Appeal No. UKEAT/0484/13/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 April 2014
Judgment handed down on 21 May 2014

Before

THE HONOURABLE MR JUSTICE SINGH

(SITTING ALONE)

DR M A REYNOLDS OBE — APPELLANT

(1) CLFIS (UK) LTD
(2) THE CANADA LIFE GROUP (UK) LTD
(3) CANADA LIFE LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TIMOTHY PITT-PAYNE (One of Her Majesty's Counsel) Instructed by: Chattel House Chambers Woodbury Pilgrims Way West Humble Dorking Surrey RH5 6AW
For the Respondents .	MR DANIEL TATTON-BROWN (of Counsel) Instructed by: Bevan Brittan LLP Solicitors Kings Orchard 1 Queen Street Bristol BS2 0HQ

SUMMARY

AGE DISCRIMINATION

The Claimant had worked for the Respondent for many years as a specialist in medical insurance. From 2006 she had a consultancy agreement with the Respondent. In 2010 it was decided to terminate that agreement. The Claimant contended that that decision was unlawful because it was taken on the ground of age. The Respondent denied that. The Employment Tribunal found that the Claimant had done enough on the evidence to shift the burden of proof to the Respondent to show that it had not discriminated against her. The Tribunal focussed entirely on the mental processes of the person who took the decision to terminate the agreement and no one else. The Claimant submitted on appeal that that was a misdirection of law, in particular having regard to the fact that the burden of proof was on the Respondent.

Held, allowing the appeal:

It was common ground that the decision to terminate the agreement had been shaped and informed by the views of other persons, in particular in a presentation given to the eventual decision-maker. In those circumstances, in particular having regard to the fact that the claim was brought against the Respondent organisation and not the individual decision-maker, and having regard to the fact that the burden of proof had shifted to the Respondent, the Employment Tribunal misdirected itself in law. It should also have considered the mental processes of those other persons who had influenced the decision to terminate in a significant way. The case would be remitted to a differently constituted tribunal to reconsider in accordance with the judgment of the appeal tribunal.

THE HONOURABLE MR JUSTICE SINGH

Introduction

1. The Claimant appeals against the decision of the Employment Tribunal at Bristol sent to the parties on 4 April 2013, by which her claim for discrimination on grounds of age was dismissed. The Tribunal comprised an employment judge sitting with two lay members. It is common ground that the sole Respondent to this appeal is the First Respondent, CLFIS (UK) Limited, which for convenience was referred to at the hearing as Canada Life. I will refer to it as such or as the Respondent.

Factual background

2. The Claimant is an eminent doctor and insurance expert. She worked for many years for Canada Life, having started on 1 November 1968. In 1992 she was made redundant but continued to work for the Respondent on a consultancy basis. In March 2006 the retainer which she was paid was increased: see the Employment Tribunal's judgment, at para 9.15.

3. On 5 June 2006 the Claimant entered into a consultancy agreement with the Respondent. It is the decision to terminate that agreement which was the subject of the complaint of age discrimination before the tribunal.

4. The Claimant was employed as the Respondent's Chief Medical Officer (CMO). Although there were aspects of her performance which were highly regarded, there were other features which were said to be causing some concern.

5. On 2 February 2010 Mr McMullan made a presentation about the future of the CMO services provided to the Respondent. This was attended by Mr Ian Gilmour, the most senior manager with the Respondent in the United Kingdom. Before the Tribunal Mr Gilmour gave evidence that, having listened to the presentation, he made up his mind that the Claimant was not delivering the service the Respondent needed and could no longer be lead CMO: para 9.22 of the judgment. Although the report presented did not go so far as to recommend dispensing with the Claimant's services, the Tribunal concluded that that was the understanding which Mr Gilmour took from the presentation: para 9.23 of the judgment. Furthermore it was confirmed to the Tribunal by Ms Deeks (Executive Director of Corporate Resources and in effect the Human Resources Manager with the Respondent) that she had discussions with Mr McMullan and Mr Newcombe following the presentation, in which they confirmed that ideally, rather than continuing to work around the deficiencies of the current provision, it would be preferable if a complete change could be effected by the termination of the Claimant's contract: also para 9.23.

