panel comprised of Ms Broadhurst, a non-executive director, Mr Mike Naylor, the Director of Finance, and Miss M Fernandez, the HR manager. The Claimant attended and was accompanied by a trade union representative. The Tribunal made findings about the appeal process at paragraph 84 including that the appeal panel took into account the needs of the Service, the needs of the Department and the needs of the Trust as a whole. The panel had evidence from the Service Director, stating that the Claimant's services were not necessary for the Service or for the Department or indeed for the Trust.

11. The Claimant, on the other hand, maintained that she was properly qualified and fit to do the job, and should be permitted to continue working until 31 March 2013. The appeal panel were satisfied that numerous attempts to arrange a meeting with the Claimant had been made and that she had not co-operated. It took into account Occupational Health's opinion that she was fit to attend management meetings, albeit not fit to return to work, and that she had as a matter of fact been sent a copy of the retirement policy with the letter of 6 January 2011 from Mr Fleming. In any event the panel were satisfied that it would have been easy for her to obtain a copy of the policy from her union. The appeal panel's unanimous decision (confirmed in writing by letter dated 18 July 2011) upheld the decision to terminate employment by reason of retirement, with reasons. The letter gave the wrong date of retirement in error, but this was corrected by further letter dated 5 August 2011, so that the Claimant's employment was extended to 30 September 2011, as already indicated, as a consequence of her appeal.

12. The Tribunal found at paragraph 87 that a few people were in fact successful in their appeals against compulsory retirement and were permitted to work beyond retirement age: in effect, a finding that these were genuine and not sham appeals. Most of those who had been

successful were given limited extensions to their employment to 31 December 2011, but three members of staff, all administrative had their contracts extended indefinitely.

13. Against those findings of fact the Tribunal reached conclusions about the termination of the Claimant's employment and its fairness or otherwise at paragraphs 88 to 93 of the Reasons. In particular, the Tribunal concluded:

> (i) the Respondents failed to comply fully with the requirements of paragraph 2 of Schedule 6 of the **Age Regulations** by failing to specify that the notice contained in the letter dated 6 January 2011 was made under paragraph 5 of Schedule 6;
>
> (ii) however the Respondents considered the Claimant's request and tried to hold a meeting to discuss matters with her;
>
> (iii) the Respondents were not in breach of Regulation 6, dealing with the employer's duty to consider a request to continue working or 7, dealing with meetings to consider such a request, or 8, dealing with appeals;
>
> (iv) so far as the requirement to have a meeting to consider an employee's request to continue working, the Respondents tried their best to have a meeting with the Claimant, pointing out the seriousness of the situation and what would happen if she did not attend. She was also offered the opportunity to make written representations, and accordingly she did not take all reasonable steps to attend;
>
> (v) appeals are concerned, there was an appeal which satisfied the requirements of Regulation 8, carried out by Ms Broadhurst, who was unaware of the grievances made by the Claimant.

14. At paragraph 90 the Tribunal held:

> **"The failure to comply with Regulation 2 does not make the dismissal automatically unfair pursuant to s98ZG ERA which relate to breaches of Regulations 4, 6, 7 and 8. Therefore the decision to retire the Claimant falls within ordinary unfair dismissal principles."**

15. At paragraph 91 the Tribunal found that the Claimant was fairly dismissed pursuant to section 98 **ERA**. The Tribunal found that the reason for dismissal was retirement, a potentially fair reason, and the Tribunal went on to make findings about the procedure and reasons that led to the conclusion at paragraph 91 to 93 that this was a fair retirement dismissal, not in any way influenced by any protected disclosure the Claimant may have made, that it was an entirely separate matter carried out fairly. The claim of unfair dismissal was therefore dismissed and, by inference, the dismissal was accordingly fair.

16. The law relating to this aspect of the Tribunal's Reasons and conclusions is set out in the **Age Regulations** in particular Schedule 6, and in sections 98ZA onwards of the **ERA**. Regulation 30 of the **Age Regulations** created an exception to the general rule prohibiting discrimination against an employee on grounds of age by dismissing him. It applied to dismissal of those over the age of 65 where the reason for dismissal was retirement. Schedule 6 of the **Age Regulations** provided a scheme for handling retirement dismissals. The following paragraphs of Schedule 6 are material to this appeal.

