Appeal No. UKEAT/0157/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 November 2017
Judgment handed down on 6 February 2018

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

MR S KELLY — APPELLANT

PGA EUROPEAN TOUR — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID MITCHELL (of Counsel) Instructed by: M Law LLP 3a Montagu Row London W1U 6DZ
For the Respondent	MR PAUL NICHOLLS (One of Her Majesty's Counsel) Instructed by: PGA European Tour European Tour Wentworth Drive Virginia Water GU25 4LX

SUMMARY

UNFAIR DISMISSAL

The Tribunal did not err in concluding that the reason for the Claimant's dismissal was not age and gave adequate reasons for its decision.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. The principal issue in this appeal is whether the Tribunal gave adequate reasons for its decision that the Claimant was not dismissed for reasons to do with his age.

Factual Background

2. The Claimant was born in 1955. At the date of his dismissal he was 60 years old. The Claimant commenced employment with the Respondent, the well-known entity administering professional tournament golf in Europe, in 1989. His position at that stage was Marketing Director. The Claimant's position by the time of his dismissal in 2015 was that of Group Marketing Director. In that capacity, he had responsibility for expanding the Respondent's commercial partnerships. It would appear that the Claimant did this with considerable success throughout much of his employment.

3. For much of the Claimant's employment, the CEO of the Respondent was Mr George O'Grady. However, in 2014, Mr O'Grady confirmed that he was standing down as CEO. In April 2015, the Respondent announced that Mr Keith Pelley would succeed Mr O'Grady as CEO. Mr Pelley commenced as CEO of the Respondent from 3 August 2015.

4. Mr Pelley immediately set about conducting a review of the Respondent's operations. He was concerned by what he saw. The Tribunal said as follows:

> **"17. After starting employment in August 2015 Mr Pelley states that he saw very quickly that … there was no clarity in the commercial vision; that there had been no proper evaluation of the Tour's commercial assets; that there were no proper creative or marketing presentations; and that there was no pro-active strategy for growth in the void categories. Mr Pelley held one hour long meetings with 54 different employees across the business, all of whom he asked the same 9 questions. At these meetings Mr Pelley listened, individuals had the opportunity to offer full and frank feedback in confidence. In these early conversations with the claimant's team and other colleagues Mr Pelley received negative feedback about the commercial team:**

> **that the team had no proper direction or leadership; that there was a lack of commercial initiatives; that the team was rudderless; that the claimant was … not seen as a strong performer or a good team leader. Mr Pelley also received negative feedback from board members and from members of my [sic] senior leadership team about the claimant. From his own observations of working with the claimant Mr Pelley formed the view that the claimant was lacking confidence, wasted a considerable amount of time on fruitless projects or ventures in which he had a personal interest, had no vision, no current marketing knowledge and his team were not behind him. Mr Pelley says he was concerned that: at almost two thirds of the way through the year, the respondent was £1.9m behind budget on sponsorship and marketing; that there had been minimal new business development in the year to date; and that there was no plan to address the shortfall. Mr Pelley considered that the claimant was "struggling with the change of management and the pace of change which I was expecting of my senior management team.""**

5. There were further matters which were said to have affected Mr Pelley's view of the Claimant. Suffice it to say that within two months of commencing Mr Pelley formed the view that the Claimant was not performing well and considered that he should be dismissed. Mr Pelley had a meeting with the Claimant to see if terms could be agreed for his departure. That meeting was held on 8 October 2016. The Tribunal describes it as follows:

> **"26. A meeting was arranged for the 8 October 2016. Mr Pelley opened by saying that he would like the claimant to consider retiring at the end of the year, continuing his relationship with the respondent by being a consultant on the Morocco project. Mr Pelley said that it would give the claimant the opportunity to do other things and offer a respectful way to leave the business. The meeting concluded with the claimant agreeing to consider the position."**

6. Terms could not be agreed. The Claimant made it clear that he did he did not wish to "retire". Mr Pelley then proceeded to dismiss the Claimant with effect from 30 October 2015. He did so without following any disciplinary procedure. The dismissal letter stated that the Claimant was being dismissed because his role was to be merged with a wider commercial role and that his experience and skill set were not suited to such a wider role.

7. The Claimant considered that the reason for his dismissal was due to his age and the fact that Mr Pelley had no place for a 60-year-old in the new structure at the Respondent.

8. The Claimant brought proceedings alleging unfair dismissal and age discrimination. By the time of the hearing before the Reading Employment Tribunal, the Respondent had conceded

A that the dismissal was unfair. Therefore, the only issue before the Tribunal was whether the reason for dismissal was to do with the Claimant's age.

B **The Tribunal's Judgment**

9. The Tribunal rejected the claim of age discrimination. It accepted the explanation given by Mr Pelley for the Claimant's dismissal, which was that he did not consider the Claimant was capable of fulfilling the role that Mr Pelley wished him to perform. The key conclusions of the Tribunal are explained at paragraph 44 onwards of the Reasons. Given the nature of the grounds of appeal, which are set out below, it is helpful to set out these paragraphs in full:

> **"44. The claimant argues that Mr Pelley eschewed a formal disciplinary process because of the claimant's seniority and length of service; that he did this because he wanted to prevail upon him to retire; that when the claimant refused to retire Mr Pelley dismissed him. These matters are accepted by the respondent. The claimant contends that this is a case where the claimant has therefore established that there is evidence from which we could conclude that the claimant was discriminated against on the grounds of his age and that the respondent is required to show that the claimant's age was not the reason for his dismissal.**
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> **45. The explanation given by Mr Pelley for the claimant's dismissal is that Mr Pelley did not consider that the claimant was capable of fulfilling the role he wished him to perform going forward. The reference to retirement was not any indication of the reason why his employment was terminated but a matter of positioning it as retirement for presentation only; to preserve the claimant's dignity by avoiding people knowing that he had been dismissed. If this explanation is correct the respondent has proved that there was no contravention of the Equality Act 2010.**
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> **46. We note the respondent's argument that the claimant has failed to discharge the burden of showing that there are facts from which we could conclude that there was discrimination on the grounds of the claimant's age. However, we accept that the claimant has proved facts from which we could conclude that there was discrimination on the grounds of his age and so we look to the respondent for a reason for the treatment that was not age.**
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> **47. The explanation given by Mr Pelley for the claimant's dismissal is that Mr Pelley did not consider that the claimant was capable of fulfilling the role he wished to perform going forward. The reference to retirement was not any indication of the reason why his employment was terminated but a matter of positioning it as retirement for presentation only; to preserve the claimant's dignity by avoiding people knowing that he had been dismissed.**
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> **48. It is said by the claimant that the comment about retirement is a basis for concluding that there was discrimination on the grounds of age: the concept of retirement in an employment context is based on age. The respondent states that in this case the use of the word retirement was a matter of presentation or positioning the claimant's departure from the respondent. We accept that there is credible evidence before us that the use of the word retirement was in the context of explaining the claimant's departure to the other employees and the outside world. Mr Pelley simply saw retirement as a convenient and uncomplicated way of explaining the claimant's departure from his employment we are satisfied that it was not the reason for the claimant's departure from the respondent's employment.**
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> **49. In arriving at this conclusion we take into account that there was reference made to the claimant's length of service and senior position as being factors for seeking to position his departure from the respondent's employment as retirement. We accept the explanation given by Mr Pelley that the thrust of which was these factors were matters that require the**

claimant's departure to be handled respectfully. We do not accept that they are an indication that the claimant's age was a reason for the decision to end his employment.

50. We do not consider that the evidence shows that there was discrimination against people of any particular age by the respondent. There were persons employed by the respondent in the claimant's age group who did not lose their employment but retained it because Mr Pelley thought they performed well.

51. The claimant has sought to rely on the use of the phrase "a diverse group of millennials and established experienced employees" by Mr Pelley in a presentation he made as part of the recruitment process. Having considered the context in which this statement is made we do not consider that it justifies any conclusion that Mr Pelley was focusing on age and therefore somehow supports any predisposition to discriminate on the grounds of age.

52. The language used in the advertisement for the recruitment of a commercial director following the claimant's dismissal does not lead us to conclude that [Mr] Pelley was preoccupied with age. The use of words like energised or vibrant in our view can also be used in reference to older people as well as younger people. In the context used we gain no assistance from it.

53. The positive reason given by Mr Pelley is that that the claimant was not suitable for the role of commercial director. The evidence before us exposed numerous references to the claimant's ability being an issue for Mr Pelley. The claimant asks us to that this is an after the fact rationalisation because there was no fair reason for the dismissal. We do not accept that. Mr Pelley carried out his own due diligence before he joined the respondent and formed a view of concern about the respondent's commercial performance. On meeting the claimant Mr Pelley was concerned about the claimant's attitude to sponsorship revenues which was 100% reactive. Mr Pelley received negative feedback on the claimant from the claimant's team. Mr Pelley formed his own unfavourable view of the claimant's performance. The claimant himself refers to incidents with Mr Pelley in which Mr Pelley makes critical observations to the claimant about matters related to his performance, which on at least one occasion was expressed in writing (p119).

54. Mr Pelley considered the claimant had not bought into his ideas and this was a matter he considered. The respondent argues that an email exchange between the claimant and Mr O'Grady supports that view. We do not accept that the email we were referred does make that position clear, however, we accept the evidence given by Mr Pelley, that the claimant had not bought into his ideas, was a genuine expression of his view that the claimant had been unable to embrace change of CEO."

The Grounds of Appeal

10. Permission to appeal was granted by HHJ Richardson following a Rule 3(10) Hearing (permission having been refused on the papers). There are six grounds of appeal:

(a) Ground 1 - The Tribunal's decision is not **Meek** compliant in that the reasons for its decision were inadequate and failed to comply with the requirements of Rule 62(5) of the **Employment Tribunal Rules 2013**;

(b) Ground 2 - There was a material misdirection of law in that the Respondent's decision to deny the Claimant any disciplinary procedure was, by its own

admission, connected with age. Alternatively, it is said that the failure to connect the absence of any disciplinary procedure with age was irrational;

(c) Ground 3 - There was a material misdirection of law in that the Tribunal failed to consider the Claimant's case as to comparators;

(d) Ground 4 - The Tribunal failed to take account of relevant matters which were material to the question of whether or not the Claimant's dismissal was tainted by age discrimination;

(e) Ground 5 - The Tribunal took into account irrelevant matters, such as the fact that some of those in the Claimant's age group did not lose their employment because they were thought to be performing well; and

(f) Ground 6 - The Tribunal misdirected itself in accepting the Respondent's explanation for dismissal without properly scrutinising whether the failure to provide a fair procedure masked the real reason for dismissal, namely the Claimant's age.

11. Each of these grounds of appeal is dealt with in turn.

Ground 1 - Failure to give adequate reasons

Submissions

12. Mr Mitchell, who appeared on behalf of the Claimant (as he did below), submitted that the Tribunal's reasons are plainly defective in terms of their recitation of its findings of fact, relevant law and application of the law to its findings. Mr Mitchell reminded me that whilst Rule 62(5) is a "*guide and not a straitjacket*", the reasons have to be such that it can "*be reasonably spelled out from the determination of the Employment Tribunal that what [the rule] requires has been provided*": **Balfour Beatty Power Networks v Wilcox** [2007] IRLR 63 per

Buxton LJ at [25]. Mr Mitchell contends that the reasoning in this case is so thin that it cannot be said that that requirement has been complied with; that the inadequacy is all the more stark given that this is a claim of discrimination where the Tribunal is required not simply to set out relevant evidential issues but to follow them through to a reasoned conclusion. Reliance was placed on the well-known judgment of Sedley LJ in **Anya v University of Oxford** [2001] ICR 847 emphasising the need to avoid making decisions based on credibility alone.

