THE INDUSTRIAL TRIBUNALS

CASE REF: 2034/12

CLAIMANT: **William Crothers**

RESPONDENT: **B F Mulholland Ltd**

DECISION

The unanimous decision of the tribunal is that the respondent unlawfully discriminated against the claimant on grounds of age and that the claimant was unfairly dismissed by the respondent. The matter will now be listed for a remedy hearing.

Constitution of Tribunal:

Chairman: **Mr J V Leonard**

Members: **Mr J Law**
Mr W Irwin

Appearances:

The claimant was represented by Mr A Lightburn, Solicitor, of Kebble Hawson LLP, Solicitors.

The respondent was represented by Mr K Smith, of KIS HR Solutions.

REASONS

THE ISSUES FOR DETERMINATION AND THE EVIDENCE

1. By claim received by the Office of the Industrial Tribunals on 11 October 2012, the claimant claimed unfair dismissal and age discrimination. By response dated 15 November 2012 the respondent company resisted these claims in their entirety and provided details of the grounds of resistance, which will be referred to further below. A Case Management Discussion took place on 22 January 2013 to identify the issues for determination which were agreed to be identified by agreement between the parties.

THE ISSUES

2. Issues were identified and agreed at some length and the tribunal will allude to this further below.

3. The tribunal had before it the written statement of the claimant Mr William Crothers and a written statement of Mr Mark Mulholland, Director of the respondent company. Included amongst the papers was also a written statement of Mr Jim McKelvey, a part-time Accounts Administrator in the respondent company. However, in the course of the hearing the respondent's representative indicated to the tribunal that Mr McKelvey was not going to attend on the second day fixed for hearing. Accordingly the tribunal attached no weight to the content of the written statement of Mr McKelvey, save to the extent that the tribunal was invited by the claimant's representative to draw inferences from the circumstances surrounding this statement. The two witnesses present before the tribunal were subject to cross-examination and to re-examination and the tribunal asked some questions for clarification of the evidence and issues. The tribunal had before it an agreed bundle of documents amounting to some 184 pages in total.

4. The primary issues for determination by the tribunal were whether or not the claimant had been unfairly dismissed by the respondent and whether or not the claimant had been subjected to unlawful discrimination on grounds of age, in connection with employment of the claimant by the respondent and the manner in which that employment was brought to an end in July 2012. There were subsidiary issues of fact and of law to be determined as agreed between the parties and the tribunal's determination in respect of the material issues is as set out further below.

5. In consequence of the oral and documentary evidence adduced, the tribunal determined, upon the balance of probabilities, the following facts:-

5.1 The claimant, Mr William Crothers, was born on 25 July 1949. A substantial part of the claimant's working life was spent with North West Securities Plc, where he worked for 12 years, firstly, for a period of seven years as Assistant Manager at Belfast Head Office, and then moving to the post of Manager in Ballymena for a further five years. After this, for a period of 17 years the claimant worked with Waveney Laundry Ltd in the role of General Office Manager, where his work responsibilities included sales ledger, payroll, credit control and staff management of six employees. After 17 years the claimant left Waveney Laundry Ltd and he gained employment with the respondent company (at that time a partnership trading entity) as an Accounts Administrator. This employment commenced on 11 February 2008 and continued until 13 July 2012. The claimant's salary in this post was £22,000.00 per annum. The post was, in the claimant's view, much lower in terms of status and salary than his previous employment, but the claimant had found the labour market to be difficult (which difficulty he ascribed amongst other matters to his age) and he was keen to stay in employment. There were two other persons employed in the respondent's Accounts Department, both of whom were accorded, as was the claimant, the informal title of "Accounts Administrator", although the functions of each of these persons appear to have been somewhat different. Miss Barbara McQuillan had primary responsibility for inputting purchase invoices and preparing payments to suppliers. For this work she was paid a salary of £18,000.00 per annum. Both the claimant and Miss McQuillan appear to have worked "full-time", in other words 37- 40 hours, or thereabouts, per week. The third Accounts Administrator, Mr McKelvey, worked part-time for approximately 16 hours per week. His salary was £11,440.00. Whilst Miss McQuillan's role appears to have been readily distinguishable and not to have overlapped much with the other two, there was a conflict in the evidence as to the precise demarcation between Mr McKelvey's job function and that of the claimant. Part of the evidential conflict in the case relates to the claimant's contention that, apart from preparation of credit

control and payroll, the claimant also prepared, together with Mr McKelvey, trial balances which were subsequently submitted to the respondent's accountants for auditing. The claimant's evidence was that he also had responsibility for sales ledger and was involved with VAT and PAYE matters. He provided accounts information to Mr McKelvey who then prepared the final figures to trial balance stage. Accordingly the claimant portrayed himself as being very much involved, together with Mr McKelvey, in the preparation of the respondent's accounts to trial balance stage. Mr Mulholland's evidence was that the claimant had very little or no part to play in many of the foregoing matters. In effect the claimant, so Mr Mulholland stated, had endeavoured to portray his role as encompassing much of Mr McKelvey's role, but that was not correct. The tribunal noted that Mr Mulholland did not give precise and detailed evidence concerning full details of the claimant's actual role as he would have seen it. One witness who might, without doubt, have provided clear and comprehensive evidence to assist in resolving matters, Mr McKelvey, did not attend the tribunal and therefore Mr McKelvey could not be subjected to examination and investigation in respect of these issues concerning precise role identification and demarcation between his function and that of the claimant. Having noted the foregoing conflict and having carefully examined the evidence of both the claimant and Mr Mulholland (in the regrettable absence of Mr McKelvey) the tribunal prefers the claimant's evidence as being the more clear, cogent and consistent. The tribunal's finding, accordingly, is that the claimant's job function encompassed the matters specifically referred to by him in his evidence and the tribunal's determination is that the claimant did have a significant part to play, amongst other matters, in assisting in conjunction with Mr McKelvey in taking the respondent's accounts to trial balance stage as part of his job function.

5.2 In his evidence to the tribunal Mr Mulholland was, it has to be said, quite disparaging concerning the attitude and aptitudes of the Accounts Department staff, stating in part of his evidence that the three staff members had no qualifications, that he had to oversee ("babysit" as he put it) the Accounts Department, that matters were left to him, and that the Accounts Department staff had "no initiative". Notwithstanding these somewhat caustic observations and these quite vehemently stated perceptions conveyed in his evidence to the tribunal, there is correspondingly no evidence that Mr Mulholland and the respondent's management took any steps to address any perceived deficiencies, perhaps by engaging with these employees, introducing training or mentoring, or indeed invoking any of the sanctions available for underperformance. The impression certainly gained by the tribunal as a result of the evidence was that at no stage was the claimant ever approached by anyone from the respondent's management with a view to pointing out any deficiencies and to seeking an improvement in his work performance. The tribunal is uncertain if the claimant indeed ever had any understanding that his work was not being conducted to an acceptable standard as far as Mr Mulholland now expresses it to the tribunal, if that was the concern at the time.

5.3 Prior to the incorporation of the limited company which is the proper respondent to these proceedings, the claimant's employer was B F Mulholland Dental Supplies, this being a partnership trading entity (for convenience in this decision the expression "the respondent" refers in proper context both to that trading entity prior to limited company incorporation and also to the limited liability company once incorporated, which latter of course is the legal respondent in the matter). The respondent's accountants for some time had been PGM Chartered Accountants ("PGM"). The typical annual accountancy service costs incurred with PGM varied from one year to the next, but were it seems £3,500.00 + VAT in the final year of retention. The respondent became concerned with substantially increased costs

and financial competitiveness of the business and discussions took place at the time, not only with the accountants PGM but also with Mr Keith Smith, a Human Resources Consultant. The respondent was around this time introduced to a firm of accountants called DNT Accountants ("DNT"). DNT appear to have recommended the incorporation of a limited liability company to replace the partnership trading entity. A limited company, BF Mulholland Ltd, was duly incorporated, upon advice from DNT, in February 2012. The existing partnership business then transferred to that company, together with the employment of the claimant and the other employees of the respondent at that time.