> **"2. Duty of employer to inform employee**
>
> **(1) An employer who intends to retire an employee has a duty to notify the employee in writing of -**
>
> > **(a) the employee's right to make a request; and**
> >
> > **(b) the date on which he intends the employee to retire,**
>
> **not more than one year and not less than six months before that date.**
>
> **(2) The duty to notify applies regardless of -**
>
> > **(a) whether there is any term in the employee's contract of employment indicating when his retirement is expected to take place,**
> >
> > **(b) any other notification of, or information about, the employee's date of retirement given to him by the employer at any time, and**
> >
> > **(c) any other information about the employee's right to make a request given to him by the employer at any time.**
>
> **3.**
>
> **(1) This paragraph applies if the employer has notified the employee in accordance with paragraph 2 or 4 or the employee has made a request before being notified in accordance with paragraph 4 (including where no notification in accordance with that paragraph is given), and**

(a) the employer and employee agree, in accordance with paragraph 7(3)(b) or 8(5)(b), that the dismissal is to take effect on a date later than the relevant date;

(b) the employer gives notice to the employee, in accordance with paragraph 7(7)(a)(ii) or, where the employee appeals, paragraph 8(9)(a)(ii), that the dismissal is to take effect on a date later than the relevant date; or

(c) the employer and employee agree that the dismissal is to take effect on a date earlier than the relevant date.

(2) This Schedule does not require the employer to give the employee a further notification in respect of dismissal taking effect on a date -

(a) agreed as mentioned in sub-paragraph (1)(a) or notified as mentioned in sub-paragraph (1)(b) that is later than the relevant date and falls six months or less after the relevant date; or

(b) agreed as mentioned in sub-paragraph (1)(c) that is earlier than the relevant date.

(3) If -

(a) a date later than the relevant date is agreed as mentioned in sub-paragraph (1)(a) or notified as mentioned in sub-paragraph (1)(b) and falls six months or less after the relevant date, or

(b) a date earlier than the relevant date is agreed as mentioned in sub-paragraph (1)(c),

the earlier or later date shall supersede the relevant date as the intended date of retirement.

(4) In this paragraph, "the relevant date" means the date that is defined as the intended date of retirement in paragraph (a), (b) or (c) of paragraph 1(2)."

Paragraph 1(1) deals with interpretation making clear that the request that is referred to at paragraph 2(1)(a) means a request made under paragraph 5. Paragraph 4 imposes a continuing duty on an employer who has failed to comply with paragraph 2 "to notify the employee in writing as described in paragraph 2(1) until the fourteenth day before the operative day of termination." Paragraph 5 concerns the statutory right to request not to retire. Paragraph 5(1) provides that an employee may make a request to his employer not to retire on the intended date of retirement. By paragraph 5(3) a request must be in writing and state that it is made under this paragraph.

17. In **R & R Plant (Peterborough) Limited v Bailey** [2012] EWCA Civ 410 the Court of Appeal, upholding a decision of HHJ Richardson in this Appeal Tribunal, held that paragraph 2(1), read with paragraph 1(1) and the obligation on the employee contained in paragraph 5(3)

to state that a request to continue employment is made expressly under paragraph 5, imposed a duty on an employer explicitly to notify the employee that the right to make a request to work beyond retirement arises under paragraph 5 of Schedule 6. The Court of Appeal held that this was the minimum required of an employer because it was only by this route that the employee would be directed to the precise provision laying down the requirements the employee would have to meet in making a request to continue working, namely the requirement to state that the request is made under paragraph 5. Otherwise an employee who simply requested a right to continue working but without reference to paragraph 5 could be met with a response from the employer that his request need not be treated as a statutory request. This decision is binding on me, and neither side has sought to challenge or go behind it in any way.

18. Where a valid notice under paragraph 5 has been given by an employer, that employer obtains a considerable benefit from the statutory scheme. In such a case the employer's dismissal of the employee is deemed to be by reason of retirement, and no other reason is to be considered. Where a valid request under paragraph 5 has been made by the employee, the employee also obtains procedural benefits. The employer is obliged to consider the employee's request at a meeting and inform the employee of the decision in writing, affording that employee an opportunity to appeal against any adverse decision.

19. It is common ground that the **ERA** provisions relevant to the Claimant's claim for unfair dismissal by reason of retirement are sections 98ZD, ZF and ZG. In a case where an employer has complied with paragraph 2 of Schedule 6 and the contract of employment terminates on the intended date of retirement section 98ZD **ERA** provides that the retirement of the employee is taken to the only reason for dismissal and any other reason is to be disregarded. In a case where the employer does not notify the employee in accordance with paragraph 2 of Schedule 6,

paragraph 98ZD(5) provides that particular regard shall be had to the matters in section 98ZF when determining the reason or principal reason for the dismissal. Those matters are set out at sections 98ZF(1)(a) to (c)

> **"(a) whether or not the employer has notified the employee in accordance with paragraph 4 of Schedule 6 to the 2006 Regulations;**
>
> **(b) if the employer has notified the employee in accordance with that paragraph, how long before the notified retirement date the notification was given;**
>
> **(c) whether or not the employer has followed, or sought to follow, the procedures in paragraph 7 of Schedule 6 to the 2006 Regulations."**

20. Section 98ZG has application if the reason or principal reason for dismissal is retirement. In such a case section 98ZG (2) provides:

> **"The employee shall be regarded as unfairly dismissed if, and only if, there has been a failure on the part of the employer to comply with an obligation imposed on him by any of the following provisions of Schedule 6 to the 2006 Regulations -**
>
> > **(a) paragraph 4 (notification of retirement, if not already given under paragraph 2),**
> >
> > **(b) paragraphs 6 and 7 (duty to consider employee's request not to be retired),**
> >
> > **(c) paragraph 8 (duty to consider appeal against decision to refuse request not to be retired)."**

21. Those provisions were repealed by the **Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011**. The Regulations were made on 5 April 2011 and came into force on 6 April 2011, with transitional provisions preserving the application of the Schedule 6 scheme where a notice of retirement under paragraph 2 of Schedule 6 was given before 6 April 2011. Accordingly the **Age Regulations** and provisions in the **ERA** applied in this case.

The Appeal

22. Miss Zeitler, on behalf of the Claimant, challenges the Tribunal's decision. She submits that, although the Tribunal found that there was a failure to comply with the notification requirements under paragraph 2 of Schedule 6 by virtue of the technical failure to make

reference to paragraph 5, the Tribunal did not address or consider, as it was required to do, the obligations contained in paragraph 4 of Schedule 6. Had the Tribunal done so, although she accepts that it was entitled to find that the reason for dismissal was retirement, pursuant to section 98ZF, she maintains that the Tribunal would have been obliged to consider the failure to comply with paragraph 4 under section 98ZG, and the inevitable conclusion would have been that the dismissal should have been treated as an unfair dismissal by virtue of that failure.

23. She argues that her submission is supported by **Bailey**. In just the same way as the technical failure to make express reference to paragraph 5 in the context of the notification duty in paragraph 2 rendered that a failure to comply with paragraph 2, she says the same technical failure would render compliance with paragraph 4 as non-compliance and that it is not possible to take the sort of purposive, practical or reasonable approach to the construction of this statutory scheme as was contended for in the case of **Norman v EC Harris Solutions Ltd** UKEAT/0141/13 for precisely the same reasons as such a purposive, practical approach was rejected there and in **Bailey**. She argues accordingly that it was incumbent on the Employment Tribunal to deal expressly with non-compliance with paragraph 4 and that the Tribunal, by failing to do so, has made a material error of law.

24. Mr Scott, for the Respondents takes issue with her approach. He argues that the content of the paragraph 4 duty is different to the paragraph 2 duty in respect of the strict requirement to refer to paragraph 5. The requirements of paragraph 4 are freestanding and separate from those of paragraph 2; and a careful reading of the retirement provisions set out in the **ERA** demonstrates that point. He points, in particular to section 98ZD(5) which provides that, where an employer has not notified in accordance with paragraph 2, particular regard is to be had to the matters identified in section 98ZF when determining the reason for dismissal. One of the

matters which requires consequential consideration is whether or not the employer has notified in accordance with paragraph 4. He submits that if, as the Claimant submits, a failure under paragraph 2 necessarily involves a failure to comply with paragraph 4, it is difficult to see why section 98ZF (1)(a) would allow for consideration of whether or not the employer has notified the employee in accordance with paragraph 4. Moreover he refers to paragraphs 12 and 13 of **Bailey** which makes clear that where there has been a failure to comply with the strict requirement in paragraph 2, the Tribunal must determine what the reason for dismissal is under section 98ZF by considering the extent to which the employer has complied with the rest of the procedural scheme apart from paragraph 2. The same exercise must be conducted under section 98ZG in the context of determining fairness or otherwise; again, by considering the extent of compliance with the remainder of the employer's obligations under the procedural scheme apart from paragraph 2. Those words "apart from paragraph 2", he emphasises, make clear that the strict obligation in paragraph 2 is not imported into the paragraph 4 duty. He says otherwise the Claimant's construction of paragraph leads to an odd, artificial and illogical outcome where, having complied with all other requirements of the statutory scheme, the employer is prevented from availing itself of a finding of a fair dismissal or of avoiding a finding of unfair dismissal under section 98ZG by reference to a wholly artificial notification requirement that can be made as late as 14 days before the operative date of retirement. He says that cannot have been the intention of Parliament.

25. Attracted as I am to the sensible and practical outcome proposed by Mr Scott by reference to the facts of this case, I do not accept his arguments. The reasoning in **Bailey** does not assist him. In **Bailey** the court was focussed expressly on the validity of a notice under paragraph 2 and did not consider or address paragraph 4, nor was there any argument addressed to that paragraph. That is unsurprising, since the employer's procedure did not get beyond the

paragraph 2 stage because the request made by the employee was not treated as a statutory request because it made no reference to paragraph 5, as required by paragraph 5(3) of Schedule 6.

26. Moreover the Court of Appeal's description of the statutory scheme at paragraph 12 and 13 is at best neutral in relation to this part of the argument. The words "apart from paragraph 2" that are particularly relied on by Mr Scott do not assist. In describing the statutory scheme and in discussing the need to consider the extent of compliance apart from paragraph 2, the Court of Appeal was making reference to the fact that paragraph 2 contained obligations that had to be complied with within a particular timeframe, non-compliance with which meant that the automatic protection available under the scheme, (namely that retirement would be deemed to be the only reason for dismissal and any other reason would be disregarded) would be lost. But the reason for dismissal and its fairness would still be matters that would have to be determined in accordance with the statutory provisions. It is unsurprising in the circumstances that, when assessing the reason for dismissal and its fairness, it is the employer's compliance with the continuing duty imposed on the employer by paragraph 4 that is relevant and is to be assessed. The paragraph 4 continuing duty enables an employer to comply with the notification duty at any time up to 14 days before the date of termination. It is not surprising, therefore, that it is the paragraph 4 duty rather than the paragraph 2 duty to which reference is made in sections 98ZF and ZG.

27. In any event it seems to me that the proper approach to this question is to approach it as a question of statutory construction rather than by analysing the Court of Appeal's description of the statutory scheme. Adopting that approach, in my judgment there is nothing in the statutory scheme to differentiate between the content of the paragraph 2 duty and that identified under

paragraph 4. Rather the duty under paragraph 4 is expressly stated to be a continuing duty to notify "as described in paragraph 2(1)". If, as **Bailey** requires, the duty described in paragraph 2(1) imports a duty to notify that a request expressly stated to be under paragraph 5 can be made, it is difficult to see how that same qualification is not be read into the continuing duty under paragraph 4.

28. The content of the duty under paragraph 2 and the duty under paragraph 4 is the same, the only difference being the time when such a duty can be complied with. That timing and the restriction on the timing in paragraph 2 was relied on by Mr Scott as suggesting that the paragraph 4 duty is different in content from the paragraph 2 duty. I disagree. The paragraph 2 duty can be complied with at any time not more than a year and not less than six months before the date of intended retirement. That time limitation is expressly disapplied in paragraph 4, which provides expressly that the 2(1) duty can be complied with at any time until the 14th day before the operative date of termination. Whilst compliance with the paragraph 2 duty carries with it more beneficial results for the employer, late compliance with the same duty under paragraph 4 also carries with it some benefits for the employer, namely the possibility of a finding that the dismissal was by reason of retirement and the possibility of a finding that the dismissal was not automatically unfair. However, to obtain the advantages of that procedural scheme, the employer is required to comply with the strict conditions imposed by it

29. Compliance with paragraph 2 has the important consequence, as I have already indicated, that retirement is to be taken to be the only reason for dismissal and is exempt from the prohibition against age discrimination by virtue of Regulation 30. Non-compliance with the paragraph 2 obligation does not, however, lead automatically to a finding that retirement is not the reason for dismissal or that the dismissal is automatically unfair. In the case of non-

compliance with the paragraph 2 obligations the Tribunal must determine the reason for dismissal and whether or not it is fair. Retirement remains a possible reason but is not a mandatory one. In determining the reason for dismissal in a case where there has been non-compliance with paragraph 2, the extent of the employer's compliance with the statutory scheme must be considered (see section 98ZD(5)). That consideration includes having particular regard to whether or not the employer has notified the employee in accordance with paragraph 4 and, if so, how long before the notified retirement that notification was given and also whether or not the employer has followed or sought to follow the requirements of paragraph 7. In other words whether or not there has been compliance with the duty to notify in advance a notified retirement date and the extent of compliance with the obligation to consider and consult with the employee over a request to continue working must be considered in order to determine whether retirement is the reason or principal reason for dismissal. Those are not the only considerations a Tribunal can have in relation to the reason for dismissal, but they are the matters to which particular regard must be had.

30. Given the statutory scheme and the fact that failure to comply with the paragraph 2 duty does not preclude a finding that retirement is the reason for dismissal, it is plainly open to an Employment Tribunal to conclude that retirement is the reason or principal reason for dismissal in a case where there is substantial compliance with these requirements. Indeed the wording of section 98ZF makes that clear. By contrast, when one comes to the provisions of section 98ZG, the Tribunal's considerations are different. Here the Tribunal is not directed to consider the extent to which there has been compliance with any of the particular requirements identified at section 98ZG 2(a) to (c). Rather, it is directed to regard the dismissal as unfair if there has been a failure on the part of the employer to comply with an obligation imposed on him by any of the

provisions set out at paragraphs (a) to (c) in Schedule 6. That emphasises the strictness of the scheme so far as determining whether there has been an automatic unfair dismissal or not.

31. In this case Employment Tribunal reached the conclusion that dismissal was by reason of retirement but did so by reference to ordinary principles rather than by reference to section 98ZF. Nevertheless, in light of its other findings taken as a whole, it is plain that this would have been its conclusion even if section 98ZF had been expressly considered. Miss Zeitler realistically conceded this to be the case, and in my judgment she was correct to do so. What the Tribunal did not do, however, is give separate and express consideration to section 98ZG, so far as compliance with paragraph 4 was concerned. It appears that the Tribunal simply assumed that the failure to comply with Regulation 2 did not lead to a conclusion that there had been a failure to comply with Regulation 4 in this case.

32. In light of the Tribunal's finding that there was a failure to comply with the paragraph 2 duty and in the absence of any finding that the Respondents subsequently provided the notification required by paragraph 2, albeit at a later date under the continuing duty to comply with paragraph 4, it is inevitable that the Tribunal would, had it expressly addressed the paragraph 4 requirement, have concluded that there was such a failure. Accordingly, there was a failure to comply with the paragraph 2 duty and with the paragraph 4 duty as well.

33. I reach that conclusion with no satisfaction. I agree with Mr Scott that these labyrinthine provisions lead to an artificial result. In a case where an employer who has complied with all other requirements of this retirement scheme, technically fails to comply with paragraph 2 by failing expressly to refer to paragraph 5, and fails thereafter to address that, such an employer would have to go through a wholly artificial process after having conducted what is a

substantially fair consideration of a request together with the procedural safeguards identified and an appeal, that would repeat all those procedural stages simply in order to comply with the technical requirement to make express reference to paragraph 5. Nevertheless it seems to me that if it is right to impose a strict obligation under paragraph 2 expressly to refer to paragraph 5, given the wording of paragraph 4, that same strict obligation to refer to paragraph 5 under the ongoing continuing duty to notify must also apply.

34. Mr Scott, in his written argument, pursued an alternative argument based on **Chapman v Simon** [1994] IRLR 124, but realistically recognised that this submission could not be pressed in the circumstances of this case. It seems to me that this argument does not assist him either and he was right to do so.

35. For those reasons, the Tribunal made a material error of law in concluding implicitly that there was no breach of paragraph 4 and accordingly the dismissal was to be considered under section 98 **ERA**. Had the Tribunal recognised the breach of paragraph 4 in this case, it would inevitably have concluded that the dismissal was automatically unfair under section 98ZG (2)(a) **ERA**. The parties are agreed about the consequences of that conclusion. In the light of the Tribunal's findings the Claimant concedes that the only award open to her in those circumstances is a basic award and that this Tribunal should therefore substitute for the finding of a fair dismissal, a finding of automatically unfair dismissal with a basic award only. That is the correct result in light of the remaining findings which have not been appealed, which plainly demonstrate that there would inevitably have been a fair retirement dismissal in this case but for the technical failure.

36. Accordingly the appeal is allowed. A finding of automatic unfair dismissal under section 98ZG(2)(a) is substituted together with a basic award, and I leave the parties to agree that sum.