

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal  
On 13 June 2013

**Before**

**THE HONOURABLE MRS JUSTICE SLADE DBE**

**MS G MILLS CBE**

**MR S YEBOAH**

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MRS L COPELAND

APPELLANT

E COOMES (HOLDINGS) LTD

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MS ALICE CARSE  
(of Counsel)  
Instructed by:  
Slater & Gordon UK LLP  
50-52 Chancery Lane  
London  
WC2A 1HL

For the Respondent

MR RICHARD REES  
(Representative)  
Peninsula Business Services Ltd  
The Peninsula  
2 Cheetham Hill Road  
Manchester  
M4 4FB

## **SUMMARY**

### **AGE DISCRIMINATION**

### **UNFAIR DISMISSAL**

#### **Automatically unfair reasons**

#### **Reason for dismissal including substantial other reason**

The reason for the Claimant's dismissal was retirement. The Employment Tribunal erred in holding that the Claimant's claim of age discrimination failed by application of Regulation 30 of the **Employment Equality (Age) Regulations 2006** when the 2006 regulations had been repealed (save for Schedules 6 and 8) by the implementation on 1 October 2010 of Schedule 27 of the **Equality Act 2010** by **Equality Act 2010 (Commencement No 4) Order 2010** para 2(15)(f). Further the ET erred in interpreting the pre-condition for the application of the savings provisions in Reg 5 of the **Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011** inconsistently with that of Schedule 6 para 2 of the 2006 Regulations as interpreted by the CA in **Bailey v R and R Plant (Peterborough) Ltd** [2012] EWCA Civ 410. The effect was that where notice of impending retirement did not include a reference to the need for the employee to apply under Reg 5 of the 2006 Regs to be allowed to remain in employment, para 8 of Schedule 9 of the **Equality Act** did not apply nor did the **Employment Rights Act 1996** s. 98ZG and 98(2)(ba). Once this legislative trail was explained by the Employment Appeal Tribunal to the parties, the Respondent conceded that the appeal must succeed. Cross appeal against the finding of automatic unfair dismissal under ERA s.98ZG allowed as that provision had been repealed and the saving provision in reg 5 of the 2011 Regs did not apply. Case remitted to a differently constituted ET to determine the age discrimination and unfair dismissal claims.

## **THE HONOURABLE MRS JUSTICE SLADE DBE**

### **Introduction**

1. Mrs Copeland, the Claimant, appeals from the dismissal of her claim of age discrimination by Judgment of an Employment Tribunal sent to the parties in its corrected form on 14 September 2012, ('the Judgment'). Her former employers, E Coomes (Holdings) Limited, the Respondent, cross appeals from the finding that she was automatically unfairly dismissed by reason of the application of the **Employment Rights Act 1996**, s.98ZG. References below to paragraph numbers are to the Judgment unless otherwise indicated.

### **Outline relevant facts**

2. The Claimant's date of birth was the 15 February 1946. She was employed by the Respondent as a branch manageress of a betting shop from 6 April 1995 until her dismissal on 15 August 2011. It was agreed by the parties that the reason for her dismissal was retirement. By a letter dated 10 June 2010 the Respondent informed the Claimant that the intended date of her retirement was 15 February 2011 but that she had a statutory right to request work in her current role past her retirement date. It was agreed that the letter did not refer to the statutory provision under which that request may be made, Regulation 5 of the **Employment Equality (Age) Regulations 2006** ('the 2006 Regulations').

3. By letter 15 August 2010 the Claimant asked to carry on working beyond her retirement date. After a meeting and consideration, the Respondent gave the Claimant a new retirement date of 15 August 2011. The Claimant was not satisfied and further meetings were held. She wished to raise a grievance but no grievance meeting was held. The employment of the Claimant ended on 15 August 2011.

4. By her ET1 the Claimant claimed automatic unfair dismissal by reason of the alleged failure to provide a retirement notice in accordance with the 2006 Regulations. In addition or alternatively, the Claimant claimed age discrimination. The Respondent resisted the claims of age discrimination and unfair dismissal. It was stated in the ET3:

**“The Respondent terminated the Claimant’s employment by reason of retirement and the Respondent acted reasonably and fairly in treating it as a sufficient reason for termination.”**

5. The Respondent stated that their letter of 10 June 2010, complied with paragraph 2 of Schedule 6 to the 2006 Regulations and that they were entitled to terminate the Claimant’s employment by reason of retirement in accordance with **Employment Rights Act 1996** s.98ZG.

### **The Judgment of the Employment Tribunal**

6. The statutory provisions referred to in the Judgment of the Employment Tribunal and by the Appellant are:

#### **Employment Rights Act 1996:**

“Section 98

...

(2) A reason falls within this subsection if it—

...

(ba) is retirement of the employee.

...

Section 98ZG

...

(2) The employee shall be regarded as unfairly dismissed if, and only if, there has been a failure on the part of the employer to comply with an obligation imposed on him by any of the following provisions of Schedule 6 to the 2006 Regulations—

(a) paragraph 4 (notification of retirement, if not already given under paragraph 2)...”

#### **Employment Equality (Age) Regulations 2006:**

“Regulation 30

...

- (2) Nothing in Part 2 or 3 shall render unlawful the dismissal of a person to whom this regulation applies at or over the age of 65 where the reason for the dismissal is retirement.

...

#### Schedule 6

...

2. (1) An employer who intends to retire an employee has a duty to notify the employee in writing of—
- (a) the employee's right to make a request; and
  - (b) the date on which he intends the employee to retire, not more than one year and not less than six months before that date.

...

5. (1) An employee may make a request to his employer not to retire on the intended date of retirement.

...

- (3) A request must be in writing and state that it is made under this paragraph."

### Equality Act 2010:

#### "Schedule 9

...

8. (1) It is not an age contravention to dismiss a relevant worker at or over the age of 65 if the reason for the dismissal is retirement."

### Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011:

- "2. (1) Schedule 9 to the Equality Act 2010 (work: exceptions relating to age) is amended as follows.

- (2) Omit paragraph 8 (retirement).

...

4. (1) Schedule 6 to the Employment Equality (Age) Regulations 2006 (duty of employer to consider employee's request to work beyond retirement) is revoked.  
(2) Omit paragraphs 22 to 24, 26 and 28 of Schedule 8 to those Regulations.

5. (1) Despite regulations 2 to 4, the provisions mentioned in paragraph (2) continue to have effect in relation to the employment of a person if—

- (a) notification in respect of that employment has been given under paragraph 2 or 4 of Schedule 6 to the Employment Equality (Age) Regulations 2006 before the date of the commencement of these Regulations, and
- (b) that person has attained the age limit or will attain it before 1st October 2011.

- (2) The provisions are—

- (a) sections 98(2)(ba), (2A) and (3A), 98ZA to 98ZD, 98ZF to 98ZH, 105(7IA), 108(3)(n), 112(5) and (6) and 120(1A) and (1B) of the Employment Rights Act 1996,

- (b) Schedule 6 to the Employment Equality (Age) Regulations 2006, and

- (c) paragraph 8 of Schedule 9 to the Equality Act 2010.

- (3) The age limit is whichever is the greater of—

- (a) the age of 65, and
- (b) the normal retirement age in the case of the employment concerned.

- (4) Despite this regulation—

- (a) an employer may not issue a notification under paragraph 2 or 4 of Schedule 6 to the Employment Equality (Age) Regulations 2006 on or after 6th April 2011 in respect of the employment of a person to which this regulation applies; and

- (b) an employee may not make a request under paragraph 5 of Schedule 6 to the Employment Equality (Age) Regulations 2006 on or after 5th January 2012 in respect of the employment to which this regulation applies.

- (5) In this regulation, "normal retirement age" has the meaning given in section 98ZH of the Employment Rights Act 1996.

