

# THE INDUSTRIAL TRIBUNALS

CASE REF: 823/14

**CLAIMANT:** Philip O'Brien

**RESPONDENTS:**

1. Ballyrobert Filling Service Station Limited
2. Joyce Beck
3. Greg Brown

## DECISION

The unanimous decision of the tribunal is that the claimant's claims of direct discrimination, harassment, and victimisation on the grounds of age are dismissed against all respondents.

### Constitution of Tribunal:

**Employment Judge:** Employment Judge Crothers

**Members:** Mr D Walls  
Mr S Pyper

### Appearances:

The claimant was represented by Ms A Jones, Barrister-at-Law, instructed by Comerton & Hill, Solicitors.

The respondents were represented by Mrs M Whittaker, of Peninsula Business Services Ltd.

### Claim

1. The claimant claimed that he had been subjected to unlawful discrimination by the respondents on the grounds of age. The respondents denied his allegations in their entirety.

## **Issues**

2. The issues before the tribunal were as follows:-

- “(1) Whether the respondents subjected the claimant to less favourable treatment on grounds of age, contrary to Regulation 3 of the Employment Equality (Age) Regulations (Northern Ireland) 2006, as amended (‘the Regulations’).*
- (2) Whether the respondents subjected the claimant to harassment on grounds of age, contrary to Regulations 6 and 7(3) of the Regulations.*
- (3) Whether the respondents victimised the claimant, contrary to Regulation 4 of the Regulations.*

## **Sources of evidence**

3. The tribunal heard evidence from the claimant and on his behalf, from Joan Dickson, a Ballyrobert customer. The statement of Dr Oscar Daly FRCP was agreed as regards his medical opinion only. The tribunal also heard evidence from Brett Paterson, Sales Manager at Ballyrobert Filling Service Station Limited (‘Ballyrobert’), Greg Brown, Business Manager, Joyce Beck, Business Manager, Chris Corson, Car Sales Consultant, (whose evidence was not challenged by way of cross-examination), and Sam Rainey, Car Sales Consultant. Fiona Ogilby, who was the sales administrator at Ballyrobert, had provided a witness statement. However, she was not present at the hearing to be cross-examined and her witness statement can be afforded little significant weight. Apart from Dr Daly, the tribunal was referred to a medical report from the claimant’s General Practitioner, Dr P Hyland, and received a bundle of documentation agreed by the parties.

## **Findings of fact**

4. The tribunal, having considered the evidence insofar as same is relevant to the issues before it, made the following findings of fact on the balance of probabilities:-

- (i) The claimant, who was aged 63 at the material time, was interviewed for the position of sales consultant during the third week of January 2013 by Brett Paterson, Sales Manager, and John Lyle, whom he described as the owner of Ballyrobert. The claimant was also afforded a second interview and commenced employment with Ballyrobert on 3 February 2014 until his resignation effective on 15 April 2014. Ballyrobert treated his letter of resignation as a grievance in writing and invited him to a meeting, which did not take place.
- (ii) The claimant had had previous sales experience in car sales. He had owned a business which failed in 2012 and accumulated very substantial debts. Against this background, the claimant was seeking a source of income. Dr Daly’s report states that:-

*“Whatever happened at Ballyrobert Cars, whether real or as perceived by Mr O’Brien, has, in my view, contributed directly*

*to Mr O'Brien becoming depressed. He has remained depressed to the present. Another significant stress which has undoubtedly contributed to the perpetuation of Mr O'Brien's depression is the considerable debt he faces. Mr O'Brien has been treated appropriately with antidepressants and has been referred for counselling ... In conclusion, this 64 year old man has developed a depressive illness in early 2014. Events at work, or at least Mr O'Brien's perception of them, appear to have been the main factors in Mr O'Brien becoming depressed. At this stage the prognosis is not very favourable."*

Earlier in his report he had stated:-

*"Overly sensitive individuals can perhaps misperceive the usual workplace banter. Mr O'Brien does not strike me as being particularly oversensitive. It certainly is his perception, real or otherwise, that he was harassed at work and he has been quite consistent in his complaints to his General Practitioner and then to me when I interviewed him."*

