Terry McCoy v James McGregor & Sons Ltd, Mr Dixon & Mr Aiken

Decision of the Industrial Tribunal in an age discrimination case, dated 19 December 2007.

Summary

The Tribunal found that the Claimant had been subjected to unlawful age discrimination in the Respondent's failure to appoint him to the position of sales representative. The Claimant was 58 years old at the time of the recruitment exercise.

James McGregor & Sons is a commercial timber trading company. Mr John Dixon is a Director of the company. Mr Shane Aiken is a Director of the parent company, R & D Aiken Ltd.

The Respondent company advertised for two sales representatives in December 2006. The advertisement specifically stated that candidates needed to have "Youthful enthusiasm".

The Claimant telephoned Mr Dixon to express his interest in the post. During this telephone call the Claimant outlined his 30 years of experience in the timber industry. Mr Dixon asked the Claimant his age and, upon hearing that the Claimant was 58 years old, commented that he was the same age as himself and asked whether the Claimant thought he still had the drive and motivation to be successful in the trade. The Claimant confirmed that he most definitely had and that he was very enthusiastic about the job.

The Claimant attended for interview with Mr Dixon on the 8 January 2007. Mr Dixon again asked the Claimant about his age. Mr Dixon wished the Claimant to convince him that he still had the drive and motivation to be successful in this position, that he was still hungry enough to succeed. The Claimant once again sought to convince Mr Dixon that he was motivated and keen to succeed.

A further interview took place on the 10 January 2007 with Mr Dixon and Mr Aiken both attending. The Claimant was told that there were three final shortlisted candidates for the two sales positions. Mr Dixon again made several references to the Claimant's age. Mr Aiken remained passive for most of the interview and did not engage in "two-way" conversation with the Claimant. Mr Dixon again asked the Claimant to convince both he and Mr Aiken that at 58 years old he had the drive and motivation and was hungry enough to succeed.

The Claimant received a letter dated 18 January 2007 advising him that he had not been successful. The Claimant sought feedback as to why he was unsuccessful. Mr Dixon emailed him to say that the successful candidates met the specifications with regard to motivation and drive more closely than had the Claimant.

The Respondents had not given any of the candidates job descriptions or personal specifications for the positions. However, they did use an interview rating sheet for both the first and second interviews.

The two successful candidates were aged 43 and 43 years old. One candidate had provided his age on his CV and Mr Dixon had written the date of birth on the other candidates CV. Mr Dixon could not provide any rational explanation to the Tribunal as to why he had taken that step. On the rating form for the first interview, Mr Dixon had recorded the Claimants age with the following comments:

> "age 59 - health good -question of motivation"

On the rating form for the second interview the comment "motivation??" was written and also "Shane's comment. That lad would put me to sleep."

Mr Aiken did not complete an interview rating sheet for any candidate. The Tribunal were critical of the process of marking and scoring of the interviewees using this rating form, describing the process as "opaque". The marking was inconsistent and difficult to understand. The Tribunal commented:
"It seemed to the tribunal as if the two panel interviewers had composed the scoring as they went along on what seems to have been an entirely ad hoc basis. There were manifest inconsistencies in the scoring. In general terms the scoring was characterised by a lack of transparency and by obscurity. Perhaps that is not surprising when it is noted the interview process conducted by Mr Dixon and by Mr Aiken without such reference points as might have been available from a properly designed and detailed job description and person specification."

The Respondents attempted to argue that the advertisements inclusion of the term "youthful enthusiasm" was a mere term of popular usage. However, the Tribunal found that it was appropriate to draw an inference of discrimination from the wording used in the advertisement.

The Tribunal accepted the Claimant's evidence in relation to the questions asked by Mr Dixon regarding his age, stating:

> "There was a clear linkage in Mr Dixon's mind at the time between the concepts of "age" and "energy" , "enthusiasm" and "motivation" , hence the usage of "youthful enthusiasm" in the advertisement (youth being synonymous with "enthusiasm"). …….. Any age related question potentially may carry with it an inference that the employer has taken into account the age of the applicant for employment in a way that is possibly unlawfully discriminatory."

Mr Dixon and Mr Aiken had approached the selection process with the notion that the Claimant would be potentially less of an asset to the company than would be his younger co-interviewers. The selection arrangements operated in a discriminatory manner. The Tribunal concluded:

"Thereby the Claimant's considerable experience and personal attributes, qualities which ought to have more probably than not secured his success, were

set to one side and the attributes of persons who were of a younger age but who (insofar as the Tribunal can glean from any facts to be derived from the evidence) were probably less suitable, were favoured for selection, notwithstanding that they did not possess such an obvious level of experience and of demonstrable achievements in the particular sector of the timber industry where the Respondents sought to recruit."

The Tribunal found that but for his age, the Claimant would more probably than not have been selected for one of the two posts. The Respondents had attempted to argue that there was empathy between Mr Dixon and the Claimant as the two were of relatively similar age. However, the Tribunal rejected this argument as motivation is not a necessary component of proving discrimination and was therefore of no consequence in reaching their finding of discrimination.

The Tribunal found discrimination against all three Respondents. Mr Dixon and Mr Aiken knowingly aided and the company to the unlawful discrimination and therefore are to be treated as doing these unlawful acts of discrimination. The Tribunal had arranged a separate remedies hearing to decide how much compensation the Claimant should receive. Prior to the remedies hearing, the parties agreed to settle the case.

The Respondents agreed to pay the Claimant £70,000. The Respondents agreed to indemnify the Claimant in respect of any liability for tax or national insurance arising from the payment. The First Respondent agreed to meet with the Employment Development Division to review its policies, practices and procedures to ensure that they are effective and conform with the requirement of The Employment Equality (Age) Regulations (NI) 2006.

The full transcript of this decision is available on the Equality Commission's website www.equalityni.org Click on "the law" and then "case decisions". Alternatively it can be obtained form the Equality Commission on request.