5.4 The pre-incorporation figures produced in March 2012 by PGM indicated some significant financial losses. The tribunal's attention was drawn to an e-mail dated 15 March 2012 (16:04) and sent by Mr Mulholland to family members involved in the respondent's business. The text reads as follows:-

> "*Hi All,*
>
> *As feared you can see the first 6 months figures are showing a significant loss (please see email below)…. It looks like we have no option other than to restructure the business and have redundancies unfortunately.*
>
> *As per our conversations and emails with our accountants, they believe we need a qualified accountant who will be able to operate the Financial department by their selves and possibly the help of another on a part time basis or a junior, depending on the restructure or what we can afford.*
>
> *So we will have to begin the restructure and redundancies in the financial department and if this does not succeed, and we're still making a loss after the redundancies have been made, we will have to look at other departments too unfortunately*".

5.5 The suggestion was made on behalf of the claimant that this email clearly appears to allude to other discussions with the accountants which preceded that e-mail in respect of which no documentary evidence was produced to the tribunal. As is mentioned further, in submissions on behalf of the claimant, the tribunal was invited to draw an appropriate inference from what was claimed to be a very obvious and telling omission. This was suggested to be the apparent omission to include e-mails or other documents which might have otherwise disclosed more information regarding the true or full reason for the respondent's decision to recruit a qualified accountant. Examining the foregoing evidence, the tribunal's perception certainly is that the tribunal has not been provided with all of the relevant material or documentary evidence in regard to any discussions and dealings between the respondent and its advisers at this material time. These would include relevant records of emails, notes of telephone conversations and other documents that one might expect to have existed in regard to significant business dealings. The tribunal thus finds it implausible that nothing further of materiality is stated to have existed, given the very significant nature of the matters which were being addressed at that particular time by the respondent's management. The respondent's explanation afforded for this is that this was a family company and that PGM were also connected by family ties. That explanation is noted but does not, in the tribunal's view, account for the entire absence of any relevant documentation at all dealing with these important issues.

5.6 The respondent's evidence was that there was an urgent need to reduce staffing costs at this time, that is to say in March 2012; the business needed urgent restructuring and matters required the recruitment of a qualified accountant who could operate the Financial Department possibly with the help of another person employed on a part-time basis or a junior. Notwithstanding this stated urgency, the respondent did not take immediate steps to recruit a qualified accountant nor to commence the restructuring of the Financial Department in pursuit of the stated urgent need to reduce staffing costs. A period of three months passed before the process was commenced. Under cross-examination, by way of explanation for this, Mr Mulholland's evidence was that the respondent had been preoccupied instead at the time with recruiting a field sales person and that this was the top priority for the respondent at that particular time (March 2012 and for the weeks following until June 2012). Mr Mulholland's evidence was that after two field sales employees had left, the respondent had recruited one person for field sales who after a training period of three months had left, necessitating a replacement being recruited. That latter person was finally in post by June 2012.

5.7 A process in respect of the persons employed as Accounts Administrators did commence on 6 June 2012. The claimant, together with Mr McKelvey and Miss McQuillan, received a letter dated 6 June 2012 from the respondent which indicated that the respondent intended to realise significant savings and at the same time to allow the respondent to present its figures to external auditors having had them signed off internally by a fully qualified and accredited Accountant. At hearing, Mr Mulholland's evidence was that part of the cost saving envisaged by recruiting a fully qualified Accountant was to enable the accounts to be signed off (perhaps after an initial period of using DNT in the first year after incorporation) and thereby to realise significant cost savings in avoiding the necessity to retain external accountants. The tribunal noted the disparity between the statement in the letter of 6 June 2012 to the claimant and the emphasis in Mr Mulholland's oral evidence in regard to the use of external auditors. The position as stated in June 2012 envisaged the qualified accountant, who was to be recruited, signing off the accounts internally and then the accounts being presented to external auditors. At hearing Mr Mulholland's evidence appeared to stress much more that the accounts would be signed off internally and that the involvement of external auditors would only be for a very limited time. The further evidence was that the respondent company's turnover at the material time was substantially less than the £6.5m per annum threshold beyond which it appears to have been necessary to have accounts audited externally. External auditing therefore seems to have been discretionary rather than mandatory. The letter dated 6 June 2012 to the claimant certainly envisages that the appointment of the qualified accountant was inevitable – "…*when the fully qualified and accredited accountant is introduced*". However, notwithstanding considerable attention being given to this topic in the oral hearing, the tribunal nonetheless found Mr Mulholland's explanation to be vague and imprecise concerning the inter-relationship between the necessity for the respondent to have an internal qualified accountant who could sign off the accounts "in house" and the desirability or the necessity to have the accounts externally audited. There were no other witnesses called by the respondent to provide clarity upon that issue.

5.8 The respondent engaged in a process with the claimant in June 2012 which ultimately resulted in the claimant's dismissal, the stated reason being redundancy. Examining the terms upon which matters were put to the claimant in the course of the consultation, things appear to have envisaged with absolute certainty that the fully qualified accountant would be introduced. It appears, for that reason, that

there was no suggestion that the claimant might have made which would have avoided the inevitability of the recruitment of the qualified accountant and consequently a significant risk to the content of his role or function within the respondent company. The claimant was provided with a job description for the new company accountant role. The claimant's evidence, which was challenged by the respondent, was that he certainly could have performed the majority of functions listed in the job description. Certainly he did not possess the stated essential requirement of possessing the qualification of a chartered accountant (ACCA, CIMA or ACA). However the claimant was quite strongly of the view that, with the exception of possessing these professional qualifications and having the capacity to sign off the accounts, he most definitely possessed most of the other skills and the experience required in the job description and list of duties. That assertion was strongly disputed by the respondent. Having heard the evidence and carefully noted details of the claimant's lengthy experience in work and the functions described, and having listened to the evidence both of Mr Mulholland and that the claimant in that respect, the tribunal is satisfied, on balance, that on account of the claimant's lengthy experience, aptitudes and skills, the claimant could have performed the majority of the functions that were set out in the job description and list of duties, save for any matters specifically requiring the professional qualification mentioned.

5.9 At this time the company was seeking to recruit a field sales representative. The tribunal noted the evidence of Mr Mulholland that there had been two field sales representatives employed by the respondent but the respondent was finding this to be expensive and inefficient. Mr Mulholland's evidence, which the tribunal finds somewhat troubling, was that a decision was taken to bring these representatives in house and to engage them in telephone sales and that it was hoped that if they were required to work in the office they might resign. The further evidence was that both of these field sales representatives did leave a short time after this had occurred. After the next field sales representative who had been recruited then left after only a few months, the subsequent recruitment of the replacement field sales representative commenced at some time, so the tribunals understands it, around March 2012.

5.10 In regard to that field sales representative role, this role was not put to the claimant by the respondent as possible alternative employment or discussed with the claimant, notwithstanding that the claimant was in June 2012 formally to be placed at risk of redundancy. The claimant had previously had field sales responsibilities during his employment with North West Securities; however, that had indeed been some considerable time before these events.

5.11 The claimant did not apply for the role of Company Accountant. Together with the other staff members in the Accounts Department the claimant had been informed by the respondent that the deadline to apply for the qualified accountant position was 8 June 2012. He sent an e-mail on 7 June 2012 to Mr Mulholland stating that the role, as he thought, was very similar to his existing role with the exception of the essential requirement for an accountancy qualification. He sought confirmation as to whether the respondent would consider his experience both in his existing role and in past employment as an alternative to the professional qualification requirement specified. He requested identification of which areas of work would require a chartered accountancy qualification so that the respondent might consider his relevant experience in those areas. In response Mr Mulholland stated that the purpose of the qualification being required in the new role was to allow the accounts to be signed off in-house and to reduce external costs. If the company accepted experience as an alternative, it would not have increased the efficiency of the

Accounts Department. To improve the performance of the Accounts Department the company needed a qualified accountant, otherwise it would remain a two-step process instead of one. That technical qualification specified by the respondent, of being a qualified accountant, effectively ruled the claimant out of any possibility of securing the post. Thus he did not proceed with an application for the post.

5.12 The respondent identified a post of part-time accounts administrator, envisaged, as it is understood to be, as a support role working with the newly-recruited qualified accountant. The three existing staff members in the Accounts Department, including the claimant, were informed by email sent 8 June 2012 that the deadline to apply for this part-time accounts administrator position was 11 June 2012. On 11 June Mr McKelvey applied for this part-time accounts administrator position and he was duly appointed to the position. The claimant did not apply for this post. His reason, as stated in his evidence to the tribunal, was that this was a part-time position only and for financial reasons he wished to work full-time and thus the part-time nature of the post and consequent salary did not suit his needs.