**(6) This regulation does not apply to the employment of a person if section 98ZE of the Employment Rights Act 1996 would (but for regulation 3(3)) apply to a dismissal from that employment.”**

7. As appears from paragraph 35, the Employment Tribunal did not accept the submission on behalf of the Claimant that if a notification of retirement does not satisfy the requirements of the 2006 Regulations, Schedule 6, paragraph 2 because it did not tell the employee that he had a right under paragraph 5 of Schedule 6 to make a request not to be retired, then that was also not a notification given under Regulation 5(1)(a) of the 2011 Regulations.

8. The Employment Tribunal reasoned that (1) the wording of Regulation 2 of Schedule 6 was different from that of Regulation 5 of the 2011 Regulations and is set in a different context. (2) The policy of the two regulations is different. They held that the provisions in the 2011 Regulations:

**“[...] is exclusively concerned with establishing a timetable of events into which the commencement date can be fitted, with a simple purpose of establishing whether the notification was given before or after that date.”**

The Employment Tribunal, therefore, held at paragraph 36:

**“36. [...] it is sufficient that the notification given by the employer to the employee purported to be given under paragraph 2. There is no compelling reason to carry over the reasoning of the Court of Appeal on the interpretation of Schedule 6 into the interpretation of Regulation 5 of the 2011 Regulations (the reference to the Court of Appeal is to *Bailey v R and R Plant (Peterborough) Ltd* [2012] EWCA Civ 410). ...**

**37. Therefore, we accept that the applicable law is Schedule 6 as interpreted by the Court of Appeal.”**

9. The Employment Tribunal reached the following conclusions:

**“39. The letter from the Respondent to Mrs Copeland of 10 June 2010 did not satisfy paragraph 2 of Schedule 6, because it made no reference to paragraph 5, and to her need to refer expressly to paragraph 5 if and when she should make a request to be allowed to continue working beyond her retirement age. [...]**

41. It is clear from reading the correspondence in this case that the Respondent did not ever expressly remedy the defect in the paragraph 2 notice. [...] It must follow that applying the judgment in Bailey's case, there was a failure to comply with paragraph 4."

10. It was agreed that the reason for dismissal was retirement. In paragraph 42 the Employment Tribunal held:

"Therefore, as in Bailey's case, section 98ZG has effect so that the employee 'shall be regarded as unfairly dismissed'."

It is, therefore apparent that the Employment Tribunal treated the provisions in paragraph 5(2) as continuing to have effect: s.98ZG was one such provision. That would only be the case if the claim fell within the 2011 Regulations, Regulation 5(1), which in terms referred to the 2006 Regulations with the effect that notification before 6 April 2011 had to be given under paragraph 2 or 4 of Schedule 6 of those regulations.

11. At paragraph 43 the Employment Tribunal held:

"43. However, the effect of Regulation 30 of the 2006 Regulations is that a finding of discrimination is excluded. [...]"

### **The submissions of the parties**

12. In her skeleton argument, Ms Carse, counsel for the Claimant, contended that:

"'Notification' in Regulation 5(1)(a) of the 2011 Regulations should be taken to mean 'effective notification' in accordance with the interpretation of the employer's duty under paragraph 2(1) of Schedule 6 to the 2006 Regulations by Smith LJ in Bailey."

13. The exemption from unlawful age discrimination in Regulation 30 of the 2006 Regulations and its successor contained in para 8 of Schedule 9 of the **Equality Act 2010** only continues to have effect under Regulation 5 of the 2011 Regulations if 'notification' has been

given in accordance with Regulation 2(1) of Schedule 6 to the 2006 Regulations. Otherwise it is said that the effect of Regulation 5 of the 2011 Regulations is a finding of unlawful age discrimination for a retirement dismissal.

14. Further, it was said that pursuant to Regulation 7 of the **Equality Act 2010 (Commencement No. 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010**, if the relevant exemption from liability for unlawful age discrimination had applied, it would have been that in paragraph 8 of Schedule 9 of the **Equality Act**, not that in Regulation 30 of the 2006 Regulations.

15. Mr Rees, for the Respondent, in his skeleton argument relies on the interpretation of paragraph 5(1)(a) of the 2011 Regulations set out in paragraphs 35 to 36 of the Judgment of the Employment Tribunal. He contended in his skeleton argument that “notification” under paragraph 5(1)(a) of the 2011 Regulations means a “purported” notification rather than a “valid” notification. He contended that the 2011 Regulations address jurisdiction whilst the 2006 Regulations address retirement procedures and liability. Further, it was said that the Claimant cannot enjoy the benefit of automatic unfair dismissal, which was referred to in the Reasons in particular at paragraph 42, yet avoid the exclusionary provisions provided in the Regulation 5 of the 2011 Regulations by introduction or reference back to the provisions for automatic unfair dismissal. In his skeleton argument, Mr Rees contended that where dismissal was for retirement at or over the age of 65 there should be a consideration of the fairness of the dismissal which was not done by the Tribunal in this case.

16. So far as the cross appeal is concerned, it was contended by Mr Rees that if the Claimant’s interpretation of Regulation 5(2) was correct, the finding of automatic unfair

dismissal cannot stand. Either the whole of Regulation 5(2) of the 2011 Regulations applies or none of it.

### **Discussion and conclusion**

17. Additional statutory provisions:

#### **Equality Act 2010:**

13. (1) 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.
- (2) If the protected characteristic is age, 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.

#### **Schedule 27**

#### **Part 2 - Revocations**

#### **Employment Equality (Age) Regulations 2006 (S.I. 2006/1031):**

**The whole Regulations (other than Schedules 6 and 8).**

18. The **Equality Act 2010** Schedule 27 revokes the whole of the 2006 Regulations other than Schedules 6 and 8. The **Equality Act 2010 (Commencement No. 4) Order 2010** brings provisions into force on 1 August 2010. One such provision, which is referred to in paragraph 2(15)(f) is Schedule 27, except for Schedules 6 and 8 of the 2006 Regulations. Accordingly, Regulation 30 of the 2006 Regulations was repealed with effect from 1 October 2010.

19. The 2011 Regulations came into force on 6 April 2011. Two amendments to the **Equality Act 2010** were introduced by those regulations, albeit that Schedule 9 paragraph 8 was omitted with a saving provision in relation to that provision in Regulation 5(2). That saving only applied where notification had been given to an employee of impending retirement under paragraphs 2 or 4 of Schedule 6 to the 2006 Regulations.

20. As the Employment Tribunal themselves recognised, the Court of Appeal in **R and R Plant (Peterborough) Limited v Bailey** [2010] EWCA Civ 410 decided, as set out in the Judgment of Dame Janet Smith at paragraph 27:

“[...] the words of paragraph 2(1), read with the interpretations section, as they should be, require the employer to tell the employee that he has a right to make a request not to retire pursuant to paragraph 5 of Schedule 6 of the Employment Equality (Age) Regulations 2006. [...] The way in which Parliament has provided for that information to be imparted is by requiring the employer to tell the employee that he has a right to make a request not to be retired under paragraph 5 of the schedule.”

21. On the findings of fact made by the Employment Tribunal, it is not in doubt but that the Respondent did not give such notification under paragraph 2 or paragraph 4 of Schedule 6 of the 2006 Regulations. For the transitional provisions in the 2011 Regulations to apply, notification has to be given under paragraph 2 or 4 of Schedule 6 of the 2006 Regulations before the commencement date of the 2011 Regulations. The Employment Tribunal themselves found that such notification had not been given. Such notification is required by the clear words of the 2011 Regulations, Regulation 5(1), before the transitional provisions in that regulation apply. They clearly did not. There is no justification for holding that the requirements of notification under paragraph 2 of Schedule 6 of the 2006 Regulations differ depending on whether the reference is in the 2006 Regulations, or in the 2011 Regulations. The Employment Tribunal erred in holding that a notification which did not comply with paragraph 2, Schedule 6 of the 2006 Regulations did comply with Regulation 5(1)(a) of the 2011 Regulations. The consequence is that the saving provisions do not apply and the Respondent cannot take advantage of paragraph 8 of Schedule 9 of the **Equality Act 2010**.

