



EMPLOYMENT TRIBUNALS

Claimant: Mr Scott Kelly

Respondent: PGA European Tour

Heard at: Reading **On: 10, 11, 12 and 13 October 2016**

Before: Employment Judge Gumbiti-Zimuto
Mrs A Brown and Ms H Edwards

Appearances

For the Claimant: Mr David Mitchell (Counsel)

For the Respondent: Mr Paul Nicholls (Queens Counsel)

RESERVED JUDGMENT

- (1) It is admitted that the claimant was unfairly dismissed.
- (2) The claimant's complaint of direct age discrimination is not well founded and is dismissed.
- (3) The hearing to decide the remedy is listed to take place on the 6 and 7 February 2017.

REASONS

1. In a claim form presented on the 23 December 2015 the claimant made complaints of unfair dismissal and direct age discrimination. The issues to be determined in this case were set out in a case management summary made following a preliminary hearing on the 2 March 2016. Since that preliminary hearing the respondent has conceded that the claimant was unfairly dismissed and the only matter that this Tribunal has had to decide is whether the claimant was discriminated against on the grounds of his age. The sole issue for us to determine is whether the claimant's age was a reason for his dismissal.
2. The claimant gave evidence in his own case and also relied on the evidence of a number of witnesses. Mr Ken Schofield and Mr Mark Lichtenhein gave live evidence in support of the claimant. Right Honourable Alex Salmond was available to give evidence, via video link,

on behalf of the claimant but the respondent agreed that this was unnecessary as his evidence was not challenged. The claimant also provided witness statements from Mr Arnaud Boetsch, and Mr George O'Grady who did not attend the hearing to give live evidence. The respondent relied on the evidence of Mr Keith Pelly, Mr Tim Hunt and Mr Jonathan Orr. The respondent also proved a witness statement from Mr Rufus Hack who did not attend to give live evidence.

3. The Tribunal was provided with a trial bundle containing over 1000 pages of documents.
4. The Tribunal was required to provide a ruling on an application by the respondent to rely on a witness statement from Mr Williams. The witness statement was prepared well after the time for exchange of witness statements between the parties had taken place. We decided that it was not in the interests of justice to allow the respondent to rely on this evidence which was served late. We came to this conclusion because the statement contained matters which could have all been addressed by the respondent before the exchange of witness statements if the respondent had wished at that stage to lead evidence on those matters. There was nothing new that is referred to. The witness statement made reference to documents provided as part of a subject access request made by the claimant but all these matters relate to events prior to October 2015 and were of peripheral relevance. Allowing the witness statement to be relied on would have led the claimant to want to revisit his evidence as set out in his witness statement and that would result in some prejudice to the claimant.
5. We made the following findings of fact which we considered necessary to decide the issues under consideration.
6. The claimant's date of birth is the 19 May 1955. At the date of his dismissal the claimant was 60 years old.
7. The PGA European Tour operates a broad range of business initiatives essential to its primary mission of administering professional tournament golf. It is a unique business which generates profits for the benefit of its members, the tournament players, who receive their returns by competing and winning prize money. The European Tour Group comprises of a number of subsidiaries and joint venture entities engaged in the promotion, management and administration of the business. The PGA European Tour currently runs The European Tour, the Challenge Tour, and the Senior Tour. The PGA European Tour also owns 60% of the Ryder Cup.
8. The PGA European Tour is run by a professional staff based at Wentworth in Virginia Water, Surrey. It is controlled by its playing members via a board of directors including past and present European Tour players, and by a Tournament Committee comprising a maximum of 15 current players. The PGA European Tour employs approximately 200 people

9. The PGA European Tour's primary revenues come from sponsors and suppliers, television and ticket sales, hospitality and governments. The PGA European Tour derives significant income from running key tournaments such as the Ryder Cup and the BMW PGA Championship. Commercial success enables the PGA European Tour to attract the world's best golfers to participate in its events.
10. In 1989 the claimant was offered the job of Marketing Director of the European Tour by Mr Ken Schofield who at the time was the Chief Executive, and George O'Grady who at the time was the Managing Director of the Tour's business division. The claimant's remit was to expand the PGA European Tour's Marketing Department and commercial partnerships.
11. By 2015 the claimant was in the position of Group Marketing Director and described his role as being responsible for growing the PGA European Tour's commercial partnerships, with considerable success throughout the period of his tenure; assisted in the development of broadcast revenues through European Tour Productions; worked closely with all aspects of the development of European Tour Productions business and broadcast partners. The claimant had overall responsibility for the PGA European Tour's commercial operations.
12. In May 2014, David Williams was appointed as Chairman. He brought in business consultants who then conducted a strategic review.
13. In early 2015 Mr Rufus Hack was appointed Director of Strategy and Media, he had been previously been employed by the business consultants to carry out the strategic review for the respondent.
14. In November 2014 Mr George O'Grady confirmed that he was standing down as CEO. On the April 2015 it was announced that Mr Keith Pelley had been selected to take on the role of Chief Executive. Mr Pelley joined the PGA European Tour on 3 August 2015.
15. Prior to commencing in the role Mr Pelley attended the BMW PGA Championship at Wentworth in May 2015 where he met the PGA European Tour's senior leadership team. It was here that Mr Pelley first met the claimant. Mr Pelley states that at this initial meeting with the claimant "it was clear" that the claimant's approach to commercial operations was "relationship driven rather than seeking to create the value propositions for potential partners based on realisable returns on investment which are necessary to generate revenue in the current sports sponsorship market". Mr Pelley observed that there seemed to be no sophisticated category analysis or proper data analytics.
16. Mr Pelley was given authority by the board to evaluate the senior team and make any necessary changes to ensure that he had the right team in place to deliver the commercial success and strategic vision.

17. After starting employment in August 2015 Mr Pelley states that he saw very quickly that there was no clarity in the commercial vision; that there had been no proper evaluation of the Tour's commercial assets; that there were no proper creative or marketing presentations; and that there was no pro-active strategy for growth in the void categories. Mr Pelley held one hour long meetings with 54 different employees across the business, all of whom he asked the same 9 questions. At these meetings Mr Pelley listened, individuals had the opportunity to offer full and frank feedback in confidence. In these early conversations with the claimant's team and other colleagues Mr Pelley received negative feedback about the commercial team: that the team had no proper direction or leadership; that there was a lack of commercial initiatives; that the team was rudderless; that the claimant was not seen as a strong performer or a good team leader. Mr Pelley also received negative feedback from board members and from members of my senior leadership team about the claimant. From his own observations of working with the claimant Mr Pelley formed the view that the claimant was lacking confidence, wasted a considerable amount of time on fruitless projects or ventures in which he had a personal interest, had no vision, no current marketing knowledge and his team were not behind him. Mr Pelley says he was concerned that: at almost two thirds of the way through the year, the respondent was £1.9m behind budget on sponsorship and marketing; that there had been minimal new business development in the year to date; and that there was no plan to address the shortfall. Mr Pelley considered that the claimant was "struggling with the change of management and the pace of change which I was expecting of my senior management team."
18. The claimant points out that Mr Pelley took issue with him over the handling of the Loro Piana luxury clothing company's offer to supply the European Ryder Cup Team in 2016. Soon after this the claimant states that Mr Pelley significantly curtailed his responsibilities. The claimant also points out that Mr Pelley questioned why the claimant and a number of colleagues had travelled to attend the Solheim Cup in Germany in September 2015. The claimant states that he was ordered to cancel a pre-planned trip to Paris.
19. The claimant takes issue with the contention that there was a £1.9m shortfall on the budget and sponsorship. The claimant refers to the contract with Rolex in 2015 at just under £9m; a new Senior Open Championship contract for 2015-2024, which is worth over £26 million and the extension contract for the Trophée Hassan II tournament for 2016-2018, valued at over £5.
20. The claimant also states that at no point was this alleged underperformance raised with him by Mr Pelley, and he was not afforded the opportunity to address this alleged underperformance.
21. Within two months Mr Pelley had taken the decision to dismiss the claimant. In the short period when the claimant answered to Mr Pelley, there were a number of disagreements. The claimant states that he was

not afraid to speak his mind if he saw that action taken by the respondent was short sighted and might compromise client relationships.

22. On Monday 21 September 2015, Mr Pelley sent an email to members of the senior leadership team in which he informed the team that he had asked the claimant to focus on his role as "Commercial Director" and that "he will back away from anything not regarding corporate sales". The claimant's sole focus was to be on building a plan to significantly increase sales in 2016. Mr Pelley explained that his intent was to give the claimant an opportunity to refocus himself in a positive way.
23. On 28 September 2015 the claimant sent an email to Mr Pelley in which he discussed his role of Group Marketing Director.
24. On receiving this response Mr Pelley states that it became clear to him that the claimant did not understand what was expected of him in terms of commercial delivery. The claimant's focus on job titles and historic relationships was at odds with the commercial challenge that the PGA European Tour had ahead. Mr Pelley considered that he and the claimant were effectively speaking a different language in terms of the commercial requirements of the PGA European Tour. Mr Pelley decided that he would not be able to work with the claimant and that he had no alternative but to remove him.
25. Mr Pelley discussed the best approach to achieve this with the HR Director. They decided to have an "off the record" discussion with the claimant to see if they can agree terms for his departure.
26. A meeting was arranged for the 8 October 2016. Mr Pelley opened by saying that he would like the claimant to consider retiring at the end of the year, continuing his relationship with the respondent by being a consultant on the Morocco project. Mr Pelley said that it would give the claimant the opportunity to do other things and offer a respectful way to leave the business. The meeting concluded with the claimant agreeing to consider the position.
27. The claimant found out the proposed terms on offer from the HR Director who presented him with a detailed settlement agreement. The claimant took the settlement agreement away to consider with his family and his legal advisors.
28. The claimant replied to Mr Pelley by email on 14 October 2016 stating that he had no intention of retiring and said that he believed that he could continue to contribute positively to the future development of the PGA European Tour. The claimant proposed that he remain in full employment, with redefined duties, on the same salary and benefits.
29. The claimant and Mr Pelley met on 15 October 2015 for a further without prejudice meeting. At that meeting Mr Pelley stated that he remained of the view that he needed to make changes on the commercial side of the business and that he would be bringing in a new Commercial Director. The

claimant stated that he did not want to retire; would not accept being walked out of the door and would not be interested in staying on as a consultant working on a project in Morocco. Mr Pelley stated if the claimant did not want his exit positioned as a voluntary retirement they could instead just "package him out". Mr Pelley says that he wanted to give the claimant control over the messaging of his departure, both internally and externally. The meeting concluded with Mr Pelley agreeing he would come back to the claimant with two options: one a termination package and the other a consultancy arrangement.

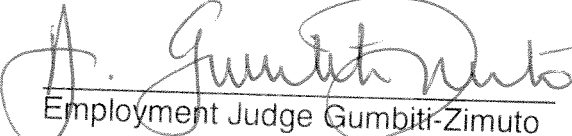
30. Mr Pelley states that he suggested that the claimant's exit from the respondent's employment could be positioned as a 'retirement'. By this he states that he was simply seeking an elegant positioning for the claimant's proposed departure, as opposed to a positioning which implied that it had been the PGA European Tour's decision to terminate his employment. Mr Pelley states that he wanted to preserve the claimant's dignity by avoiding people knowing that he had been dismissed.
31. The claimant met the HR Director on 19 October 2015 and was presented with two proposals. On 25 October 2015, the claimant's lawyers wrote to the HR Director rejecting both of the proposals.
32. Mr Pelley then took the decision to terminate the claimant's employment and informed him on Monday 26 October 2015. On 27 October 2015 the claimant and Mr Pelley met. It was confirmed that the claimant's employment was being terminated with effect from Friday 30 October 2015. The claimant was handed a termination letter setting out his financial payments and exit arrangements.
33. The reasons for the claimant's dismissal set out in the Grounds of Resistance, 'capability' and a mutual breakdown of trust in my relationship, were not discussed.
34. The letter of dismissal stated: "Under the leadership of our new CEO, Keith Pelley, a complete restructuring of the Tour and its senior leadership is underway. It has been identified that the role of Group Marketing Director should be merged with a wider commercial role undertaken by an experienced commercial director with significant experience in all areas of commercial revenue generation as well as marketing, and that your experience and skiliset are not suited to such a wider role."
35. The claimant states that Mr Pelley had no place for a 60-ysear-old in the new structure. The claimant was not given the opportunity to interview for the new role even though two of his junior colleagues were. There was no subsequent concession or consideration of the various proposals which he put to Mr Pelley about redeployment.
36. The claimant contends further that the language used by Mr Pelley in the meeting, and the conduct of the PGA European Tour in dismissing him, prove that age has played a significant factor in his dismissal.

37. Mr Pelley stated that his use of the word 'retirement' was not in any way suggesting that the claimant's age was a factor in the decision to terminate his employment. The PGA European Tour has a wide age range among its employees including many employees in their 50s and 60s who are key members of the senior leadership team.
38. Mr Pelley further stated that he was "extremely shocked and disappointed" when he discovered that the claimant had covertly recorded their meetings on 8 and 15 October 2015.
39. An employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment. An employer discriminates against an employee if because of his age he treats the employee less favourably than he treats or would treat others. An employer does not discriminate on grounds of age where the employer can show that the treatment of the employee is proportionate means of achieving a legitimate aim. Where the employee seeks to compare his treatment with that of another employee there must be no material difference between the circumstances relating to each case.
40. If there are facts from which the employment tribunal could decide, in the absence of any other explanation that the employer contravened the provision concerned the employment tribunal must hold that the contravention occurred. However, this does not apply if the employer shows that it did not contravene the provision.
41. The Tribunal has been provided with written submissions from the claimant and the respondent. We have taken these matters into account together with the matters set out in the parties' oral submissions.
42. Has the claimant proved facts from which the Tribunal could decide, in the absence of any other explanation, that the employer dismissed the claimant on the grounds of his age?
43. There is only one issue that the Tribunal has to decide in this case. That is whether the reason for the claimant's dismissal was his age. Was the claimant's age an important factor in the employer's decision to dismiss the claimant. It is not necessary that the claimant's age is the only reason for the decision to dismiss.
44. The claimant argues that Mr Pelley eschewed a formal disciplinary process because of the claimant's seniority and length of service; that he did this because he wanted to prevail upon him to retire; that when the claimant refused to retire Mr Pelley dismissed him. These matters are accepted by the respondent. The claimant contends that this is a case where the claimant has therefore established that there is evidence from which we could conclude that the claimant was discriminated against on the grounds of his age and that the respondent is required to show that the claimant's age was not the reason for his dismissal.

45. The explanation given by Mr Pelley for the claimant's dismissal is that Mr Pelley did not consider that the claimant was capable of fulfilling the role he wished him to perform going forward. The reference to retirement was not any indication of the reason why his employment was terminated but a matter of positioning it as retirement for presentation only; to preserve the claimant's dignity by avoiding people knowing that he had been dismissed. If this explanation is correct the respondent has proved that there was no contravention of the Equality Act 2010.
46. We note the respondent's argument that the claimant has failed to discharge the burden of showing that there are facts from which we could conclude that there was discrimination on the grounds of the claimant's age. However, we accept that the claimant has proved facts from which we could conclude that there was discrimination on the grounds of his age and so we look to the respondent for a reason for the treatment that was not age.
47. The explanation given by Mr Pelley for the claimant's dismissal is that Mr Pelley did not consider that the claimant was capable of fulfilling the role he wished him to perform going forward. The reference to retirement was not any indication of the reason why his employment was terminated but a matter of positioning it as retirement for presentation only; to preserve the claimant's dignity by avoiding people knowing that he had been dismissed.
48. It is said by the claimant that the comment about retirement is a basis for concluding that there was discrimination on the grounds of age: the concept of retirement in an employment context is based on age. The respondent states that in this case the use of the word retirement was a matter of presentation or positioning the claimant's departure from the respondent. We accept that there is credible evidence before us that the use of the word retirement was in the context of explaining the claimant's departure to the other employees and the outside world. Mr Pelley simply saw retirement as a convenient and uncomplicated way of explaining the claimant's departure from his employment we are satisfied that it was not the reason for the claimant's departure from the respondent's employment.
49. In arriving at this conclusion we take into account that there was reference made to the claimant's length of service and senior position as being factors for seeking to position his departure from the respondent's employment as retirement. We accept the explanation given by Mr Pelley that the thrust of which was these factors were matters that required the claimant's departure to be handled respectfully. We do not accept that they are an indication that the claimant's age was a reason for the decision to end his employment.
50. We do not consider that the evidence shows that there was discrimination against people of any particular age by the respondent. There were persons employed by the respondent in the claimant's age group who did not lose their employment but retained it because Mr Pelley thought they performed well.

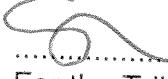
51. The claimant has sought to rely on the use of the phrase "a diverse group of millennials and established experienced employees" by Mr Pelley in a presentation he made as part of the recruitment process. Having considered the context in which this statement is made we do not consider that it justifies any conclusion that Mr Pelley was focusing on age and therefore somehow supports any predisposition to discriminate on the grounds of age.
52. The language used in the advertisement for the recruitment of a commercial director following the claimant's dismissal does not lead us to conclude that Pelley was preoccupied with age. The use of words like energised or vibrant in our view can also be used in reference to older people as well as younger people. In the context used we gain no assistance from it.
53. The positive reason given by Mr Pelley is that the claimant was not suitable for the role of commercial director. The evidence before us exposed numerous references to the claimant's ability being an issue for Mr Pelley. The claimant asks us to conclude that this is an after the fact rationalisation because there was no fair reason for the dismissal. We do not accept that. Mr Pelley carried out his own due diligence before he joined the respondent and formed a view of concern about the respondent's commercial performance. On meeting the claimant Mr Pelley was concerned about the claimant's attitude to sponsorship revenues which was 100% reactive. Mr Pelley received negative feedback on the claimant from the claimant's team. Mr Pelley formed his own unfavourable view of the claimant's performance. The claimant himself refers to incidents with Mr Pelley in which Mr Pelley makes critical observations to the claimant about matters related to his performance, which on at least one occasion was expressed in writing (p119).
54. Mr Pelley considered the claimant had not bought into his ideas and this was a matter he considered. The respondent argues that an email exchange between the claimant and Mr O'Grady supports that view. We do not accept that the email we were referred does make that position clear, however, we accept the evidence given by Mr Pelley, that the claimant had not bought into his ideas, was a genuine expression of his view that the claimant had been unable to embrace a change of CEO.
55. We have also considered the fact that the respondent has failed to carry out any fair procedure to deal with a capability dismissal. The fact that the respondent's conduct was unfair does not support a view that there was discrimination on the grounds of a protected characteristic. Mr Pelley had approval of the board to decide his team having formed his view of the claimant he decided to follow it through quickly. The failure to follow a reasonable procedure is not necessarily indicative of discrimination. It may indicate a closed mind but it does not assist in concluding why the decision to dismiss was taken.

56. The conclusion of the Tribunal is that having heard the evidence of the respondent and in particular Mr Pelley whose evidence we have accepted we are satisfied that the respondent has proved that there was no contravention of the Equality Act 2010.
57. The claimant's complaint of direct age discrimination is not well founded and is dismissed.
58. The hearing to decide what the remedy should be for the unfair dismissal is listed to take place on the 6 and 7 February 2017.


Employment Judge Gumbiti-Zimuto

Date: 25 November 2016

Sent to the parties on: 29 November 2016.


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For the Tribunals Office