13. Particular deficiencies highlighted by Mr Mitchell are that:

(a) At various stages the Tribunal sets out the opposing positions of witnesses without resolving the dispute or setting out its findings;

(b) The relevant law is not properly summarised; and

(c) The rationale of the Tribunal's decision is indiscernible and the Claimant cannot tell why he lost.

14. First instance courts sometimes do fall into the trap of setting out the parties' opposing positions without expressing a conclusion as to which version they accept or explaining why they do so. It is said that the Tribunal fell into this trap by describing witnesses as having "stated" something without clearly setting out whether what is stated is accepted as a finding of fact. An example of this appears at paragraph 17 of the Reasons:

> **"17. After starting employment in August 2015 Mr Pelley states that he saw very quickly that … there was no clarity in the commercial vision; …"**

15. Mr Mitchell says that these assertions by Mr Pelley were not accepted by the Claimant as statements of fact; that in the absence of a determination by the Tribunal as to whether or not the stated facts were true, it would appear that the Tribunal has reached its conclusions purely on the basis of the credibility of the witness; and that to the extent that the Tribunal took that

approach it erred because it is clear from decisions such as **Anya v University of Oxford** that a finding that there was no discrimination on the basis of a view of credibility without making findings of fact on disputed issues is not acceptable.

16. Mr Nicholls QC, who appeared on behalf of the Respondent (as he also did below), reminds me that whilst the purpose of the Tribunal's reasons is to enable a party to know why it has won or lost, the Tribunal was not required to set out every point or argument raised in the case and reach a conclusion on it. He contends that the Tribunal's Judgment does do this, particularly when one bears in mind that the key question for the Tribunal was what was in the decision-maker's mind. It follows from that that the relevant factual conclusions will mainly relate to the reasons for which Mr Pelley claims to have acted. Seen in that light, says Mr Nicholls, the reasons explain precisely why the Claimant has lost.

17. Mr Nicholls also submits that there is no error in the Tribunal referring to a witness having stated something. This is because when the Tribunal does so it is in relation to an opinion held by the witness about that something. Thus, where the Tribunal says in paragraph 17 "*Mr Pelley states that he saw very quickly that … there was no clarity in the commercial vision*", Mr Nicholls submits that it was perfectly proper for the Tribunal not to go further and not to make a finding of fact as to whether there was clarity in the Claimant's commercial vision. That is so submits Mr Nicholls QC because all the Tribunal had to do was to make findings of fact as to what was in the mind of the decision-maker and whether the reason for the dismissal was by reason of a protected characteristic.

The law in relation to reasons

18. The starting point is Rule 62(5) of the **Employment Tribunals Rules 2013**, which provides:

> **"(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. …"**

19. The scope of the Tribunal's duty in giving reasons is well-established. In **Meek v City of Birmingham District Council** [1987] IRLR 250 (at page 251), Bingham LJ stated that a Tribunal's reasons should:

> **"8. … contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; …"**

20. In his judgment, Bingham LJ relied on a *dictum* of Donaldson LJ in **Union of Construction, Allied Trades & Technicians v Brain** [1981] ICR 542 (page 551):

> **"[Employment] Tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law … their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which reasons are given."**

21. In **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409, Lord Phillips MR found (at paragraphs 17 to 22) that the duty to give reasons was a duty to give sufficient reasons so that the parties could understand why they had won or lost and so that the Appellate Tribunal/Court could understand why the Judge had reached the decision which s/he had reached. Lord Philips said:

> **"16. We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.**
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> **17 As to the adequacy of reasons, as has been said many times, this depends on the nature of the case: see for example *Flannery's* case [2000] 1 WLR 377, 382. In *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119, 122 Griffiths LJ stated that there was no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case:**

> **"When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he has acted … (see Sachs LJ in *Knight v Clifton* [1971] Ch 700, 721)."**
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> **18. In our judgment, these observations of Griffiths LJ apply to judgments of all descriptions. But when considering the extent to which reasons should be given it is necessary to have regard to the practical requirements of our appellate system. A judge cannot be said to have done his duty if it is only after permission to appeal has been given and the appeal has run its course that the court is able to conclude that the reasons for the decision are sufficiently apparent to enable the appeal court to uphold the judgment. An appeal is an expensive step in the judicial process and one that makes an exacting claim on judicial resources. For these reasons permission to appeal is now a nearly universal prerequisite to bringing an appeal. Permission to appeal will not normally be given unless the applicant can make out an arguable case that the judge was wrong. If the judgment does not make it clear why the judge has reached his decision, it may well be impossible within the summary procedure of an application for permission to appeal to form any view as to whether the judge was right or wrong. In that event permission to appeal may be given simply because justice requires that the decision be subjected to the full scrutiny of an appeal.**
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> **19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.**
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> **20. The first two appeals with which we are concerned involved conflicts of expert evidence. In *Flannery's* case [2000] 1 WLR 377 Henry LJ quoted from the judgment of Bingham LJ in *Eckersley v Binnie* [1988] 18 Con LR 1, 77-78 in which he said that "a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal". This does not mean that the judgment should contain a passage which suggests that the judge has applied the same, or even a superior, degree of expertise to that displayed by the witness. He should simply provide an explanation as to why he has accepted the evidence of one expert and rejected that of another. It may be that the evidence of one or the other accorded more satisfactorily with facts found by the judge. It may be that the explanation of one was more inherently credible than that of the other. It may simply be that one was better qualified, or manifestly more objective, than the other. Whatever the explanation may be, it should be apparent from the judgment.**
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> **21. When giving reasons a judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision."**

22. In the discrimination context, it was confirmed by Sedley LJ in **Anya v University of Oxford** [2001] ICR 847 that there is a particular need to avoid making findings based on credibility alone:

> **"24. The difficulty is not answered by the decisions of this court relied on by Mr Underhill (*Martin v Glynwed Distribution Ltd* [1983] ICR 511, and Meek v *Birmingham City Council* [1987] IRLR 250) to the effect that tribunals are not required to do more than make findings**

of fact and answer a question of law. In the race relations field this principle does no more than beg the questions: what findings, what law? It is elsewhere, above all in *King* [*v Great Britain-China Centre* [1992] ICR 516], that the answers lie. In *Tchoula v Netto Foodstores Ltd* (Employment Appeal Tribunal, 6 March 1998) Morison J spelt out what this means in practice:

> **"A bald statement saying that X's evidence was preferred to Y's is, we think, both implausible and unreasoned and therefore unacceptable; and it might appear to have been included simply to try and prevent any appeal. It seems to us likely that there will be a great deal of background material which is non-controversial. There is no need to recite at length in the decision the evidence which has been received. What a tribunal should do is state their findings of fact in a sensible order (often chronological), indicating in relation to any significant finding the nature of the conflicting evidence and the reason why one version has been preferred to another.**
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> **It is always unacceptable for a tribunal to assert its conclusion in a decision without giving reasons."**

25. To assert this is not to demand, as Mr Underhill sought to suggest it did, an infinite combing by the Industrial Tribunal through endless asserted facts or an over-nice appraisal of them. It is simply that it is the job of the tribunal of first instance not simply to set out the relevant evidential issues, as this Industrial Tribunal conscientiously and lucidly did, but to follow them through to a reasoned conclusion except to the extent that they become otiose; and if they do become otiose, the tribunal needs to say why. But the single finding of the Industrial Tribunal in this case on Dr Roberts' honesty as a witness, while important, does not make the other issues otiose: on the contrary, it begs all the questions they pose. Mr Underhill's reliance on it as effectively dispositive overlooks what Lord Goff said in *The Ocean Frost* [1985] 1 Ll.LR 1, 57:

> **"It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence … reference to the objective facts and documents, to the witnesses' motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth."**

The industrial tribunal has not given any ground, and none is evident, for departing from this classic mode of reasoning in a case where every one of the ingredients mentioned by Lord Goff was present. The citation from *The Ocean Frost* in fact features in the transcript of this court's decision in *Heffer v Tiffin Green* (17 December 1998) where Henry LJ concluded, relevantly to the present case:

> **"Nor were the crucial contemporary documents given proper, detailed and dispassionate consideration. In my judgment they cannot be explained away … by an uncritical belief in Mr Heffer's credibility …"**

Credibility, in other words, is not necessarily the end of the road: a witness may be credible, honest and mistaken, and never more so than when his evidence concerns things of which he himself may not be conscious…"

23. Although it is not acceptable to go through a Tribunal decision with a fine-toothed comb to find defects, Sedley LJ in the same case also warned against upholding a decision that is patently deficient:

> **"26. … The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."**

Analysis

24. The question therefore is whether the Tribunal's Reasons met the basic requirements set out in Rule 62(5) and adequately explained to the Claimant why he lost. The first requirement of Rule 62(5) is for the Tribunal to identify the issues to be determined. In this case, the Respondent having conceded unfair dismissal, there was only one issue, which was whether the Claimant's age played an important role in his dismissal. The Tribunal clearly identified that issue in paragraph 1 of the Reasons:

> **"1. … The sole issue for us to determine is whether the claimant's age was a reason for his dismissal."**

25. At paragraph 43, the Tribunal said;

> **"43. There is only one issue that the Tribunal has to decide in this case. That is whether the reason for the claimant's dismissal was his age. Was the claimant's age an important factor in the employer's decision to dismiss the claimant. It is not necessary that the claimant's age is the only reason for the decision to dismiss."**

26. Mr Mitchell does not contend that the Tribunal in this case asked itself the wrong question. He does, however, contend that the next requirement of Rule 62(5), namely to set out findings of fact in relation to that question, was not met. His first contention is that it is unclear when the Tribunal is setting out conclusions of fact and when it is merely reciting each side's position without reaching a conclusion.

27. More specifically, Mr Mitchell submits that it is unclear if the Tribunal is simply reciting the Respondent's evidence at paragraphs 6 to 17 as opposed to reaching distinct findings of fact. However, paragraphs 6 to 14, which deal with the story up to the point of Mr Pelley's appointment on 3 August 2015, do clearly set out findings of fact. There is nothing in the Tribunal's language in those paragraphs which could raise any doubt as to whether these were findings of fact. The language complained of, which is to refer to what particular

witnesses "stated" rather than expressing a clear conclusion on whether what was stated was accepted by the Tribunal as true, first appears in paragraph 15 of the Reasons and is repeated in many of the following paragraphs. If all that the Tribunal had done in these paragraphs was to set out opposing positions without reaching conclusions relevant to the issue it had to determine, then Mr Mitchell's criticism would be fair. However, on closer analysis, it is apparent in my judgment, that the Tribunal has not failed in its duty to make *relevant* findings of fact:

> (a) The Tribunal's Reasons are not a model of clarity. There are no subheadings used to guide the reader as to the subject being addressed, whether it be the facts, submissions, the law or final conclusions. Furthermore, where the Tribunal purports to commence a section containing conclusions of fact (as it does at paragraph 6) it later strays into what are obviously submissions (at paragraphs 35 to 38) and then the law (at paragraph 39) before reverting to certain issues of fact once again in what might be described as the conclusions section. Other deficiencies, not already mentioned, include the fact that some findings are not set out in chronological order (see, for example, the finding at paragraph 21 that "*within two months [of commencing employment] Mr Pelley had taken the decision to dismiss the Claimant*", and that paragraph 47 is a repeat of the first two sentences of paragraph 45). However, the fact that the Reasons are not well-organised or sloppily expressed would not, on its own amount to an error of law, if, when read as a whole, it can be said that the Tribunal has made the necessary findings of fact in respect of the issue it had to consider.

(b) The Tribunal's use of the phrase, "*Mr Pelley states* …", is, in most cases, used to record that witness's opinion or assessment. Thus, at paragraph 15, for example, the Tribunal records that:

> **"15. … Mr Pelley states that at this initial meeting with the claimant "it was clear" that the claimant's approach to commercial operations was "relationship driven rather than seeking to create the value propositions for potential partners based on realisable returns on investment which are necessary to generate revenue in the current sports sponsorship market". Mr Pelley observed that there seemed to be no sophisticated category analysis or proper data analytics."**

There can be no doubt that the second of these sentences is a finding as to Mr Pelley's opinion about the lack of analysis. The only reason that there is any doubt that the first sentence is also finding about Mr Pelley's opinion (in that case as to the Claimant's approach) is that it used the word "states". It would have been far clearer if the Tribunal had simply said, "it was Mr Pelley's opinion/view/assessment that …". However, it is tolerably clear in my judgment, especially given what is said in the subsequent sentence, that the Tribunal was intending here to record its finding as to Mr Pelley's opinion; it was not merely setting out a version of events which was inconsistent with another version set out by the Claimant. There was, therefore, no unresolved issue of fact raised by the first sentence. The Claimant undoubtedly disagreed with the opinion of Mr Pelley as to his performance. However, that did not mean that the Tribunal was not entitled to reach a finding that that was the opinion Mr Pelley held.

A similar pattern to that in paragraph 15 emerges in paragraph 17 of the Reasons, whereby the Tribunal begins by using the phrase, "*Mr Pelley states* …" but it quickly moves on to use language more consistent with definitive findings of fact in relation to how Mr Pelley perceived the Claimant's performance. It is fair to say that paragraph 17 contains no shortage of findings about the extent of Mr Pelley's concerns about the Claimant.

(c) This focus on Mr Pelley's opinion cannot be said to be misplaced. The issue for the Tribunal was, "What was the reason for dismissal?". That issue necessarily involved ascertaining what was in the mind of the decision-maker, Mr Pelley. In order to address that issue, it was relevant to consider what Mr Pelley thought about the Claimant. It was therefore appropriate for the Tribunal to focus on his views.

(d) The Tribunal has not simply reached a decision based on its view of Mr Pelley's credibility. It is clear from the content of paragraphs 53 and 54 of the Reasons that the Tribunal rejected the suggestion that Mr Pelley's views on the Claimant's suitability for his role was an ex post facto rationalisation, and it went on to explain why: the Tribunal referred to the fact that Mr Pelley had carried out his own due diligence and was concerned by what he saw; that on meeting the Claimant, Mr Pelley considered him to have a "*reactive attitude*", that he had received "*negative feedback*" from others and that the Claimant himself accepts that there were incidents during which Mr Pelley made critical observations of the Claimant. None of these findings are challenged. At paragraph 54 there is a finding that the Claimant had "*not bought into [Mr Pelley's] ideas*" and that this was a "g*enuine expression of his view that the claimant had been unable to embrace a change of CEO*". There are other examples contained within the Reasons - see e.g. paragraphs 15, 17 and 24 (where the Tribunal found that "*Mr Pelley considered that he and the claimant were effectively speaking a different language*"). Suffice it to say that, this is patently not just a case of the Tribunal accepting Mr Pelley's evidence on the basis of his credibility; rather, the Tribunal has given several cogent reasons (albeit in a rather disorganised manner) for rejecting the suggestion that Mr Pelley's view was a false afterthought.

(e) For these reasons, the Reasons do perform the task required of them. Whilst they are far from the ideal, they are not patently deficient.

28. The Claimant says that the Tribunal failed to engage with his case that his performance was not as Mr Pelley saw it and that it should have reached findings on matters such as whether, for example, there was in fact a £1.9m shortfall in the budget and sponsorship. However, as stated above, the question for the Tribunal was what was in Mr Pelley's mind and whether the reason for acting as he did was influenced by the Claimant's age. In answering that question, it was not necessary, in the circumstances of this case, to go further. This was not a case where Mr Pelley's view could be said to wholly at odds with all of the other evidence such that it was perverse for the Tribunal to accept that view as genuine. Indeed, as set out in the previous paragraph, there were several matters that were consistent with and which supported Mr Pelley's view. The Tribunal was therefore entitled to reach the conclusion that it did, notwithstanding the fact that there might have been other evidence supportive of a contrary view of the Claimant's performance.

29. The Claimant also argues that Mr Pelley's explanation (which the Tribunal accepted) that "retirement" was used to describe the Claimant's termination as opposed to capability in order to preserve the Claimant's dignity, was not credible given that performance or capability had never been raised with the Claimant as a reason for dismissal until the ET3. This argument does not raise any issue of law. Whether or not a witness's evidence was credible was a matter for the Tribunal, which had the benefit of hearing and seeing the witnesses. This Appellate Court cannot interfere unless the Tribunal's conclusion on this issue can be said to be perverse or entirely unsupported by any evidence. There is no such allegation here.

30. A further point made by Mr Mitchell is that the Tribunal omitted to record the reason given by Mr Pelley for dismissing the Claimant, namely capability. I do not accept that there was any such omission; the Tribunal makes reference to capability at paragraphs 45 and 53 (where the reason is described as the Claimant being not suitable for the role of Commercial Director).

31. The next requirement imposed by Rule 62(5) is to identify the relevant law. The grounds of appeal suggest that paragraph 39 of the Reasons is "confusing" because it refers to the justification defence even though the Respondent was not seeking to rely upon that defence. Mr Mitchell, correctly in my view, did not seek to develop this point in oral submissions. It is not a fair criticism of the Tribunal that it decided to set out the full scope of the provisions on age discrimination when there is no suggestion that it erroneously applied the wrong part of those provisions.

32. The final requirement imposed by Rule 62(5) is for the Tribunal to apply the relevant law to its findings of fact. Mr Mitchell contends that the Tribunal failed in this task because paragraph 44 contains findings of fact which had been omitted from the earlier part of the Judgment apparently dealing with the facts, and there is duplication in paragraph 47. In my judgment, there is nothing in these points. As already stated, the disorganised presentation of the Judgment does not give rise to any error of law in itself; nor does the duplication. These deficiencies in presentation do not detract from the fact that the Reasons, when read as a whole, otherwise satisfy the requirements of Rule 62(5). For reasons already set out, the Tribunal has adequately explained why it reached the conclusions that it did and its rationale is discernible.

33. The Claimant has been told why he lost his case; it is because the Tribunal accepted that Mr Pelley's reason for dismissal was his concern that the Claimant was not capable of fulfilling the role that Mr Pelley wished him to perform. The Claimant may not agree with that reason but that disagreement does not give rise to any ground of appeal.

34. Ground 1 is therefore dismissed.

Ground 2 - failure to take account of Mr Pelley's "admission" that seniority and length of service were necessarily a facet of age

Submissions

35. The Claimant places heavy reliance on the following section of Mr Pelley's evidence:

> **"DM: you say by 28 September Scott Kelly should have been exited and reason you don't go down disciplinary procedure is because of seniority and length of service. Seniority and length of service are a facet of age?**
>
> **KP: Yes they are**
>
> **DM: And because of age, you tell them that decided not to go down disciplinary. Therefore treating Scott Kelly separately from someone who didn't have seniority and length of service?**
>
> **KP: Out of respect.**
>
> **DM: You are treating him differently?**
>
> **KP: We didn't have a disciplinary procedure**
>
> **DM: Asking a third time, treating him differently?**
>
> **KP: No**
>
> **DM: Therefore strike through paragraph 30 of your witness statement?**
>
> **KP: That's the truth so I wouldn't strike it**
>
> **DM: Facet of age, seniority and length of service is what informs you?**
>
> **KP: It is preposterous. You respect people.**
>
> **DM: Are you changing your evidence?**
>
> **KP: No keep it."**

36. Mr Mitchell submits that this exchange between him and Mr Pelley discloses an admission on Mr Pelley's part that seniority and length of service were necessarily a facet of

age. He goes on to submit that this means that the disciplinary process was eschewed as a direct consequence of the Claimant's age and not because Mr Pelley intended to position or present the dismissal in a more respectful way. The Claimant's summary dismissal was therefore infected with age discrimination and it was irrational for the Tribunal not to find as such. It is said that the Tribunal had thereby inexplicably failed to adjudicate on one of the central pillars of the Claimant's claim and failed to refer to aspects of the evidence which supported that claim.

37. Mr Nicholls QC submits that there are three answers to this ground of appeal: the first is that it is wrong to say that the Tribunal omitted to make the link (which Mr Pelley made in evidence) between age and seniority and length of service. The second is that it is incorrect to suggest that treatment by reason of a person's seniority or length of service is necessarily on the grounds of age. He said that the link between seniority and length of service and age may give rise to a claim of indirect discrimination not the claim in this case which was solely that of direct discrimination. The third reason is that there is no arguable error of law arising out of a mere failure to deal with particular aspect of the evidence.

Analysis

38. I agree with the submissions of Mr Nicholls QC. Whilst the Tribunal did not expressly refer to the answers given by Mr Pelley in cross-examination, it is clear, on a fair reading of the Reasons, that the Tribunal must have made the link between seniority and length of service, the lack of disciplinary process and age upon which Claimant relies:

(a) The Tribunal accepted that there was a prima facie case of age discrimination such that the Respondent was required to prove that the reason for the impugned treatment was not age. The Tribunal's conclusion in this regard is set out at

paragraph 46, wherein it says that it accepts that the Claimant has "*proved facts*" from which it could conclude there was discrimination on the grounds of his age. The only relevant facts to which the Tribunal could be referring were those set out in paragraph 44. (Paragraph 44 is effectively the preceding paragraph to paragraph 46 because paragraph 45 refers to the explanation for the impugned treatment, which would logically follow the Tribunal's conclusion that there was a prima facie case. Paragraph 45, it should be noted, is largely repeated in paragraph 47, and one can fairly infer that it has been included between paragraphs 44 and 46 in error.)

(b) The first sentence of paragraph 44 expressly refers to the fact that Mr Pelley eschewed the formal disciplinary process because of the Claimant's seniority and length of service; that he did this because he wanted to prevail upon the Claimant to retire; and when the Claimant refused to retire Mr Pelley dismissed him. The third sentence of paragraph 44 states that the Claimant contends that this is a case where the Claimant has *therefore* established a prima facie case; in other words the factors showing that there was a case of age discrimination to be answered were those in the first sentence. The Tribunal could only have accepted that there was a prima facie case if it had accepted that there was a link between seniority and length of service, the lack of procedure and age.

(c) Thus, whilst the Tribunal did not refer expressly to Mr Pelley's evidence, the matters set out in paragraphs 44 and 46 demonstrate that the Tribunal did take account of the failure to afford any form of disciplinary process and relied upon that as giving rise to a prima facie case.

39. The Claimant overstates the significance of Mr Pelley's acceptance that seniority and length of service are a "facet of age". The fact that seniority and length of service might be

related to age in some circumstances does not necessarily mean that any treatment done on the grounds of seniority and length of service must therefore be by reason of age. A 40-year-old and a 60-year-old could have the same seniority and length of service if they had both worked for the same employer for 20 years and reached the same level. If they were subjected to less favourable treatment than a 50-year-old with 25 years of service, that treatment might well be because of the 50-year-old's longer service, and not because of their age. The Claimant is therefore incorrect to say that any treatment of the Claimant by reason of his seniority and length of service necessarily meant that such treatment was by reason of age. This is a point that Mr Pelley appears to have been trying to make in response to Mr Mitchell's questions in cross-examination, where he refers to it being "preposterous" that his decisions were informed by age and says that what motivated him was the respect to be shown to employees with the Claimant's seniority and length of service. I accept Mr Nicholls' submission that the Claimant might be able to construct a claim of indirect discrimination arising out of treatment based on seniority and length of service. That is because it will often, but not always, be the case that those with greater seniority and the longest service will tend to be older than others. However, that was not the case pursued before the Tribunal.

40. In this case, the Tribunal accepted Mr Pelley's explanation that the reason for "*seeking to position [the Claimant's] departure as retirement*" was that his seniority and length of service required his departure to be handled respectfully. That was a conclusion that the Tribunal was entitled to reach.

41. Mr Mitchell also criticises paragraph 55 of the Reasons in which the Tribunal once again considers the failure to conduct any fair procedure to implement a capability dismissal. By this stage of the Reasons, the Tribunal has made it clear that age was not the reason for the

decision to dismiss. Thus where it refers in this paragraph to Mr Pelley "*having formed his view of the claimant*" that can only be a reference back to its earlier findings that Mr Pelley had decided the Claimant had to go because of performance concerns, and not because of age. Having reached that view, he decided to "*follow it through quickly*". The Tribunal had already decided that his reasons for presenting the matter as a retirement and eschewing the disciplinary procedure were to do with seniority and length of service and to ensure, as he saw it, more respectful treatment. Whilst the Claimant may disagree that the eventual treatment was respectful (given the stigma of retirement), the Tribunal was entitled, on the evidence, to accept that that was the reason for Mr Pelley's treatment of the Claimant. The only basis on which that finding could be challenged is if it could be said to be perverse. However, the challenge falls far short of establishing perversity.

42. Ground 2 is therefore not upheld.

Ground 3 - failure to consider the case as to comparators

Submissions

43. The Claimant submits that he had compared himself to two comparator senior executives, Mark Liechtenhein and Jonathon Orr, both of whom were considerably younger than the Claimant and who had left on agreed terms without being asked to "retire". The Claimant complains that the Tribunal did not refer to these comparators at all and neither did it refer to two other "junior colleagues", who were invited to apply for a role from which the Claimant was excluded, or to the person, 21 years his junior, eventually appointed to the role. It was submitted that if the Tribunal had considered these comparators it would have been bound to conclude that the Claimant's dismissal was because of his age.

Analysis

44. The difficulty for the Claimant under this ground is that his claim was not pleaded or pursued on the basis of any of these express comparators. His case was based on the hypothetical comparator. Accordingly, the complaint here is that the Tribunal did not expressly deal with certain evidence which the Claimant contends was relevant to his claim. However, as set out in the authorities above (see e.g. **English v Emery**), there is no error of law in a Tribunal failing to address every argument or evidential point raised so long as the Reasons satisfy Rule 62(5) and meet the basic requirement of explaining why the Claimant lost. For the reasons already set out, I consider that the Reasons do meet those requirements.

45. It is also relevant to note that the Tribunal found that there was a prima facie case to be answered by the Respondent here even without reference to the comparators upon which the Claimant now seeks to rely. The burden then fell on the Respondent to establish the reason for the treatment and that it was not on the grounds of age. As Mr Nicholls submitted, a detailed consideration of comparators in that scenario would perhaps be superfluous even if actual comparators had been part of the pleaded case (which they were not). Lord Nicholls of Birkenhead stated as follows in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 at [8] and [11]:

> **"8. No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.**
>
> …
>
> **11. This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."**

A

46. In the present case, there was little danger of arid and confusing arguments about the appropriate comparator because the Claimant did not seek to rely on any actual comparators and the Tribunal was right to focus, as it did, on the *reason why* question.

B

47. Mr Mitchell submits that notwithstanding the absence of any pleaded case based on actual comparators, the evidence relating to these individuals was before the Tribunal, that they were strong comparators strengthening the prima facie case; that the burden imposed on the

C

employer will depend on the strength of the prima facie case: **Network Rail Infrastructure Ltd v Griffiths-Henry** [2006] IRLR 865; and that, as such, the Tribunal ought to have dealt with the evidence anyway.

D

48. In my view, the failure to plead the case on the basis of actual comparators means that these arguments must fail:

E

(a) The absence of any pleaded case on actual comparators meant that the Tribunal was not asked to adjudicate on whether they were appropriate. Had it been asked to do so it might well have concluded that none of them were appropriate.

F

(b) The **Network Rail** case does not assist as the Claimant there did rely upon a number of express comparators in the context of a recruitment exercise. President, Elias J (as he then was) said as follows:

G

> **"20 Accordingly, in our judgment the Tribunal was fully entitled to find that the employee had established a prima facie case so that it fell to the employer to explain why it was that five white men have been selected and she was not. The employer knows why the selection was made and can give evidence about that. That evidence should identify why he did what he did and if that has nothing to do with race or sex, then that is the end of the matter. Also, it seems to us that the burden imposed on the employer will depend on the strength of the prima facie case. A black candidate who is better qualified than the only other white candidate and does not get the job imposes a greater burden at the second stage than would a black candidate rejected along with some others who were equally qualified (assuming that the Tribunal properly finds a prima facie case in such a case)."**

H

It is obvious that there would be a stronger prima facie case and a more difficult situation for the employer to explain in the first of Elias J's examples than the second. In the present case, one is not in a position to know whether any of the comparators establishes a stronger prima facie case than another (or than the hypothetical) when none has been expressly pleaded and the Respondent has not been required to state its case in respect of any of them.

(c) It is understandable why, in these circumstances, the Respondent focused its case on explaining that the reason for its decision was not age, rather than arguing that any of the comparators was wrong or inappropriate. Similarly, in these circumstances, the Tribunal cannot have committed any error of law in focusing on a determination of that case.

49. Ground 3 is therefore not upheld

Ground 4 - Failure to take account of relevant matters

50. This ground of appeal was not vigorously pursued in oral submissions. That is not altogether surprising as it is difficult to see what point of law arises, if any. Mr Mitchell accepts that the Tribunal cannot be expected to rehearse every point of dispute and matter of evidence in its Reasons. What he says, however, is that there were certain matters that were material and not peripheral to the question of whether or not the Claimant's dismissal was infected by age discrimination. I was not taken to any authority which suggests that every material and non-peripheral matter of evidence must be addressed by the Tribunal. In the absence of such a requirement and in the absence of any meaningful yardstick to distinguish between that which is material for the purposes of inclusion in a judgment as opposed to merely peripheral, it seems to me that this point does not get anywhere. Of course, the Tribunal is obliged to explain to the

losing party why it lost and to satisfy the requirements of Rule 62(5). For the reasons already set out, I consider that the Tribunal has met that obligation. It is not open to the Claimant to seek to reargue the case on the merits at the appellate stage on the basis that the Tribunal ought to have referred to some item of evidence or other.

Ground 5 - taking into account irrelevant matters

51. This ground was described in the Rule 3(10) ruling as comprising "minor points". I agree.

52. The Claimant makes two points under this ground. The first point is that the Tribunal erred in taking account of whether Mr Pelley had discriminated against others "*in the claimant's age group*" (see paragraph 50 of the Reasons). However, it does not appear to me to be in any way illegitimate for the Tribunal to draw support for its conclusion that age was not the reason for treatment from examples of others of a similar age who were retained because they were thought to be performing well.

53. The Claimant's second point is that the Tribunal erred in taking account of Mr Pelley's ostensibly benign motive for seeking to present the Claimant's dismissal as a retirement. One does not have to find a malign motive, submits Mr Mitchell, in order to find that there was unlawful discrimination: **R(E) v JFS Governing Body** [2010] 2 AC 728. In the present case, the Tribunal was not so much considering motive as it was the reason why Mr Pelley acted as he did. If the reason for his treatment of the Claimant was his desire to treat him respectfully (due to his seniority and length of service) then that is not to do with age. The position would have been otherwise if the Tribunal had found that the reason for treatment *was* age; in those

circumstances, there would be unlawful discrimination and it would be irrelevant that Mr Pelley had acted out of a misplaced desire to protect the Claimant's dignity.

54. Ground 5 is therefore not upheld.

Ground 6 - Misdirection concerning the Respondent's reason for dismissal

55. The main argument here is that, before accepting the Respondent's case that the reason was to do with capability, the Tribunal was required to assess the plausibility of that case given that it was only put forward for the first time in the ET3 and appeared to be inconsistent with other evidence. It seems to me that this argument has already been addressed to an extent under ground 1 above. This was not an unfair dismissal case. As stated already, the only issue for the Tribunal was whether the reason for dismissal was age or, as the Respondent contended, capability. In deciding that issue, the Tribunal was entitled to focus on what was in the mind of the decision-maker. The Tribunal accepted Mr Pelley's evidence (which was based on more than just credibility) that his view that the Claimant was not suitable for the role which Mr Pelley wished him to perform was genuine. That was a finding of fact which it was entitled to make. In the circumstances of this case, where that finding was evidently supported by other matters (including negative feedback about the Claimant from others) to which the Tribunal was entitled to have regard, it was not obliged to identify, or reach final conclusions on, every item of evidence that might show that the Claimant's performance was not as Mr Pelley perceived.

56. The Claimant's final point is a suggestion that the Tribunal here fell into the error identified by the EAT in **Komeng v Sandwell MBC** [2011] EqLR 1053:

> **"45. Tribunals should, we think, take care before accepting an explanation that the reason for less favourable treatment (if proven) lies merely in poor administration. There is always the**

risk that poor administration masks real disadvantage to a particular group or a particular individual on prohibited grounds. …" (per HHJ Richardson)

57. Mr Mitchell submits that the Tribunal's brief reasoning in paragraph 55 betrays the very error identified in **Komeng**. I disagree. The Respondent here was not seeking to hide behind poor administration at all. It was advancing a positive reason for the treatment which was not age. One aspect of Mr Pelley's approach to the Claimant was to eschew any disciplinary procedure. However, for the reasons already discussed under ground 2, that treatment was not by reason of age.

58. Ground 6 is therefore not upheld.

Conclusion

59. For all of these reasons, none of the grounds of appeal are upheld and this appeal is dismissed.