5.13 In respect of the cost-saving objective stated by the respondent, it appears that the respondent initially felt that it could have secured a fully qualified Accountant for a somewhat lower wage than indeed proved to be the case. The recruitment agency engaged by the respondent, Bond Recruitment, indicated that for the anticipated wage of £25,000 suggested by the respondent, all that the respondent could expect was a newly qualified accountant. The respondent ultimately interviewed a Mr David Pegg. Mr Pegg was fully qualified ACMA with the CIMA. Mr Pegg possessed five years' experience in industry but that experience was as an unqualified Accountant. As a qualified Accountant, Mr Pegg's experience was not substantial and consisted of two temporary fixed-term contracts, for a total period of nine months. Mr Pegg had indicated to Bond Recruitment a salary expectation of £26,000.00-£30,000.00. He was offered by the respondent a salary of £25,000 and he accepted the offer at that salary level. The post was offered to him by the respondent on 18 June 2012 (which indeed was the same day as the claimant was informed of his redundancy). Bond Recruitment's fees were £2,500.00 plus VAT (10% of the starting salary).

5.14 The respondent met with the claimant on 13 June 2012. By letter of 18 June 2012 the respondent announced to the claimant that the employment would be terminated following a period of four weeks' notice. The letter of 18 June 2012 specifically stated that the outcome in no way reflected the claimant's performance in his job which was stated to have been entirely satisfactory. Notwithstanding this, the tribunal noted that in his evidence to the tribunal Mr Mulholland on a number of occasions endeavoured to denigrate the lack of any proactive performance on the part of those in the Accounts Department, including the claimant. Mr Mulholland indeed spoke in a very positive manner about what he portrayed as being the very proactive and wide-ranging performance of Mr Pegg in the new post, in obvious contrast to the performance of the claimant in his job. The claimant's last day of service was 13 July 2012. The claimant was paid a lump sum of £2,538.47 upon termination, which was stated to be on grounds of redundancy, based upon his final salary of £22,000.00 per annum and his service of four years with the respondent company. Seemingly there was an error in calculation that was swiftly rectified by the respondent.

5.15 The claimant, by letter of 28 June 2012, appealed against the dismissal decision, providing detailed grounds of appeal in which he indicated that, amongst other matters, the true reason for the dismissal was on account of his age (he was to be

aged 63 on 25 July 2012). He also asserted that only the Accounts Department had been affected by the restructuring, whereas the work still required to be performed, that the "new business model" had not been discussed (unless it was simply the decision to bring the accountancy services "in house"), that replacing the claimant's salary of £22,000 and that of Miss McQuillan of £18,000 with a qualified accountant would be unlikely to present any costs savings, that the speed of the process stated to relate to the need to make urgent savings did not relate to the bringing in of a qualified company accountant, and that the redundancy process was in effect a "done deal" and the respondent already had had someone in mind to take on the claimant's role. An appeal meeting took place on 9 July 2012, which was conducted by Mr Kieran Matthews, a HR Consultant engaged by the respondent to hear the appeal. By letter dated 11 July 2012 Mr Matthews wrote to the claimant confirming that the redundancy decision had been upheld, mentioning specifically that there were no grounds for determining that the reason for dismissal was because of the claimant's age, and that the new fully qualified Accountant did not have to have his accounts signed off by a third party. There were no other redundancies made by the respondent save for those in respect of Miss McQuillan's post and that of the claimant. Mr McKelvey made application for the part-time accounts administrator post and, in effect, as far as the tribunal understands it, remained in post working alongside Mr Pegg in a part-time capacity. Whilst there may have been cost saving measures undertaken by the respondent in other areas of the business, none such arose on account of any further employees being made compulsorily redundant, as had been the claimant and Miss McQuillan.

5.16. It might be useful, for clarity, to construct a timeline of material dates (all of these being in 2012) and this is as follows:-

- 15 March - email sent by Mr Brian Mulholland to other family members concerning trading losses;
- 6 June - letter sent by the respondent to the claimant regarding the first consultation meeting;
- 7 June - claimant sends email to Mr Mulholland raising various queries;
- 3 staff members in Accounts Department informed that the deadline to apply for the qualified accountant position was 8 June 2012 (there followed no internal applications);
- 8 June - the respondent contacted Bond Recruitment to start the external recruitment for the qualified accountant position;
- 3 staff members in Accounts Department informed by email sent 8 June 2012 that the deadline to apply for the part-time accounts administrator position was 11 June 2012;
- 11 June - Mr McKelvey applies for part-time accounts administrator position;
- 13 June - Bond Recruitment sends CV's for various potential qualified accountants to the respondent;
- 13 June - respondent has meeting with claimant re redundancy (claimant invited by letter of 12 June);
- 15 June - respondent has interview with Mr Dave Pegg;
- 18 June - respondent has second interview with Mr Pegg and Mr Pegg offered job (to start on 1 August 2012);
- 18 June - redundancy notice letter issued to claimant;
- 13 July - claimant's last day of employment with the respondent.

5.17 In the evidence in the case an issue was also raised regarding the provision of a written statement of main terms and conditions of employment to the claimant. The respondent's evidence was that, whilst the claimant did not sign express acceptance of these terms, which terms were provided to him some time after he commenced employment, nonetheless he did not expressly object to these written terms (as indeed had one named employee). The case for the claimant was that the claimant had never accepted these written terms. The only issue that turns upon this, in the tribunal's assessment, is the observation that these written terms expressly specified a retirement age of 65 and that provision remained unamended at the date of the claimant's dismissal. In his evidence to the tribunal Mr Mulholland confirmed that the respondent now did not have any contractual retirement age. It was however pointed out to Mr Mulholland in cross-examination that the comparatively recent recruit, Mr Pegg, had a written contract which likewise expressly specified a retirement age of 65. In response, Mr Mulholland stated that this was a regrettable error and he reaffirmed that the respondent company did not have any contractual retirement age. The tribunal heard some additional evidence which might have had relevance to the issue of remedy, but the tribunal finds such evidence insufficient in a case of this nature to permit the tribunal to deal both with issues of liability and also of remedy. Accordingly, in this matter the tribunal does not intend to record any further findings of fact which might go towards the issue of remedy, which matter will be decided at a further hearing, as mentioned below, and in this case the tribunal concerns itself with issues of liability only.

THE SUBMISSIONS OF THE PARTIES

6. The written submissions made on behalf of the claimant were set forth at length by the claimant's representative in a written document running to some 29 pages. The tribunal will allude below to various of the written submissions which have most significance as far as the legal issues to be determined by the tribunal are concerned. The written submissions made on behalf of the respondent by the respondent's representative run to a rather more modest 3 pages.

THE SUBMISSIONS FOR THE RESPONDENT

6.1 For the respondent, it was contended that Mr McKelvey, who was 71 years old, had successfully applied for the part-time role which was still available during the business reorganisation. The claimant had not applied for this role. This clearly indicated that the respondent did not discriminate against the claimant in respect of future employment within the business. It was contended that the claimant had stated that although he was aware of the ongoing recruitment for a sales representative and that 17 years previously he had worked in sales he did not advise the respondent during his consultation that he would consider this role as a suitable alternative employment and that the respondent at all times, prior to the tribunal hearing, was unaware of the claimant's earlier sales experience. The claimant had presented no alternative solutions during his redundancy consultation when asked how he thought the respondent should manage the spiralling costs of the business. In respect of the consultation process employed, "best practice" had been used and the respondent did not advertise externally until an opportunity had been taken to assess the claimant's ability to apply. After the deadline had passed the external advertising took place but there were no restrictions on who could apply in terms of age. The respondent refuted the allegation that the professional qualification requirement either directly or indirectly discriminated in any way in relation to the claimant in respect of age. The professional qualification was essential to move the business forward. The claimant had commenced

employment with the respondent at the age of 58. A colleague of the claimant who was significantly younger was also made redundant (Miss McQuillan). During this period the respondent relied on the advice of their external accountants, PGM Accountants, who had advised that the introduction of a qualified accountant would significantly reduce the respondent's running costs, obviate the need for additional training of existing staff and this recommendation had since been proven to be correct. The respondent's business was operating with less staff and at significantly reduced cost. There had been a genuine redundancy situation. Following the appointment of the qualified accountant and for the future there would be no requirement to engage external accountants unless the respondent chose to have an independent audit. In terms of the work tasks performed by the claimant, the claimant simply produced reports from a computer and it was Mr McKelvey within the accounts team who actually carried out the work on the final accounts. The claimant had misrepresented his function which, as described by him, was factually incorrect and was intended to undermine the case that a qualified professional accountant was required to manage the Accounts Department. Notwithstanding the energy and enthusiasm possessed by the qualified accountant the only criteria required were ability, professional qualifications and experience; age was never a criterion. The redundancy was genuine and was based on purely commercial decisions.