22. Whilst the Employment Tribunal referred to Regulation 5 of the 2011 Regulations in their reasoning in the section of the Judgment headed ‘Conclusions’, they based their decision on their view that the age discrimination claim was “excluded” by Regulation 30 of the

2006 Regulations. This regulation was repealed along with other provisions of the 2006 Regulations, apart from Schedule 6 and 8 on the coming into force of Schedule 27 of the **Equality Act 2010** on 1 October 2010. Mr Rees, rightly and properly recognised that the Employment Tribunal had erred in relying on a repealed provision in dismissing the claim of age discrimination. He also rightly acknowledged that the Employment Tribunal erred in its interpretation of Regulation 5 of the 2011 Regulations. Accordingly, he rightly and properly conceded that the appeal against the dismissal of the age discrimination claim should be allowed. It was agreed that the reason for the Claimant's dismissal was retirement. This is unlawful age discrimination under the **Equality Act** s.13(2), unless the Respondent can show that their treatment of the Claimant was a proportionate means of achieving a legitimate aim.

23. So far as the cross appeal is concerned, it is impermissible to give Schedule 6 paragraph 2 a different interpretation depending on whether it appears in the 2006 or the 2011 regulations. The consequence is that there should not be a different interpretation depending on whether an age discrimination claim is under consideration or the application of the automatic unfair dismissal provisions. Where the savings provisions in the 2011 Regulations apply, the notice requirement is the same and has the same effect, whether the age discrimination claim of the unfair dismissal claim is considered. Accordingly, the cross appeal is allowed and the finding of automatic unfair dismissal is set aside.

24. Ms Carse raised an issue as to whether the Respondent should be able to rely on some other substantial reason for dismissal to resist a claim for unfair dismissal. However, the consequence of allowing the cross appeal is that the finding of automatic unfair dismissal is set aside. If the matter stopped there, the unfair dismissal claim would not succeed. There is no attempt in the comments in the response to the cross appeal to maintain a finding of unfair dismissal as an ordinary unfair dismissal on any grounds. We canvassed the consequence of  
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allowing both the appeal and the cross appeal with counsel and with Mr Rees. Ms Carse had, as we have said, initially contended that the Respondent should not be able to rely on some other substantial reason to resist the claim of unfair dismissal. She contended that retirement had been determined as the reason for dismissal and that the provision in the **Employment Rights Act**, which makes retirement a listed acceptable reason for dismissal had been repealed.

25. On further enquiry, very properly and conscious of her duty as counsel to assist the court, Ms Carse showed us her note of the proceedings before the Employment Tribunal. That note contains the following material passage:

“N (the representative of the Respondent) if retirement & not in scope of regs we have to rely on SOSR (some other substantial reason).”

The note continues recording the Employment Judge as saying:

“Put to one side issue of SOSR.”

Accordingly, it is apparent that before the Employment Tribunal the Respondents were reserving their position in that they would have relied on some other substantial reason for dismissal as a fallback position had their primary submissions failed. It appears that it was the Employment Judge who, as we have found, erred in law in his approach both to age discrimination and to unfair dismissal, also said that some other substantial reason should be put to one side. It is apparent that the Respondents had raised some other substantial reason as a justification for the dismissal but that the matter was not aired or considered at the Employment Tribunal hearing because of the approach of the Employment Judge.

26. The consequence of the argument initially raised by Ms Carse would be that whilst automatic unfair dismissal would have been repealed with the repeal of the **Employment** UKEAT/0606/12/LA

**Rights Act 1996** s.98ZG, the same result would obtain if retirement were not an acceptable reason for dismissal under s.98.

27. In our judgment, if that argument is to be pursued, the proper venue for it is before an Employment Tribunal when the issue of whether there was some other substantial reason for dismissal within the meaning of ERA 98(1)(b) is to be considered. Accordingly both the appeal and the cross appeal are allowed. Ms Carse and Mr Rees have agreed the consequence of these conclusions. The claims for age discrimination and unfair dismissal are remitted to a differently constituted Employment Tribunal for determination, respectively under the **Equality Act** s.13 and the **Employment Rights Act** s.98.