- (iii) The tribunal was satisfied that Brett Paterson was the most credible and reliable of the main witnesses before it. The claimant himself was not a convincing or reliable witness. He claimed in his evidence that he did not receive a copy of his contract of employment until after his wife phoned Ballyrobert on 31 March 2014. He also insisted that he did not see the Ballyrobert Handbook which contained details in relation to the grievance procedures, disciplinary procedure and sickness procedure. However, contrary to the claimant's assertions, the tribunal is satisfied that on 3 February 2014, having been offered a job as a used car salesman on a basic salary of £12,000.00 plus commission, he did receive the contract from Brett Paterson on that date and that Brett Paterson also highlighted certain features of the company Handbook including SSP, disciplinary procedures and grievance procedures. He gave the claimant the contract together with the Handbook to take away and read at his leisure. He also requested him to sign his contract and return it but the claimant never did so. Brett Paterson reminded him about his contract subsequently but again the claimant did not return it duly signed. The contract ultimately sent out at his wife's request was retrieved from the claimant's own drawer in the premises. Had the claimant followed Brett Paterson's advice and read through the Handbook, he would have discovered the procedure for raising a grievance in writing.
- (iv) It is also evident that within a few days of commencement of employment, the claimant showed signs of agitation, frustration and erratic behaviour. The tribunal is satisfied that no formal training is provided to any sales consultants until they have been with Ballyrobert for six months and that such training usually takes place in England.
- (v) The tribunal is further satisfied that it was the claimant himself who referred to his age during the initial interview process, and that when offered the job as a used car salesman, he expressed his thanks to

Brett Paterson and John Lyle for giving him the opportunity as he considered that he would have been overlooked due to his age and that he was an old 'fuddy duddy'. Moreover the tribunal accepts the respondents' evidence that the claimant referred to his age and his financial problems regularly in the course of his employment. The fact that he was described as having a face 'like a beetroot' or that his face was red and that he huffed and puffed was a factual description of the claimant as he presented himself.

- (vi) In terms of comparators, the claimant relied on other sales consultants aged between 30 and 46 as an evidential basis for a hypothetical comparator.
- (vii) During the first interview, the Reef and Kerridge computer systems were discussed with the claimant. These are computerised systems used for all sales and servicing of cars. The Reef system is a simple five step process which involves entering basic details of a customer onto the system. It is clear that the claimant had difficulty in managing this simple procedure and that he was assisted on a regular basis in this and on the more complicated invoicing Kerridge system. The claimant was obviously out of his depth in performing his role in Ballyrobert, at least in these respects. The tribunal is satisfied that this generated frustration for Greg Brown and especially Joyce Beck, and that inappropriate language was used by the claimant and, in all likelihood, on occasions by Joyce Beck and Greg Brown. However, the tribunal had no reliable evidence to satisfy it that any such language included comments directed at the claimant's age or, by implication, directed to his age. Sam Rainey's evidence was that the claimant himself used the 'f' word more than anybody else in the place. This indicated to the tribunal that this word was used by the claimant and by others. It is not convinced by Sam Rainey's explanation that it was confined to 'cleaners'. He conceded that it was used by 'some people in general'. This is likely to have included the business managers.
- (viii) An episode occurred on 10 February 2014 after which the claimant alleges he raised a grievance with Ballyrobert. He made allegations that he had been discriminated against since the commencement of his employment on 3 February 2014 and that certain comments had been made against him which were discriminatory on the grounds of his age before 10 February 2014. However, Brett Paterson never had any of these alleged episodes reported to him and the claimant had never expressed concerns to him about any alleged treatment he had received from Joyce Beck.
- (ix) However, on 10 February 2014 the claimant spoke to Brett Paterson and stated that he had communication problems with Joyce Beck. These circumstances emerged from a situation involving the claimant entering an office where Joyce Beck was discussing what she described as a serious matter with the sales administrator, Fiona Ogilby. Joyce Beck requested the claimant to come back or wait until she had finished what she was doing. The tribunal is

satisfied, contrary to the claimant's allegation, that Joyce Beck did not say:-

*"Why are you selling cars at your age, you should be retired by now."*

- (x) The tribunal is fortified in its finding in the foregoing paragraph as it accepts Brett Paterson's evidence that when the claimant came to him stating he had communication problems with Joyce Beck he never mentioned aggression, bullying, harassment, or that he had been discriminated against due to his age. Brett Paterson's approach was a sensible managerial approach. He spoke with Joyce Beck and later to the claimant concerning his conversation with her. The claimant never indicated that he was unhappy with Brett Paterson's explanation. He had told the claimant that Joyce Beck was a good person who was good at her job and that he should get on with her. The tribunal is not satisfied that the claimant raised a grievance before Brett Paterson in relation to this matter and Brett Paterson certainly did not understand the claimant to be raising any grievance. Furthermore, it is clear that the claimant never raised a grievance in writing against this or any other alleged episodes at any time during his employment with Ballyrobert. It was clearly open to him to do so. The tribunal reiterates that had he exercised himself to read his contract and the accompanying Handbook, as he was encouraged to do on the first day of his employment, he would have understood clearly the circumstances and the manner in which a grievance could be raised in writing.
- (xi) The tribunal is further satisfied that it was the claimant who remarked on the age of his clothes and that his suit was 17 years old and had been bought in Macy's in New York. The tribunal has also considered the allegations the claimant made against Greg Brown, including remarks allegedly made on 5 March, 12 March and 28 March 2014, and is not satisfied that there is sufficient reliable evidence before it to substantiate such allegations.
- (xii) Joan Dickson, who gave evidence before the tribunal, was a customer of Ballyrobert and dealt with the claimant on 14 March 2014. She was clearly impressed by the claimant's approach and manner. She stated in cross-examination that Greg Brown had made both herself and her husband feel uncomfortable and that he was a 'bit condescending' to the claimant and themselves. She focused on the statement that Greg Brown made to the claimant in front of herself, her husband and son in relation to him not using the computer properly and saying "*for goodness sake I showed you how to do this before*". The fact that this occurred on 14 March 2014 illustrates that even at this stage, and despite being shown how to do so regularly, the claimant had not been able to properly use the computer system. In the context of a busy sales environment and the claimant's performance up to that point, the tribunal is not surprised that Greg Brown made such a remark.

- (xiii) It was also clear to the tribunal that the claimant was irrational at times and became very frustrated and erratic if he did not succeed in selling a car, or if he had to obtain assistance from business managers. The tribunal also accepts that Brett Paterson, together with Joyce Beck and Greg Brown, had to request the claimant to calm down and take time out as he would shout and stress himself out over small things. This was accompanied by loud breathing and a red face. The tribunal also accepts Brett Paterson's evidence that as a result of such behaviour, two customers requested that the claimant should not contact them again.
- (xiv) The tribunal is satisfied that, not only was the claimant given his contract of employment and the company Handbook on 3 February 2014 but that the sales process was discussed with him at both interviews. Dealership expectations were also dealt with together with the number of cars he would be expected to sell and how commission worked. Brett Paterson also explained his role and the role of the two business managers and how they would be there to support him and assist him to close deals. He also explained why it was important for the business managers to be involved in all deals.
- (xv) Ballyrobert car dealership has a workforce of 77 employees, 8 of whom are of the same age as the claimant. Brett Paterson is the sales manager with a sales team of 10 car sales consultants. Each consultant is given a basic salary and sales are achieved through customers visiting the premises, telephone enquiries, and prospecting existing customers from lists provided by the business managers and sales manager. Telephone enquiries are made to Greg Brown and Joyce Beck and are passed to the sales team via a rota system. There is no satisfactory evidence before the tribunal that the claimant was not dealt with fairly in relation to the rota system as he alleges. Moreover, the fact that he lived close to the premises and enjoyed, on his own initiative, driving cars onto the area adjacent to the premises, (sometimes in the rain), cannot be relied on as evidence of discrimination on the ground of his age.
- (xvi) In an effort to assist the claimant, Brett Paterson gave him his own personal copy of the sales process which he had written when working for Lindsay Ford. It was evident from Brett Paterson's evidence that the simple and basic details to be entered on the Reef system, including the customer's name, address, telephone number and e-mail address, were essential to the sales process all the way through, as was the invoicing process in relation to a sale being closed.
- (xvii) The tribunal has carefully considered all of the evidence, including what was referred to as the 'Babbs' incident, in respect of which, again, there was contradictory evidence. Brett Paterson was made aware of the one alleged incident on 10 February 2014 involving Joyce Beck. If other incidents occurred of the nature described by the claimant, involving bullying, harassment, victimisation and direct discrimination on the ground of his age, it is surprising that he did not

speak to the sales manager on other occasions to highlight any such difficulties. Brett Paterson appeared to the tribunal to be a reasonable, sensible and straightforward witness. The claimant, on the other hand, was not a convincing or reliable witness.

- (xviii) The parties agreed the claimant's schedule of loss in terms of the figure to be used for any computation. The tribunal is not satisfied that in a case of this nature, it was appropriate to offset state benefits, as in the schedule of loss. The claimant relied on the mid **Vento** range in relation to compensation for any injury to feelings, whereas the respondents' representative directed the tribunal to the lower end of this band, in the event of an award being made.

## **The law**

5. (1) Regulations 3, 4, and 6, of the Regulations provide as follows:-

### ***"Discrimination on grounds of age***

- 3.(1) *For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if —*

(a) *on the grounds of B's age, A treats B less favourably than he treats or would treat other persons, or*

(b) *A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but—*

(i) *which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and*

(ii) *which puts B at that disadvantage,*

*and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.*

- (2) *A comparison of B's case with that of another person under paragraph (1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.*

- (3) *In this regulation —*

(a) *"age group" means a group of persons defined by reference to age, whether by reference to a particular age or a range of ages; and*

(b) *the reference in paragraph (1)(a) to B's age, includes B's apparent age.*

### ***Discrimination by way of victimisation***

4.(1) *For the purposes of these Regulations, a person (“A”) discriminates against another person (“B”) if he treats B less favourably than he treats or would treat other persons in the same circumstances, and does so by reason that B has—*

- (a) brought proceedings against A or any other person under these Regulations;*
- (b) given evidence or information in connection with proceedings brought by any person against A or any other person under these Regulations;*
- (c) otherwise done anything under or by reference to these Regulations in relation to A or any other person; or*
- (d) alleged that A or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of these Regulations,*

*or by reason that A knows that B intends to do any of those things, or suspects that B has done or intends to do any of them.*

(2) *Paragraph (1) does not apply to treatment of B by reason of any allegation made by him, or evidence or information given by him, if the allegation, evidence or information was false and not made (or, as the case may be, given) in good faith.*

### ***Harassment on grounds of age***

6.(1) *For the purposes of these Regulations, a person (“A”) subjects another person (“B”) to harassment where, on grounds of age, A engages in unwanted conduct which has the purpose or effect of—*

- (a) violating B’s dignity; or*
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

(2) *Conduct shall be regarded as having the effect specified in paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect.”*

### **Burden of Proof Regulations**

6. Regulation 42 of the Regulations deals with the burden of proof and provides:-

#### ***“Burden of Proof: industrial tribunals***



42.(1) *This regulation applies to any complaint presented under regulation 41 to an industrial tribunal.*

(2) *Where, on the hearing of the complaint, the complainant proves facts from 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 41 (jurisdiction of industrial tribunals) applies; or*

(b) *is by virtue of regulation 26 (liability of employers and principals) or regulation 27 (aiding unlawful acts) 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.”*

(i) In ***Igen Ltd (formerly Leeds Carers Guidance) and Others v Wong, Chamberlains Solicitors and Another v Emokpae; and Brunel University v Webster [2006] IRLR 258***, the Court of Appeal in England and Wales set out guidance on the interpretation of the statutory provisions shifting the burden of proof in cases of sex, race and disability discrimination. This guidance is now set out at Annex to the judgment in the ***Igen*** case. The guidance is not reproduced but has been taken fully into account, as it also applies to cases of discrimination on the ground of age.

(ii) The tribunal also considered the following authorities, ***McDonagh and Others v Hamilton Thom Trading As The Royal Hotel, Dungannon [2007] NICA, Madarassy v Nomura International Plc [2007] IRLR 246 (“Madarassy”), Laing v Manchester City Council [2006] IRLR 748 and Mohmed v West Coast Trains Ltd [2006] UK EAT 0682053008***. It is clear from these authorities that in deciding whether a claimant has proved facts from which the tribunal could conclude in the absence of an adequate explanation that discrimination had occurred, the tribunal must consider evidence adduced by both the claimant and the respondent, putting to the one side the employer’s explanation for the treatment. As Lord Justice Mummery stated in ***Madarassy*** at paragraphs 56 and 57:-

*“The Court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*

*‘Could conclude’ in s.63A(2) must mean that “a reasonable tribunal could properly conclude” from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory “absence of an adequate explanation” at this stage..., the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.”*

- (iii) The tribunal received valuable assistance from Mr Justice Elias’ judgement in the case of **London Borough of Islington v Ladele and Liberty (EAT) [2009] IRLR 154**, at paragraphs 40 and 41. These paragraphs are set out in full to give the full context of this part of his judgement.

*“Whilst the basic principles are not difficult to state, there has been extensive case law seeking to assist tribunals in determining whether direct discrimination has occurred. The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:*

- (1) *In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in **Nagarajan v London Regional Transport [1999] IRLR 572, 575** – ‘this is the crucial question’. He also observed that in most cases this will call for some consideration of the mental processes (conscious or sub-conscious) of the alleged discriminator.*
- (2) *If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in **Nagarajan** (p.576) as explained by Peter Gibson LJ in **Igen v Wong [2005] IRLR 258**, paragraph 37.*
- (3) *As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in **Igen v Wong**. That*

case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:-

*'Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer.'*

If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the tribunal must find that there is discrimination. (The English law in existence prior to the Burden of Proof Directive reflected these principles save that it laid down that where the prima facie case of discrimination was established it was open to a tribunal to infer that there was discrimination if the employer did not provide a satisfactory non-discriminatory explanation, whereas the Directive requires that such an inference must be made in those circumstances: see the judgment of Neill LJ in the Court of Appeal in **King v The Great Britain-China Centre [1991] IRLR 513.**)

- (4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson pointed out in **Zafar v Glasgow City Council [1997] IRLR 229:-**

*'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'*

Of course, in the circumstances of a particular case unreasonable treatment may be evidence of

*discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in **Bahl v Law Society [2004] IRLR 799**, paragraphs 100, 101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself – or at least not simply from that fact – but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.*

(5) *It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test: see the decision of the Court of Appeal in **Brown v Croydon LBC [2007] IRLR 259** paragraphs 28-39. The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.*

(6) *It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in **Anya v University of Oxford [2001] IRLR 377** esp paragraph 10.”*

(iv) The tribunal also received considerable assistance from the judgment of Lord Justice Girvan in the Northern Ireland Court of Appeal decision in **Stephen William Nelson v Newry and Mourne District Council [2009] NICA 24**. Referring to the **Madarassy** decision (supra) he states at paragraph 24 of his judgment:-

*“This approach makes clear that the complainant’s allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the tribunal could properly conclude in the absence of adequate explanation that the respondent has committed an act of discrimination. In **Curley v Chief Constable***

**[2009] NICA 8 Coghlin LJ emphasised the need for a tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination".**

- (v) The defence of justification was not raised or relied on in the course of the hearing.
- (vi) In relation to harassment the necessary elements are threefold:-
  - (1) Did the respondent engage in unwanted conduct?
  - (2) Did the conduct in question either:-
    - (a) Have the purpose; or
    - (b) The effect of either:-
      - (i) violating the claimant's dignity; or
      - (ii) creating an adverse environment for him – the proscribed consequences?
  - (3) Was the conduct on a prohibited ground?
- (vii) In relation to victimisation, whether a particular act can be said to amount to victimisation must be judged primarily from the point of view of the alleged victim, whether or not they suffered any 'detriment', rather than from the point of view of the alleged discriminator; (***St Helens Metropolitan Borough Council v Derbyshire (2007) IRLR540 HL***). Furthermore, once the tribunal has established a protected act it has to explore whether this had a significant influence on the outcome, and, if so, discrimination is made out. (***Nagarajan v London Regional Transport (1999) IRLR 572 HL***, and ***Villalba v Merrill Lynch and Co Inc (2006) IRLR 437 EAT***). A person is treated less favourably than others because he has done one of the protected acts (***Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830 HL***).

### **Submissions**

- 7. The tribunal carefully considered the written submissions submitted by the claimant's representative which are annexed to this decision. It also carefully considered oral submissions made by both parties' representatives on 17 December 2014.

## Conclusions

8. The tribunal, having carefully considered the evidence together with the submissions and having applied the principles of law to the findings of fact, concludes as follows:-

### Direct Discrimination

- (i) In relation to the direct age discrimination claim, the tribunal is satisfied that the claimant has not proved facts from which the tribunal could conclude in the absence of an adequate explanation that discrimination has occurred on the grounds of age. The tribunal has to determine the reason why the claimant was treated as he was. It is not necessary in every case for a tribunal to go through the two stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of an adequate explanation, would have been capable of amounting to a prima facie case under Stage 1 of the *Igen* test.
- (ii) The tribunal is satisfied that the reason for the claimant's treatment was not on the grounds of age. The claimant was interviewed and successfully appointed to the position of used car salesman without consideration of his age by Ballyrobert. The only mention of age at the interviews was by the claimant himself. Furthermore, the tribunal relied on the evidence of Brett Paterson, Sales Manager, as being the most credible and reliable. Neither the alleged incident involving Joyce Beck on 10 February 2014 of which Brett Paterson was aware nor any other matter relied on by the claimant could lead the tribunal to conclude, in the absence of an adequate explanation by the respondents, that he was being discriminated against on the grounds of his age. In so finding, the tribunal acknowledges, that on the balance of probabilities, inappropriate language was used not only by the claimant but in all likelihood, on occasions, by the business managers. The tribunal reiterates that there is no reliable evidence before it that the claimant's allegations are well-founded. The claimant, contrary to his allegations, had received a copy of a contract and the relevant Handbook on the first day of his employment, yet chose to provide evidence to the tribunal to the contrary. This set the tone for the reliability of his evidence in general.
- (iii) The tribunal is satisfied that the claimant himself referred to his age and to financial problems on an ongoing basis during his employment with Ballyrobert. He was clearly out of his depth and was unable to manage even the simplest of computer tasks involving populating five basic fields which fed through to the closing of car sales. Furthermore, he showed an inability to cope with the Kerridge system involving invoices. Again, contrary to his evidence, he was clearly shown how to operate the computer systems on a frequent basis by the business managers, but failed to grapple with these essential tasks. It is perfectly understandable, in the tribunal's view, for the

business managers to become frustrated with his performance. The tribunal is also satisfied, on the balance of probabilities, that he referred to the age of his clothes and where they were purchased and that he was erratic and frustrated, and 'huffed and puffed', displaying a red or 'beetroot' complexion. He also relied on a hypothetical comparator and used as the evidential basis for such a comparator, other sales consultants, in the age bracket of between 30 and 46 years of age. However, there is no evidence before the tribunal that they would have been treated more favourably than the claimant in the same or similar circumstances.

#### Victimisation

- (iv) In relation to victimisation, the tribunal is not persuaded that there was a protected act and, in any event, even if the claimant were to prove such an alleged act, the tribunal could not be satisfied that a causal nexus had been established by the claimant between the fact of having done any such protected act and his subsequent alleged treatment by the respondents.

#### Harassment

- (v) The tribunal is also not satisfied that the claimant has proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that he had been harassed in accordance with the definition in the Regulations. Regulation 6(2) of the Regulations states that conduct shall be regarded as having the effects specified in Paragraph (1)(a) or (b) only if, having regard to all the circumstances, including in particular the perception of B, it should reasonably be considered as having that effect. There is no satisfactory evidence before the tribunal, having regard to all the circumstances, including in particular the perception of the claimant, that the alleged conduct should reasonably be considered as having that effect, particularly in view of the tribunal's finding as to the unreliability of the claimant's own evidence, and the credibility and reliability of Brett Paterson's evidence.
- (vi) The claimant's claims of direct discrimination, harassment and victimisation on the grounds of age are therefore dismissed against all respondents.

**Employment Judge:**

**Date and place of hearing: 15 – 17 December 2014, Belfast**

**Date decision recorded in register and issued to parties:**

IN THE INDUSTRIAL TRIBUNAL IN NORTHERN IRELAND  
THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN

PHILIP O'BRIEN

Claimant

AND

BALLYROBERT SERVICE STATION LIMITED  
JOYCE BECK AND GREG BROWN

Respondents

CASE NUMBER

**Submissions regarding the statement of Ms Ogilby**

The Respondents were aware prior to the commencement of the hearing and prior to the Tribunal's reading time that they had no intention of calling Ms Ogilby. Despite this they permitted the statement of Ms Ogilby to remain in the bundle.

It is important to note that this statement is not signed and not adopted by the witness. The Tribunal can not know whether this is the witnesses own statement and there is no opportunity to cross examine her or test her evidence. Despite this the Respondent has placed reliance on it in their cross examination of Mr O'Brien and in the evidence of their own witnesses, most notably Ms Beck.

In relation to this the Claimant would submit that the Tribunal should place no weight on this statement of evidence nor any reference made to Ms Ogilby in the other evidence.

As in the case of *Alex Taylor v Crawfordsburn Inn* (Case ref 496/12) Judge Drennan QC noted at 4.0;

'Although in the present case, there are some differences with the facts in the *Bingham* case and it was not a choice by the respondent, not to use a particular category of evidence, but rather it was a deliberate choice not to investigate and/or make certain enquiries and/or to challenge in cross-examination the evidence given by the claimant relating to issues of remedy in respect of loss of earnings/mitigation of loss, the tribunal is satisfied that, as in *Bingham*, by analogy, the respondent is bound by that choice and could not be allowed to go back on it.'

As the Claimant disputes the items contained within Ms Ogilby's statement I would draw the panels attention to *Clapson v British Airways plc* [2001] IRLR 184;

'Ordinarily, where there was a disputed area of fact or where allegations had been made to witnesses for one party which had not been supported by evidence from the other party, the tribunal would deal with the situation by simply drawing the inevitable adverse inference against the party who had not given the evidence.'

Finally, David Porter was mentioned as a person whom witnessed an incident, just like Ms Ogilby. He was not called as a witness for the Respondent, even though he is still in their employment



## CLOSING SUBMISSIONS

In support of the Oral submissions made by the Claimant's legal representative below is a summary of the key legal issues and any reference to be made to legal text and or case law, for ease of the Tribunal, is cited below.

Firstly, the Claimant would summarise the evidence within the Respondents discovery (tab C page 11-26) as to the amount of sales achieved by each of the sales consultants as follows:

Name	Age	Length service	February sales	March Sales
<b>Philip O'Brien</b>	<b>63</b>	<b>2 month</b>	<b>8</b>	<b>9</b>
Chris Corson	34	10 months	15	17
Sam Rainey	46	2 years	11	26
David Porter	42	6 years	8	18
Gareth McCausland	30	18 months	11	15
John McCrea	44	4 years	8	14
Mark Mulholland	30	Resigned after 2 months	9	5
Patrick Smyth	37	6 years	12	15

### Direct discrimination

- a. Whether the Respondents subjected the Claimant to less favourable treatment on grounds of age, contrary to Regulation 3 of the Employment Equality (Age) Regulations (NI) 2006, as amended.

'As the Courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts.' (*London Borough of Islington v Ladele* [2009] IRLR 154, (Harvey on Industrial relations and employment law,251))

With regards to the reporting of the alleged instances of direct discrimination to Brett Patterson the Claimant would state:

'If the reason for the employer's failure to take steps to protect the employee was the employee's protected characteristic, the employer would be liable for an act of direct discrimination on ordinary principles.' (Discrimination and Equal Opportunities I, 11.39)

### Harassment

- b. Whether the Respondents subjected the Claimant to harassment on grounds of age, contrary to Regulation 6 and 7(3) of the Employment Equality (Age) Regulations (NI) 2006, as amended.

In *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 the case of harassment has been broken down into three elements:

- a) Unwanted conduct;
- b) Having the purpose or effect of either:
  - i. Violating the claimants dignity; or
  - ii. Creating an adverse environment for her;
- c) The prohibited ground

In the case of *Reed v Stedman* [1999] IRLR 299 it was viewed that no single act or incident in itself could amount to harassment. 'What was important was that the series of events could be looked at as a whole' (Harvey on Industrial relations and employment law, 417)

"It is for each person to define their own levels of acceptance, the question would be whether words or conduct she had made it clear that she found such conduct unwelcome. It is not necessary to make a public fuss to indicate her disapproval, walking out of the room may be sufficient. Tribunals will be sensitive to the problems that victims may face in dealing with a man, perhaps in a senior position to herself, who will be likely to deny that he was doing anything untoward and may say the victim was oversensitive."

The claimant submits that no justification can be made for harassment and no comparator is needed. (Harvey on Industrial relations and employment law, 410)

### Victimisation

- c. Whether the Respondents victimised the Claimant, contrary to Regulation 4 of the Employment Equality (Age) Regulations (NI) 2006, as amended.

In the case of *St Helens Metropolitan Borough Council v Derbyshire* [2007] UKHL 16 it was emphasized that under the victimisation provisions it was primarily from the perspective of the alleged victim that one determines the question whether or not any 'detriment' has been suffered, and it is not proper to judge whether or not a particular act can be said to amount to victimisation from the point of view of the alleged discriminator.' (Harvey on Industrial relations and employment law, 484.02)

There is no requirement in victimisation claims, for a complainant to show that the alleged discriminator was wholly motivated to act by his [the complainant's] behavior in carrying out the protected act. (Harvey on Industrial relations and employment law, 489)