THE SUBMISSIONS FOR THE CLAIMANT

6.2 For the claimant it was submitted that the respondent had engineered a redundancy exercise to remove the claimant and to replace him with a younger employee when in fact the claimant's role was not redundant. An unnecessary requirement was imposed that the post-holder had to be a qualified accountant. In fact this post was the original role and function as carried out by the claimant but "dressed up" as something different. The respondent's case set out in the response form was that the only reason for dismissal was redundancy. The tribunal had heard from two witnesses, the claimant and Mr Mark Mulholland, the latter being the Finance Director of the respondent. The respondent had intended to call a second witness, Mr McKelvey, from whom a witness statement had been obtained. However, Mr McKelvey did not attend the tribunal, despite the suggestion on the first tribunal hearing day that he would be in attendance on the second day. It was important to bear in mind that it was unusual to find direct evidence of discrimination. Inferences may be drawn from primary facts on the basis of the evidence. No conscious motivation of discrimination was required and it was important for the tribunal to exclude the possibility of discrimination and to establish that the treatment complained of was in no sense whatsoever upon the grounds of age. The claimant had an employment history in financial management. He had been a Bank Manager for 12 years and then he was an Office Manager responsible for an accounts function for 17 years. The tribunal was invited to find that there was no acceptance of the written contract terms at the time of the claimant's dismissal. The draft contract produced by the respondent contained a potentially discriminatory provision in respect of age, with a compulsory retirement age of 65 provided. That clause even appeared in the respondent's most recent employment contract, that of the new accountant, Mr Pegg. Mr Mulholland's explanation was that this contract had not been updated and he stated that in fact the respondent company did not have a retirement age. In terms of the claimant's role, each of the three persons in the Accounts Department was given the title of "Accounts Administrator". These three were the claimant, Mr McKelvey and Miss McQuillan. Each held a different role and, loosely speaking, the claimant ran the Department. That was at first disputed by Mr Mulholland. The claimant had given clear evidence

about his involvement in and responsibility for the production of the trial balance, whereas Mr Mulholland's evidence was vague, critical and belittling to the claimant. The one person who could have categorically confirmed the job functions was Mr McKelvey, but he did not attend to give evidence.

6.3 The firm's accountants were PGM but Mr Mulholland had been critical at that firm and the firm of DNT Accountants had taken over with the incorporation of the new company and the transfer over of the business in February 2012. The respondent's financial year changed from January to December to April to March. PGM were tasked with preparing final end of year accounts for the partnership up to December 2012. PGM also prepared the final figures up to the date of incorporation of the limited company. Mr Mulholland had stated that it was the provision of the pre-incorporation figures on 15 March 2012 by PGM that prompted the respondent to consider cost-cutting measures. Mr Mulholland had forwarded an e-mail to other members of management on 15 March 2012 in a manner which suggested that there had been previous conversations and e-mails about recruiting a qualified accountant. However, no copy e-mails had been produced. The tribunal was invited to draw an inference from the evident failure to disclose these e-mails which might have contained evidence of the true reason for the respondent's decision to recruit an accountant and which might well have been related to the age of the employees in the Accounts Department. There was also no reference made to reducing external accountancy costs. The true reason to be inferred was that Mr Mulholland's belief was that the claimant was unqualified and incompetent and this had little to do with cost saving. Notwithstanding the gravity of the apparent losses being sustained, the respondent did nothing for a further three months. Mr Mulholland's reason for that was that the company had been preoccupied with recruiting a field sales person. However this demonstrated the fact that there was seemingly no urgent need to cut costs, otherwise the respondent would have done that. The true reason for the dismissal of the claimant was not cost saving as stated by the respondent, but at best capability and at worst related to age discrimination. Redundancy consultation was rushed, with the affected employees only being afforded two weeks' consultation, commencing on 6 June and ending 18 June 2012. In the letter to the claimant and his colleagues of 6 June 2012 there is a reference to having accounts signed off internally by a fully qualified and credited accountant. Here the respondent was saying that the recruitment of the accountant was to allow "signed off" accounts to be presented to the respondent's external auditors. That was different to the evidence given by Mr Mulholland which was that the intention was not to use external auditors. However, there was no legal requirement to do so as a company's turnover was substantially less than the threshold of £6.5 million. The reasons given to the claimant and his colleagues were simply a cover for a more sinister reason that they were old and the respondent wished to "freshen things up". It was clear from the letter that things were a *fait accompli*. Mr Mulholland's evidence was that he had spent much time "babysitting" the Accounts Department and he referred to them as being "reactive". Mr Mulholland's explanation to the claimant by email sent 7 June 2013 was that the purpose of the qualification being required in the new role was to allow the accounts to be signed off in-house and to reduce external costs. There was however no legal requirement for external auditing of the company accounts. The redundancy consultation was run to a "script" and was merely paying lip service to the consultation requirement. There was no genuine attempt at consultation. The role of external field sales representative was not discussed or offered to the claimant despite the fact that the claimant was at risk of redundancy. The claimant had previously undertaken field sales, albeit some 17 years before. With some training the claimant could have undertaken this role. The claimant did not apply for the

role of company accountant nor did his colleagues as he felt unqualified for that. The evidence was that, in reality, urgent and significant cost saving was simply not at the heart of the decision to make the claimant redundant. It was clear that the respondent had initially underestimated the cost of recruiting externally a qualified accountant. The claimant was costing the business just £22,000.00 annual salary. At an early stage the respondent could have researched the likely salary for external accountants and would have established that the salary budget was likely to be between £25,000.00 and £28,000.00. The stated reason for dismissing the claimant due to cost savings simply could not be substantiated. In terms of the accountant who was recruited, Mr Pegg, that person had five years' experience in industry, but as an unqualified accountant. The only experience Mr Pegg had as a qualified accountant consisted of two temporary fixed-term contracts, for a total period of 9 months. This had to be compared to the claimant's experience of banking and accounts of over 30 years. Whilst Mr Mulholland had stated that the recruitment of the company accountant did not occur until after the consultation process had ended, he was forced to agree that at the point the claimant was being invited to a consultation meeting on 13 June concerning his proposed redundancy, recruitment had begun for the company accountant and on the day the claimant was handed his redundancy notice, the respondent was offering the job of company accountant to Mr Pegg.

6.4 It was submitted that Mr Mulholland in his evidence revealed the real reason for the restructuring and the recruitment of Mr Pegg. Mr Mulholland had branded the claimant as "incompetent" and "unqualified". He relied upon an accusation that because the claimant had failed to acknowledge the receipt of a capital injection of £100,000.00 into the business as a sign that the business was in difficulty, that was a sign of the claimant's incompetence. There was nonetheless no evidence of incompetence and capability was never raised as an issue in the proceedings until that was first mentioned by Mr Mulholland in his evidence to the tribunal at hearing. But that perception was the real reason for things occurring as they did, despite the fact that in the dismissal letter of 18 June 2012 it was stated that the decision in no way was a reflection of the claimant's commitment, ability or performance. Under the superficial explanation of cost-saving something very different lay at the heart of the case. The cost savings did not really add up beyond the cost saving resulting from the dismissal of Miss McQuillan. There was therefore an alternative reason for the dismissal. Age discrimination was the most obvious and most logical explanation. The claimant was aged 63, Miss McQuillan was in her 50s and Mr McKelvey was aged 71. Mr Mulholland was aged 35 and Mr Pegg 25. Mr Mulholland claimed that Mr Pegg was undertaking many functions and he was "like a breath of fresh air". The respondent was seeking a younger and more dynamic individual to run the Accounts Department. The central plank of the respondent's case was cost savings. Mr Mulholland stated that the business saved £18,500 as a result of the re-structure. But the cost of Ms McQuillan's wages was just short of £20,000. There was no perceptible cost saving. The respondent had indeed chosen to engage in services of DNT Accountants to undertake an audit at a cost of £2,000 plus VAT. This contradicted the need to make urgent cost savings and also the reason for employing a qualified accountant. The restructure to "rescue the business" had in fact cost more money to implement than simply sticking with the original model. There were the additional costs of the increased salary for Mr Pegg, an increase of £3,000 over the claimant's wage. There was a recruitment fee for Mr Pegg of £3,000.00 including VAT and the claimant's redundancy payment of £2,538.00 on top of that. The cost basis as a sole reason for redundancy simply could not be substantiated; therefore the stated reason for the dismissal must fail.

