



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr B. Duffy

**Respondent:** Her Majesty's Revenue and Customs

**Heard at:** London Central  
and in chambers 27 March 2017

**On:** 20-24 March 2017

**Before:** Employment Judge Goodman  
Mrs J. Cameron  
Mr S Ferns

## Representation

Claimant: in person

Respondent: Mr R. Moretto, counsel

## RESERVED JUDGMENT

- 1 The victimisation claims fail.**
- 2 The direct discrimination claims fail.**
- 3 The indirect discrimination claim fails**

## REASONS

1. The claimant is a senior tax specialist at grade 6 in HMRC, the respondent and his employer. These claims arise from his marking in his annual performance appraisals in March 2015 and May 2016. In the background is an employment tribunal claim he brought in October 2013 for his marking on annual appraisal in March 2013, which was settled by mediation in March 2014.
2. He brings claims of victimisation for making the employment tribunal claim in October 2013, and of direct discrimination because of age or sex or both, and indirect discrimination relating to age.
3. Other claims, for equal pay and indirect sex discrimination, were withdrawn at a preliminary hearing in May 2016.
4. These claims were presented to the employment tribunal in October 2015. At that stage they related only to the March 2015 appraisal, when he was given a "must improve", the bottom of three possible markings. On 7

October 2016 at a preliminary hearing he was permitted to amend the claim by adding complaints about his treatment in the May 2016 appraisal, when he was again marked “must improve”, and about the July 2016 remarking of his March 2015 appraisal, when “must improve” was upgraded to “achieve”, which the claimant believes should in fact be “exceed”, the top mark.

5. In the victimisation claim, the protected act is the employment tribunal claim presented in October 2013. This complained of age and sex discrimination.
6. In the claim of indirect discrimination, the provision identified as having discriminatory effect on older people (over 55) was clarified at a preliminary hearing in May 2016 as:

“the application in the claimant’s validation group (around 38 people) of the section of the Performance Management Policy (PMP) headed “achievable” under section HR71015 PMP and the subsequent questions under the heading “achievable” on the following page of the PMP, the application of which involved the respondent setting targets under the PMP for more experienced staff which were more demanding than those for less experienced staff”.

### **Evidence**

7. To decide the claims, the tribunal heard oral evidence from:
  - **Bernard Duffy**, the claimant. His witness statement of 93 pages mixed evidence and argument, and we read it in conjunction with the employment tribunal claim form.
  - **Martyn Rounding**, an assistant director at grade 5, and the claimant’s line manager until May 2015 within the directorate known as Corporate Tax, International and Stamps (CTIS).
  - **Philip Donlan**, a grade 6, the claimant’s current line manager.
  - **Nicholas Houghton**, deputy director of foreign profits team, chaired the validation group in the CTS directorate and, in particular, the meeting making decisions about the grade 6 non-managers in 2016. He also remarked the March 2015 decision in July 2016.
  - **Andrew Parrock**, a grade 6 tax professional, who attended the CTIS as validation meeting in April 2015 as an independent.
  - **Mark Speed**, assistant director large business, in Nottingham. He managed the claimant’s June 2015 grievance about his April 2015 marking.
8. The hearing bundle of pleadings, emails, minutes and policies ran to around 1300 pages. We read those to which we were directed.
9. At the conclusion of the evidence, each party handed in a written submission and subsequently made oral submissions. Arising from submissions the parties provided the ET1 claim form and the claimant’s

grievance forms, all October 2013, as they were not in the bundle. The Tribunal then reserved judgement.

### **Findings of Fact**

10. The claimant was born 19 January 1954, and is now 63. At the date of the marking which was the subject of the first tribunal claim, alleging age discrimination, he was 59. At the time of the first of the two disputed markings which are the subject of this claim, he was 61.
11. He joined Inland Revenue (now part of HMRC) on 1 July 1975. In January 2014, part way through the events which are the subject of this claim, at the age of 60, he began to draw his pension, and reduced his working hours to half-time, 18 hours a week, working Tuesday, Wednesday, Thursday, 10.30 am to 5pm. As his work as a senior policy specialist frequently involves litigated cases, at times he works flexibly, working full hours when necessary and taking compensatory time off later. He continues in employment and has no current plan to retire. The Tribunal was told that HMRC has no default retirement age.
12. The claimant's specialism was EU law as it related to UK tax. For example, he reviews budget proposals to see if they comply with EU rules on state aid. His career had included secondment to Brussels from 2001-2004. He was extremely capable. The manager investigating his grievance in 2013 said that he was "at the pinnacle of his career" and that he had "set a very high benchmark by which he is now judged".
13. He was also hard-working. When asked for his view on a particular policy skeleton argument in litigation he would reply both promptly and at length, and his contributions were praised for their incisiveness, clarity, and ability to see beyond the particular point to UK policy objectives. From the feedback we saw, he was also generous in contributing advice to colleagues both within and without his directorate on the EU angle on their particular area of tax. He takes great pride in his work.
14. The claimant first met Martyn Rounding in 1997 when they both worked in SIS – avoidance. Both were promoted to grade 6 at the same time. In 2011, the grade 5 manager's position became vacant. The claimant did not apply, but Martyn Rounding did, and was appointed. The claimant's reason for not applying was that grade 5 is the bottom rung of the Senior Civil Service, which has a higher pension age.
15. Thus Martyn Rounding became his manager. Until then, the claimant says, and it was not disputed, he had never had an adverse report, nor experienced any difficulties. He had always been marked top performer on annual appraisal.

### Performance Appraisal

16. The respondent has a Performance Appraisal System for its staff. At the start of each appraisal year the employee writes objectives for the coming year, which are to be related to generic objectives for his grade, and agrees them with his line manager. At a midyear review, the claimant is told whether he has got the top middle or bottom marking, and why. At the

end of the year his performance is assessed by his line manager against the agreed objectives on the basis of evidence for the full year. Before he does this, there is a consistency group meeting of line managers within section to establish the benchmarks for each marking by reference to their proposals for their own staff. Then there is a meeting with the employee to discuss his performance, and the manager's proposed mark. Then there is a validation meeting of line managers to discuss the reasons for the proposed final mark. The purpose of the meetings is to ensure some consistency across the group in the decisions made by different line managers.

17. The respondent also had an expectation of a standard distribution of box marking (as it was known). The top marking was awarded to 20% of staff, and the bottom marking to 10% of staff.
18. To ensure fairness there are very detailed policies and guidance to managers, who must also engage in online training in nondiscrimination and objectivity before they participate.
19. This was the system to March 2014. For the coming year, 2014/15, the three box markings were now called "exceed", "achieve", and "must improve". Further, performance was to be assessed against objectives with respect to the "what", and the "how". "What" measures whether the employee has met the objective set; "how" assesses the behaviour or conduct by which it was achieved.
20. Those who achieve the top (or exceed) marking receive performance related pay, a small percentage of their annual salary. In the two disputed years the claimant's performance pay, had he received it, would have been around £600 each year.

Appraisal history leading to first ET claim.

21. The first appraisal of the claimant carried out by Martyn Rounding was in March 2012, for the year 2011/12. We do not have documents about this process, but on the claimant's evidence Martyn Rounding told him that his performance was good, the middle marking, and the claimant disputed the evidence for that. At the conclusion of the discussion Martyn Rounding agreed that he was a top performer, and that was his box marking for that year.
22. The second appraisal carried out by Martyn Rounding of the claimant was in March 2013 for the year 2012/13. In that year Martyn Rounding assessed the claimant as good again. The claimant told him that he would appeal this decision. Martyn Rounding, according to the claimant, as it is not discussed in Mr Rounding's witness statement, then went to get evidence from others about the claimant's performance. This included a comment that he "could come over as domineering at times". The marking remained at good, not top. The claimant then appealed. We have the note of his meeting with Chris Davidson about this in the summer of 2013. The claimant argued he should get a top grade, and that the evidence collected by Mr Rounding was not enough to bring him down. The claimant said: "the only reason he could see for such a move in performance mark was the row between himself and Martyn in the (redacted case name)". The

meeting note records that Martyn Rounding thought the claimant was pursuing this case as private enterprise, unsupported by HMRC”; the claimant thought this view was unsupported by the facts. That the claimant was “forceful”, was justified by the position he was taking. Chris Davidson observed of the meeting at which the row occurred that: “this was no one’s finest hour”.

23. At the end of this meeting with Chris Davidson, the claimant said that the statistics showed that people over 55 performed badly on the guided distribution of top marks, and “if this was the case, people in this age group would be more experienced and, if the performance bar is raised to counter this, this could amount age discrimination – the expectation that the over 55’s have to do considerably more to attain a top than younger members of staff”. This is the view reproduced in the grievance and tribunal claim in October, a few months later.
24. Summarising, in 2013 the claimant thought Martyn Rounding was treating him unfairly because of the difference of opinion, leading to a row, about a particular case; he also thought the distribution system for setting the boundaries between markings was discriminatory.

#### Grievances and Tribunal Claim - October 2013

25. In October 2013 the claimant presented 3 formal grievances. Two of these grievances concern Chris Davidson’s remarks about the system for allocation of marking boundaries, in particular, that “performance and performance marking (are) to take account of the experience and length of time of the post holder. It was the case that, each year, the performance bar was set higher to reflect this”. He alleged age discrimination in one of these, and sex discrimination and (un)equal pay in the other. The third grievance is about Martyn Rounding’s narrative in the performance review giving reasons for the decision. The particular complaint was that he was said to have behaved in a domineering manner: he was in effect being accused of bullying. He wanted the material removed from the narrative report, an apology, and for the end of year marking to be based on evidence, which would entitle him to a top marking. This third grievance, about Martyn Rounding, does not complain of discrimination, though it refers to the two other grievances.
26. On 30 October 2013 the claimant presented a claim to the employment tribunal, which is protected act in the victimisation claim in this case. The claim form was not in the bundle, though following submissions and a question from the employment tribunal, a copy was produced for us. It is a complaint of age and sex discrimination. In the narrative of the claim form is set out the complaint that the performance bar was being set higher with experience, so older workers had to deliver higher performance to achieve a top marking, saying too that the statistics showed that only half the staff over 55 achieved a top mark compared with the target distribution. Of his own case, he said that Martyn Rounding had applied a discriminatory criterion in his evaluation of the claimant’s performance because in the narrative he had said: “given this background it is expected that Bernard will bring that experience and knowledge to bear in dealing with the cases”. Martyn Rounding was said to have followed the approach described by Chris Davidson.

27. Following investigation by Alan Tume, who thought (December 2013) the use of the evidence was unbalanced, as the claimant was at “the pinnacle of his career” and had “set a very high benchmark by which he is not judged”, and a finding by Judith Knott, a decision was made in February 2014 that the grievance was upheld and the claimant was to be awarded the top marking. The narrative must be rewritten to omit reference to *domineering*, but *forceful* was left in.
28. In March 2014, following mediation, the employment tribunal claim was settled for £1,000 and a rewritten manager’s report.

Appraisal following the Tribunal claim

29. By now of course it was time for assessment of performance for 2013/14. Martyn Rounding marked the claimant as a top performer. No detail of that process was available to us.
30. Coming now to the claimant’s performance in 2014/15, appraisal of which is the subject of the first claim in this case, several features of the claimant’s working arrangements are relevant to his performance in that year. During 2013, the two grade 7 staff for whom the claimant was responsible, were promoted grade 6, leaving him without staff to manage. From January 2014 the claimant took partial retirement and commenced part-time working. The claimant remained in Bush House, while Martyn Rounding was in 100 Parliament Street and managing the Corporation Tax Structure team (CTS), following its manager’s retirement, as well as the claimant. Thus he was on his own more.
31. Then in May 2014 began a long trial in the High Court of a difficult and issue which had been running for several years and was worth a great deal of money to the Revenue. For several weeks the claimant worked full-time to assist counsel during the hearing, and took compensatory leave over the summer. Despite that we can see that he would write emails with advice, on request, in his own time. There was no further activity on the large-scale litigation until judgement was issued in mid-December 2015. At that stage the claimant became involved in extensive discussion on the implications of the judgement, and whether it should be appealed. It concerned whether the European Court’s assessment of what should be left to the national court in relation to tax (here, Advance Corporation Tax and MCT) had been correctly interpreted. At a conference with Counsel in January 2015 it appears the claimant was forceful in his view of error, but out on a limb. He and his colleague Victor Baker were asked by counsel to write a short paper about the argument he wanted to make. There was then extensive email debate and dispute between the policy specialists (as the claimant) and the litigators. The claimant emails were long - though almost all the content is redacted - and firm, though in the tribunal’s assessment, by the end of the chain in March 2015 his tone to colleagues verged on sarcasm. Everyone’s patience may have been wearing thin. He said in one, probably jocularly, that he was putting on his tin hat, but it is the case that he became embattled.

32. 2014/15 was also the year that the system changed to assessing “what” and “how”. Setting objectives at the start of the year, Martyn Rounding told his staff that the agreed objectives for this year: “should reflect both the level of experience of individual officers and what is required in terms of stretch over and above the normal requirements of the job to show that you have exceeded your objectives”. The department expected all its staff to be able to display continuous improvement, so “the standard required for an individual to receive a solid “mid achieved” will be higher this year was last”, and that included the “must improve” category. The guided distribution would apply to CTS as a whole. This meant “each individual’s objectives were meekly more stretching than the equivalent objectives for last year. The exact nature of the stretch will differ from each individual” which should be linked to development objectives. Some examples of stretch given were: taking on a new area of responsibility, addressing a generic development need that had been identified, and engaging in corporate activities e.g. the CTIS People Plan, and the rollout of Building Our Future across the directorate.
33. The claimant drafted objectives. The “what’s” were: work on large litigation cases, and as a specialist high-level consultant on difficult points of EU and double taxation convention, advising colleagues on their cases, giving good quality presentations to the litigation team to make it a centre of excellence, and train the new grade 7 the team, and to maintain tax professional competence. *How* he would achieve each of these objectives was set out in some detail. Those relevant for subsequent events included “working collaboratively with colleagues and stakeholders, maintaining existing links and forging new ones, giving presentations on subjects to be determined in order to coach and support colleagues, looking for opportunities to develop own performance, acting as a role model for others, using effective coaching skills to support and mentor colleagues, and coaching and supporting other tax professionals.
34. At the mid-year performance review in November 2014, he described several difficult cases in which he had engaged, either for his own section or for other parts of HMRC. He pointed out that within the half year in question he had been taking great deal leave because of the High Court trial. Martyn Rounding said that the claimant was “performing close to the top end of “achieve” but in the second half of the year, he would need to do more in relation to the induction and training the new grade 7 specialist”, who was joining in November. The claimant “could not stand still. He needed to improve on past performance if he was not going to go backwards”. The agreed note of discussion specific activity of training the new grade 7. He was marked “achieve”.
35. At the beginning of March 2015, as the performance year ended, Mr Rounding met other managers for a consistency check meeting. The claimant prepared his self-assessment for the year, and solicited feedback from others. A colleague in counter avoidance passed on the very high regard held by an academic at Queen Mary College for the claimant’s contribution to academic discussion on leading EU law issues; James Rivett of counsel sent glowing feedback, which we quote as it was later read out to the validation meeting, on behalf of “the large (number) of my barrister colleagues (both juniors and silks)... your considerable expertise in the field of the law of the European Union and interaction with UK

domestic tax code has been and remains an invaluable and unrivalled resource.. Your knowledge and understanding of jurisprudence which is both dense and swiftly moving is something which lies at the heart of many of the arguments that we have presented before the tribunals and courts... Your feel for your subject is the envy and inspiration to many a member of the bar... That is not an isolated experience...” The claimant referred to this feedback in his end of year performance review. In other development needs, he said he had kept up-to-date. He did not mention wider contribution, nor that he had been training John Harrison.

36. Mr Rounding also sought feedback on the claimant’s performance. The responses to his emails were forwarded to the claimant and discussed at the end of year meeting on 18 March 2015. Three of these described the claimant as good to outstanding. Another four were more reserved. Harry Smith described him as “an invaluable resource for the legal team”, keen to make himself available to help, on the other hand “the way which express the views that he holds (strongly) is, at times, rather forceful – and even, on occasion, rather personal”. When he saw this the claimant wrote to him with a forceful factual challenge, which led to a slight redrafting, and then the claimant came back with an even more forceful and lengthy response which begins “I am sorry but”, which got a little more redrafting and a sardonic response. Ian Valentine wrote two pages about the claimant’s style of debate, with reference to the recent discussion of appealing the High Court judgement. He said it was “unnecessarily combative and ultimately unconstructive”; it also dissuaded others from becoming engaged in the dialogue. He complained that the claimant took any scepticism about the argument he advanced as failure to engage with it. In the case of Esther Isaacs and Hugh Dorey, there was an oral conversation with Mr Rounding, who then summarised it in an email for each to comment. In both cases they edited the email, extensively in the case of Hugh Dorey, and returned it. Hugh Dorey was concerned that the claimant came across as dismissive of others’ views and that the tone of his emails might stifle debate. He sometimes laboured a point that was already agreed. Esther Isaacs thought that conversations rather than emails might help clarify the argument when things are moving quickly, and mentioned a concern about propriety. All stressed his technical ability and high regard in which it was held.
37. The criticism of propriety touched a sensitive nerve – it is core to the Civil Service that all proper arguments are covered when giving advice. It seems to have arisen from concern that some of the claimant’s lengthy emails on conflicting views about the construction of tax law were not subject to litigation privilege.
38. The claimant discussed these emails with Martyn Rounding at the end of year meeting on 18 April, then in writing he criticised the feedback emails as unfair, in that “some sort of informal complaint” had been upheld without his input.
39. In tribunal the detail of how this feedback was obtained was extensively examined. The claimant’s view is that Martyn Rounding “was the spider who was weaving this tangled web of deceit” and they were “overt evidence of malice”. The tribunal has discussed this evidence carefully and concludes that the views expressed in response to Mr Rounding’s request



are those of the authors, and not words put into their mouths. These were senior people, well aware of the purpose and consequences of feedback. Some of the emendations show that they rejected certain suggestions from Martyn Rounding, which in turn suggests that Mr Rounding's view was thought to go too far.

40. The end of year validation meeting was on 20 April 2015. It was chaired by Ian Quelch. The meeting discussed three "must improve" cases, three "achieved", and three "exceed", to check the benchmarking. They then discussed the borderline cases. Martyn Rounding presented the claimant as on the borderline between achieved and must improve. He read out extracts from the James Rivett email. He stated that the internal feedback reflected this too, "however MR said that he had canvassed a number of people for feedback on Bernard's performance and whilst these were very positive about delivery they all raised concerns about the tone of the emails and some raised concerns about the effect of these on the ability to have frank and open discussions about the issues at hand". There was particular reference to Ian Valentine's email. It was noted that these "related to correspondence that had arisen in the last few months of the reporting year". The discussion that followed was lengthy and inconclusive. The note says: "it was agreed to continue validation of borderline decisions at AD (assistant director) level".
41. After the grade 6's left the meeting, the 7 ADs (this includes Martyn Rounding) who remained seem quickly to have concluded that the claimant must be marked "must improve". The reasons are not recorded. The rules of validation mean that the decision must be the line manager's, or that of the chair of the meeting - so Martyn Rounding or Ian Quelch. The claimant's comment is that the distribution requirement meant that they needed another "must improve" to meet the 10% quota.
42. On the evidence, of the personnel at this meeting only Martyn Rounding knew about the employment tribunal claim settled a year earlier. Martyn Rounding has said that he knew there was an employment tribunal claim, but did not know the detail and had not seen it.
43. After the validation meeting, on 14 May 2015 Martyn Rounding met the claimant to discuss the outcome of the validation meeting. He told him it had become a "must improve" because of the tone and length of the emails "to a wide cross-section of recipients". The claimant said he would accept an improvement objective (performance improvement plans are a normal consequence of a must improve marking), but would "protect his position", by which he meant lodge a grievance about it. Martyn Rounding was about to hand over line management of the claimant to Philip Donlan. They discussed whether he should know about the marking. The claimant said he would tell Mr Donlan.

#### Disputing the 2014/15 marking

44. The claimant lodged a grievance about this on 2 June 2015. On 18 June 2015 he met Ian Quelch to discuss it. He said that it concerned victimisation.

45. Towards the end of July 2015 Mark Speed was asked to handle the grievance. In turn he decided to use a factfinder, Sally Piggott, who was on leave until 4 September. It was not until 11 September that Sally Piggott contacted the claimant to arrange a meeting. Because of his part-time hours, this only took place on 1 October. On 27 October she met Martin Rounding. She did not meet those who had given the critical feedback. She prepared a report, which was sent to Mark speed on 16<sup>th</sup> November. Her report concluded that the marking should to be looked at again, because it was unbalanced in its use of evidence – so much of the critical feedback related to events at the very end of the performance year. She concluded that there was no evidence of a grudge towards the claimant. It was suggested that there should be some comparative evidence. Mr Speed thought the matter deserved careful thought. A month after getting the report he met the claimant on 15 December. The claimant gave him substantial arguments and many extra documents. Giving his decision in a letter on 15 January 2016, Mr Speed concluded that the must improve marking was a “credible mark that did not breach the guidance”. There was no evidence that he received materially different treatment to others in the validation process. Orchestration of critical feedback was denied.
46. After he had presented the June grievance, but before he heard from Sally Piggott in September, the claimant lodged these tribunal proceedings on 4 August 2015.
47. The claimant appealed Mark Speed’s decision. He had a meeting with Kevin Franklin about it on 3 March 2016.
48. On 12 May 2016 Kevin Franklin upheld the appeal: the marking had been unfair. The feedback was late in the year, and the claimant had had no opportunity to take the criticism on board and improve his behavior in that year. There was nothing wrong with long emails. However, he did not agree that this unfairness was victimisation.
49. On 18 July 2016 Nick Houghton and Arun Arul met to reconsider the 2015 marking on the available contemporary evidence, including the end of year performance report written by the claimant, and the feedback. The “must improve” was increased to “achieve”. The document recording the reasons for the decision said that the feedback was factually flawed and came late in the year, but had some substance, such that there was not enough to give an “exceed” marking.
50. By now of course the claimant had been assessed on his performance for the next year, 2015/16. Both Nick Houghton and Arun Arul had been present at the validation meeting for this in April 2016 which had given him another must improve marking.

#### Performance assessment for 2015/16

51. In May 2015 Phil Donlon, a grade 6 like the claimant, took over his line management from Martin Rounding. The decision to do this preceded the disputed 2015 marking. The claimant’s draft of objectives for the year had already been agreed by Martyn Rounding. They are little different to preceding year.

52. In July 2015, a senior manager, Jon Sherman circulated his managers about: “what constitutes stretch and wider contribution when evaluating performance within the PMR process”. Principles for both were set out in a series of bullet points. For example: “stretch may take people out of their comfort zone, but will always be challenging but achievable”, it will “always be tailored to the individual’s circumstances and will distinguish between the natural expectation of development and stretch”, and “stretch for one person may not be stretch to somebody else, as it is dependent on individual experience and skills”. It must be measurable, it must be agreed between jobholder and manager and reviewed during the year. As for wider contribution, it was not just a tick box exercise, it should go beyond the core role and responsibility. It would depend on grade and experience. It should have some features of “engagement with wider departmental initiatives and priorities, contributing to improvements across the directorate, increasing the visibility of CTIS across the wider department or beyond, and developing people both within and outside your own team”.
53. There was a mid-year validation meeting on 21 October when the claimant was listed as a “must improve”. He was noted as a recognised expert who kept up-to-date, but he could struggle to see the position of others, and stayed “within his comfort zone”, was limited in responding to feedback received (this must refer to the feedback at the end of 2014/15 year). He had attended only one Litigation meeting, though this could be due to part-time working. He had spoken at an external European conference on branch taxation which had raised profile of the Department.
54. Phil Donlan met the claimant for a mid-year post-validation meeting on 11 November 2015. The claimant was told that his projected assessment marking was “must improve”. This was not a judgement on the quality and quantity of the work but “an indicator that there are areas where he must make changes on how he delivers some of his work, and also that there are areas where he does not engage as widely with wider departmental issues as his peer group”. In more detailed discussion he was challenged to ensure that his specialist knowledge was disseminated more widely. John Harrison had by now moved to a new job on promotion, and the claimant was to train another individual (although after one meeting she decided not continue). There was discussion of the claimant’s communications and mention of a recent complaint from a senior manager about the claimant’s language. By reference to the disputed feedback from the previous year this was raised as why the claimant “can struggle to communicate (his) view effectively to senior leaders...where their views did not match his own”. Phil Donlan mentioned the claimant’s limited wider contribution to the Department even compared to other part-timers. He had attended one meeting on Litigation Strategy. He was to seek opportunities to demonstrate corporate leadership and contribute to wider changes. He was to engage with the wider team. At this point it emerged that the claimant was not on the circulation list for these two meetings, which in any event met on a day he did not work. (The tribunal notes that following this the meetings were adjusted to suit the claimant’s working hours, he was informed of them, and attended). It was suggested that he could volunteer for the policy support group. In Tribunal the claimant pointed out that he had not attended a “Building Our Future” meeting because he was part-time, and he had ceased involvement in litigation strategy meetings because he was in the Upper Tribunal for the next meeting.

55. At around this time Martyn Rounding met the claimant and his colleague Victor Baker to tell them that following further opinion from external counsel, HMRC was not pursuing the ACT appeal. By this time the claimant was heavily engaged in a case on cross-border loss relief.
56. In February 2016 preparation for the end of year performance assessment began. On 10 March 2016 there was a manager's consistency meeting chaired by Nick Houghton and attended by Phil Donlan and Martin rounding among others. The panel was reminded that currently there had 9 exceeds and 1 must improve, and to get within the guided distribution they needed 3 must improves and 6 exceeds. The claimant was discussed as a "must improve". It was noted that there was "impressive analytical work, he had developed a new line of defence", he provided advice on a range of litigation across the Department, was a recognised expert and "HMRC rarely lose a case if Bernard attends court". There was good feedback from solicitors and caseworkers, he had given a well-received presentation in Milan. He lacked grade 7 support. However, "unless he is asked "he did not take on a new task"; there was "an incident of inappropriate language" (which had been resolved with an apology). He "could display more leadership regarding knowledge transfer, and more engagement with HMRC leadership initiatives such as BOF and leadership courses". He had a "defensive attitude" when discussing the must improve marking. The Tribunal notes that this criticism of defensiveness came at a time when the claimant's grievance about the previous year's marking had been turned down and his appeal was still pending.
57. On 21 March 2016 the claimant sent his self-assessment for the year. He gave himself an exceed marking. The tone of the covering email is combative. He dismissed criticism that he was not a team player. He considered that his education of other people in HMRC and Cabinet office was a wider contribution. He did not want his assessment influenced by the previous year or anyone else; he said "first, it is YOUR job as manager to assess my performance". He was to be judged "by reference to individual performance agreement and not by reference to something added in by people who have not seen what I'm tasked to do". He was part-time. Commenting Phil Donlan's reference to having written a paper for David Bunting, he added "the fact that you did not even read it does not invalidate it. On any view, it is an impressive document".
58. The claimant met Phil Donlon to discuss performance for the year on 31 March. The claimant said his experience at the mid-year review left him with the opinion that he had been remarked for 2014/15, not 2015/16. He had not received notification of any Leading Our Future meetings; he not seen the complaint from the senior manager, nor any evidence of general struggling to communicate effectively. He complained of being patronised by Phil Donlan. There was no improvement plan in place that could justify the reference back to 2014/15 criticism.
59. The first version of the note of the meeting on 31 March, drafted by the claimant, records as Phil Donlan's view that "achieve was the appropriate mark", following the feedback and discussion. However, Phil Donlon's corrected version of this note, sent 4 May, after the subsequent validation meeting which finalized the mark, rephrases this as: "however, he was

prepared to make the case for an achieved mark, in the light of BD's feedback, which had not all been available before the year end".

60. At some point around the time of the March consistency meeting Mr Donlon attended a meeting with others reporting to Mr Rounding, who was the claimant's countersigning officer. It is denied that there was discussion of the claimant's case, but the proposed "must improve" marking was not disputed.
61. At some point between the meeting with the claimant on 31 March, and the validation meeting on 11 April, Phil Donlon had a corridor discussion with Martyn Rounding when he said he was going to try for an achieved marking for the claimant.
62. Phil Donlan had prepared a template for the consistency meeting on 10 March, which gave the claimant a must improve rating. This was not revised or updated, following 31 March, for the validation meeting.
63. The validation meeting was chaired by Nick Houghton. 32 members of the group (CT&BIT) were up for consideration. Participants were reminded that currently they had not achieved the guided distribution. They discussed those who had not been covered in the consistency meeting, and those who were down as "must improve". Many of the recorded comments on other staff are very brief – though almost all consider wider contribution. Those of the claimant by far the longest, and it was confirmed that the discussion was extensive. Phil Donlan presented some positives, and then added: "there is little evidence of any wider contribution this year". He had not been proactive in seeking opportunities to build department capability in EU litigation. Several of his objectives included building capability in spreading knowledge more widely. He did not engage with Building Our Future events or Leadership Academy. His response was defensive. Comments from the wider panel tended to confirm this, they added that his end of year assessment was more good evidence of *what* he had achieved but little on *how*. Someone added that being part-time should not make him "must improve" if he did not attend Building Our Future events – he had a heavy caseload. However, other part-time staff demonstrated wider contribution.
64. The tribunal comments that reading the notes of the meeting gives the impression that Mr Donlon had not tried for an achieve rating, as he represented in his revised note of the 31 March discussion.
65. Martyn Rounding was at this meeting. The transcript of Nick Houghton's handwritten notes which record who said what shows that he did not contribute to the discussion.
66. It was drawn to our attention that a woman aged 58 had moved from "must improve" to "achieve" following discussion in at this meeting. We could see that a 66 year old man was marked "exceed".
67. Phil Donlan saw the claimant on 2 June 2016 about the validation meeting outcome. He was told that the primary reason for the must improve marking was "that the validation panel wanted to see more on building capability across the whole of HMRC in relation to Bernard's specialism in

EU law". A lesser point was lack of involvement in "Leading our Future", which he ought to know about because they were all over the intranet. At this point the claimant told Phil Donlan about Kevin Franklin's decision on the grievance appeal that the previous year's marking was unfair and was to be remarked.

### **Survey evidence**

68. The claimant refers to a document in the bundle which was a CTIS Bullying Harassment and Discrimination People Survey carried out in 2014, with feedback issued June 2015. 56% of staff completed the survey; this did not include the claimant. The findings include that the performance management review system was identified as lacking transparency, with some management bullying, that there was too much focus on non-core activities, no regular performance discussions with staff, and much mistrust of distribution quotas. Some technical specialists were not listened to.
69. There was also statistical analysis of end of year performance ratings carried out in July 2015. This noted "interesting variations" in performance ratings between groups of staff, in particular, sickness absence levels, old age, part-time working male gender, ethnicity, and seniority of the manager compared with the individual managed. However, the sample was considered too small to explain substantial majority of variation between individuals in performance ratings.
70. Also in the bundle were lists of team members for the years 2014/15 and 2015/16, giving the marking achieved by each, identified for age and sex. The tribunal made its own analysis of this material.
71. In March 2015, there were 78 people in the group. 30 of these were 55 and over, 48 younger. In total, 18 of the group got exceed, 53 achieve, and 7 must improve. Of exceed, there are 4 old, 14 young; of achieve, 22 were old and 31 young; of must improve 4 old and 3 young. Looking at the figures by gender, there are 58 men and 20 women in the group. Among the 18 exceeds, 11 were men and seven women. Among the 53 achieves, 42 were men and 11 were women. Among the must improves, 5 were men and 2 women. Women were overrepresented in the exceed group, and men slightly overrepresented in the must improve group. Older people were overrepresented in must improve group and young people overrepresented in the exceed group.
72. In March 2016, there were 91 in the group. Of these 19 got exceed, 64 got achieve, 8 got must improve. Looked at by age, there were 39 who were 55 and over, and 52 younger than that. In the exceed group 5 are older and 14 younger. In the achieved group 29 were older and 35 younger. In the must improve group, 5 were older and 3 younger. Moving to gender, there were 66 men and 25 women in the group. In the 19 exceeds, 13 were men and 6 women, so women were overrepresented. They were also overrepresented slightly in the achieve group, where 47 were men and 17 women. Women were slightly underrepresented in must improve, where there were 6 men and 2 women.

### **Relevant law**

73. Section 13 of the Equality Act 2010 provides: “a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”.
74. Section 27 of the Equality Act provides: “a person (A) victimises another person (B) if a subjects B to a detriment because (a) be as a protected act, or (b) a believes that the has done, or may do, a protected act”.
75. In both sections the crucial word for the employment tribunal is “because”. **Shamoon v Royal Ulster Constabulary (2003) IRLR 285** makes clear that in considering this we are looking at the “reason why” the respondent employer acted as he did. It need not be the sole reason. Tribunals must look at whether the protected characteristic or protected act had “a significant influence on the outcome” – **Nagarajan v London Regional Transport 1999 1 AC 501**, or were “wholly or in substantial part” the reason – **Martin v Devonshires Solicitors 2011 ICR 352**. **Fecitt v NHS Manchester (2011) EWCA Civ 1190** is authority that it is sufficient to show that there was a material influence of the protected (in this case) disclosure on the treatment complained of to establish causation.
76. The tribunal is aware of the discussion of what a reason is: it is a set of facts or beliefs known to the respondent which operated on him: **Abernethy v Mott, Hay and Anderson (1974) ICR 323**, and **Kuzel v Roche (2008) IRLR 530**. Reason is distinct from intention or motive. The decision-maker may not be aware and even be unconscious of the fact that he is discriminating, or that a protected characteristic or protected act has influenced his decision.
77. As the decision-maker himself may not be aware of, let alone admit, the real reason, inferences may have to be drawn, and section 136 of the Equality Act provides the reverse burden of proof. It is the claimant to prove facts from which the tribunal could properly conclude, in the absence of any other explanation, that the respondent discriminated. It is then for the respondent to show an explanation which is non-discriminatory. The tribunal must find what facts the claimant has proved, and decide whether those add up to a prima facie case which requires explanation. There must be an evidential basis for findings – **Bahl v The Law Society (2004) IRLR 799**. Unfairness alone is not sufficient to establish discrimination – **Network Rail Infrastructure v Griffiths-Henry (2006) IRLR 865**. It is a two-stage process – **Igen v Wong (2005) IRLR 258** - which need not be followed in that order – **Madarassey v Nomura (2007) IRLR 246**.
78. The claimant took us to cases with the decision-maker may have been influenced or manipulated by another: **CLFIS v Reynolds (2015) IRR 562**, discusses “tainted information”, and we know from this that the tribunal must assess the facts in the light of the case advanced by the claimant (in that case, tat a particular individual was the decision maker, and not others), and not find another case from the facts. **Royal Mail Group v Jhuti UKEAT/0020/16** states it is important to identify the decision-maker and ask whether he or she was manipulated.

## Discussion

### Victimisation -April 2015 marking

79. It is the claimant's principal case that Martyn Rounding marked the claimant unfairly in performance assessment at the end of 2014/15 because of the October 2013 Employment Tribunal claim that Martyn Rounding had applied a discriminatory criterion when marking the claimant's performance in 2012, as older, so more experienced, workers had to deliver higher performance to get the grade. Although the claimant complained of the feedback relied on, he had made it clear at a preliminary hearing that he did not think the feedback was discriminatory, only the use Martyn Rounding made of it.
80. The claimant does not rely for protected act on his grievance of October 2013, which complained of bullying allegation on the part of Martyn Rounding. In his closing submissions the claimant referred more than once to the respondent having accepted that he had been discriminated against. Examination of the letter responding to the 2013 grievance is not clear, but in any event it was not accepted that *Martyn Rounding* had discriminated, because the claimant had not asserted that in his grievance.
81. In examining Martyn Rounding's reasons for acting as he did, we considered that he had not been fair to the claimant in his assessment of performance for the year. We did conclude from the analysis of the way in which Martyn Rounding went about collecting feedback that he did have an adverse view of the claimant, and that not all of those he approached agreed, as shown by their deletion of some elements. This suggested that Martyn Rounding was not taking a fair view of the claimant's achievements.
82. In considering why this was, we held the following facts relevant.
83. Firstly, because of the tribunal claim Martyn Rounding had to rewrite his report. This is stated in the grounds of claim, though we have not seen the rewritten report, nor did Martyn Rounding give evidence on when and how this occurred, nor was he questioned about the circumstances, or his feelings, by the claimant. In answer to questions from the tribunal about his knowledge of the Tribunal claim, Martyn Rounding said he knew about it but did not know the content. He was not aware why his marking had been overturned, or the claim settled. This was odd - not to give feedback to a manager following a grievance about him, let alone a Tribunal claim in which he was named - and we considered whether he was truthful when he said it, but concluded that he was when he said he had not known the detailed reasons until he saw the documents in the tribunal bundle shortly before this hearing.
84. Next, the claimant's grievance about Martyn Rounding, which did *not* allege discrimination, had been upheld. Martyn Rounding knew there was a grievance but did not get feedback on the outcome. It is perfectly possible that being the subject of a grievance or claim would not endear the claimant to Mr Rounding.
85. The staff bullying survey for this year does suggest that the claimant's experience with Mr Rounding was not unique, and as noted, the claimant did not participate in the survey, so it squarely represents the experience of others. Nothing in the survey relates to treatment of those who lodged grievances or brought tribunal claims, so the evidence, such as it is,



indicates that unfair treatment was sufficiently widespread, in the perception of the respondent's staff, not to be linked necessarily to bearing a grudge for having brought a grievance or a claim.

86. We considered the relationship between the two before the Employment Tribunal claim of 2013. Martyn Rounding's first mark in 2012 was only a good, though turned into a top following the claimant's argument. His next mark in 2012 was also only a good, and this time he made sure to get some evidence to counter the claimant's such that it did not become a top. This was regarded by the claimant as unfair and became the subject of the Tribunal claim. It cannot be said they had a good relationship before. Martyn Rounding did have reservations about how to rate the claimant's performance, and did not want to award him an exceed marking. We can only speculate about the reasons for this: it may have been the reason given, there may have been a personality clash, and the claimant himself thought it was because there had been a row, but it cannot have been the tribunal claim.
87. It was part of the claimant's presentation of his case that Martyn Rounding acted unfairly in seeking out adverse feedback in 2015 just as he had in 2013: he more than once referred to "similar fact evidence" of unfairness. This is a difficulty for the claimant. It indicates that the fact of the employment tribunal claim that intervened may have had little or no influence on his methods or on his intention when he sought evidence to justify his view in 2015.
88. The contemporary context of performance assessment in 2015 was of a claimant recently and acutely embattled with his colleagues about an issue on which he had strong views. Martyn Rounding, as his manager, must have seen this as a problem. It may have affected his judgement of the weight to be given to the various factors in the claimant's performance that year. If he already saw the claimant as good, not top, it can have been a reason why he now placed him on the borderline. When the marking was to be remarked – the view of Sally Pigott and Kevin Franklin, the basis of the decision was not that the feedback was untruthful, only that it was unfair the claimant had not been told earlier and given an opportunity to put this right.
89. The claimant's own end of year assessment did not help him on the areas where he had to show what he had done to build capacity or deliver coaching: he omitted for example anything about training John Harrison. The evidence that he did do this came out of the Tribunal hearing.
90. Taking these facts into account, we asked ourselves whether if there had been no tribunal claim, Martyn Rounding would have acted as he did in March and April 2015. We concluded that there was no evidence he would have acted any differently. A number of reasons unconnected with the tribunal claim affected his judgement of the claimant, whether before the tribunal claim, or in the weeks leading up to the assessment. There was nothing from which we could infer that he bore a grudge which weighed materially in the balance.
91. Accordingly this victimisation claim fails.

**Direct discrimination because of sex – 2015 marking**

92. The claimant was clear that his claims of direct discrimination whether because of age or sex were a fallback position if the victimisation claim was unsuccessful.
93. In assessing the facts from which we could conclude that being a man was the reason why Martyn Rounding acted unfairly in his end of year assessment, we have the following. The claimant is a man. There is no evidence that Martyn Rounding held any particular views about how to treat the relative performance of men and women, or that he did treat their performance differently. The claimant did not identify a comparator, actual or hypothetical. He did not rely on the figures for the group. He put this case to Martyn Rounding reluctantly, after prompting from the tribunal, and not with conviction.
94. The only other fact relied on by the claimant is that in the July 2015 assessment by HMRC of how different groups fared in performance assessment, when comparing men and women, men were twice as likely as women part-timers to be placed into the must improve category: across all grades 8% of men under 55 got up must improve, and 4% of women. Across all grades 10% of over 55's got must improve. Among those working up to 3 days a week, 14% got must improve, of which 9% of women and 20% of men got this marking. We did not have a similar breakdown of older full-timers. On the standard distribution, the proportion of women in each group just about followed the distribution, though they did slightly better in exceed. This isolated statistic from across the whole department is not helpful or significant in making a finding about the influence of the claimant's sex on Martyn Rounding's decision.
95. We concluded that these facts did not amount even to a prima facie case that sex was the reason for the claimant's performance marking in 2015.

**Direct discrimination because of age – 2015 marking**

96. We start again with the fact that Martyn Rounding acted unfairly, and the claimant is in the over 55 age group. We also have the survey evidence noted above, which suggests that older men working part-time were more likely to be placed in must improve. However, the older age group as a whole got 10% of the must improve markings, which is the standard distribution. The younger group got 6% must improve. Looking at the figures overall, older people are overrepresented in must improve, compared to younger people, but do not exceed the quota on distribution, younger people are overrepresented in exceed, and older people are overrepresented in achieve.
97. The claimant relied on a remark reported by the minister, Francis Maude, in Civil Service News on 29 April 2015 that the performance management system could be gamed by managers removing imminent retirees into the must improve category. This was not explained, but the tribunal understands this to mean that unscrupulous managers could achieve their 10% must improve quota without having to engage in troublesome performance improvement plans, as the staff in question would be gone soon. The evidence base for this remark is not known, it may be derived

from a comment by trade union representative critical of the system. The difficulty of this piece of evidence for the claimant is that there is no evidence that he or anyone else expecting to retire soon. All the evidence is that the claimant intended to continue, though part-time, and that his managers hoped he would continue, as there was no one else with his expertise.

98. The claimant did not rely on any actual comparator to show differential treatment of old and young people in his group, or by Martyn Rounding. We could not think of any evidence that suggested that the claimant, if, say, and years younger, would have been treated any differently by Martyn Rounding, given the other facts surrounding his decision-making referred to in our discussion of the victimisation claim.

99. We concluded that the age discrimination claim is not well-founded.

### **Delay in grievance procedure as victimisation or discrimination**

100. The claimant's case was that the respondent did not intend to process his grievance adequately or at all, and that little nothing happened until he presented this claim on 4 August 2015.

101. We do not know why Ian Quelch took 4 to 6 weeks from his meeting with the claimant in mid June to appoint Mark Speed towards the end of July. After that, the fact that most of some holiday in August probably accounts for Sally Piggott not getting in touch until early September. She made reasonable progress. Mark Speed was a little slow after that. His evidence was that this was a complicated matter and he wanted time to think about it, and this may not be unreasonable when the claimant had presented him with a great deal more evidence which he had to judge in the light of Sally Piggott's report.

102. Members of the tribunal have considerable experience of how different organisations deal with grievance procedures, whether from tribunal cases or activity outside the tribunal. We observe that in general public service bodies take a very long time to resolve grievances, whether central government, local government or in the health service, when contrasted with private organisations motivated by profit, which often move to resolve grievances extremely quickly. By the standards of other public sector bodies, the time it took to resolve this grievance was, regrettably, not unusual. Even taking 4 to 6 weeks to move from a meeting to appointing an investigator is not out of the ordinary in our experience. We do not wish to condone such delay, observing that protracted grievance processes are very damaging for organisations, as managers and staff may get little real work done while it is ongoing, but the fact of delay does not, without more, suggest that the earlier tribunal claim, or the claimant being a man, or over 55, was the reason for the delay.

### **Victimisation – the 2016 marking**

103. The tribunal was not impressed by the fairness of Mr Donlan's approach to the 2016 assessment.

104. The mid year marking of must improve was based on a lack of contribution which had never been discussed with the claimant, nor had they set particular targets to achieve it. As the claimant appreciated, some of the criticism at this stage was based on his performance in the previous assessment year. The single complaint was put down to miscommunication.
105. We can understand that the claimant was so convinced by his own evidence that he thought Mr Donlan had rated him achieve; Mr Donlan's more nuanced view in the written note was that he had said only that he would make a case for achieve, but the evidence of what happened to the validation meeting does not show Mr Donlan making a case. At its highest, he put the evidence to the meeting and did not express a view, but his template, and the consistency meeting, indicated must improve was his view.
106. The mid year note does show the claimant being told he needed to make a wider contribution but little on what he should do to achieve it; on his objectives, offering advice on his expertise within and outside the Department can amounts to wider contribution, and the only significant criticism is that he needed to be proactive. Our own view is that this was unfair for a man working part-time and working extremely hard delivering high quality advice which others in the department could not give. It is not for us to say that he should have got exceed. Nor is it for us to dictate to an employer what they want to see by way of improvement if their requirement is spread across the board and does not discriminate or victimise. The notes of the meeting show that stretch targets and wider contribution were considered in relation to almost everyone, sometimes to the exclusion of what they had done in the core role.
107. In relation to the victimisation claim, there is no evidence that Mr Donlan was aware of the employment tribunal claim. He knew only that the mark had been disputed, and of course that could arise from the grievance against Martyn Rounding, which did not suggest discrimination, as much as the tribunal claim.
108. The claimant's case is that the material used by Mr Donlan, in particular, the suggestion of poor communications which was raised in the mid year discussion, was tainted by Mr Rounding who had victimised him. As our finding has been that Mr Rounding did not treat the claimant unfairly because the claimant had bought an employment tribunal claim, this cannot succeed.
109. If there was unfairness, an explanation may lie in the tone of the claimant approach to Mr Donlan in the email 21 March. Most line managers, even of equal grade, will resent being told what to do in this way. Our own view is claimant was at this stage difficult to manage, given that he was still fighting what was proving to be a long war against the April 2015 marking.

**Direct discrimination because of age or sex in the April 2016 marking**

110. There is no evidence of differential treatment relating to the claimant being a man than in the claim about the previous year's marking.

Although there is a lot of information about how other others in the group were considered, the claimant makes no comparisons, actual or hypothetical. He did not rely on the tables of figures for the results for the group. This case was not even put to Mr Donlan.

111. Nor is there any further evidence of differential treatment relating to the claimant being over 55. The claimant points to the need to achieve the 10% quota of must improves. We cannot see how this relates to his age - it applies across the entire age range. A woman in the older group was moved from the very small group of must improves to achieve, which tend to suggest that age was not a reason. A man of 66 was marked exceed.
112. The claim of direct discrimination for either protected characteristic in relation to the April 2016 marking does not succeed.

### **The remarking of the 2015 assessment**

113. The remarking upgraded the must improve to an achieve, but rejected the exceed category for the claimant. The reasons for this include lack of evidence of wider contribution and succession planning, with no mention of John Harrison being trained. Account was taken of his behaviour towards the end of the year, while accepting that use of it have been unbalanced. Both assessors were scrupulous in using the evidence that was available in April 2015, which of course meant that the claimant had not mentioned John Harrison.
114. We note that both assessors had been present only two months earlier at the validation meeting which had marked the claimant must improve. They may well have been influenced by that. However, we have found that even if this validation meeting discussion was unfair to the claimant, it was not victimising or discriminatory, so without more, is not grounds for finding that their decision not to get the claimant and exceed marking was victimising or discriminatory.
115. The claimant stopped short of saying Nick Houghton had victimised him, relying for this on his use of evidence which was tainted, because on his case Martyn Rounding been influenced by the employment tribunal claim. As we have found that this was not the case, this argument does not succeed.
116. No evidence was presented in relation to discrimination on grounds of sex or age. There is nothing which we can make a finding that if the claimant had been 54 or a woman he would not been remarked with the same result. The evidence from the 2016 validation meeting shows that the managers were concerned with stretch and wider contribution for members of both sexes and of all ages.

### **Indirect discrimination related to age**

117. Section 19 of the Equality Act provides:

“a person (A) discriminates against another person (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s”.

It is discriminatory if:

“(a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving illegitimate aim”.

118. The provision that stretch targets must be individual (to paraphrase the wording recorded at the preliminary hearing) is, on the claimant’s case, to be viewed in its effect in his validation group of 32 people in 2016. In 2015 there were 39 in the group.

119. The document complained of is called “How to set SMART objectives”, SMART being an acronym for specific, measurable, achievable, realistic and timed. The section complained of says:

“achievable: consider the context of the task and individual capability. Achievable does not mean easy to achieve. Objectives should be stretching. You may need to adjust objectives to meet individual needs, for example: for a new recruit during the probation period or when a jobholder starts a new role; for jobholders with alternative working patterns to ensure targets reflect hours they work; when a jobholder has a disability or health concern”.

120. The claimant says that this is a provision which applied across the board, so is apparently non-discriminatory. He says that older people were put to a particular disadvantage, because they have less room for improvement. As he put it, it is like asking the world recordholder to beat his own record.

121. Within the group, in 2015, four people were in the must achieve group. Three were over 55 and one was younger. In the 2016 group of 32, there were two must improves, one younger one older. While the 2015 figures suggest a disadvantage to the older group, the parallel process a year later does not. We note too that these numbers are very small, and any change to an individual’s rating significantly alters particular disadvantage. We are not persuaded that there was particular disadvantage in the application of stretch targets.

122. While we accept the difficulty for older and experienced people in finding room for improvement when they are at the top of their game, stretch targets did not in fact relate to the performance of the core job where they (or at any rate the claimant) were at the top of their game. Rightly or wrongly, the respondent required people to do things that were not the core job to demonstrate stretch. Using the claimant’s analogy, it was like asking someone who held the record for the 100 metres to develop competence in long jump, or javelin.

123. Moreover, the very fact that stretch targets had to be individually tailored means that it is hard to see that this is something which applies across the board to the particular disadvantage of individuals who share a protected characteristic. We can see how setting individual targets could be discriminatory, but it would not be because of the provision itself but because of managers using them in a discriminatory way, which would be direct discrimination.

### **Conclusion**

124. We do not wish to finish what must be a very discouraging judgement for the claimant to read without acknowledging that it was evident that he is a very valuable public servant, hard-working, committed and dedicated. Even in the current performance year, after so many setbacks, and with his evident disbelief in the fairness of the system, he is working hard on achieving stretch targets set by Mr Donlan. Like many of his colleagues, it seems, he does not accept the current performance management assessment regime is fair. He may be right, but for the reasons given we found no breach of the Equality Act in its effect or operation.

Employment Judge Goodman  
29 March 2017