6. On 4 March 2010 Mr Gilmour telephoned the Claimant. On 10 May 2010 a meeting was held with the Claimant at the Celtic Manor Hotel, which was attended also by Mr Gilmour, Ms Deeks and the Claimant's sister.

7. On 11 May 2010 an email was sent by Mr Gilmour to Mr McMullan following that meeting.

8. On 13 May 2010 an email was sent from Mr Skinner to the Group team about future use of the Claimant's services.

9. On 11 June 2010 the Respondent wrote to the Claimant giving notice that her consultancy agreement would terminate on 31 December that year. She was given the

opportunity of a new contract after that date which would mean reduced work on her part. That new contract was signed on 29 December 2010 and eventually ended on 31 December 2011.

10. On 31 December 2010 the termination of the Claimant's consultancy agreement of 2006 took effect. That termination is the subject of the present proceedings.

Material Legislation

11. The claim was brought under the **Employment Equality (Age) Regulations 2006** (SI 2006 No. 1031). Regulation 3(1), so far as material, provides

> **"For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if –**
>
> > **(a) on grounds of B's age, A treats B less favourably than he treats or would treat other persons…**
>
> **and A cannot show the treatment …. to be a proportionate means of achieving a legitimate aim."**

12. Regulation 25, so far as material provides:

> **"(1) Anything done by a person in the course of his employment shall be treated for the purposes of these Regulations as done by his employer as well as done by him, whether or not it was done with the employer's knowledge or approval. …**
>
> **(3) In proceedings brought under these Regulations against any person in respect of an act alleged to have been done by an employee it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description."**

13. Regulation 37, so far as material, provides:

> **"(1) This Regulation applies to any complaint presented under Regulation 36 to an Employment Tribunal.**
>
> **(2) Where, on the hearing of the complaint, the complainant proves facts from the which the tribunal could, apart from this Regulation, conclude in the absence of an adequate explanation that the Respondent –**
>
> > **(a) has committed against the complainant an act to which Regulation 36 applies; or**
> >
> > **(b) is by virtue of Regulation 25 (liability of employers and principals)…to be treated as having committed against the complainant such an act,**
>
> **the tribunal shall uphold the complaint unless the Respondent proves that he did not commit, or as the case may be, is not to be treated as having committed, that act."**

The Employment Tribunal's judgment

14. The hearing before the Employment Tribunal took place over four days, including time for deliberation, starting on 25 February 2013. The Tribunal heard evidence from the Claimant and two witnesses on her behalf who had been employed by the Respondent as Claims Assessors. On behalf of the Respondent it heard evidence from Mr Gilmour, UK General Manager; Steven Cameron, Head of Risk Management; and Tracey Deeks, Executive Director of Corporate Resources.

15. The Tribunal also read the statement of Ian McMullan, Managing Director of the Group insurance division. He was unable to attend the hearing because of illness and this impacted on the weight that the Tribunal attached to his evidence: para 5 of its judgment.

16. At para 6 of its judgment the Tribunal identified the issue which it had to determine as follows:

> **"Whether the 2006 consultancy agreement was terminated by the Respondent on the 31 December 2010 on the grounds of the Claimant's age."**

As the tribunal noted at para 7, the Respondent did not raise any defence of justification. It contended simply that the reason for the termination of the agreement was not the Claimant's age.

17. At section 9 of its judgment the Tribunal made findings of fact, which I will summarise here.

18. The Claimant was born on 2 July 1937. As at 31 December 2010 she was 73 years of age and had worked at Canada Life for a period of 42 years. She was pre-eminent in the field of medical underwriting in the insurance industry. She received an OBE for her work in

insurance and also received several insurance industry awards. Her role as CMO was to be responsible for medical aspects of insurance claims. It involved providing support to teams engaged in the areas of individual and group underwriting and claims management.

19. The consultancy agreement between the Claimant and the Respondent of 5 June 2006 was terminable on three months' notice. The agreement provided that the Claimant's services would be provided from her home in Caerleon, Newport, Wales. Although the agreement contained a provision allowing the Respondent to require the Claimant to attend meetings with managers at its offices, in practice all meetings took place at the Claimant's house in Wales.

20. At para 9.16 of its judgment, the Tribunal found as a fact that the Respondent was not happy with aspects of the CMO service provided by the Claimant in around 2006, although her remuneration package was reviewed and an increase recommended in March 2006. The Tribunal's view was that "this represented a work around."

21. In late 2009 a report was prepared by Mr Newcombe and Mr McMullan for the purpose of an away day in December 2009. This provided the basis for the presentation which was made by Mr McMullan (and Mr Newcombe) on 2 February 2010. A number of deficiencies were identified in the CMO service provided. Service was regarded as being poor overall with many chases required to follow up cases. This was thought not to be commensurate with modern day claims handling needs where commercial pressure is greater. It was said the conversations were too long and lacking focus. It was said that no written summaries were provided, nor letters drafted or signed off. It was also said that the team had been canvassed confidentially to provide feedback and these were the comments which had been received which were regarded as the most significant. The report concluded that the Respondent was under resourced in terms of CMO support and expertise.

22. As has been mentioned earlier, Mr Gilmour decided after seeing the presentation that he would bring the Respondent's relationship with the Claimant to an end. That was certainly the conclusion reached by the Tribunal at para 9.24 of its judgment. Nevertheless it was decided to give her a "soft landing": para 9.24. Mr Gilmour had known the Claimant since 1996. The Tribunal found that he genuinely held the view that the Claimant was not providing the level of support required and would not make the necessary changes to enable her to do so: para 9.29.

23. Mr Gilmour and Ms Deeks agreed to use a subterfuge initially to get the Claimant to attend a meeting in 2010. They agreed to refer to a fictitious requirement by the Financial Services Authority for succession planning to be adopted in relation to her position and other senior roles.

24. At para 9.55 of its judgment, the Tribunal noted that, following the termination of the Claimant's role as CMO for the Group, the Respondent had not appointed a new CMO. In late 2010 the Respondent appointed two medical officers. A third medical officer continued to take referrals. The Respondent's evidence was that arrangements were working well and that it had not been necessary to appoint a CMO in the Claimant's place. The Tribunal also noted that the two medical officers were in their 60's or 70's and that that the third was also in his 60's.

25. From para 10 of its judgment the Tribunal set out its conclusions. At paras 11 – 14 the Tribunal directed itself as to the Regulations and the principal case law on the subject. In particular it referred to the decision of this appeal tribunal in **Amnesty International v Ahmed** [2009] ICR 1450 at 32 – 36. I will return to that decision later.

26. At para 17 of its judgment the Tribunal concluded that the less favourable treatment complained of by the Claimant was not inherently age based. That treatment was the

termination of her 2006 consultancy agreement. Accordingly, the Tribunal went on to consider whether Mr Gilmour's mental processes were such that he had discriminated against the Claimant on the grounds of her age: para 18 of the judgment.

27. At para 19 the Tribunal considered the burden of proof provision in Regulation 37. It concluded that the Claimant had done enough on the evidence to discharge the burden of proof on her and so shift the burden to the Respondent to establish an explanation for the less favourable treatment that was not an unlawful one. Its reasons for so doing were that: (1) the Claimant's work was very highly regarded; (2) the fact that Mr Gilmour, who was responsible for the decision to terminate the contract carried out that decision in a covert and underhand way; (3) there were references made by Mr Gilmour to the Claimant's age, particularly in the phone call of 4 March 2010; (4) the fact that the Respondent made no attempt to ask the Claimant to address the deficiencies in her performance or to adapt to the changes that were required in the service provision by her. The Tribunal considered that this may have been based on a stereotypical assumption that, as an older person, she would be unable to change or adapt to the new approach required. These factors led the Tribunal to infer that the reason why the Respondent terminated the Claimant's contract may have been on the grounds of her age: para 20 of the judgment.

28. At para 22 the Tribunal concluded that the principal reason for the termination of the contract was that the Respondent was unhappy with the service provided by the Claimant. It went on to note that:

> **"The deficiencies in the service were identified in the Group Directors' presentation of the 2 February 2010 and we found no direct link between those deficiencies and the Claimant's age."**

29. Despite the underhand way in which the Respondent acted, the Tribunal concluded that none of the factors why her contract was terminated related to the Claimant's age. As the Tribunal said at para 26:

> **"Mr Gilmour's approach may have been misguided, reprehensible even, but this did not make it discriminatory."**

30. At para 27 the Tribunal said that it was significant and supportive of the Respondent's contention that the Respondent engaged the services of medical officers who were in the same age range as the Claimant and that there had been another medical officer who was retained until his 90th year.

31. In para 30 of its judgment the Tribunal said that it was satisfied that Mr Gilmour genuinely believed from his own knowledge of the Claimant that she was unlikely to change to adapt to the new requirements of the Respondent. It continued:

> **"Whilst a reluctance to embrace change may be a characteristic that is attributed to older people, and an assumption in any particular case that that characteristic must be present because of the individual's age would be discriminatory, we concluded that there was no such assumption in this case. Mr Gilmour's view of her capacity to change was based on his knowledge of the Claimant and was, we concluded, a genuine view held by him."**

32. At para 32 the tribunal concluded as follows:

> **"The reason the Respondent terminated the 2006 agreement was not in any sense related to the Claimant's age. It was because of the Respondent's genuine belief that the Claimant was not providing the CMO service in the manner it required. It was not under an obligation to give the Claimant an opportunity to change as she was a self-employed consultant and in any event it held a genuine view that the Claimant would not meet the new requirements, a belief which itself was based on its own knowledge of the Claimant and was not anything to do with her age."**

The Claimant's grounds of appeal

33. After a hearing before Mitting J. on7 November 2013, the Claimant's grounds of appeal were amended so as to advance only the points which he permitted to proceed to a full appeal hearing.

34. Those amended grounds are in essence as follows: (1) The Employment Tribunal misdirected itself that it was necessary to consider only Mr Gilmour's mental processes. It is contended that the Tribunal erred by focussing solely on Mr Gilmour and disregarding the involvement of other individuals in the process leading to the termination of the Claimant's contract. (2) Having decided that the burden of proof had shifted, the Tribunal erred by failing to take into consideration (a) the fact that Mr McMullan had not given oral evidence; and (b) the fact that Mr Newcombe had not been called to give evidence. (3) The Tribunal erred in failing adequately to address whether the Respondent's alleged belief that the Claimant was incapable of changing the way in which she worked was itself an age-related belief.

35. At the hearing of this appeal, Mr Pitt-Payne QC accepted that, if the first ground of appeal succeeded, he did not need the other two grounds; and that, if the first ground failed, the second ground would fail too, as it flowed from the first. He submitted that, if the first ground failed, the third ground would be affected to some extent but would not fall away entirely and he made specific submissions in criticism of the Tribunal's approach to its consideration of Mr Gilmour's mental processes in this regard, to which I will return.

The first ground of appeal

36. It was common ground before me that the relevant principles which the Employment Tribunal had to apply were correctly identified by it as having been summarised in the decision of this appeal tribunal in **Amnesty International v Ahmed** [2009] ICR 1450. In giving the judgment Underhill J (President) said at paras 32-36:

> **"32 The basic question in a direct discrimination case is what is or are the 'ground' or 'grounds' for the treatment complained of. ……..**
>
> **33 In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying 'No blacks admitted', race is, necessarily, a ground on which (or the reason why) a black person is excluded. …….in cases of this kindwhat was going on inside the head of the putative discriminator - whether**

described as his intention, his motive, his reason or his purpose – will be irrelevant. The 'ground' of his action being inherent in the act itself, no further inquiry is needed. It follows that…….a respondent who has treated the claimant less favourably on the grounds on his or her sex or race cannot escape liability because he had a benign motive.

34 But that is not the only kind of case. In other cases…….the act complained of is not in itself discriminatory but is rendered so by the discriminatory motivation, i.e., other 'mental processes' (whether conscious or unconscious) which led a putative discriminatory to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and surrounding circumstances (with the assistance where necessary of the Burden of Proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as a benign motive is irrelevant. ……. …….

36 the ultimate question is – necessarily – what was the ground of the treatment complained of (or - if you prefer – the reason why it occurred)

……..."

37. As I have already mentioned, in the present case the Employment Tribunal concluded that the ground on which the decision to terminate the Claimant's contract did not fall into the first of those two categories: it was not inherently age-based. Accordingly, the Tribunal went on to consider the second of the two categories and it was for that reason that it examined the mental processes of Mr Gilmour. On behalf of the Claimant it is submitted that the Tribunal erred as a matter of law in focussing exclusively on his mental processes and not examining the mental processes of any other person who had been involved in the decision-making process.

38. The first submission that Mr Pitt-Payne makes is that Mr Gilmour was not the sole decision-maker in this case. Mr Tatton-Brown disputes that suggestion. In my view, this is essentially a question of fact. On the findings of fact that were made by the Employment Tribunal, the decision-maker in this case was indeed Mr Gilmour and no one else: see in particular paras. 9.24 and 19 of the judgment. However, that is not necessarily the end of the matter.

39. The second submission that Mr Pitt-Payne makes is that, even if the sole decision-maker was Mr Gilmour, his decision was shaped and informed by others within the Respondent organisation. As a matter of fact, Mr Tatton-Brown accepts that but disputes its significance as

a matter of law. He submits that, in such circumstances, the Employment Tribunal is entitled (indeed required) to focus on the mental processes of the decision-maker and no one else. It is this dispute of law which lies at the heart of the present appeal.

40. It is not difficult to think of many situations in the employment context in which this issue may arise. For example, the actual decision to terminate an employee's contract may be taken by a senior manager, indeed it may be that, within the structure of the relevant employer, only that manager has the power of dismissal. However, that person may have no personal knowledge of the employee and may have to rely entirely on reports which have been prepared by others, for example about an employee's performance or conduct. Mr Pitt-Payne submits that, if the mental processes of those who prepared such reports are based on discriminatory grounds, then in principle the Tribunal must examine those mental processes and cannot confine itself to those of the eventual decision-maker alone. Otherwise a real injustice might be done, where for example the authors of the underlying reports are acting for reasons which are discriminatory and their reports have a significant influence on the decision to dismiss.

41. It would appear that the precise point of law that arises has not been the subject of direct authority in the past. However, it seems to me that some assistance as to the correct approach in principle can be found in dicta in earlier cases.

42. In **Nagarajan v London Regional Transport** [2000] 1 AC 501, Lord Nicholls of Birkenhead explained that the reason for decisions which are discriminatory can often be subconscious rather than conscious. At 512H-513B he said: "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial

grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out." In my view, Mr Pitt-Payne's submissions are consistent with that passage and derive some support from it. If a prohibited ground (whether race, sex, age or another prohibited ground) had a significant influence on the outcome, it may be said that discrimination has been made out, even if the person who makes the actual decision has not acted for that reason if one examines only the mental processes of that person.

43. Furthermore, it is important to recall that in the present context the discrimination legislation provides for a reversal of the normal burden of proof. In **Igen Limited v Wong** [2005] ICR 931 the Court of Appeal gave guidance as to the application of the reverse burden of proof in discrimination legislation. In the annex to that judgment at 956F-957E it set out in a series of numbered paragraphs the guidance to be applied. At para (11) it said: "To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive." Again I consider that Mr Pitt-Payne is right to submit that that passage is consistent with and supports his contention in the present context. As he submits, the present complaint was not brought against Mr Gilmour or any other individual: it was brought against the Respondent organisation. The Employment Tribunal concluded on the evidence before it that the Claimant had done enough to shift the burden of proof to the Respondent. It was then for the Respondent as an organisation to prove that the decision to terminate the Claimant's contract was "in no sense whatsoever" on the ground of age. For the Tribunal properly to be able to assess whether the Respondent had discharged that burden of proof, it had to consider the mental processes of others whose views

had a significant influence (to use Lord Nicholls' phrase) on the eventual decision to terminate. In the present case the Employment Tribunal found as a matter of fact that the views of others did play that part, in particular the presentation by Mr McMullan and Mr Newcombe on 2 February 2010. Yet it failed to examine the mental processes of those persons to see if they were based on the prohibited ground of age.

44. In his written submissions Mr Pitt-Payne advanced a third submission, relying upon the terms of Regulation 25, which I have set out so far as material earlier. On reflection, at the hearing before me, he accepted that this was not a free-standing point but should be regarded as part of his earlier submission about the reverse burden of proof. He submits that the effect of Regulation 25 is that, where a relevant employee's acts are attributable to the Respondent by virtue of Regulation 25, it cannot be said to have discharged the burden of proof placed upon it in circumstances where the Tribunal has failed to address the mental processes of all the relevant employees but has focussed exclusively on the mental processes of just one (here Mr Gilmour). Again I accept that submission.

45. On behalf of the Respondent Mr Tatton-Brown submits first that the Claimant is attempting to raise a new point of law on this appeal which was not raised before the Employment Tribunal, as it normally should be. I do not accept that submission. In my judgment, the Claimant is not trying to raise a new point of law which should have been raised below but seeks to criticise the way in which the Tribunal went about its task: in particular, Mr Pitt-Payne submits that, once the Tribunal had found that the burden of proof had shifted to the Respondent, it was required to analyse correctly the way in which the Respondent could discharge that burden. He submits that, in seeking to carry out that analysis, the Tribunal misdirected itself in law and that error of law should be corrected by this appeal tribunal. I agree.

46. Turning to the merits of the argument, Mr Tatton-Brown's primary submission is that the Employment Tribunal was entitled, and required, to focus on the mental processes of the decision-maker and no one else, even if (as he accepts) other people shaped and informed that decision. For reasons I have already set out, I reject that submission: I prefer the analysis proffered by Mr Pitt-Payne. In support of his primary submission Mr Tatton-Brown submits that his analysis would not lead to any injustice because, if a claimant alleges that one of those earlier people discriminated on a prohibited ground, he or she will be able to bring a claim in respect of that act on the ground that he or she has suffered a detriment. However, he submits, what is not permissible is for the claim to be brought in respect of the decision to terminate a contract where that decision was taken by someone else. The difficulty with that submission is that, very often, it will be the termination of a contract (typically the dismissal of an employee) which will be the primary reason why a person is aggrieved: the practical consequences of such a decision will be obviously serious for a person who may be left without work. As Mr Tatton-Brown accepts, on his submission it would not be possible for a claimant to claim compensation for loss flowing from that decision to terminate their employment; he or she would be confined to compensation for the detriment imposed by reason of the earlier act complained of (for example an appraisal report that was alleged to be based on discriminatory grounds). I do not accept that this is the scheme of the discrimination legislation.

47. Mr Tatton-Brown next submits that the Claimant's analysis would lead to potential unfairness. Although the claim in the present case was brought against a corporate respondent, it can in principle be brought against an individual, for example if Mr Gilmour himself had been the employer of the claimant. Mr Tatton-Brown submits that an individual such as Mr Gilmour could also be named as a respondent on the basis that he aided and abetted the employer to discriminate; and that individual (not himself the employer) could be named a sole respondent. He submits that it would be unfair if, in such circumstances, a claimant could

successfully bring a claim against an individual who took the decision to terminate where that person's mental processes are untainted by a discriminatory ground but someone else in the process leading up to the decision did act on such a ground. I do not accept that this is outside the contemplation of the discrimination legislation. For example, Regulation 25 can be invoked against an individual respondent as it can against a corporate one. That provision contemplates that the discriminatory acts of another person will be attributed to the respondent in certain circumstances. It also provides for a defence in Regulation 25(3) where the conditions for that defence are made out.

48. Mr Tatton-Brown also submits that the analysis advanced by the Claimant is unworkable because it would lead to the problem of potentially infinite regression. He submits that the Employment Tribunal would be required to go back to examine not only the mental processes of people such as Mr McMullan and Mr Newcombe but also the people who had been consulted by them in arriving at their report and presentation. He submits that this would be particularly unfair where, as here, others have been consulted on a confidential basis. In my judgment, the Claimant's analysis would not lead to the problem of potentially infinite regression. The Employment Tribunal can be expected to bring common sense to bear upon its task. The reverse burden of proof does not require a respondent to satisfy the tribunal so that it is sure that there was no discrimination: the standard of proof is the conventional civil standard of a balance of probabilities. Although it will always be a question of fact for the tribunal it may well be that, having examined the mental processes of those people who are known to have been involved in a significant way in the process leading up to a decision to terminate a person's employment, the tribunal will conclude that the respondent has discharged the burden of proof. However, that was not the present case. What is crucial in the present case is that, even though it was known that other identified people were involved in a significant way in the process which led up to Mr Gilmour's decision to terminate the Claimant's contract, the mental

processes of those other people were never examined. That, in my judgment, was an error of law.

The second ground of appeal

49. As I have already indicated, this does not need to be considered further. Mr Pitt-Payne accepts that it stands or falls with the first ground. As I have already found that the Employment Tribunal erred in law in its approach to the task it had to perform when considering whether the Respondent had discharged the burden of proof imposed on it, he succeeds on that first ground. However, if I had been against him on the first ground, it would have followed that there was no error of law in the Tribunal's approach and so it was not required to consider evidence from Mr McMullan or Mr Newcombe.

The third ground of appeal

50. Mr Pitt-Payne does not strictly need this ground in view of my decision on the first ground. However I will address it briefly in case I am wrong on the first ground.

51. Mr Pitt-Payne submits that the Employment Tribunal was wrong in law in failing to explore further the grounds on which Mr Gilmour acted as he did in this case. He submits that those grounds may well have been based on stereotyped assumptions about what an older person is or is not capable of doing to change his or her behaviour. In particular he submits that no one had asked the question what would have happened if the Claimant had been faced with the stark choice of changing her ways or having her contract terminated.

52. I reject those submissions. In my judgment this third ground amounts to no more than a disagreement with the Employment Tribunal's findings of fact as to the mental processes of Mr

Gilmour. The passages I have already quoted from the Tribunal's judgment, in particular at paras 27 and 29-30 make it clear that the Tribunal was alive to the question of possible stereotyped assumptions lying at the root of Mr Gilmour's mental processes but rejected that suggestion on the facts of this particular case.

Conclusion

53. For the reasons I have given this appeal is allowed.

54. At the hearing Mr Pitt-Payne submitted that in those circumstances the claim should be remitted to a differently constituted tribunal for redetermination in accordance with the law as set out in this judgment. Mr Tatton-Brown did not make submissions about this issue at the hearing. However, on receipt of the draft judgment in this case, he has made written submissions urging me to remit to the same tribunal. Mr Pitt-Payne has also made written submissions in response. Mr Pitt-Payne submits that the point should have been argued at the oral hearing before me but that, in any event, I should remit to a differently constituted tribunal. I have taken into account those submissions and have reached the conclusion that it would be just to decide the question on its merits.

55. Both parties have reminded me of the decision of this appeal tribunal in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. I have taken careful account of the various factors that, in accordance with that judgment, are relevant in deciding whether a case should be remitted to the same tribunal or a differently constituted one and have also taken careful account of the parties' submissions. After weighing up those various factors, I am persuaded by Mr Pitt-Payne that the case should be remitted to a differently constituted tribunal. This is particularly so for the following reasons. First, in my view, the Tribunal fell into fundamental

error, as it failed to ask itself the right legal question in this case. Secondly, there is a risk that the Tribunal (however subconsciously) would be tempted to reach the same decision as before. As Mr Pitt-Payne submits, there is a real risk of apparent bias (although he makes no suggestion of actual bias). Thirdly, the lapse of time since the last hearing means that the same Tribunal would not have a particular advantage over a differently constituted one by having a clear recollection of the evidence.

56. However, I do not accept Mr Pitt-Payne's further submission that the case should be remitted to a different region rather than the Bristol region. I do not consider that there is any real risk of apparent bias if the case is heard on the same region as before. Furthermore, the case must have been heard in Bristol because there would be practical advantages to the parties and I can see no good reason why it should not stay in that region.

57. Accordingly, this case will be remitted to a differently constituted Tribunal in the Bristol region.