6.5 The claimant's representative argued that the tribunal ought to note Mr Mulholland's evidence regarding the resignation of the existing field sales representatives on the basis that if they were forced to work from the office he hoped they would resign. The tribunal was invited to pay some attention to this and the submission was made that this indicated the respondent's propensity to use a sham when it did suit them to achieve their objectives. There was simply no documentary evidence to support the respondent's reasons for restructuring the Accounts Department. There is a reference to e-mails in discussions but the respondent's case was that there were no documents. It was stated that this was because it was a family business and everything was done verbally. Mr Mulholland also had suggested that his professional advisers did not keep notes either and matters were discussed informally. It was submitted on behalf of the claimant that this was simply not credible that the business had no documentary evidence including e-mails of decisions to restructure and in particular to recruit the accountant and the same in regard to the company accountants, PMG. The tribunal was invited to draw inferences from the lack of documentary evidence and what were asserted to be the lengthy but nonetheless evasive answers given by Mr Mulholland in his evidence. Regarding the position in respect of Mr McKelvey, it had been intended that he was to be called to give evidence. It was stated that it was Mr McKelvey who produced the trial balances. This could not be tested because Mr McKelvey did not attend to give evidence. It was important to note that Mr McKelvey was unclear as to what work Mr Pegg was undertaking. He did not state that any cost savings were being made because of Mr Pegg's work. The tribunal should draw inferences from Mr McKelvey's failure to attend. He was an existing employee within the respondent's control and the most likely explanation was that Mr McKelvey's evidence might have contradicted the respondent's case, in particular in regard to the amount of work which Mr Pegg was currently undertaking and Mr Pegg's impressive performance such as was portrayed by Mr Mulholland. In respect of the claimed significant cost savings, the respondent was still engaging professional accountants and there were no significant cost savings. The respondent commenced recruitment for the Company Accountant on 12 June 2012 which was during the redundancy consultation period and before the claimant had had a first formal consultation meeting. The Company Accountant, David Pegg, is 25 years old. According to Mr Pegg's Curriculum Vitae he qualified in 2011 and appears to have held three roles as a Management Accountant in that time. The last two temporary positions do not appear to have involved running an accounts function. His role at Grainger Building Services Ltd (a reference to a role described in Mr Pegg's CV) was more akin to his role with the respondent but Mr Pegg was working in an unqualified capacity whereas in comparison the claimant had over 20 years experience in running an accounts function including the majority of the tasks in the Accountant job description. In respect of the qualified Company Accountant and certification of accounts a company's accounts do not require accounts to be signed off by a qualified accountant. The decision to have the accounts audited externally is at the discretion of the company. The respondent incurred the cost of having their accounts independently audited nonetheless. The respondent was not therefore certifying accounts in-house. The reason for dismissal was not redundancy. The rationale for implementing redundancy was the urgent need to save costs. Things were not dealt with urgently and the respondent waited for some three months before implementing matters. The stated reason for redundancy did not exist. The claimant's role still existed but he was replaced by Mr Pegg. The tribunal should accept the claimant's evidence that he could in many cases have undertaken the various tasks listed on the company accountant job

description, with the exception that he did not hold a professional accountancy qualification.

6.6 The claimant's representative submitted that there was no evidence to support the respondent's assertion that the reason for the dismissal was redundancy. What then was the reason for the dismissal and was that reason the claimant's age? The tribunal had heard evidence from Mr Mulholland that his opinion of the claimant and his colleagues in the Accounts Department were "unqualified" and "incompetent". He regarded him as being "reactive" as opposed to "proactive" as he viewed Mr Pegg. Mr Mulholland acknowledged that indirectly his budget for the role of company accountant was set at a level which would attract newly qualified accountants. He described Mr Pegg as a "breath of fresh air". Mr McKelvey, the oldest employee at an age of 71 and who remained employed by the respondent had failed to appear as a witness despite the production of his witness statement and despite the suggestion that he would attend on the second day of the hearing. The tribunal was invited to draw inferences concerning the fact that a 71 year old employee would not attend to give evidence in an age discrimination case on behalf of his employer.

6.7 On the question of whether the respondent did act reasonably in treating redundancy as a sufficient reason for dismissing the claimant, it was submitted that if a tribunal where to find that the reason for dismissal was redundancy then it was contended that the respondent did not act reasonably in dismissing for that reason as little or no cost savings were made and in reality an experienced accounts manager was replaced with an inexperienced (albeit qualified) replacement. There was no meaningful consultation carried out. The respondent had already decided on its course of action and was merely paying lip service to consultation. Recruitment had already started for the new accountant during the consultation period. The claimant was being asked for ways to avoid redundancy. The job was offered to the new accountant on the same day as the claimant was dismissed. The appeals process against the dismissal was therefore entirely futile. It was submitted that the claimant could have undertaken the company accountant role and could have also been offered a trial period in the field sales representative role and could have been encouraged to apply. He had previous experience in the financial sector but not in the medical sector but neither did the person who secured the field sales role.

6.8 In terms of the correct comparator, the proper comparator was a hypothetical comparator and it was submitted that the construction of such a comparator would be an accounts administrator with significant experience in running an Accounts Department and bringing the accounts to trial balance, with no formal accountancy qualifications, but aged in his twenties or thirties. It was submitted that the claimant was accordingly treated less favourably by the respondent on grounds of his age. The respondent appears to have wanted a younger and more qualified individual running the Accounts Department. The claimant was neither of these but in fact there was no legal requirement for the respondent to have accounts signed off by a qualified accountant and it was exercising discretion to replace the 63 year old claimant who had in excess of 30 years experience in finance and accounts with a 25 year old who had been qualified as an accountant for some nine months only. The less favourable treatment was the dismissal of the claimant. In respect of the futile consultation and the recruitment process the claimant was also less favourably treated on grounds of his age. Any costs savings argued by the respondent did not justify the restructure or the redundancy of the claimant and the discriminatory acts and therefore this was not a reasonable or proportionate means

of achieving any legitimate aim. In regard to the claim for indirect discrimination, it was submitted that it would be more probable that younger employees, in particular those of the age of Mr Pegg at 25 years old, were more likely to hold degrees or professional qualifications than employees in their 60s, as access to further education was less common for those persons at the same age as the claimant. The tribunal noted that there was no specific evidence adduced regarding that latter contention.

For the reasons stated below, any further matters of evidence or submission which might go towards the matter of remedy in the case do not require to be dealt with by the tribunal in this decision.

THE APPLICABLE LAW

7. The Employment Equality (Age) Regulations (Northern Ireland) 2006 ("the 2006 Regulations") are applicable. The provisions of the 2006 Regulations material to this matter follow below.

Regulations 3 and 6, of the 2006 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".

