THE INDUSTRIAL TRIBUNALS

CASE REF: 5465/18

CLAIMANT: **Patrick Gerald Matier**

RESPONDENT: **Spring & Airbrake Ireland Limited**

DECISION

The correct title of the respondent is Spring & Airbrake Ireland Limited. The tribunal's determination is that the provisions of Regulation 7(1)(a) of the Employment Equality (Age) Regulations (Northern Ireland) 2006 were breached by the respondent in that the claimant suffered unlawful discrimination on grounds of age in relation to the determination of whether or not he should be offered employment. The tribunal's determination is that, as a result, the claimant suffered an injury to feelings and the tribunal Orders the respondent to pay to the claimant the total sum, including interest, of £3,155.18.

Constitution of Tribunal:

Employment Judge: **Employment Judge Leonard**

Members: **Mr A White**
Mr A Huston

Appearances:

The claimant was represented by Mr R Fee, Barrister-at-Law, instructed by the Equality Commission.

The respondent was represented by Mr Pat Moore of MCL Employment Law.

THE CLAIM AND CASE MANAGEMENT

1. By claim dated 14 March 2018 the claimant claimed that he had been discriminated against by the respondent on grounds of age. By response to this claim dated 16 April 2018 the respondent denied the factual basis of the claim and contended that the claimant had raised a vexatious and opportunistic claim. The response mentioned that the date of the alleged discrimination as set out in the claim form post-dated the claim and the respondent also requested a deposit hearing. The case was subject to case management by the Vice-President. The Vice-President's determination was that the case appeared to be a straightforward case involving brief evidence from the claimant and from one or two witnesses for the respondent,

with no possibility of any discoverable documentation and the Vice-President's determination accordingly was that the witness statement procedure was unnecessary. Therefore, the case was directed to proceed by means of oral evidence. The respondent's request for a deposit hearing was refused. The matter was listed for an oral hearing to be held on 26 and 27 July 2018. The tribunal received into evidence an agreed bundle of documents running to some 45 pages. The tribunal determined that the proper respondent in this matter was a limited liability company, "Spring & Airbrake Ireland Limited". The tribunal heard the oral evidence of the claimant and from Mrs Geraldine McCallum. On behalf of the respondent, the claimant heard oral evidence from Ms Judith Graham, who was the Finance Director of the respondent company, from Mr Gareth Abbott, who was a Company Director of the respondent company and also from Mr Alan Cromie, who was a Director of the respondent company. These witnesses gave oral evidence-in-chief and the witnesses were subject to cross-examination and to re-examination and the witnesses also addressed in evidence some questions from the tribunal. In the course of the hearing certain additional documents were introduced into evidence, including coloured photographs of the respondent's premises, externally, including the car-parking area and also an aerial photograph of the site. In the course of the hearing it was clarified on behalf of the claimant that the single claim, which was in respect of age discrimination, related solely to the statutory provision comprised in Regulation 7(1)(a) of the Employment Equality (Age) Regulations (Northern Ireland) 2006. This discrete claim encompassed the claimant's allegation that the respondent had discriminated against the claimant in the arrangements the respondent had made for the purpose of determining to whom the respondent should offer employment. The tribunal is grateful to the parties for clarifying the requisite focus of the tribunal, in respect of that statutory ground. This was, regrettably, a case in which there was a fundamental conflict in evidence between the claimant and the respondent. In the context of that fundamental conflict, the tribunal heard and carefully examined, and attributed appropriate weight and value to, all of the available evidence, documentary and oral, and the tribunal carefully considered and evaluated the submissions made upon conclusion of the case. The tribunal determined pertinent issues of fact, upon the balance of probabilities, in resolving this fundamental evidential conflict.

THE TRIBUNAL'S DETERMINATIONS OF FACT

2. The tribunal, upon the foregoing basis, made the following determinations of fact:-

2.1 The claimant, on 2 February 2018, attended his local Social Security Office in Antrim in order to sign on for Job Seeker's Allowance. He spoke with an employee of the Office concerning a possible job as a store person/van driver. This employment vacancy had been placed by the respondent company with Antrim Jobs and Benefits Office. The tribunal had sight of the written details such as were provided by the respondent to the Jobs and Benefits Office. The method of application stipulated by the respondent and recorded in the Jobs and Benefits Office system was for any potential applicant to contact the respondent's Finance Director, Ms Judith Graham, as it was stated, "*strictly between the hours of 10.00 am and 12.00 pm Monday to Friday. Calls will not be accepted outside of these hours*". The tribunal had no information as to whether or not these latter specific conditions were effectively communicated by the Jobs and Benefits Office officer to the claimant. However, the claimant was handed by the officer a "post it" note upon

which was written a telephone number for the respondent company. Having received information about the vacancy, the claimant decided that he was going to visit the respondent's premises personally, rather than merely making a telephone call. This was for the reason that the claimant felt that a personal visit would perhaps give him a better opportunity of success if he were to, "show a face".

2.2 The claimant had made an arrangement with a friend, Mrs McCallum, to call with Mrs McCallum with the intention of then travelling with her to a kitchen showroom, which was located at the Holywood Exchange in County Down. Mrs McCallum lived in Lisburn. The claimant left his home in Antrim on the morning of Monday 2 February 2018 and drove in his car to collect Mrs McCallum from her home. Having collected Mrs McCallum, the claimant decided next to drive to the respondent's premises, located at Lisnataylor Road, Nutts Corner, Crumlin, County Antrim, in connection with the advertised vacancy, before then travelling onwards to the Hollywood Exchange.

2.3 The precise nature of the events which are next alleged to have occurred are fundamentally in contention between the parties. Dealing firstly with the claimant's version of events, the claimant's evidence was that, accompanied by Mrs McCallum who was in the front passenger seat of his car, the claimant completed this part of his journey and drove into the car park of the respondent's premises. The claimant parked his car at a location in the car park which the claimant identified to the tribunal on a photograph of the respondent's business premises. Mrs McCallum remained in the front passenger seat of the car. The claimant then entered the respondent's premises by a doorway located on the right-hand side of the building when one observes the location from the direction of the car park and where the claimant states he had parked his car. The tribunal notes that there is no direct line of sight towards this doorway for a passenger sitting in a car parked at the indicated location. No part of the interior of the premises would have been visible to such a passenger seated at this location. Having entered the premises, the claimant noted that another customer was being dealt with at the trade counter. The claimant waited briefly until that customer had finished his business and had left the premises.

2.4 The claimant then spoke with a man who was at the trade counter. The claimant made an enquiry about the advertised job concerning the store person/van driver post. The man to whom the claimant spoke indicated to the claimant that the lady who normally dealt with these matters was not there. However, the man stated that he was, as he put it, "the boss" and that he would take the claimant's details. The time of these events, as alleged by the claimant, was between 11.20 am and 11.30 am. The claimant's evidence was that when he provided these requested details, the man wrote down on some type of a paper specific details such as the claimant's name, address and age. The claimant informed the man that he had done some tiling work and that he had worked in the building trade. When the claimant was asked his age, he told the man that he was aged 63. The claimant then asked the man if being that age would go against him. The man replied, "*Well I was looking for a younger person who I could train and move upstairs*". In response to this reply, the claimant queried with the man whether there was any point in the claimant continuing the conversation. The man responded with the words, "*No not really*". The claimant then left the respondent's premises and he returned to his car. He spoke with Mrs McCallum and told her that he had been told that he was too old. He recounted to the tribunal how Mrs McCallum was very

angry and that she had stated to the claimant that this was not allowed and that Mrs McCallum had suggested that the claimant should contact the Social Security Office concerning this encounter. This entire episode, as recounted, took place over a very few minutes only.

2.5 The tribunal noted the oral evidence of Mrs McCallum. In her evidence, Mrs McCallum provided corroboration for the claimant's evidence. The first issue of corroboration was Mrs McCallum's confirmation that she had indeed attended the respondent's premises, as a passenger in the claimant's car, on the late morning of 2 February 2018. Mrs McCallum was sitting in the front passenger seat of the claimant's car outside the premises. Mrs McCallum identified the same location as had been identified by the claimant in reference to the photograph. The tribunal noted that the photograph in question was produced to the tribunal by the respondent shortly before both the claimant and Mrs McCallum gave their oral evidence. Both persons independently identified the same location where the claimant's car was parked, without any apparent opportunity for consultation about this location. Mrs McCallum recounted how she remained in the passenger seat for the few minutes during which she stated that the claimant was in the premises. Mrs McCallum further corroborated the claimant's evidence to the effect that the claimant had returned to his car and that he had immediately recounted to her the conversation which he had had with the person in the respondent's premises. Mr McCallum confirmed that the conversation, as recounted by the claimant, concerned the claimant's age, with a person who was purporting to be an employee of the respondent. Mrs McCallum further confirmed in her evidence to the tribunal that she had at the time expressed her concern to the claimant regarding what she had been informed and that she had stated to the claimant that this was not allowed and was against the law. Mrs McCallum confirmed that she and the claimant had engaged in a further brief conversation about this matter and then the claimant had driven away from the respondent's premises.

2.6 The respondent's oral evidence to the tribunal from Ms Judith Graham was that Ms Graham had checked which employees were on duty on the day the claimant had alleged he had attended the premises, that being 2 February 2018. Having done so, Ms Graham stated that no-one had confirmed to her having had such a conversation with the claimant as had been alleged. Indeed, no one had confirmed to her that the claimant had even attended the premises. Ms Graham prepared brief statements, dated 9 July 2018, on behalf of Mr Gareth Abbott and Mr Alan Cromie. Both of these statements as produced to the tribunal indicated that the two witnesses did not know anyone of the same name as the claimant. They both stated, in identical terms, that they were not approached by anyone at the counter seeking employment. Ms Graham also introduced into evidence some documentation. Firstly, there was a document consisting of a list of questions asked (or intended to be asked) of applicants on the telephone in response to any anticipated enquiries regarding this post. These questions included a question concerning the age of the potential applicant. Ms Graham explained to the tribunal that the reason for this question, concerning the applicant's age, was necessary for the reason that any applicants would require to be aged over 25, due to insurance requirements. Ms Graham produced a further document which consisted of a list of all applicants who had applied for this post. This list identified the applicants by name together with, in each case, their age in years (not whether they were over or under the age of 25). In a third document there was a list of the six persons who had been shortlisted by the respondent for interview concerning this post, together

with the age of the person in each case. A further document provided a list of all the respondent's employees identified by name, age in years, and by job title. In the course of the oral hearing, both Mr Abbott and Mr Cromie were in attendance and the each provided oral evidence. The tribunal noted that the claimant did not specifically identify to the tribunal either of these two persons as being the person with whom he stated he had had the conversation, at the respondent's trade counter, on 2 February 2018.

2.7 Certain additional factors emerging in evidence assisted the tribunal in the resolution of this evidential conflict. The most significant matter in terms of cogency and credibility related to an error contained in the claimant's application form. This error, indeed, was commented upon in the respondent's response. If one examines paragraph 7.2 of the claimant's claim form, this is the section of the form where the claimant was asked to provide the date upon which the alleged unlawful discrimination occurred. Clearly in error, the claimant inserted the date in this section as being "02/05/2018". However, the claimant's claim form is dated 14 March 2018. Apart from this, all of the other evidence and information from the claimant was that these alleged events had occurred on 2 February 2018, not 2 May 2018. The claim form was duly copied by Office of the Tribunals to the respondent. The evidence was that the respondent very shortly thereafter instructed the respondent's representatives. It will be recalled that the evidence of Ms Graham was that she had approached the employees with a view to ascertaining who was working in the respondent's premises on 2 February 2018. When Counsel for the claimant, in cross-examination, asked Ms Graham how she was made aware of that specific date, 2 February 2018, Ms Graham's evidence was that she had looked up which of the employees were working on that day. She was then asked when she had conducted this search. Her response to this question was that this was when she had received the "claim letter", as she put it, in "March or April" (2018). At this point Counsel put it to Ms Graham that the date on the claim form was wrong and indeed that it post-dated the time at which she said she made her enquiry. Ms Graham's response was that she must be mistaken, but she did not further seek to clarify matters.

2.8 The claimant's evidence was that, having again attended at his Jobs and Benefits Office on Monday 5 February 2018 and having informed them concerning what had transpired on Friday 2 February 2018 at the respondent's premises, he had been referred to the Labour Relations Agency and then onwards to the Equality Commission for advice. The Equality Commission had, it seems, advised the claimant to send a letter of complaint to the respondent. The tribunal had sight of a copy of a manuscript letter written by the claimant. However, this letter was undated. The claimant's evidence was that he had sent a letter, of which this was a copy, to the respondent on or about 12 or 13 February 2018. The text of that letter contains details of the claimant's allegations concerning these events, which the claimant explicitly states in this letter had occurred on, "February 2nd of this year". That information, of itself, if it had been effectively imparted by the claimant to the respondent at the time he stated this was done, would have confirmed an accurate date concerning the allegation, in contrast to the incorrect date stated in the claimant's claim form. However, Ms Graham vehemently denied ever having received the claimant's letter. In the face of this strong denial by Ms Graham, and in the absence of any other evidence as to how the accurate date could possibly have been effectively communicated to the respondent in order to result in the enquiry being made by Ms Graham at the time concerning which of the

respondent's staff members staff were serving on 2 February 2018, the tribunal was faced with a significant issue of cogency and credibility concerning Ms Graham's evidence. For the reason that there was no evidence placed before the tribunal regarding any other means by which Ms Graham might have been alerted to the correct date, save for the claimant's letter, which she denied receiving, the tribunal proceeded to draw an adverse conclusion. Ms Graham, further, explained to the tribunal that the respondent had a CCTV system, but she maintained that any CCTV recordings were "wiped" after a period of one month and that no evidence from that source was accordingly available. The tribunal noted that there was no other documentation to account for this and that nothing had emerged in the formal tribunal processes, until very recent times, concerning how the respondent might otherwise have been alerted to the correct date.

2.9 Set against this foregoing evidential difficulty for the respondent, it has to be said that the tribunal did, at certain times, find the evidence of the claimant to be a little imprecise and vague. However, the tribunal's assessment was that this imprecision or vagueness was not of any nature or degree so as fundamentally to undermine, in general terms and overall, the cogency of the claimant's evidence. The claimant's evidence was also, in many respects, corroborated by Mrs McCallum. This was so, firstly, concerning the attendance by both at the respondent's premises on the day in question; secondly concerning the fact that the claimant had left his car and had entered the premises; thirdly, that the claimant had returned a short time later and had immediately recounted to Mrs McCallum what he stated had transpired within the premises and; fourthly, that the two had had a conversation about what the claimant stated had transpired within the premises and, indeed, that Mrs McCallum had told the claimant that this was not allowed and was against the law.

2.10 To further support the claimant's version of events, the tribunal noted the corroborative documentation concerning the record of the claimant's attendance at the Jobs and Benefits Office on 5 February 2018. This date was the Monday after the alleged events which had occurred on the previous Friday. In the Office document it is recorded as follows: "*HAD CONTACTED SPRING AND AIRBRAKE RE VACANCY 1360653 BUT WAS TOLD THAT HE WAS TOO OLD TO APPLY. NUMBER GIVEN FOR LABOUR RELATIONS AGENCT"* [sic]. This document provides clear corroboration to the effect that the claimant had indeed complained to the Social Security Agency on 5 February 2018 that he had been told on 2 February 2018 that he was too old to apply for this vacancy with the respondent company.

2.11 The respondent's representative went to some lengths to cross-examine the claimant concerning any endeavours on his part to identify the Social Security Agency employee with whom the claimant stated he had spoken on 2 February 2018 and indeed concerning certain other Social Security Agency employees who appeared to the representative to the relevant. However, the tribunal found this rather extensive course of questioning by the representative, whilst diligent, to be somewhat off the point. This was so in the light of the respondent's representative's position adopted in respect of the evidence of Mrs McCallum. The representative indicated to the tribunal, in concluding submissions, that he was not questioning the general credibility of Mrs McCallum as a witness, save in respect of one discrete area upon which he focussed. This latter was whether or not Mrs McCallum had seen any other cars in the car park and whether she had witnessed the customer who had been attended to at the trade

counter prior to the claimant, leaving the respondent's premises and driving off. The tribunal attached little weight to this matter. Mrs McCallum indicated in her evidence that she was probably looking at her mobile telephone whilst sitting in the passenger seat and awaiting the claimant's return. If that were so, she might well not have observed anyone leaving the premises prior to the claimant's exit. The tribunal also noted that the respondent's representative did not take any issue regarding the travel route adopted by the claimant that day in order to collect Mrs McCallum. As the route of itself was not challenged on behalf of the respondent, the tribunal disregards any issue concerning the route taken and this has had no impact upon the tribunal's assessment of the credibility of the parties.

2.12 In terms of the tribunal's concluding assessment of fact, the tribunal determines that the claimant did attend the respondent's premises in the late morning of 2 February 2018, this being corroborated by Mrs McCallum. The tribunal found Mrs McCallum at all times to be a fully credible witness. Concerning what transpired when the clamant entered the respondent's premises, the tribunal has only the claimant's account of the alleged events. The respondent's position is that it is fundamentally denied that the claimant attended the premises never mind speaking to anyone at the trade counter on 2 February 2018. Having conducted a full assessment of all of the evidence, the tribunal accepts the claimant's account. The tribunal's finding of fact is that the claimant did enter the respondent's premises on that day and that he did speak to someone. The tribunal further accepts the claimant's evidence that he did hear the person to whom he spoke identify himself as being "the boss", thereby indicating a position of authority. That person did proceed to take the claimant's details and to write these down into a document. The claimant was asked by that person to state his age. He replied that he was aged 63. The tribunal's assessment is that there was probably something in the nature of the encounter between the claimant and that other person which caused the claimant to query whether his age would go against him. The tribunal accepts the claimant's further account of what next transpired which is that the person ("the boss") replied, "*Well I was looking for a younger person who I could train and move upstairs"*. The tribunal further accepts that the claimant queried with the person whether there was any point in continuing the conversation and that the claimant was then told by this person, "*No not really*". At that point the claimant left the premises. Assessing this evidence, there is no doubt that the person with whom the claimant spoke at the trade counter purported to be someone in authority ("the boss") who possessed the status and the entitlement to deal with the claimant's query and to speak on behalf of the respondent.

2.13 When questioned about his reaction to this encounter, the claimant indicated to the tribunal that he "did not feel great" about this, being told that he was too old for a job about which he had been enthusiastic and that, in effect, it had shaken his confidence in the prospects of getting another job. The claimant had been absent from employment for a time due to the claimant having had to care for a partner who subsequently died. At this time, the claimant was endeavouring to re-enter the workplace. The claimant also indicated to the tribunal that he determined at that stage to spend time and money in training to get a taxi driver's licence with a view to becoming self-employed. The tribunal noted that there was no medical evidence nor any other evidence of any significant impact upon the claimant nor anything which could be properly assessed as constituting a major or far-reaching injury to feelings arising as a result. However, there is no doubt that the claimant was disheartened and quite disappointed and indeed possibly a little angry concerning

what had transpired. It is noted that he sought to record this on the next occasion, a couple of days afterwards, when he attended the Jobs and Benefits Office.

2.14 In these circumstances, the tribunal is also entitled to draw certain inferences from other factual elements present in the case. The tribunal notes that there was a significance (of itself reasonable) attaching to the fact that applicants for this post had to be over the age of 25 years, for insurance purposes. That much is fully understood. What is not at all clear to the tribunal is why a question concerning actual age in years was asked of all applicants, extending beyond what would have been strictly necessary for an assessment (for the stated purposes of insurance) of whether someone was over or under the age of 25 years. The tribunal has had sight of the respondent's written record of applicants for this post. On that list are 22 names. The recorded ages for all of the stated applicants range between 66 years and 23 years. The tribunal notes that those shortlisted for interview were aged, respectively, 28, 32, 34, 35 and 30. The tribunal was invited by Counsel for the claimant to draw an adverse inference from this evidence. It thus appears that the evidence discloses a relatively narrow age range or band of 28 to 35 years, whereas the applicant list is much more extensive in terms of age than this narrow range. The tribunal bore this evidence in mind concerning the potential for drawing an inference which would be for the restricted purpose of the statutory ground upon which this claim is made.

THE APPLICABLE LAW

3. The relevant statutory provisions are contained in the Employment Equality (Age) Regulations (Northern Ireland) 2006 ("the 2006 Regulations"). Part 2 of the 2006 Regulations, at Regulation 7, provides as follows:-

> "**Applicants and Employees**
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> 7. – (1) It is unlawful for an employer, in relation to employment by him at an establishment in Northern Ireland, to discriminate against a person –
>
> (a) in the arrangements he makes for the purpose of determining to whom he should offer employment."

Part 6 of the 2006 Regulations at Regulation 42, concerning burden of proof, provides as follows:-

> "**Burden of Proof; Industrial Tribunals**
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> 42. – (1) This regulation applies to any complaint presented under Regulation 41 to an industrial tribunal.
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> (2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this regulation, conclude in the absence of an adequate explanation that the respondent –
>
> (a) has committed against the complainant an act to which Regulation 41 (Jurisdiction of Industrial Tribunals) applies; or

(b) is by virtue of Regulation 26 (liability of employers and principals) or Regulation 27 (aiding unlawful acts) to be treated as having been committed against the complainant such an act,

the tribunal shall uphold the complaint unless the respondent proves that he did not commit or as the case may be is not to be treated as having committed, that act."

4. Leading authorities regarding what is popularly termed the "shifting of the burden of proof" are now well-settled, the leading cases being the case of ***Igen v Wong [2005] IRLR 258*** (which considered similar provisions relating to sex discrimination) and which approved the decision of ***Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332***, ***Madarassy v Nomura International Plc [2007] IRLR 246*** and ***Laing v Manchester City Council [2006] IRLR 748*** which decisions were expressly approved by the Northern Ireland Court of Appeal in ***Arthur v Northern Ireland Housing Executive and Another [2007] NICA 25***. These cases and the general law in this regard were fully considered by the tribunal in reaching its determination in this matter.

THE SUBMISSIONS OF THE PARTIES AND THE TRIBUNAL'S DETERMINATION OF THE ISSUES AND THE DECISION

5. For the respondent, Mr Moore submitted that this was an entirely opportunistic and vexatious claim by the claimant and contended that the claimant was simply not to be believed: the respondent had no record whatsoever of the claimant applying for the post. If the tribunal were to admit this claim, it would "open the floodgates" for such opportunistic claims. The tribunal had seen the list of applicants and the documentation concerning the shortlisting exercise for the post. The respondent simply had no record whatsoever of the claimant's attendance at the premises either on the day claimed or indeed on any other day. The case did not even remotely approach the point of passing the threshold whereby the burden of proof would shift to the respondent. It was submitted that the tribunal ought to take credence from the overwhelming weight of the evidence of the respondent's witnesses to the effect that the alleged conversation between the (unnamed and unidentified) "employee", "the boss", and the claimant had just not taken place. In the absence of there being any proof that the conversation had indeed occurred, the respondent's submission was that the claimant's case ought properly to be dismissed by the tribunal. The respondent's representative also sought to draw to the tribunal's attention the fact that the claimant did not return to the respondent's premises in order to identify the person to whom he alleged he had spoken, nor did the claimant make any complaint at that time. It was simply not credible that the claimant had dispatched a letter to the respondent, undated, in terms of the copy now produced to the tribunal, when the claimant himself was so vague about the details of posting that letter. The respondent's submission continued that whilst no substantial issue was taken with the evidence of the claimant's witness, Mrs McCallum, nonetheless Mrs McCallum had not seen the customer (who had been described by the claimant as being attended to before him) emerging from the premises nor that person driving away. It was to be noted that the respondent's business premises were in a rather remote location which could only be normally accessed by motor vehicle. The tribunal was invited to conclude that the events alleged by the claimant simply had not occurred.

6. In terms of the submissions made on behalf of the claimant, Counsel for the claimant sought to draw to the tribunal's attention the evidence of the claimant, corroborated as it was by Mrs McCallum, both of these submitted to be compelling witnesses. Accordingly, it was contended on behalf of the claimant that the events had indeed occurred in the manner described by the claimant. The submission continued that a most significant point in this case was that Ms Graham had given categorical evidence that she had certainly not received the letter which the claimant stated he had posted to the respondent. However, she had received the claimant's claim form which contained the incorrect date attributed to the alleged discrimination. Notwithstanding that, Ms Graham had informed the tribunal that she had caused enquiries to be made upon receipt of the claim form or "letter" of claim concerning any of the respondent's employees who might have been in attendance on 2 February 2018. However that was impossible according to Ms Graham's version of events, unless she had otherwise been informed of the correct date. That date was correctly set out in the claimant's (undated) letter, which Ms Graham steadfastly maintained the respondent had definitely not received. The date was simply wrong. That error could not possibly have alerted Ms Graham to the correct date upon which the claimant had attended the respondent's premises. The tribunal had heard no valid and proper explanation from the respondent concerning that striking disparity. The contention was that, accordingly, a fundamental issue arose concerning the credibility of the respondent's witnesses, most especially Ms Graham. For this reason and in the light of the totality of the evidence, the tribunal was invited to conclude that the events had occurred as described by the claimant, upon the date stated, 2 February 2018. Further to that, the tribunal was entitled to draw an adverse inference under the statutory provisions concerning the burden of proof. The tribunal was invited to conclude that the burden had passed to the respondent and, furthermore, that the respondent had manifestly failed to discharge that burden. Generally, the tribunal was invited to draw appropriate inferences against the respondent from all of the evidence.

7. Having heard the arguments and having fully reviewed the evidence in the case, the tribunal observes that this is a somewhat troubling case. It is indeed quite unusual to encounter a matter where some basic factual issues are so fundamentally disputed. It is, accordingly, the task of the tribunal to resolve conflicts in evidence. Having assessed the quality of the evidence emanating from both sides, the tribunal's considered conclusion is that the evidence supporting the claimant's version of events is the more cogent and credible. For this reason, the tribunal has determined, as a matter of fact, that the claimant did attend the respondent's premises on 2 February 2018 at the approximate time stated. The occurrence of these events is satisfactorily corroborated by the entirely credible evidence of Mrs McCallum. The only matter in respect of which Mrs McCallum was unable to provide direct evidence was concerning the events which occurred inside the premises. It is a fact that the claimant certainly entered the premises. The claimant states that he had a conversation with a person who described himself as being "the boss". Having assessed the claimant's evidence, the tribunal considers that it is more probable than not that the conversation transpired as described by the claimant. The claimant spoke with a man at the counter who purported to have had the necessary authority to engage in a conversation with the claimant concerning prospective employment and to take his details from the claimant and to note these down, including the claimant's age. When the topic of the claimant's age emerged in the course of this conversation, the words spoken by that person in authority to

the claimant are determined by tribunal to be those words provided in the claimant's evidence to the tribunal. These words spoken had the effect of confirming, in response to the claimant's query, that the claimant was too old for the post. Furthermore, the claimant was informed by that person in authority that there was no point in his application for the post continuing. The conversation terminated at that point and the claimant left the respondent's premises. The tribunal has no doubt that the claimant, having heard this, felt aggrieved. The claimant, upon returning to his car, immediately had a conversation with Mrs McCallum in terms of what the claimant stated in his evidence to the tribunal. The tribunal finds such evidence to be credible, especially so as it is convincingly corroborated by Mrs McCallum. Further reinforcing the proposition that these events occurred, as described, is the existence of documentary evidence. This corroborates to the extent that the claimant, on the first normal working day thereafter, Monday 5 February 2018, attended at his local Jobs and Benefits Office and reported the matter. This is unambiguously recorded in the documentation. In summary, the claimant attended the respondent's premises, speculatively, to apply for a post of employment. However, he was told by a person in authority that there was no point in his continuing with the application on account of his age. Age was therefore the fundamental reason for the rejection of the claimant's application.

8. Applying the provisions of Regulation 7 of the 2006 Regulations, it is unlawful for an employer in relation to employment by him at an establishment in Northern Ireland (such as the respondent's business establishment) to discriminate against a person (in this case the claimant) in the arrangements made (in this case by the respondent) for the purposes of determining to whom the respondent should offer employment. This has been described by the representatives, in agreement, as being a so called statutory "arrangements" case. The case sought to be argued on behalf of the claimant goes no further than that specific focus. Examining the facts and drawing permissible inferences, in the context of these statutory provisions and the general law, the tribunal's determination is that the claimant has proved facts from which the tribunal could conclude unlawful discrimination in the case. The statutory burden has passed to the respondent and the respondent has failed to discharge that burden to the effect that there was no unlawful discrimination, upon grounds of age, in the matter. The provisions of Regulation 7(1)(a) of the 2006 Regulations were breached by the respondent. The claimant thereby suffered unlawful discrimination on grounds of age in relation to the determination of whether or not he should be offered employment. He was, in effect, given no opportunity on the grounds of his age. The tribunal's determination is that, as a result, the claimant suffered an injury to feelings.

9. In terms of the measure of damages for injury to feelings, Mr Moore on behalf of the respondent sought to argue that, if indeed the tribunal found in favour of the claimant, the award should be at the very bottom end of the lower "Vento" band. The reference to "Vento" is a reference to the case of ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*** where the Court of Appeal set out the guidelines concerning awards of compensation for unlawful discrimination for injury to feelings. This lower Vento band, for less serious cases, currently encompasses the range of £900, at the lower end, up to £8,600 at the upper end. The bands have been increased from time to time to arrive at the current band or scale mentioned. For the claimant, the claimant's representative submitted that this was not an appropriate case for an award of compensation at the bottom end of the lower Vento band, as the claimant had suffered a relatively significant injury to

feelings. It was submitted that the claimant had been discouraged from entering the field of employment. This was argued to be especially significant, in the claimant's case, as he had been absent from employment for a time due to the claimant having to care for a partner who had subsequently died. At this time, the claimant was endeavouring to re-enter the workplace, only to experience this encounter which had the effect of significantly discouraging the claimant. This had been caused entirely by the behaviour of the respondent and this behaviour was motivated by age discrimination. Accordingly the award ought to be placed in the mid-point of the lower Vento band, so it was submitted.

10. Having carefully considered the competing arguments regarding the matter of appropriate compensation, the tribunal's determination is that this is not a case that would be properly and fairly compensated by an award located at the bottom end of the lower Vento band. The tribunal's determination is that the appropriate award should be positioned at a point higher than that. In the absence of there being clear evidence of significant injury to feelings (perhaps with the evidence of a medical report), the appropriate award is assessed by the tribunal at a figure of £3,000. This represents the total monetary award in this case. Interest is assessed at a figure of 8% per annum upon the usual basis. The period of interest runs from the date of discrimination, which is determined by the tribunal as being 2 February 2018, until the decision date which is 26 September 2018. The total award, including interest, is therefore the sum of £3,155.18.

11. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: **26 July 2018, Belfast.**

Date decision recorded in register and issued to parties: