Case No. 2301244/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS C OLDFIELD**
MS S CAMPBELL

BETWEEN:

Mr B Eagles

Claimant

AND

Howard Kennedy Services Ltd

Respondent

ON: **31 May and 1, 2 and 5 June 2017**
IN CHAMBERS: **6 and 7 June 2017**

Appearances:
For the Claimant: **Mr A Smith, counsel**
For the Respondent: **Mr N Caiden, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. Upon the respondent conceding that the claimant was unfairly dismissed, the claim for unfair dismissal succeeds.
2. The claims for direct and indirect disability discrimination and for a redundancy payment are dismissed upon withdrawal by the claimant.
3. The claim for disability discrimination (reasonable adjustments and discrimination arising from disability) succeeds.
4. The claim for direct age discrimination fails and is dismissed.

REASONS

1. By a claim form presented on 1 July 2016 the claimant Mr Brian Eagles claims unfair dismissal, age and disability discrimination and a redundancy payment.

2. The claimant worked for the respondent firm of solicitors as a salaried partner with continuous service from 1 October 1999 to 30 April 2016.

3. The parties agree that the correct name of the respondent is Howard Kennedy Services Ltd and the record is amended accordingly.

The issues

4. There was an agreed list of issues which was at pages 59-64 of the bundle and was confirmed with the parties at the outset of the hearing.

5. Unfair dismissal was conceded by the respondent. The claims for direct and indirect disability discrimination and for a redundancy payment were withdrawn by the claimant and are dismissed.

Discrimination arising from disability – section 15 Equality Act

6. Was the claimant dismissed by the respondent because of something arising in consequence of his disability? The respondent accepts that it was aware of the claimant's diagnosis of mouth cancer in or around October 2015 and that this constitutes a disability for the purposes of section 6 of the Equality Act 2010.

7. The "something arising in consequence of the claimant's disability" is said to be all (or alternatively some) of the following:

    a. A material decline in the claimant's performance during the business year 2015/2016, in comparison with the previous year;
    b. without prejudice to the generality of (a) above, a material decline in revenue/income generated by the claimant from (i) introductions and/or (ii) billings during the business year 2015/2016, in comparison with the previous year;
    c. the claimant's reduced and/or impaired capacity/ability to carry out his day-to-day work;
    d. the claimant's reduced and/or impaired capacity/ability to carry out business development activities;
    e. the claimant's reduced and/or impaired capacity/ability to interact with colleagues, clients and potential clients.

8. If the claimant was dismissed by the respondent because of something arising in consequence of his disability, was that unfavourable treatment a proportionate means of achieving a legitimate aim? For the purposes of section 15(1)(b) of the Equality Act, the aim relied upon by the respondent is "the need to ensure that employees were performing sufficiently and at a level commensurate with their remuneration, thus ensuring the respondent could remain profitable and in business".

Failure to make reasonable adjustments – sections 20 and 21 Equality Act

9. Did the respondent apply all or some of the following provisions, criteria or practices (PCP's) to the claimant (whether individually or in combination);

a. A requirement or expectation that the claimant, as a salaried partner earning a basic salary of £125,000 per annum (for a 4-day working week), for the business year 1 May 2015 to 30 April 2016, generate revenue/income of £200,000 from personal billings;
b. a requirement or expectation that the claimant, for the business year 2015/2016, generate revenue/income of £325,000 from introductions;
c. a requirement or expectation, in respect of the business year 2015/2016, that the cost of individuals within teams and/or the claimant specifically, shall not exceed 30% (or thereabouts) of the revenue/income generated by them?

10. The respondent does not dispute applying the PCP's.

11. Was the claimant placed at a substantial disadvantage by the application of such PCP's in comparison with persons who are not disabled?

12. The substantial disadvantages relied upon by the claimant are:

a. That he was unable to meet, or alternatively found it more difficult to meet, the aforesaid requirements/expectations;
b. that he was at an increased risk of having his employment terminated by the respondent;
c. that he was dismissed.

13. If the claimant was put at a substantial disadvantage, did the respondent fail to take such steps as it was reasonable to have to take to avoid the disadvantage? The claimant contends that the following steps would have been reasonable in the circumstances:

a. Suspending or dis-applying the expectations/requirements listed in paragraph 9 above (all or some of them) for the business year 2015/2016 in respect of the claimant;
b. alternatively, modifying the expectations/requirements listed in paragraph 9 above (all or some of them) for the business year 2015/2016 in respect of the claimant, such that his performance/productivity/contribution/value to the respondent would have been regarded as satisfactory;
c. suspending the practice of measuring the claimant's performance by reference to the aforesaid expectations/requirements (all or some of them) whilst the claimant was suffering from the effects of mouth cancer and/or until he had fully recovered and/or was in better health;
d. not taking into account or giving less weight to the claimant billings and/or introductions figures for the business year 2015/2016, alternatively the period of time during which the claimant was a disabled person, when deciding (i) the future structure of the respondent's departments; (ii) who was to be placed at risk of dismissal as a result of the respondent's decision to restructure its

business; and/or (iii) who was to be dismissed;

e. assessing the claimant's performance/productivity/contribution/value to the respondent by reference to his figures, in respect of billings and/or introductions, for: (i) the business year 2014/2015 and/or (ii) the period between November/December 2014 and 30 April 2015 and/or (iii) the claimant's cancer diagnosis, alternatively attaching greater weight and/or significance to such figures;
f. accepting the claimant's proposal that he continued to be employed by the respondent on a base salary of £100,000 per annum, plus commission on introductions;
g. affording the claimant a reasonable opportunity to demonstrate (or further demonstrate) his effectiveness/profitability as a salaried partner and/or his ability to satisfy the aforesaid expectations/requirements, once he had fully recovered from the effects of mouth cancer and/or was in better health;
h. extending the claimant's employment in order to investigate, facilitate and/or implement any of the adjustments set out above;
i. not dismissing him.

Direct age discrimination - section 13 Equality Act

14. Did the respondent, because of the claimant's age (79 years at the date of dismissal and in the over 55 age group) treat him less favourably than it treated or would treat others? The claimant relies on a hypothetical comparator.

15. The less favourable treatment relied upon by the claimant is (a) selecting him as the only person in the respondent's IP/Media team to be put at risk of dismissal and/or dismissed in the course of the purported restructure and (b) dismissing him.

16. If the claimant was treated less favourably because of age, was that treatment a proportionate means of achieving a legitimate aim? For the purposes of section 13(2) Equality Act, the respondent relies on the aim of inter-generational fairness – specifically:

    a. Ensuring that the limited opportunities to work in the solicitor field at the respondent are shared equally between the generations;
    b. encouraging staff to remain with the firm with a view to advancement; and/or
    c. creating a balanced workforce.

17. The claimant confirmed that there was no claim for breach of contract or for unlawful deductions from wages.

Remedy

18. What compensation, if any, is the claimant entitled to receive in respect of a basic award, a compensatory award, injury to feelings, aggravated

damages and/or a statutory redundancy payment?

19. To what extent if any should the claimant's compensation be reduced on account of contributory fault, specifically the claimant's alleged failure to "get work in the door"; and/or any failure by the claimant to take reasonable steps to mitigate his losses?

20. Did the claimant all the respondent unreasonably failed to comply with the ACAS code of practice on disciplinary and grievance procedures? If so should any award of compensation be increased or reduced, and by what amount? The claimant relied on a breach of paragraphs 5, 9 and 19-21 of the Code based on the claimant's case that it was a poor performance dismissal. Paragraph 5 is relied upon in relation to lack of investigation, paragraph 9 relates to failure to inform the employee of the problem and paragraphs 19-21 in terms of warnings and opportunity to improve. The respondent relied upon a breach of paragraphs 26 and 32, failure to appeal against dismissal and not raising a grievance.

21. What interest, if any, is the claimant entitled to receive pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996?

Witnesses and documents

22. There was a bundle of documents running to just under 400 pages.

23. We heard from the claimant.

24. For the respondent we heard from Mr Paul Millett who at the material time was one of the respondent's two joint managing partners and from Ms Sarah O'Connor, a Senior HR Business Partner.

25. In relation to the claimant's witness statement, there was a section from paragraphs 176-193 dealing with the respondent's conduct in the proceedings. Counsel for the claimant confirmed that there was no outstanding costs application against the respondent. Mindful of the decision of the EAT in ***Oni v NHS Leicester City 2013 ICR 91*** (Richardson J) we said we would not be making any findings on the respondent's conduct in the proceedings so that this should not be given in evidence at this stage and we asked the respondent not to cross-examine on it.

26. We had an agreed cast list and chronology.

27. We had detailed written submissions from both sides to which they spoke, plus authorities. These submissions are not replicated here. They were fully considered along with the authorities referred to, even if not expressly referred to below.

Findings of fact

28. The claimant qualified as a solicitor in 1960. He has had a long career specialising in media and entertainment law. He has worked for SJ Berwin and Hammond Suddards, building up successful teams in each of those firms. Since leaving the respondent, he has joined Burlingtons in Mayfair.

29. In 1999 he was headhunted by Howard Kennedy, joining that firm in October 1999. His offer letter was at page 85 of the bundle. His initial salary was for £200,000 per annum based on a four-day week.

30. The claimant built up a successful team of six partners and three associates. The team did well until about 2008/2009 with the removal of Government tax relief for film financing. This resulted in a substantial loss of work so that everyone in the firm's Media Entertainment Department, amounting to about 14 employees, were made redundant, with the exception of the claimant.

31. The claimant does non-contentious work. He deals with matters such as commercial agreements for intellectual property, with an emphasis on work in the media and entertainment business. He was rated highly by Chambers & Partners in 2016 as a leading individual in media and entertainment work for theatre and publishing. He was described in the Chambers' Guide to the Legal Profession 2016 as "*a media industry veteran, particularly well regarded for his theatre and publishing work*". He was praised as "*straightforward and effective*" (page 173).

32. From 2008 the claimant's basic salary was £125,000 plus his entitlement to a commission of 10% on his introductions (work introduced by him but carried out and billed by others).

33. On 1 February 2013 Howard Kennedy merged with Finers Stephens Innocent (Finers) to form the respondent firm. The claimant transferred to the respondent under TUPE (letter page 98).

34. Finers had its own media team. The contentious media work went into the new firm's litigation department and the claimant's non-contentious media work became part of the Intellectual Property section within the Corporate Department.

35. Immediately pre-merger the claimant was the Head of Media, which is understandable, as following the redundancies in about 2009, the department consisted only of himself and one more junior lawyer. Post-merger Mr Robert Lands, became Head of Media. Although the claimant considered that insufficient courtesy had been shown to him, he "*felt it was right for a younger person to take the reins*" (his statement paragraph 11). He did not object to Mr Lands becoming the Head of Media. Nevertheless he regarded it as a demotion.

36. In November 2013 Mr Paul Millett and Mr Craig Emden became the respondent's joint managing partners. They ran firm together with their Chief Operating Officer.

37. Mr Millett, who is a solicitor of 30 years experience and corporate lawyer, led on performance matters. He has dealt with pay for partners since 2001 and has extensive experience in monitoring performance against pay and dealing with partner underperformance, including financial underperformance.

38. Both pre- and post-merger the claimant was an employed salaried partner. Pre-merger, Howard Kennedy had three types of partner, full equity partners who received a share of the profits, fixed-share partners who had a cap or a fixed share of profits and salaried partners, like the claimant, who were employees.

39. From April 2014 a new tax regime came into force affecting the members of Limited Liability Partnerships (LLPs) as to whether they could be regarded as employed or self-employed, with the knock-on effects such as employment rights and national insurance contributions. From April 2014 the respondent required fixed share partners to invest capital in the firm. There was no such requirement on salaried partners and the claimant had no capital invested in the firm.

40. As a result of these tax changes, Mr Millet had discussions with the fixed share partners as to whether they wished to invest capital in the firm. He also had discussions with some of the older partners as to whether they wished to remain partners or to become consultants on new terms and conditions.

41. Four such partners chose not to introduce capital and became consultants. All were aged in their late 60s or early 70s; they were Elizabeth Smith, Rolfe Roseman, Alan Banes and Allen Levene. By contrast Michael Lewis, of a similar age, decided to contribute capital and remain a fixed share partner.

42. The respondent was keen to retain talent and experience within the firm. The move to consultancies was on new terms for the four partners concerned and had the effect of making room for new partners to be appointed.

<u>The claimant's performance in the newly merged firm</u>

43. The claimant considered that not long after the merger, by about June 2013 when he moved from his office in Cavendish Square to Great Portland Street, he was sidelined in terms of work allocation. Post-merger work allocation within the department was done by Mr Robert Lands as Head of Department.

44. The claimant accepted that he was passed a prestigious Formula 1 client

which had been a Finers' client and not a client of his predecessor firm. He highlighted the significance of this client at paragraph 110(a) of his witness statement. It was a difficult time for the claimant as he got used to the new regime for work allocation in the merged firm.

45. The firm's financial year starts in May. The first three months of the new financial year are generally at a lower revenue than the rest of the year. The first meeting Mr Millett had with the claimant regarding his financial performance was at the end of September 2014. Mr Ashely Reeback Head of Corporate (including IP and Commercial) was also at the meeting. They discussed with the claimant what they regarded as his financial underperformance and said they were looking for his introductions to be much higher, at around £325,000 rather than £200,000 and a reduction in his basic salary to £65,000. Mr Millett accepted (statement paragraph 30) that the respondent did not have the contractual right to make these changes unilaterally.

46. There was no contemporaneous note of the late September 2014 meeting. The claimant made a note on 8 October 2014 (page 104) setting out the matters that had been discussed. The claimant made a counter-proposal at the meeting of a reduction in basic salary firstly to £112,500 until the end of the 2014/2015 financial year and thereafter to £100,000 with suggestions on how his commission would be earned. He wished all other terms of his contract to remain the same. He did not wish to give up his employment status. This was the first meeting with the claimant on this matter since the merger on 1 February 2013 and there had been no prior indications given of any underperformance.

Target setting

47. The next meeting between Mr Millett, Mr Reeback and the claimant took place on 19 November 2014. There was no contemporaneous note of this meeting. The claimant made his own note after the meeting (page 114-115) and some notes in preparation for that meeting (page 112).

48. In the 19 November meeting Mr Millett and Mr Reeback told the claimant that they expected his introductions to be £250,000 to 30 April 2015 and £325,000 in the twelve months to 31 October 2015. The claimant told Mr Millett and Mr Reeback that he was shocked at the suggestion of a basic salary of £65,000 and this was not acceptable. The claimant thought they had an agenda to knock his salary down because it did not fit with what they were currently expecting of people (his notes page 114). The respondent's view was that the claimant was only breaking even and he was not making a sufficient financial contribution to justify his remuneration package.

49. The claimant was told that if he did not meet the new targets they would put him on a performance monitoring process. Mr Reeback offered the claimant a compromise as an alternative. The claimant was not interested in this.

50. The claimant wrote to Mr Reeback on 9 December 2014 (letter page 117-118). Somewhat surprisingly he said that he thought there was "very little between us". He said he felt sidelined for his desk work now that all new work came through Mr Lands as Head of the IP/Media Department. He made a slightly different counter offer as follows:

    i. Salary reduction from 1 May 2015 to £100,000
    ii. All other terms and conditions to remain the same
    iii. Review in April 2016
    iv. Bonus of £25,000 if his introductions in any 12 month period from 1 May 2015 exceeded £325,000.

51. In a letter of 10 December 2014 (page 119) Mr Millett said that the firm did not judge the claimant's financial performance to be strong enough relative to the salary he was being paid. Mr Millett set the claimant an introductions target of £250,000 to 30 April 2015 increasing to £325,000 for the year to 30 November 2015. They would begin monitoring on that target from 31 January 2015.

52. The firm would provide support to assist the claimant in reaching the target. Mr Millett wavered in oral evidence as to whether this was a "hard target" which the claimant had to meet. We find that it was a hard target as these were exactly the words Mr Millett used in his witness statement at paragraph 37. Formal performance monitoring would follow if the claimant did not meet the targets. Mr Millett said in oral evidence that he did not think the claimant was capable of achieving the target.

53. There were to be quarterly meetings to review the claimant's performance. The first such meeting took place on 18 February 2015. There was a handwritten note of this meeting at page 155. It was attended by the claimant, Mr Millett, Mr Reeback and Mr Lands. No concerns were expressed at this meeting because Mr Millett was of the view that the claimant was "*heading in the right direction*". Although the note said that they would "*pick up again in May*" no further review meeting took place. The next relevant meeting was on 8 February 2016, a full year later. As we set out in our findings below, this was not a review meeting as by that date Mr Millett had made a decision that the only way to tackle the claimant's situation was to terminate his employment.

54. Mr Millett also said that because billing figures tend to be lower in the first three months of the financial year, he considered that the autumn of 2015 would be a better point at which to review the claimant's performance. He considered that the best point at which to review would in fact be December, so that they would have the figures for the first six months of the 2015/2016 financial year. We find that another reason for not holding a review meeting in late 2015 was because the claimant became unwell and Mr Millett did not wish to add the

additional stress of performance review meetings.

55. When looking at the billing figures for August, September and October 2015, Mr Millett took the view that the claimant was not on target. Certainly he was of this view by December 2015 when he had the figures for the first six months of the financial year.

56. The claimant had a performance review with his line manager Mr Lands for the year ending 30 April 2015. This took place at the end of the financial year (pages 129-136). Mr Lands was very positive about the claimant's performance concluding the review with the following: "*Brian more than met the introductions target set for him and has a follow up meeting with [Mr Millett] planned for the next few weeks. He is also on track to complete the BD objectives set in Jan. Brian is an extremely valued colleague and makes a huge contribution to the firm".*

57. The claimant could hardly have had a more positive year-end appraisal. Following the setting of the December 2014 targets, he met and exceeded them by about £63,000 on an introductions target of £250,000.

58. Mr Millett was clear in his evidence and we find that if the claimant had continued with the same level of performance as for the financial year 2014/2015, he would have had no issue with it.

The claimant's health

59. The claimant had some health problems in about July 2015 and some short periods of sick leave. It is accepted that these were not disability related.

60. In September 2015 the claimant was diagnosed with tongue cancer and had surgery on 11 September 2015 to remove the tumour. On about 21 September 2015 the claimant informed the respondent's HR Director Ms Irena Molloy of his diagnosis.

61. The claimant had a second surgery on 19 October 2015. By the end of October 2015 the claimant was informed that his surgery had been successful and the tumour had been completely removed. The claimant's evidence was that he informed Ms Molloy and Mr Lands of this on 21 September 2015 (his statement paragraph 39). We did not hear from either of them in evidence. We find that the claimant did inform Ms Molloy and Mr Lands on 21 September and we are supported in this by the email exchanges between the claimant and Ms Molloy in October 2015 including page 169 in which Ms Molloy thanked the claimant for dropping off the paperwork and said "*I am also thinking of you and hope that your results are as you would want them when you finally meet with the medical team"* and page 172 when she said "*I tried to call you earlier to see how the op went on 19 October? Hope all went to plan, do let me know if you need to catch up".*

62. The claimant's evidence was that this health condition affected him from mid-September to the period up to Christmas 2015, a period of just over three months. The claimant said that once he had been diagnosed he considered he could do one of two things, either to "*fall into a heap and sit in a corner*" or to "*get up and do what was necessary*". He did the latter and said he was quite prepared to continue working either from home or from the office to keep his mind busy.

63. The claimant is a private person and he did not generally discuss his health situation at work. He agrees that he tried to hide his condition when he was at work. The claimant worked within about 10 feet of Mr Millett in an open plan office. The claimant did not discuss his health with Mr Millett at any point. Mr Millett did not observe any adverse effect on the claimant, but he did not have any conversation with him about this.

<u>The effect of the claimant's health on his performance</u>

64. The respondent suggested that the claimant achieved about the same level of client entertaining from September to December 2015 as compared with the same period in the previous year. We saw the claimant's expenses figures at pages 285-286. Other than a taxi fare, the claimant put in no expenses claims in October 2015. He attended a dinner on 30 September 2015 as he attended a television fair in France (the claimant has a home in France) and he did not attend another client event until 3 November 2015. We find that the claimant's tongue cancer and surgery affected his ability to entertain clients and carry out this aspect of business development (BD) and marketing.

65. The period during which the claimant was most affected by his diagnosis of tongue cancer was from his first surgery in mid-September 2015 until the Christmas holidays in December 2015, a period of just over three months.

66. At page 376 of the bundle we had the claimant's billing and introductions figures for the four financial years from 2012 to 2016. In September 2015 he billed £20,764 this was significantly more than he had billed in September 2014 which was £8,094.50. In October 2015 he billed £16,525 and in October 2014 he billed £11,481.99. In November 2015 he billed £15,989.24 and in November 2014 he billed £15,555.71.

67. In the months September to November inclusive, the claimant billed more in 2015 than he had in 2014. We recognise that billing is not necessarily an accurate reflection of the work done in any month as it usually takes a period of time for the work to be completed and the bill rendered to the client. In December 2015 the claimant billed £7,719.01 and in December 2014 he billed £17,744.80 so he had a substantial drop in billings by December 2015. We find that this drop was as a

result of his health problems.

68. During cross-examination there was an analysis of the claimant's cumulative totals for both billings and introductions for February 2015 and 2016 because February was the month in 2016 in which they had the relevant figures when making a decision about terminating the claimant's employment. In February 2016 the cumulative total for billings was £138,924.91 and for introductions was £164,789.30. In February 2015 the cumulative total for billings was £136,735.38 and for introductions was £223,352.62. The claimant's performance was worse in 2015/2016 than in 2014/2015 as at the month of February.

69. The claimant understandably sought to avoid entertaining clients during the period of just over three months in which he was affected by his condition. He found it difficult to eat and swallow, so eating out was naturally something he was not keen to do. He also found it difficult to speak because his tongue was swollen.

70. The claimant gave detailed evidence in paragraphs 46-54 of his witness statement as to the effects upon him of this disability. He was not challenged on the truthfulness of this evidence. Mr Millett accepted in cross-examination that the claimant's evidence on this issue accorded with common sense and truthfulness. In paragraph 51 of his statement the claimant said, and we find, that in addition to the effects set out in our paragraph above, he had little energy, felt very depressed and extremely anxious. He found it hard to concentrate and everything seemed to take him longer to do.

<u>One Equity</u>

71. In the first four months of 2016 the firm's partnership structure was made up of 18 equity partners, 44 fixed share partners and five salaried partners including the claimant.

72. In 2015 the respondent took advice from an expert in partnership structures in law firms. In 2015 average age of the equity partners was in the 50s and the average age was set to grow older unless the firm took steps to address it. The difficulty this posed for the respondent was the effect of retirements and partners seeking to remove their equity from the firm. A wider equity base was therefore considered necessary and important.

73. The equity partners also formed the view that the remuneration structure for fixed share and salaried partners was not the best that it could be. A decision was made to move to a full equity partnership from 1 May 2016, a project titled One Equity. There were to be only two levels of partner, equity whose remuneration was based on the firm's profitability, or fixed share partners.

74. To achieve this end, the partnership created four pools. They were (i)

those whom they intended to appoint as equity partners, (ii) consultants, (iii) legal directors and (iv) those who would leave the firm. The title of salaried partner would no longer exist.

75. There were four factors for consideration (a) the financial performance of the individual (b) how close they were to the firm's retirement age of 65 for equity partners (c) any knowledge of their attitude to becoming an equity partner and (d) whether the respondent wanted the individual as an equity partner within the firm.

76. Between February and April 2016 Mr Millett and Mr Emden had at least two conversations with each fixed share and salaried partner. The result was 32 became equity partners, seven became consultants and one became a legal director. Nine individuals left the firm and no salaried partner roles remained.

77. The claimant was not offered equity partnership. Mr Millett's evidence was that his financial performance was not good enough, he was beyond equity partner retirement age and he had not wished to give up employment status in 2011 when the pre-merger Howard Kennedy incorporated to become an LLP.

78. Mr Millett's view together with Mr Reeback, was that the claimant was significantly overpaid. They wished to persuade the claimant to move to the role of consultant rather than to leave the firm. They valued the claimant's skill and experience which they did not wish to lose but they wished to renegotiate the claimant's remuneration package so that he would be more profitable for the firm.

The claimant's profitability

79. The claimant accepted that the cost of lawyers within teams should not exceed 30% (or thereabouts) of the revenue/income they generated. This was the PCP at paragraph 9c above, which the respondent admits was applied.

80. At page 284A of the bundle we saw a spreadsheet showing the Intellectual Property team figures for 2015/2016 and 2016/2017, showing the figures both before and after the claimant left the respondent's employment.

81. The claimant accepted that in his final year with the firm 2015/2016, the department was not hitting the 30% target. After stripping out costs, the contribution of the team in that year was £183,055 resulting in a 20% contribution. Following the claimant's departure in 2016/2017, the contribution after cost, amounted to £331,360 resulting in a 43% contribution. This was despite the fact that the fees generated by the team were lower in 2016/2017 by just over £130,000.

82. In 2015/2016 the IP Department consisted of three senior lawyers, Mr

Lands as Head of Department, Mr Jonathan Sellors and the claimant. Reporting to them was an associate solicitor, Mr Alex Meloy and for a short period the department employed a newly qualified solicitor Ms Natasza Slater. The respondent accepted that some of the drop in cost in 2016/2017 was due to Ms Slater's departure. She was on a salary of £52,000 (shown at page 288).

83. Even if the respondent had accepted the claimant's proposal to reduce his salary from £125,000 to £100,000 this would only have increased the figure for 2015/2016 to 23% and thus would still have missed the 30% target significantly.

84. The claimant also accepted that his cost to the firm was somewhere between £165,000-£200,000 after taking into account his salary, national insurance costs, benefits and expenses and his share of admin and support costs. He accepted that based on the figures for 2015/2016 he was costing the firm too much based on his fee generation versus his cost. The claimant considered it unfair however to base this analysis upon 2015/2016 alone. The claimant also candidly accepted that based on these figures, it made sense for the respondent to consider a restructure of the department.

85. The profit line increased dramatically following the claimant's departure from £183,055 to £331,360, a jump from 20% to 43% - even though fee income had reduced. It was put to the claimant in cross-examination that based on these figures, it made sense to remove him from the partnership. The claimant replied very frankly "yes". This evidence was highlighted in the respondent's submissions at paragraph 30(ii).

86. The respondent is a profitable firm. Its annual report for the financial year 2015/2016 showed a profit on ordinary activities before taxation of £17,504,034.00 (page 291D).

<u>The restructure letter</u>

87. By January 2016 Mr Millett had formed the view that the only way to deal with claimant's situation was to bring his employment to an end and look to negotiate a consultancy agreement (his witness statement paragraph 67). Mr Millett was not prepared to allow the claimant to continue on his present level of remuneration set against his contribution to the firm. With the claimant seeking a basic salary of £100,000, he thought there was nowhere else to go other than to terminate employment. Mr Millett's oral evidence was "*If we could get it down to the right number, great for everyone including me, but if we were still stuck at £100,000 a year I was ready to bring our relationship with him to an end".*

88. On 8 February 2016 Mr Millett wrote to the claimant to set out a proposed restructure of the IP team (pages 192-194). The existing structure was set out with three at the top: the claimant, Mr Lands and

Mr Sellors. Reporting to them was Mr Meloy an associate solicitor, and below him was Ms Slater a newly qualified solicitor, plus trainees. Everyone in the department, apart from the claimant who was 79, was aged 55 or under.

89. The claimant was called into a meeting on 8 February 2016 without any prior notice or warning of what it was about. He came into the meeting room and met with Mr Millett and Ms O'Connor a Senior HR Business Partner, whom he had never previously met. He was handed the letter of 8 February plus a without prejudice letter enclosing a settlement agreement with a termination date of 29 February, in three weeks time. The meeting lasted 5 minutes. Mr Millett accepts that it was a brief meeting (his statement paragraph 72). We find that this was not a consultation meeting. Mr Millett himself accepted that "*formal consultation [took] place on 22 February 2016*". There was no note of the 8 February meeting despite the HR presence.

90. The proposed restructure was to have Mr Lands and Mr Sellors at the top, with Ms Gill White who was about to be made up to partner, just below them. The same lower tiers applied with Mr Meloy, Ms Slater and trainees.

91. On 10 February 2016, one of the equity partners, Mr Mark Stephens CBE, sent an email to all fee earners at the firm regarding the Media Sector (page 195). He said: "*One of the sector groups forming part of this initiative is Media and I would like you to work with me to set up a vibrant Media sector group".* He said he wanted to find increasingly creative ways to expand the amount of "the pie" spent with the respondent.

92. On 17 February 2016 there was a meeting between the claimant and the other managing partner Mr Emden, who came from the legacy Howard Kennedy side of the business. The meeting was initiated by Mr Emden after becoming aware from Mr Millett that the 8 February meeting had not gone well. The claimant and Mr Emden had known each other for many years. This meeting was with a view to seeing whether matters could be resolved. They could not.

<u>Consultation meetings</u>

93. The next meeting took place on 22 February 2016. The respondent describes this as a first consultation meeting. The claimant prepared a very detailed letter for use at this meeting (pages 200-205). Ms O'Connor's notes of the meeting were at pages 206-209. In his letter the claimant dealt with his skill set and profile, the merger, his ill health specifically stating the nature of the condition as cancer and the fact that he had two surgeries. He set out his view that he had been sidelined and commented on the restructure proposal. The claimant considered that he should be pooled with Mr Sellors for redundancy purposes. He dealt with his financial performance and his contribution

and said "*As a result of my medical difficulties I have not been able to operate during this current year in the way I have in the past".* The claimant therefore made a direct link between his recent performance and his disability.

94. The claimant set out his proposal which was, in a nutshell, that he would agree to a reduced salary of £100,000 and to remain as a salaried employee.

95. The meeting concluded with Mr Millett saying that he would consider the claimant's counter proposal and they would set up a final consultation meeting. The claimant expressed his concern that the consultation was a sham and that he feared that the intention was to exit him from the business (claimant's notes page 209).

96. On 24 February 2016 Mr Millett sent the claimant a without prejudice email which was copied to Ms O'Connor (page 210). There were seven points to this proposal whereby the claimant would continue working with the firm. These points included that he take the title of consultant and that he be engaged via a service company such that his employment would terminate on 30 April 2016. He was to refer work on to other members of the IP team unless his expertise could not be found elsewhere. His consultancy fee was to be in the region of £60,000 per annum + VAT with a discretionary bonus on introductions over £240,000. This arrangement was to expire after a year and was to be reviewed in January 2017. Mr Millett said he hoped the claimant would see this in the spirit in which it was intended, as a way to keep him within the firm. The claimant did not accept this without prejudice proposal.

97. We also saw in the bundle (page 223) the Media and Entertainment Business Development Plan for 2015/2016 dated April 2014 so this was naturally forward looking. It noted that the media sector was growing at three times the rate of the wider economy and this was expected to continue. The respondent was considering how best to market and promote their services within this growing sector. We saw the respondent's Board Meeting Minutes of 25 February 2016 (page 212) in which they reported on client wins in the sector and their ongoing BD activities to continue to win new business.

98. The consultation meeting was arranged for 4 March 2016. Ms O'Connor prepared a note for Mr Millett for use in preparation for that meeting page 230-232. The notes dealt with the points raised in the claimant's letter of 22 February and we also saw Mr Millett's handwritten notes on the typed document. The notes show that Mr Millett delayed holding such a meeting because of the claimant's ill health.

<u>The figures as considered by Mr Millett</u>

99. Mr Millett had considered the claimant's figures (as we saw on page 376

referred to above) and took the view that the reason the claimant's performance was better in 2014/2015 than in 2015/2016 was because of a "spike". Mr Millett set out the figures he had considered (page 231 point 10) and he wrote "*A spike in '15. My decision that this is what it is".*

100. Mr Millett agreed that no investigation was carried out into reasons for the claimant's lower performance in 2015/2016. He also agreed that he did not embark on a performance management process after the end of year appraisal in 2015, despite the letter of 10 December 2014 stating that this is what would happen if he did not meet the targets (page 119).

101. Mr Millett's view was that he had given the claimant a chance following the December 2014 letter and he was not going to give him a second chance. This is despite the fact that the claimant initially met the targets he had been set.

102. The respondent's case was that introductions are not capable of being performance managed. We accept that introductions involves an element of good fortune having met and socialised with potential clients. We find that training would not have been suitable, but had the claimant been given a performance style warning with an opportunity to improve, he could have chosen to increase his level of BD activity with a view to creating more introductions. The level of successful introductions cannot be guaranteed by the fee earner but their attempts to achieve them can be built upon. Although the claimant was working hard at his introductions we find he could have chosen to increase the amount of time he devoted to it. Mr Millett said that if the claimant had met the introductions target of £325,000 he would not have been dismissed.

103. The claimant did not accept as fair, the way in which Mr Millett had counted the value of his introductions. The respondent said that the claimant's approach involved double-counting because he combined billing and introductions.

104. In order to recognise that the claimant had been unwell in 2015, Mr Millett decided to credit the claimant with an uplift of £30,000 on his introductions because he thought that is where the claimant would have been but for his ill health. The claimant's cumulative introductions figure as at February 2016 was £164,789.30 and by adding £30,000 this brought the claimant close on £200,000 which is where Mr Millett thought he would have been.

105. We saw in the figures for introductions in October and November 2014 were particularly high at £71,252 and £36,619. Mr Millett would not countenance that this was anything other than a "spike", which in his view the claimant was not capable of maintaining or replicating in the future.

106. Mr Millett's view was that looking at the trend over a four year period, the claimant was not performing to the level required. In paragraph 61 of his witness statement he made comparison with the last six months of 2014/2015 with the with period from 1 May 2015 to 31 December 2015 – an eight month period. He saw that the claimant's introductions had fallen and even grossing up for a full 12 months, he considered that at best the claimant's introductions would only reach £200,000 for the full financial year.

107. We find that Mr Millett was taking into account a period of results when the claimant was affected by mouth cancer. In the event the claimant achieved less than £200,000 for the financial year end, the figure was £174,581.30. Mr Millett did not, of course, have this final figure when he attended the consultation meeting with the claimant. This supports our finding above that Mr Millett made the decision to dismiss in January 2016 after analysing the figures for 1 May 2015 to 31 December 2015.

108. At the very latest, Mr Millett was aware of the claimant's cancer by 22 February 2016 (letter page 200 and in particular page 201). We have found that the respondent had earlier knowledge of his cancer as the claimant had notified the HR Director Ms Molloy on 21 September 2015, and she subsequently informed Ms O'Connor that the claimant had received the "all clear". Mr Millett also accepted that the claimant had informed Mr Reeback and Mr Lands.

<u>The March 2016 meetings</u>

109. The final meeting took place on 4 March 2016 between the claimant, Mr Millett and Ms O'Connor. Ms O'Connor responded to the claimant's point about pooling with Mr Sellors by stating that there was no requirement to pool when it is not a redundancy. Redundancy was denied by the respondent in the ET3 (page 44). By 19 April 2017 just over a month before this hearing, the respondent conceded the claims for unfair dismissal and a redundancy payment (letter page 82) and tendered a redundancy payment to the claimant. The claimant does not accept this as a redundancy payment but accepted it in satisfaction of his basic award (page 84). Mr Millett told the claimant that Mr Sellors was more than covering his cost for 3 days per week.

110. During the meeting the claimant and Mr Millett discussed the claimant's situation as a salaried partner. The claimant's view was his presence would not block an equity partner appointment. Mr Millett's view was that if the claimant remained there would be four senior fee earners in the department and his status as a partner and his salary were blocks to Ms White's progression.

111. Mr Millett told the claimant that his counterproposal of remaining as an employee on a basic salary of £100,000 did not work for the business. Mr Millett did not wish to give a decision on the day. He hoped that the

claimant would come up with a further counter proposal. The respondent expected the claimant to come forward with a further proposal. The claimant considered that he was in a fait accompli situation, as he had been with the hard targets of November 2014 and he did not make any counter-offer.

112. A further meeting took place on 8 March 2016 (notes page 239) at which the claimant's employment was terminated. He was handed a letter confirming this, page 241. The reason for dismissal was given in the letter as the restructure of the IP/Media team, effective from 30 April 2016. The claimant was given a right of appeal to Ms Molloy. The claimant was the only person to be dismissed from the IP team as a result of what the respondent described as a restructure.

Mr Jonathan Sellors

113. Mr Sellors did not become an Equity Partner within One Equity. He agreed to move from partner to consultant. He worked part-time for the respondent as he had another job with The Wellcome Trust. He was earning about one-third of the claimant's salary. Although we were not told the precise figure, we find he was earning a basic salary (on 3 days per week) in the region of £40,000. He was amply covering his cost to the respondent.

Ms Gill White

114. Ms White, who at the time was aged about 35, had just completed the partnership track in the Corporate Department and was recommended for promotion. She held a Master's degree in IP. The claimant considered that the suggestion that Ms White was to join the team, was a sham because she did not in fact join. The claimant went as far as to say this was a "lie" and that the proposed restructure was founded upon a lie. The claimant did not consider that Mr Reeback would release Ms White from the Corporate Department. It is not in dispute that Ms White did not ultimately join the IP and Media department.

115. In relation to the proposed reorganisation Mr Millett's evidence (statement paragraph 91) was that the IP team was "top heavy" whether the claimant or Mr Sellors had remained as a partner. He said he had been told there were problems when trying to recruit senior assistants into the team because of the number of "*much older partners in the team*" and it did not look like there was room for new joiners. The respondent did not produce any evidence to support the contention that the age of the claimant as a partner in the IP department, caused problems with recruitment or that this was the reason why anyone had failed to apply (whether internally or externally) or join. We find that the presence of the claimant did not give prospective candidates the view that their progression in the firm would be blocked.

116. Neither Mr Sellors nor Ms White became partners in the department.

With the removal of the claimant, the department was left with only one partner, the Head of Department Mr Lands. This was not a department which was top heavy at partner level and would not have been so even if the claimant had remained.

117. Mr Millett was asked in cross-examination on day 4 about the proposed restructure. He was asked whether the plan was for Ms White to come in and become a partner; he replied yes. He said there would be two partners at the top and Ms White as a part-time contributor, but not at the same level as Mr Lands and Mr Sellors. It was put to Mr Millett that this was not a restructuring, but the removal of the employee he no longer wanted and replacing them with someone else. Mr Millett said "*That is a restructuring".* He was asked if that was what he called a restructuring and he said "*Yes, it's a restructuring on a part time basis".* Both the claimant and Ms White were part-time, albeit on different fractions. We found it telling and considered that Mr Millett had lacked robust HR advice, in that he considered the replacement of one employee with another to be a restructuring. We find that it was Mr Millett's plan to replace the claimant with Ms White.

118. In his statement at paragraph 63 Mr Millett described Ms White as having "*enormous drive"* and having a lot of enthusiasm (his oral evidence). He did not attribute the same or similar characteristics to the claimant. He had done no financial analysis of Ms White's performance because she was paid much less than the claimant. He considered that Ms White had "*all the right attributes".* At paragraph 71 Mr Millett said "*There was no role in the existing team for the claimant given his contribution and earnings, and we were looking to bring Gill White in to help bolster the team. It was aspirant and forward looking".* In re-examination he said he thought that Ms White would create a "*dynamism*" in the department that was not there. Mr Millett described the claimant as a senior statesman and an eminence grise.

119. He acknowledged in paragraph 121 of his statement that the claimant was still there because he was "*active, vibrant and well connected*".

<u>The lack of an appeal against dismissal</u>

120. On 15 March 2016 the claimant wrote to Ms Molloy (page 243) saying that he did not intend to appeal the decision to dismiss. He did not see any point in engaging further because he had already had meetings with the managing partners, as the senior equity partners in the firm and he doubted that any appeal would be effective. He had regarded the consultation process as a sham and believed it would be no more than a continuation of this. He also did not accept that Mr Millett did not know that he had been diagnosed with cancer.

121. Ms Molloy took on board the claimant's point about seniority of the appeal officer and offered him a hearing before an external HR consultant who could provide a recommendation to the firm (letter 17

March 2016 page 250). The claimant rejected this (letter page 252 dated 21 March 2016) because all the external consultant could do was to make a recommendation so that the same decision makers (Mr Millett and Mr Emden) would ultimately be involved. The claimant rightly stated in his letter of 21 March, that the decision to terminate his employment had been made prior to the commencement of the consultation process. We find that the claimant was correct about this, based on Mr Millett's own evidence (his statement paragraph 67).

122. On 16 March 2016 Mr Reeback sent an email to the claimant, copied Mr Millett, setting out a draft announcement of the claimant's departure. It said "*Dear all, I write to let you know that Brian Eagles has decided to retire from the practice….."* The claimant was offended by this because he had not made a decision to retire. He wanted to carry on working. He replied saying that he did not approve it because it was not true and he suggested that instead they say that he was leaving (page 245).

<u>The HR input</u>

123. We heard from Ms Sarah O'Connor, a Senior HR Business Partner. Ms O'Connor joined the respondent in December 2015. The review of the IP team was one of the first tasks she became involved with after joining the firm. She met the claimant for the first time at the meeting on 8 February 2016 when he was given the letter of that date setting out the proposed restructure of the team (page 192).

124. By the time Ms O'Connor became involved, the decision to terminate the claimant's employment had already been made by Mr Millett. Ms O'Connor could not remember what documents she had seen in connection with the claimant. We find she had not seen his last impressive appraisal carried out by Mr Lands for the financial year ending on 30 April 2015. She said that the only medical information she had in relation to the claimant was that her HR Director Ms Molloy had told her that the claimant had received the "*all clear*".

125. Ms O'Connor told the tribunal that she was aware that performance was an issue with the claimant. She was asked if she was familiar with the firm's performance improvement policy at page 377 of the bundle. She said she was "probably" aware of it, she had not been with the firm for very long but she was sure she was aware there was a performance improvement policy. We find it surprising that she was not more aware of this given that one of her main tasks within the firm was performance management (paragraph 2 of her witness statement) and it was accessible to all employees on the intranet.

126. Ms O'Connor was content with the position, that on her understanding, the claimant had not been performing for the last four years, apart from a spike, and she was not sure that a performance improvement process would have made any difference. In answer to tribunal questions she

said she was not sure if it was appropriate to manage a partner, despite the policy, on page 377 at point 1.3, making clear that it applied to all employees. She was content to rely on what she had been told, that the nature of introductions meant that it would be fruitless seeking to performance manage this.

127. Ms O'Connor accepted that she did not draw the performance improvement policy to Mr Millett's attention. No investigation was carried out into the claimant's performance issues and/or his health issues. From the perspective of reasonable adjustments she said she was "comfortable" with the adjustment of a notional £30,000 being added to the claimant's introductions to take account of his health problems in 2015. No further consideration was given to the matter of reasonable adjustments.

128. Ms O'Connor was aware that the plan was to dismiss the claimant who was aged 79 and to bring in Ms White who was aged about 35. She was asked if she perceived any risk from the point of view of age discrimination. She did perceive a risk but did not raise it because she said she "*understood the business rationale*". She understood that her role was to question what was being proposed, by those without HR experience, but she did not do so because she was "*comfortable with the proposal*".

129. We find that Ms O'Connor was brought in simply to facilitate the decision that had already been made by Mr Millett, namely that the claimant was to be dismissed from the respondent's employment. She did not provide any HR input or advice. We find that she was insufficiently senior and/or confident to provide HR advice which might conflict with the view of the managing partner.

<u>The reason for dismissal</u>

130. From the perspective of the unfair dismissal claim, which succeeded, we make a finding on the reason for dismissal as this remained in dispute between the parties. The respondent's submission was that this was "all about money" in a harsh world. The claimant cost too much to the business. The respondent would have retained him had he met the introductions targets set in November 2014 and they would have retained his services, had he agreed to forgo his employment status and become retained as a consultant through a service company. This was because the claimant's then status as a salaried partner did not fit with the plans for One Equity. This was due to come into effect on 1 May 2016.

131. Had the claimant been on target or agreed to take a basic salary of £60,000-65,000 we accept Mr Millett's evidence that they could have found a way to keep him as an employee. Mr Millett also said and we accept and we find that if the claimant had met the introductions target of £325,000 he would not have been dismissed. We therefore find that

the claimant's financial performance was the reason for his dismissal. We also find that the respondent wanted to make way for Gill White and wished to replace the claimant with Ms White and that the respondent wanted to ensure that the claimant was dismissed before the introduction of One Equity on 1 May 2016.

The law

Direct discrimination and the burden of proof

132. Section 13 of the Equality Act 2010 provides that a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others.

133. Section 13(2) provides a defence in the case of direct age discrimination in that A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim. This is sometimes referred to as the objective justification defence.

134. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

135. Section 136 provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

136. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

137. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

138. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden doers not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

139. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

140. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

Discrimination arising from disability

141. Discrimination arising from disability is found in section 15 Equality Act 2010

> *(1) A person (A) discriminates against a disabled person (B) if –*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim,*
>
> *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

142. The EAT in ***T-Systems Ltd v Lewis EAT/0042/15*** (Richardson J) set out five elements which tribunal is well advised to consider and make findings upon. They are: (i) the contravention of section 39 Equality Act, (ii) that it must amount to unfavourable treatment, it being the action or inaction which is relevant and not the mental process, (iii) it must arise in consequence of the disability and therefore must be part of the employer's reason for the unfavourable treatment, (iv) the treatment must be because of something arising in consequence of disability and at this stage the mental processes are relevant and the fundamental question is whether something arising in consequence of the disability operated on the mind of the putative discriminator and (v) whether there is justification.

143. In ***Hall v Chief Constable of West Yorkshire Police 2015 IRLR 893*** the EAT held on causation, that under section 15(1) discrimination can occur where the matters arising in consequence of the claimant's disability have a significant influence on the unfavourable treatment. It

need not be the main or sole cause, but it is sufficient if it is an effective cause of the treatment.

Objective justification

144. On justification, both in relation to direct age discrimination and discrimination arising from disability (section 15(1)(b) above), the Court of Appeal made clear that the tribunal should not apply a range of reasonable responses test (as with unfair dismissal) in determining whether an employer's conduct is objectively justified – ***Hardys & Hansons plc v Lax 2005 IRLR 726.*** The principle of proportionality requires the tribunal to take account of the reasonable needs of the business, but it is for the tribunal to make its own judgment as to whether the rule imposed was reasonably necessary. It is not enough that the view is one which a reasonable employer could take. It requires an objective balance between the discriminatory effect of the condition on the employee and the reasonable needs of the employer.

145. ***Hardys*** was a case decided under the indirect discrimination provisions of the Sex Discrimination Act 1975 but the same principles apply to section 15 of the Equality Act - ***Monmouthshire County Council v Harris EAT/0332/15.***

146. The leading cases on justification are ***Homer v Chief Constable of West Yorkshire Police 2012 IRLR 601*** and ***Seldon v Clarkson Wright and Jakes 2012 IRLR 590.*** The employer must show that the discrimination was a proportionate means of achieving a legitimate aim but that aim need not have been articulated or realised at the time. The legitimate aim is a question of fact for the tribunal, there is no requirement of it amounting to a social policy. It is then a question of whether the measure is capable of achieving that aim and then whether it is a proportionate means of achieving that aim which requires the tribunal to balance the discriminatory effect against the aim being pursued. The EAT in ***Kapenonva v Department of Health EAT/142/13*** said that there is no rule that if there is a less discriminatory means of achieving the aim, the defence must fail (paragraph 83).

147. We have also considered the principles set out in relation to justification in the recent decision of the Court of Appeal in ***Harrod v Chief Constable of West Midlands Police 2017 IRLR 539 CA*** (EAT judgment at 2015 IRLR 790).

148. In relation to knowledge of disability, ***Secretary of State for Work & Pensions v Alam 2009 IRLR 283 EAT*** sets out a two stage test (the case having been decided under the predecessor legislation, the Disability Discrimination Act 1995 but remains good law in relation to section 15 above):

> *(i) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in s.4A(1)?*

> *(ii) If the answer to question (i) is "no", ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in s.4A(1)?*

Reasonable adjustments

149. The duty to make reasonable adjustments is found under section 20 Equality Act 2010. The duty comprises three requirements and in this case the relevant requirement is the first requirement which appears in section 20(3):

> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

150. The case of ***Archibald v Fife Council 2004 IRLR 651, HL,*** holds that the duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability.

151. The burden is on the claimant to establish both the PCP and the substantial disadvantage, there is no reversal of the burden of proof at this stage - ***Bethnal Green and Shoreditch Education Trust v Dippenaar 2015 EAT/0064.***

152. The Court of Appeal considered the comparison issue in ***Griffiths v Secretary of State for Work and Pensions 2015 EWCA Civ 1265***. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied to equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of her disability.

153. At paragraph 26 of ***Griffiths,*** Elias LJ held "*an employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment…will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified*."

154. Under section 21 of the Equality Act a failure to comply with the first, second or third requirement (in section 20) is a failure to make reasonable adjustments. Section 21(2) provides that "*A discriminates against a disabled person if A fails to comply with that duty in relation to that disabled person".*

155. In deciding whether an employer has failed to make reasonable

adjustments, as set out by the EAT in ***Environment Agency v Rowan 2007 IRLR 20,*** the tribunal must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer, or;

(b) the physical feature of premises occupied by the employer;

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

156. The claimant is not required to prove outright that the adjustments would have avoided the relevant disadvantage. A real prospect of avoiding the relevant disadvantage can be sufficient, ***Leeds Teaching Hospital NHS Trust v Foster EAT/0552/10.***

157. It may be a reasonable adjustment not to dismiss a disabled employee – ***Aylott v Stockton on Tees Borough Council 2010 IRLR 994 CA.***

158. We are required to take into account any part of the Equality and Human Rights Commission Statutory Code of Practice on Employment (2011) that appears to us to be relevant to any questions arising in proceedings. Paragraph 6:28 states in relation to reasonable adjustments:

> *The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:*
>
> - *whether taking any particular steps would be effective in preventing the substantial disadvantage;*
> - *the practicability of the step;*
> - *the financial and other costs of making the adjustment and the extent of any disruption caused;*
> - *the extent of the employer's financial or other resources;*
> - *the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and*
> - *the type and size of the employer.*

159. Paragraph 6.16 of the Code provides that unlike direct or indirect discrimination – under the duty to make adjustments, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled persons.

160. In relation to knowledge of disability and reasonable adjustments Schedule 8 paragraph 20(1)(b) of the Equality Act provides:

> *(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know - …..that an interested*

disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

161. Once a potentially reasonable adjustment has been identified by the claimant, the burden of proof shifts to the respondent to show why it would not have been reasonable to make the adjustment in the particular case - ***Project Management Institute v Latif 2007 IRLR 579, (EAT)*** paragraph 53.

Remedy principles

162. In relation to the compensatory award for unfair dismissal we have considered ***Polkey v AE Dayton Services Ltd 1981 ICR 142*** and with regard to discrimination, the approach as laid down by the Court of Appeal in ***Chagger v Abbey National 2010 ICR 397***: would the dismissal have occurred had the employer not discriminated against the employee? And, if so, when?

Conclusions

Discrimination arising from disability

163. We have considered whether the claimant was dismissed because of something arising from his disability. It is not in dispute that dismissal is unfavourable treatment under section 15. The "something arising in consequence of the claimant's disability" was put as all or more of the following:

    a. A material decline in the claimant's performance during the business year 2015/2016, in comparison with the previous year;
    b. without prejudice to the generality of (a) above, a material decline in revenue/income generated by the claimant from (i) introductions and/or (ii) billings during the business year 2015/2016, in comparison with the previous year;
    c. the claimant's reduced and/or impaired capacity/ability to carry out his day-to-day work;
    d. the claimant's reduced and/or impaired capacity/ability to carry out business development activities;
    e. the claimant's reduced and/or impaired capacity/ability to interact with colleagues, clients and potential clients.

164. We have found above that because of his treatment for tongue cancer, the claimant found it difficult to eat, swallow and speak which affected his ability to generate introductions. We have also found that he had little energy, felt very depressed and extremely anxious and that he found it hard to concentrate and everything seemed to take him longer to do.

165. We have found that the claimant's performance from 1 May 2015 to 31 December 2015 was very much in Mr Millett's mind in January 2016

when he made the decision to terminate the claimant's employment. He had formed a view on these figures (as set out in paragraph 61 of his witness statement) that the claimant's performance was not on track to achieve what he wanted to see, namely introductions of £325,000. Mr Millett had in mind a period when the claimant's performance was significantly affected by his disability and this contributed to his reduced financial performance in late 2015. He gave the claimant an uplift of £30,000 to reflect the fact that the claimant had been unwell.

166. We therefore find that the claimant was dismissed because of something arising from his disability namely his reduced financial performance and a decline in his introductions and an impaired ability to perform. Following ***Hall*** (above) we find that even if this was not the main or sole cause for the dismissal, it was nevertheless an effective cause.

167. We have gone on to consider whether the dismissal was a proportionate means of achieving a legitimate aim under section 15(1)(b) Equality Act. The aim relied upon by the respondent was "*the need to ensure that employees were performing sufficiently and at a level commensurate with their remuneration, thus ensuring the respondent could remain profitable and in business*". The respondent's submission was that in simple terms fee earners need to be paid the right amount in relation to their contribution to the firm.

168. We find that it is a legitimate aim to ensure that employees are performing sufficiently and commensurately with their remuneration so that the respondent can remain profitable and in business.

169. We have gone on to consider whether it was a proportionate means of achieving that aim to dismiss the claimant. The business was not going to fail because of the claimant individually. We have to balance the discriminatory effect on the claimant and the reasonable needs of the respondent to remain profitable and in business. We are strongly persuaded by the words of Elias LJ in ***Griffiths*** (above) where he said: "*an employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment…will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified*."

170. This is a large and financially successful employer. We have found that they did not make a reasonable adjustment which would have allowed the claimant a period of time to get back on track after his cancer treatment and make efforts to comply with the targets that had been set. We find that it was not proportionate just to consider the results as they stood in February 2016 and move to dismissal. The respondent had the financial means to allow the claimant an extra period of time in

which he could have proved himself. It was not in balance as a means of achieving that aim to dismiss the claimant immediately upon it becoming apparent that his results, whilst arguably still profitable or at least breaking even, were not enough so that dismissal was the outcome without a chance to improve in the light of better health.

171. We therefore find that the claimant's dismissal was a disproportionate means of achieving the legitimate aim.

172. The claim for discrimination arising from disability succeeds.

Reasonable adjustments

173. The respondent admits applying the following PCP's:

    a. A requirement or expectation that the claimant, as a salaried partner earning a basic salary of £125,000 per annum (for a 4-day working week), for the business year 1 May 2015 to 30 April 2016, generate revenue/income of £200,000 from personal billings;
    b. a requirement or expectation that the claimant, for the business year 2015/2016, generate revenue/income of £325,000 from introductions;
    c. a requirement or expectation, in respect of the business year 2015/2016, that the cost of individuals within teams and/or the claimant specifically, shall not exceed 30% (or thereabouts) of the revenue/income generated by them?

174. We have considered whether the claimant was placed at a substantial disadvantage by the application of any of these PCP's in comparison with persons who are not disabled. This is a disadvantage which is more than minor or trivial, which is a relatively low threshold.

175. The substantial disadvantages relied upon were:

    a. That he was unable to meet, or alternatively found it more difficult to meet, the aforesaid requirements/expectations;
    b. that he was at an increased risk of having his employment terminated by the respondent;
    c. that he was dismissed.

176. Based on our findings above, we find that the claimant was placed at a substantial disadvantage. He was unable to meet the targets in the financial year 2015/2016 and found it more difficult to perform his job, this put him at increased risk of dismissal and he was dismissed.

177. The duty to make reasonable adjustments applies and we have considered whether the respondent took such steps as it was reasonable to have to take to avoid the disadvantage.

178. Following the 10 December 2014 letter and target setting, the claimant

had met the targets as shown by his year-end appraisal for April 2015. Despite the letter stating that there would be quarterly reviews, this did not happen. No further review or opportunity to improve was given post-cancer treatment, before Mr Millett made the decision to dismiss.

179. We find that it would have been a reasonable step to avoid the disadvantage to extend the period during which the claimant was required to meet the targets before moving to a performance management process and ultimately dismissal. A reasonable step would have been a moratorium or a significant reduction in the targets for a six-month period to cover the time during which the claimant was affected by cancer, the recovery time and time he needed to resume his pre-cancer levels of performance.

180. Alternatively the respondent could have assessed him on the pre-cancer financial year of 2014/2015 or the period pre-cancer after which the targets were imposed.

181. We do not accept the claimant's contention that the respondent should have accepted his proposal of a basic salary of £100,000 as being reasonable to remove the substantial disadvantage. This would not have removed the disadvantage in relation to introductions or billings targets.

182. We find that it would have been a reasonable adjustment for the respondent to investigate the causes of his underperformance and/or to have carried out a proper performance management process once he recovered. The claimant could have devoted more time to his introductions work in the light of the targets once he had recovered from his condition. It would have been a reasonable adjustment not to have dismissed before going through that process.

183. The claim for failure to make reasonable adjustments succeeds.

Direct age discrimination

184. We have considered whether the respondent put the claimant at risk of dismissal and/or dismissed him within the purported restructure because of his age. We have considered whether there were facts from which we could conclude, in the absence of any other explanation, that the respondent discriminated against the claimant.

185. We find that there are facts which lead us to conclude that the claimant has a prima facie case of discrimination, thus reversing the burden of proof and requiring the respondent to provide an explanation for the treatment.

186. As we have found above, the respondent wished to replace the claimant with Ms White. She was about 35 and he was 79. This was also being done against the backdrop of One Equity in which one of the

respondent's aims was to reduce the age profile of the equity partnership.

187. We have also taken into account what we find to be a somewhat ageist tone in some of the language used by Mr Millett in his descriptions of Ms White as opposed to the claimant. He described her as having "*enormous drive*" and a lot of enthusiasm. He said "*There was no role in the existing team for the claimant given his contribution and earnings, and we were looking to bring Gill White in to help bolster the team. It was aspirant and forward looking".* We find that he was alluding to Ms White as being aspirant and forward looking. She aspired to become a partner in the firm. He said he thought that Ms White would create a "*dynamism*" in the department that was not there. This is despite the presence of the claimant in that department so we find that he attributed dynamism to Ms White and not to the claimant.

188. Although not binding upon us, we are aware that the Industrial Tribunal in Northern Ireland in ***McCoy v James McGregor & Sons Ltd 00237/07IT*** considered that words used by a respondent such as "youthful enthusiasm", "drive" and "motivation" were enough on the facts of that case for them to draw an inference of direct age discrimination. We accept that the respondent in this case did not use the word "youthful" in conjunction with the word "enthusiasm".

189. In this case we find that the combination of the background of One Equity and the respondent's aims in that regard and the ageist tone of Mr Millett, the decision maker's language, is sufficient to place the burden of proof upon the respondent.

190. We have gone on to consider the respondent's explanation and what was the effective and predominant cause or real and efficient cause of putting the claimant at risk of dismissal within the restructure and then dismissing him.

191. We are satisfied and find that the effective and predominant cause of placing the claimant at risk of dismissal and then dismissing him was his performance. The claimant's remuneration package was significantly out of line with others in the firm. He was not in line with the 30% cost to the firm and they considered, on their analysis of the figures that he was only breaking even.

192. They were right in their view of the claimant's profitability as when he left the department and fee income reduced, the profit of the department jumped dramatically from 20% to 43%. Even the claimant frankly acknowledged that on the figures they had considered, it made sense to remove him. Mr Millett said and we accept, that if the claimant had met the introductions target of £325,000 he would not have been dismissed. We accept the respondent's submission that this was "all about the money" and thus about the claimant's performance.

193. We find that the claimant was not put at risk or dismissed because of his age. As such it has not been necessary for us to consider whether the respondent's actions amounted to a proportionate means of achieving a legitimate aim. The claim for direct age discrimination fails and is dismissed.

Concluding observations

194. Based on our findings above, we are not saying that an employer cannot address the situation of an employee who is earning a salary that his disproportionately high compared with his or her level of contribution to the firm. The claimant's salary was out of line and even he candidly accepted in cross-examination that on the figures it made sense to remove him from the department.

195. It is open to an employer to vary an employee's terms and conditions of employment by following a fair procedure based on a genuine business need. It was open to the respondent to consult with the claimant on a variation of his contract and following a process, to dismiss and offer immediate re-engagement on the new terms and conditions. We had no evidence that this option was considered by the respondent.

196. We find that this was not a genuine restructure. It was an implementation of Mr Millett's decision that the claimant should be replaced by Ms White, something which he thought amounted to a restructure but as we have set out above, we do not.

197. It was not a redundancy dismissal. The requirement for the work had not ceased or diminished nor was this expected. The respondent was focussed upon increasing the level of their business in IP and media and had experienced some good client "wins" by February 2016 (page 212). Notwithstanding the respondent's argument that they were seeking to reduce the workforce in the department or that the department was top heavy, they did not, with the benefit of advice, consider it a redundancy dismissal at the time. Ms O'Connor, the HR professional, told the claimant at the 4 March 2016 meeting that it was not. It was only conceded as late as 19 April 2017. The reason given for dismissal in the termination letter was the restructure of the IP/Media team.

Listing a provisional remedies hearing

198. The parties having had an opportunity to check their availability, we listed a provisional remedies hearing for **16 October 2017** for one day at London South Employment Tribunal commencing at 10am. No further orders were sought in relation to remedy.

199. In the light of our findings above the remedy hearing is effective.

200. We were invited by counsel at liability stage to make findings on ***Polkey***

and ***Chagger***. We took the view that we required further submissions in the light of our findings on liability and we have not made findings on these issues. It would assist the tribunal at the remedy hearing to have submissions which include the interrelationship between ***Polkey*** and ***Chagger*** on the particular facts of this case.

201. We expressed our gratitude to both parties for the high standard of preparation and advocacy in the case.

_____

Employment Judge Elliott
Date: 12 June 2017