The Employment Rights (Northern Ireland) Order 1996 (hereinafter referred to as "the 1996 Order") provides at Article 126 that an employee has the right not to be unfairly dismissed by his employer. Article 130 of the 1996 Order provides for the test of fairness concerning the dismissal by an employer. It is for the employer under the provisions of Article 130 (1) (a) to show the reason (or, if more than one, the principal reason) for the dismissal, and, under Article 130 (1) (b), that it is either a specified reason as set out in Article 130 (2) or some other substantial reason of a kind such as to justify the dismissal. The specified (potentially fair) reasons for dismissal that are set out in Article 130 (2) include redundancy. If a tribunal makes a finding of unfair dismissal, and an order for re-engagement or reinstatement is inapplicable, a tribunal may make an order for compensation, including both a basic award and a compensatory award. For the compensatory award under Article 157, the award is such amount as the tribunal considers just and equitable, having regard to the loss sustained by the complainant in consequence of a dismissal, insofar as that loss is attributable to action taken by the employer. In the application of the statutory provisions regarding unfair dismissal as set out above, the leading authority remains the case of ***Iceland Frozen Foods v Jones [1982] IRLR 439*** in respect of which guidance has been given and approval confirmed by the Court of Appeal in Northern Ireland in the case of ***Rogan v South Eastern Health and Social Care Trust [2009] NICA 47,*** following similar guidance and approval having been given by the Northern Ireland Court of Appeal in ***Dobbin v Citybus Ltd [2008] NICA 42.*** The tribunal in the exercise of its function is therefore very clearly guided by ***Iceland***. Therein the guidance (as given by Browne-Wilkinson J and bearing in mind that the statutory provisions referred to are the equivalent to Article 130 of the 1996 Order in Northern Ireland and that there is a "neutral" burden of proof) is stated as follows:-

'(1) The starting point should always be the words of section 57(3) themselves;

(2) In applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;

(3) In judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) The function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'

Circumstances in which an employee who is dismissed shall be taken to be dismissed by reason of redundancy are set forth in Article 174 of the 1996 Order. This provides as follows:

> *"For the purposes of this Order an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to*

(a) the fact that his employer has ceased or intends to cease

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."

In regard to the claimant's age discrimination claim, as in other areas of the equality legislation, there is a requirement to compare like with like. By virtue of Regulation 3(2) of the 2006 Regulations, a comparison of B's case with that of another person must be such that the relevant circumstances in the one case are the same, or not materially different, in the other. But because direct discrimination occurs if B is treated less favourably than A treats or 'would treat' another person, the comparator may be real or hypothetical. The guidance concerning the use of comparators in sex discrimination claims which was given by the House of Lords in ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** **[2003] IRLR 285** applies also to comparisons under the 2006 Regulations.

The burden of proof relating to the claimant's claim of age discrimination is set out in Regulation 42 of the 2006 Regulations in similar terms to that found in other anti-discrimination legislation. The Court of Appeal in England in ***Igen v Wong [2005] IRLR 258*** considered the provisions, equivalent to Regulation 42 of the 2006 Regulations, in a sex discrimination case; and approved, with minor amendment, the guidelines set out in ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332***. The Northern Ireland Court of Appeal has approved ***Igen v Wong*** and the two-stage process in the case of ***Bridget McDonnell & Others v Samuel Thom t/a The Royal Hotel Dungannon [2007] NICA 3.*** There, the Court of Appeal, in reference to this two-stage process stated:-

> *" ... the first stage required the claimant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination against the complainant. The second stage (which only came into effect if the claimant had proved those facts) required the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld ... ."*

Igen v Wong has been the subject of a number of further decisions, including ***Madarassy v Normura International PLC [2007] IRLR 246***, a decision of the Court of Appeal in England and Wales, and ***Laing v Manchester City Council***

[2006] IRLR 748, both expressly approved by the Northern Ireland Court of Appeal in the ***Arthur v Northern Ireland Housing Executive and SHL (UK) Ltd NICA 25***.

In ***Madarassy***, the Court of Appeal held, inter alia, that:-

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts 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 Section 63A(2) must mean that 'a reasonable tribunal could probably conclude' from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, 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 needs to consider all the evidence relevant to the discrimination complaint, such as evidence as to the act complained of occurred at all, evidence as to the actual comparators relied upon by the claimant to prove less favourable treatment, evidence as to whether the comparison being made by the claimant were of like with like as required by Section 5(3), and available evidence of the reasons for the differential treatment. ... ."*

This involves a two-stage analysis of the evidence but does not prevent the tribunal at the first stage from drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

In the case of ***Laing v Manchester City Council***, Elias J held that it was not obligatory for a tribunal to go through the formal steps set out in ***Igen*** in each case.

Indirect discrimination (under Regulation 3 (1) (b) of the 2006 Regulations) consists of a number of elements:-

(i) that the employer applied to the employee a provision, criterion or practice which the employer applies or would apply equally to persons not of the same age group as the claimant, but

(ii) which puts or would put persons of the same age group as the claimant at a particular disadvantage compared with other persons; and

(iii) which puts the claimant at that disadvantage; and

(iv) which the employer cannot show to be a proportionate means of achieving a legitimate aim.

All four conditions have to be met before indirect discrimination can be established. Given the nature of the claim, it is difficult to strictly apply the two-stage process, as referred to in ***Igen v Wong*** and other authorities.

In order to comply with Regulation 42 of the 2006 Regulations within the guidance of ***Igen v Wong***, the tribunal must firstly find that it could conclude that the first, second and third points referred to above had been satisfied by the claimant; and then, if so satisfied, find that the burden of proof had shifted, requiring the respondent to justify the provision, criterion or practice.

THE TRIBUNAL'S DECISION

8. The claimant's evidence, which was accepted as accurate by the tribunal, was that his job with the respondent encompassed responsibility for sales ledger and VAT and PAYE matters and that he worked closely with Mr McKelvey to trial balance stage. Whilst Mr Mulholland has asserted that the claimant had very little part to play in many of the accounts functions (which were substantially attended to by Mr McKelvey) and that the claimant had tried to portray his role as encompassing much of Mr McKelvey's role, in the absence of Mr McKelvey to add clarification to the issues of contention, the tribunal's finding is that the claimant's job function encompassed the matters referred to by him in his evidence and that the claimant had a significant part to play, amongst other matters, in assisting in taking the respondent's accounts to trial balance stage as part of his job function. The tribunal accepts the claimant's evidence that he could certainly have performed the majority of functions mentioned in the new company accountant job description, the post that was secured by Mr Pegg. Whilst the claimant did not possess the specified requirement of being a fully qualified chartered accountant (ACCA, CIMA or ACA) he nonetheless possessed most of the other skills and certainly the experience required in the job description and list of duties. The tribunal is thus satisfied that the claimant could well have performed the majority of the functions, save for any matters specifically requiring the professional qualification. However the claimant, after endeavouring to check with the respondent if his existing skills and experience would have been suitable as an alternative, then was clearly informed by the respondent that he did not have the professional qualifications that were stated to be essential to the post and quite understandably, having been very clearly dissuaded in this fashion, the claimant did not proceed with an application that would evidently have been futile.

9. Mr Mulholland was closely questioned in cross-examination regarding the true cost savings to the respondent. He stated that the cost savings included the difference between the charges of PMG for the final accounts produced and the fees charged by DNT, which produced a saving. On top of that, Mr Mulholland stated in his evidence that the respondent had saved £20,000 on account of the redundancy process. Accordingly the actual cost savings made by the respondent were the claimant's salary and the salary of Miss McQuillan and some external accountancy costs saved by comparing PMG's costs with the fees of DNT. Against that has to be set the cost of engagement of Mr Pegg (Bond Recruitment fees of £2,500 + VAT) together with Mr Pegg's annual salary of £25,000 and also the redundancy payment costs of both the claimant and Miss McQuillan. The respondent company, upon the evidence, continued to engage external Accountants, DNT, at a cost of £2,000.00 plus VAT. The tribunal was accordingly somewhat puzzled by the strenuous contention made by the respondent that in reality significant cost savings had been made by making the claimant redundant. In his evidence Mr Mulholland appeared somewhat uncertain about the policy of whether it was a requirement for the in-house accountant to sign accounts before these went to external auditors and he maintained that accounts could not be signed off in-house unless the person was qualified. In answer to close cross-examination about the precise details of the stated cost-saving, the tribunal noted that Mr Mulholland, when strongly pressed to

provide the precise detail, focusing upon the dismissal of the claimant, sought to bring the discussion towards an emphasis upon the proactive nature of Mr Pegg in his job role, where Mr Mulholland spoke in very positive terms about Mr Pegg's job performance. As a result of this evidence the tribunal was left with no clear concept concerning the true cost savings that might have actually been achieved as a result of the dismissal of the claimant and of Miss McQuillan, other than the saving from the two salaries, respectively £22,000 and £18,000, however with additional and quite substantial costs requiring to be set off against any savings. Whilst there might have been lower external accountancy fees charged by DNT in comparison to PMG for external accountancy work in the relatively small time period under scrutiny, that appeared to the tribunal to be an issue unconnected to the cost saving specifically stated to have been generated by the redundancy dismissals of these two persons. There was no specific evidence that the respondent might have been saved external accountancy fees expressed in anything other than somewhat vague and aspirational terms by Mr Mulholland.

10. The tribunal was invited in regard to the application of the burden of proof provisions relating to the claimant's claim of age discrimination in Regulation 42 of the 2006 Regulations (and following the principles in ***Igen v Wong***) to consider any inferences to be drawn from the evidence and conclusions of fact. The two-stage test is a matter of judicial guidance. The first stage requires the claimant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination, in this case age discrimination, against the complainant. At this stage the tribunal should consider what inferences could be drawn from them, and must assume that there is no adequate explanation for them. It must not take the employer's explanation into account at this stage. Inferences are thus commonly relied upon as it is important to bear in mind (as mentioned in ***Igen v Wong***) that in deciding whether any claimant has proved such facts, it is unusual to find direct evidence of unlawful discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

11. What inferences might thus be drawn in this matter? The tribunal was invited by the claimant's representative to find, firstly, that material documentation had not been produced by the respondent relating to the dealings and discussions concerning the advice to recruit the qualified accountant. The email of 15 March 2012 appears to allude to other discussions with the accountants which precede that e-mail in respect of which no documentary evidence was produced to the tribunal. In submissions, the tribunal was invited to draw an appropriate inference from what was claimed to be a very obvious and telling omission. This, it was submitted, might have disclosed more information regarding the true reason for the respondent's decision to recruit a qualified accountant and there might have been some evidence linking matters with possible age discrimination or disclosure of some motivation in regard to the claimant's age. The tribunal was accordingly invited to draw an inference from that omission. The tribunal's conclusion, on balance, is that the tribunal has not been provided with all of the relevant material documentary evidence in regard to the discussions and dealings between the respondent and its advisers at this material time. The tribunal thus finds it implausible that nothing further exists, given the very significant nature of the matters being addressed at that particular time by the respondent. The tribunal accordingly is entitled to draw an adverse inference from this conclusion. The tribunal was further invited by the

claimant's representative to find that the failure on the part of Mr McKelvey to attend the tribunal to give evidence ought to entitle the tribunal to draw an inference from that absence of a key witness. The submission was that Mr McKelvey, the oldest employee of the respondent at age 71 and who remained employed by the respondent, had failed to appear as a witness despite the production of his witness statement and despite the suggestion that he would attend on the second day of the hearing. The tribunal was invited to draw an inference based upon Mr McKelvey failing to attend in an age discrimination case on behalf of his employer when clearly he was under his employer's control. The tribunal was provided with no clear reason why Mr McKelvey did not attend and certainly there was no evidence that he was unfit to attend or otherwise incapable of being in attendance for some good reason. The tribunal's conclusion from this is that the tribunal, by Mr McKelvey's non-attendance, has been deprived of a very valuable opportunity to explore some key issues of conflict in the case. As no good and clear reason has been provided as to why this valuable source of evidence was seemingly withheld, and making what is believed to be a reasonable assumption that the withholding was within the respondent's control, the tribunal is entitled to draw an adverse inference from this to the effect that Mr McKelvey might have provided material information adverse to the respondent's defence. These inferences will be further mentioned below.

12. In regard to the necessary comparator for statutory purposes, the claimant's representative made clear that the proper comparator for the unlawful discrimination case was not Miss McQuillan but, rather, that a hypothetical comparison was properly to be made under the circumstances. That hypothetical comparator was to be constructed consisting of an Accounts Administrator, with significant experience in running an accounts department and bringing the accounts to trial balance and with no formal accountancy qualification, but aged in his twenties or thirties and thus of a different age group to the claimant. The tribunal's task was to determine how the respondent would have treated such a hypothetical comparator with these putative characteristics. That proposition was not challenged by the respondent's representative. The tribunal accepts the claimant's submission that this formulation of such a hypothetical comparator is appropriate.

13. The tribunal requires to satisfy itself that the claimant has proved, on balance of probabilities, facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act or acts of discrimination on grounds of age and the tribunal considered inferences to be drawn from the foregoing facts assuming (as it is required to do) that there is no adequate explanation. Based upon this assessment, the tribunal's conclusion is that the claimant has at this first stage of matters proved such facts as would entitle the tribunal to conclude, in the absence of an adequate explanation, that the respondent has committed unlawful direct age discrimination against the complainant by making a decision to recruit a qualified accountant to take over substantially the various functions performed by the claimant, by instituting a process that would lead to the claimant's dismissal, and by the replacement of the claimant by a younger employee. In that regard the comparison is properly to be made with the hypothetical comparator mentioned above. The tribunal, examining all of the evidence and drawing appropriate inferences from the evidence and conduct of the matter, concludes that the hypothetical comparator would not have been treated in the same, unfavourable, manner as was the claimant by being subjected to the foregoing events and treatment.

14. In regard to the claimant's indirect discrimination claim, the issue to be determined by the tribunal, pursuant to Regulation 3(1)(b) of the 2006 Regulations, is whether a

relevant provision, criterion or practice ('PCP') had been applied to the claimant, arising out of the newly created role of Company Accountant and that the person required to fulfil that role had to be a qualified accountant. In this case the PCP was the requirement to be a qualified accountant. A PCP, if determined, may be applied equally (in the circumstances of this case) to persons not of the same age group as the claimant, but for the claimant to succeed the tribunal must determine that the PCP puts persons of the same age group as the claimant at a particular disadvantage when compared to other persons and that the PCP put the claimant at such a disadvantage. Thus, having established the required PCP, it is necessary for the claimant to show that he was placed at a particular disadvantage. Although not expressly cited in argument, the tribunal took account of the judgement of the Supreme Court in ***Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15***. The tribunal, in essence, has to be satisfied that any PCP had a discriminatory impact. The tribunal was satisfied that in the light of the burden of proof provisions (see further ***Igen v Wong***) the tribunal is entitled to have regard to all of the evidence in relation to such matters, in determining whether the claimant has satisfied the tribunal in relation to the issue of disparate impact. Examining the arguments made and the full extent of the evidence, the tribunal does not determine that the case for the claimant in that regard is properly made out and thus properly is to be upheld by the tribunal, without more evidence of disparate impact upon persons of the claimant's age group under these circumstances. The case made, on the weight of the evidence and submissions, falls short of that required to enable the tribunal to make a determination in favour of the claimant. Accordingly the tribunal does not find that there was indirect age discrimination in the matter and that aspect of the claimant's case is dismissed.

15. The tribunal is then required to address the claim of unlawful direct discrimination in the light of the tribunal's finding that the claimant has proved facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act or acts of discrimination on grounds of age. The tribunal is accordingly required to focus upon the explanation afforded by the respondent and it is necessary to exclude the possibility of any unlawful discrimination whatsoever on grounds of age. In conducting this assessment, the tribunal notes comments made by Mr Mulholland concerning what he portrayed as being the inadequacy of the claimant's performance in his post, together with the others in the Accounts Department. In his evidence Mr Mulholland stated to the tribunal on a number of occasions and in quite disparaging terms that the persons in the Accounts Department were "unqualified" and "incompetent" and that he regarded them as being "reactive". He was specifically critical of the claimant and he made reference on more than one occasion to one specific matter and that was the claimant's alleged failure to recognize the significant difficulties that the business was facing at the time that a substantial the capital injection was made into the business. Much was made by Mr Mulholland of the continued employment of Mr McKelvey at the age of 71. Be that as it may and that fact has to be placed into the balance, the primary concentration and focus of the tribunal must be upon whether or not there was unlawful direct discrimination on grounds of age specifically concerning the claimant.

16. Looking at the entirety of the evidence, the tribunal's considered assessment is as follows: in the context of somewhat pressing financial difficulties and issues, a perception arose that part of the blame for this was to be laid at the door of the Accounts Department. That Department and the three incumbents were regarded as being reactive and inefficient, ("unqualified" and "incompetent") and settled in their ways. The management perception was that the Department needed to be

swept clean, as it were, to be re-invigorated, with someone new who would tackle the perceived problems. A new company had recently been incorporated and the mood abroad was one of change to the business and the necessity to make big decisions. This mood led to the perceived need to dispense with at least two of the three persons in the Accounts Department who were seen as getting in the way of the needed revitalisation and progress. This seemed attractive and the goal was thus set to remove these persons and to hire a person who was going to resolve any problems which beset the respondent company.

17. The tribunal has little doubt that there were other discussions and dealings between the advising accountants and the respondent's management at the relevant time details of which have not made their way, evidentially, before this tribunal for the reason that they might have been perceived to be damaging to the respondent's case. The revitalisation process was attractive but bore considerable risks and thus had to be managed rather carefully. So a process was devised which called for careful timing and for things to be disposed of with considerable speed and wedded to a very tight timetable, once a decision had been taken. The timetabling obviously was not surprising to management who had devised this and were in control of the process, but indeed came as very much of a surprise to the claimant, as one affected. The tribunal notes the claimant's representative's submission to the effect that, had the pressing nature of the losses been so urgent in March 2012, the process could have commenced at that point and a fair and reasonable timescale could have been afforded to the potentially affected employees. Looking at how things turned out as they did, the only reason given by the respondent was the need, present in March 2012, to recruit a field sales representative. That explanation appears rather unconvincing to the tribunal. If there was an urgent need to save staff costs by instituting a redundancy process, that process could well have commenced in March 2012 when the perceived need arose. Meaningful consultation could certainly have commenced at that time.The alacrity of the eventual process, as far as the claimant was concerned, which culminated in his dismissal, and the absence of compelling evidence of real and tangible cost savings beyond Miss McQuillan's wage costs, without doubt detracts from the strength of the respondent's position in the matter.

18. The tribunal has to determine whether or not the claimant was treated less favourably than the hypothetical comparator (as mentioned above) would have been treated. Examining the manner in which matters were attended to within this very rapid process which lasted only for a very few working days and noting the respondent's evident perception that the Accounts Department needed very rapidly to be swept clean and to be re-invigorated with someone new being introduced rapidly in June 2012 who would tackle the perceived problems, the tribunal does not believe that the hypothetical comparator would have been treated in the same fashion as was the claimant by being subjected to such a rapid process, culminating in dismissal. This was a process where any management interaction with the claimant took place in the context of the inevitable recruitment of a successor to replace the claimant's function. This inevitable recruitment of a successor has been decided upon in principle many weeks before. The bar was set at a height that could not be attained by the claimant, the requirement to have a professional accountancy qualification. The claimant tried to suggest alternative attainments, but his plea fell on deaf ears. The process concluded after a very few days, with a decision being announced to the claimant that he would be dismissed.

19. All of this occurred in the context of the active recruitment of an effective replacement to take over the claimant's work duties, Mr Pegg. Mr Pegg was from a

different, younger, age group than was the claimant. He was clearly perceived very differently. From Mr Mulholland's very disparaging evidence to the tribunal about the claimant and from his speaking in glowing terms about Mr Pegg, the tribunal has little doubt that strongly held perceptions of the claimant's age and stereotyping of his level of proactivity, efficiency and effectiveness, played a significant part in the respondent's decision-making, leading to the dismissal. No endeavour was ever made to address any perceived deficiencies by engagement with the claimant. He was clearly regarded as a "lost cause" and his removal under the designation of a redundancy was regarded as the swifter and easier option by management. The central core of the potentially neutral rationale (significant cost saving) falls away under close examination in this case, leaving unlawfully discriminatory assumptions and attitudes and conduct as the other, more troubling, explanation that emerges from all of this. Accordingly, the tribunal's determination, upon the weight of the evidence and upon the balance of probabilities, is that the respondent unlawfully discriminated against the claimant on grounds of age by subjecting him to this process and by dismissing him from employment. The tribunal concludes that a hypothetical comparator, constructed as above-mentioned, would not have been dealt with and treated in this fashion. The tribunal finds the claimant's claim of direct age discrimination to be well-founded.

20. In regard to the claim for unfair dismissal, the onus is upon the respondent to specify the reason for the dismissal of the claimant. This reason, the respondent has stated, was on grounds of redundancy. The tribunal has been invited to examine the basis of that stated redundancy. The stated reason was the single reason of cost saving. The tribunal has mentioned its difficulty in perceiving, upon the basis of the evidence, the significant cost savings which were endeavoured to be portrayed by the respondent as the basis for this dismissal on this stated ground of redundancy. As the respondent has failed to satisfy the tribunal concerning the real and substantive basis of cost saving as a reason for the claimant's dismissal for redundancy, that single stated reason is not substantiated in the tribunal's determination. No other reason was provided. The tribunal in this regard examined the technical definition of redundancy as is set forth in Article 174 of the 1996 Order, insofar as this might be applied to the situation of the claimant. In the absence of any specific submission on the part of the respondent's representative to link that technical definition to the action taken against the claimant, the tribunal has considerable difficulty in seeing how the statutory definition applies to the factual situation of the claimant at the time of the dismissal. This is so as, in the absence of any specific submission, it cannot be said that the claimant is to be taken to have been dismissed wholly or mainly for a reason attributable to: (a) the fact that the respondent had ceased or intended to cease (i) to carry on the business for the purposes of which the claimant was employed by the respondent, or (ii) to carry on that business in the place where the claimant was so employed, or (b) the fact that the requirements of the respondent's business - (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the claimant was employed by the respondent, had ceased or diminished or were expected to cease or diminish.

21. In the absence of any such specific technical submission on the part of the respondent, the tribunal's determination is that a redundancy situation fulfilling the definition does not arise on the facts. The stated reason for the dismissal does not apply. Examining the true reason for the dismissal, the tribunal's determination is that this true reason appears to be in some manner connected with the respondent's perception concerning the capability and the competence of the claimant and the others in the Accounts Department; that these persons were

perceived as “dead wood”. Rather than addressing any perceived issues of capability or competence or other difficulties in a fair and proper manner, a decision was taken to dispense with the claimant for the stated reason of “redundancy” and to arrange for his work tasks and functions to be carried out by a newly recruited, quite inexperienced, albeit qualified, accountant, assisted by a part-time assistant or junior. The reason cited in that regard was cost saving and efficiency, but as has been mentioned, in reality that cost saving reason was more of an aspiration than any reality. Notwithstanding a number of months available during which that process could have been addressed, such consultation as there was engaged in by the respondent was very rushed and was entirely ineffective. This is so for the reason that a determination had already been made at an earlier stage to recruit a qualified accountant whose functions would have inevitably eclipsed all of the functions then performed by the person due to be consulted, the claimant. There was a fixed inevitability about matters; there was nothing whatsoever that the claimant could have done about that, rendering the consultation exercise entirely and effectively futile. In the well-known House of Lords case of ***Polkey -v- A E Dayton Services Ltd [1987]*** **IRLR 503** the following is noted: “*In the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair basis on which* [employees] *to select for redundancy and takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organization.*”

22. There was no consultation whilst proposals were at a formative stage (very probably in March 2012) thereby enabling the claimant to have properly and rationally engaged with the respondent and to have had a meaningful role or part to play in the consultation and what might have emerged therefrom. The respondent clearly had a significant period of time potentially available to attend to this, but matters were indeed extremely rushed at the end. Examining this, the tribunal's determination is that the action taken by the respondent does not fall within the band of reasonable responses of a reasonable employer. The reason provided for the dismissal is not substantiated. The dismissal of the claimant by the respondent was unfair on this account. The appeals process afforded did nothing to correct any unfairness.

23. With these findings of unlawful direct age discrimination and unfair dismissal now made by the tribunal, the matter will be reconvened for a hearing on remedy, for the reason that the tribunal has been provided with insufficient evidence and insufficient argument and submissions to enable the tribunal properly to determine the matter of remedy.

Chairman:

Date and place of hearing: 7 and 8 May 2013, Belfast.

Date decision recorded in register and issued to parties: